EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
MR N. LOWRY	**V**	**PEOPLE'S COFFEE LIMITED**

Heard at: London Central (by video) **On**: 22 & 23 February 2021

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: In person

For the Respondent: Mr D. Preston (legal representative)

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

JUDGMENT having been sent to the parties on 23 February 2021 and reasons having been requested by the Respondent on 3 March 2021, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

Reasons

Background and Issues

1. By a claim form presented on 9 October 2020 the Claimant brings claims for unfair dismissal, breach of contract for notice pay, and unlawful deductions from wages. The Claimant was a co-founder of the Respondent and its CEO. The Claimant's case is that his employment terminated on 9 October 2020 with the presentation of his ET1 which he describes as his acceptance of a repudiatory breach by the Respondent.

2. The Respondent is the licensee of a licence granted by easyGroup Limited to grant "easyCoffee" franchises to sell coffee from high street retail premises and kiosks throughout the UK.
3. The Respondent denies liability for all the claims and further contends that the Claimant was not an employee or a worker of the Respondent, and therefore the tribunal does not have jurisdiction to consider his claims. The Respondent's case is that the Claimant "*administered the Respondent as a quasi-sole trader*" until his services were terminated on 15 May 2020. The Respondent also brings a counterclaim for repayment of sums it says the Claimant owes it. The Claimant denies that he owes any money to the Respondent.
4. The issue of the Claimant's employment status was set to be determined at an open preliminary hearing on 23 and 24 February 2021. There were two questions that I needed to decide:
    a. Whether the Claimant was an employee of the Respondent such as to entitle him to bring a claim for unfair dismissal and breach of contract for notice pay?
    b. Whether the Claimant was a worker entitling him to claim unlawful deductions from wages?
5. The Claimant represented himself at the hearing, and Mr Preston appeared for the Respondent. There were two bundles of documents. The Respondent's bundle of 80 pages and the Claimant's bundle of 147 pages. There were two witness: Mr Neil MacKay (acting Chief Financial Officer of the Respondent) for the Respondent and the Claimant. They gave sworn evidence and were cross examined. The Claimant has also submitted written statements of Prannay Rughani and Claudio Obertelli. They did not attend the tribunal to give evidence, however, the Respondent was content to accept their evidence as read. I have, therefore, accepted their written statements in evidence.
6. On the morning of the second day of the hearing the Claimant, in response to the Respondent's written submissions, wished to introduce in evidence further documents (Whatsapp messages). By that time, the evidence taking had been concluded, and the parties had made their closing

statements. I decided that it was too late for the Claimant to introduce additional evidence. He had not included those documents in his bundle and did not seek to introduce them during the first day of the hearing.

7. Generally, I find that the bundles prepared by the parties were wholly inadequate. In particular, the Respondent omitted to include in its bundle any documents related to the disciplinary process and the Claimant's dismissal. That was not helpful.

Findings of fact

Incorporation and Shareholding structure

8. The Claimant is a co-founder of the Respondent and a shareholder, holding 33% of the shares in the Respondent. He was also a statutory director of the Respondent at all material times.
9. The Respondent was incorporated by the Claimant on 3 November 2015 in order to exploit a license agreement that the Claimant (in his own name) had entered into with easyGroup Limited on 2 November 2015 for the sale of takeaway coffee under the "easyCoffee" brand. On its incorporation, the Claimant was the Respondent's sole director and shareholder.
10. In November 2015, the Claimant was introduced by Mr Terry Mitchell ("TM") to Mr Abdullah Saad Al Dhowayan ("ASD"), who is a Saudi national, residing in Al Khobar, Saudi Arabia. The introduction was for the purposes of the Claimant pitching his idea and obtaining investments from ASD for the easyCoffee venture, which was necessary for the Respondent to secure a brand licence agreement with easyGroup Limited.
11. This resulted in an agreement, pursuant to which ASD made investments into the Respondent of initially £50,598 and subsequently a further £230,000.
12. It was also agreed that the shares in the Respondent would be held in the following proportion: ASD – 37%, International Energy Investment (a nominee of ASD) – 30%, the Claimant – 33%, and the Claimant would transfer the brand licence, which had been issued in his name, to the Respondent.

