EMPLOYMENT TRIBUNALS

Claimant: Mr CI Ohiri

Respondents: (1)Clipfine Limited
(2) Riverside Construction (Essex) Limited

Heard at: London Central (by CVP) **On:** 14 & 15 February 2022 & in chambers 21February 2022

Before: Employment Judge Isaacson

Representation
Claimant: Mr A Kamara, consultant
First Respondent: Ms B Omotosho, solicitor
Seond respondent: Not present

Covid -19 Statement
This was a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face- to- face hearing was not held because of the Coronavirus pandemic.

RESERVED JUDGMENT

The judgment of the Tribunal is:

I find that the claimant was an employee of R1 and therefore is entitled to bring claims of unfair dismissal, notice pay, holiday pay, unlawful deduction from wages and whistleblowing detriment under the Employment Rights Act 1996 and claims of race discrimination, victimisation and harassment under the Equality Act 2010 against R1.

REASONS

Background and evidence before the Tribunal

1. The claimant presented his claim form on 25 August 2020 against the first respondent Clipfine Ltd. There was a case management preliminary hearing (CMPH) before EJ J Burns on 27 November 2020. EJ Burns ordered that Clipfine Holdings Limited and Riverside Construction (Essex) Limited be joined as respondents. The claimant later withdrew his claim against Clipfine Holdings Limited.

2. A further CMPH was heard by EJ Walker on 8 February 2021. Both parties had sought orders for strike out in view of delay and failure to comply with various orders but withdrew those at the hearing. EJ Walker ordered that the claimant provide further and better particulars by answering the specific questions set out in the list of issues she had drafted and which she attached as a schedule to her order.

3. A further CMPH was listed before me on 5 May 2021. I made it clear that the claimant had not fully complied with EJ Walker's order for further and better particulars and made further orders. I also made a default judgment against the second respondent Riverside Construction (Essex) Limited on the basis they failed to file and serve a response, despite receiving the claim form and response pack and sending it to their solicitors.

4. A separate Default Judgment was made against the second respondent. The second respondent was required to comply with the orders for disclosure and the orders for witness statements and to attend the open preliminary hearing (OPH). The second respondent did not attend the OPH.

5. What the second respondent is liable for will be clarified following the OPH and the final hearing. The second respondent may only participate in any hearings to the extent permitted by the employment judge hearing the case.

6. I listed a 3 days OPH to decide the claimant's employment status in Ocotober 2021. That hearing was adjourned and a 2 hour telephone CMPH was listed on 30 November 2021 instead as both parties were writing to the Tribunal complaining that the other party had not complied with orders. At that hearing I made a number of orders, including an order for further particulars of the claimant's claim and disclosure.

7. On 27 January 2022 the first respondent's solicitor made an application for an unless order, specific disclosure and wasted costs on the basis the claimant had not complied with the case management order dated 30 November 2021.

8. I made an unless order on 31 January 2022 requiring the claimant to comply with the additional information contained within paragraph 2 of my case manangement order of 30 November 2021 by midday on 4 February 2022 or the claimant's claims would be struck out for non compliance.

9. I also ordered specific disclosure and that the first respondent's application for a wasted costs order would be considered at the open preliminary hearing on 14/15 February 2022.

10. Before the OPH the first respondent's solicitor sent an email suggesting the claimant had not fully complied with the unless order and therefore the claim was struck out.

11. At the OPH we carefully went through the unless order and the further and better particulars provided. In relation to paragraph 2.3 I was satisfied that the claimant had complied materially with the order and he was able to clarify what were the two alleged protected disclosures. The first disclosure was on 17 September 2019 to Magda of HR and the disclosure was what is set out in paragraphs a) and b). The second is the grievance letter set out at f).

12. The claimant, however, failed to send to the respondents a copy of the grievance, as specifically ordered "*Without reference to the particulars of claim the claimant should state what he relies upon, and state to whom it was said and as far as possible the words used, or if not oral, he will need to identify the documents he relies upon* ***and provide a copy."***

13. The claimant also failed to set out how much pay is outstanding to be paid to the Claimant in his claim for holiday pay under the Working Time Regulations 1998 (WTR).

14. I accepted that as there had not be full compliance of the unless order the whole claim was automatically struck out.

15. The claimant then applied for relief from sanction under rule 38(2) of the Employment Tribunals Rules of Procedure.

16. I set aside the strike out on the basis it was in the interests of justice to do so. I gave my full reasons but in summary I applied the guidance set out in the case of **Thind v Salvesten Legistics LTD 0487/2009,** taking account of the reason for the failure, whether it was deliberate, prejudice to the parties and whether a fair hearing was still possible. I decided that the failure was not deliberate. The claimant's solicitor had not realised he could calculate the holiday pay claim without a contract under the WTR. He also thought the respondent would already have a copy of the grievance as it was previously sent to them. The failure to provide the calculation and grievance did not cause any major delay to the proceedings and it was still possible for the final hearing in October to go ahead.

