EMPLOYMENT TRIBUNALS

Claimant: **Mr A Hallsworth**

Respondent: **NAM Global Ltd**

Heard at: Watford by Cloud Video Platform **On:** 11 May 2021
Before: Employment Judge Street

Appearances
For the Claimant: Ms Greenley, counsel
For the Respondent: Mr Fitzgerald, company director

Written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, in respect of the status of Mr Hallsworth, the following Judgment is issued with written Reasons.

JUDGMENT

Mr Hallsworth is an employee of NAM Global Ltd within the meaning of section 230 of the Employment Rights Act 1996 and section 83 of the Equality Act 2010

REASONS

1. **Evidence**

1.1. The Tribunal heard from the claimant and from Mr Fitzgerald, and read the documents referred to in the agreed bundle. The Tribunal read the witness statements of Mr Mansourian, Mr Barter and Mr Logan who did not attend.

2. Issues

2.1. The issue to be determined at this Preliminary Hearing was whether the claimant was an employee, a worker or self-employed, specifically,

1.1 Was there a contract between Mr Hallsworth and the company? If so, what were its terms?

1.2 Was the Claimant an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996?

1.3 Was the Claimant an employee of the Respondent within the meaning of section 83 of the Equality Act 2010?

1.4 Was the Claimant a worker of the Respondent within the meaning of section 230 of the Employment Rights Act 1996?

3. Findings of Fact

3.1. Mr Hallsworth is a van driver.
3.2. He was employed previously by Panic Link, who had him on the payroll and gave him a P45 when he left.
3.3. He moved from Panic Link to Courier Freight Services International, when Panic Link were closing. Mr Logan was a director of that company and the two men discussed and agreed terms, in 2001. No written statement of terms and conditions of employment was issued and there is no documentary evidence of the contract agreed between the two men.
3.4. Mr Hallsworth continued to work for Courier Freight Services until 2018.
3.5. The business of Courier Freight Services was bought and continued by NAM Global Ltd in 2018.

Contract Terms

3.6. The terms agreed between Mr Hallsworth and Mr Logan were based on his previous employed contract with Panic Link. Mr Hallsworth expressly wanted the same terms. Knowing Panic Link was closing, Mr Logan offered to take Mr Hallsworth on and they talked through the terms he had been on with Panic Link. The discussion covered rate of pay, payment for annual holidays and use of the vehicle Mr Hallsworth would be driving. The only thing that differed from the arrangement with Panic Link was that Mr Logan asked him to present an invoice reflecting the agreed daily rate, rather than offering to pay him through PAYE. The daily rate was fixed at the rate which reflected Mr Hallsworth's previous salary.
3.7. It was an oral conversation, not recorded in writing at any time.

3.8. The terms that then operated throughout, based on that initial agreement, were these:

- Mr Hallsworth worked for a daily rate, fixed by the company and increased by the company a couple of times over the 17 years of employment prior to the transfer of the business. It did not vary with the hours or number of deliveries. He invoiced once a month for four or for five weeks.
- He used the company van. The company provided fuel, insurance for the vehicle and the scanner. He did not provide his own tools and equipment.
- The company allocated work on a daily basis, including determining the area for deliveries, supplying the items to be delivered based on its contracts with clients, and the route. Mr Hallsworth worked under the control of the company, taking no managerial responsibility and making no investment. He was required to follow the designated route and to meet the estimated delivery times. He was given a run sheet and a tracker which tracked his route. He did not refuse work on the run sheet, although he was entitled to refuse extra packages if there wouldn't be time to do them.
- Some jobs – flowers, medicines, for example – would have priority. There were times when packages were returned undelivered.
- He worked co-operated with the other drivers. If there were additional parcels for delivery he might take them on, or finish other rounds, or others might take work off him, to see the jobs completed.
- He did not work for others. He had no customers of his own paying him for deliveries.
- He attended every day as required, from Monday to Friday, taking no sick leave. He attended punctually, at 7.30 am, returning to the depot in the evening. Mr Logan stipulated the working hours – for a time, Mr Logan supplied Mr Hallsworth's services to another company who started work at 7.00 am, so Mr Hallsworth did too.
- He took the van home in the evenings and at weekends, and for any short periods of annual leave.
- He was expected to perform the contract personally. There was no discussion of any power of substitution and he never failed to attend in person – as he said,

  "At no time was it even suggested that I could substitute myself for someone else. No such suggestion. Never came up."