13. On 23 May 2016, the parties entered into an investment agreement, recording that:
    a. the Respondent had an issued share capital of £6,800;
    b. ASD had invested £280,000 and had agreed to invest a further £400,000 in the Respondent;
    c. in consideration of that investment, ASD would receive 370,000 A ordinary shares of £0.01 each in the Respondent;
    d. International Energy Investment held 300,000 B ordinary shares of £0.01 each in the Respondent;
    e. the Claimant held 330,000 B ordinary shares of £0.01 each in the Respondent.
    f. the directors of the Respondent were the Claimant and TM.
14. It was also agreed verbally that the Claimant would become the Chief Executive Officer ("CEO") of the Respondent and draw a salary of £5,000 a month. The salary was in addition to the shares allocated to the Claimant at par value "*in lieu of managing and growing the business*" (see page 22 of the Respondent's bundle). The salary arrangement was never recorded in a formal written agreement.
15. On 16 June 2016, the Respondent, the Claimant and easyGroup Limited signed a Brand Licence Agreement, pursuant to which easyGroup Limited granted to the Respondent an exclusive worldwide licence for 20 years to use the easyCoffee brand.
16. On 23 May 2016, TM was appointed as a director of the Respondent to protect ASD interests. He served as a director of the Respondent until 1 December 2018. He was then replaced by ASD from December 2018.
17. In 2017 and in 2018 additional investors were found and the shareholding structure of the Respondent changed to allot further shares to ASD, the Claimant, and the new investors.
18. One of the new shareholders was Mr Neil MacKay ("NMcK"), who was also appointed by the new investors as a director of the Respondent to represent their interests on the board. He was a director from 25 September 2018 until 30 April 2019. He is also the acting Chief Financial Officer ("CFO") of the Respondent. He provides his services to the Respondent as a self-employed consultant.

19. On 19 December 2018, the founding shareholders, including the Claimant, have signed a share disposal and reinvestment agreement to sell a portion of their shares and lend the proceeds to the Respondent to address the Respondent's cashflow issues. The Respondent, however, says that the sale transaction was invalid, and the agreement is a nullity.
20. These corporate transactions resulted in a dispute between the Claimant and other shareholders. The essence of the dispute appears to be whether the Claimant should have paid for additional shares allotted to him. This dispute lies outside the jurisdiction of the employment tribunal, and the parties did not seek to include it in these proceedings. However, it appears the dispute had caused further disagreements between the parties on how the business was run, and eventually led to the Respondent dismissing the Claimant from his CEO role, and a few days later removing him as a statutory director of the Respondent.

CEO Role

21. During his time as the CEO of the Respondent, the Claimant mainly worked from the Respondent's office in central London. He was working regular working hours, Monday to Friday, dealing with staff, suppliers, and potential franchisees. He also travelled on the Respondent's business and attended, shop openings, and various marketing events and trade shows to promote the Respondent's franchise business.
22. He had regular communications with ASD to discuss the Respondent's business matters, and when ASD was visiting London, they would meet either in the Respondent's offices or in the hotel where ASD was staying.
23. He was responsible for hiring and managing the Respondent's staff (there were around 30 employees in total). He had the sole authority over the Respondent's bank account and was able to transfer funds.
24. He drew his salary, and that was reflected as transactions on the Respondent's directors' loan account. His drawings of the salary were not regular. In some months he would not take his salary. He says that was because of cashflow issues the Respondent was facing. Later he would draw a larger amount covering the arrears. He increased his salary

drawings to £6,000 a month in 2017 and £7,000 a month in 2019. He says it was agreed with ASD.

25. The Respondent disputes that those increases were properly authorised by the Respondent. The Respondent also alleges that the Claimant used the Respondent's cash to fund his other business ventures. The Respondent says that the Claimant has withdrawn £382,140.75 from the Respondent's bank account and counterclaims for that sum.
26. The Claimant claims that the Respondent owes him money for untaken salary and the money he paid into the business to allow the Respondent to pay other staff and its suppliers. I make no findings of fact on the Claimant's money claim and the counterclaim. These issues will need to be further examined and decided upon at the final hearing.
27. The Claimant was not on the Respondent's payroll. He was not paid as a PAYE employee and did not receive payslips or P60 from the Respondent.
28. While working as the CEO of the Respondent the Claimant maintained his business interests in other ventures, including a wine bar and other hospitality businesses. However, he spent most of his time working for the Respondent.

Dismissal

29. On 14 April 2020, Mr Samer Alsourni, ("SA") acting with apparent authority from ASD (who purported to appoint him and NMcK as alternate directors) wrote to the Claimant proposing various board resolutions, which the Claimant objected to, because those were diluting his shareholding and removing him from the CEO position.
30. On 5 May 2020, ASD wrote to the Claimant informing him that ASD had been asked by the majority of the minority shareholders of the Respondent to convene an extraordinary general meeting to pass special resolutions set out in a draft written resolution attached to the letter. Those included a resolution to remove the Claimant from his position as CEO and to remove him as a director.
31. By the same letter ASD invited the Claimant to a disciplinary meeting, to take place by video conference on Thursday 7 May 2020 at 3pm, concerning

his role as CEO of the Respondent, to answer the allegations set out in a letter dated 2 May 2020 that was attached to the letter.

