# EMPLOYMENT TRIBUNALS

**Claimant:** Ms A Beenham

**Respondent:** Admedia Solutions Limited

**HELD AT:** Manchester **ON:** 29th March 2022 and in Chambers on 31st March 2022

**BEFORE:** Employment Judge Anderson
(sitting alone) via CVP

**REPRESENTATION:**
**Claimant:** Mr Rogers Solicitor
**Respondent:** Miss L Quigley of Counsel

# RESERVED JUDGMENT

1. The Claimant was not an employee of the Respondent. Her claims of unfair dismissal, failure to provide written reasons for dismissal and breach of contract (notice pay) are not well founded and dismissed.

2. The Claimant was a worker providing services personally to the Respondent within the meaning of s.230(3)(b) of the Employment Rights Act 1996.

3. The remainder of the Claimant's claims, unlawful deduction from wages, failure to provide written terms and conditions, failure to pay holiday pay, failure to pay National Minimum Wage are dismissed due to illegality.

Employment Judge Anderson
4th April 2022

JUDGMENT SENT TO THE PARTIES ON
5 April 2022
FOR THE TRIBUNAL OFFICE

Notes

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

# Reasons

## Introduction

1. This is my Reserved Judgment following the one day Preliminary Hearing that took place on the 29th March 2022.

2. The Claimant, Mrs Ann Beenham by an ET 1 dated 26th November 2021 makes complaints of unfair dismissal, failure to provide written reasons for dismissal, failure to pay notice pay, unlawful deductions from wages, failure to pay national minimum wage, failure to provide a written statement of terms and conditions and failure to pay holiday pay. The Respondent by its ET 3 denies all of these claims.

3. This matter comes before the Tribunal by way of a Preliminary Hearing to determine the following issues:
   a. Whether the Claimant was an employee of the Respondent
   b. Whether the Claimant was a worker
   c. Whether the Claimant was in self-employment.

4. The parties agreed that the same test was to be applied in respect of employment status over the different claims that were being made and were further agreed that the same test was to be applied In respect of worker status over the different claims that were being made.

## Procedural Matters

5. There were some outstanding points to deal with at the outset of the case. The first point related to the late admission of a document that the Claimant contended amounted to a script that she was required to use. The document was referred to in witness evidence. The veracity of the document was in contention between the parties. I took the view that the document should be admitted as any prejudice was minimal and the parties were capable of dealing with the point in cross examination.

6. The second point was that the Claimant sought to rely upon the witness statement of Ms Ormerod. The date for exchange of witness statements was the 4th March and this statement was disclosed on the 22nd March.

7. I did not permit the Claimant to adduce the late witness statement. The Respondents position was that it would wish to cross-examine Ms Ormerod in respect of both specific matters and general credibility, all of which would require the disclosure of and admission of extra documents. I accepted that the Respondent had identified genuine prejudice arising from the late disclosure. I further accepted that admission of the statement put the hearing at risk of going

part heard. The hearing was listed for one day, the bundle was in excess of 600 pages and three witnesses needed to be cross examined in addition to submissions in respect of employment status.

8. I accepted that there would be prejudice to the Claimant in terms of not being able to rely upon a potentially corroborating witness statement. The Claimants explanation for the late disclosure of the statement was that she was not sure that Ms Ormerord would be available until a late stage in the proceedings. I considered this to be somewhat opaque and I pressed for further detail and none was forthcoming. Weighing up all these matters, I decided not to admit the statement.

9. Following the above preliminary points, the parties representatives cooperated in agreeing a timetable to ensure that this matter was heard within the day. The parties subsequently kept to this timetable and the hearing concluded just before 16.30 with Judgment being reserved.

10. Subject to the disputed additional document, there was a joint bundle agreed between the parties. The Claimant supplied a witness statement on her own behalf and was cross-examined. The two Directors of the Respondent Mr Declan Bradley & Mrs Deborah Bradley gave evidence on behalf of the Respondent and were cross-examined.

**Findings of Fact**

11. In respect of each of the witnesses, I formed the view that on occasion each witness descended into giving the answer that they believed would favour their respective case. Each witness needed to be pressed on occasion to give factual answers that would assist the Tribunal. As a result, I treated the oral evidence with a degree of scepticism and looked to documents to assist me wherever possible. In relation to the Claimants evidence, there was the additional factor of her explanation for failing to complete tax returns, which also relates to credibility and I deal with that point in more detail below.