- He was the named driver and sole regular user of the vehicle provided.
- He was paid for annual leave, taken at times arranged with the consent of the employer, for 20 days per year and was paid for Bank Holidays. he did not work them. Agreed leave dates were written up on a calendar.

- He was paid £30 per month in respect of the expense of his mobile phone.
- He was told at the outset by Mr Logan to provide monthly invoices. He provided regular invoices for his services and was responsible for his own tax and national insurance. The invoices were at the rates the company determined as his daily rate.
- He wore an APC polo shirt. He understood it was part of the contract with the company's major client, that drivers were required to wear them. Others did not wear them regularly, but he did.
- Work was provided every working day for Mr Hallsworth. He was not sent home or asked not to come in because there was no work for him until May 2020.

3.9. He had not chosen to be self-employed. When Mr Logan told him he would have to provide invoices, Mr Hallsworth rang HMRC for advice –

> "I was left in a quandry as to how to keep the tax record straight. They said you are self-employed. I disputed that. I said I am getting a wage but my employer hasn't set me up on PAYE. I wanted to make sure my pension was covered and to keep clean with the tax office. So all is straight with my tax, and my NI is up to date. So from the tax angle, they are happy with me. But I wasn't left with an option of PAYE."

3.10. He was told by HMRC that he should provide the invoices as requested. He did so, using his own name. (He was not himself a director of a limited company). His concern was to keep matters straight with HMRC and ensure his pension was covered by payment of his national insurance contributions.

3.11. He did not do Saturday work. He was not offered Saturday work or asked to do it.

3.12. He was not in a pension scheme with either company.

3.13. There were other drivers working for both companies. Mr Hallsworth was paid a set rate. Others were paid by delivery. One other used a company vehicle, others provided their own and met the costs.

3.14. Mr Hallsworth continued to work for NAM Global Ltd on the same basis from 1/12/98. On being told of the transfer, he wanted to be clear that his terms and conditions would remain the same. He pressed on the matter. He was assured by Mr Logan that there would be no change in his terms on the transfer of the business to NAM Global Ltd and there was no change. There was no re-negotiation of his contract on the transfer of the business or any discussion of his contract terms. He continued to work under the direction of the new management. He submitted invoices to NAM Global Ltd instead of to Courier Freight Services.

3.15. His annual leave and bank holidays continued to be paid until March 2020. That was the first change in the arrangements since 2001, save for the two previous pay rises he had had.

3.16. In March 2020, Mr Hallsworth had his holiday approved in the usual way by Mr Mansourian. Mr Fitzgerald, company director of the Respondent, called him in during his annual leave and told him that this was an "unauthorised absence" and that he would not be paid for it. He told him that he was dismissed with one week's notice. He later changed that to a "verbal warning".

3.17. Mr Hallsworth at that point tried to consult the company disciplinary process but was unable to. Mr Fitzgerald challenged why he was trying to look at it.

3.18. On 5 May 2020, Mr Fitzgerald told Mr Hallsworth that the company would not be paying annual leave or public holidays, and that would be applied retrospectively to the Easter period 2020. That decision was then applied for future leave, but the Easter holiday period was paid.

3.19. The company then stopped offering him work on the previous consistent basis, so he had no work on 11 and 18 May, or 8 June and none from 16 June. That was the first time he had not been given work.

