EMPLOYMENT TRIBUNALS

Claimant: **Mr Z Misiuda**

Respondent: **Cleaner Communities Limited**

Heard at: **Nottingham**

On: **26 April 2021**

Before: **Employment Judge Smith (sitting alone)**

Representation
For the Claimant: In person
For the Respondent: Mr P Wakefield and Mr L Freer (Directors)

JUDGMENT

1. In relation to issue 1, the Tribunal's judgment is that the Claimant was an employee of the Respondent at all material times.

2. The hearing will be re-listed to consider issue 2, with a time estimate of half a day. The Tribunal has made separate case management orders relating to the re-listed hearing.

REASONS

Introduction

1. At a Preliminary Hearing (PH) held on 23 December 2020 Employment Judge Butler dismissed some of the Claimant's claims, identified the issues in the claims which remained, and made case management orders leading up to this hearing. The issues which were identified for determination at this hearing were as follows:

1.1. Was the Claimant an employee of the Respondent or a self-employed independent contractor?

1.2. If the Claimant was an employee, is he entitled to the sums claimed?

2. The matter was listed for one day. However, the Tribunal was ultimately invited to hear live evidence from five witnesses on the question of employment status:

2.1. For the Claimant: the Claimant himself, Ms Stephanie Misiuda (the Claimant's mother) and Ms Isobelle Masefield (the Claimant's partner); and,

2.2. For the Respondent: its directors Mr Peter Wakefield and Mr Lee Freer.

3. Only Ms Misiuda and Ms Masefield had prepared witness statements and there was no agreed bundle. Each party had independently sent to the Tribunal a variety of documents upon which they intended to rely, and no collation or pagination into one volume had taken place despite the orders made in unambiguous terms by Employment Judge Butler at the PH. The situation faced by the Tribunal on the day of the hearing was therefore worse than unsatisfactory.

4. Rather than strike the case out for non-compliance with orders the parties agreed that I should proceed on the basis that the evidence in chief of the Claimant could be taken from the narrative he had set out in his ET1 claim form, and the evidence in chief of Mr Wakefield and Mr Freer taken from the Grounds of Defence document attached to the Respondent's ET3 response form. With some reservations I concluded that it was in the interests of justice to adopt that course, but I made it clear to the parties that given the amount of documentation I had to read, the number of witnesses I was being asked to hear from and the factual complexities involved in determining the question of employment status, that first issue would be dealt with before the Tribunal proceeded to consider the second. In the event, the time allocation was fully utilised in dealing with the employment status issue. The second issue remains outstanding.

Findings of fact

5. At some point in 2018 the Respondent placed an advertisement on Facebook. This advertised a vacancy for a role with the Respondent, cleaning wheelie bins. I was not shown a copy or a screenshot of the advertisement and am therefore unable to make a finding as to what the proposed terms of engagement were. Nevertheless, the Claimant applied and was interviewed for the role. He was successful and commenced on 26 November 2018. Ms Misiuda's unchallenged evidence was that prior to the Claimant's commencement she had had discussions with him about the role and what his duties would be, but that in those discussions he had made no mention of his engagement with the Respondent being on the basis of a self-employed, independent contractor. I accepted her evidence on this point.

6. Prior to this date the Claimant had no prior experience of cleaning wheelie bins or the wheelie bin cleaning industry at all. He had no independent, established

business of his own in this field. At the time of his engagement the Respondent engaged four individuals as contractors to clean wheelie bins and the Claimant became the fifth. Mr Freer confirmed in evidence that none of the Respondent's individual contractors had established businesses in this field prior to them becoming engaged in such work by the Respondent.

7. Ms Misiuda told me that it was only on the second day of his engagement that the Claimant had been told by the Respondent that his engagement was to be on the basis of his being an independent contractor. They discussed some of the potential implications of this arrangement for the Claimant, principally the tax situation and who would be responsible for accounting for tax and National Insurance to HM Revenue and Customs (HMRC). Ms Misiuda raised these issues because she had had experience of being self-employed in the mobile catering industry, in 1989. Her evidence on this point was also unchallenged by the Respondent and I accepted it.

8. In the first few weeks of the Claimant's engagement as a contractor he was provided with training by the Respondent. Whilst on Mr Freer's proper admission the training programme was not particularly rigorous, the Respondent required a minimum standard of competence and both he and Mr Wakefield trained the Claimant in order that he should meet this standard. It was necessary not just because of the Claimant's complete lack of experience at that stage, but because the equipment used in the process of wheelie bin cleaning is somewhat complicated and if not used correctly, it is potentially dangerous. In particular, the process involves driving a van with a trailer and it was necessary for the Respondent to be satisfied that the Claimant could properly and safely drive a vehicle with a trailer attached. Secondly, but no less importantly, the trailer contains a hydraulic lifting device used for lifting up empty bins before they can be cleaned with a jet washer. If misused the device can be dangerous, and if damaged it can be expensive to repair.