12. On the balance of probabilities, I make the following findings of fact.

13. The Claimant's engagement with the Respondent began on the 29th May 2018. Mr and Mrs Bradley were customers of the Bistro which the Claimant owned and worked in with her husband. The Claimant became aware that the Respondent was advertising for a telesales role and having previous experience in this field, she considered that this would be a way of supplementing her income from the Bistro which was having some financial troubles.

14. At the outset, the parties agreed that the relationship would be one of self-employment. No written contract was entered into. I accept the Respondents stated reason for this which was that this was a new business and initially it did not know how many hours work were sustainable or how useful the role would be.

15. There was no discussion of the issue of substitution either orally or in writing. This was not in the contemplation of the parties at the time and it was intended and by extension a requirement, that the Claimant undertake the work personally. That remained in place throughout the entire period of this engagement.

16. There was no paid holiday and no pension contributions. The Claimant was expressly paid on a gross basis.

17. The Claimant was paid a 'retainer' of £50 per day, equating to £250 per week. The Claimant was then paid commission of 10% based upon the sales that she would make.

18. The Claimant would work on a roughly 9-5 basis, with some leeway in terms of start and finish times.

19. The Claimant would obtain potential leads though a mixture of her own research and them being provided by the Respondent. She would then telephone those leads. Once a potential lead had been contacted and a potential relationship established, the lead would be referred to Mr Bradley to follow up, who would visit personally on a Tuesday, Wednesday or a Thursday.

20. There was a script of sorts in the sense that the Claimant had observed Mr Bradley make calls and that notes were taken to enable there to be some structure to future calls. It was in both parties interest for the Claimant to make effective calls.

21. There is a dispute between the parties as to whether or not the Respondent initially provided the Claimant with a mobile telephone. The parties agree that around 16 months into the engagement a phone was provided, the Respondent describing this as a work phone for use by anyone. I find that the Claimant used her own telephone initially. I consider that this dispute could have been resolved by the disclosure of telephone records or other similar corroborating evidence. The Claimant was making a lot of calls during this period and her phone records would either evidence that fact or dispute it. The absence of those records or any real explanation as to why we do not have these records leads me to conclude that the Claimant initially used her own phone.

22. The Claimant would largely work from the Respondents premises, which was the home of the Bradleys. She would also, less frequently work from home. When she worked from home she would use her daughters lap top. Whilst some of the job involved messages between herself and the Bradleys, the main element of the role was the Claimant being on the telephone with potential leads.

23. Mr Bradley would usually be present in the house on a Monday and Friday and Mrs Bradley would be present most days.

24. From the outset, the Claimant was aware of the fact that she was being paid on a gross basis. At the bottom of each commission document it is stated "Please note you are responsible for all Tax and national insurance on any monies received."

25. At no time did the Claimant complete a tax return and at no time did she account to the revenue for any of the sums that she was receiving. Tax returns are due by January at the latest and it follows that there are tax returns for the tax years 18-19, 19-20 and 20-21 that have not been completed.

26. When asked, the Claimants explanation for this was that she 'just didn't'. I find that the Claimant was aware of the need to submit a tax return and that she has not been forthcoming about the reasons for the failure to file a tax return.

27. At paragraph 29 of the Claimants witness statement she says that she didn't register for self-employment as that wasn't a representation of her true status. I reject this assertion on the facts. It doesn't accord with the Claimants oral evidence, furthermore given that the Claimant was completing the CEST tool in 2020, that doesn't explain the Claimants inaction to that date. At that point in time, there was significant tax outstanding to the revenue. In any event, I do not consider this reasoning to be sustainable in light of the failure by the Claimant from commencement of the engagement to the date of the hearing to engage with HMRC in any way in terms of tax liability or completing a tax return.

28. The parties relationship continued without any substantial events of note until March 2020. The impact of COVID and lockdown was to significantly reduce demand for the Respondents business and as a result there was no work to do.

29. The Claimant was not paid her £50 retainer. She did not earn commission because she was not making any sales. There was a suggestion towards the latter part of the Claimants case that there was an initial challenge to this. I do not find that there was so. The most consistent evidence based on the Claimant and the Respondents oral evidence that the first time the Claimant began to question the situation was around August 2020.

30. The reason why the Claimant began to question the arrangement was the financial impact of coronavirus. The issue was raised only briefly and informally.