3.20. Mr Hallsworth wrote to the Respondent three times to try to resolve his status. He had no response.

3.21. The van is now insured for another driver to use.

4. **Law**

4.1. Section 230(1) of the Employment Rights Act 1996 ("ERA 1996") defines an employee as "an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment."

4.2. Section 230(2) provides that "a contract of employment means 'a contract of service or apprenticeship whether express or implied, and (if it is express) whether oral or in writing'. That is by distinction from a contract for services, which is a contract for a self-employed arrangement.

4.3. Section 230(3) provides that "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 of a client or customer of any profession or business undertaking carried on by the individual.

4.4. The section 230 definition of "employee" is adopted for a range of provisions including breach of contract (s42 Employment Tribunals Act 1996). The section 230 definition of "Worker" is adopted elsewhere, including for the Working Time Regulations.

4.5. By section 83(2) of the Equality Act 2010, "Employment" is defined as "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work".

4.6. The Equality Act definition therefore includes workers in the ERA 1996 definition and those concepts have been held to be the same (Pimlico Plumbers [2018] UKSC 29).

4.7. Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), regulation 2, "employee" means any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services. There must be a contractual relationship between the individual and the transferor. Employees and apprentices are clearly covered, together with a wider and ill-defined group (those identified by the words "or otherwise"). There is no appellate authority on whether workers who are not employees are covered by that, but in Dewhurst and ors v Revisecatch Ltd t/a Ecourier and anor ET Case no 2201909/2019, the Judge identified workers who are not employees but who fall within the definition in section 230(3)(b) of the ERA 1996 as included within the TUPE definition. If so, such workers can enforce the same rights against the transferee as against the transferor but not any enhanced rights.

4.8. Both relationships, that is, employee and worker, depend on the formation of a contract between the parties (Windle v S of S for Justice 2015 ICR 156 (para 12)).

4.9. A contract is a promise, or set of promises, that the law will enforce. In employment context, the employee promises to perform work in exchange for the payment of wages and the commitment to provide work. Other terms may also apply, covering holidays, payment for holidays, sickness absence, the use of equipment, satisfactory performance standards. Typically, an employment contract will be made up of a variety of terms and conditions setting out the respective obligations of the parties.

4.10. For there to be a contract, there must be the intention to enter into legal relations and those legal relations must be intended to be created by way of a

contract not by some other legal mechanism (Sharpe v Bishop of Worcester 2015 CA IRLR 663). There must be, expressly or impliedly, an offer, acceptance and consideration – that is, each party gives something of benefit to the other.

4.11. It is not necessary for a contract to be in writing. It is an important protection for each party that it is in writing, so that the terms can be clearly identified, but an oral contract of employment or for services is binding on both parties. Contracts may be partly written and partly oral and they can also be constituted or evidenced by conduct. (Protectacoat Firthglow Ltd v Szilagyi [2009] EWCA Civ 98, [2009] IRLR 365)

4.12. Once a contract does exist, 'employment' tends to reflect mutual obligations, whereas the 'worker' definition tends to concentrate on the element of personal service by the individual (not on the obligation of the employer to provide work).

4.13. If the contract is not one of employment, those who carry on a business on their own account and enter into contracts with clients or customers to provide work or services for them are self-employed and excluded from statutory employment rights. Those who provide their services as part of a business carried on by someone else rather than on their own account are likely to be workers, with a range of statutory employment rights, even though more limited than those for employees.

4.14. Someone who pays their own tax and national insurance may do so because they are properly self-employed, or it may be that they are employees whose status has been mis-categorised so that the “employer” can reduce tax and national insurance liabilities or to escape other consequences of employing staff.

4.15. The question is always what the true legal relationship between the parties is. That may or may not be accurately reflected in contractual documents. All the relevant evidence, oral, written and ongoing conduct, must be examined to determine the “true agreement” (Carmichael v National Power Plc [1999] ICR 226 HL).

4.16. Taperer v South London and Maudsley NHS Trust 2009 ICR 1563 EAT, a TUPE case, reminds us that the contract terms are to be identified at the time at the time the contract is entered into, describing that as an elementary premise in the construction of contracts.