9. On 10 December 2018 the Claimant signed an "Independent Contractor Agreement" with the Respondent. This document had not been provided to him prior to this date but he read it at the time. In it the Claimant is referred to as the "Contractor" and the Respondent as the "Client", and amongst the terms of that agreement were the following:

> ***Services***
>
> *1. The Client hereby agrees to engage the Contractor to provide the Client with the following services ("the Services"):*
>
> - *Completion of wheelie bin cleaning operations in line with standard operating procedures of Cleaner Communities Ltd.*
> - *Safe and responsible driving of company vehicles in line with the Highway Code.*
> - *completion of full wash day duties at the end of each shift in line with provided check sheet to include vehicle, unit & storage*

space / driveway at registered business address [citing the Respondent's address].

- *To ensure when carrying out paid work for Cleaner communities contractor will adhere to company dress code consisting of provided cleaner communities branded t-shirt, hoodie where required and overcoat where required. Persons will provide own work style trousers (jeans are acceptable but not jogging bottoms or sports trousers) and may choose there own footwear of either boots or trainers.;*

- *carry out sales duties both face to face, telephone and utilizing company online and social media platforms;*

- *will commit to using whats app company group chat for all interactions with company staff and directors;*

- *Will be tasked with handling payments including cash, Direct debit sign ups, cardless transactions and will be responsible for ensuring cash payments are returned to registered business address* [again citing the Respondent' address]. *All cash payments must be verified with a receipt as detailed in company standard operating procedures document.; and*

- *Any expenses such as fuel that are incurred by the contractor whilst undertaking duties for cleaner communities will be fully reimbursed only on when a VAT receipt is produced to account for the expenses.*

2. *The Services will also include any other tasks which the parties may agree on. The Contractor hereby agrees to provide such Services to the Client.*

Term of agreement

4. *In the event that either Party wishes to terminate this Agreement, that Party will be required to provide 30 days' written notice to the other Party.*

5. *In the event that either Party breaches a material provision under this Agreement, the non-defaulting Party may terminate this Agreement immediately and require the defaulting Party to indemnify the non-defaulting Party against all reasonable damages.*

Performance

8. *The Parties agree to do everything necessary to ensure that the terms of this Agreement take effect.*

Payment

10. The Contractor will charge the Client for the Services at the rate of £240 per week ("the Payment").

11. The Client will be invoiced every month.

12. Invoices submitted to the Contractor by the Client are due within 30 days of receipt.

13. The Contractor shall be responsible for all income tax liabilities and National Insurance or similar contributions relating to the Payment and the Contractor will indemnify the Client in respect of any such payments required to be made by the Client.

Capacity/Independent Contractor

21. In providing the Services under this Agreement it is expressly agreed that the Contractor is acting as an independent contractor and not as an employee. The Contractor and the Client acknowledge that this Agreement does not create a partnership or joint venture between them and is exclusively a contract for service.

Assignment

26. The Contractor will not voluntarily, or by operation of law, assign or otherwise transfer its obligations under this Agreement without the prior written consent of the Client.

10. I was not provided with a copy of the *"company standard operating procedures document"* referred to in clause 1, nor did any witness refer to it in their evidence. I am therefore unable to make any finding in relation to it.

11. There was no dispute that throughout his engagement the Claimant carried out the tasks inherent with cleaning wheelie bins. He typically worked four days a week: Monday to Thursday. His working hours were set at 8am to 6pm on each of those four days.

12. Within those four working days the Claimant would generally service around 120 customers, although this was not set in stone. In quieter weeks there could be half that amount, but in busier weeks there could be double. The Claimant noticed that as the Respondent acquired more customers there could on some individual days be as many as 70 or 80 clients to service. Whilst the Claimant did introduce one or two customers to the Respondent, these were people he knew socially and could not properly be classified as his client base. Save for these individuals, the client base to be serviced was entirely the Respondent's.

13. Despite the apparent requirement placed upon him to provide the Respondent with an invoice every month in respect of his charges (clause 11 of the Independent Contractor Agreement) Mr Freer conceded that the Claimant never

provided any invoices until expressly requested to do so around 23 August 2019, some nine months after the commencement of his engagement. Until that time no requests had been made by the Respondent, who simply paid the Claimant £240 per week, every week, save for a few exceptions. Payment was made to the Claimant via direct bank transfer.

