EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Carlish	v	Slough Borough Council

Heard at: Watford Tribunal (via CVP) **On**: 27-28 June 2022

Before: Employment Judge Smeaton (sitting alone)

Appearances
For the Claimant: In person
For the Respondent: Mr Gray-Jones (counsel)

RESERVED JUDGMENT

1. The Tribunal does not have jurisdiction to hear the Claimant's claims for unfair dismissal (including automatic unfair dismissal), notice pay, redundancy pay, unlawful deductions from wages, holiday pay and failure to provide payslips because the Claimant was not an employee or worker of the Respondent at the material time. Those claims are struck out.

2. The Tribunal does not have jurisdiction to hear the Claimant's claims of discrimination after 12 March 2018 because the Claimant was not an employee of the Respondent or a contract worker within the meaning of the Equality Act 2010 from that point onwards. Those claims are struck out.

3. The Claimant was a contract worker within the meaning of s.41 Equality Act 2010 during the period 14 April 2017 and 12 March 2018 (inclusive). Any claims of discrimination said to have occurred during that period are prima facie out of time. The Tribunal will only have jurisdiction to consider those claim if time is extended.

REASONS

Introduction

1. This is the reserved judgment of the Tribunal. The case was listed for an Open Preliminary Hearing via CVP on 27 and 28 June 2022 to determine the Claimant's employment status and to make case management orders. The judgment was reserved due to time constraints on the day of the hearing.

2. The Claimant, Mr Carlish, represented himself. The Respondent was represented by Mr Gray-Jones (counsel).

The hearing

3. Mr Carlish has a diagnosis of Parkinsonism and on some occasions during the hearing, required assistance from his wife, Mrs Carlish. Mrs Carlish's assistance was limited to reading out questions prepared by Mr Carlish and assisting him in locating documents in the bundle. I am grateful to her for her help.

4. I was provided with a bundle of 285 pages and four witness statements (two from Mr Carlish and two on behalf of the Respondent).

5. I heard evidence from Mr Carlish and an ex-colleague of his, Mr Fregredo, on his behalf. I also heard evidence from Ms Lallian, the Respondent's Neighbourhood Contracts and Business Services manager, and Ms Jones, Senior Payroll Coordinator at Client Directs Limited ('CDL').

6. CDL, was originally a respondent to this claim. In its ET3 and Grounds of Resistance, CDL was said to be a limited company offering payroll and invoice services to clients, including the Respondent, and their temporary workers. It is a wholly-owned subsidiary of Matrix SCM ('Matrix') which contracted with the Respondent to manage the provision of temporary workers. Mr Carlish has withdrawn his claim against CDL and it is no longer a respondent to the claim.

7. At the end of the hearing, both parties made closing submissions. Mr Gray-Jones relied on a written skeleton argument. I reserved my decision, which I now give.

The claim

8. Mr Carlish worked for the Respondent, Slough Borough Council ('SBC'), from April 2017 until some point in January or February 2020. The decision to end his engagement was that of the Respondent. The reasons for that decision are in dispute but are not relevant to this judgment.

9. On 26 June 2020, following a period of early conciliation ('EC') commencing on 22 February 2022, Mr Carlish lodged a claim with the Tribunal. The Particulars of Claim ('PoC') are unclear but appear to cover claims of:

(a) automatic unfair dismissal for raising a protected disclosure (s.103A Employment Rights Act 1996 ('ERA 1996'));
(b) direct age and disability discrimination (s. 13 Equality Act 2010 ('EqA 2010'));
(c) victimisation (s.27 EqA 2010);
(d) harassment related to age and/or disability (s.26 EqA 2010);
(e) failure to provide itemised payslips; and
(f) unpaid notice pay, holiday pay, arrears of pay, redundancy pay and other payments.

10. The claims were initially brought against another three respondents (CDL, Mr Griffiths and Ms Lallian). They were subsequently dismissed by the Tribunal on withdrawal. SBC (the only remaining Respondent) has accepted that it is liable for any unlawful actions found in this claim to have been committed by Mr Griffiths or Ms Lallian (who were employees of SBC at the material time), that it will meet in full any award made against either of them, and that it will use its best endeavours to call them as witnesses at any final hearing.