31. In this initial 2020 period, the Claimant did not raise a grievance, commence early conciliation or make a claim to the Employment Tribunal. For all purposes, the parties over this initial period acted consistently with the label of self-employment that they had both attributed to the relationship.

32. The Claimant received no income from the Respondent between 1st April 2020 to 27th August 2020 and between 5th November 2020 to 21st April 2021. This accords with the varying degrees of lockdown that the country was in and the varying availability of work for the Claimant to undertake. In short, when the level of work varied, so did the Claimants work and remuneration.

33. The Claimant raised the issue of her employment status in more explicit terms in May/June 2021. This caused the Respondent to speak to its accountant which led to a slight amending of the wording of the commission statements that were received by the Claimant.

34. Mrs Bradley and the Claimant would sit down with each commission document to go through the figures to ensure the Claimant was being paid correctly. It was when going through the 9th June 21 commission document that the Respondent became aware that the Claimant had not registered as self-employed. I find that at no prior time was the Respondent aware of the fact that the Claimant had not been accounting to the revenue.

35. On the 31st August 2021, things came to a head. The Claimant had emailed the Bradleys regarding her employment status and it was indicated that this was to be discussed on their return from holiday on the 31st.

36. The result of that meeting was that the Claimant was subsequently offered a draft employment contract. The parties continued to exchange correspondence, with the Claimant ultimately rejecting the wording of that contract over a number of matters.

37. The parties continued to exchange correspondence, however the Claimant did not undertake further work for the Respondent. The Claimant commenced Early Conciliation on the 28th September 2021.

## The Law

38. Section 230 of the Employment Rights Act 1996 provides:

**Employees, workers etc.**

(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.

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

(5)In this Act "employment"—

(a)in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b)in relation to a worker, means employment under his contract; and "employed" shall be construed accordingly.

39. In Autoclenz v Belcher & Others [2011] IRLR 820 the Supreme Court required Tribunals to look at the reality of the situation. In his Judgment, Lord Clarke stated that "the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and 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. This may be described as a purposive approach to the problem"

40. An essential requirement of any employment relationship is mutuality of obligation: Carmichael v National Power PLC [2000] IRLR 43. The employer is obliged to make work available for the employee and the employee is obliged to undertake that work. Furthermore, it is permissible to take into account the subsequent conduct of the parties as evidence of what the parties thought they had agreed as part of the contract.

41. In respect of illegality, there are a range of authorities as to the correct approach. Some relate to employment disputes, others do not.

42. The leading non-employment case is that of Patel v Mirza [2016] UKCS 42 in which Lord Toulson at para 99 noted
"Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand."

43. At para 120, it was further held:
"The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

44. There are specific employment authorities covering illegality. In Colen v Celebran [2003] EWCA Civ 1676 [2004] IRLR 210 At para 24 Waller LJ summarised the previous authorities and held:

"The above passages demonstrate that an analysis needs to be done as to what the party's intentions were from time to time. If the contract was unlawful at its formation or if there was an intention to perform the contract unlawfully as at the date of the contract, then the contract will be unenforceable. If at the date of the contract the contract was perfectly lawful and it was intended to perform it lawfully, the effect of some act of illegal performance is not automatically to render the contract unenforceable. If the contract is ultimately performed illegally and the party seeking to enforce takes part in the illegality, that may render the contract unenforceable at his instigation. But not every act of illegality in performance even participated in by the enforcer, will have that effect. If the person seeking to enforce the contract has to rely on his illegal

action in order to succeed then the court will not assist him. But if he does not have to do so, then in my view the question is whether the method of performance chosen and the degree of participation in that illegal performance is such as to "turn the contract into an illegal contract" (see the dictum of Jenkins LJ in B and B Viennese Fashions v Losane [1952] 1 All E R 909 at 913 cited by Scarman LJ in Ashmore Benson Ltd VA v Dawson Ltd [1973] 1 WLR 828 at 836, and the language of para 34 in Hall quoted above). The decisions cited in the paragraphs 30 and 31 in Hall reflect, I suggest, the principle that not every illegality in performance will turn a contract into an illegal contract; on one side of the line appears to be Ashmore Benson Ltd v AV Dawson Ltd and on the other St John Shipping Corporation v Joseph Rank Ltd [1957] 1 QB 267. In the latter case the court was concerned with a breach of statute, and performance in breach of that statute. The question in relation to performance, it asked itself, was whether the statute intended to prohibit the type of contract sued on, and held on the construction of the relevant statute that it did not. In the former case the citation by Scarman LJ of the dictum of Jenkins LJ suggests that where illegality by virtue of the common law is concerned the question is whether the common law would say that a contract has by its illegal performance been turned into an illegal contract. Of course much may depend on the question whether the party seeking to enforce the contract needs to rely on the illegal performance in order to succeed."

