Case Number: 3312887/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr A Catt	v	(1) English Table Tennis Association Limited (2) Mr M Quartermaine (3) Ms S Deaton (4) Ms S Sutcliffe

Heard at: Watford, in person **On**: 13 January 2023

Before: Employment Judge Hyams, sitting alone

Representation:

For the claimant: Mr Daniel Matovu, of counsel
For the respondent: Ms Victoria Brown, of counsel

RESERVED JUDGMENT ON A PRELIMINARY POINT

The claimant was at all material times a worker within the meaning of section 230(3)(b) of the Employment Rights Act 1996.

REASONS

The hearing of 13 January 2023

1 By a reserved judgment dated 19 July 2021 after a hearing on 7 July 2021 conducted by video (Cloud Video Platform), Employment Judge ("EJ") Bloom (1) changed the first respondent's name from Table Tennis England to the name given above, (2) determined that the claimant was not a worker within the meaning of section 230(3)(b) of the Employment Rights Act 1996 ("ERA 1996"), and (3) as a result of that determination, dismissed the claimant's claims.

2 That determination that the claimant was not such a worker was appealed to the Employment Appeal Tribunal ("EAT"). The appeal was heard by Ms Justice Eady DBE, President ("Eady J"), on 20 July 2022. By a judgment which was handed down on 26 August 2022, [2022] EAT 125, Eady J allowed the appeal, remitting to a fresh tribunal the question whether or not the claimant was such a worker. On 13 January 2023, I conducted a hearing to determine that question. It was in person, at Watford Employment Tribunals. I heard oral evidence from the second respondent, Ms Deaton, on behalf of all of the respondents, and I heard oral evidence from the claimant on his own behalf. I had before me a bundle of 276 pages including its index. I did not have time to do more than hear that evidence, consider that bundle, and hear submissions. Even if I had had time to start to deliberate, however, I would have reserved my judgment, since the issue required careful thought and I needed time to review the case law, including the decision of Eady J in this case. That decision had, I saw after the hearing had ended, been reported at [2022] IRLR 1022. The following passage of Eady J's judgment in that case made clear the scope of the inquiry which I had to undertake.

3 In paragraph 50, Eady J said this:

> "Mindful of the observation made by Baroness Hale in **Bates van Winkelhof**, that there is no magic test other than the words of the statute (and see the more recent reminders in **Sejpal** and in **Rainford** (the latter specifically addressing the position of office-holders), to the same effect), the ET's focus ought properly to have been on the question whether there was a contract between the claimant and the first respondent whereby the former undertook to perform work or services for the latter. The ET's reasoning suggests, however, that it lost sight of this point, focusing instead on questions of vulnerability, subordination and dependency. Those may well be very relevant issues in many cases – in particular where the standard form documentation provided by the more powerful party does not reflect the reality of the relationship – but they were unlikely to provide material assistance in the circumstances of the present case."

4 In paragraph 54 of her judgment, Eady said this:

> 'That, in my judgement, reveals the error made in the present case. Mindful of how the determination of worker status had been undertaken in cases such as **Uber**, the ET lost sight of the particular facts of the case before it. Focusing on issues of vulnerability, subordination and dependence, the ET failed to engage with the fact that this case involved an individual who held office as a non-executive director. With that in mind, the question for the ET was more akin to that identified in **Gilham** at paragraph 16 (drawing upon the guidance provided in other cases concerned with office-holders, such as **Percy** and **Preston**), that is, whether the parties intended "to enter into a

contractual relationship, defined at least in part by their agreement"? In answering that question, the ET would have been assisted by considering the matters identified in **Gilham** (albeit mindful that this is not an exhaustive list): the manner of the claimant's engagement, the source and character of the rules governing his service, and the overall context.'

The relevant case law

5 In those two paragraphs, Eady J referred to the decisions (taking them in chronological order) of

5.1 the House of Lords in *Percy v Church of Scotland Board of National Mission* [2006] ICR 134,

5.2 the Supreme Court in *Preston v President of the Methodist Conference* [2013] 2 AC 163,

5.3 the Supreme Court in *Bates van Winkelhof v Clyde & Co LLP* [2014] ICR 730,

5.4 the Supreme Court in *Gilham v Ministry of Justice* [2019] ICR 1655,

5.5 the Supreme Court in *Uber v Aslam* [2021] ICR 657,

5.6 the EAT in *Rainford v Dorset Aquatics Limited* (unreported; EA-2020-000123-BA; judgment handed down on 8 December 2021), and

5.7 the EAT in *Sejpal v Rodericks Dental Limited* [2022] EAT 91, [2022] ICR 1339.

