EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr A Manning		Walker Crips Investment Management Limited

Heard at: London Central (by video) **On**: 25 and 28 March 2022

Before: Employment Judge Stout

Representations
For the claimant: Thomas Cordery (counsel)
For the respondent: Patrick Halliday (counsel)

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JUDGMENT ON OPEN PRELIMINARY HEARING

The judgment of the Tribunal is that the Claimant was not a worker within the meaning of s 230(3)(b) of the Employment Rights Act 1996 (ERA 1996) and reg 2(1)(b) of the Working Time Regulations 1998 (WTR 1998).

REASONS

Introduction

1. Mr Manning (the Claimant) is an investment manager who between 7 April 2015 and 18 January 2021 worked with Walker Crips Investment Management Limited (the Respondent) as an Investment Director.

2. This has been a remote electronic hearing by video under Rule 46 which has been consented to by the parties.

3. The public was invited to observe via a notice on Courtserve.net. No members of the public joined, but there were some observers. There were no issues with connectivity.

4. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.

5. I announced my decision at the hearing and provided the party with a summary of my conclusions. These are the full written reasons.

The issue

6. The issue to be determined at this Open Preliminary Hearing is whether the Claimant was a worker within the meaning of s 230(3)(b) of the Employment Rights Act 1996 (ERA 1996) and reg 2(1)(b) of the Working Time Regulations 1998 (WTR 1998).

The Evidence and Hearing

7. I explained to the parties at the outset that I would only read the pages in the bundle which were referred to in the parties' statements and skeleton arguments and to which I was referred in the course of the hearing. I did so. I also admitted into evidence certain additional documents which were added to the bundle.

8. I explained my reasons for various case management decisions carefully as we went along.

9. I have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that I have found to be material to my conclusions are as follows. If I do not mention a particular fact in this judgment, it does not mean I have not taken it into account. All my findings of fact are made on the balance of probabilities.

The facts

10. The Claimant was engaged by the Respondent as an investment manager. Investment managers manage investments for mainly private individuals comprising pensions, ISAs and discretionary savings. His engagement was terminated in January 2021 following the Respondent concluding that it could no longer certify him as a 'fit and proper' person under the FCA Senior Managers Certification Regime (SMCR) and CISI Statement of Professional Standing (SPS) licence to practice. The lawfulness of the Respondent's actions in that regard are challenged by the Claimant in these proceedings on the basis that they were detriments to which he was subjected for making protected disclosures, but in order to bring that claim he needs to establish that he was a 'worker' within the meaning of s 230(3)(b) ERA 1996 and reg 2(1) of the WTR 1998. This hearing has been concerned solely with that question, and not at all with the substance of the Claimant's claim or the reasons for the termination of his contract.

11. As a matter of form, and in name at least, the Respondent has two categories of investment manager: employed investment managers and self-employed investment managers or "associates". The Claimant was regarded by the Respondent as being in the latter category of self-employment. The two categories have different contracts, corresponding to what the Respondent maintains is their different employed and self-employed status. To the outside world the two categories of investment manager appear identical; a customer would not know the difference and someone else in the industry would not know the difference. The employed and associate investment managers are allocated company offices, equipment, email addresses, business cards, attend company social events, are provided with company Christmas cards to send to clients and represent the company at external events.

12. However, so far as the Respondent is concerned there are differences and it is convenient to identify what those differences are said by the Respondent to be before considering the Claimant's position. Employed investment managers are allocated clients by the company and are subject to restrictive covenants preventing them from taking them with them when they leave; employees are paid a salary while self-employed associates are paid only a share of fees and commissions; employees are not responsible for any business expenses, while associates are responsible for some business expenses; employees are taxed as employees through PAYE, while associates are responsible for their own tax and NI; associates are subject to fines and penalties, employees are not; the Respondent's disciplinary procedure applies to employees not associates, but the Respondent does monitor associates for compliance with regulatory requirements and takes actions where it considers there may be breaches; and employees have to follow a holiday booking process and obtain consent for time off, for which they are paid, whereas associates do not.

13. Prior to joining the Respondent, the Claimant had previously worked with another investment management firm, JP Finn. He could not remember whether he had worked for them on an employed or self-employed basis for

tax purposes. He described the process of deciding which company to move to next as a *"beauty parade … the companies have different packages, you have to decide which package is right for you"*. The Claimant professed not to have seen the Respondent's 'package' as something to be negotiated, but in fact the parties' agreement differed from the Respondent's 'standard' package in a number of respects and it is thus clear that there was as a matter of fact negotiation:-

a. The Respondent has a standard tariff for management and transaction fees which it charges to clients with funds under management. This tariff was higher than the tariff that the Claimant's clients were on. The Claimant requested that his clients should remain on their old tariffs. This was agreed. The offer letter expressed an intention that this *"should"* be for a limited period, but in the end it was never changed and all the Claimant's clients (including new ones that he gained while with the Respondent) benefitted from the lower tariff.

b. It is standard for nominally self-employed associates at the Respondent both to bring clients with them and to take them when they leave. The Claimant raised the question of what would happen in the event of him retiring and it was agreed, and recorded in the offer letter, that if at any time he retired, provided he co-operated in an 'orderly handover', he could either leave the clients with the Respondent in return for a cash sum of 1.25% of the assets under management (a substantial sum as the Claimant had between £57m and £85m assets under management during his time at the Respondent), or he could sell his clients to any other person or party of his choosing, subject again to an 'orderly handover'.

c. Some associates have negotiated alternatives to the Respondent's standard offer of a 50% share on the fees charged to clients and commission on client transactions (with variations in rate of 40-70%). The Claimant did not try to negotiate on the proposed 50% share, and assumed other associates had the same arrangement. However, the Claimant's personal circumstances were such at the time that he joined the Respondent that he needed a loan in order to secure his house for him and his family. The Respondent agreed to make a £275,000 loan to the Claimant, to be paid back through a reduction in his share of fees/commission to 40% over five years, with his share thereafter reverting to 50%. The loan was secured against monies in the Claimant's personal savings account, pension (SIPP) and ISA which he held on the Respondent's platform. The Respondent does not extend such loans to employees. The security was required to be maintained at 110% the value of the loan. I accept the Claimant's evidence that he could not readily have used the monies in his personal accounts to pay off the loan as much of that was illiquid and his pension was not accessible until age 55.