4.17. The Supreme Court in Uber Bv and ors v Aslam and ors 2021 ICR 657 held that by reason of the purpose of the statutory protections conferred on workers and employees the terms of a written contract are not even the starting point in determining whether an individual falls within those definitions.

The focus must be on the practical reality of the working relationship. The key questions relate to subordination and dependence, having regard to the legislative purposes of statutory rights. These are not ordinary commercial contracts.

4.18. A number of tests have been applied in distinguishing employees from workers and workers from those in genuine self-employment.

4.19. In relation to employee status, the traditional three questions, derived from Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433 QBD are:

1. Did the worker undertake to provide his own work and skill in return for remuneration?
2. Was there a sufficient degree of control to enable the worker fairly to be called an employee? That is, has the worker expressly or impliedly agreed to be subject to the other's control in the performance of his duties?
3. Were other provisions consistent or inconsistent with the existence of a contract of employment?

4.20. Mutuality of obligation – that is, each party to the contract offering something to the other, perhaps one committing to offer work and pay, the other promising to carry out the work - is a central issue in determining whether an individual is an employee or genuinely in business on his or her own account.

4.21. Without mutuality of obligation and a sufficient degree of control, there cannot be a contract of employment (Carmichael above, and Montgomery v Johnson Underwood Ltd [2001] ICR 819)

4.22. In Stephenson v Dephi Diesel Systems Ltd EAT [2003] ICR 471, Elias J said this,

> "The significance of mutuality is that it determines whether there is a contract in existence at all. The significance of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract."

4.23. The question of control is not to be determined solely by whether the worker has day-to-day control over their own work but by addressing the cumulative effect of the provisions in the agreement and all the circumstances (White and anor v Troutbeck SA , CA 2013] IRLR 949.

4.24. Can a worker or employee engage a substitute to carry out the work for them? Personal performance is an explicit component of the ERA 1996 definition of worker and is also a necessary constituent of a contract of employment. A limited or occasional power of delegation is not inconsistent with that requirement (Ready Mixed Concrete, MacKenna, above) An unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do the work personally. A conditional right to provide a substitute may not be inconsistent with the obligation to provide personal service (Pimlico Plumbers Ltd v Smith [2018] UKSC 29). but the presence of a substitution clause in written documentation is unlikely to prevent a finding of "worker" status if there is no evidence of such a clause being operated or intended to operate in practice (Uber, above).

4.25. The requirement for personal service for employees has been seen as higher than for workers. So, if there is no requirement for personal service, the contract cannot be one of employment (Express & Echo Publications Ltd v Tanton [1999] ICR 693 HL). That now has to be approached in the light of the judgement of the Supreme Court in Uber, bearing in mind the purpose of the legislation.

4.26. Relevant to the analysis as to whether an individual is self-employed, a worker or an employee, therefore, will be the extent of control of the worker and the way he does the work held by the organisation, the extent of mutual obligation to provide and to perform work, the extent of integration into the organisation, that is whether the worker was part and parcel of the organisation or truly independent of it, whether there is an obligation on the worker to perform the work personally or whether he is entitled to employ a substitute. It is a multi-factorial assessment: consideration of all the circumstances is required, the terms of the contract and between whom and when it was made.

4.27. The following questions are helpful in creating the overall picture.

- What was the amount of the remuneration and how was it paid?—a regular wage or salary tends towards a contract of service; profit sharing or the submission of invoices for set amounts of work done, towards independence.
- How far, if at all, did the worker invest in his own future: who provided the capital and who risked the loss?
- Who provided the tools and equipment?
- Was the worker tied to one employer, or was he free to work for others (especially rival enterprises)? Conversely, how strong or otherwise is the obligation on the worker to work for that particular employer, if and when called on to do so?
- Was there a 'traditional structure' of employment in the trade?
- How did the parties themselves see the relationship?