17. We then proceeded with the preliminary hearing. The issues to decide at the OPH are: (i) What was the claimant's status vis a vis each of the respondents? (ii) Was he an employee or a worker or genuinely self-employed? (iii) Further case management and (iv) the first respondent's application for wasted costs.

18. Unfortunately we ran out of time. The unless order and relief from sanction application took up the morning. The claimant on the first day gave evidence from his car and kept having connection problems. Both parties produced new documents which required adjournments to take instructions.

19. It was agreed and I ordered that the parties would send in written submissions on the preliminary points and on the first respondent's application for wasted costs. The claimant and the first respondent provided written submissions.

Claims and issues

20. The claimant claims unfair dismissal, wrongful dismissal, whistleblowing detriment, direct race discrimination, victimisation, harassment, unlawful deduction of wages and holiday pay. For the Tribunal to have jurisdiction the claimant must be an 'employee' to bring claims of unfair dismissal and wrongful dismissal and a 'worker' to bring his claims of whistleblowing detriment, direct race discrimination, victimisation, harassment, unlawful deduction of wages and holiday pay. The definitions of employee and worker for the different claims are set out in the law section below.

Submissions

21. The second respondent did not attend the hearing or produce written submissions. Reference to the respondent's submissions is a reference to the first respondent's submissions. I will also refer to the respondents as R1 and R2.

22. In brief, and not including all that was said by both parties – R1 argued that the claimant is not an employee but an independent contractor of R2. There was no contract between the claimant and R1 and no contract should be implied.There was no mutuality of obligations between the parties and R1 did not have control over the claimant. The claimant could be substituted by another person via the agency if he was unable to work. The claimant is not a worker as there is no contract between the claimant and R1.

23. The claimant argues that although there was a contract between the claimant and R2 the reality of the situation was that a contract should be implied between the claimant and R1. R2 was merely there to facilitate paying the claimant. The claimant had to provide his services personally, was obliged to work, had no control over his work and was provided with all the equipment and tools.

The law

24. S. 230(1) of Employment Rights Act 1996 (ERA) defines an "employee" as "*an individual who has entered into or works under a contract of employment."* A contract of employment is defined under s.230(2) as a contract of service or apprenticeship, whether express or implied.

25. The rights on termination of employment granted under the ERA (not to be unfairly dismissed, and statutory minimum notice) apply only to employees.

26. A worker is defined under section 230(3) ERA as:

(3) "*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 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."

27. Section 230 ERA goes on to state:

"(4) In this Act 'employer', in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed."

(5) In this Act 'employment'—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and
(b) in relation to a worker, means employment under his contract;
and 'employed' shall be construed accordingly.

[(6) This section has effect subject to sections 43K [47B(3) and 49B(10)]; and for the purposes of Part XIII so far as relating to Part IVA or section 47B, 'worker', 'worker's contract' and, in relation to a worker, 'employer', 'employment' and 'employed' have the extended meaning given by section 43K.]

[(7) This section has effect subject to section 75K(3) and (5).]

28. In the context of whistleblowing claims (also brought under the ERA) the term worker has a wider definition than the ordinary s.230(3)(b) worker test. Specifically, s.43K extends the definition of worker for the purposes of whistleblowing to include agency workers and individuals supplied via an intermediary provided that the terms are not set by the worker themselves.

29. Section 43 K provides:

43KExtension of meaning of "worker" etc. for Part IVA.

(1)For the purposes of this Part " worker " includes an individual who is not a worker as defined by section 230(3) but who—

(a)works or worked for a person in circumstances in which—

(i)he is or was introduced or supplied to do that work by a third person, and

(ii)the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

(b)contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for "personally" in that provision there were substituted "(whether personally or otherwise)",

30. For the purposes of the Working Time Regulations 1998 (WTR) the usual definition of worker is extended to include an agency worker supplied by another person to do work for a principal who is not carrying out the work under a contract where the principal is a client or customer of a professional or business undertaking carried on by the individual (Reg 36):

    'Agency workers not otherwise "workers"

    36.—*(1) This regulation applies in any case where an individual ("the agency worker")—*

    (a)is supplied by a person ("the agent") to do work for another ("the principal") under a contract or other arrangements made between the agent and the principal; but

    (b)is not, as respects that work, a worker, because of the absence of a worker's contract between the individual and the agent or the principal; and

    (c)is not a party to a contract under which he undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual.

    (2) In a case where this regulation applies, the other provisions of these Regulations shall have effect as if there were a worker's contract for the doing of the work by the agency worker made between the agency worker and—

    (a)whichever of the agent and the principal is responsible for paying the agency worker in respect of the work; or

    (b)if neither the agent nor the principal is so responsible, whichever of them pays the agency worker in respect of the work,

    and as if that person were the agency worker's employer.'