32. The letter of 2 May 2020 was not included in the bundles for this hearing. The Claimant's particulars of claim describe the 2 May letter as follows:

> "14. *The letter dated 2 May 2020 was a letter addressed to Mr Al Dhowayan sent by Mr MacKay, a minority shareholder and the acting Chief Financial Officer of the Respondent, on behalf of various minority shareholders, requesting that an EGM be called to terminate the appointment of the Claimant as CEO of the Respondent. It ran to 8 pages and set out allegations of financial misconduct that covered a period of over 4 years. There were attached 5 schedules totalling 45 pages.*"

33. On 6 May 2020, the Claimant emailed ASD objecting to the disciplinary meeting because a proper procedure had not been followed. He also asked whether the meeting, to which he was called to attend, was a board meeting, in which case under the Articles of Association a minimum seven days' notice was required, or a disciplinary meeting, in which case the Respondent must follow the ACAS Code of Practice on Disciplinary and Grievance Procedures. He also raised a formal grievance on: *"including victimisation, harassment, bullying, unequal treatment and not being paid what is owed me for what I have lent the company nor my salary"*.

34. Later the same day, SA replied to the Claimant confirming that it was a disciplinary meeting. He also stated that he accepted that the Claimant was entitled to lodge grievances and asked him to provide details by 5pm on 8 May 2020. He said that the meeting would be rescheduled for "*a mutually convenient date next week*".

35. On 8 May 2020, the Claimant replied stating that it was unreasonable for the Respondent to expect him to deal with the allegation in such a short period of time and telling the Respondent that he was seeking legal advice in relation to this matter.

36. The Respondent rescheduled the disciplinary meeting for 13 May 2020 at 3pm.

37. On 13 May 2020, acting via his counsel, the Claimant sent a detailed letter to the Respondent objecting to the meeting going ahead, raising various

procedural irregularities and requesting the meeting to be postponed to enable the Claimant to properly prepare.

38. The Respondent proceeded with the meeting without the Claimant in attendance. By email of 13 May 2020, the Respondent informed the Claimant that he would receive a decision by 5pm on 15 May 2020.
39. On 15 May 2020, the Claimant's counsel, wrote again to the Respondent objecting to the process and requesting that, prior to a decision being reached, the disciplinary process be adjourned to enable it to be properly undertaken.
40. On 15 May 2020, the Respondent wrote to the Claimant confirming the outcome of the disciplinary meeting, which were: that the allegations against the Claimant of financial impropriety were upheld, and the Respondent's decision to summarily dismiss the Claimant for gross misconduct. The letter stated that the Claimant had the right to appeal the decision to ASD within seven days, and that the appeal would be by way of re-hearing and the Claimant could have an employee of his choice or TM to accompany him to the meeting.
41. On the same day, 15 May 2020, the Respondent sent the Claimant another letter with a heading "*without prejudice, save as to costs*", in which it offered the Claimant to resign to avoid "*any further embarrassment to you flowing from dismissal from employment*". This document was introduced by the Claimant in evidence (page 43 of the Claimant's bundle) and the Respondent did not object to it being introduced as open document.
42. On 22 May 2020, the Claimant's counsel wrote to the Respondent contending, *inter alia*, that the Claimant did not accept that he had been dismissed for lack of authority of the people, who purported to dismiss him, but appealing the decision, without prejudice to his contention. The Respondent did not respond and did not arrange an appeal meeting.
43. On 5 June 2020, NMcK emailed the Claimant informing him that there had been a private shareholders meeting, at which it had been resolved, *inter alia*, to terminate the Claimant's appointment as a director and to appoint AS as a director and acting CEO.

The Law

44. Section 230(1) of the Employment Rights Act 1996 ("ERA") defines 'employee' as '*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment*'.
45. Section 230(2) of ERA provides that a *contract of employment* means '*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing*'.
46. Section 230(3) of ERA defines "worker". It reads: "worker" *means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*
    a. *a contract of employment* ("limb A")*, 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* (the so-called "limb (B) worker")*;*

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

47. There are others, so-called extended definitions of "worker", in different statutes, but for the purposes of the claims in these proceedings, the relevant definitions are in section 230 of ERA.
48. Limb (A) of the statutory definition of 'worker' in section 230(3) of ERA means that anyone who is an employee under ERA is also a worker. The terms 'employee' and 'worker' are therefore not mutually exclusive.
49. The effect of these definitions is that employment law distinguishes between three types of individuals:
    i. employees - those employed under a contract of employment;
    ii. self-employed - people who are in business on their own account and provide their services to clients and customers as part of their profession or business undertaking; and

iii. an intermediate category – "Limb B workers", who are not employees, but also do not provide their personal services as part of their profession or business undertaking, but rather as a profession or business undertaking carried out by someone else, who retained them to provide such services.

"Worker"

50. The concept of the worker is the statutory concept. It is comprehensively defined in the legislation. Lady Hale in *Bates van Winkelhof v Clyde & Co LLP and anor (Public Concern at Work intervening) 2014 ICR 730, SC* said: '*there can be no substitute for applying the words of the statute to the facts of the individual case*'. She, however, acknowledged that "*there was not 'a single key to unlock the words of the statute in every case*'.