- What were the arrangements for the payment of income tax and national insurance?
- How was the arrangement terminable?—a power of dismissal smacks of employment.

4.28. In Cotswold Developments Construction Ltd v Williams [2006] IRLR 181, a four-fold approach was suggested:

(1) was there one contract, or a succession of shorter ones?

(2) If one contract, did the claimant agree to undertake some minimum (or, at least, reasonable) amount of work for the company in return for pay?

(3) If so, was there such control to make it a contract of employment?

(4) If there was insufficient control (or some other factor negativing employment) was the claimant nevertheless obliged to do some minimum (or reasonable) amount of work personally, this qualifying him as a worker?

4.29. Relevant factors in assessing control include whether the individual is under a duty to obey orders, has control over his or her hours of work and holiday, is supervised as to the mode of working, whether he or she provides their own equipment.

4.30. An alternative approach considers integration, that is the integration of a worker into the organisation – is there any disciplinary or grievance procedure, is the individual included in any occupational benefit scheme? Is he in business on his own account? Does he provide his own equipment, hire his own helpers, take a financial risk, take any role in investment and management of his own business and can he profit from his own success?

4.31. Where someone works on an assignment-by-assignment basis, that may indicate a degree of independence, or lack of subordination in the relationship while at work which is incompatible with employee status or extended employee/ worker status (Secretary of State for Justice v Windle and Arada [2016] EWCA Civ 459. Where there is continuity and regularity of work and performance, that points to at least worker status (Pimlico Plumbers Ltd and anor v Smith 2018, ICR 1511, SC). Two additional criteria are identified in that case, based on Cotswold Developments Construction Ltd above and Hashwani v Jivraj [2011] UKSC 40:

- whether the purported worker actively markets his services as an independent person to the world in general, or is instead recruited to work as an integral part of the principal's operations, and/ or

- whether the person performs services for and under the direction of someone else in return for which he receives remuneration, or whether he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services.

4.32. Express contract terms are important but not necessarily decisive. An express contract term stating that there is no contractual obligation to offer and/or to do work does not inevitably preclude a finding of worker, or even employee status, where the individual works regularly and consistently for the master (using the old-fashioned term as being more neutral than "employer).

4.33. The effect of the judgment of the Supreme Court in Uber is that in assessing status, the facts must be looked at in the round, bearing in mind the purpose of the statutory protections provided to those who are in a situation of economic dependence, subordinate and vulnerable to exploitation.

Reasons

4.34. The terms of the contract here stand to be established in the first place by what was agreed at the outset. That was the discussion between Mr Hallsworth and Mr Logan in 2001. The further terms can be inferred from the parties' conduct.

4.35. Mr Fitzgerald was not able to provide evidence in respect of the creation of the contract or the way it was implemented. He told us he did not know the terms on which Mr Hallsworth had worked for the predecessor company.

4.36. It is agreed that the Respondent company took over the business of Courier Freight in 2018. Employment contracts transferred under TUPE.

4.37. Mr Fitzgerald denies any TUPE transfer of Mr Hallsworth's employment, given that his assertion is that Mr Hallsworth was self-employed.

4.38. Mr Fitzgerald was asked about the contract discussions with Mr Hallsworth. If Mr Hallsworth was not taken on as part of the transferred business, there would have had to be some discussion about terms, perhaps even an interview, however informal. Terms would have been agreed. Expectations established.

4.39. Mr Fitzgerald's evidence was this.

> "I don't know his pay and conditions when he worked for Courier Freight."

> "When did you make clear to him the terms he was on? Or who did?"

"I told him he would be working on an self-employed basis."
"I told him we would pay him £80"

4.40. Asked why that figure,

"Just the figure we picked"
"I didn't pick £80 because it was what he was on".
"Sean Logan was our advisor, he recommended it was a fair figure for a fair day's work."
Was it based on what he had earned before?
"I never got into that conversation with Mr Logan. He said it was a good rate."