14. The party's agreement was documented in writing in an Offer Letter dated 31 March 2015 and a contract signed by both parties on 7 April 2015. In addition to the above terms, the following points are to be noted regarding the written documentation of the party's agreement:

    a. The offer letter and clause 11 of the agreement refer to the Claimant as being a *"self-employed Associate"*, an *"independent contractor"* (and not an employee or partner) and responsible for his own tax and national insurance contributions.

    b. The offer letter is an *"offer to join Walker Crips Stockbrokers Limited"* and closes *"We take pride in being able to offer you a position in this exciting phase for the Company where I can assure you of efficient client take-on, settlement and administration procedures supported by professional and flexible management"*.

    c. The Offer Letter does not describe the relationship as one of client/customer. The contract describes the Claimant as *"agent"* of both the Respondent and the end client (or "Customer" as the agreement puts it).

    d. By Clause 2 of the Agreement the Claimant was appointed as the Respondent's Approved Person (for FCA purposes) and broker, for which purposes the Claimant is to be the Respondent's agent, but only when procuring clients to enter into Designated Investment Business with the Respondent. The clause includes the words in brackets *"but not with other persons"* which it is not in dispute means on its face that the Claimant is not to be regarded as acting as agent for the Respondent if he procures clients to engage in Designated Investment Business with other people (a point confirmed by Clause 2.2 which recognises that the Claimant is free to act as broker for and on behalf of *"Customers"*, i.e. clients). This in principle leaves scope for the Claimant to work with another investment management company at the same time if he wishes, although the Claimant did not understand the clause thus.

    e. By Clause 2.3, the Respondent reserved the right to lay down prohibitions or restrictions on the associate as to *"the kinds of investment to which this agreement relates and the kinds of advice the Associate may give…"*.

    f. By Clause 1.3 references in the agreement to the *"Associate"* are, subject to clause 2.5, deemed to include *"any employee or agent of the Associate or … any person acting on the Associate's behalf"* . Clause 2.5 places restrictions on those who may act on the Associate's behalf: there must be prior written approval by a director of the Respondent; provision by the Claimant of *"such information and documentation and requested by the Compliance Department"*; and approval is *"at the sole discretion"* of the Respondent and *"may be withdrawn … at any time"*.

g. By Clause 3, the Respondent accepted responsibility for compliance with all applicable legal requirements *"for the Designated Investment Business carried on by the Associate in the course of performing his/her duties"*, but by Clauses 4 and 15 the Claimant also undertook to ensure compliance with regulatory requirements, and *"any in-house Dealing Rules and the Compliance Manual prepared by the stockbroker and including internal rules governing training and competence"* and *"any restrictions contained in the company's Personal Account Dealing notice"*.

h. By clause 4.4 confidential information of clients remained the property of the Respondent, to be returned by the Claimant to the Respondent on departure.

i. By clauses 5.4 and 7, the Claimant agreed to indemnify the Respondent and/or be responsible for any losses incurred as a result of any transaction carried out by the Claimant, or *"any action on the part of any client of the Associate or any failure: i. to fulfil obligations of a contract, or ii. To comply with the rules or practices of the FCA or LSE or, iii. Any breach by the Associate of the terms of this Agreement"*. Further, by clause 7.2 *"The allocation of responsibility for the indemnified Losses will not be varied in the event that, due to the Associate's absence from the office or otherwise, a member of staff or another associate carries out a transaction on behalf of the Associate for the Associate's customer".*

j. By clause 8, the Respondent reserved the right to: *"a) limit the exposure of any client or group of clients, b) close down any position, … e) to require a deposit or collateral to support or cover a trading position".*

k. Clause 10 prohibited the Claimant from having any dealings with the press or public otherwise than as approved by the Respondent.

l. Clause 14 prohibited the Claimant, but not the Respondent, from assigning the agreement.

m. By clause 6, either party could terminate the agreement on one month's written notice, but the Respondent reserved the right to terminate with immediate effect for breach of the agreement, or 'unbecoming conduct' detrimental to the Respondent's reputation.

15. In April 2018 the Respondent's contracts were reviewed by external advisors (RSM) in light of the introduction of IR35. The external advisors concluded that for tax purposes the Respondent's nominally self-employed consultants were probably genuinely self-employed. However, they recommended a contract review to strengthen that position and ensure consistency. As part of that review they noted: *"While the Workers [i.e. associates] are generally expected to provide personal service, and WCG [i.e. the Respondent] do not*

have the ability or resources to use 'substitutes', there is scope for the Workers to engage their own assistants". Mr Cordery for the Claimant relied on this as indicating that the substitutes are not used by associates at the Respondent, but I do not consider this sentence bears the weight that Mr Cordery seeks to place on it: the issue for me is not whether the Respondent used substitutes, but whether the Claimant and other associates did. The remainder of the sentence *"there is scope for the Workers to engage their own assistants"* sounds very much like an acknowledgment that at least some associates could and did use assistants as substitutes.