31. The effect of these definitions, as Baroness Hale of Richmond observed in **Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32; [2014] 1 WLR 2047, paras 25 and 31**, *"is that employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else. Some statutory rights, such as the right not to be unfairly dismissed, are limited*

to those employed under a contract of employment; but other rights, including those claimed in these proceedings, apply to all "workers".

32. There have been various tests established over time to guide a Tribunal when deciding whether a claimant is an employee, worker or an independent contractor. A Tribunal must not only focus on what is in any written document but must look at the reality of the situation or how the parties conduct themselves. The Supreme Court in the leading case of ***Autoclenz Ltd v Belcher*** ***[2011] UKSC 41***, ***[2011] IRLR 820***, ***[2011] ICR 1157*** gave guidance that a Tribunal should consider whether the written contract represents the true intentions or expectations of the parties.

33. Case law has provided further guidance that a Tribunal should start with the relevant statutory provisions and then weigh up all the factors in the particular case and ask whether it is appropriate to call the individual an employee; to stand back and look at the whole picture before reaching a conclusion.

34. Case law has established that to be an employee the claimant must demonstrate there is a contract of employment, mutuality of obligations, a degree of control by the employer and the claimant must carry out the work personally.

35. Mutuality of obligations is understood as a reciprocal obligation for the employer to provide work and pay for it and for the employee to accept work which is offered. In the view of the House of Lords in **Carmichael and anor v National Power plc ([2000] IRLR 43)** this constituted the *"irreducible minimum obligation necessary to create a contract of service".*

36. In the case of **Nursing and Midwifery Council v Somerville [2022] EWCA Civ 229** the Court of Appeal has confirmed that an 'irreducible minimum of obligation' is not a prerequisite of 'worker' status. Under the statutory definition, it is sufficient that the contract includes an obligation on the individual to perform work or services personally, and that the other party is not a client or customer. There is no indication that there must be some distinct, superadded obligation to provide work or services, independent from the provision of work or services on a particular occasion. This case was only published after the parties sent in their written submissions but is helpful guidance on the distinction between an employee status which requires the irreducible minimum obligation necessary to create a contract of service and a worker, which does not.

37. In **Stevedoring and Haulage Services Ltd v Fuller [2001] IRLR 627**. - The EAT found that where the term of a contract expressly negates mutuality of obligations, there cannot be a contract of employment. Where the terms upon which casual work is offered and accepted expressly negates mutuality of obligation, there can be no global or overarching contract of employment. If there is no contract, one cannot be created by implying terms which water down the effect of the express terms so as to give it sufficient mutuality of obligation to pass the test necessary for establishing a contract of employment.

38. However, in determining whether an individual is a "worker", there can, as Baroness Hale said in the **Bates van Winkelhof** case at para 39, *"be no substitute for applying the words of the statute to the facts of the individual case." At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who is employed under a "worker's contract".*

39. In **Uber BV v Aslam [2021] IRLR 407** the Supreme Court starts by approving the "realities" test in Autoclenz and states at paras 85 and 86:

"In the Carmichael *case there was no formal written agreement.*
The Autoclenz *case shows that, in determining whether an individual is an employee or other worker for the purpose of the legislation, the approach endorsed in the* Carmichael *case is appropriate even where there is a formal written agreement (and even if the agreement contains a clause stating that the document is intended to record the entire agreement of the parties). This does not mean that the terms of any written agreement should be ignored. The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other. But there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it. Furthermore, as discussed, any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded.*

This last point provides one rationale for the conclusion reached in the Autoclenz *case itself. The findings of the employment tribunal justified the inference that the terms of the written agreements which stated that the claimants were subcontractors and not employees of Autoclenz, that they were not obliged to provide services to the company, nor was the company obliged to offer work to them, and that they could provide suitably qualified substitutes to carry out the work on their behalf, had all been inserted with the object of excluding the operation of employment legislation including the National Minimum Wage Act 1998 and the Working Time Regulations 1998. Those provisions in the agreements were therefore void."*

40. Therefore, the starting point is the statute definition and then any written agreement, if there is one, and then to question whether any written agreement reflects the reality of the relationship. What was the true intention of the parties?

41. The relevant circumstances which a Tribunal may consider when deciding a claimant's employment status are:

a. payment of wages or salary or different methods of payment, and the extent to which the worker takes a degree of financial risk;
b. invoicing by the worker;
c. whether the worker provides his own equipment (in whole or in part);
d. whether the worker is subject to disciplinary or grievance procedures;
e. receipt of sick pay or contractual holiday pay;
f. receipt of health care or other benefits;
g. whether the worker is part of the employer's business;
h. whether there are restrictions on working for others (or working for oneself).
i. is the person concerned in business on his own account? – **Hall (Inspector of Taxes) -v- Lorimer [1994] IRLR 171**.