The issues

11. Following a preliminary hearing before Employment Judge Lewis on 29 October 2021, this preliminary hearing was listed to determine Mr Carlish's employment status and accordingly which of his claims, if any, may proceed to a final hearing. The claims were split into three categories:

(1) Claims which depend on Mr Carlish being an employee of the Respondent in accordance with s.230(1) ERA 1996 (unfair dismissal, notice pay and redundancy pay);
(2) Claims which depend on Mr Carlish being a worker for the Respondent in accordance with s.230(3) ERA 1996 (unlawful deductions from wages, including statutory sick pay, unpaid holiday pay and failure to provide itemised payslips); and
(3) Claims which depend on Mr Carlish being an employee or a contract worker in accordance with s.83 or s.41 EqA 2010 (discrimination, victimisation and harassment).

12. Case management issues were also directed to be considered, if the claim proceeded.

13. In advance of this hearing, the Respondent was ordered to notify Mr Carlish and the Tribunal whether it admits that, at the material time, Mr Carlish was in a relationship with it to which s.41 EqA 2010 applies. The Respondent confirmed on 19 November 2021 that it denies that s.41 EqA 2010 applies.

The law

14. The definitions of 'employee' and 'worker' for claims other than discrimination claims, are set out in s.230 of the ERA 1996 as follows (so far as is relevant);

Section 230. ***Employees, workers etc.***

(1) In this Act "employee" means an individual who has entered into or works under (or, where there 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.

15. The definition of employment in the EqA 2010 (relevant to claims of discrimination, victimisation and harassment) is provided for in s.83(2) EqA 2010 as following:

s.83. ***Interpretation and exceptions***
…
(2) "Employment" means –
(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.

16. Notwithstanding the difference in wording between s.230(3) ERA 1996 and s.83(2) EqA 2010, there is no practical distinction between the two concepts and the same test applies when considering whether an individual is a worker under the ERA 1996 or an employee under the EqA 2010 (*Pimlico Plumbers Ltd v Smith* [2018] ICR 1511, at [13-15]).

17. Leaving aside the question of contract workers under the EqA 2010 (dealt with below), employment law recognises three types of people:

(1) Those employed under a contract of employment
(2) Those self-employed people who are in business on their own account and undertake work for their clients or customers; and
(3) An intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else (*Uber BV and others v Aslam and others* 2021] IR 657, per Lord Leggatt at [38]).

18. Employees enjoy the greatest level of employment protection. All employees are workers but not all workers are employees. Accordingly, other categories need only be considered if the individual is not an employee.

19. In considering tripartite relationships between A, B and C, in which C does work for A but there is no express contract, written or otherwise, between A and C and A and B have a contract under which B agrees to supply C to A to do work, the test for where there is an implied contract directly between A and C is set out in *James v Greenwich LBC* [2008] ICR 545. Such a contract between the worker and end user can only be implied if it is necessary to do so '*in order to give a business reality to the transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist'*.

20. The burden is on the claimant to establish such an implied contract. The mere fact that an agency worker is integrated into the end user's business does not make it necessary to do so (*Tilsom v Alstom Transport* [2011] ICR 169). It will be rare for an employment contract to be implied where agency arrangements are genuine and, when implemented, accurately represent the actual relationship between the parties. If any such contract is to be implied, there must have been, subsequent to the relationship commencing, some words or conduct that entitle the tribunal to conclude that the agency arrangements no longer adequately reflect how the work is actually being performed. The mere fact that an agency worker has worked for a particular client for a considerable period of time does not justify the implication of a contract between the parties.

21. An express agreement that a relationship is between limited companies is a relevant factor in determining employment status, but the fact that the worker has formed a limited company and provides services through that company does not dictate employment status. If the true relationship is one of employment under a contract of service, putting a different label on it makes no difference (*Catamaran Cruisers Ltd v Williams and others* [1994] IRLR 386, EAT).

22. If a contract between the purported employee and purported employer does exist, the Tribunal will have to determine what the nature of that contract was.