16. In December 2018 the Respondent proposed a new draft contract for associates, which required them to contract with the Respondent through third party entities. The Claimant did not sign this as he and his fellow associates agreed that it was not in their best interests to do so.

17. The Claimant was at all times self-employed for tax purposes, and has remained as such with his new company Dowgate Capital Limited.

18. The Claimant's formal job title was Investment Director of the Respondent. Like other associates he was integrated into the Respondent's workforce in many practical respects. He had a Respondent email address and an allocated desk, office equipment and phone number in the Respondent's offices. He was issued with business cards by the Respondent and Christmas cards to send to his clients. He had full use of the Respondent's offices for meetings, including out of hours access as he had authority to disable the Respondent's alarms. He was held out to the world as an Investment Director of the Respondent. He attended the Respondent's parties and social events and represented the Respondent at events.

19. During his engagement with the Respondent he used only the Respondent's investment management platform and worked solely with the Respondent. He felt it would not have been practicable for him to have worked with any other investment platform because of his level of integration with the Respondent's platform, business and compliance systems.

20. In 2017 the Claimant set up a home office and thereafter he worked from home much of the time, especially in the latter years of his employment (which encompassed the Covid-19 pandemic). He was encouraged by the Respondent to work from home. He paid for his home office equipment, but some of it was selected and ordered by the Respondent in order to get better deals and he was provided with IT support from the Respondent's IT department. The Respondent's Fact Set market screen data system was installed in his home office free of charge. A table of charges made to the Claimant between 2015 and 2021 is at pp 180-181 of the bundle.

21. The Claimant paid for his own Chartered Institute of Securities and Investments (CISI) professional membership and professional indemnity insurance cover (the premium of which was brokered through the Respondent in bulk on behalf of its brokers). The Respondent also had its own insurance.

22. The Claimant had no holiday entitlement from the Respondent and did not ask for holiday pay while employed. He decided when and whether to take holiday and notified his personal assistant when he would be away. The Claimant was free to work when and where he wanted. In practice he diarised absences with his personal assistant. He was also free to trade on his own personal account whenever he wanted, and frequently did so during normal business hours.

23. The Claimant brought his own clients with him to the Respondent. He had approximately £50-£60m under management when he joined. Approximately 80% of his clients from his previous engagement with JP Finn moved with him. By the time he left the Respondent the Claimant had £80-£85m funds under management and was earning approximately £240k per annum.

24. In fact, in the Claimant's case as the Respondent terminated his engagement at the point that it decided not to certify him as a 'fit and proper' person for regulatory purposes, the Claimant could not therefore lawfully deal with his clients for a period. The Claimant's clients thus initially remained with the Respondent. Neither party has suggested that this situation might have constituted 'retirement' thus triggering the Claimant's right to 'sell' his client base (or, rather, the goodwill in that client base), although I cannot immediately see why that would not be the case. In any event, the Claimant was focused on regaining 'fit and proper' status, which he did in the summer of 2021, when he entered into a similar agreement with Dowgate Capital Limited as he had with the Respondent, remaining on a self-employed status for tax purposes.

25. The Claimant suggests that his clients would have seen the Respondent as their nominated stockbroking firm rather than the Claimant in his personal capacity, but in the absence of evidence from the clients I do not accept that. The Claimant's own evidence was that when he saw clients it was generally in their homes. The vast majority of them followed him from JP Finn to the Respondent and (notwithstanding the difficulties of his termination by the Respondent) the vast majority (approximately 80-85%) of his clients have moved with him to Dowgate. In those circumstances, I find it more likely that those clients see the Claimant as their key relationship and are relatively indifferent to his choice of investment platform for their funds.

26. The Claimant was paid commission based on a fixed percentage of the fees charged by the Respondent to his clients on the funds under management and a share of any commission on transactions. If the Claimant arranged no transactions for his clients in a particular year, the only fee charged to the client would be the platform management fee. With c£80m of funds under management, the platform management fees alone provided a steady income for him and the Respondent (by my calculation a minimum of £320,000 per annum even assuming the 0.4% lower rate for the whole amount), but if he undertook transactions both he and the Respondent earned more.

27. So far as his own earnings were concerned, the Claimant took all the financial risk of broking. If he generated no fees from his clients he would earn nothing (although this was highly unlikely as it would mean that all his clients would need to withdraw funds). If he did anything that caused the Respondent to incur bad debts or losses, the Claimant was responsible for that.

28. The Claimant was responsible for growing his own client base. He was not allocated clients by the Respondent, but did occasionally gain an introduction to a client through others working at the Respondent.

29. The Claimant enjoyed significant freedom in how he served those clients' needs, but it was not an unlimited freedom. For regulatory compliance purposes, the Claimant had to be personally authorised by the Respondent as a 'fit and proper' person to provide investment management and advisory services. He was subject to oversight and control by the Respondent through its regulatory policies, and the internal staff rules and procedures that were related to those regulatory requirements, as well as through the contractual terms I have noted above.

30. The Claimant pursued an investment strategy which Mr Darbyshire described as 'unique', and on which the Claimant clearly prided himself as it had brought high returns for him, the Respondent and his clients in 2020 (at least). The Respondent strongly discouraged what it regarded as riskier investments in small companies from 2017 onwards; indeed, the Claimant says that the Respondent prohibited further investment in unlisted companies, but as a matter of fact the Claimant did not cease investing in such companies. It was only when those investments, on the Respondent's assessment, breached portfolio risk variance margins that he was required by the Respondent to adjust his investment strategy so as to bring client portfolios back within the risk margins to which the Claimant had assigned them on the basis of their suitability survey and capacity for loss. The Respondent determined the risk classification of investments through its Investment Senate and reviewed the Claimant's classification of his client's appetite for risk against its own risk variance margins.