42. The greater degree of personal responsibility an individual undertakes in any of the matters listed above, the more likely he is to be considered an independent contractor rather than an employee or worker.

43. The way in which a person is treated for tax is relevant (but not necessarily decisive). There is a mismatch between employment and tax law. The tax regime is one factor that the Tribunal must consider in determining employment status but is not the only factor.

44. Who pays the claimant is an important factor to consider. In **Quashie v Stringfellows Restaurants Limited [2013] IRLR 99**, the Court of Appeal affirmed that in the absence of any obligation on the employer to pay the worker for services provided there was no contract of employment. The claimant lap dancer was remunerated by the fee paid by visitors to the club and therefore not an employee of the club itself.

45. The conduct of the parties (including the manner in which they describe themselves and the way in which they understood their relationship) is a legitimate factor for the Tribunal to take into account – ***Carmichael -v- National Power plc [2000] IRLR 43.***

46. An independent contractor is one who enters a contract for services as opposed to a contract of employment. He is independent in the sense of being responsible for making his own decisions in performing the job, whereas the employee is subject to the directions of the employer. Economically, they stand on their own two feet, in business on their own account. The employer benefits from being free of many statutory obligations and the independent contractor enjoys a favourable tax position.

<u>Agency and end user</u>

47. In **Dacas v Brook Street Bureau (UK) Ltd [2004] EWCA Civ 217** the Court of Appeal found that**:***'The employment tribunal had correctly concluded that the applicant was not an "employee" of the employment agency which had assigned her to work as a cleaner at a hostel run by Wandsworth Borough Council and that, therefore, the applicant was not entitled to claim that she had been unfairly dismissed by the agency when, at the instigation of the council, her contract with the agency was*

terminated. In deciding whether it has jurisdiction to hear and determine a claim for unfair dismissal, an employment tribunal must decide whether the applicant has a contract with the respondent and, if so, whether it satisfies the requirements of "an irreducible minimum of mutual obligation necessary for a contract of service", i.e. an obligation to provide work and to perform it, coupled with the presence of control. In the absence of a contract, or of a contract having those features, the applicant cannot qualify as an employee, even though it may well be surprising not to regard the applicant as an employee. A tribunal must resist the temptation to conclude that an individual is an employee simply because he or she is not a self-employed person carrying on a business of their own'.

48. Mumby J comments in **Dacas** at paragraph 101,211:

"Had the issue been appealed and the case remitted for rehearing by the employment tribunal, a finding that there was a contract of service between the applicant and the council was unlikely. Such a finding is likely to be extremely rare because there can only be an employment relationship if the end-user is responsible for the payment of remuneration to the applicant and in most cases, deliberately, it is the agency and not the end-user who undertakes to pay the worker. In the present case, the council did not set the applicant's rate of pay and had no obligation to pay her. What the council was paying for was not the work done by the applicant but the services supplied to it by the agency".

49. In **Craigie v London Borough of Haringey (EAT/0556/06)**, the EAT cast doubt on Dacas. Returning to fundamental principles of law, it stated that an inference of a contract can only be found where such inference is necessary, not merely possible or desirable.

50. This test was also applied in **Heatherwood & Wrexham Park Hospitals NHS Trust v Kulubowila and Others (EAT/0633/06)** where it was emphasised that the necessity of implying a contract had to be considered on the facts of each individual case and that this test held a high threshold.

51. The leading case on agency workers' status at present is the EAT's decision in **James v Greenwich London Borough Council ([2007] IRLR 168)**, approved by the Court of Appeal in **James v Greenwich London Borough Council ([2008] EWCA Civ 85)**. Mrs James was an agency worker who worked for Greenwich London Borough Council for five years and argued that an implied contract of employment had arisen. The EAT held that it may be possible to infer a contract based on the conduct of the parties, but a contract should only be implied in exceptional cases and that the test to be applied is whether it is necessary to imply a contract in order to reflect the business reality of the situation.

52. Elias P in the EAT said at paragraph 5*8:"When the arrangements are genuine and when implemented accurately, represented the actual relationship between the parties, as is largely to be the case where there was no pre-existing contract between worker and end user. Then we suspect that it will be a rare case where there will be evidence entitling the Tribunal to imply a contract between the worker and the end user. If any such a contract is to be inferred, there must, subsequent to a relationship commencing, be some words or conduct which entitle the Tribunal to conclude that the agency arrangements no longer dictate or adequately*

reflect how the work is actually being performed, and that the reality of the relationship is only consistent with the implication of the contract. It will be necessary to show that the worker is working not pursuant to the agency arrangements, but because of mutual obligations binding worker and end user which are incompatible with those arrangements."

53. The EAT disagreed with comments made in **Dacas** to the effect that once arrangements had been in place for a year or more, there would be an inference that an implied contract of service existed with the end user. The EAT restated settled law that the most important factors to consider were necessity, control and mutuality of obligation.

