EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100184/2017 Preliminary Hearing at Dumfries on 2 and 3 November 2017

Employment Judge: M A Macleod (sitting alone)

David Skachill	Claimant Represented by Mr A Bryce Solicitor
Andrew Brownhill & Jacquie Berrie T/a The Hand Job Car Wash	Respondent Represented by Mr R Morton Avensure Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was an employee of the respondent, Andrew Brownhill, trading as Spitfire Motors, throughout his employment with him, and that a hearing on the merits should now be listed.

REASONS

1. A Preliminary Hearing was fixed to take place in this case, in order to determine whether or not the claimant was an employee, at the material time, of the respondent, on 2 and 3 November 2017, in Dumfries Sheriff Courthouse.

2. The claimant attended and was represented by Mr Alastair Bryce, solicitor. The respondent was represented by Mr Richard Morton, of Avensure Ltd.

3. The claimant gave evidence, as did his wife, Yvonne Skachill. The respondent called Andrew Stanton Brownhill to give evidence.

4. Each party produced a separate bundle of documents. Reference is made to these documents using the prefix "C" for the claimant's bundle and "R" for the respondent's bundle. Where there is overlap (as unfortunately happens where a joint bundle is not agreed between parties), reference will be made only to one version.

The Claimant's Name

5. One issue which arose at the outset of the hearing was the name of the claimant. On his claim form, and in previous Tribunal correspondence, the claimant has been identified as "David Scachill". It was apparent from a cursory read of the productions that he is identified in correspondence between the parties as "David Skachill". When asked about this by the Employment, Judge, he confirmed that his name is David Skachill, and, importantly, that that was a simple error made in the drafting of the ET1. He confirmed that he is the claimant in this case, and that he had not seen the ET1 before its presentation to the Tribunal.

6. In submissions, Mr Bryce made application to amend the claim to include the proper spelling of the claimant's name. Mr Morton (who was not instructed by the respondent at the start of these proceedings but only became involved relatively recently) sought to make something of this. He argued that the application to amend should not be granted, and that the claim should have been rejected by the Tribunal on presentation as the name of the claimant does not match that on the Early Conciliation Certificate (which spells his name correctly).

7. I have given careful consideration to this matter. It is extremely unusual to be confronted with a situation where the claimant's name is wrongly identified on the ET1. Rule 12(1)(e) of the Employment Tribunals Rules of Procedure 2013 provides that the staff of an Employment Tribunal office shall refer a claim to an Employment Judge if *"the name of the claimant on the claim form*

is not the same as the name of the prospective claimant on the early conciliation certificate to which the early conciliation number relates".

8. It is clear that in this case, whether it was referred to an Employment Judge or not, the claim was not rejected under Rule 12(2) due to this defect being present.

9. As a result, it does not appear to me that the subsequent provisions in Rule 12 and Rule 13 apply to this situation. It is open, in my judgment, for the Tribunal simply to deal with the matter when it arises. It was not raised by either party in this case at any stage. It was raised by the Employment Judge after the claimant had identified himself in evidence after he had been administered the oath.

10. It is my judgment that the application to amend should be granted, in the interests of justice. Had the claim been rejected for the reasons given, it would have been open to the claimant to rectify the error and make application for reconsideration. In those circumstances, I would have been inclined to grant reconsideration of the rejection owing to the matter having arisen, clearly, as a simple spelling error. It is a matter of great importance to the Tribunal to ensure that the claimant in a case is properly identified, but I am satisfied that in this case, taking the whole evidence together, the claimant who appeared is the claimant in this case. There was no difficulty between the parties, for example, in recognising each other and referring to each other in the course of the hearing, and no questions were directed at the claimant suggesting that he was not who he bore to be.

11. The prejudice to the respondent is minimal, whereas the prejudice to the claimant of rejecting his claim at this stage (an act which it does not appear to me to be competent so late in the proceedings) would have been very considerable. It is not in the interests of justice to deprive the claimant of his right to proceed in this case owing to this minor error which has hitherto been of no concern or interest to the respondent.

12. Accordingly, I have amended the instance to take account of the claimant's properly spelled name, and granted the application to amend in these terms.