23. In determining employment/worker status, the correct approach is to focus on the reality of the relationship in order to determine what was the true agreement between the parties. Terms and conditions in contracts are often dictated by employers rather than being the product of negotiation between parties of equal bargaining power, so the Tribunal should look beyond the simple written terms of the contract.

24. There is no single test to be applied when determining employment status. The most useful starting point is the 'multiple test' set out in the judgment of Mr Justice MacKenna in *Ready Mixed Concrete (South East Ltd) v Minister of Pensions and National Insurance* [1968] 1 All ER 433, QBD and confirmed by the Supreme Court in *Autoclenz Ltd v Belcher and others* [2011] ICR 1157, SC as follows:

- *did the worker agree to provide his or her own work and skill in return for remuneration?*
- *did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?*
- *were the other provisions of the contract consistent with its being a contract of service?*

25. Without the irreducible minimum of control, personal performance and mutuality of obligation, it is all but impossible for a contract of service (employment) to exist.

26. 'Control' is a matter of degree. The question is whether there is sufficient control to make the relationship one of employer and employee. An absence of day-to-day control does not preclude an employment relationship. The question is whether the employer has, to a sufficient degree, a contractual right of control over the individual (see *White and another v Troutbeck SA* [2013] IRLR 949, CA). Control requires that ultimately authority over the purported employee in the performance of his or her work rests wit the employer.

27. 'Mutuality of obligation' means that there is an obligation on the employer to provide work and pay a wage or salary, and a corresponding obligation on the employee to accept and perform the work offered. Even in circumstances where an individual is subject to a large degree of control as to how the work is done, an absence of mutuality of obligation will act as a bar to employee status (*Cheng Yuen v Royal Hong Kong Golf Club* [1998] ICR 131, PC). In the absence of an express obligation on either party, it can be implied.

28. In the case of global/umbrella contracts, the questions for the Tribunal will be whether there is an obligation to provide and perform any work that becomes available, and whether that obligation continues during non-working periods. A casual worker who does not benefit from the mutuality of obligation necessary to establish a 'global' contract of employment, may nevertheless be able to establish mutuality of obligation within a specific engagement entered into as part of that relationship, i.e. it is possible to establish that a single contract within a relationship gives rise to employee status during the duration of that contract (*McMeechan v Secretary of State for Employment* [1997] ICR 549, CA) (see also *Cornwall County Council v Prater* [2006] ICR 731, CA).

29. 'Personal service' demands that the employee must have agreed to provide his or her own work and skill in exchange for a wage of other remuneration. Consideration of this factor tends to focus on substitution clauses. Where a substitution clause does exist in a contract, the Tribunal should ask whether there was a true right of substitution and, if so, the extent of that right. A limited or occasional power of delegation is not necessarily inconsistent with a contract of services.

30. Other factors potentially relevant to employee status include:

(a) financial considerations: a person in business on his or her own account will carry the financial risks of that business
(b) monetary benefits: the provision of benefits such as sick pay, holiday pay and pensions suggests a contract of service
(c) tools: the provision by the worker of his or her own tools, equipment and premises tends to point towards self-employment
(d) tax and national insurance: deductions at source tend to point to employment; gross payments suggest self-employment
(e) organisational integration: i.e. the degree to which the individual is integrated into the organisation, including whether they wear a uniform or are subject to the organisation's disciplinary and grievance process
(f) intentions of parties: the parties' stated intentions may be a relevant factor but the Tribunal should always look at the substance of the matter, irrespective of what the parties agree.

31. An individual who is not an employee, may nevertheless be a worker. Determining whether an individual is a worker pursuant to s.230(3)(b) ERA 1996 requires a structured application of the statutory test:

(1) The individual (A) must have entered into or work under a contract (or possibly, in limited circumstances, some other agreement) with the other person (B); and
(2) A must have agreed to personally perform some work or services for B.

32. A will be excluded from being a worker if he or she carried on a profession or business undertaking and B is a client or customer of A's by virtue of the contract (*Sejpal v Rodericks Dental Ltd* 2022] EAT 91.

33. In contrast to an employee, a worker under s.230(3)(b) ERA 1996 is comprehensively defined in the legislation and there can be no substitution for applying the words of the statute to the facts of the case (*Bates van Winkelhof v Clyde & Co LLP and another, Public Concern at Work intervening)* [2014] ICR 730, SC per Lady Hale).