6 I found *Rainford* to be of less assistance (despite the fact that it concerned in part the question whether the claimant company director was a worker) than *Sejpal*. That was because as Eady J said in paragraph 21 of her judgment in this case, there was no substitute for applying the words of section 230(3)(b) here. That paragraph had to be read with the two preceding ones. The whole of the passage was this:

'19. As it was common ground that the claimant did not work under a contract of employment, his case depended upon subsection (3)(b) (in the case law, this is referred to as "limb (b)"). In **Uber and ors v Aslam and ors** [2021] ICR 657 SC, Lord Leggatt JSC (with whom the other members of Supreme Court agreed) identified that limb (b) has three elements:

"41. … (1) a contract whereby an individual undertakes to perform work or services for the other party; (2) an undertaking to do the

work or perform the services personally; and (3) a requirement that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual."

20. It was not in dispute in this case that the claimant undertook his duties as a non-executive director personally and there was no suggestion that the first respondent was his client or customer; the issue was that identified at (1): whether there was a contract between the parties whereby the claimant undertook to perform work or services for the first respondent.

21. In seeking to answer this question, it was also not in dispute that an individual can be both director, or office-holder, and a worker simultaneously (see, **Percy v Church of Scotland Board of National Mission** [2006] ICR 134 HL; **Secretary of State v Neufeld** [2009] EWCA Civ 280 CA; and the summary of relevant principles derived from the case-law at paragraph 16 **Rainford v Dorset Aquatics Limited** [2021] 12 WLUK 203 EAT). As was noted at paragraph 17(1) **Rainford**, the primary underlying question will be one of statutory rather than contractual interpretation; in each case, there is no substitute for applying the words of the statute to the facts of the individual case (and see per Baroness Hale of Richmond DPSC at paragraph 39 **Bates van Winkelhof v Clyde & Co LLP and anor** [2014] ICR 730 SC).

7 I found the statement of the EAT presided over by His Honour Judge James Tayler in *Sejpal* of the legal tests to be applied to be particularly helpful. The main part of that statement was in paragraphs 7-26 of that judgment, but even the following parts, namely paragraphs 27-32, concerning the possible effect of a stated power of substitution (which was not directly relevant here), and paragraphs 33-35, concerning the impact of the carrying on by the claimant of a profession or business undertaking, were helpful in that they showed how important it was to focus on the facts of the particular case and then to apply the statutory test, but in the light of the various appellate court judgments. I refer below to the relevant parts of the authorities to which I refer above when discussing the parties' submissions and when stating my conclusions.

The factual inquiry which I carried out on 13 January 2023

8 At the start of the hearing on 13 January 2023, I said that I wanted to focus first on the factual situation concerning the question whether or not there was a contract in place between the claimant and the first respondent, and that I was going to hear oral evidence on that point first. As I said then, it appeared to me that there was little dispute about the relevant underlying facts. That was, as I said then, the result of (1) the existence of a number of documents which evidenced the relationship between the claimant and the first respondent and (2) the fact that the question whether there was a contract between the claimant and

the first respondent (which was the core question in the circumstances) depended at least for the most part on objective rather than subjective phenomena. While the subjective intentions of the parties are not irrelevant, they were here in my view of little relevance. In paragraph 17(1) of *Rainford*, the EAT said that it is 'open to an employment tribunal to take account of the "subjective" views of the parties as to their obligations and status in ascertaining the terms of any agreement between the parties', but the authority for that proposition was the speech of Lord Hoffman in *Carmichael v National Power plc* [1999] ICR 1226, at 1234D-H. That passage concerned a situation in which "a contract ... is based partly upon oral exchanges and conduct". Here, if there was a contract, it was evidenced by what was written (on which Ms Brown relied heavily, as described below) rather than relevant conduct of the parties: to the extent that Ms Brown relied on that conduct, she sought to argue (it appeared to me) again (despite what Eady J had said in her judgment which led to the remission of the issue which I had to decide) that for example if the claimant was not subordinate to the board of directors of the first respondent then he could not have been a worker. It was for that reason that I intervened during Ms Brown's cross-examination of the claimant, stopping Ms Brown from asking a series of questions about the claimant's understanding of the meaning of words "voluntary" and "commitment". Mr Matovu then put to Ms Deaton some questions about the use of the word "honorarium" in the document at pages 55-57, to which I refer in detail below, and Ms Brown complained that I was now allowing Mr Matovu to do something which I had precluded her from doing. I said then that I thought that the word "honorarium" was of particular importance and that the questions were not mistaken, and that if Ms Brown had any further questions which she wished to ask the claimant then she could ask them. I said that if Ms Brown wanted to ask more questions on the factual situation concerning the question whether or not there was a contract in place, she should say so, and I would require the claimant to return to the witness table and to resume giving oral evidence. I also said that if either party wished to cross-examine on any factual matter which was relevant to the question whether, assuming there was a contract in place, the claimant was a worker within the meaning of section 230(3)(b) of the ERA 1996, then they could so after lunch.