31. As a result of its responsibility to certify the Claimant as 'fit and proper' the Respondent ultimately had a very significant degree of control over the Claimant's ability to operate as a professional broker and earn a living, as happened at the end of the Claimant's engagement. When terminating the engagement (on 1 month's notice) the Respondent also instructed the Claimant, during his notice period, not to make contact with any employees, agents, customers or clients of the Respondent and not to *"make any comment to any employee, associate or client about your departure from the company"* (140). The Respondent's control was not, however, complete: the Claimant could, having signed up with a new investment platform willing to certify him as 'fit and proper' continue in business and he did so, taking most of his clients with him.

32. I record that the Respondent has also terminated some associate agreements on poor performance grounds for not generating enough income. Mr Darbyshire was aware of five since 2017/2018.

33. The Claimant was subject to the Respondent's appraisal policy and also acted as line manager and appraiser for his personal assistant, who was an employee of the Respondent. The Claimant's own appraisals were, however, focused on regulatory compliance and not any wider considerations.

34. If clients had complaints about the Claimant they were dealt with by the Respondent through its complaints process, and in one case a complaint was upheld against the Claimant and a decision made about client compensation against his wishes.

35. The Claimant suggested he was also subject to the Respondent's disciplinary policy, but so far as the Respondent is concerned he was not. The disciplinary policy on its face applies only to 'employees', whereas other policies that are in place to fulfil regulatory requirements such as the Personal Account Dealing Rules applied on their face to both employees and associates. The Claimant suggested that the action the Respondent took against him at the end of his engagement was under its disciplinary policy, but on its face it was not. The same goes for the letter of 2 June 2020, which was said to be a final written warning, but is not in fact described as such and the threat is to *"look at your position as a self-employed Associate"*, not a final warning of risk of dismissal.

36. The Claimant worked closely with another nominally self-employed investment broker engaged by the Respondent, Ian Amiee. The Respondent's position is that the Claimant was using Mr Amiee as a substitute and that he worked on the Claimant's clients, but was never paid for that work by the Respondent. Indeed, from October 2020 the Respondent had required each broker to nominate an alternate broker as a formal cover during periods of absence and Stephen Simper suggested that the Claimant nominate Mr Amiee, and vice versa. The Claimant's position is that this arrangement was just what it would have been if the two of them were employees of the Respondent: they provided cover for each other.

37. There are print-outs in the bundle showing Mr Amiee as having 'dealt with' trades for clients of the Claimant. The Claimant said that the vast majority, if not all, of these were not 'normal' on the market trades, but 'placings' in response to cash calls by companies where the 'dealt by' person would simply be the person who took the call from the company or entered the placing on the system. I accept the Claimant's evidence in this respect, but it is nonetheless the case that in those trades Mr Amiee was formally the nominated deal broker on the transaction, but as the transaction was for the Claimant's clients he would not have been paid. Moreover, the Claimant accepted that in theory Mr Amiee could have placed on the market trades for his clients, and vice versa, but he was unable to think of an example where that had happened in six years.

38. So far as the possibility of any broader use of a substitute was concerned, the Claimant said *"I don't think anyone in the office thought it remotely likely"* and *"it would have been totally impractical"*. Mr Darbyshire gave no example of a wider type of substitute being used, although he did say that some of the assistants were qualified to do trades and did carry out trades on behalf of individual associates. He added that the authorisation process need not take long at all for someone already qualified, especially if they were known to the Respondent in which case it would take only a few hours.

39. The Claimant was provided by the Respondent with support from a full-time personal assistant for whom the Respondent initially paid the salary costs. The Claimant was responsible for recruiting to this role. When a replacement was recruited who the Claimant and Mr Amiee were particularly keen to obtain but who required a salary exceeding the Respondent's normal salary bands for her staff grade, the Claimant and Mr Amiee contributed an additional £3,000 per annum towards the cost. This was on the basis that they understood she would be working exclusively for them. However, after a couple of months they realised she was being deployed on the Respondent's other business. The Claimant raised whether he and Mr Amiee should be paying in those circumstances, and after a couple of months the Respondent ceased re-charging the salary costs to the Claimant and Mr Amiee.

Conclusions

The law

40. Section 230(3) of the Employment Rights Act 1996 (ERA) defines a 'worker' as an individual who has entered into or works under (or, where the employment has ceased, worked under): a contract of employment ('limb (a)'), or 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 ('limb (b)'). This case is concerned with 'limb (b)'. There are three elements to the definition:

    (i) The requirement for a contract or 'mutuality of obligation';
    (ii) The requirement that the contract is to do or performance work 'personally'; and,
    (iii) The requirement that the putative employer is not 'a client or customer' of the putative worker, (an element more often referred to as 'not being in business on his own account': see *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 at [17] *per* Mr Recorder Underhill QC as he then was).

41. Element (i) is not in issue in this case.

42. Where, as here, the parties have expressly agreed that their relationship is to be one of something other than employment, that is relevant but not

determinative. The Tribunal must scrutinize the true nature of the relationship in order to determine whether the terms of the written agreement reflect the true nature of the relationship between the parties or whether the written agreement seeks to characterize the relationship in an artificial way. In this respect, the relative bargaining power of the parties must be taken into account: the terms of any agreement will be more readily accepted as representing the true nature of the agreement where the parties' bargaining power is relatively equal. These are the principles to be derived from the Supreme Court's decision in *Autoclenz Ltd v Belcher and ors* [2011] UKSC 41, [2011] ICR 1157. In *Uber BV and ors v Aslam and ors* [2021] ICR 657 the Supreme Court explained (at [69] *per* Lord Leggatt, with whom the other members of the court agreed) that the principles enunciated in *Autoclenz* are principles of statutory interpretation rather than contractual interpretation: the point is to identify whether someone is a worker within the statutory definition, not what the terms of their contracts are. At [71]-[76], the Supreme Court continued:

> 71. The general purpose of the employment legislation invoked by the claimants in the Autoclenz case, and by the claimants in the present case, is not in doubt. It is to protect vulnerable workers from being paid too little for the work they do, required to work excessive hours or subjected to other forms of unfair treatment (such as being victimised for whistleblowing). ….
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> 76. Once this is recognised, it can immediately be seen that 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. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it.