34. Those who are not employees or workers within the meaning of the ERA or the EqA 2010 may nevertheless have some protection under the EqA 2010 against discrimination if they come within the definition of 'contract workers'. The relevant definitions are found within s.41 EqA 2010:

S.41 Contract workers

(1) A principal must not discriminate against a contract worker…
…
(5) A "principal" is a person who makes work available for an individual who is
(a) employed by another person, and
(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it)
…
(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

35. It is a requirement of s.41(5) EqA 2010 that the contract worker is 'employed' and supplied by another. Accordingly, the contract between the individual and the supplier must be one of 'employment' within the meaning of s.83 EqA 2010 (not s.230(3)(a) ERA 1996).

Findings of fact

36. Mr Carlish was initially engaged by the Respondent from May 2016 to 31 March 2017 as a 'Client Contracts Coordinator' ('the First Assignment'). During that period of time, he was employed by his personal service company, Go Cruise Limited ('GOC').

37. His services were engaged by the Respondent through an agreement between an employment agency, Baltimore Consulting Limited ('Baltimore') and GOC. GOC invoiced Baltimore for Mr Carlish's services on a daily-rate basis of £200 gross of tax and national insurance. The Respondent paid Baltimore who in turn paid GOC, via Matrix. CDL were not involved.

38. Neither Mr Carlish, nor GOC, had an express contract with the Respondent.

39. It is not in dispute, and I accept, that during the First Assignment, Mr Carlish was engaged by the Respondent as an independent contractor. No factors were identified before me that would justify implying a contract between Mr Carlish and the Respondent.

40. Even if such a contact could be implied, there were no factors identified before me that would tend to suggest Mr Carlish was an employee or a worker of the Respondent within any of the relevant definitions in the ERA 1996 or the EqA 2010 during that period. Neither party suggested that he was.

41. The First Assignment came to an end in March 2017. The dispute before me concerns the period thereafter. Mr Carlish maintains that, from April 2017, he became an employee of the Respondent.

42. In March and April 2017, Mr Carlish was in discussions with the Respondent about a potential new assignment. By this point, he wanted to work directly for the Respondent, ideally as an employee, although he accepted in evidence that he did not say as much to the Respondent.

43. On 21 March 2017, Mr Carlish was sent a project brief by Vikki Swan (Project Officer – Repairs, Maintenance and Investment ('RMI') Programme). What was being proposed by the Respondent was a further, fixed term assignment, still on the basis that Mr Carlish would be an independent contractor.

44. The only difference envisaged between that proposal and the First Assignment was that the Respondent would engage with Mr Carlish's PSC (GOC) directly, instead of engaging him via Baltimore. Although the agreement between GOC and Baltimore had a six-month restriction clause (preventing Mr Carlish from

being engaged directly by the Respondent within that time), Baltimore had agreed to waive that restriction.

45. The intention at that time was that GOC would be added to the Respondent's supplier list and a Purchase Order set up for invoicing.

46. That is the type of agreement that could potentially fall within IR35. IR35 is tax legislation which, put simply, was designed to combat tax avoidance by workers (and the companies hiring them) who supply their services to clients via an intermediary (such as a limited company) but who would be an employee if the intermediary was not used.

47. Amended legislation, which applies to contracts entered into with the public sector or payments made by public sector clients after 6 April 2017 (and, for private clients, after April 2021), means that where an individual performs a service to the public sector through their own PSC, limited company or partnership, and were it not for that arrangement would be classified as an employee for tax and national insurance purposes, the client engaging with the worker must pay tax and national insurance on top of the fees paid to the contractor.

48. Those who are 'inside' (or 'caught') by IR35 are treated as employees for tax and national insurance purposes. Those who are 'outside' IR35 continue to be treated as contractors.

49. Much of Mr Carlish's evidence and his questioning of the Respondent's witnesses focused on IR35. However, IR35 is distinct from, and does not affect, the employment tribunal's task in determining employment status. IR35 merely provides that, for purposes of tax and NI, a worker will, in certain circumstances, be treated as an employee by HMRC. The test for the Tribunal, however, is not whether Mr Carlish falls within IR35, but whether he falls within the definition of an employee or worker following established principles developed in case law.