9 Mr Matovu completed his cross-examination of Ms Deaton on the question whether there was a contract in place after 1pm, and we then had lunch. When the hearing resumed, both parties said that they did not want to carry out any further cross-examination. I then heard submissions. My following findings of fact are founded almost purely on the documentary evidence before me. To the extent that they are not so founded, I say so.

The facts

10 The first respondent is a company limited by guarantee. It is what with reason might be called an incorporated members' association. There were in the hearing bundle two versions of the first respondent's articles of association. (Any

reference in what follows to a page is to a page of that bundle.) The first set at pages 74-94 was dated August 2019 and was preceded by what was stated to be "Table Tennis England – Board Guidance" (to which I refer below as "the Board Guidance"). At page 80, in article 8, it was provided that the liability of each member of the respondent was "limited to £10". Article 8 on page 175 was part of a set of articles dated 29 June 2019. It was not clear why there were two sets of the articles, but certainly article 8 at page 175 was in the same terms as article 8 on page 80.

11 Paragraph 6.4 of the Board Guidance was in these terms:

> "It is the role of the Chair of the Board to identify appropriate behavioural standards at their meetings; the Chair may choose to deprive members of their membership of the board in writing if any member has, without the permission of the Chair, been absent from meetings of the Board to the extent that it inhibits their ability to provide a valid contribution.
>
> It is at the discretion of the Chair in conjunction with the CEO and the Head of Operations and Governance as to whether the inappropriate conduct should be deemed serious enough to be recommended to the Board for removal of any Director from the Board (see Article 26 for further reference)."

12 It was not clear to me from what the statement in the first of those two paragraphs was drawn. I saw that article 28.2 on page 86 was in these terms:

> "The Company may by ordinary resolution, of which special notice has been given in accordance with section 168 of the Companies Act 2006, remove any director before the expiration of his period of office notwithstanding anything in these Articles or in any agreement between the Company and such director."

13 Article 47.2 (on page 92) was to the effect that such a resolution could be passed only at a general meeting, and therefore not in writing. There were, however, in an appendix to the articles of association some standing orders for meetings of the first respondent's board of directors. Those standing orders were at pages 95-100, but they referred (in paragraphs 18 and 19) only to the Chairman removing a member from a meeting of the board, not from the board itself.

14 Article 26.6 (on page 85) provided for the ending of a person's membership of the board by resignation. Article 26.1 was in these terms: "A person ceases to be a director ... if that person is requested in writing by a majority of his fellow directors to resign".

15 Article 23 (on page 84) related to “Elected Directors”, who were stated by article 23.1 to be “Chairman, Deputy Chairman and Treasurer”. Article 23.8 provided this:

> “An Elected Director shall hold office for a term that begins on the day after the Annual General Meeting following his election and terminates not later than at the end of the fourth Annual General Meeting thereafter. At the end of his first term in office he shall be eligible to stand for re-election for one further such term provided that at the time of nomination he is not prohibited under any other provision of these Articles from being a director.”

16 Article 20 on pages 82-83 was headed “Conflicts of Interest”. In article 20.1, this was said.

> “A person other than the Chief Executive Officer holding a paid appointment with the Company or a person connected in any way with the manufacture, sale or endorsement of table tennis equipment or with consultation on such equipment may not be a director of the Company.”

17 The claimant was elected to the board of the first respondent after an election which was conducted in May 2019. The election was preceded by the issuing by the first respondent of the document at pages 55-57, which had as its opening passage these words (the capitals and bold font being in the original):

> “**TABLE TENNIS ENGLAND ROLE DESCRIPTION & PERSON SPECIFICATION**
>
> **ELECTED NON EXECUTIVE DIRECTOR to be known as ELECTED DEPUTY CHAIRMAN**
>
> **THREE VACANCIES**
>
> **Status**: Voluntary
>
> **Remuneration**: £1,500 Honorarium per annum plus expenses
>
> **Term of Office**: 4 years from 30 June 2019 (the day after AGM)
>
> **Time Commitment**: 15-20 days per annum (including attendance at Board, sub-committee and other meetings and competition/events)”.