51. Breaking down the statutory definition into its constituent elements, the following factors are necessary for an individual to fall within the definition of "worker":
    a. there must be a contract, whether express or implied, and, if express, whether written or oral,
    b. that contract must provide for the individual to carry out personal services, and
    c. those services must be for the benefit of another party to the contract who must not be a client or customer of the individual's profession or business undertaking.

"Employee"

52. Over the years several legal tests have developed to identify relationship between parties, which should be regarded in law as being under a contract of employment, and how these should be distinguished from those falling outside that category. In making such determination a tribunal must consider all relevant factors. The irreducible minimum for employment relationship to exist requires control, mutuality of obligation and personal performance, but other relevant factors also need to be considered.
53. The issues of mutuality of obligation and personal performance are common for the purposes of determining whether the Claimant was a "worker" and, if so, whether he was an employee.

54. The control element of the employee status test goes back to the *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD*, and since then has been developed and refined by subsequent case law. The main propositions of the control tests can be summarised as follows:
    a. There should be either an express or implied agreement that in the performance of his service the person will be subject to the other's control in a sufficient degree to make that other his master.
    b. There are many forms of control — for example, practical and legal, direct and indirect. It is not necessary for the work be carried out under the employer's actual supervision or control.
    c. The notion of control has moved on from the time when the relationship of employer and employee could correctly be described as "master and servant". It is no longer realistic to look for a right to direct how an employee should perform his duties. Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus, the significance of control today is that the employer can direct what the employee does, not how he does it.
    d. It is rarely a question of whether there is any control, but rather of whether there is enough control to make the relationship one of employer and employee.
    e. An absence of day-to-day control over work does not preclude an employment relationship. The question is not whether the employer exercised day-to-day control over the employee's work but whether it had, to a sufficient degree, a contractual right of control over them.
    f. In a more general sense, therefore, control requires that ultimate authority over the purported employee in the performance of his or her work rests with the employer. However, indirect control, which exists by virtue of an employer's right to terminate the contract if the worker fails to meet the required standards of skill, integrity and reliability, is not by itself sufficient. Some elements of more direct control over what the worker does is needed.

55. Further, the fact that a person is a shareholder, or even a majority shareholder, and a director of the company, and that he exercises his entrepreneurial skills and stands to gain if the company prospered should not lead to the necessary conclusion that he is not an employee (see *Sellars Arenascene Ltd v Connolly 2001 ICR 760, CA)*.

Submissions and Conclusions

56. The Claimant admits that there was no written contract of employment or a director's services agreement between him and the Respondent. He says that there was an oral agreement with ASD. The Claimant says that because of the high level of trust between him and ASD he never thought it was necessary to put the agreement in writing.
57. He contends that the agreement was that he would work for the Respondent as CEO on a full-time basis and draw a salary of £5,000 a month for his work, which was subsequently increased to £6,000 and then £7,000. This arrangement was known to all other shareholders and directors, and through the whole period of his engagement with the Respondent both parties acted consistently with it. He drew his salary, recording it through the director's loan account when there were funds available, but when the company was cash strapped, he would defer taking his salary, and in some months would pay staff and suppliers from his own pocket to keep the business going, and then would re-pay himself when the funds were provided by the investors.
58. He submits that there were multiple meetings and discussions over the years where ASD would instruct him what to do and he would follow his instructions. He says he would talk to ASD regularly and ASD would send him Whatsapp messages with his instructions on business matters. He further submits that ASD would not have kept investing into the Respondent if he had not had visibility and control over the Claimant's actions.
59. He says that he worked employee hours, full time, five days a week and sometimes more, and attended the office daily and worked alongside other employees of the Respondent.
60. He was referred to as CEO, attended board meetings as CEO, for which attendance he was not paid any separate directors fees. His pay was

always referred to as “salary”. He reported to the board and took instructions from it and acted in accordance with such instructions.

61. He was required to and did perform services personally and no one else could do his job or replicate what he did.
62. Finally, he says the Respondent is in the current bad financial position because the necessary investments had not been made at the right time. That he tried to save the business by using his own funds, and now is being blamed for the failure and not being paid what he is due as an employee of the company.