4.41. Asked to flesh his evidence out, he offered nothing more.

4.42. The obvious reason for there being no fuller discussion about the basis of Mr Hallsworth's work must be that he was continuing on known terms, in accordance with Mr Fitzgerald's evidence of the assurances he was given by Mr Logan about the effect of the transfer.

4.43. That also explains the rate of pay proposed, the same rate as that which Mr Logan had paid, and that Mr Hallsworth continued to be paid for his annual leave and bank holidays.

4.44. Mr Fitzgerald offered three witness statements for witnesses who did not attend. They were not available for cross-examination and it was explained at the outset that that affected the weight that would be attached to that evidence.

4.45. Two are from Mr Mansourian and Mr Logan. Mr Mansourian is another director of the Respondent. Mr Logan's witness statement is presented on the basis that Mr Logan recommended Mr Hallsworth to the Respondent as a self-employed driver.

4.46. Mr Logan, Mansourian and Fitzgerald agree that Mr Hallsworth was taken on as on a self-employed basis in good faith. They do not provide evidence of any discussion of terms. The assertion is that Mr Hallsworth took care of his own tax and national insurance, was able to choose his own work, to accept or decline work as he chose and turned up at various times to start a day's work, often refused work and finished when he wanted.

4.47. Mr Mansourian also says that the claimant was a self-employed driver when working for Courier Freight, but does not explain on what basis he says that.

4.48. Mr Logan in his witness statement says that Mr Hallsworth worked as a self-employed driver for Panic Link and Courier Freight. The P45 from Panic Link points to Mr Hallsworth having been an employee.

4.49. Only Mr Logan could give evidence on the terms on which Mr Hallsworth worked for Courier Freight Services and he does not. His evidence simply confirms the sale of the business to NAM Global Ltd on 1/12/18, and that he himself remained a consultant director for a handover period.

4.50. As to annual leave and bank holidays, Mr Fitzgerald says it was payment for those was because of a mistake by the girls in the office. It is also said to be Mr Lynch's error. The Response says that Mr Hallsworth invoiced for them fraudulently.

4.51. There was no letter to Mr Hallsworth from April/ May 2020 describing those payments as in error or giving the basis on which they were said to be made in error. There was no response to Mr Hallsworth's letters setting out in very clear terms the basis on which he said he was an employee.

4.52. Mr Fitzgerald tells us there was no need to reply to the three letters from Mr H setting out his claim that he was an employee and entitled to payment for annual leave. That makes little sense. On any interpretation the company was changing a practice established for over a year, and that required to be addressed. But Mr H was also putting forward a case that the contract was very different from the one the company understood it to be and that required too to be addressed. So saying there was "Nothing to reply to" is just wrong. That undermines Mr Fitzgerald's account – it is neither responsible nor rational.

4.53. The third witness statement is from Mr Barter, who describes himself as a self-employed driver with NAM Global, which does not help in determining Mr Hallsworth's terms.

4.54. There is no report of any discussion about the right of substitution – Mr Hallsworth having the right to send another driver to do his run if he chose. There is no evidence of that ever happening.

Conclusion

4.55. Mr Fitzgerald says there was no contract. There was a contract. Mr Hallsworth performed work, the company provided it and paid him. There is no doubt that there was an intention to enter into legal relations. An oral contract is still a contract. There was a contract.

4.56. He may mean there was no employment contract. It is also right to say there is no written employment contract. That does not mean there was no employment contract. That remains to be established.

4.57. These are the primary contentions advanced to support the view that Mr Hallsworth was self-employed.

- The assertion that Mr Hallsworth took care of his own tax and national insurance, was able to choose his own work, to accept or decline work as he chose and turned up at various times to start a day's work, often refused work and finished when he wanted.

  I do not accept that Mr Hallsworth had the right to choose his own work, to accept or decline work as he chose or to turn up at various times to start a day's work and finish when he wanted.