50. On 3 April 2017, Mr Carlish sent the Respondent a draft Consultancy Agreement with GOC. That agreement proposed that GOC ('the Consultancy') would provide staff (Mr Carlish) to the Respondent in order to carry out specific duties set out in a Schedule of Services. It also provided that, during the period of the agreement, Mr Carlish (referred to as 'the Consultancy staff') would not be a servant or employee of the Respondent and that the Consultancy would be responsible for his tax and national insurance liabilities. The project was proposed to last between 3 April and 31 December 2017.

51. In the Schedule of Services, the agreement was said to '*fulfil the need for a senior experienced and qualified interim property asset manager'.*

52. That Consultancy Agreement was never signed by the Respondent and is not, accordingly, determinative of Mr Carlish's employment status.

53. Instead, on 18 April 2017, Ms Lallian asked that three new posts be set up on Matrix, all of which were said by her to be outside of IR35. One of those posts

was for Mr Carlish. His title was said to be 'Project Manager – Demobilisation & Mobilisation' and he was said to be working under a specific brief. The project brief attached to that request largely replicated that set out in the Schedule of Services proposed by Mr Carlish on 3 April 2017. The project was said to finish on 31 December 2017.

54. On 21 April 2017, Mr Carlish, on behalf of GOC, signed an 'Intermediaries Contract' between CDL and GOC. It was backdated to 3 April 2017. Mr Carlish also filled in and provided his details as 'the Worker' and the details, including bank details, of his company, GOC.

55. The 'background' section of the Intermediaries Contract stated that '*CDL has been established to provide contingency staffing resources to public sector bodies ("Clients") who wish to temporarily engage workers on a 'contract for services' basis, as non-staff contractors'*.

56. Mr Fregredo, who gave evidence on behalf of Mr Carlish, also signed an Intermediaries Contract with CDL, on behalf on his PSC, RCA Limited. That contract was signed on 10 October 2017. Mr Fegredo's evidence is that he was, at all times, an independent contractor. He was employed by RCA Limited which, in turn, had a contract with CDL. At no point did Mr Fregredo have a contract with the Respondent.

57. From 3 April 2017, Mr Carlish was working under the Intermediaries Agreement ('the Second Assignment').

58. In evidence, Mr Carlish accepted that, during this period of time, he continued to be engaged as an independent contractor. Save as to the removal of Baltimore, in practice nothing had changed in the way Mr Carlish provided services to the Respondent. GOC remained responsible for his tax and national insurance. There was no significant change to the way he was managed or his work was overseen.

59. On 7 April 2017, Mr Carlish attended a meeting during which, he claims, Ms Lallian offered him the role of Interim Contracts Strategy Manager. Mr Lallian denies that. She says that at the time a lot of job descriptions were being prepared because the Respondent was looking to restructure the team. She accepts that there was a discussion about what such a role might entail and the skills needed to carry it out, but is adamant that no such role was offered or accepted by Mr Carlish. She explained that, in order to do so, she would have had to go through a job evaluation and approval process and then a recruitment exercise. It was not suggested by Mr Carlish that this was ever done and I accept Ms Lallian's evidence that Mr Carlish was not offered the role of Interim Contracts Strategy Manager. The 7 April 2017 meeting was no more than a discussion about what work the Respondent needed doing that Mr Carlish may be able to assist with going forwards.

60. On 28 July 2017, Mr Carlish emailed CDL providing them with updated bank details. Ms Jones understood him to be updating bank details for CDL. In fact,

the bank details provided were for Mr Carlish's personal bank account, although no indication to that effect was given to Ms Jones or CDL more generally.

61. From 3 August 2017, therefore, payments were made from CDL to Mr Carlish directly. The Respondent was not aware of this and assumed that the agreement was as per the Intermediaries Agreement and its correspondence with Mr Carlish in April 2017.

62. In August 2017, Mr Carlish applied for a permanent role with the Respondent's Neighbourhood Services department. His application was unsuccessful.