63. The Respondent denies that there was an oral contract between the parties. It says there was no contract at all, and the Claimant’s role was purely as a shareholder and a director of the business. He used the CEO title, which he gave himself, to further develop the business, but in doing so he acted to advance his interests as a shareholder and a co-founder of the business and not as an employee or a worker working for a salary.
64. The Respondent relies on the fact that there was no written agreement between the parties. It accepts that at the start there was an intention to have director’s services agreement put in place, but nothing came of it.
65. It says that the Claimant was involved in many other businesses at the same time, which is inconsistent with him being an employee or a worker of the Respondent.
66. It clams the Claimant was drawing money from the Respondent because he had the sole control of the Respondent and was able to do so. The Respondent accepts that there was a mutual understanding that the Claimant could draw £5,000 a month, but not more, and that was essentially an advanced dividend to the Claimant as a shareholder and a director, which the Respondent says is usual for start-up businesses. Further, it argues, because the Claimant was not on the Respondent’s payroll and was not paid as a PAYE employee, this further supports the contention that he was not an employee or a worker.
67. The Respondent further argues that making payments to the Respondent’s staff and suppliers from his own money was inconsistent with the Claimant

being an employee of the Respondent and shows that he was effectively acting as the owner of the business.

68. The Respondent says that there was no control over the Claimant's activities by the main shareholder or the board, which is the necessary element for the employment relationship to exits. Also, it argues, given the number of businesses the Claimant had interest in, he could not have devoted all his time and attention to the Respondent's business as would be required if he had been a true employee.
69. The Respondent says there is no need to imply a contract into the relationship between the Claimant and the Respondent because the test of business efficacy is not met, and the Claimant did not argue that point.
70. In conclusion, the Respondent submits, that the reality of the situation was that the Claimant was an entrepreneur, using the Respondent as one of its many other ventures and that was his business. He was far too entrepreneurial and innovative to come within the definition of "worker" under the ERA and to deserve the statutory protection given to workers. He simply took a risk with the venture looking for a long-term reward.

71. The Respondent submitted a bundle of authorities it relies upon. In particular, Mr Preston argued that the case of *Ajar-Tec Ltd v Stack UKEAT/0293/13/DA* supported his contention that the Claimant being a director and a shareholder of the Respondent could not be a worker or an employee, that is because there was no need to imply such a contract to give business efficacy to the relationship.
72. After the first day of the hearing had finished, I examined that case. I do not accept that the EAT judgment supports Mr Preston's contention. However, in any event, the EAT decision was overturned by the Court of Appeal.
73. In doing so, the Court of Appeal made a few observations which I thought were relevant to this case. In particular, in paragraph 30 of his judgement, Lord Justice Tomlinson writes (***my emphasis***): "*However there was in my view an alternative analysis the possibility of which Judge Birtles seems, with respect, to have overlooked,* ***which is that whilst a contract may be created expressly or by implication, so too the process of contract formation may be partly express and partly by implication****. Thus, here*

it was not fatal to the existence of a concluded contract that the three promoters failed expressly to agree to a term concerning remuneration. Even ignoring the fact that they had in fact, on the analysis of the Employment Judge, made an express binding contract in which such a term was to be implied, it would have been open to the Employment Judge to conclude that a contract had been formed by a combination of that which was said expressly and that which was necessarily to be implied, in the light of the manner in which the three directors dealt with one another, ***"in order to give business reality to a 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."*** *See per May LJ The Elly 2, [1982] 1 Lloyds Rep 107 at 115, a passage wrongly attributed in Tilson and an earlier case there cited to Bingham LJ, who did however cite it with approval in The Aramis [1989] 1 Lloyds Rep 213 at 223-224*.

74. Given that the Respondent strongly relied on the *Ajar Tec* case in its closing submissions, before the second day of the hearing, I had written to the parties inviting them to make further submissions on this case in the light of the Court of Appeal decision.

75. The Claimant did not make any specific submissions. The Respondent made further submissions. Mr Preston argued that the Claimant's case was different on the facts because in the *Ajar Tec* case "*there was clear evidence of specific terms of director's benefits being agreed and service contracts being discussed (para 15) although never entered into*". In the Claimant's case Mr Preston argued "*there [was] certainly no evidence of any concluded express agreement in respect of any terms and benefits of service let alone to pay salary*." I find these submissions unpersuasive.

76. First, if the cases are different on the facts, it is not clear why the Respondent had initially sought to rely on the *Ajar Tech* case as its key legal authority. (Mr Preston list of authorities contained other case law. However, these do not appear to be relevant to the issues in this case. They deal with ad hoc workers employment rights, and LLP partners status under the Limited Liability Partnership Act 2000. It appears they might have been

inadvertently included from a list of authorities in a different case of Mr Mark Shulman)

77. Further, the *Ajar Tech* case, as I read it, simply establishes that it is not fatal to find a contract if consideration is not expressed either in writing or orally, because it can be implied as a term into an agreed oral or written contract.

78. In the present case there is no dispute that the initial consideration of £5,000 was agreed. The Respondent accepts that there was a mutual understanding to that effect. Therefore, unlike in the *Ajar Tech* case there is no need to imply a term as to the Claimant's remuneration, and this case does not assist the Respondent in any way.