14. The first payment to the Claimant was made on 30 November 2018, albeit of £220. It was not explained why the payment was less than the £240 later agreed to be paid to him. At the time of that payment, the Claimant was in training.

15. The "invoice" that was submitted by the Claimant (dated 26 August 2019) does not resemble what would commonly be understood to be an invoice; instead, it appeared to me to resemble a statement of account showing what payments had been due at particular times, which of those had been made, and which were outstanding. Nevertheless, it provided a useful illustration of how the Claimant came to be paid, and the level of frequency.

16. The Respondent provided all of the tools and equipment necessary for the Claimant to carry out the tasks inherent in mobile wheelie bin cleaning. This included a van to travel between locations, a trailer to transport the cleaning equipment such as the hydraulic lift, a jet washer, sponges, sanitary sprays and refuse bags. The Claimant was not expected or indeed obliged to provide any equipment of his own.

17. Fuel for the van was provided and paid for by the Respondent without the Claimant ever having to cover this up front and reclaim expenses. Insurance in relation for the Claimant's use of the van was provided and paid for by the Respondent by adding his name to an existing policy, as Mr Freer confirmed.

18. The Respondent also provided the Claimant with items of personal protective equipment (PPE) such as a jacket, glasses and gloves. In his evidence Mr Wakefield stated that the Respondent did so because *"it was a nice thing to do"*, the implication being that he did not consider that the Respondent had an obligation to provide PPE. Mr Wakefield further stated that, *"Some people would bring their own. They would bring boots and a waterproof pair of trousers. They are professionals and can do as they wish".*

19. I found this evidence unconvincing. Mr Wakefield recognised the need to avoid *"sprayback"* – presumably meaning the likelihood of dirty water and cleaning chemicals spraying onto the contractor's person during the cleaning process – and the Respondent ensured that the PPE mentioned above was located in the Claimant's van. I did not accept that the provision of PPE could be characterised as a *"nice"* gesture: given the nature and process of cleaning dirty wheelie bins it appeared to me that the provision of PPE was essential to the protection of the individual carrying out the cleaning and that it would not realistically be left to the individual discretion of an independent contractor to provide their own PPE, unless (for example) they had entered into an agreement with the Respondent with an established, independent wheelie bin cleaning business in their own right. Neither the Claimant nor any of his cleaner colleagues were in that position.

20. The Respondent also provided the Claimant with items of uniform, including those described in the Independent Contractor Agreement, above. The only items the Claimant had to provide were an appropriate pair of trousers and footwear within the meaning of clause 1 of the Independent Contractor Agreement. Ms Masefield told me that on the occasions when she had travelled with the Claimant in his van during his working days she observed that he always put on his Respondent-branded coat or hoodie before commencing his work, *"so people knew he was a part of the company"*. The essence of her evidence was that he considered it a strong moral obligation that he should do so.

21. In fact, the obligation to do this carried stronger force than mere moral obligation. On the face of the Independent Contractor Agreement the obligation was said to be a legal one: the fourth bulletpoint within clause 1 made it a mandatory requirement on the Claimant to adhere to a dress code. Adherence to that dress code would, in my judgment, have completely obscured the fact that on the face of the Independent Contractor Agreement the Claimant was operating independently of the Respondent. To the person in the street, the Claimant would have appeared to be fully integrated into the Respondent's operation. Indeed that was the intended effect.

22. The Independent Contractor Agreement contained no clause to the effect that the Claimant could not perform work for another entity or of his own accord. In cross-examination the Claimant accepted that during the same period as he was engaged by the Respondent he had entered into another Independent Contractor Agreement, in virtually identical terms, with another entity run by Mr Wakefield but in the unrelated field of fitness. It was called BST and the Claimant's capacity was as a personal trainer/coach.

23. However, in evidence the Claimant pointed to a situation which arose during his engagement with the Respondent where there was a conflict between his responsibilities regarding the Respondent and his responsibilities with BST. Whilst the date and time are not shown, a WhatsApp message was sent by Mr Wakefield to the Claimant in the following terms (page 24):

> *"Will sound blunt but you know I love you so forgive the blunt…… BST starts at 1830*
>
> *You don't need to finish cleaner comms at 1630*
>
> *Cleaner comms has to come first and get all bits sorted and tied up.*
>
> *Either bike ride or car or whatever. Il get flack for you finishing early and I can't have that line being blurred. You need to be at lakeside for like 1810 for set up.*
>
> *Don't wanna make it a thing so let's just be slick.*
>
> *If yo cant make an 1830 session just say. We can make things work*
>
> *Love you*

Don't forget it ;-)

24. The Claimant said that to him, this was an example of Mr Wakefield telling him that his primary role was with the Respondent and that it must take priority over any other arrangements the Claimant had. In evidence Mr Wakefield said that this message merely amounted to him giving advice to the Claimant as to which order he believed the Claimant should carry out his responsibilities for the Respondent and BST.