45. Hounga v Allen [2014] IRLR 811 identified that there was a different approach between employment rights and Equality Act claims. Equality Act claims are founded in tort. The case before me does not involve a tort.

46. The applicability of Patel to employment cases was considered in Robinson v al Qasimi [2021] EWCA CIV 862 [2021] IRLR 774. The facts of Robinson are important. The Claimant began working for the Respondent in 2007. Her letter of appointment made clear that she would be responsible for paying her own tax and national insurance. In 2014 the Respondent became aware that the Claimant had not paid any tax to HMRC. From the 1st July 2014, the Respondent deducted tax equivalent amounts from her pay and held them so that they would be available to payment to HMRC if necessary. The Tribunal found that her unfair and wrongful dismissal claims failed for illegality. This was overturned by the EAT on the ground that whilst the Claimant would have been performing her contract illegally between 2007 and July 2014 and not entitled to rely on that period, by the time of her dismissal, she was not performing her contract illegally and could rely on that period. The Court of Appeal upheld the Judgment of the EAT.

**Submissions**

47. The Respondent went first in submissions and the Claimant responded.

48. The Respondent submits that this is a case of illegality, that it must be dealt with at this stage in the proceedings and that the Claimants failure to complete

a tax return and pay tax directly relates to the contract but also relates to the proceedings.

49. The Respondent submitted that the Claimant was responsible for a fraud on the revenue, that the position was exceptionally serious and for this claim to continue in any form would offend the conscience of the Tribunal.

50. The Respondent started with the basic proposition that "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." Per Lord Mansfield in Holman v Johnson (1670).

51. The Respondent principally referred me to Patel v Mirza [2016] UKSC 42 and in particular the three factors identified above at para 120 of the Judgment.

52. In respect of employment status, the Respondent submits that the facts demonstrate mutuality was not present. In terms of control, that was largely a dispute of fact between the parties as to how the Claimant performed her role.

53. The Respondent accepted that in light of the oral evidence, there was little that could be said on the issue of substitution or personal service. The Respondent submitted that the issue of the Claimant being in business on her own account was still live, but accepted that there was no evidence of a wider business being operated by the Claimant or similar.

54. The Claimant submitted a skeleton argument on the morning of the hearing. It was the Claimants submission that mutuality was present as was control, personal service and integration.

55. In respect of illegality, the Claimant did not take issue with the authorities relied upon by the Respondent. It was submitted however that the Claimants conduct did not render the contract between the parties unlawful and that tax and the employment contract were separate concepts.

## Conclusions

56. In respect of employment status, there are a number of relevant factors which lend themselves to the Claimant potentially being an employee. It is clear that the Claimant was subject to a degree of control by the Respondent. The Respondent would set the parameters of her work and whilst there may not have been strict monitoring of the Claimant, it was in the interests of the Respondent to know what the Claimant was doing and whether she was doing it effectively. The Claimant was generating effective leads for the Respondent and the Respondent did not need to micro manage the Claimant who could be left to her own devices in generating leads.

57. The Claimant was required to perform the work personally. There was no right of substitution and indeed the Claimant did perform all of her work personally throughout the engagement.

58. The Claimant was also integrated into the business of the Respondent, working alongside the Directors and was an important cog in the machine, generating leads for the business.

59. However, there are opposing factors. Both parties are clear that at the outset of the relationship, the intention was for the relationship to be one of self-employment. It is an accepted fact that this was the contractual intention of the parties. Of course, the label that the parties put on a relationship is far from determinative.

60. Upon lockdown occurring and with the subsequent economic inactivity that followed that, the conduct of the parties evidences a relationship in which mutuality of obligation is not present. For a sustained period either due to a lack of work or other factors, the Respondent does not provide work to the Claimant and this for a number of months is the Claimants accepted position. There are multiple exchanges of text messages which clearly evidence the parties understanding of and acceptance of the situation.