79. The Respondent also relies on the judgment of Lord Leggatt in the recent decision of the Supreme Court in the case of *Uber BV and Ors v Aslam and Ors [2021] UKSC 5*. In particular paragraph 87, where Lord Leggatt says (***my emphasis***):

> *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"****.*

80. Mr Preston also refers me to paragraphs 71 - 75 of the judgment, which analyses the purpose of the statutory protection of "worker" and in particular the dicta of Mr Recorder Underhill (as he then was) in *Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667* (***my emphasis***)

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). The paradigm case of a worker whom*

the legislation is designed to protect is an employee, defined as an individual who works under a contract of employment. In addition, however, the statutory definition of a "worker" includes in limb (b) a further category of individuals who are not employees. The purpose of including such individuals within the scope of the legislation was clearly elucidated by Mr Recorder Underhill QC giving the judgment of the Employment Appeal Tribunal in Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667, para 17(4):

"[T]he policy behind the inclusion of limb (b) … can only have been to extend the benefits ***of protection to workers who are in the same need of that type of protection as employees*** *stricto sensu - workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction 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 in the relevant***

respects."

81. Mr Preston submits that the comments of Lord Leggatt in paragraph 87 "*are fatal to a finding of worker status in this case*", because the Claimant "*fits centrally into the category of persons who can 'look after themselves' and certainly does not need statutory protection*".
82. I do not accept the Respondent's contention that the comments in paragraph 87 of the *Uber* judgment are fatal to a finding that the Claimant was a worker. I say, far from that. I read Lord Leggatt's comments in paragraph 87 as him agreeing with the approach set out by Lady Hale in the *Bates van Winkelhof* case (see paragraph 50 above), which is that one needs to look at the statutory wording and apply it to the facts of the individual case. He says that one must look at the facts realistically and keep in mind the purpose of the legislation. However, I do not read this passage as Lord Leggatt saying that the words of the statute should be "flexed" depending on whether a person can or cannot look after themselves (as Mr Preston appears to suggest).
83. "Worker" within the meaning of section 230(3) is not a means-tested benefit or a social status. In my judgment, the enquiry must be into the relationship between the individual and the putative employer and not into the financial standing of the individual concerned or how well or otherwise he could look after himself.
84. I also do not read the dicta in paragraph 87 as introducing a separate and stand-alone test of control (in addition to the statutory wording in section 230(3) of ERA) as a necessary ingredient to find the worker's status. The control issue is certainly relevant. However, it must be part of the enquiry into the question of whether in performing personal services the individual carries out "*a profession or business undertaking*" on his own account, as set out in the section 230(3) of ERA. The lesser the level of control by the putative employer, the more likely that the individual would be regarded as in business of his own.
85. Finally, paragraph 87 should be read in the context of the entire *Uber* judgment, which ratio, as I read it, is that in determining the worker's status one must look at the statute and not be blindsided by whatever contractual

arrangements the parties might have put in place to characterise their relationship in a different way. The last two sentences in paragraph 85 state just that:

> "*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. Therefore, I do not find that the *Uber* judgment is any way fatal to the Claimant's case.

Was the Claimant a worker?

87. First, I shall deal with the question of whether the Claimant was a "worker". That is because my findings on this issue will also be relevant to the question of whether he was an employee.
88. As noted above (see paragraph 55), employment status cases state that while the fact that an individual is a shareholder or a statutory director, or even a controlling shareholder or the sole shareholder, is a relevant consideration, it does not by itself mean that the individual cannot also be an employee or a worker.

Was there a contract?

89. The first step is to decide whether there was a contract for the Claimant's services as CEO. The Claimant's evidence is that there was an oral agreement to that effect. It was agreed between him and ASD. The Respondent's case there was no contract at all and there was no need for one because the Claimant was simply a co-founder and an investor looking to gain return from the venture.

90. A worker's contract, or for that matter - a contract of employment, is no different to other legal contracts when it comes to the question of its formation. It requires offer and acceptance, intention to create legal relations and consideration. It must be sufficiently certain as to its terms for the courts to give them meaning. However, just because the terms are not comprehensive or difficult to construe this does not mean that they are not legally binding.
91. For the reasons I explained above I do not accept that the *Ajar Tec* case helps the Respondent to show that there was no and could not have been a contract between the Claimant and the Respondent for want of documentary evidence of a concluded express agreement.
92. I accept the Claimant's evidence that there was an oral agreement between him and ASD that he would be serving as the CEO of the Respondent and in return for that the Respondent in addition to allotting him shares at par value would also pay him a cash remuneration of £5,000. Whether there were subsequent agreements to increase that sum to £6K and then £7K is irrelevant for the purposes of finding that a binding agreement had been formed at the start of the engagement. That agreement was a separate and distinct agreement from the Investment Agreement between the parties.
93. If there were no such agreement, there seems to be no basis for the Claimant to assume the role and act as the Respondent's CEO. I reject the Respondent's suggestion that the Claimant simply made himself CEO and acted as such for 4.5 years without that being agreed by other shareholders and directors of the Respondent.
94. All other elements to form a legally binding agreement are clearly present. The Claimant offered his services as CEO, the offer was accepted, and he was appointed as the Respondent's CEO. There was a consideration, and clearly it was a business venture and therefore the intent to create legal relations. The fact that agreement was never reduced to or otherwise confirmed in writing does not make it less effective as a binding legal agreement.
95. The agreement made by ASD, and him being the controlling mind of the Respondent was binding on the Respondent. The fact that ASD was not a statutory director of the Respondent until December 2018, and it was TM,