  Little evidence is advanced in support of those contentions, none from the period before the transfer of the business. The evidence produced is not of Mr Hallsworth refusing a run, but of refusing additional items when unable to accommodate them within the day's work.

  His evidence is clear and consistent and is of a settled pattern of daily work under the direction of the two companies he worked for.

  No evidence supports a finding that he worked hours to suit himself, arriving or leaving early.

  That he took care of his own tax and national insurance is consistent with being in independent self-employment. Alone, it does not suffice to be determinative of Mr Hallsworth's status. That is, if taken with other factors, it may be consistent with employee or worker status.

- As to annual leave and bank holidays, Mr Fitzgerald says payment for those was because of a mistake.

  It is central to Mr Hallsworth's account of his terms and conditions as agreed in 2001 and continued from then on that he was paid for annual leave and bank holidays. Payment for those continued to be made for over a year when it was challenged. I accept too that Mr Hallsworth sought permission to take those holidays and did not simply say he was unavailable for work.

  I find it unlikely that he requested and was paid annual leave and bank holidays by accident for over a year. It is more likely that that the arrangement reflected the continuance of his previous terms and conditions.

The Respondent fails to establish that those payments were made in error, as against pursuant to the original contract.

4.58. Applying the legal tests discussed above, I find as follows.

Personal Service

4.59. The suggestion that he had the right to send a substitute came as news to Mr Hallsworth. I am satisfied that no such term was discussed or agreed and there was no instance when he exercised such a right. He does not acquire a right to substitute someone to do his job instead of himself by Mr Fitzgerald's assertion to the effect that, "Of course he could". Further, the van was the company's van, with Mr Hallsworth as the named driver. He did not have the right to authorise someone else to use it.

4.60. There was no substitution clause. Mr Hallsworth was required to discharge his duties in person.

Control

4.61. Mr Hallsworth carried out the duties assigned to him by the company, taking the run, and using the routes identified. He worked under the company's management and control, including as to start and finish times. He used the company's equipment. He asked permission for annual leave.

4.62. He worked under the control and direction of the company as a subordinate.

Client or Customer

4.63. Mr Hallsworth was not in business on his own account. His tools and equipment, including the van and the tracker were supplied to him, for use on company business. He did not have his own. He did not seek or work for other clients or customers. He made no investment in the business and took no risk. He had no authority to make decisions. He had no working relationship with the clients of each company.

The Practical Reality

4.64. The practical reality of this working relationship is that Mr Hallsworth worked steadily for many years under the direction of the first company on terms that are inescapably those of employment. He was not in business for himself. He made no decisions. He had no clients. He used company equipment to carry out the work in the way the company wanted, under their

control. He was required to attend work on a regular basis and could not send a substitute.

4.65. Only the payment of tax and national insurance runs to an extent counter to that. And he explains more than adequately how that arose. He wanted and looked for the employer to put him on PAYE. On that not being offered, he did his best by consulting HMRC and making arrangements under their guidance. His payment of his own tax and national insurance do not contradict the otherwise clear evidence that he was an employee.

4.66. He was not self-employed.

4.67. I have no need to linger on the less protected status of worker. The overall picture is of a straightforward employment relationship. He worked under a contract for service. He was an employee.

4.68. Mr Hallsworth is clear that Mr Fitzgerald told him he was sacked with one week's notice. That was later converted to a warning. That would point to an employee relationship. Mr Fitzgerald denies both. I do not need to rely on it, the evidence being so clearly in favour of an employment contract.

4.69. If he was an employee for Courier Freight, then he transferred over to NAM Global on the same terms under TUPE.

4.70. The nature of the working relationship remained constant throughout, before and after the transfer in 2018 until May 2019, when the present Respondent chose to stop paying Mr Hallsworth for annual leave and to give him work.

4.71. I find Mr Hallsworth to have been an employee throughout.

Employment Judge Street

Date 18/06/21

REASONS SENT TO THE PARTIES ON

.....21.06.2021.....

FOR THE TRIBUNAL OFFICE
THY