18 Further on down page 55, this was said:

> “Following changes introduced in 2017 in accordance with the Code of Sport Governance, we are seeking three elected directors to join the Board for a

four-year term (which may be renewed for a further four years). Each elected director will be called an Elected Deputy Chairman.
The Board comprises 12 directors; the Chairman, three elected directors from the membership, three independent directors, four appointed directors from the membership and the Chief Executive Officer. The Board is the body that sets the strategic direction and takes decisions to implement the strategy. There are a number of Board sub-committees and all directors are expected to sit on at least one sub-committee depending on their skills and experience.

You must be a member of Table Tennis England to be eligible for election and you must be nominated by at least two company members."

19 It was Ms Deaton's evidence in paragraph 9 of her witness statement that "only the elected members" received payment through an honorarium. However, she was not herself at the time of making her witness statement an elected member, but she (as she said in that paragraph), as the Non-Executive Chairman of the first respondent, also received an honorarium. The honoraria paid to at least the three elected members and Ms Deaton was of the same amount, namely £1500 per year. While it was not part of her witness statement (which consisted in many respects of comments on the documentary evidence), it was Ms Deaton's oral evidence that the first respondent had a remuneration policy which it was open to the first respondent to change from year to year, with the result that it was open to the first respondent to change the honorium paid to the claimant if the first respondent so wished. There was, however, nothing in the articles of association which provided for that. There was in the bundle before me only this paragraph headed "Remuneration" in the Board Guidance, on page 71, under the heading on page 70 "Matters reserved for the Table Tennis England* Board":

"• Determining the remuneration policy for Chairman, Deputy Chairman and Treasurer based on the recommendations of the appropriate committee.

• Determining the remuneration policy for staff on the recommendations of the appropriate committee".

20 Article 6 on page 79 provided this:

"6.2 No dividends or bonus may be paid or capital otherwise returned to the Company Members, provided that nothing in these Articles shall prevent any payment in good faith by the Company of:

6.2.1 reasonable and proper remuneration to any Company Member, officer or servant of the Company for any services rendered to the Company".

21 The claimant was paid his honorarium of £1500 per year in 12 equal monthly instalments. The instalments were recorded in the pay statements at pages 186-205. They described the payments as "salary" and the first respondent deducted income tax from the payments. The claimant was described as "Employee No: 550". That suggested that the first respondent had a number of paid staff. The "staff structure" document at pages 143-149 showed that that was the case: the respondent had a number of employees.

22 I could see no other relevant documentary evidence. No evidence was before me of the first respondent at any time in the past determining to reduce a regular honorarium paid to any member of its board.

The parties' submissions; a discussion

23 Ms Brown's submissions on the existence of a contract focused on the traditional tests for determining whether a contract has come into existence. In paragraphs 11 and 12 of her skeleton argument, she said this:

> '11. In respect of the existence of a contract, as Leggatt J (as he then was) said in *Blue v Ashley* [2017] EWHC 1928 (Comm) at [49]-[50]:
>
> "*The basic requirements of a contract are that: (i) the parties have reached an agreement, which (ii) is intended to be legally binding, (iii) is supported by consideration, and (iv) is sufficiently certain and complete to be enforceable… In general, the agreement necessary for a contract is reached either by the parties signing a document containing agreed terms or by one party making an offer which the other accepts. Acceptance may be by words or conduct*."
>
> 12. As to certainty of terms, "*unless all the material terms of a contract are agreed there is no binding obligation*": *Foley v Classique Coaches Ltd* [1934] 2 KB 1 per Maugham LJ at p13.

24 She then submitted, in paragraph 13 of her skeleton argument:

> "None of Leggat [sic] J's key elements have been identified by C in this claim."

25 However, the following passage of the EAT's judgment in *Sejpal* (which I have taken from the ICR report) shows that it would have been an error of law for me to apply the test in *Blue v Ashley*, which in any event concerned a rather different situation from the one in which it is necessary to decide whether a person was engaged personally to provide work under a contract of any sort to the other party to the contract. The following quotation has the emphasis in the quoted passages added by the EAT in *Sejpal*.

‘17. Focus on the statutory language tells us that there must be a contract (or, for reasons we will briefly consider below, in limited circumstances, a similar agreement) between the worker and the putative employer. But how do we analyse the nature of the agreement? Is it by applying undiluted common law contractual principles? No, it is not; as the Supreme Court authorities now make clear. While there must generally be a contract, the true nature of the agreement must be ascertained and contractual wording, that may have been designed to make things look other than they are, must not be allowed to detract from the statutory test and purpose.