61. The Claimants subsequent challenging of this situation begins lightly in August 2020 and then only with a degree of genuine challenge in 2021. Given that work ceases end of March/start of April 2020, a significant amount of time expires.

62. As noted in Carmichael (above), mutuality of obligation is an essential element of employee status. The absence of mutuality means a claim must fail.

63. I have asked myself whether or not it would be wrong to rely upon the parties conduct during the lockdown period given that it was an extraordinary event, but I have decided that it is proper to take this matter into account. This is a case in which the parties agree on their original intention when entering into the terms and there is evidence of their subsequent conduct being consistent with that. It would be wrong to exclude that relevant evidence.

64. I therefore find that the Claimant was not an employee of the Respondent for the purposes of s.230 ERA 1996. There was an absence of mutuality of obligation.

65. In the alternative, If I am wrong regarding the above and mutuality has been established through the conduct of the parties in the period prior to lockdown, then I find in the alternative that mutuality did not exist between the parties from the 1st April 2020. The post 1st April 2020 situation persisted over a long

period and is incompatible with the existence of mutuality of obligation and therefore employment.

66. At this point I would pause to note that I am not asked to deal with the issues of continuity of employment or length of service as part of this Preliminary Hearing. If I am wrong in respect of this conclusion regarding employment status, these points would remain as additional hurdles to the Claimant succeeding in her complaint of unfair dismissal.

67. In respect of worker status, I find that the Claimant was required to provide personal service. There was no evidence to indicate otherwise and the facts that I have found above point all in one direction on this point.

68. I do not find that the Claimant was in business on her own account. There was little, if any financial risk. There were no other clients, there was no general advertising of her services or suggestion that she could provide services elsewhere. This was work she was required to perform personally for one company.

69. I therefore find that the Claimant was a worker within the meaning of s.230(3)(b) ERA 1996.

70. However, that is not the end of the matter. During the course of the hearing, it became apparent that facts of this case require consideration of the issue of illegality. As noted above, the Claimants evidence was that she had not completed any tax returns in respect of her income from the Respondent nor had she accounted to the revenue in any way or taken any steps in any way to do so.

71. I consider that the parties have had sufficient time to consider this matter. First of all, the issue is raised in the inter parties correspondence when the Respondents first became aware of the Claimant not completing tax returns. Secondly, the parties had fair warning based upon the Claimants evidence in the morning that this was a point that may need addressing in submissions. Thirdly, I don't see how it is possible for the parties to have got this far in the litigation without this issue being prominent or at least an aspect of their consideration of the factual matrix. The tax returns would be relevant to the Claimants claims and her schedule of loss and the tax position is a normal element of cross-examination of both parties in a status case.

72. I consider this to be a serious matter. The requirement to pay tax is part of the common ties that bind us as a society. Amongst other matters, tax funds public services.

73. This is not a case in which confusion over employment status has resulted in errors being made in reporting to the revenue. The facts in this case are more stark. I would note the following:

    a. Each of the Claimants commission documents explicitly made clear that she would need to account to the revenue.
    b. The Claimant was content with her employment status being labelled as self-employed. She only questioned this following COVID and after a significant amount of time into COVID. The period in which the Claimant has not completed a tax return includes the tax year 2018-2019, entirely pre-covid and when from her perspective, there was no employment status issue.
    c. This hasn't arisen as a result of the employment status issue. It is solely attributable to the choice of the Claimant.
    d. This occurred over a long period, at least three years.
    e. No steps have been taken to account to the revenue retrospectively
    f. The scale of the loss to the revenue is likely to be in substantial. It is not de minimis or technical in nature.

74. The Claimant's reason for not completing a tax return was that she 'just didn't do it'. No further oral explanation was advanced beyond this phrase, which was repeated as the Claimant was pressed.

75. I would also note that this is not a case in which the Claimant is a vulnerable individual being placed in a difficult position or where the unequal bargaining power has resulted in this state of affairs. Rather, the Claimant received sums on a gross basis over a sustained period and chose not to complete a tax return or pay tax.

76. Because the Respondent was unaware that the Claimant was not accounting to the revenue, until at least June 2021, this is not a case in which the Respondent has conspired to be a party to a fraud on the revenue. Nor is it a case in which arises from the incorrect labelling of self-employment. The Claimant was aware that the revenue had not received sums that it was otherwise entitled to.