Findings in Fact

13. The claimant, whose date of birth is 21 October 1968 (in contrast to the date given on the ET1, which was 22 October 1968), is a mechanic and engineer. He worked for a business called Eric Wright Motors, in Dumfries, until towards the end of March 2016, as a mechanic, earning £15 an hour.

14. Mr Brownhill is a businessman who owns and trades in the name of a number of businesses based at Spitfire Road, Dumfries, in the Heathwell Industrial Estate. Those businesses include the Garage Company, Spitfire Motors, The Hand Job Car Wash, and other businesses including a powder coating business, a tyre business and a business trading in dog beds.

15. His fiancee, Jacquie Berrie, operates a business known as Bridge Resources. This business supplies certain services to Mr Brownhill's businesses, but has not been involved in the contractual relationship with the claimant and accordingly is not liable for any claim made by the claimant.

16. In approximately February 2016, Mr Brownhill approached the claimant, to whom he had been recommended by a mutual acquaintance, to ask him to install a compressor into the garage which he was setting up. The claimant did so, in his own time, while still working full time for Eric Wright Motors.

17. As a result, Mr Brownhill saw that the claimant was a skilled worker who could be of use to him in his new car repair business, Spitfire Motors. Mr Brownhill had a large stock of cars which required work done on them, so considered it appropriate to ask the claimant to come and work for him, repairing the cars in stock and preparing them for sale. Mr Brownhill anticipated that the claimant might then be able to allow the business to offer car repair services to the public.

18. Mr Brownhill offered him a job with his business, at £15 an hour, the same rate of pay which he was currently receiving. The claimant declined that offer, on the basis that he did not wish to move to a new employer without receiving an increase in pay. However, within a matter of weeks, Mr Brownhill contacted the claimant again and offered him a job at the rate of £20 per

week. He offered him a company pension, medical cover, overtime rates and double time rates if he worked at weekends.

19. The claimant made clear in these discussions that he did not wish to be self-employed. He had never been self-employed in relation to his mechanic work and had always been an employee, "through the books", as he put it.

20. Mr Brownhill agreed that the claimant's employment would be "put through the books". The claimant understood that to mean that he was being offered a contract of employment, and not a self-employed arrangement, and as a result, he gave notice to his then employer, and completed the application form to Bridge Resources as he had been requested to do (42). He also passed over his P45 to the respondent.

21. That form is headed up "Application for Employment", and next to "Position Applied For" is printed "Self Employment". The form is labelled with the logo of Bridge Resources, by whom the claimant has never been employed. The claimant completed the form with the assistance of his wife, who wrote what appears on it. The claimant and his wife understood that he was not applying for a position with Bridge Resources on this form, but completing it so as to provide the respondent with the necessary information to allow him to be paid. The form was supplied to the claimant after he had agreed with Mr Brownhill to take up employment with him as a mechanic. The claimant signed the form but relied upon what he had been told by Mr Brownhill, that his tax and national insurance would be sorted out.

22. Mr Brownhill confirmed to the claimant that he would be paid £4,000 per month until he could make the necessary arrangements to sort out tax and national insurance payments. The claimant never received a written statement of terms and conditions of employment.

23. The claimant commenced working with the respondent on 28 March 2016. He would work approximately 50 hours per week, carrying out the tasks allocated to him by Mr Brownhill, namely repairing cars which were to be sold or undergo MOT testing. As time went on, the claimant was asked to carry out repairs for customers. R70 shows a job sheet for two cars which the

claimant had examined. The top half of the sheet refers to a Vauxhall Corsa, KA57 RCV, and the claimant wrote in the details of the work required. He passed that to Mr Brownhill, who then priced the work and advised the customer of the price to be charged for the work. If the customer accepted, the claimant would then carry out the work required.

24. In the lower half of the sheet, a similar exercise is undertaken for a vehicle registration number SH52 YSB. The prices attached to the different items of work required were written on, as they had been in the upper part of the sheet, by Mr Brownhill. The sums set out would be paid by the customer to Mr Brownhill as part of the engagement between them for services rendered.