25. In my judgment, the Claimant's interpretation was correct and to be preferred. Read as a whole, the message could not be properly interpreted as Mr Wakefield giving mere advice. The third sentence included a command rather than a suggestion. The fourth sentence encouraged compliance and was consistent with the previous one being a command. The fifth sentence revealed the potential for this dispute to degenerate into something worse in the event that the Claimant failed to comply. Whilst there was reference in the sixth sentence to making things work, placed in context that comment was set against the background of a command and the need for the Claimant to comply.

26. It is right to observe that it may not have amounted to the full extent of the conversation on the Respondent's WhatsApp group or indeed all the direct communications between the Claimant and Messrs Wakefield and Freer on the same platform, but the compendium of WhatsApp messages provided by the Claimant was informative as to how the relationship between him and the Respondent worked in practice. My findings in relation to it are as follows:

    26.1. Pages 2 and 27: the Respondent issued instructions to the Claimant as to the fine detail of some of the tasks he was to perform, such as where he should park his van, the order in which he should alter the customer to his presence (*"If the bins not out knock…… wait, knock again, look over the fence, try the side gate, call the phone number, use the FB messenger……. be resourceful"*), the point in time at which he should enter notes into the work diary, and the detail of the notes he was to take down.

    26.2. Pages 5, 9, 10, 14, 15, 16, 19, 23, 28, 29, 36, 37 and 38: on these particular occasions Mr Wakefield and Mr Freer were able to allocate tasks and adjust the Claimant's priorities whilst his working day was in progress, instructing him to attend on particular customers as a matter of priority. None of these adjustments were expressed as suggestions or advice to the Claimant; they had the character of instructions as to what he should do and when.

    26.3. Page 11: on this occasion Mr Wakefield issued the Claimant with an express instruction regarding the collection of monies from customers (*"be sure to call them when your in the area and message them if nothing heard. Gotta hunt these down mate"*) and provided a template message to use for this purpose. That template made it clear that the message was being sent on behalf of the Respondent (rather than the Claimant in an independent capacity) as it was named in the opening sentence.

26.4. Page 31: on this occasion Mr Wakefield reminded the Claimant of his working hours and that he would be *"less happy"* about earlier finishes if certain cleans had not been completed. To me, this strongly implied that Mr Wakefield held a position of dominance over the Claimant and that this was not a commercial relationship of equals.

26.5. Page 32: on this occasion Mr Wakefield issued further direct instructions to the Claimant. Those included instructions to check particular things in relation to his van, and that *"For the end of the day duties it is essential and mandatory that we are completing and signing the end of shift sheet. might sound a bit firm but this is extremely important to us and is something that will cause a big issue if we don't get better at it. The things on the list are there to look after us all and to support business continuity"* (emphasis added).

26.6. Page 34: on this occasion Mr Wakefield told the Claimant *"can we please stick to the route this is mapped out geographically to be the most sense and also is the most economically from a fuel prospective"*.

27. From the above messages it was clear to me that in carrying out his role the Claimant had in practice no discretion as to how, when and where he would undertake his tasks. The Respondent (in the form of Messrs Wakefield and Freer) had complete control over his tasks and even the minutiae of carrying them out.

28. I was reinforced in this view by the Claimant's (agreed) evidence concerning the allocation of tasks in the first place, which was carried out by the Respondent leaving a clipboard in his van at the start of each day. That clipboard contained a daily task sheet and a list of the names and addresses of all the customers he had to service during each day. I was shown a copy of the daily task sheet. It was a generic document setting out ten individual tasks to be carried out by the Claimant prior to commencing a clean, and nine to be carried out after a clean. None were described as optional, and all were expressed as instructions. In addition, at the start it included the following text:

> *"This is sheet is to be completed to the best of your ability each working day where cleans are commenced. If any elements are unable to be completed this has to be discussed and agreed with management (Pete* [Wakefield] *or Lee* [Freer]*) prior to the end of your day."*

29. At its conclusion the daily task sheet required the Claimant to sign off, and it included the following text:

> *"In signing I commit to completing the tasks set out in this document to the best of my ability and reporting any deviation from the tasks as described to either Pete Wakefield or Lee Freer directly via company whatsapp group."*

30. Mr Wakefield described the daily task sheet as *"guidance"* but I had no hesitation in rejecting that contention. The weight of evidence against that proposition being

true was overwhelming. The text of the document itself could only properly be interpreted as issuing instructions to the Claimant, and requiring compliance. From this it was clear that the Claimant had no control or discretion over his workload at all, and as evidenced in the WhatsApp messages only the Respondent could modify the order in which the tasks needed to be carried out, which it did so Mr Wakefield or Mr Freer issuing real-time direct instructions to the Claimant. The route itself – and therefore the order of tasks – was determined in advance by the Respondent, which had already mapped it out to ensure logicality and efficiency as evident from the WhatsApp messages from Messrs Wakefield and Freer at page 34 of the compendium.

