EMPLOYMENT TRIBUNALS

Claimant: **Ms M Randall**

Respondent: **(1) Miss B Gurney**
(2) Merali's Limited
(3) Fordover Services Limited

Heard at: **Watford (CVP)** **On:** **7 & 8 June 2021**

Before: **Employment Judge A.M.S. Green**

Representation

Claimant: Mr M Sprack - Counsel
First Respondent: Ms G Churchhouse – Counsel
Second & Third Respondent: Ms I Egan - Counsel

RESERVED JUDGMENT

The Tribunal does not have jurisdiction to hear the claims.

REASONS

Introduction

1. For ease of reading I have referred to the claimant as Ms Randall, the first respondent as Miss Gurney, the second respondent as Merali and the third respondent as FSL. I also use the acronym "SPH" when referring to Scottish Provident House.

2. I conducted a remote public preliminary hearing via the CVP platform. We worked from a digital bundle. The following people adopted their witness statements and gave oral evidence:

    a. Ms Randall;
    b. Miss Gurney;
    c. Mr M Merali;

d. Ms W De Sanchez.

3. The representatives provided written representations which they expanded upon with closing oral submissions.

4. In reaching my decision, I have considered the oral and documentary evidence. The fact that I have not referred to every document produced should not be taken to mean that I have not considered it.

5. Ms Randall must establish her case on a balance of probabilities.

The claims

6. Ms Randall presented a claim form to the Tribunal 21 July 2020. She claims the following:

    a. ordinary unfair dismissal;
    b. age discrimination;
    c. a redundancy payment;
    d. notice pay;
    e. holiday pay;
    f. arrears of pay;
    g. “other” payments;
    h. unlawful deduction from wages;
    i. failure to provide itemised payslips.

7. In respect of calculating payments due, her claim is predicated upon not receiving the National Minimum Wage and the sums claimed must be adjusted to reflect that fact.

The issues

8. On 3 January 2021, Employment Judge Lewis directed that there would be a public preliminary hearing for further case management and to determine the following issue: to decide if Ms Randall was an employee of, or a worker of Miss Gurney, Murali or FSP, and if so, when.

The parties’ respective positions

9. Ms Randall’s position is that for the relevant period (i.e. 1990 to April 2020):

    a. Miss Gurney engaged her to work as an employee within the meaning of Employment Rights Act 1996, section 230 (1) and (3) (a) (“ERA”); or

    b. Miss Gurney engaged her to work as a worker within the meaning of ERA, section 230 (b).

10. Miss Gurney’s position is that Ms Randall was, at all times, an independent contractor and her claims should be struck out under rule 37 of the rules of procedure as having no reasonable prospect of success.

11. Merali and FSP's position is that she was not employed by them or Miss Gurney. She was not a worker. She was an independent contractor, engaged by Miss Gurney and her claims must, therefore, fail.

Findings of fact

12. Having considered the evidence, I make the following findings of fact.

13. Ms Randall is Colombian. She has family in Colombia whom she regularly visits for prolonged periods of time (i.e. for several months a year). In 1990, on her own admission, she did not speak English particularly well. Over the years, her English improved and when I heard evidence at the hearing, she did not require the services of an interpreter and she spoke and understood English well.

14. Miss Gurney, an employee of FSP, first met Ms Randall in 1990 at a bus stop. Because there was a bus strike at the time, they took a taxi together and talked about the possibility of Ms Randall undertaking cleaning work at SPH. FSP is a not-for-profit organisation that provides maintenance and cleaning services for tenants at SPH. The cleaning services are restricted to the common parts of the building. FSP charges the tenants for the cleaning work of the common parts of the building. The tenants separately arrange for their offices to be cleaned. Prior to meeting Ms Randall, Miss Gurney had been responsible for cleaning the common parts of SPH and had performed this work personally. She no longer wanted to do that work and it was fortuitous that she met Ms Randall who was willing to perform cleaning work in the common parts of the building.