54. In **Harlow District Council v O'Mahony [2007] UKEAT/0144/07** the EAT (applying Elias P's statement in **James** above) had no hesitation in finding that the subsequent agreement between the worker and the end-user had superseded the contract between the worker and the agency. It decided that by implication, a new contact had been entered into between the worker and the end user. The end-user was the employer despite the fact the original contract was between the worker and the agency. Furthermore, the fact that the Second Respondent was still paying the Claimant was not fatal to him being an employee of the First Respondent. At para. 21 of its judgment his honour J Clark of the EAT stated that: *"The fact that the agency pays the wages of the worker on behalf of the end user, here HDC, is not fatal to the existence of an implied contract of service between the worker and end user. Munty J's view to the contrary in **Dacas** was not shared by Mummery LJ and Sedley LJ in that case, and that majority view was endorsed by the Court of Appeal in **Muscat**, paragraph 35."*

55. As set out above section 43 K ERA extends the definition of a worker for the purposes of whistleblowing to include agency workers and individuals supplied via an intermediary provided that the terms are not set by the worker themselves.

56. In the case of **Mctigue v University Hospital Bristol NHS Foundation Trust UKEAT/0354/1** the EAT held that Ms McTigue could be a worker as s43K focuses on identifying who, as between the individual and the other parties (the agency and the end user) substantially determines the relevant terms. If the individual substantially determines their own terms, they are not a worker under this provision. Where the agency and the end user determine the relevant terms between them, both parties might have "substantially determined" the terms, and there could be two employers for these purposes. It is not necessary to compare the extent to which it was either the agency or the end user who predominantly determined the terms.

Evidence before the Tribunal

57. There was an agreed bundle but both parties produced further documents throughout the hearing. I ensured both parties had an opportunity to take instructions on the new documents. R2 did not attend and did not provide any documents apart from a contract which had been sent to R1. I heard evidence from the claimant and from Mr M Ganesh, R1's company secretary and head of finance. Both the claimant and R1 produced written submissions.

Findings of fact

58. I have tried to limit the findings of fact to those relevant to the preliminary issues.

59. The Battersea Power Station project BPS was the client of R1.The BPS project was very large and R1 successfully tendered for a service containing a package of logistics, provision of materials and skilled operatives and any other service they required. R 1 used some of its employees to provide the service but also used “subcontractors” supplied by R2. R1 looked after various aspects of logistics at BPS such as traffic, welfare, looking after 150 staff, haulage drivers and deliveries.

60. The claimant was introduced to R1 by Fairmead Construction Limited, who is another subcontractor that R1 uses. The claimant had previously worked for Fairmead.

61. The claimant attended the offices of R1 at BPS and met with Mick Jones of R1. He was told the project was lengthy and could last years. He was given a document headed “Your details Riverside Construction” which is dated the 18 and 24 September 2017 and marked with ‘£12.50 per hour.’ The claimant provided his contact details and banking details and proof of his right to work.

<u>Written contracts/agreements</u>

62. The claimant was then presented by Mick Jones of R1 with a document headed “Self – employed contract for services” (“the contract”) which was between R2 and the claimant. The claimant is referred to in the contract as the ‘subcontractor’ and R2 as the ‘contractor’. The claimant did not meet anyone from R2 but was told he would be paid via R2 under the CIS.

63. The contract explained that the contractor’s business was in construction and is appointed by clients to complete a project. The subcontractor has skills and abilities which may from time to time be available to the contractor. The contract states at para 1 that the contractor is not obliged to offer work to the subcontractor neither is the subcontractor obliged to accept work. Para 4 says the subcontractor is free to provide services to any other party at the same time as being engaged with the contractor. Some tools will be provided by the contractor. Para 6 sates the subcontractor is responsible for covering his own risk with insurance. An agreed hourly rate is paid by the subcontractor after the contractor has provided a pay statement. The subcontractor pays for his own travel expenses and is not entiled to holiday pay, sick pay or any other payment for periods he is not providing his services – para 14.

64. Para 19 provided that the claimant could send a substitute at his absolute discretion and the agreement could be terminated without notice.

65. The claimant was not given a copy of this contract but signed it. His understanding was that R2 was a sister company of R1 and was used to pay all the staff. He thought it was just used as a payroll company by R1. He viewed himself as being employed by R1.

66. R2 did not give any evidence. They are a separate legal entity, a separate registered company with different directors to R1. I accept R1 uses R2 to provide contractors for them at various sites. Mr Ganesh confirmed that R1 had no control over R2, no input into their trade or how they carry out their operations.

67. The claimant never met anyone from R2 and barely had any correspondence with them apart from the occasional email to chase pay slips or other pay queries. The forms and contract he completed and signed were given to him by R1 and not R2.