31. I asked the Claimant about the consequences there might be in the event that he failed to comply with an instruction from the Respondent. His evidence was that he had not been expressly told that there would be any particular consequence in the event of non-compliance, and that for his own part he did not contemplate that there would be a specific consequence for not complying with instructions. Other than on occasions where there were technical faults with the equipment, a non-compliance situation for which the Claimant could be blamed simply never arose.

32. However, by reference to the contents of some of the WhatsApp messages referred to above, the Claimant told me that of his concern that there would be *"repercussions"* of some sort if he failed to do as he was told, even if on his own admission he did not know precisely what these could be. On this issue I asked Mr Wakefield what would happen if there had been a failure to comply with, for example, the matters set out in the daily task sheet. His answer was *"nothing"*, although *"there was an expectation"* that a contractor would comply. I therefore asked him why the daily task sheet was there. His answer was *"efficiency"*.

33. Clearly, compliance with those 19 instructions would have likely have meant the Claimant was carrying out his duties efficiently, but in my judgment Mr Wakefield avoided addressing the point. Imposing an expectation without there being any potential sanction for non-compliance at all would be unusual even in a true commercial relationship, but in this particular case I found Mr Wakefield's contention to be not merely unusual but absurd given the Respondent's express inclusion within the Independent Contractor Agreement of a detailed list of tasks (*"the Services"*; clause 1), a *"do everything necessary"* performance clause (clause 8), and a unilateral without-notice termination clause (clause 5) which could on its face be utilised in the event of any material breach. It is plain that in terms of applying sanction for non-compliance with instructions the Respondent did have considerable power. Indeed, it expressly retained the ultimate power, of unilateral termination.

34. Clauses 4 and 5 of the Independent Contractor Agreement set out the circumstances in which the Claimant or the Respondent might unilaterally terminate the contract. This was either on 30 days' notice (clause 4) or, as referred to above, immediately in the event of the other party's material breach (clause 5). None of the witnesses suggested that these clauses reflected anything other than the parties' true intentions.

35. Both the Claimant and Mr Wakefield appeared to be under the common impression that clause 26 of the Independent Contractor Agreement conferred a power on the Claimant to appoint a substitute wheelie bin cleaner in the Claimant's place (a "substitution clause"). The Claimant's evidence was that he had the right to send a substitute in his place but only with the written consent of the Respondent's directors, and the situation never arose. As this did not seem to be in dispute, I accepted that evidence. However, even if that situation had arisen it seemed to me that the substitution clause would have conferred a very limited right of substitution in practice as he would have had to identify an individual who was competent at least at driving the van and operating the equipment and then to obtain the written consent of Mr Wakefield and Mr Freer.

36. As to the tax position, clause 13 of the Independent Contractor Agreement stipulated that accounting for tax and National Insurance contributions to HMRC was the responsibility of the Claimant. The Respondent did not make deductions at source under Pay As You Earn (PAYE). The Claimant's unchallenged evidence on this point was that he had not yet accounted for the tax situation to HMRC, nor indeed has he paid any tax or National Insurance contributions that may be due on his earnings from the Respondent. He said that he found the process of registering his business too complicated and as a result he gave up. The task of registering a business appeared to me to be a completely separate matter from filing a return and paying any sums due to HMRC. His failure to do either of those things was not adequately explained.

37. As to the wider wheelie bin cleaning industry, the Claimant was unable to say whether the kind of arrangements he had with the Respondent were commonplace. For the Respondent, Mr Freer stated that through the market research he had carried out (by contacting other such entities in different locations) his understanding was that the Respondent's competitors generally paid their individual bin cleaners the same rate as the Claimant's, and most did so on a *"cash in hand"* basis. For some individuals, their bin cleaning work was their second or third source of income. Whilst this provided me with a very limited picture of the arrangements prevalent within the wider industry, Mr Freer was in a better position than the Claimant to comment. I accepted his evidence on this point as truthfully reflecting his understanding of the situation.