15. A verbal agreement was reached between the two women. It was agreed that Ms Randall would clean the common parts of SPH Monday to Friday at any time between 7 PM and 8 AM. In return, Miss Gurney would pay her £55 per week. This increased to £55.70 per week from 2010. These working and remuneration arrangements were never reduced to writing. There was conflicting evidence about what else, if anything, was agreed at the time. Miss Gurney's evidence was that there was a detailed conversation in 1990 about Ms Randall's employment status to the effect that she would be self-employed, responsible for her own tax and national insurance and would be free to provide substitutes. I cannot accept this for the following reasons:

    a. On her own admission in her oral evidence, Miss Gurney said that she had no training in HR matters or employment law. It seems implausible that she would be able to address these issues about status with such precision and understanding without the requisite background knowledge.

    b. The conversation took place over 30 years ago. Memories fade and recall is infallible over such a period of time. This is particularly the case with Miss Gurney. Occasionally, when she was giving her evidence, she became confused and contradicted herself. She told the Tribunal that she was taking medication for anxiety and had been doing so since 2020 and this impacted on her powers of recall. Set in that context, it is implausible that she would be able to remember the precise terms of the agreement with Ms Randall.

16. The only thing, which can be said with any certainty is that Miss Gurney no longer wanted to perform the cleaning work at SPH, and she agreed the basic arrangements with Ms Randall namely, when she would come in, what needed to be done and how much she would be paid. It is what happened in the subsequent years that determined the nature of the working relationship.

17. Ms Randall was paid by cheque drawn from Miss Gurney's personal bank account. Ms Randall has provided a schedule of cheque payments [104]. Miss Gurney sometimes paid Ms Randall in cash. Miss Gurney was not reimbursed the cost for paying Ms Randall by FSP. FSP paid Miss Gurney her monthly salary out of which she paid Ms Randall. Merali had no role to play in this arrangement because it is a dormant company.

18. Income tax and national insurance was not deducted from the payments made to Ms Randall throughout the time that she worked as a cleaner. On her own evidence, she admitted that she never received a P60 from Miss Gurney, FSP or Merali. She also told the Tribunal that she had other part-time work as an employee for different employers and had received P 60s and tax codes from HMRC. She never queried why tax and national insurance been deducted or why she had not received P 60s in respect of her work at SPH.

19. Throughout the time that Ms Randall was cleaning at SPH she only dealt with Miss Gurney although she occasionally saw Mr Merali. Her contact with him was limited to exchanging pleasantries.

20. There is no dispute between the parties that Ms Randall came into SPH Monday to Fridays to clean the common parts of the building from late 1990 until 15 April 2020. What is disputed is the extent to which Miss Gurney or FSP controlled the manner in which the work was performed, whether Ms Randall was personally obliged to do the work and if she had the right to offer a substitute.

21. I find that Ms Randall was not subject to Miss Gurney's control for the following reasons:

    a. In the first five years when Ms Randall was cleaning at SPH, she would come into work before 9 AM. In her own words, Miss Gurney said that initially she wanted to supervise her. However, after approximately a couple of weeks she was happy with the work being performed. The obvious inference to be drawn from this was that after that period of time, there was no need for Miss Gurney to supervise the work. Thereafter, Ms Randall was left to her own devices to do the work at any time, Monday to Friday between 7 PM and 7 AM. Ms Randall's evidence on this point under cross-examination coincided with what Miss Gurney said. Ms Randall said:

        I knew what I had to do, Betty did not have to supervise, initially she had to supervise me when I started.

        When Ms Randall was cross examined and asked whether Miss Gurney had control over how she carried out her work, she replied that she [i.e. Ms Randall] was responsible for her job.

b. On 16 November 2017 Miss Gurney wrote to Ms Randall [86]. In her letter, she told Ms Randall that she had noticed of late that some parts of the building were not cleaned properly and she listed several tasks for Ms Randall to perform. The letter was signed "Betty".

c. On 9 January 2019, Miss Gurney wrote another letter to Ms Randall [88] in similar terms about the quality of the cleaning and listed several tasks for her to perform. The letter was signed "B Gurney".

d. On 9 January 2019, Miss Gurney wrote to Ms Randall [89]. She said:

> *I have written to you on several occasions regarding the cleaning at Scottish Provident House. It appears that the cleaning is not done properly as per the cleaning schedule.*
>
> *Please note that if you don't do the cleaning properly, as per the schedule enclosed I will have to get someone else to do the cleaning.*