63. By summer 2017 at the latest, it had become clear to the Respondent that the scale of the demobilisation project Mr Carlish was working on was much bigger than had been anticipated. The Respondent engaged the property management services of Savills and, by July/August 2017, many of the tasks Mr Carlish had been engaged to carry out under the Intermediaries Agreement were taken over by them.

64. Nevertheless, Mr Carlish continued to perform services for the Respondent. He continued to do so after 31 December 2017, when the RMI project had been due to end.

65. He was assigned the specific project of Chalvey Extra Care, a development for the housing of older residents, as well as other projects. He continued to provide services to the Respondent throughout 2018, 2019 and into 2020, with no gaps save for a period of time during which he was unwell. No further agreements were signed between Mr Carlish or GOC and CDL or the Respondent, there was no additional Schedule of Services and no further written project briefs were produced. He continued to be paid purportedly in accordance with the Intermediaries Agreement and was offered work orally by Mr Griffiths.

66. It is not in dispute that there was no express contract between Mr Carlish and the Respondent at any point during his engagement. Nor, do I accept, that there is any need to imply one in order to give a business reality to the transaction. During the disputed period, Mr Carlish remained employed by GOC and was supplied to the Respondent as a contractor.

67. Even if I am wrong about that, save as to the change after the RMI project in the way work was assigned to Mr Carlish, there is no evidence to suggest that the manner in which he performed his services for the Respondent altered in any significant way. Mr Carlish's evidence on this matter was reflected in an online form he filled out on HMRC's website which was a tool used to assist in determining whether someone fell inside or outside of IR35. I accept that his entries on that form largely reflect the reality of his working relationship with the Respondent, save for some specific points outlined below.

68. The Respondent did not have the authority to simply assign Mr Carlish work. He could not be moved to different projects without his agreement (which he always gave) and he had an overriding right to decline work. I find that the

Respondent was not required to offer work to Mr Carlish and he was not required to accept any offers made. There was not, accordingly, the irreducible minimum of obligation necessary to create a contract of employment.

69. When Mr Carlish was working, there was some mutuality of obligation, in that he had undertaken to work and the Respondent in turn had undertaken to pay him for the work done. As happened in respect of the RMI project, however, the Respondent was able to terminate any specific project at will even during the project.

70. The Respondent could not decide how Mr Carlish carried out his work. The focus was on the output, rather than the process. The Respondent was unable to dictate Mr Carlish's working hours or where he worked. He did not work the same hours or days each week and when he took days off, those were unpaid. Mr Carlish was not paid holiday pay or sick pay, including during the lengthy period that he was unwell.

71. Mr Carlish had no line management responsibilities and no authority to hire or dismiss anyone working with him. Although he said otherwise in the online IR35 form, there was no evidence to suggest that he did anything other than introduce the Respondent to others (i.e. Mr Fregredo).

72. Mr Carlish was not subject to performance management and the Respondent had no discretion to set his rate of pay beyond that amount which had been agreed in the Intermediaries Agreement.

73. Mr Carlish submitted timesheets to Matrix as he had always done and payment was made to GOC. I do not accept that payment, at some unspecified time, was paid net of tax and national insurance where before it had been paid gross. The rate of pay remained exactly the same throughout. Mr Carlish was not told that there would be an increase in his pay. There was no indication given to Mr Carlish that GOC was no longer responsible for his tax and national insurance. Payment was made gross of tax and national insurance throughout and GOC was responsible for those obligations to HMRC.

74. Until GOC stopped trading, it maintained a policy of professional indemnity insurance covering Mr Carlish. It was required to do so throughout Mr Carlish's engagement and the Respondent was not aware, until these proceedings, that the policy had been stopped prematurely in or around March 2018. Ms Lallian's evidence, which I accept, is that if she had become aware of that at the time, the engagement would have had to be terminated. All consultants were required to have indemnity insurance.

75. Mr Carlish was unclear whether he had the right to send a substitute although he said that under his previous contract he had had that right. The situation never arose and there was no clear evidence before me to make an informed finding on whether such a right existed or not.