18. In *Autoclenz Ltd v Belcher and others*, [2011] UKSC 41, [2011] ICR 1157 Lord Clarke held:

> “29. However, the question for this court is not whether the two approaches are consistent but what is the correct principle. I unhesitatingly prefer the approach of Elias J in *Consistent Group Ltd v Kalwak* [2007] IRLR 560 and of the Court of Appeal in *Firthglow Ltd (trading as Protectacoat) v Szilagyi* [2009] ICR 835 and in this case to that of the Court of Appeal in *Kalwak* [2008] IRLR 505. The question in every case is, as Aikens LJ put it at para 88 quoted above, **what was the true agreement between the parties**. I do not perceive any distinction between his approach and the approaches of Elias J in *Kalwak*, of Smith LJ and Sedley LJ in *Szilagyi* and this case and of Aikens LJ in this case.
>
> “30. In para 57 of *Kalwak* (set out above) Elias J quoted Peter Gibson LJ’s reference to the importance of **looking at the reality of the obligations** and in para 58 to **the reality of the situation**. In this case Smith LJ quoted (at para 51) para 50 of her judgment in *Szilagyi*: ‘The kernel of all these dicta is that the court or tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by.’
>
> “31. She added in paras 52, 53 and 55: ‘52. I regret that that short paragraph [ie para 51] requires some clarification in that my reference to “as time goes by” is capable of misunderstanding. What I wished to say was that the court or tribunal must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them. 53. In my judgment the true position, consistent with *Express & Echo Publications Ltd v Tanton* [1999] ICR 693, *Kalwak* and *Szilagyi*, is that where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. **To**

carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right. … 55. It remains to consider whether the EJ directed himself correctly when he considered the genuineness of the written terms. I am satisfied that he directed himself correctly in accordance with, although in advance of, *Szilagyi*. In effect, he directed himself that he must seek to find the true nature of the rights and obligations and that the fact that the rights conferred by the written contract had not in fact been exercised did not mean that they were not genuine rights.'

"32. Aikens LJ stressed at paras 90 to 92 the importance of identifying what were the actual legal obligations of the parties. He expressly agreed with Smith LJ's analysis of the legal position in *Szilagyi* and in paras 47 to 53 in this case. In addition, he correctly warned against focusing on the "true intentions" or "true expectations" of the parties because of the risk of concentrating too much on what were the private intentions of the parties. He added: "What the parties privately intended or expected (either before or after the contract was agreed) may be evidence of what, objectively discerned, was actually agreed between the parties: see Lord Hoffmann's speech in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, paras 64-65. **But ultimately what matters is only what was agreed**, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed." I agree.

33. At para 103 Sedley LJ said that he was entirely content to adopt the reasoning of Aikens LJ: 'recognising as it does that **while employment is a matter of contract, the factual matrix in which the contract is cast is not ordinarily the same as that of an arm's length commercial contract**.' I agree.

34. The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para 92 as follows: '92. I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which

commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, **it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed** and the court or tribunal **must be realistic and worldly wise** when it does so.'

"35. **So 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**. If so, I am content with that description." [emphasis added]

19. This realistic and worldly-wise determination of the true nature of the agreement between the parties must be undertaken with a focus on the statutory provision. In *Uber BV v Aslam*, [2021] ICR 657 , Lord Leggatt held:

"62. Beginning at para 22 of the judgment, Lord Clarke considered three cases in which 'the courts have held that the employment tribunal should adopt a test that focuses on the reality of the situation where written documentation may not reflect the reality of the relationship'. From these cases he drew the conclusion (at para 28) that, in the employment context, **it is too narrow an approach to say that a court or tribunal may only disregard a written term as not part of the true agreement between the parties if the term is shown to be a 'sham', in the sense that the parties had a common intention that the term should not create the legal rights and obligations which it gives the appearance of creating** : see *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802 (Diplock LJ) . Rather, the court or tribunal should consider what was actually agreed between the parties, 'either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded': see para 32, again agreeing with observations of Aikens LJ in the Court of Appeal. …

"68. The judgment of this court in the *Autoclenz* case made it clear that **whether a contract is a 'worker's contract' within the meaning of the legislation designed to protect employees and other 'workers' is not to be determined by applying ordinary principles of contract law such as the parol evidence rule, the signature rule and the principles that govern the rectification of contractual documents on grounds of mistake**. Not only was this expressly stated by Lord Clarke but, had ordinary principles of contract law been applied,

there would have been no warrant in the *Autoclenz* case for disregarding terms of the written documents which were inconsistent with an employment relationship, as the court held that the employment tribunal had been entitled to do. **What was not, however, fully spelt out in the judgment was the theoretical justification for this approach. It was emphasised that in an employment context the parties are frequently of very unequal bargaining power**. But the same may also be true in other contexts and inequality of bargaining power is not generally treated as a reason for disapplying or disregarding ordinary principles of contract law, except in so far as Parliament has made the relative bargaining power of the parties a relevant factor under legislation such as the Unfair Contract Terms Act 1977 .