43. The Supreme Court went on to explain (at [81]-[82]) that provisions in an agreement that purport to prevent a person being entitled to (for eg) holiday pay, who otherwise would be, may be viewed as unlawful 'contracting out' of the relevant provisions, prohibited by s 203 ERA 1996 and the equivalent anti-avoidance provisions in other legislation.

44. Finally, the Supreme Court gave the following guidance as to how Tribunals should approach the question of deciding whether or not someone is a 'worker' within the meaning of the legislation:-

> 84. In the Autoclenz case it was said (at para 35) that "the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part." More assistance is provided by the decision of the House of Lords in *Carmichael v National Power plc* [1999] 1 WLR 2042. That case concerned tour guides engaged to act "on a casual as required basis". The guides later claimed to be employees and therefore entitled by statute to a written statement of their terms of employment. Their case was that an exchange of

correspondence between the parties in March 1989 constituted a contract, which was to be classified as a contract of employment. The industrial tribunal rejected this case and found that, when not working as guides, the claimants were not in any contractual relationship with the respondent. The tribunal made this finding on the basis of: (a) the language of the correspondence; (b) the way in which the relationship had operated; and (c) evidence of the parties as to their understanding of it. The House of Lords held that this was the correct approach. Lord Irvine of Lairg LC said at p 2047C that:

"…it would only be appropriate to determine the issue in these cases solely by reference to the documents in March 1989, if it appeared from their own terms and/or from what the parties said or did then, or subsequently, that they intended them to constitute an exclusive memorial of their relationship. The industrial tribunal must be taken to have decided that they were not so intended but constituted one, albeit important, relevant source of material from which they were entitled to infer the parties' true intention …"

85. 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.

86. 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.

87. 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".

> 88. This approach is also consistent with the case law of the CJEU which, as noted at para 72 above, treats the essential feature of a contract between an employer and a worker as the existence of a hierarchical relationship. In a recent judgment the Grand Chamber of the CJEU has emphasised that, in determining whether such a relationship exists, it is necessary to take account of the objective situation of the individual concerned and all the circumstances of his or her work. The wording of the contractual documents, while relevant, is not conclusive. It is also necessary to have regard to how relevant obligations are performed in practice: see *AFMB Ltd v Raad van bestuur van de Sociale verzekeringsbank* (Case C-610/18) EU:C:2020:565; [2020] ICR 1432, paras 60-61 .
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> 89. Section 28(1) of the National Minimum Wage Act establishes a presumption that an individual qualifies for the national minimum wage unless the contrary is established. This is not a case, however, which turns on the burden of proof.

45. So far as the requirement for personal service is concerned, the key question is whether the individual has a right not to provide personal service but to substitute some third party otherwise than on an occasional or limited basis.

46. The significant body of case law on this point was summarised by the Court of Appeal in *Pimlico Plumbers Ltd v Smith* [2017] ICR 657 (upheld on appeal to the SC: [2018] ICR 1511). Following a review of the authorities, Sir Terence Etherton MR (with whom Davis LJ agreed, and with whose reasons Underhill LJ "essentially" agreed) stated at [84]:

> "In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution 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, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance." (Emphasis added)."

47. It was pointed out in *Stuart Delivery Ltd v Warren Augustine* [2021] EWCA Civ 1514 (at §55) that although a helpful exposition, the *dictum* of Etherton MR contains two principles and then three illustrations of the principles and is not an exhaustive description of substitution clauses. In each case, the Tribunal must focus on the nature and design of any fetter on the right or ability to appoint a substitute, to determine whether that was inconsistent with any obligation of personal service. In the Supreme Court in *Pimlico Plumbers*, Lord Wilson (giving the judgment of the Court) at [32]-[33] considered there would be cases in which it was helpful to ask whether the 'dominant purpose' of the contract was personal service, in assessing the significance of any right of substitution, although the Supreme Court emphasised that the notion of

'dominant purpose' was not be allowed to usurp the statutory language. In that case, the Supreme Court held that the contract had been rightly held by the Tribunal to be for personal service where plumbers were required to work for 40 hours per week, there was no express right of substitution and in practice only substitution of another Pimlico operative was accepted.

48. Mr Halliday also relies on [33] of *James v Redcats (Brands) Ltd* [2007] ICR 1014 for the significance of the requirement to work/freedom to take holidays:

> 33 Mr Rose contends that there is no duty on the claimant to work. Holidays and sickness are merely examples of inability; they are not exhaustive of situations where delegation may occur. He contends, and I accept, that if the individual is free to work or not at his own whim or fancy, then that would be inconsistent with his being a worker at all. He relied in support both on the Tanton case and on the Court of Appeal decision in Mingeley v Pennock (trading as Amber Cars) [2004] ICR 727, para 14, per Maurice Kay LJ. Here there was no duty to work because there was no restriction on the right of the claimant to take holidays. Every day could be a holiday; and therefore she could in theory at her own whim choose never personally to do anything.