The letter was signed "B Gurney".

e. Miss Gurney accepted under cross examination that whilst she did not think she would have signed the first letter "Betty" she was not suggesting that the letter was not genuine. She accepted that she was giving specific instructions to Ms Randall on both occasions about how to do the cleaning. It had fallen below an acceptable standard.

f. It might be suggested, at first glance, that this correspondence incontrovertibly leads to a finding that Miss Gurney was exercising control over how Ms Randall performed her tasks. I do not think such a conclusion can be justified. First, Ms Randall was not subject to any performance management, appraisals or disciplinary action during the time that she worked at SPH. There was no evidence of that. Secondly, in Ms Randall's oral evidence, she confirmed that, generally, Miss Gurney was pleased with her work and it was only towards the end of the relationship that she told that she was not doing very well and they would be getting another cleaner. She said that she did the work for many years without any complaint. These were isolated incidents over 29 years where Miss Gurney felt it necessary to remind Ms Randall about the requisite standard of the work that she had to perform.

g. There is no evidence to suggest that she was prevented from working for anyone else at the time that she worked at SPH. Indeed, she had part-time employment with other employers.

22. Turning to the right to provide substitutes, I find that not only did Ms Randall have an unfettered power she regularly exercised it. I justify this conclusion for the following reasons:

a. There is no dispute, that during the 29 years that Ms Randall was working at SPH that when she took extended time off to return to Colombia to visit her family, other people, particularly Ms De Sanchez and/or a man called Carlos, would cover her work. Both of these

people where Ms Randall's friends. She introduced them to Miss Gurney before they provided cover during Ms Randall's absences. In her oral evidence, Ms Randall suggested that Miss Gurney was required to approve Ms De Sanchez and Carlos before accepting them to provide cover. However, she said nothing about this in her witness statement. This is a material averment of fact which she has made to suggest that she was an employee or a worker. I would have expected something to have been said about this in her witness statement. Furthermore, her witness statement was prepared with the help of a lawyer who would, no doubt advised on the key adminicles of evidence that must exist for a claimant establish employment or worker status. Such averments are conspicuously absent. In the absence of such a material averment of fact in her witness statement, I do not attach any weight to what she said as it only came out under cross-examination. It points to embellishment. I believe that the arrangement was that Miss Gurney trusted Ms Randall to find an appropriate person to cover for her and it was not conditional upon Miss Gurney approving the choice.

b. In her oral evidence, Ms De Sanchez confirmed that she had no direct dealings with Miss Gurney. Everything was arranged by Ms Randall. This contradicts what she says in her witness statement where she says that she did have direct dealings with Miss Gurney. In her oral evidence she also claimed that she could only cover for Ms Randall once Miss Gurney had approved of the arrangement. She says nothing about this in her witness statement. That is a material omission which, when taken with the contradictory evidence regarding direct dealings with Miss Gurney, undermined her credibility. I give Ms De Sanchez's evidence little weight.

c. Ms Randall would arrange for cover when she took extended time to return to Colombia. In her evidence, she confirmed the procedure that she followed for this. She would tell Miss Gurney that she needed to take time off for her holidays. Miss Gurney told her to find someone to cover for her. Ms Randall was clear that she had to find someone to cover her work. When she found cover, they would do the work instead of Ms Randall and would be paid for that work. She also eventually admitted under cross-examination that Miss Gurney did not make it a precondition of having to meet and approve the proposed cover before they were engaged. She would ask Ms Randall who was going to cover for her.

d. Ms Randall knew that if she did not provide cover, Miss Gurney would find someone else and Ms Randall would not have work to return to after taking time off. This is entirely plausible because, in her own evidence, Ms Randall needed to take at least two months off each time that she returned to Colombia. It was, therefore, essential that she found someone else to do the work in her absence over such an extended period. Furthermore, FSP was a small business that employed no more than four people, and it did not have the resources to provide internal cover during Ms Randall's absences. Finally, Miss Gurney did not want to do the work. Had she done so, she would never have retained Ms Randall in the first place and was content with the arrangement whereby Ms Randall sourced substitutes to do the work.

e. Ms Randall regularly returned to Columbia. The substitutes performed the work and were paid accordingly. This was not a one-off arrangement but an established and regular practice that played out over many years.