77. I have raised with the parties and considered whether the finding on status could alter the position. i.e. under the Income Tax (Earnings and Pensions) Act 2003 could the change in status render the Respondent liable for the tax, albeit with a potential claim in restitution from the Claimant? I have rejected this approach for a number of reasons. This scenario doesn't alter the knowledge of the Claimant for which she is culpable and in respect of which she is the key beneficiary to date. Nor was there any discussion or approach to the revenue to at least ascertain or deal with the tax issue.

78. Many of the authorities relate to factual scenarios in which one or both of the parties have engaged in tax avoidance or through the incorrect labelling of the relationship have not paid tax that was due. Colen for example was a case about sharing commission so as to reduce tax. I find that the present case is more serious than this.

79. Given that the Respondent was unaware until a late stage in the relationship of the tax issue, this is not a case in which the contractual relationship is illegal due to the conduct of both parties. Furthermore & crucially, the authorities above make clear that the mere existence of the illegal act does not render the contract unenforceable.

80. Having found that the Claimant knew of the illegality and was the participant in the illegality, the next point to consider is the extent to which the Claimant needs to rely upon the illegality in order to succeed. This is a nuanced point, but I have concluded that the following factors are relevant:

    a. The Claimants tax position is relevant to the question of status. It is a point to be cross-examined on. I do not in any way suggest it is determinative of status, but it is a factor.
    b. Disclosure of tax records are relevant to both issues of employment status and the calculation of remedy.
    c. The Claimants schedule of lossis not the most straightforward document. However, it is discernible that in parts of her schedule of loss she is seeking to recover her losses based upon the prior calculations that have not been accounted to the revenue. At the end of the document, it also states:

    > "In the event that the Claimant is awarded in excess of £30,000 as "compensation for loss of employment", she will invite the Tribunal to gross up any excess over £30,000 to ensure that she is effectively not penalised/taxed twice, based on any calculation of her losses on a net basis."

81. I have also considered the extent to which this is too pious an approach, recognising that employment rights are important rights, which people in a variety of sometimes difficult or extreme situations need to rely upon as part of what makes a fair and just society. However, I have decided that the deliberate and sustained non payment of tax is solely the fault of the Claimant and goes beyond mere avoidance.

82. Looking at Patel (above), I would note:
    a. Underlying purpose – the underlying purpose is tax. That is to say that people pay tax on income earned and that the tax is received to fund the state in its activities, such as public services, defence or welfare. That purpose will be enhanced by the denial of the claim in that the Claimant

will not be able to rely upon the illegal conduct in order to receive a benefit in the form of a Tribunal award.

b. Public policy – There are competing public policies at play. Employment Rights are important and are for a range of people, including those who are culpable and not just model citizens. An individual is not always in an equal bargaining position with their putative employer and these statutory rights are an important protection. Competing against that is the underlying public policy of not participating in or endorsing a fraud on the revenue.
c. Whether denial of the claim would be proportionate – It is the deliberate and sustained nature of the illegality that is the problem in this case. This Tribunal has encountered many status cases in which parties have made errors regarding taxation or labelled the employment relationship with a hope of paying less tax. The present case goes far beyond that. There isn't an alternative approach that would be more proportionate than dismissing the claim and yet allow the illegal conduct to be disregarded.

83. In light of the above, I have asked myself whether I can therefore separate out the illegality from the claims that are before the Tribunal. I have concluded that whilst this may be possible in other cases, on these specific facts, whether it relates to the question of status or the quantification of remedy that it ultimately sought, that I cannot.

84. This is a case in which the facts are similar to the 2007 to 2014 period in Robinson v Al Qasimi (Above). This is the period both the EAT and the Court of Appeal considered to be the illegal period. The distinguishing factor in the present case is that the latter period in Robinson, which allowed the EAT and the Court of Appeal to find for the Claimant is not present. Severability is not possible, because there is no distinct period.

85. Finally, I have also taken a step back and looked at the overall picture. Given the lack of vulnerability of the Claimant, the fact that this is not a discrimination case and the fact that I have found that the illegality was deliberate, I have concluded that it would essentially offend the conscience of the Tribunal if I were to allow the claims to proceed further. The Tribunal cannot endorse illegal conduct and if the claims were to proceed beyond today, the Tribunal would be so doing.

Employment Judge Anderson
4th April 2022