68. I was shown one email exchange between the claimant and R2 dated 15 November 2017 where the claimant sought copies of his wage slips. R2 referred to them as remittance advices. The claimant signed off the exchange saying "*thanks Clare, and am still available should any job comes up".* The claimant could not recall what he meant by that exchange but believed at the time he wasn't yet working a full week at BPS and was looking for extra hours. I accept the claimant's evidence and do not infer anything more from this limited email exchange. There is no evidence that the claimant worked elsewhere throughout the period of September 2017 to May 2020 and I accept the evidence of the claimant that he did not.

69. R1 would send to R2 a weekly record sheet which set out the name of the contractor and the hours they did for the week. A number of workers were listed on the sheet and it would be sent to R2 and other agencies supplying contractors.

70. In the bundle was a copy of the "agreement" between R1 and R2 dated April 2019. I was later sent a copy of the agreement dated 2 May 2017. The agreement is headed "Terms and Conditions for the provision of Temporary Labour". It confirms that R1 is the client and R2 the agency who supplies temporary workers for an assignment in consideration for the client paying an agency fee.

71. The agreement states that workers will act professionally and accept instructions from the client. The agency pays the worker wages and reimburses expenses, deducts tax and NIC, pension contributions and where applicable is responsible for management and settlement of any individual temporary workers rights claims. The agency provides the pay slips.The agency ensures the worker has the necessary licences etc. The agency will manage the replacement of any temporary worker in the event of holiday, sickness or other absences. The agency will maintain adequate insurance cover. The agency will provide PPE and ensure the worker has his own tools and the right to work.

72. Para 4.2 confirms the client agrees to exercise reasonable supervision, direction and control over the way the worker carries out his work.

73. Para 4.4 provides that the client acknowledges the temporary workers supplied by the agency are employees of the agency. The client pays the worker's hourly fee as evidenced by a weekly time sheet. The client can terminate without notice. The agency is liable to the client for any loss/ liability in connection with the worker.

The claimant

74. The claimant commenced working at BPS around September 2017. The claimant was a bit vague about the start date but correspondence suggests it was around September 2017. He was initially engaged as a traffic marshall.

75. I accepted the claimant's evidence that he did not own a company or sell his services as an independent contractor prior to working at BPS or during his time there.

76. He registered with HMRC as a sole trader under the Construction Industry Scheme CIS. This enabled the claimant to have a unique tax reference and meant national insurance contributions and tax could be deducted at source via the CIS from his earning at 20%. Confirmation of this was a letter from HMRC dated 22 December 2016 .The letter stated that "*the letter did not confirm his self-employment status."* Many people working in the construction industry are registered under the CIS.

77. From around September 2017 the claimant worked exclusively for R1 at the BPS. He was initially the traffic marshall and later the fire marshall and was moved around 6 times.

78. Prior to working at BPS the claimant had paid for himself to under go a site supervisor safety training scheme which he completed in March 2017. In May 2020 he completed a first aid course and a fire marshall course funded by R1. The training lasted a few days.

79. I accept the claimant's evidence that throughout his time at BPS he was told what to do by R1. The shift times and rotas were controlled by R1 or the client BPS and R1 determined what hours the claimant worked. The claimant sometimes worked the day shift and then was moved to night shift and back again when it suited R1.

80. The claimant would arrive for work at a set time and be told his job for the day. The claimant would carry out his role under the supervision of R1. The claimant would be given a daily safe start briefing sheet which set out the jobs the claimant and his team were required to do. Often the sheet would be accompanied by photos of tasks that needed to be completed. During the shift, as each task was completed a photo would be taken as evidence. The claimant was in a supervisory role so did supervise a team but ultimately what he and his team did was under the control of R1. The briefing sheet confirmed what jobs were to be done, the risks involved, who to report to. The daily sheet was a standard document with check lists and some space for comments but were not merely a procedural checklist, as suggested by R1.

81. R1 could move the claimant to different jobs and did do so. Every aspect of his role was set by R1.

82. The claimant was provided with tools and PPE to carry out his work by R1. The claimant was provided with safety shoes, goggles, helmet, gloves,

high vis jacket, hand and bench grinder, hand saw, ladder, drills and other equipment.

83. The claimant had been working regular hours since starting at BPS. The initial hours were lower but soon increased to 12 hour shifts 6 days a week and sometimes additional hours on a Sunday. Although the agreement between R1 and R2 describes the provision of temporary labour the reality in this case is that the claimant was engaged to do work on the BPS which was a long term project of many years. The claimant worked consistently 6 or 7 days a week, usually 12 hours shifts, between September 2017 and May 2020.

84. The claimant was not asked his availability each week. I find that from when the claimant had met with Mick Jones of R1 and had signed his contract there was an expectation by R1 that the claimant would take any shifts offered to him. He was expected to work his shifts unless he had specifically requested time off for an appointment.