25. A document was produced at R43A which bears to be a note of "Other Jobs", written out either by the claimant or on his behalf, listing jobs carried out, the length of time taken and the cost to be applied, to a total of £1,270. The claimant's evidence was that these jobs related to the period when he was still working for Eric Wright Motors. Mr Brownhill could not say, in his evidence, which period this related to. There are no dates on this document, and it is my conclusion that this related to the period before the claimant's full time engagement with the respondent began, and it therefore adds nothing to the Tribunal's knowledge of the specific arrangement made from 28 March onwards.

26. The claimant submitted timesheets to the respondent, in order that a record was kept of the number of hours he was working each week (44ff). These show the date, day of the week and the hours worked on that day, totalled at the side (by a different hand). No financial sums appear next to these figures. They were prepared by the claimant so that he could tell the respondent how many hours he had been working.

27. The claimant generally received payments from the respondent of £4,000 each month, regardless of the number of hours worked, though there were some variations (see below). His last monthly payment was made on 1 September 2016. He received no pay thereafter, and on 28 October 2016

the claimant decided that he wanted to leave, so he packed up his tools and left the respondent's business. His employment terminated from that date.

28. During the claimant's work for the respondent, he worked personally to provide mechanic services to the respondent. On occasions, he brought in his son to assist him, but his sons were understood to be engaged on a different, ad hoc basis, as self employed contractors. When they carried out work, they kept a record of the dates worked and the payments made (65 and 66).

29. The claimant was not able to provide a substitute to carry out the duties he was contracted to perform. When the claimant wished to take time off, he required to request that time from the respondent, but his pay did not vary as a result. He was not in a position to refuse work if it was offered to him by the respondent, as he regarded himself as employed to do a job for the respondent.

30. The claimant's bank statement, in respect of the current account held by the Bank of Scotland in his name jointly with that of his wife, shows that payments were made (C42ff) to that account on 3 May, 13 June, 1 September and 28 September 2016, from the account named "Mrs J Berry t/a BR", understood to be a reference to Bridge Resources, which carried out payroll services on behalf of the respondent. The first two payments were for £4,000, the third for £5,460.58 and the fourth for £2,000. There appears to have been a gap in the produced bank statement so there are no entries available to the Tribunal in respect of July or August.

31. On 20 June 2016, the claimant's wife, Yvonne, came into the office of the respondent. While there, she was asked for assistance by Mr Brownhill in creating a document to register his business, as Andrew Brownhill trading as The Hand Job Car Wash, for PAYE services as an employer. That document (R67) was initially created on 20 April 2016 but submitted to Her Majesty's Revenue and Customs on 20 June 2016.

32. The claimant was becoming increasingly frustrated with the failure of the respondent to provide him with payslips or confirm that his pay would be

properly subject to the deduction of tax and national insurance. On 26 August 2016, Sam Gomez (Mr Brownhill's daughter, who assisted in his businesses) sent a text message to Yvonne Skachill (C56) in which she said: *"Hey how are you? I've left work now but omg today has been hell I just wish the pair of them would talk!! Davy [the claimant] isn't happy and I hear he's picking up his stuff and leaving tonight X".* Mrs Skachill responded, and then said to Ms Gomez: *"He is annoyed that your dad has not done his payslips that me (sic) promised to do last Friday or Saturday by the latest and he said he was thinking about talking to Jackie, oh I know it's doing my head in 2 at the moment x".*

33. Ms Gomez replied: *'They are being done today! No excuses but he's been so busy I've hardly seen him the last week lol I know he's frustrated but why doesn't he go mental at my dad lol I wanna bang their heads together I've snapped at my dad today and told him sort this shit out our I'm leaving lol X"*

34. On 13 October 2016, Mr Brownhill sent a text message to the claimant (C53), in which he said *"Have spoken to HMRC. I have explained that I have been waiting for the authorisation code to activate my Paye system. I have explained that I have completed a payroll but it hasn't been transmitted due to the missing authorisation code. I have also asked whom is responsible for the tax liability. They have asked me if I have entered the P45 details for my employees. I said yes of course. Importantly they confirmed that your tax is my liability. "*

35. No payslips were provided to the claimant by the respondent, and as it turned out the respondent never succeeded in registering his business for PAYE.