who represented ASD's interests on the board, does not mean that ASD did not have authority to bind the Respondent. He was at all material times the ultimate controlling mind of the Respondent. As the majority shareholder he could exercise his authority by controlling the board. He certainly had ostensible authority to bind the Respondent, and in concluding the agreement on his CEO role, it was reasonable for the Claimant to assume that ASD had the requisite authority to bind the Respondent.

96. Further, the parties acted consistently with that agreement. In his evidence NMcK said that he thought that in performing the CEO role the Claimant was a contractor. However, that would still require a legal contact between the parties.

97. Equally, if there was no contract in respect of the Claimant's work as the CEO, and he was only a director and a shareholder, the Respondent in dismissing him from the CEO role would be terminating a contract, which on the Respondent's case did not exist. That makes no sense. Furthermore, the Claimant was dismissed as CEO on 15 May 2020 and his directorship terminated later, on 5 June 2020.

98. In summary, I have no difficulty in concluding that there was an express oral agreement that the Claimant would be appointed as the CEO of the Respondent to work in that position for a salary of £5,000, which the Respondent agreed to pay.

Was the Claimant required to perform services personally?

99. I equally have no difficulties in finding that the Claimant was required to perform his services personally and that is what he did. The Respondent did not seek to argue otherwise. Further, the Respondent expressly accepted written statements of Prannay Rughani and Claudio Obertelli, both of whom corroborate on this issue.

Was the Claimant an independent contractor?

100. The next question is whether in performing his CEO services the Claimant was acting as an independent contractor and not a worker, or using the statutory wording, whether the Respondent's status was virtue of

the contract that of a client or customer of any profession or business undertaking carried on by the Claimant.

101. I accept that the Claimant had outside business interests. There was a great deal of arguments as to the extent of such interests and how much time the Claimant had devoted to them. While that might be relevant to the issue of how well or otherwise the Claimant performed his duties as the CEO of the Respondent, I find that whatever his outside interests might have been and the extent of his dedication to those, he was not in the business of providing CEO services to others.

102. He is an entrepreneur, generating various business ideas and promoting them to investors, he is not a top executive "for hire". In performing his CEO role at the Respondent, he was working within the Respondent's business to implement his business idea and to see it take off and prosper. Executive management is not his profession or business undertaking.

103. Given his involvement in the day-to-day running of the business (and I accept his evidence and the written statements of Prannay Rughani and Claudio Obertelli on this issue) I find that he was not acting as someone akin to a management consultant. He was not providing his executive management services to the Respondent, as if the Respondent were one of his clients or customers. Therefore, I find that the Respondent status was not a client or a customer of the Claimant.

104. This conclusion is further supported by the fact that the Claimant did not invoice the Respondent for his services but drew his remuneration as a salary, which was known to and accepted by the Respondent. I will return to the issue of the payment arrangement later in my judgment when dealing with the question of whether the Claimant was an employee.

105. It follows that, in my judgment, the Claimant was a worker within the meaning of s.230(3) of ERA.

106. For completeness, I shall add that I do not accept the Respondent's assertion that someone could be too entrepreneurial or too innovative to deserve the statutory protection afforded to workers. There is nothing in the statue to say that, and it would seem incongruous to suggest that Parliament intended to exclude people from the statutory protection just because they happen to generate many or even too many business ideas and have

diverse business interests to pursue. For the reasons explained above (see paragraphs 82 to 86) I equally do not accept that the *Uber* judgment and in particular paragraphs 71-75 of that judgment say that people who can "look after themselves" do not deserve statutory protection.

Was the Claimant and employee?

107. The next question is whether the Claimant was an employee. Having found that the Claimant was employed under a contract to perform services personally, I must now decide whether that contract was a contract of employment?

108. I have already dealt with the issue of contract and that the Claimant was required to and did perform services personally (see paragraphs 89 to 99 above). That is sufficient to find that there was mutuality of obligations and personal performance.

109. The central issue in this case in one of control. The Claimant says he was reporting to the board of directors and ASD, he shared and discussed with them all business plans, he followed their instructions and directions. The Respondent says the Claimant was in control of the Respondent and essentially run it as his own show.

110. The Claimant was the CEO of the Respondent. He was the top man in the organisation, and therefore by the very nature of his role it is not surprising that he enjoyed a much greater autonomy and decision making powers than would be expected in the case of a less senior employee.