23. I also heard evidence about integration into FSP's organisation. I find that Ms Randall was not integrated for the following reasons:

    a. She had no direct meaningful dealings with FSP. She communicated directly with Miss Gurney.

    b. Although Miss Gurney was an FSP employee there is no evidence to suggest that she was acting as their agent when she retained Ms Randall.

    c. Ms Randall was not provided with a uniform and cleaning equipment by Miss Gurney, FSP or Merali. She wore her own clothes to do the work and Miss Gurney paid for cleaning materials and equipment out of her own resources and did not back charge the cost to FSP. The cleaning materials and equipment were kept in a cupboard in SPH for Ms Randall, and others, to use when they came in to clean the common parts of the building.

    d. She was not subject to any FSP disciplinary or performance management procedure.

    e. She was never paid for taking holidays.

    f. She took very little sick leave and when she did, she did not receive sick pay.

Applicable law

24. Most statutory employment rights are conferred on employees or workers. Employees are those who work or worked under a contract of employment, meaning a contract of service or apprenticeship, whether express or implied and whether oral or in writing (section 230 (1) & (2) ERA). A worker is defined by section 230 (3) as an individual who has entered into or works under (or, where the employment has ceased, has worked under):

    a. A contract of employment (defined as a "contract of service or apprenticeship") (section 230 (3) (a) ERA); or

    b. Any other contract, whether express or implied, and (if 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 (section 230 (3) (b) ERA) (known as a "limb b worker").

25. With the possible exception of those receiving work-related training, it remains an essential requirement that there must be some kind of contractual relationship between the Ms Randall and Miss Gurney and/or Merali and FSP.

Consequently, if Ms Randall was genuinely and wholly self-employed she cannot advance her claims in the Tribunal. The Tribunal will not have jurisdiction.

26. It is clear from section 230(3)(a) that all employees are workers. However, the second limb of the definition is of much wider scope and includes some people who are nominally self-employed.

27. For Ms Randall to lay claim to worker status she must first show that there is a contract with the "employer". To be a worker, she must "do or perform personally" the work or services required under the contract. Personal performance is generally considered necessary for a contract of employment. To qualify as a worker, Miss Gurney and/or Merali and FSP must not be a client or customer of any professional business undertaking carried on by Ms Randall. This was designed to exclude, for example, a barrister who contracts with the client to perform personal services as part of his or her profession or plumber in business on his or her own account who does the work personally.

28. I am reminded that in **Byrne Bothers (Formwork) Ltd v Baird and Ors 2002 ICR 667**, the EAT gave guidance and held that the intention was clearly to create an intermediate class of protected worker made up of individuals who are not employees but equally could not be regarded as carrying on a business. Accordingly, the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves.

29. Drawing this distinction in any particular case will involve all or most of the same considerations that apply when distinguishing between a contract of employment and a contract for services but with the boundary pushed further in the individual's favour. Factors to consider could include the degree of control exercised by the "employer", the exclusivity of the engagement and its typical duration, the method of payment, what equipment the "worker" supplied on the level of risk undertaken. Factors such as the individual having business accounts prepared and submitted to HMRC, being free to work for others, being paid at a rate that includes an overheads allowance and not being paid when not working cannot be relied on to support the contention that he or she is running a business and that the person for whom the work is performed as a customer of that business.

30. Although the courts have moved away from using the 'control test' as the sole means of identifying a contract of employment, it remains an essential part of the 'multiple test' approach advocated in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD**, and subsequent decisions. In **Montgomery v Johnson Underwood Ltd 2001 ICR 819, CA**, the Court of Appeal held that control is a separate factor, no less vital to the creation of an employment relationship than mutuality of obligation. Thus, since the tribunal had made a finding of fact that there was no control of the claimant by the employment business which supplied him to the client, he could not be its employee. And in **UPVC Designs Ltd t/a Croston Conservatories v Latimer and anor EAT 0431/07** the EAT allowed an appeal against a tribunal's finding that a worker was an employee of the company on the basis that the tribunal had failed to address

whether the company had a sufficient right to control her work. While acknowledging that control was not a 'bright line test', since there were clearly some kinds of work where the scope for control was limited, the EAT nevertheless held that the question of control was one which must be addressed and evaluated. It was not sufficient to conclude, as the tribunal did in the instant case, that a contract of employment exists solely on the basis of mutuality of obligation between the parties. Since the company could not require the worker to follow up a specific client lead, to work at particular times or to come into work to help at peak periods, it could not control her in important respects. Accordingly, the tribunal's decision could not stand.