36. The claimant received no payments from the respondent following the termination of his arrangement.

Submissions

37. For the claimant, Mr Bryce observed that there is a big gap in the interpretation of how matters unfolded between the three witnesses who gave evidence in this case. The claimant's position is that there were meetings

about coming to work for the respondent. He made it very clear that he would not come to work for Mr Brownhill unless he was an employee and received a higher rate of pay. That was the agreement which was reached, and the basis upon which the claimant left his previous employer.

38. The claimant made a number of demands of Mr Brownhill to sort things out. He understood that he was paid £4,000 a month until that was sorted out. There was an attempt made by Mr Brownhill to register for PAYE and sort out the tax and national insurance.

39. Mr Bryce submitted that rather than the respondent seeking to change the claimant's status to that of an employee, it was simply the respondent following through on what all involved understood the situation to be. At C54, the message from Mr Brownhill in which he speaks about the tax liability being his gives clear indications in favour of the claimant's argument that he was an employee.

40. The claimant required to attend the workplace, and carry out the tasks available to him. He put in long hours, as is demonstrated by the timesheets. There was therefore, in Mr Bryce's submission, a situation of control by the employer and mutuality of obligation between the parties. It makes no sense to say that the claimant had the option not to turn up, he said. The business model is that Mr Brownhill allocated work to the claimant. If there were a risk that the claimant would decline that work, the whole business would fall apart. Mr Brownhill was clearly the directing mind behind this arrangement.

41. He argued that if there are issues of credibility to be resolved, the claimant and his wife offered far more credibility and straightforwardness than Mr Brownhill, who frequently avoided answering questions. Saying that he could not remember certain events is not credible when this is his own business.

42. Mr Bryce referred to the well-known authorities in this area and submitted that the tests under law, while complex, should persuade the Tribunal to find that the claimant was an employee, not a self-employed contractor.

43. For the respondent, Mr Morton addressed first the issue already dealt with above, namely the application to amend the claim to identify the claimant's name accurately.

44. With regard to credibility, Mr Morton said that Mr Brownhill had not seen the ET3 nor the correspondence submitted by Mr Moodie to the Tribunal, and that this was not unreasonable. The Tribunal should not apply a level of pedantry to this situation. He submitted that any employment lawyer would be familiar with the situation where a set of papers is handed to them and they have to make something of that.

45. The claimant was not able to engage with certain aspects of the paperwork in the same way as the respondent could. It would be wrong to assume that the respondent has any particular knowledge of dealing with the HMRC or of employment status. He was credible and consistent.

46. Mr Morton submitted that the claimant's submission that the only logical explanation for the evidence heard was that the claimant was engaged as an employee who sought to chase up the tax position should not be accepted - there is an alternative interpretation, which for the respondent is obvious, that the claimant was told in March 2016 that the respondent did not have a PAYE set up so could not engage the claimant in an employment relationship. It is accepted that there were discussions, particularly about the possibility of the respondent registering for PAYE, and that all sits entirely consistently with both parties being aware that it was a self-employed relationship. That did not change during the course of the engagement of the claimant by the respondent.

47. On the application form (C42/3), it is made clear that the claimant was applying for self employment, said Mr Morton. In addition, there was an invoice submitted at R43A for work done being engaged on a self employed basis. There were inherent contradictions in the claimant's own evidence, for example, when he said that he was paid per hour, at an hourly rate, for variable hours, and yet was paid £4,000 per month as a flat rate.

48. The claimant accepted that he set his own hours of work, and was in control of what days he worked or did not. The text messages produced by the claimant reinforce the respondent's views.

49. The respondent arranged things so that work could be done if the claimant were available to do the job, but it could be cancelled if he were not available. He could do work where he wanted - at his home workshop, for example - and he could use his own equipment.

50. It was logical for the respondent to engage the claimant on a self-employed basis, given that this was one of a stream of businesses he ran, and that it was uncertain, at least initially, how much work would be involved. He relied upon the claimant's expertise and knowledge in carrying out and assessing the work required on each vehicle.