76. Taking that evidence in the round, and notwithstanding the period of time over which Mr Carlish provided services to the Respondent, I find that he remained

an independent contractor in business on his own account, as he had been since May 2016. At no point did he became an employee or a worker within the meaning of s.230(1) or (3) ERA 1996 or s.83 EqA 2010.

77. I accept (as did Mr Gray-Jones on behalf of the Respondent) that up until March 2018, Mr Carlish was a contract worker within the meaning of s.41 EqA 2010. Work was supplied by the Respondent. That work was carried out by Mr Carlish who was employed by GOC. Mr Carlish was supplied to the Respondent by GOC.

78. On 13 March 2018, however, GOC was struck off the Companies House register. Mr Carlish did not inform the Respondent or CDL of that significant event. They were unaware of it until these proceedings. From that date onwards, the Intermediaries Agreement could not legally be performed by GOC, because it did not exist. Nor could it be performed by anyone else (including Mr Carlish) because it contained (at clause 14.6) an express prohibition on assignment, novation or sub-contracting without the written acceptance of CDL.

79. Mr Carlish accepted in evidence that there was no such written acceptance by CDL. Where, as here, a contract requires the consent of the parties in order for an assignment or novation to take place, there will be no assignment or novation in the absence of such consent (Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2021] UKSC 48, [2021] Bus. LR 1717 at [60]-[69], applying WB Business Exchange Centres Ltd v Rock Advertising Ltd [2018] UKSC 24; [2019] AC 119).

80. Accordingly, from March 2018 onwards (and by February 2020), the Claimant was not a contract worker within the meaning of s.41 EqA 2010.

Conclusions

81. The Claimant was not an employee of the Respondent within the meaning of s.230(1) ERA 1996. The Tribunal does not have jurisdiction to hear the claims of unfair (or automatic unfair) dismissal, notice pay or redundancy pay. Those claims are dismissed.

82. The Claimant was not a worker of the Respondent within the meaning of s.230(3) ERA 1996. The Tribunal does not have jurisdiction to hear the claims of unlawful deductions of wages (including statutory sick pay), holiday pay and failure to provide itemised payslips. Those claims are dismissed.

83. The Claimant was not an employee of the Respondent within the meaning of s.83 EqA 2010 at the material time. He was, however, a contract worker within the meaning of s.41 EqA 2010 until 12 March 2018.

84. In the Particulars of Claim, Mr Carlish references potential allegations of discrimination that are said to have occurred prior to 12 March 2018. Those claims are not obvious in the 'Working Summary of Claims' he produced on 1 October 2020, pursuant to an order of the Tribunal dated 30 August 2020.

Accordingly, it is unclear what, if any, allegations of discrimination, Mr Carlish makes during the period 2017-March 2018.

85. On the fact of it, any such allegations would be prima facie out of time, having occurred significantly more than three months before the Claimant commenced ACAS Early Conciliation and presented his claim to the Tribunal. Accordingly, the Tribunal will only have jurisdiction to consider those claims if it considers that it is just and equitable to extend time.

86. If Mr Carlish wishes to pursue allegations of discrimination relating to the period of time prior to 12 March 2018, he must write to the Tribunal within 28 days of the date this judgment is received specifying **in bullet point format** the following information:

    (a) What was said to have occurred, when and by whom
    (b) Whether the facts alleged are pursued as an act of direct discrimination, victimisation or harassment (these are the only types of claim referenced in the original particulars of claim)
    (c) Where in the original particulars of claim the allegation is referenced
    (d) Why he says it would be just and equitable to extend time to deal with those claims.

87. The Respondent must respond within 28 days thereafter, setting out its position on any such allegations by reference to its original Grounds of Resistance.

88. If any such allegations are pursued, an Open Preliminary Hearing will be held to determine whether it is just and equitable to extend time to hear those allegations.

89. If Mr Carlish does not respond as set out above, or if no such allegations are pursued, it will be taken that he is not making any complaint of discrimination during the period that he has been found to be a contract worker. That will have the result that the whole of the claim will stand struck out given that the Tribunal has no jurisdiction to consider the other complaints discussed above.

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Employment Judge Smeaton

Date: 17 October 2022

Judgment sent to the parties on

18 October 2022

For the Tribunal office