85. If the claimant needed to go to a GP for an appointment he had to get permission from R1. He did not recall ever taking a day's absence for sick leave. He went on holiday but that was unpaid and the timings had to be agreed by R1. The claimant believed that if he did not turn up to work he would be fired. There were no periods of inactivity which would be expected if the claimant really had been a casual worker. I therefore find that there was mutuality of obligation between the claimant and R1, despite what was set out in the contract and agreement.

86. The claimant was a skilled supervisor and could not just find a substitute for himself if he was unable to work. Although the contract said he could do so in reality he could not.

87. Mr Ganesh told the Tribunal that the agency could have supplied R1 with another supervisor as could other agencies like Meads if the claimant was not available. However, this did not happen in practice and the claimant would not have had anything to do with any substitution if it had happened. Any substitution would have been with the consent of R1 and not the claimant. I therefore find that the claimant was required to provide his personal service to R1 and could not, in reality, personally provide a substitute instead.

88. The claimant said he had been disciplined and given verbal warnings by R1. There was no evidence to contradict the claimant's evidence.

89. The claimant did not have his own insurance policy and was covered by R1's insurance, even though the contract stated he was responsible for his own professional insurance.

90. Nor did the agency provide insurance cover, PPE or tools as stated in the agreement between R1 and R2. This agreement stated that the agency acknowledged that the temporary worker was an employee of the agency. This agreement contradicts the wording of the contract between the claimant and R2.

91. The claimant did not invest anything in the business but his service. He did not have a share in any profit or any financial liability, whilst carrying out his role. He did not take any of the risks.

92. There is no evidence before me to suggest the claimant was really a person in business on his own account. The claimant was not his own boss. There is no evidence that the claimant could in reality choose his own hours, refuse shifts when he felt like it and not turn up for work. I accept the claimant's evidence that if he did not turn up for a shift he would be fired.

Pay and tax

93. R1 determined his hourly rate, which was a rate agreed across the construction industry. The claimant explained there are standard schedules of rates for various trades which would be paid to contractors supplied by the various agencies to R1.

94. At the end of each week a weekly record sheet would be compiled by R1 and sent to the various agencies they used. Mr Ganesh suggested that R2 claimed some profit from R1 but the agreement between the parties only refers to an agency fee. There is no evidence of any mark up on the hourly rate paid by R1 to R2, who then paid the claimant.

95. R1 sent the weekly agreed amount for the claimant to R2 who then paid it to the claimant, as evidenced by remittance advices. These show the claimant's supervisor hourly rate and the hours he worked and the construction tax deducted. He did not pay VAT.

96. The claimant's tax liability was paid through the CIS. I accept this is not indicative of the claimant being a sole trader. It is a system set up to ensure a set amount of tax and NIC can be deducted at source and many in the construction industry are paid under the scheme. The tax regime does not fit neatly into the definitions of employee, worker and self employed independent contractor as defined by employment legislation.

97. The claimant did submit accounts for the years he was at BPS, as required under the CIS. His profit and loss account showed his 'sales', which was his income from R1 via R2. He set out some expenses which were nominal amounts. He understood that as he was not being paid for holidays he could claim some money as expenses in his accounts. For example he included wages for his gardener. Some equipment costs were recorded. I accept that this does not indicate that the claimant provided his own equipment when at BPS. The claimant was provided with the equipment he needed by R1.

During the pandemic

98. During the start of the pandemic and the first lock down the claimant's hours were reduced but he was still given work to do. There was no gaps in his engagement. The claimant was advised by R1 and was able to apply for a self employed grant from the government. It is understandable that the claimant did not apply for furlough as he was being paid under the CIS and filing annual accounts.

99. The claimant was remunerated by R1 via R2. R2 was used as a facility to pay the claimant under the CIS. The CIS does not fit neatly into the categories of employment status set out by employment legislation. How the claimant pays his tax is just one factor I take into account when assessing his employment status. I understand that the CIS is broadly used within the construction industry. I do not find that the claimant being paid under the CIS stopped him from being an employee.

Applying the law to the facts

100. My starting point is the two written contracts in the bundle; the contract between the claimant and R2 and the agreement between R1 and R2. Does the contract between R2 and the claimant reflect the reality of the situation? I then need to consider did the claimant undertake to provide his own work and skill in return for remuneration? Was there a sufficient degree of control to enable him fairly to be called an employee? Were there any other factors inconsistent with the existence of a contract of employment?

<u>Mutuality of obligation and personal service</u>

101. The contract states that there is no mutuality of obligation and the claimant can substitute himself for someone else. I find that this does not reflect the reality of the situation. I find there was mutuality of obligation and the claimant was required to provide his personal service.

102. The claimant believed he was employed by R1. He had no relationship with R2 and thought they were just a company through which he was paid. His only contact with R2 was when he had a query about his payslips/admittance advice.

103. The claimant had signed a contract which he believed was an employee contract with R1 to work at BPS. The claimant was given the contract by an employee of R1 and he never saw a copy of the contract other than to sign it when he attended R1's office on site. He was told it was a long term project. There was an expectation that the claimant would be offered work and would be required to personally carry out the work he was offered in return for remuneration.