51. This was, he said, clearly a contract for services. It was like a plumber, who comes along to a house, assesses the problem he has been called to see, gives a price, and agrees to do the work at an appropriate time. That is a self-employed relationship. He had no control over the claimant in the work he did because of his lack of knowledge.

52. The claimant was not entitled to, nor paid for, holidays or sick pay, he had no statement of terms and conditions of service, and was only paid for the hours he submitted.

53. Mr Morton invited the Tribunal to find that this claimant was a self-employed contractor with a contract for services with the respondent.

The Relevant Law

54. Section 108 of the Employment Rights Act 1996 provides that an individual may not make a claim for unfair dismissal unless he or she has had two years' continuous service with their employer.

55. Section 230 of the 1996 Act provides as follows:

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

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

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

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

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

56. I had reference to the case of **Carmichael and Another v National Power Pic [1999] UKHL 47,** in which the then House of Lords stated that the irreducible minimum of a contract of employment is the feature of mutuality of obligation.

57. The well known case of **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance (1968) 2 QB 497** sets out some principles in this area, and in particular, at p515:

"A contract of service exists if these three conditions are fulfilled.

(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master, (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (Hi) The other provisions of the contract are consistent with its being a contract of service. "

58. **Market Investigations Ltd v Minister of Social Security (1968) 2 QB 173** found that while control was always a factor to be considered it could no longer be regarded as the determining factor. Cooke J went on to say that other factors which may be of importance are whether the claimant provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has the opportunity to profit from sound management in the performance of his task.

59. **Autoclenz v Belcher & Others [2011] UKSC 41** was referred to by Mr Bryce, as authority for the proposition that the Tribunal should not simply accept a label on a form or in a contract as indicative of the true nature of the relationship. The Tribunal must be alive to the possibility that the written documentation may not accurately reflect the nature of the relationship between the parties.

Discussion and Decision

60. The issue before the Tribunal is to determine whether or not the claimant was an employee of the respondent, and if so, which respondent, or a self-employed contractor engaged in a contract for services with the respondent.

61. It is appropriate to deal firstly with some observations on the evidence before the Tribunal. I found the claimant to be an honest, straightforward and open individual, whose evidence should be regarded as entirely credible. He emerged as one who is clearly skilled with his hands and in his understanding of mechanical operations, but, to some extent, less accustomed to dealing with documentation and the legal concepts associated with that. The claimant's wife, Yvonne, came across as an honest witness, whose evidence was helpful in setting the context of the attempts made by the respondent to obtain PAYE registration.

62. Mr Brownhill, by contrast, gave evidence which was somewhat unsatisfactory. He is a man of business, plainly experienced in setting up businesses and operating them. His evidence was self-contradictory, confused and unclear. At times he was unwilling to answer direct questions.

63. Where there was a direct conflict between the evidence of the claimant and Mr Brownhill, I found no difficulty in preferring the evidence of the claimant.

64. It is necessary, then, to consider the evidence and its effect, in order to establish the contract between the parties. There was no written contract issued to the claimant, and accordingly there is no assistance provided by any detailed written evidence.

65. The claimant's engagement with Mr Brownhill came about when he approached the claimant, having seen the quality of his work, and invited him to come and work for him. I accept the claimant's version of the two conversations which took place. In the first conversation, the claimant was offered a position at the same rate of pay he was receiving in his then current position, an employed position with another garage in the town, and rejected this. He made it clear that he would only move if the pay were improved, but I also accept that he told Mr Brownhill that he wanted to be "on the books", that is, an employee of the respondent. He reiterated that when Mr Brownhill returned with a higher offer of pay, and having received what he understood to be an assurance that he would be an employee, accepted that.

66. Accordingly, it is my judgment that the offer made to the claimant, accepted by him, was to come and work for Mr Brownhill, trading as the Spitfire Motors, at £20 per hour, as an employee.

67. Mr Brownhill, in giving evidence, did not specifically deny that this was the case. Indeed, when asked if the claimant made clear that he would not come over unless he was put through the books, Mr Brownhill replied that he may have said that but that the claimant did that of his own choice. I found that an answer notable for its disingenuousness. In my judgment, Mr Brownhill well understood that the claimant would only come to work for him on the basis that he was an employee, and agreed to do this.