38. On 27 August 2019 the Claimant gave 30 days' notice of termination in writing, stipulating that his *"finishing date"* would be 27 September 2019. Following the giving of notice the Respondent allocated him no work. It is not necessary at this stage to make any further finding in relation to the termination as that falls to be determined within issue 2.

The law

39. The starting point in any dispute about employment status is to consider the statutory definitions. Those relevant to this case are set out in:

    39.1. **Section 42** of the **Employment Tribunals Act 1996** ("**ETA 1996**"), through which the **Employment Tribunals Extension of Jurisdiction**

(England and Wales) Order 1994 has effect, permitting the Tribunal to consider complaints of wrongful dismissal; and,

39.2. **Regulation 2** of the **Working Time Regulations 1998** ("**WTR 1998**"), through which the Tribunal has jurisdiction to consider claims for compensation in respect of accrued but untaken annual leave (holiday pay).

40. Those provisions are set out as follows:

Employment Tribunals Act 1996

42 Interpretation

(1) In this Act (except where otherwise expressly provided) –

"contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing,

"employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment,

"employer", in relation to an employee, means the person by whom the employee is (or, where the employment has ceased, was) employed,

"employment" means employment under a contract of employment and "employed" shall be construed accordingly…

Working Time Regulations 1998

2 Interpretation

"employer", in relation to a worker, means the person by whom the worker is (or, where the employment has ceased, was) employed;

"employment", in relation to a worker, means employment under his contract, and "employed" shall be construed accordingly

"worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

41. The use of the word *"worker"* in **reg.2** is important. The concept of *"worker"* emanates from European Union law, which was the origin of the **WTR 1998** in English law. As can be seen from the definition in sub-paragraph **(b)**, it is a broader concept than that of *"employee"* as set out in **s.42 ETA 1996** but it does include anyone who would otherwise qualify as an *"employee"* under that provision. In this case, the Claimant only contends that he was an *"employee"*; as a result, it is not necessary for me to determine whether he was, in the alternative, a *"worker"*. If he was an *"employee"* he qualified for the rights provided by the **WTR 1998**.

42. **Section 230 Employment Rights Act 1996** provides an identical definition of employment to **s.42 ETA 1996**, and it is relevant because most of the authoritative cases on employment status have arisen from that or from one of its predecessor provisions. It is reproduced as follows:

> **Employment Rights Act 1996**
>
> ***230 Employees, workers etc.***
>
> *(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
>
> *(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*

43. On the question of who meets the definition of *"employee"* there is no single legal test or exhaustive list of factors that are determinative, but the following binding cases are of assistance:

    43.1. **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433** (High Court, Queen's Bench Division). Whilst describing a contract of employment (*"contract of service"*) and its parties (*"master"* and *"servant"*) in the language of the period, McKenna J set out three key considerations that have withstood the test of time:

> *"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that*

other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

43.2. On the issue of personal service – *"he will provide his own work and skill"* – the case of **Cotswold Developments Construction Ltd v Williams [2006] IRLR 181** (EAT) set out four tests that would generally determine whether the degree of personal service essential to an employment relationship was present:

> *"… the central questions:*
>
> *(a) was there one contract or a succession of shorter assignments?*
>
> *(b) if one contract, is it the natural inference from the facts that the claimant agreed to undertake some minimum, or at least some reasonable, amount of work for* [the employer] *in return for being given that work, or pay?*
>
> *(c) if so, was there such control as to make it a contract of employment so as to give rise to rights of unfair dismissal, as well as a right to holiday pay?*
>
> *(d) if there was insufficient control, or any other factor, negating employment, whether the claimant was nonetheless obliged to do some minimum (or reasonable) amount of work personally?"*

43.3. On the issue of control – *"control in a sufficient degree"* – the case of **White & another v Troutbeck SA [2013] IRLR 949** (Court of Appeal) reminds Tribunals that they must assess *"the cumulative effect of the totality of the provisions in the agreement and all the circumstances of the relationship created by it."*

43.4. Also of relevance is the degree to which the individual is integrated into the organisation. In **Stevenson Jordan and Harrison Ltd v MacDonald and Evans [1952] 1 TLR 101** the Court of Appeal highlighted a critical distinction, stating that *"Under the contract of* [employment] *a man is employed as part of the business, whereas under a contract for services his work although done for the business is not integrated into it but only accessory to it."*

43.5. The Tribunal should also consider the economic reality of the situation. A useful question for the Tribunal to answer – as approved by the Privy Council in **Lee v Chung and Shun Shing Construction and Engineering Co Ltd [1990] IRLR 236** – is, *"Is the person who has engaged himself to perform these services performing them as a person in business on his own account?"*

43.6. As to the weight to be attached to any agreement between the parties on the matter of employment status, in **Young & Woods Ltd v West [1980] IRLR 201** the Court of Appeal stated that the label the parties attach is a factor to take into account but it is not determinative: *"It must be the court's*

duty to see whether the label correctly represents the true legal relationship between the parties in that case as in every other."