"69. Critical to understanding the *Autoclenz* case, **as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, *Autoclenz* had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a 'worker'** in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. **In short, the primary question was one of statutory interpretation, not contractual interpretation**.

"70. **The modern approach to statutory interpretation** is to have regard to the purpose of a particular provision and **to interpret its language, so far as possible, in the way which best gives effect to that purpose** …"

"76. Once this is recognised, it can immediately be seen that **it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a 'worker'**. To do so would reinstate the mischief which the legislation was enacted to prevent. **It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker.** Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it." [emphasis added]'

26 In paragraph 14 of her skeleton argument, Ms Brown developed her argument that there was no contract because the traditional tests for determining whether a contract came into existence were not satisfied. I could not accept the submissions in paragraph 14.1 because they relied purely on the manner in which the claimant came to be a director of the first respondent, namely via an election. In paragraph 14.2, Ms Brown said this:

> "There was no intention to create legal, contractual relations between C and R1. Indeed, doing so was prohibited by the Articles of Association [74, 82/20.1] and the role description [55]."

27 However, the role description on page 55, to which I refer in paragraphs 17 and 18 above, plainly could not prohibit the first respondent from entering into a contract with the claimant, and article 20.1, which I have set out in paragraph 16 above, in my judgment merely provided so far as relevant that an employee of the first respondent (who would, necessarily, be paid) could not be a director of the first respondent unless that employee was the CEO. Article 20.1 did not preclude the payment of fees to directors, as far as I could see, both as a matter of common sense and on the basis that article 20 concerned conflicts of interest and there is no conflict of interest in a director of a company being paid a fee for his or her work as such a director. In any event, I did not see the question whether a company's articles of government could be interpreted to preclude someone being engaged under a contract which satisfied the requirements of section 230(3)(b) of the ERA 1996 as being capable of being determinative of the question whether such a contract had come into existence.

28 Also in paragraph 14.2 of her skeleton argument, Ms Brown said this:

> "Where R1 intends to create legal relations, it has an established practice which was not applied to C:
>
> 14.2.1. R1 has a standard form of terms which it provides to all employees and workers. It was not provided to C [WS:SD/15]. C did not feature in R1's organogram [143];"

29 However, what Ms Deaton said in paragraph 15 of her witness statement was, so far as relevant, this:

> "The Claimant was not provided with an employment contract following his appointment at the AGM (I refer to page 150 to 151 of the bundle) given he is not an employee nor a worker."

30 The fact that the claimant was not provided with a contract of employment was self-evidently irrelevant, and certainly the words "nor a worker" were unwarranted in that sequence. In any event, the latter three words were not evidence, but assertion. The fact that the claimant did not feature in the first

respondent's "organogram" was probably the result of the claimant not being an employee, but in any event was of only peripheral, if any, relevance here.

31 Similarly, Ms Brown said this in paragraph 14.2.2:

> "C did not receive holiday, sick pay, or any pension entitlement, which would have been a legal requirement on R1 if such an intention was present".

32 The conferring of those benefits would normally be the result of a recognition that a person had the status of employee or worker. A failure to confer those benefits could not be determinative of the question whether as a matter of statutory interpretation the person had either such status. If authority for such a proposition is required, it is to be found in paragraph 69 of the judgment of Lord Leggatt in *Uber*, which was set out by the EAT in the paragraph of its judgment in *Sejpal* which I have set out in paragraph 25 above.

33 Equally, saying (as Ms Brown did in paragraph 14.2.3. of her skeleton argument) that because the claimant was not given a copy of the first respondent's Staff Handbook during his induction, there was no intention to create legal relations, Ms Brown raised an issue which was at best of only peripheral relevance to the question whether or not the claimant was a worker within the meaning of section 230(3)(b) of the ERA 1996. That is because the question whether or not a person was given a copy of the first respondent's staff handbook could not be any more than remotely relevant to the question whether or not the person was engaged under a contract.

34 In paragraph 14.5 of her skeleton argument, Ms Brown said this:

> "C resigned following a majority vote by his fellow directors to request the same, in accordance with the procedure for removing members of the Board [85/26.1]. Self-evidently, that is entirely different to how staff contracts are terminated [135, 142(a)]."

35 A "staff contract" would at least normally be one of employment, and the claimant was agreed not to be an employee. If the "staff contract" were one of a worker within the meaning of section 230(3)(b), then a difference in the means of termination could in circumstances such as these be a result of the fact that the worker's contract arose from the articles of association. Thus, the fact that the claimant's removal from the respondent's board followed a majority vote under article 26.1, which I have set out in paragraph 14 above, could not be taken to show that there was no contract in place between the claimant and the first respondent.