49. I caution myself that the above passage perhaps goes more to the question of whether there is mutuality of obligation (not in dispute in this case), but in general terms I accept that it is relevant to the question of whether or not there is a requirement for personal service and/or the degree of control exercised by the putative employer (which is in turn relevant to the question of whether the putative worker is in business on their own account) to consider the extent of the putative worker's freedoms in these matters.

50. Mr Halliday for the Respondent also particularly relies on the citation by Sir Terence Etherton MR (at [81]) of *Pimlico Plumbers* of a decision of the EAT (*UK Mail Ltd v Creasey,* unreported, 26 September 2012) in which personal service was precluded by a substitution clause which required that the substitute be *"approved in writing by the respondent (such consent not to be unreasonably withheld)"*, even though the procedure for obtaining consent required the substitute to complete an application form and provide various documents and evidence of various matters reflecting relevant experience and competence.

51. The last element of the statutory worker definition is that the putative employer must not in reality be a 'client or customer' of the putative worker. In *Byrne Brothers (Formwork) Ltd v Baird and ors* [2002] ICR 667*,* EAT, the EAT (Mr Recorder Underhill QC, as he then was) observed (at [17]): *"the essence of the intended distinction* [created by the exception] *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"*. The fundamental question is whether the individual is in truth in business on his or her own account or not (see also *James v Redcats (Brands) Ltd* [2007] ICR 1006, at [49] *per* Elias P). The EAT continued:

> "Drawing that distinction in any particular case will involve all or most of the

> same considerations as arise in drawing the distinction between a contract of service and a contract for services -- but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the passmark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers."

52. However, a note of caution is sounded by Elias P (as he then was) in *James v Redcats* ibid at [48]:

> 48 I accept that in a general sense the degree of dependence is in large part what one is seeking to identify if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached but that must be assessed by a careful analysis of the contract itself. The fact that the individual may be in a subordinate position, both economically and substantively, is of itself of little assistance in defining the relevant boundary because a small business operation may be as economically dependent on the other contracting party, as is the self-employed worker, particularly if it is a key or the only customer.

53. The description of the parties' relationship as being that of principal and agent does not prevent the principal being a client: see *Wolstenholme v Post Office Ltd* [2003] ICR 546 at [46].

54. Further important considerations were identified by the Supreme Court in *Uber* (above) as being relevant to the question of whether a putative worker was in business on his own account: see especially at [76], [87] and [92]-[101]. The factors include: the level of subordination of putatative worker to putative employer; the degree of control exerted by the putative employer over the putative worker; the degree of dependence by the putative worker on the putative employer; the extent to which the putative worker is free to develop their own extended business (in *Uber* the drivers had no opportunities to develop business through their own enterprise and skill, and could only earn more by working longer hours, adhering to Uber's strict standards of performance); who deals with complaints and determines whether there should be refund to the customer; which party dictates the terms on which they trade with the 'end client' or 'consumer'; who has the most control over contact with end clients (in Uber that was heavily controlled by Uber): and the degree of integration of the putative worker within the putative employer's organisation. Regarding the latter factor, the EAT in *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 (at [53], cited with approval by the Supreme Court in *Pimlico Plumbers Ltd v Smith* [2018] ICR 1511 at [47]) observed:

> "a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls"

55. Finally, for the significance (or, rather, lack of significance of a regulatory framework) Mr Cordery relies on [102] of *Uber*:

> 102 I would add that the fact that some aspects of the way in which Uber operates its business are required in order to comply with the regulatory regime although many features are not cannot logically be, as Uber has sought to argue, any reason to disregard or attach less weight to those matters in determining whether drivers are workers. To the extent that forms of control exercised by Uber London are necessary in order to comply with the law, that merely tends to show that an arrangement whereby drivers contract directly with passengers and Uber London acts solely as an agent is not one that is legally available.

56. In addition to the above authories on worker status, I have also been referred by Mr Halliday to *Paragon Finance plc v Nash* [2002] 1 WLR 685 in support of his submission that a term falls to be implied into the Claimant's contract to the effect that consent to use of a substitute will not be unreasonably withheld. In *Nash* the Court of Appeal considered the judgment of the court below as follows:

> 25 He explained, at paragraphs 127 to 130, why he thought that an implied term such as that for which the defendants sought permission to amend at the hearing on 4 September 2000 had a real prospect of success. He relied in particular on Abu Dhabi National Tanker Co v Product Star Shipping Ltd (No 2) [1993] 1 Lloyd's Rep 397. That case concerned a E charterparty under which the master and the owners had a discretion in determining whether any port to which the vessel was ordered was dangerous. In the express terms of the charter, the discretion was unqualified. The question was whether any restriction on the exercise of the discretion was to be implied. In giving the leading judgment of the court, Leggatt LJ said, at p 404:
>
> > "Where A and B contract with each other to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably."
>
> 26 It will be seen at once that the formulation of the implied term for which the defendants now contend is closely based on this passage in the judgment of Leggatt LJ. The authorities to which Leggatt LJ was referring were charterparty cases. The recorder said that in his view there was nothing special about charter contracts which sets them apart from other kinds of contract such as contracts of loan. As he put it: "a contract where one party truly found himself subject to the whim of the other would be a commercial and practical absurdity."

57. The Court of Appeal concluded at [36]:-

> 36 It follows that I do not agree with the obiter dicta expressed by this court in the Lombard case in the passage that I have cited. I would hold that there were terms to be implied in both agreements that the rates of interest would not be set dishonestly, for an improper purpose, capriciously or arbitrarily. I have no doubt that such an implied term is necessary in order to give effect to the reasonable expectations of the parties. I am equally in no doubt that such an implied term is one of which it could be said that "it goes

> without saying". If asked at the time of the making of the agreements whether it accepted that the discretion to fix rates of interest could be exercised dishonestly, for an improper purpose, capriciously or arbitrarily, I have no doubt that the claimant would have said "of course not".