The parties' submissions

44. For the Respondent, Mr Wakefield contended that the Claimant was not an employee but a self-employed contractor. This contention was based on his assertion that others in the Claimant's position enjoyed the same status, that all the Respondent did in practice was provide a sufficient level of guidance to enable their independent contractors to carry out their roles, and that the Independent Contractor Agreement permitted for an *"immense"* amount of freedom for the Claimant in his engagement. Those factors, he submitted, pointed away from there being a relationship of employer and employee in this particular case.

45. For himself, the Claimant contended that he was an employee of the Respondent as a matter of law because of the degree of control that was exercised upon him, the imposition of specific working hours upon him, the contractual obligation upon him to wear the Respondent's uniform, and the fact the Respondent provided all the equipment necessary for him to do his role. He submitted that he did not have the degree of freedom the Respondent suggested, and pointed to the fact that he was paid irrespective of whether he had submitted invoices to indicate that in reality he was being paid a wage as an employee.

Conclusions

46. As mentioned above, there is no all-encompassing definition of who qualifies as an *"employee"* for the purposes of **s.42 ETA 1996** or **reg.2 WTR 1998**. However, based firmly on my findings of fact my conclusions in relation to the Claimant's status are set out as follows.

Personal service

47. In basic terms it is clear that the Claimant provided his own work and skill to the Respondent in travelling from location to location and cleaning its customers' wheelie bins, in exchange for the payment of £240 per week (**Ready Mixed Concrete**, point 1). Further, in relation to the first two considerations set out in **Cotswold Developments**:

    47.1. The parties entered into a single contract (the Independent Contractor Agreement) which endured until its termination; this was not a situation where the Claimant agreed to provide work for the Respondent across a number of smaller assignments. His working hours and days were regular and generally uniform throughout the period, even if there were times when his work was quieter or indeed busier than usual. The payment made to him by the Respondent was set at and paid, save for a few exceptional occasions, at a constant rate.

    47.2. The natural inference from the facts was indeed that the Claimant agreed to undertake some minimum, or at least some reasonable, amount of

work for the Respondent in return for being given that work, or pay. In reality, this agreement was not to be found from mere inference but from the explicit stipulations the Respondent made throughout the period of the engagement. Clauses 1 and 2 of the Independent Contractor Agreement (*"the Services"*) set out a list of tasks which the Claimant was required to perform, which endured throughout the engagement. There was also a set of standard operating procedures, although it was not clear what these were. The existence of a minimum amount of work was also evident from how the relationship worked in practice, principally through the provision of instructions by the Respondent to the Claimant on a daily basis via the clipboard and the daily task sheet, and through Mr Wakefield and Mr Freer issuing real-time instructions to the Claimant via WhatsApp on a frequent basis.

48. For these reasons, in my judgment the Claimant has satisfied the test for personal service.

Control

49. The second key issue in **Ready Mixed Concrete** (and the third and fourth points in **Cotswold Developments**) concerns the degree of control the Respondent had over the Claimant. **Troutbeck** reminds me to consider the degree of control provided for in the contract but also the bigger picture of the actual relationship it created. In my judgment, the Respondent enjoyed a very high degree of control over the Claimant and his activities throughout the engagement. With reference to my findings of fact as set out above:

    49.1. The Claimant had no experience of bin cleaning, nor did he have an established bin cleaning business of his own, prior to entering into the Independent Contractor Agreement with the Respondent (paragraph 6). He was therefore not entering into the engagement with a specific set of skills which he could use by deploying professional judgment. His bin-cleaning skills were only acquired through training provided by the Respondent at the start of the engagement. During the course of the engagement the type of work he was actually doing was process-based and not the type where professional judgment would be required.

    49.2. In practice, the Respondent had complete control over the tasks the Claimant was to perform and sometimes even the minutiae of such tasks (paragraphs 26.1, 26.3, 26.5, 26.6 and 27). This degree of control was evident from and consistent with clauses 1 and 2 of the Independent Contractor Agreement (*"the Services"*), the clipboard and the daily task sheet. It also had complete control over the Claimant's overall workload, both at the commencement of his working day and throughout each working day as updating instructions were sent to him (paragraphs 29 and 30).

    49.3. As to the prioritisation of work, this was always set by the Respondent and never by the Claimant. There was an abundance of evidence which supported this finding (paragraphs 24, 25 and 26.2).