31. An absence of day-to-day control over work does not preclude an employment relationship — **White and anor v Troutbeck SA 2013 IRLR 949, CA**. In that case the claimants had agreed to manage and maintain the house and grounds of T's small farm estate and had signed an agreement to that effect which referred to them as being 'employed' by T, a Panamanian company owned by a Nigerian family. The tribunal, however, decided that they could not be employees because T had delegated the day-to-day running of the farm to the claimants. The EAT overturned that decision, noting that there was nothing unusual or inconsistent with the concept of employment in circumstances where an absentee owner requires someone to be responsible for maintaining and managing the property. In its view, the tribunal had misunderstood the control test as formulated in **Ready Mixed Concrete**. The question was not whether T exercised day-to-day control over the claimants' work but whether it had, to a sufficient degree, a contractual right of control over them. On the facts of the case, it was clear that T retained a sufficient degree of control in that, for example, it decided on maintenance that required expenditure and gave instructions concerning the upkeep of the house and grounds. The EAT substituted a finding that the claimants were employees. On further appeal, the Court of Appeal held that the EAT had correctly set aside the tribunal's decision. Viewed in the round, the parties' relationship evinced the principal elements of employment: the claimants worked, in return for a reward plus annual holiday pay, at a workplace designated by T and for its continuing benefit. Furthermore, T retained a degree of control over the claimants' work that was sufficient to preclude them operating as independent contractors.

32. In a more general sense, therefore, control requires that ultimate authority over the purported employee in the performance of his or her work rests with the employer. However, indirect control, which exists by virtue of an employer's right to terminate the contract if the worker fails to meet the required standards of skill, integrity and reliability, is not by itself sufficient. Some element of more direct control over what the worker does is needed.

33. Mutuality of obligation is now generally regarded as a necessary element of the contract of employment (**Carmichael and Another v National Power plc 1999 ICR 1226, HL**). This is usually expressed as an obligation on the employer to provide work and a corresponding obligation on the employee to accept and perform the work offered. Relevant considerations include whether there are any notice requirements and whether a worker is free to leave at any time in favour of alternative work. If there is no mutuality of obligation between the parties, then it is highly unlikely that there will be a contract of employment in existence.

34. Another factor pointing to employment is the incidence of income tax and national insurance contributions; deductions at source points to employment; gross payment suggests self-employment. However, this factor is not generally regarded as strong evidence and the opinion of HMRC on a worker's employment status for tax purposes will never be conclusive as to his or her status for employment law purposes. Payment of tax and national insurance on a "self-employed" basis is not conclusive proof of a contract for services (**Enfield Technical Services Ltd v Payne; BF Components Ltd v Grace 2008 ICR, 1423, CA**) just as being part of the PAYE scheme and paying employees' national insurance contributions is not conclusive evidence that a worker works under a contract of service (**O'Kelly and others v Trusthouse Forte plc 1983 ICR 728, CA**).

35. The parties' stated intention as to the status of their working relationship in law may be a relevant factor but the courts will always look at the substance of the matter, even if the parties expressly agree on a label with the approval of HMRC.

36. In **Pimlico Plumbers v Smith [2017] EWCA Civ 5** the Court of Appeal had to determine whether a plumber engaged on a self-employed basis was a worker for the purposes of rights under ERA, holiday pay, unlawful deduction from wages and disability discrimination. It held that he was a worker because he had to provide personal service although there was a conditional right to provide a substitute. The level of integration into Pimlico Plumbers' business and control by Pimlico Plumbers over Mr Smith was inconsistent with being self-employed. Mr Smith normally had to be available to take on a minimum of 40 hours' work a week. He was subject to restrictive covenants including a three-month non—compete restriction. He had to wear a uniform and drive a Pimlico Plumbers branded van.