Conclusions

58. I am grateful to both counsel for their efficient cross-examination of witnesses and their excellent oral and written submissions.

59. I have considered first the issue of whether the Claimant's contract met the statutory requirement for personal service.

60. What happened most of the time and as a matter of fact in the Claimant's case is that Mr Amiee was a colleague who had his own agreement with the Respondent and who the Respondent had asked him to nominate as a substitute for occasions when he was not available. Those facts alone fall on the 'personal service' side of the line in most cases, according to the summary of the case law drawn together by Sir Terence Etherton in *Pimlico Plumbers* (see above). However, that is not the whole picture in this case.

61. In this case, unlike in *Pimlico Plumbers*, there is contractual provision for substitution in clause 2.5, and the contract is drafted (see clause 1.3) on the basis that the associate may act through agents or employees. On its express terms, that clause probably does not negate a personal service requirement (following the Sir Terence Etherton examples) because on its face it affords the Respondent 'an absolute and unqualified discretion' to refuse to approve a substitute. However, if Mr Halliday is right that, in order to give effect to the obvious intention of the parties and give the contract business efficacy, a term is to be implied (as in *Paragon Finance plc*) that consent would not be unreasonably withheld then the clause would likely take this agreement to the other side of the line and point away from this being a personal services contract.

62. I add here that the mere fact that there might be a paperwork process to be gone through before approval could be given for a substitution in this highly regulated environment does not in my judgement make any difference one way or another, especially given that for an individual already regulated and known to the Respondent it could take only a matter of hours to authorise.

63. I have tried to approach this question of contractual construction from first principles, uninfluenced so far as possible by the statutory question that I am charged with determining. It seems to me if I had been presented with this contractual clause outwith the confines of the present hearing, I would readily have accepted Mr Halliday's argument. Certainly, if the issue before me had been one where the Claimant had obtained a substitute that he wanted to use (whether that be his assistant employed by the Respondent or an apprentice that he may have wished to take on independently of the Respondent), I cannot imagine that I would have concluded that the term fell to be read on its face only without the implication of a *Paragon Finance*

reasonableness requirement. A reasonableness requirement is what is required to give the clause efficacy and not leave that clause as being one 'writ in water'.

64. I further note it would not be inconsistent with the express terms of the contract to imply a *Paragon Finance* term because the express wording refers only to 'sole discretion' rather than 'absolute and unqualified' or any other similar words of emphasis.

65. However, in this case the Claimant effectively asks me to conclude that the clause is not genuine, was never intended to be genuine and thus that there is no need to imply the words that would be necessary to make it efficacious if it were genuine.

66. In my judgment, however, it would not be proper on the facts of this case to regard that substitution clause as a fiction for the following reasons:

    a. The Claimant himself accepted that in theory and in principle Mr Amiee could have dealt for his clients, and likewise he for Mr Amiee. That shows that in principle substitution to a certain extent was within event the Claimant contemplation;

    b. In practice, Mr Amiee did occasionally deal with the Claimant's clients when carrying out off-market placings. This may only have been a very small amount of work, but they are nonetheless examples of Mr Amiee being the named dealer for the Claimant's clients;

    c. As a matter of fact other associates do make use of assistants as substitutes;

    d. As there are no requirements for the Claimant to work any particular hours or to work from any particular place (albeit that there may be an expectation to attend occasional social events and industry engagements), there is no reason to disbelieve Mr Darbyshire's assertion that in general terms (subject to regulatory compliance and some fairly basic performance expectations) the Respondent does not mind who is dealing with the Claimant's clients; and,

    e. Although the Claimant may never have contemplated using a substitute, it seems to me that that is more a matter of lifestyle choice than necessity or reality. It does not seem to me that there is anything about the nature of this business that makes it inherently unlikely that an associate may wish to use a substitute. Individual investment managers make substantial sums of money (and the Claimant was no exception). They can well afford to take on assistants and may wish to do so to relieve themselves of some workload or to grow their business. While it is hard to imagine why any fully qualified or experienced investment manager would wish to be employed by the Claimant rather than contract directly with the Respondent, it is

relatively easy to contemplate a situation, perhaps as someone nears retirement, where an investment manager decides to bring on an apprentice, who can learn the business and the clients gradually, with a view to taking over fully when the investment manager retires. Indeed, it could be said that something like that is inherent in the agreement reached in the offer letter about the Claimant being able to hand his clients on to someone else on retirement.

67. It follows that I find the substitution provision in the contract to be a genuine one. As such, it is necessary in order to give it business efficacy to imply a term that consent to substitution is not to be unreasonably withheld (subject to confirmation of regulatory compliance). Given what I have already said about the reality of the substitution clause, it further follows that in my judgment this was not a contract that required personal service. As such, the Claimant is not a 'worker' within the statutory definition.