49.4. As to substitution, I have found that any right the Claimant may have had on the face of clause 26 of the Independent Contractor Agreement was highly fettered as it depended initially on the Claimant being able to find someone with the requisite minimum level of competence, and then entirely on his obtaining written consent of both Mr Wakefield and Mr Freer (paragraph 35). This was far from being a situation where the Claimant had a complete discretion to substitute someone else in his place.

49.5. Mr Wakefield's contention in submissions that the Claimant enjoyed an *"immense"* degree of freedom was patently wrong; in fact, the complete opposite was true. The Claimant enjoyed no discretion whatsoever in relation to the tasks he was to perform or his workload.

50. For these reasons, in my judgment the Claimant has satisfied the test of sufficient control.

Integration

51. The case of **Stevenson Jordan and Harrison Ltd** illustrates that where a person enjoys a high degree of integration into the business he is likely to be its employee, in contrast to a situation where he performs work accessory to it. With reference back to my findings of fact, in the Claimant's case it is clear that there was a very high degree of integration into the Respondent's business:

51.1. In terms of outward appearance:

51.1.1. The Claimant was required to – and did – adhere to a comprehensive dress code imposed by the Respondent. This not merely a moral obligation but on the face of the Independent Contractor Agreement one which had legal force (paragraph 21). To the person in the street, the Claimant would have appeared to be fully integrated into the Respondent's operation, and that was the Respondent's intended effect. The fact he had to provide his own trousers and footwear is not of material importance.

51.1.2. The Claimant was required to communicate with customers using the standard wording of the Respondent, which named the Respondent only (paragraph 26.3) and would not have given the impression to the person in the street that he was in any way independent of the Respondent's organisation.

51.2. In terms of the practical realities:

51.2.1. In cleaning wheelie bins for its customers the Claimant was responsible carrying out the sole purpose of the Respondent's business operation. Any suggestion that the Claimant's work was ancillary or accessory to what the Respondent did could not be sustained. That fact was not diluted by the fact that the Respondent had other contractors performing the same work. It was the work itself that was central, regardless of how many people were doing it at any one time.

51.2.2. All of the equipment, PPE and insurances necessary for the Claimant to perform his tasks were provided by the Respondent (paragraphs 16 to 19). The Claimant was not required to make any independent provision in that regard, nor was it a situation where both sides made provision or jointly contributed in some form or another.

52. For these reasons, in my judgment the Claimant has satisfied the test of sufficient integration.

Economic reality

53. The **Lee** case encapsulates a straightforward point of principle: was the Claimant performing this work as a business in his own right? On this point there is little I can add to the preceding analysis, save to reiterate the following:

53.1. I have found that prior to his engagement with the Respondent the Claimant had no established wheelie bin cleaning business and in fact he had no experience in this field at all (paragraph 6). This situation was common to all of the Respondent's contractors when they started (also paragraph 6).

53.2. Given the personal service required of him, the degree of control placed over him and the degree to which he was integrated into the Respondent's business – and seen to be so – any suggestion that the Claimant had even begun to establish a business in his own right during the course of his engagement with the Respondent was unsustainable. The economic reality of the situation is that the Claimant was not carrying out a business in his own right: he was wholly part of the Respondent's business.

54. The case of **West** requires the Tribunal to consider the written agreement between the parties with a view to determining whether the label it applies correctly describes the nature of their relationship.

54.1. In my judgment, the Respondent's use of an Independent Contractor Agreement – and in particular its use of clause 21 to describe the Claimant's status as not being that of an employee – was an attempt to disguise the true nature of the relationship and the wider economic reality of the situation. It was an entirely false description of the true relationship that existed between the parties.

54.2. In my judgment, given their own knowledge of how the relationship would work in practice, clause 21 was fully understood by Mr Wakefield and Mr Freer as being a false description both at the point at which the Claimant was required to sign the Independent Contractor Agreement itself and throughout the Respondent's engagement of the Claimant.

54.3. For those reasons, taken together with my findings of fact and my earlier considerations in relation to the legal tests appropriate to employment status cases, I consider that no weight whatsoever can be attached to clause 21 of the Independent Contractor Agreement.

55. For these reasons, in my judgment the Claimant has satisfied the economic reality test.

Conclusion

56. It follows that in my judgment, the Claimant was at all material times an employee of the Respondent for the purposes of **s.42 ETA 1996** and **reg.2 WTR 1998**.

57. The matter shall therefore be re-listed for hearing in relation to issue 2, and the Tribunal has issued consequential orders in that regard.

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Employment Judge Smith
Date: 30 April 2021

Sent to the parties on:

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For the Tribunal:

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