68. It is also necessary to consider the way in which the relationship operated in practice. Mr Morton placed heavy emphasis on the point that Mr Brownhill was not registered for PAYE and therefore could not have taken the claimant on as an employee. I do not place much emphasis on this evidence. Mr

Brownhill took the claimant on as an employee. The onus was then on him to take the necessary steps to register for PAYE. The fact that he did not do so is difficult to understand, except as demonstrating that he did not wish to register for PAYE. He took some help from the claimant's wife, but he had, throughout, the assistance of his partner, Jacquie Berry, who ran her own Human Resources consultancy, and indeed ran his payroll for him. No explanation was given as to why she could not have assisted him with this process.

69. However, and in any event, whether the respondent was registered for PAYE may be a matter of interest to Her Majesty's Revenue and Customs but does not determine whether or not the claimant was employed under a contract of service or contract for services.

70. When the claimant came to work, he was allocated work under the control of and the authority of Mr Brownhill. He carried out that work based on his own knowledge and experience, for which Mr Brownhill had expressly hired him. Mr Morton sought to argue that because Mr Brownhill did not understand how motor engines worked the claimant was therefore like a plumber who is contracted to come to one's house from time to time. That argument cannot be sustained. There is simply no logical basis to it. In this Tribunal's experience, there are many specialist staff employed in different employments subject to the management and authority of non-specialist managers. Different employees have different roles within a business. The fact that a garage owner relies upon a mechanic to diagnose and treat the ailments of the cars he allocates to him does not, of itself, demand the conclusion that that mechanic is therefore a self employed contractor.

71. The claimant provided personal service to the respondent. On some occasions, he brought his sons with him, and they provided services to the business in return for payment in respect of submitted invoices. Their relationship with clearly, and expressly, different with the respondent to that of the claimant. Their work was ad hoc, whereas the claimant was a regular attender at the garage, doing a regular day's work throughout each week, and sometimes at weekends. There was never any suggestion in the

evidence that had the claimant been allocated a job, he could have introduced another specialist mechanic to do that job for the payment which he himself was receiving. If another mechanic, such as one of his sons, provided a service, that service was paid for (or should have been) by the business, and not out of the payments already received by the claimant, or due to him.

72. It is true that the claimant did not receive sick pay or holiday pay. In my judgment, the reason for that was not that he was not entitled to receive those payments, but that the respondent chose not to make them to him.

73. When the claimant was allocated work, he was required to carry it out, and did so. Mr Brownhill suggested that if the claimant refused to attend work, or refused to do the jobs given to him, he would simply tell the customer and cancel the job, or postpone it to another time. I did not find that evidence credible. As Mr Bryce submitted, the whole business model of the garage was based on Mr Brownhill being able to rely upon his mechanic to repair cars within a tight timescale in order to provide the best service to customers. The claimant devoted his time to working in the garage, as he was expected to do. There was no evidence at all that the claimant could, or did, decline to carry out work for the respondent.

74. Mr Morton argued that the way in which the claimant was paid - at a flat rate of £4,000 per month - meant that his argument that he was contractually due more was bound to fail because the contractual term which the claimant relied upon was that he was to be paid £20 an hour.

75. I reject that argument for two reasons. Firstly, the claimant's understanding was that these flat rate payments (which, to be accurate, did vary over time) were payments made in anticipation that the PAYE and national insurance deductions would be made within the tax year once the respondent had his PAYE registration. Secondly, the fact that the claimant received a flat rate means that his payment more closely resembles a salary rather than payment for a series of individual jobs of varying durations, based on timesheets submitted.

76. With regard to the documents which the claimant referred to as timesheets, and the respondent as invoices, it is my judgment that these documents, recording as they do only hours and dates, are simply timesheets. They have none of the characteristics of invoices, and at no stage do these documents mention any financial sums to be paid to the claimant.