104. He was soon working 12 hour shifts 6 days or more a week. He was required to turn up to work and could not and did not refuse shifts. If there was a reason he could not turn up for a shift, like a GPs appointment he had to get it approved in advance by R1.

105. Although he was paid via R2, R1 paid for his work. He was offered roles in accordance with the needs of the business (based on what R1's clients required) but he was not at liberty to accept or reject this. If he had he would have been fired.

106. There is no evidence before me that the claimant offered and refused shifts in the past. The claimant denies this and I accept his evidence. There is something in the claimant's pleadings about the claimant being required to turn up for a rota and then being told he was not on the rota

and so leaving. That is not evidence of the claimant refusing to work a shift.

107. R1 did pay the claimant via R2. It is not like the Quashie case where the customers paid the claimant and not Stringfellows. R1 paid for the claimant's services via R2.

108. In reality the claimant was not free to work elsewhere. He was required to do the shifts he was offered by R1 or he would be fired.

<u>Control</u>

109. I find there was sufficient degree of control. I do not accept the suggestion that as a supervisor the claimant was in control of the work he did. The claimant is skilled and compotent but he was told what to do each shift by R1. I do not accept that the site briefing sheet is merely an operating procedure to follow. Each task the claimant and his team were required to do was indicated on the sheet or via photos. The claimant then had to demonstrate that each task had been completed. The claimant did not in reality have a discretion in relation to how the work was done.

110. He was provided with training and equipment and tools by R1. He did fund some of his own training as he wanted to "better himself" but while he was at BPS R1 funded the training they wanted him to have to carry out his tasks.

111. He could not dictate which supervisor role he did and was moved 6 times during his period at BPS.

112. Although the contract said he was not required to provide his work personally that did not reflect the reality of the situation. The claimant could not find someone else to substitute himself for a shift. He was specifically trained as a supervisor and trained on site and could not replace himself.

113. I accept that the agency may have been able to find a replacement for the claimant if he was unable to work but that did not happen in practice and is not the same as the claimant being able to provide a substitute for himself. Any replacement would have been outside the control of the claimant and nothing to do with him.

<u>Overall picture</u>

114. The way the claimant was paid and the fact that he was paid under the CIS does not sit neatly with the claimant being an employee. However, many people working in the construction industry are paid in this way. The claimant was told to register by the agencies so he could be paid under the scheme. The claimant does not pay VAT. He has no registered company. He had not marketed his services prior to his engagement with R1 and R2 nor during the relevant period.

115. He was not paid for holiday pay during this period although the agreement between R1 and R2 suggested he ahould have been paid holiday pay.

116. The claimant was subject to the disciplinary process of R1 by being given a verbal warning.

117. He was integrated in the business in the sense that he was supervising a team under the control of R1.

118. He did not have his own insurance policy and was covered for any liability by R1.

High threshold to imply the contract to the reality of the situation

119. Did the claimant have a contract with R1 with an irreducible minimum of mutual obligation necessary for a contract of service? Yes, as set out above the claimant was expected to undertake any shifts offered to him and was paid for those shifts by R1 via R2.

120. It is possible to infer a contract based on the conduct of the parties in exceptional cases and the test to be applied is whether it is necessary to imply a contract in order to reflect the business reality of the situation. Can I conclude that the words of the contract between the claimant and the agency, R2 no longer dictates or adequately reflects how the work is actually being performed, and that the reality of the relationship is only consistent with the implication of the contract? In this case I find it is necessary to imply a contract between the claimant and R1 to reflect the business reality of the situation. R2 was not the employer of the claimant despite what the agreement said between R1 and R2. Nor was the claimant a self employed casual worker. R2 had no control over the claimant and was just a facility through which the claimant was paid under the CIS.

121. R1 paid the claimant for the work he was obliged to do. They controlled his work, provided insurance cover, his PPE and tools. The claimant had to provide his services personally and was trained by R1. His was not in a business of his own account with his own customers or clients.

Conclusion

122. In conclusion I find that the claimant was an employee of R1 and therefore is entitled to bring claims of unfair dismissal, notice pay, holiday pay, unlawful deduction from wages and whistleblowing under the Employment Rights Act 1996 and claims of discrimination, victimisation and harassment under the Equality Act 2010 against R1.

123. If I am wrong about mutuality of obligation then the claimant is a worker of R1 as he has demonstrated that his contract includes an obligation on him to perform his work personally and the respondents are not a client or customer of the claimant. As a worker the Tribunal has jurisdiction to hear the claimant's claims of holiday pay, unlawful deduction from wages, whistleblowing detriment, race discrimination, victimisation and harassment.

Employment Judge A Isaacson

25th February 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

28/02/2022.

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FOR EMPLOYMENT TRIBUNALS