36 Ms Brown continued in paragraph 14.5 of her skeleton argument:

> "R1 would not be able to terminate the relationship of its own accord – something mutually inconsistent with the basis of the interaction being a contractual agreement between the parties."

37 However, article 26.1, which I have set out in paragraph 14 above, was in effect a power on the part of the first respondent to terminate the relationship between it and the claimant as one of its directors.

38 In paragraph 15.1 of her skeleton argument, Ms Brown said this:

> "15. Even if a contract were found, looking at the content of the relationship and the overall context, it would not involve the requisite obligations:
>
> 15.1. C's role existed by virtue of his office as opposed to contractual agreement. The rights and duties of the NED position exist independently of the person who fills it. They are not the subject of choice or negotiation between the parties".

39 The claimant's "role" as a director of the first respondent arose from both the constitution of the first respondent and the document at pages 55-57 to which I refer in paragraphs 17 and 18 above. The content of the latter document was very much the result of a choice by the first respondent. If the claimant could not negotiate the terms on which he was engaged to do whatever he did as a director of the first respondent, that assisted his claim to be a worker, given what Lord Leggatt said in paragraph 76 of his judgment in *Uber*, which the EAT set out in the paragraph of its judgment in *Sejpal* which I have set out in paragraph 25 above.

40 The matters referred to by Ms Brown in paragraphs 15.2 to 15.4 inclusive of her skeleton argument related to issues of "control", which paragraph 54 of Eady J's judgment in this case, which I have set out in paragraph 4 above, shows were immaterial to the question whether or not there was a contract of any sort between the claimant and the first respondent.

41 In paragraph 16 of her skeleton argument, Ms Brown said this:

> "Therefore, applying the language of the statute, there is no contractual agreement between the parties whatsoever, for reasons similar to those in *Gilham*. If there were any contract, it would not include the necessary obligations to bring C within s230(3) ERA."

42 *Gilham* concerned a judge. The claimant in that case was not employed under a contract within the meaning of section 230(3)(b) of the ERA 1996 because of the constitutional arrangements which apply to the appointment and service of a judge. The claimant relied on *Gilham* here only in case his claim to have been

employed under a contract to which section 230(3)(b) applied failed. In paragraph 58 of her judgment in this case, Eady J said this.

> "As the respondents have observed, it may be that the ET considered that it was unnecessary to address the claimant's case on this point, given that it was not suggested that non-executive directors, as an occupational class, were precluded from being workers in same way as judges. The ET did not, however, state that was its finding on the point and its failure to engage with the claimant's argument inevitably means that he cannot know the reason why he lost in this respect. To the extent that this argument continues to be pursued by the claimant, it can be considered at the remitted hearing."

43 The claimant did in fact pursue that argument before me. In paragraph 23 of his skeleton argument on the claimant's behalf, Mr Matovu said this.

> 'Alternatively, if it were ruled that the Claimant as a volunteer non-executive director was excluded from being classified as a "worker", then it is submitted that the failure to extend the ERA's protection against whistleblowing to the Claimant's role is a violation of his rights under Article 14 of the ECHR read with Article 10.'

44 In paragraphs 24-28 of that skeleton argument, Mr Matovu developed that contention. It was clear from them that the focus of the argument was on the position of a "volunteer non-executive director".

45 Mr Matovu's primary position was of course that the claimant was engaged by the first respondent under a contract which fell within section 230(3)(b) of the ERA 1996. However, his submissions in that regard in reality treated it as self-evident that there was such a contract. They did not address the impact of the use of the words "honorarium" and "volunteer", which were in my view the key words in the document at pages 55-57. I did, however, agree with Mr Matovu's implicit submission in paragraphs 8 and 9 of his skeleton argument that that document was of critical importance in determining whether or not the parties had entered into a contractual relationship as opposed to a relationship which was not governed by a contract.

A discussion

46 It seemed to me to be self-evident that the first respondent used the words "honorarium" and "volunteer" in the document at pages 55-57 with a view to avoiding there being any kind of contract between it and any elected non-executive director. The word "honorarium" is defined (as I pointed out to the parties on 13 January 2023) by the Shorter Oxford English Dictionary in this way:

> "A (voluntary) fee, esp. for professional services nominally rendered without payment."

47 However, the "honorarium" was here described (see paragraph 17 above) as "remuneration", and it was paid (see paragraph 21 above) as a "salary". While those factors could not be determinative, if they were of peripheral relevance only then the use of the word "honorarium" itself could justifiably be said to be of peripheral relevance only.