77. There was one document where jobs were broken down into payments (R43A) but the claimant's evidence (not contradicted by Mr Brownhill, who simply could not remember what period this related to) was that these works were carried out by him for the respondent prior to his appointment as an employee, and while he was still employed by Eric Wright Motors. (I should say, in passing, that during the hearing both Eric Wright Motors and Eric Waters Motors were referred to, interchangeably, as the claimant's previous employer. It is not part of the Tribunal's function to carry out its own investigations into this matter, and neither party appeared to be in a position to clarify definitively the name of that business. However, I have simply referred to the business as Eric Wright Motors since that was the name the claimant gave it, and proceeded on the basis that whatever that business's name was, there was no dispute that that was the business for which he had previously worked, and therefore nothing material turned on the point.)

78. Reliance was placed by the respondent upon the document produced at R42. The suggestion, as I understand it, was that this showed that the arrangement being entered into was clearly one of self-employment. The **Autoclenz** decision makes clear that any such contractual documentation should be taken into consideration but only in the wider context in order to ensure that it reflects the true relationship between the parties.

79. R42 is a very peculiar document in this context. It is headed up "Bridge Resources", the name of the consultancy run by Mr Brownhill's partner (personal, rather than business, for clarity), and identified as an "Application for Employment'. Immediately it is clear that whatever it is, it cannot be that. The claimant never applied to work for Bridge Resources, and it is common ground between the parties that he was never employed by that business.

80. The next entry on the document "Position applied for - Self Employment" is, itself, a contradiction in terms, and contradicts the statement just above it, that this was an application for employment.

81. The claimant's evidence on this document was that he did not know what it was, but was told by Mr Brownhill that it was necessary simply to obtain his personal details in order to ensure that he could be paid when he started to work for him. That is a credible explanation. The respondent's position - that this document clearly proved that he understood that he was moving to a position of self employment - is not sustainable in my judgment. The claimant did not apply for a position with the respondent. He was given this document after he had verbally agreed to move to a position with the respondent, and this form was therefore an administrative tool to obtain his bank details and home address for record purposes, and no more than that.

82. Reference was made to an email sent by Lyall Moodie, the respondent's previous legal representative, to the Tribunal on 13 April 2017, in which he asserted on behalf of the respondent that "During October 2016 David Skachill asked to be made an employee and change from self-employed status. Andrew Brownhill looked into that. Nothing came of it." When that was put to Mr Brownhill, he denied that such a conversation had taken place in October 2016, and disavowed the statement of his own representative. He made clear, however, that he did not suggest that Mr Moodie had made this up, but could not explain why there was a difference between what he had himself said and what was said on his behalf. Mr Morton's explanation - that legal advisers are often handed material at the last minute and have to make the best of it - was unhelpful in explaining this discrepancy which appears to have happened much later in the process. In any event, the claimant did not, in my judgment, ask to be changed from self-employed status to become an employee; he did, however, repeatedly ask Mr Brownhill to honour his commitment to put him through the books.

83. In October 2016, Mr Brownhill also had a text exchange with the claimant (C53) in which he said that he had explained that he had completed a payroll, and the HMRC had asked him if he had entered the P45 details for his

employees, to which he had said, yes, of course, and that it was confirmed that the claimant's tax was his (Mr Brownhill's) liability. Mr Brownhill seemed to suggest in evidence that it was not him who sent this message. I found that suggestion incredible. It was plainly his identifier on the copy printed out, and in my judgment was consistent with the true position, which was that the claimant was an employee for whom the respondent was responsible for the payment of income tax.

84. With regard to the identity of the respondent, Mr Morton helpfully conceded that there was no doubt that the claimant worked for Mr Andrew Brownhill, albeit trading not as The Hand Job Car Wash but as Spitfire Motors. He did not seek to take any point as to the proper identity of the respondent and accepted that the correct respondent is as set out below.

85. Reviewing the whole of the evidence, then, I am persuaded that the claimant was engaged by the respondent, namely Mr Andrew Brownhill, trading as Spitfire Motors, on a contract of employment, and worked as an employee throughout his relationship with the respondent.

86. A hearing on the merits of this case will now be fixed.

Employment Judge: **M Macleod**
Date of Judgment: **07 December 2017**
Entered in register: **13 December 2017**
and copied to parties