37. The Court of Appeal provided a helpful review of relevant authorities on personal service (paragraphs 75 to 83) and summarised the relevant principles as follows:

    a. An unfettered right to provide a substitute is inconsistent with an undertaking to provide services personally.

    b. A conditional right to provide a substitute may or may not be inconsistent with personal performance. It will depend on the degree to which the right is limited or occasional. By way of example, a right to substitute:

        i. Only when the contractor is unable to carry out the work is consistent with personal performance (subject to any exceptional facts);

        ii. Limited only by the need to show that the substitute is as qualified as the contractor to do the work whether or not that entails a particular procedure, is inconsistent with personal performance (subject to any exceptional facts); and

        iii. Only with the consent of another person who has an absolute and unqualified discretion to withhold consent is consistent with personal performance.

38. The Master of the Rolls commented that the test for determining whether an individual is a limb (b) worker or self-employed does not involve any single touchstone. Relevant factors might include:

    a. Subordination (also referred to as control).

    b. Are there are number of discrete separate engagements?

    c. Do obligations continue during the breaks and work engagements (sometimes called an umbrella contract)?

    d. The extent to which the individual is integrated into the putative employer's business.

39. The Court of Appeal's decision was upheld by the Supreme Court (2018 ICR 1511, SC).

40. In **Uber BV and ors v Aslam and ors 2021 ICR 657, SC**, the Supreme Court dismissed Uber's appeal against an employment tribunal's decision that Uber drivers are 'workers' under S.230(3)(b) ERA and the equivalent provisions in the Working Time Regulations 1998 SI 1998/1833 and the National Minimum Wage Act 1998. Uber drivers own their own cars and are free to choose when they make themselves available to accept bookings by logging in to the smartphone app. Uber's position on the legal relations between it, the drivers and passengers is that it is merely a technology platform facilitating the provision of private hire vehicle services as an agent for the drivers. An employment tribunal rejected that characterisation, relying on **Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC** to look beyond the written documentation that purported to show that the drivers were independent contractors. Uber appealed without success to the EAT, the Court of Appeal and, finally, the Supreme Court. The Supreme Court pointed out that Lord Clarke's judgment in **Autoclenz** makes clear that whether a contract is a 'worker' contract is not to be determined by applying ordinary principles of contract law. The Court in **Uber** expanded on the rationale for that approach. It pointed out that it was critical to understand that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunal was primarily one of statutory interpretation, not contractual interpretation. Furthermore, that interpretation should give effect to the purpose of the legislation, which is to give protection to vulnerable individuals who have little or no say over their pay and working conditions because they are in a subordinate and dependent position in relation to a person or organisation who exercises control over their work. In the Court's view, it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a 'worker'. To do so would reinstate the mischief which the legislation was enacted to prevent.

41. As for the result on the facts before it, the Court emphasised five aspects of the tribunal's findings that justified its conclusion that the claimants were working for and under contracts with Uber. First, where a ride is booked through the Uber app, it is Uber that sets the fare and drivers are not

permitted to charge more than the fare calculated by the Uber app. It is therefore Uber which dictates how much drivers are paid for the work they do. Secondly, the contract terms on which drivers perform their services are imposed by Uber and drivers have no say in them. Thirdly, once a driver has logged onto the Uber app, the driver's choice about whether to accept requests for rides is constrained by Uber, including by the imposition of a penalty if a driver declines or cancels too many trip requests. Fourthly, Uber exercises significant control over the way in which drivers deliver their services, such as by use of a ratings system that may lead to warnings and eventual termination for the driver. Finally, Uber restricts communications between passenger and driver to the minimum necessary to perform the particular trip and takes active steps to prevent drivers from establishing any relationship with a passenger capable of extending beyond an individual ride. Drivers are therefore in a position of subordination and dependency in relation to Uber such that they have little or no ability to improve their economic position through professional or entrepreneurial skill. In practice, the only way in which they can increase their earnings is by working longer hours while constantly meeting Uber's measures of performance.