68. I have nonetheless gone on to consider whether the Respondent was by virtue of the contract in reality a client or customer of any profession or business undertaking carried on by the Claimant. In my judgment, it was. In reaching that conclusion I have in particular taken into account the following matters:-

    a. This is a relationship where the bargaining power at the outset was relatively equal. The Claimant viewed the process of deciding which platform to move his clients to as a 'beauty parade'. He chose the company offering the package that most appealed to him. While the Respondent characterised the offer to the Claimant as being one of him 'joining' the company, it was also advertising its services. It was the Claimant, after all, who was bringing the money to the party: £60m of funds under management from which they could both benefit. The Respondent offered in return an investment platform and administrative support.

    b. The relative equality is demonstrated by the standard offer of 50% share on fees. In the Claimant's case, he did not seek to negotiate that particular figure (although colleagues did), but he demonstrated his strength of bargaining power by obtaining from the Respondent a £275,000 loan on favourable terms and getting the Respondent to agree not to put up the fees tariff for his clients. The Claimant has asserted that ultimately the Respondent could have dictated that tariff, but I do not accept that. The offer letter expresses an intention to increase the fees, but there is nothing to suggest that this could be done without the Claimant's agreement. And, no doubt, the Claimant would enjoy significant power in any such negotiation too as (depending on the market position) he could probably threaten to take his clients elsewhere if he was unhappy with any increase the Respondent wished to make (or decided to impose, if that was how it worked out).

c. The fact that these relatively equal parties chose to characterise their relationship, and to arrange their tax affairs, on the basis that the Claimant was self-employed rather than employed is one to which weight should be attributed in the overall picture.

d. It is right that neither the Respondent nor the Claimant 'owned' the end clients, but that is true of almost all service businesses. The client at the end of the day is normally free to take their business elsewhere. But it is absolutely clear that the goodwill in those clients was that of the Claimant. He brought them to the Respondent, and he was free to take them away. Moreover, the goodwill was so much 'his' rather than the Respondent's that the parties were happy at the outset to agree that the Respondent would actually have to pay the Claimant for the goodwill in those clients on his retirement, which at the time of his moving to the Respondent was many, many years off. Despite the difficulties caused by the Respondent ceasing to certify him as 'fit and proper' at the end of his engagement, the Claimant has in fact taken the vast majority of the clients with him to Dowgate Capital Limited.

e. Although the Claimant was for the most part fully integrated into the Respondent, the fact that he was not subject to the Respondent's employee disciplinary policy, and was appraised only from a regulatory perspective rather than more broadly are elements that also point away from employee/worker status.

f. Further, the degree of integration of the Claimant into the Respondent's business was to a significant extent a matter of choice. If he had wished, he could under the contract have entered into agreements with other investment management platforms. The Claimant did not consider that practical, but there is no reason in principle it seems to me why that could not have been done. The Claimant did not appear to me to be particularly interested in growing his client base, confining himself during his time at the Respondent to picking up the occasional referral. Had he been looking to grow his client base more significantly, he might have wished to look at alternative platforms for clients. In any event, I see no reason to conclude that the possibility provided by the contract was entirely fictional any more than the substitution clause was.

g. Similarly, the facts that the Claimant predominantly saw himself as part of the Respondent and did not market himself independently was also in my judgment largely a matter of choice. If he had wished to, he could have marketed himself, whether independently or solely as agent for the Respondent. Any new clients obtained in that way, he would have retained for himself; even new clients obtained as the Respondent's agent fell to be treated as 'his' under the terms the parties had agreed.

h. The Claimant was free to choose his hours of work and holidays. The Respondent was only interested in what he produced by way of fees and commission, not when or where or even whether he was working.

i. The Claimant conducted his own business as well during normal business hours, investing on his own personal account to a substantial extent. While this may not represent such a significant amount of independent business as the post office 'workers' had in the *Wolstenholme* case, it is still the case that the Claimant was pursuing his own independent investment activities (albeit, it appears, largely through the Respondent's platform).

j. The Claimant bore all the financial risks of the business (so far as he was concerned). It was up to him to bring in and maintain the clients, and to develop an effective investment strategy. Of course, the Respondent would also suffer reduced earnings if he did not do a good job, but so far as the Claimant was concerned the risk was all his, and he assumed that risk voluntarily. He also bore financial responsibility for the consequences of errors and mistakes (even if made by an assistant or substitute rather than himself).

k. The Claimant bore many of his business expenses, including for home office equipment, insurance and even, for a period, part of the cost of a personal assistant employed by the Respondent. It is unusual for a worker or employee to contribute to office costs to that extent. Moreover, the Claimant's relative bargaining power is also illustrated with this example as it was at his instigation that the Respondent subsequently ceased re-charging the new assistant's salary.

l. I fully acknowledge that the fact that the Respondent, in the exercise of what it regarded as its regulatory responsibilities, could ultimately limit the investments that the Claimant made for his clients and even (at least temporarily) prevent him from continuing in business at all. I also take into account that a corollary of that was that the Respondent was also responsible for handling complaints about the Claimant by clients. These are very significant elements of control, but it was control that in the ordinary course of events would never be exercised. Provided he stayed within the regulatory framework, as it was understood and implemented by the Respondent, the Claimant enjoyed great freedom to exercise skill and entrepreneurship in growing his business and investing how he wished on his clients' account and his own. The control the Respondent exercised in these respects does not in my judgment negate the overall and dominant impression that the Claimant in this case was a relatively equal player to the Respondent and in business on his own account. In the event, despite the Respondent's actions, he has continued in business elsewhere, taking his clients with him.

69. Finally, it is clear from the *Wolstenholme* case that the fact that there is an agency relationship does not preclude the putative employer being in the position of a client. In this case, taking into account all the factors above, I find the Respondent was in the position of client or customer to the Claimant. The Claimant brought end clients and their savings and investments to the Respondent's platform and thus earned fees for the Respondent. The Respondent was a client or customer of the Claimant who was in business on his own account.

Overall conclusion

70. In my judgment the Claimant was not therefore a worker within the meaning of s 230(3)(b) of the ERA 1996 and reg 2(1)(b) of the WTR 1998.

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Employment Judge Stout

28 March 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

29/03/2022.

FOR THE TRIBUNAL OFFICE