48 Ms Deaton's statement that the first respondent had the power to decide not to pay an honorarium after all to an elected non-executive director was not evidence. As I indicate in paragraph 22 above, she gave no evidence to the effect that such a decision had ever been made by the first respondent. In addition, as Mr Matovu put it to Ms Deaton in cross-examination and pointed out in oral submissions, the "honorarium" of £1500 per year was offered to members as a (my word, not his) carrot to encourage them to seek election as a non-executive director. Such a carrot was required (he submitted) because of the considerable time commitment stated (see paragraph 17 above) in the document at page 55. The assertion by and on behalf of the respondents that that commitment was voluntary was contradicted by paragraph 6.4 of the Board Guidance, which I have set out in paragraph 11 above. However, that paragraph of that guidance was not, as I indicate in paragraph 12 above, supported by the articles of association. Nevertheless, the power to require a member of the board to resign, conferred (see paragraph 14 above) by article 26.1 supported the proposition that at least the first respondent, even if not its non-executive chairman, could take action if the time commitment stated on page 55 were not met.

49 Even if the payment of the £1500 was not obligatory, it was of financial value and therefore was, as far as I could see, given what is said in paragraphs 6-001 and 6-002 of the current, 34th, edition of *Chitty on Contracts*, consideration. In the second of those two paragraphs, this was said:

> "A person or body to whom a promise of a gift is made from purely charitable or sentimental motives gives nothing for the promise; and the claims of such a promisee are regarded as less compelling than those of a person who has provided (or promised) some return for the promise."

50 Those words suggested that if the claimant provided the services envisaged by the time commitment of 15-20 days per year stated in the document at pages 55-57, then he would have provided consideration for the payment to him of the "honorarium" of £1500 per year referred to in that document.

My conclusion on the question whether the claimant was employed under a contract which fell within section 230(3)(b) of the ERA 1996

51 Drawing all of the relevant threads together, and applying the words of section 230(3)(b) of the ERA 1996 in the light of the case law (in particular the case law

to which I refer in particular in paragraph 25 above and the judgment of Eady J in this case), I came to the conclusion that the claimant entered into a contract within the meaning of that provision. Thus, I concluded that he was a worker within the meaning of section 230(3)(b) of the ERA 1996. That was for the following reasons.

51.1 The mere description of the claimant as a volunteer could not exclude the application of section 230(3)(b). Nor could the description of the remuneration given to the claimant in return for him meeting the commitments stated in the document at pages 55-57 as an honorarium.

51.2 Those words ("volunteer" and "honorarium") did, however, cause me to think very carefully about the situation of the first respondent as a members' association which governed a popular sport on a national basis. Nevertheless, that association was very different from the Methodist Church whose organisation was in issue in *Preston*. That is clear from paragraphs 33 and 34 of the judgment of Lord Sumption in that case. Even Baroness Hale, who gave a dissenting judgment, said in paragraph 36: "the spiritual nature of some (but by no means all) of the duties involved is an important part of the context".

51.3 Certainly, the claimant had no choice if he was to become an elected non-executive director but to accept the terms at pages 55-57.

51.4 Here, the fact that there was (see paragraph 17 above) a commitment of 15-20 days per year for the claimant coupled with the offer of an annual payment of £1500 in my judgment caused a contract within the meaning of section 230(3)(b) of the ERA 1996 to come into existence between the claimant and the first respondent when the claimant was elected to the post of non-executive director. I could not see how it could realistically be contended otherwise. The assertions of the first respondent that there was no such contract amounted in my view to no more than assertions to the effect that, principally because the respondent used the words "volunteer" and "honorary" in the document at pages 55-57 in the ways to which I refer above, there was no such contract.

52 For those reasons, I concluded that the claimant was a worker within the meaning of section 230(3)(b) of the ERA 1996 and that his claims of detrimental treatment within the meaning of section 47B of that Act for the making of public disclosures within the meaning of section 43A of that Act should proceed. I agreed with the parties' counsel at the end of the hearing day on 13 January 2023 that there should be a 2-hour private preliminary hearing of the sort which usually takes place in such a claim if I determined the preliminary issue of worker status in the claimant's favour, but it was not practicable at that time to agree a provisional listing of such a hearing. The parties should therefore write to the

tribunal within 14 days of receiving this judgment, giving their dates to avoid within the period from 1 June 2023 to 30 November 2023.

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Employment Judge Hyams

Date: 3 February 2023

SENT TO THE PARTIES ON:

9 February 2023

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FOR THE TRIBUNAL OFFICE