42. Although the final result in the Uber case was fact-specific, the decision changes the way in which all courts and tribunals must now approach the question of employment status, and generally makes it easier for 'worker' status to be established in similar cases. Post-Uber, courts and tribunals will focus squarely on the practical reality of the working relationship and be much less concerned with any inconsistency with the written documentation. **Autoclenz** held that the written agreement is only a part of the factual context in which the status of the working relationship should be determined. Uber has now gone further and established that the written agreement is not even the starting point for determining employment status. The key question in such cases should now be whether the relationship is one of subordination and dependence, having regard to the legislative purpose of protecting those who have little or no influence on the terms under which they work.

Discussion and conclusions

43. I find that Miss Randall was neither an employee or a worker. She was truly self-employed for the following reasons.

    a. there was no requirement for personal service;

    b. there was no mutuality of obligations; and

    c. there was a lack of control.

44. Ms Randall did not undertake to provide her own work and skill (i.e. the requirement for personal service). She was able to provide a substitute which he did on several occasions. This was an unfettered right. She did so without any restrictions (e.g. prior approval from Miss Gurney). The fact that she was not retained for the personal quality of her work is amplified when one remembers that she took prolonged periods of time off work to return to Colombia to visit her family. She was not paid when she was away. She was not reliant upon Miss Gurney approving her absences. She simply told her when she was going away and was required to find cover for her during her absence. If she failed to do that, she knew that she would be unable to return

to work at SPH. All that was required was the common parts of SPH had to be cleaned. Ultimately it did not matter who did the work. In practice it was Ms Randall, Ms De Sanchez or Carlos. Miss Gurney no longer wanted to do the work and she paid for other to clean out of her own wages.

45. Apart from an initial period of a couple of weeks where there was a modicum of supervision, Ms Randall had autonomy as to how she performed her cleaning duties on a day-to-day basis. She simply had to ensure that the work was done Monday to Fridays. For the first five years, she came in to SPH before 9 AM. Thereafter, the work had to be performed between 7 PM and 8 AM. She was not supervised or managed. She was not subject to any performance reviews or disciplinary procedures. The fact that latterly, Miss Gurney felt it necessary to write to Ms Randall pointing out deficiencies and reminding her of her tasks does not, in itself, point to a level of control required to establish employee or worker status. Nor is this the situation that arose in **Troutbeck**. It bears all the hallmarks of an independent contractor who was retained to provide services which must be performed to a requisite level of standard. If the contractor fails to meet the requisite standard, the client is within its rights to bring that fact to the contractor's attention and require it to remediate the position. When Miss Gurney wrote to Ms Randall that is what she was doing. She was the client, and Ms Randall's work was found wanting and she was reminded of the tasks that needed to be performed and the level of performance necessary to be satisfactory. Apart from this, there were never any meetings to discuss performance over the 29 years that Ms Randall did the work.

46. There was no evidence of mutuality of obligation. There was no evidence to suggest that Miss Gurney offered work to Ms Randall which she had to accept. Ms Randall simply performed the work for which she was paid. If she did not want to do the work (e.g. because she wanted to take time off to return to Colombia) she provided a substitute. Ultimately, the arrangement was terminable by Miss Gurney when she wrote to Ms Randall to tell her that if she did not improve, she would get someone else in to do the cleaning.

47. There are other factors which point to a genuinely self-employed status which are as follows:

    a. Ms Randall did not receive a regular wage or salary. She was simply paid for the work that she did without deduction of tax and national insurance. The money came out of Miss Gurney's wages.

    b. Ms Randall wore her own clothes and was not provided with a uniform.

    c. It cannot be said that there was any level of integration in FSP's organisation.

48. The dominant purpose of the contract was cleaning the common parts of SPH rather than an obligation personally to perform work. Ms Randall was essentially carrying out a business undertaking. Miss Gurney was the customer. It cannot be said that Merali was a customer because it is a dormant company. It cannot be said that FSP was a customer because there was no direct relationship between Ms Randall and FSP and no evidence to suggest that Miss Gurney was acting as its agent. Miss Gurney simply wanted someone else to do the cleaning work which she had previously performed,

and she shared part of her wages with whoever did the work to achieve that outcome. She was never reimbursed for that by FSP.

49. As Ms Randall was truly self-employed, it follows that the Tribunal has no jurisdiction to hear her claims.

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Employment Judge Green

_____

Date 23 June 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

15 July 21

FOR EMPLOYMENT TRIBUNALS