111. The issue, however, is whether the Respondent had a sufficient degree of the contractual right of control over the Claimant.

112. MMcK in his evidence says that when he was a statutory director of the Respondent, the Claimant "*refused to engage with [him] on any matters of substance*". He says: "*I got the distinct impression he just wanted to be left alone to run what he saw as his business without interference*."

113. The Claimant strongly disputes that and gives evidence that there were multiple meetings with his fellow board members and ASD to discuss business issues and take instructions. He points to the Business Plan 2018, which he says was prepared by him and approved by the board and ASD, as an example of the Respondent exercising its control over him.

114. As I stated above, I did not read the Claimant's Whatsapp messages he had submitted on the morning of the second day of the hearing in support of his contention that ASD exercised control over his work. My judgment is based solely on oral evidence I heard and the documents I was referred to during the first day of the hearing.

115. Considering all the evidence I heard and the documents I was referred to in the bundle, I find that the Respondent did have sufficient contractual right of control over the Claimant for there to be the employer-employee relationship. The Respondent had the necessary mechanism to exercise that right. It might not have done that in the most effective way, and gave the Claimant more latitude than with the benefit of hindsight it would have liked, but that is a different issue.

116. Equally, if ASD because of his location or other business interests did not have enough time or desire to get involved more deeply into business affairs of the Respondent, does not mean that he did not have such right or opportunity and could not exercise his control over the Claimant.

117. I have no reasons to disbelieve the Claimant's evidence about him engaging with other directors and ASD on the Respondent's business matters. Whether those meetings were in the office or in the hotel, in my judgment, makes no difference. The Claimant's oral evidence are further corroborated by the documents in his bundle, including the 2018 Business Plan, and his email communications with ASD. The Respondent chose not to call ASD as a witness to give evidence to the contrary.

118. I reject the Respondent's case that there were no evidence of control. I find that in the circumstances, and taking into account the Claimant's role as CEO, there were a sufficient degree of control by the Respondent to make the relationship one of the employer and its employee.

Other factors

119. I must now look at other factors to see whether they are consistent with this being employment relationship.

120. I accept the Claimant's evidence that he was operating out of the Respondent's offices and was spending most of his time there managing the Respondent's business and staff.

121. Therefore, he was fully integrated into the business structure of the Respondent. From day one he was described as CEO and acted as such.

122. I accept that the fact that the Claimant was not on the Respondent's payroll and was not paid as a PAYE employee are factors to be taken into account. However, they are not determinative of the employment status, and in my judgment, do not outweigh other factors strongly pointing towards the employment relationship.

123. I also do not accept that irregular drawings of the salary defeat the employment status. The fact that an employee for whatever reason may forgo or defer the exercise of his right, including to receive his full salary on time, does not mean he is not or no longer an employee.

124. Equally, if the employee decides to lend his employer money either by way of transferring his money to the employer or meeting some of the employer's liabilities as they fall due, does not mean that in doing so he loses his employment status. In normal circumstances such actions by an employee might be seen unusual. However, sthe Claimant had a substantial vested interest in the Respondent as a co-founder and a shareholder.

125. The Respondent's allegations that the Claimant used the Respondent's money to pay his other businesses will certainly be relevant in deciding issues in the unfair dismissal, breach of contract and deduction from wages claims. However, even if these allegations were true (and I make no findings on that), this does not mean that the Claimant having control over the Respondent's account and using it inappropriately is inconsistent with his status as an employee.

126. Finally, looking at the intention of the parties. The Respondent accepts that there was, what it calls, an "initial expectation" of a service contract. Further, the Claimant was described as CEO, he acted as a CEO, he was drawing what in all the documents I have seen is described as salary. It is inconceivable, in my judgment, that in all these years of him doing that, it would have remained unknown to the Respondent.

127. He was dismissed by the Respondent from his CEO job through a disciplinary process. He was given the right to appeal his dismissal and to be accompanied to the appeal meeting by "*an employee of your choice*". In the dismissal letter he was referred to as "*senior employee*". In the "without

prejudice" letter of 15 May 2020 the Respondent confirms that it was "*dismissal from employment".* The Respondent recognised the Claimant's right to raise grievances.

128. Although on their own, each of the above factors would not be sufficient to find employment relationship, viewed together, they further support my primary findings and demonstrate that the parties acted in a way you would expect them to act in the context of employment relationship.

129. For these reasons, I find that the Claimant was an employee of the Respondent and therefore is entitled to pursue his claims for unfair dismissal, breach of contract, and for unlawful deduction from wages.

130. This conclusion also confirms that the tribunal has jurisdiction to deal with the Respondent's counterclaim for breach of contract.

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Employment Judge P Klimov
22 March 2021

Sent to the parties on:

22/03/2021

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For the Tribunals Office

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