EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105484/2022

Held in Glasgow on 25 May 2023

5 **Additional submissions received on 27 June 2023**

Employment Judge M Kearns

Mr A Amir	**Claimant** **In person**
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Taziker Industrial Ltd	**Respondent** **Represented by:** **Mr A Rhodes –** **Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The respondent's application for strike out of the claim under rule 37(1)(c) and (d) was refused in a judgment delivered orally with reasons on 25 May 2023.

20 2. The reserved judgment of the Employment Tribunal following the preliminary hearing was that:-

    a. The claimant was a contract worker as defined in section 41 of the Equality Act 2010.

    b. The issues of time bar: (i) whether the complaint is time barred; (ii) 25 whether the claimant's complaints amount to alleged 'conduct extending over a period' under section 123(3)(a) of the Equality Act 2010; and/or (iii) whether it would be just and equitable to extend time, are reserved to be determined at the full hearing of this case.

3. Date Listing stencils will be sent out to parties for the full hearing.

30 ## REASONS

1. The claimant worked for the respondent as a groundworker from 24 March until 27 June 2022 under a contract between Unity Contracting Services Limited and himself. On 10 October 2022 he presented an application to the Employment Tribunal in which he claimed that he was subjected to harassment and victimisation on grounds of race, contrary to sections 26 and 27 Equality Act 2010. He also made a claim of automatically unfair dismissal under section 104 Employment Rights Act 1996 for asserting a statutory right and claimed notice pay. Coyles Personnel Ltd and Unity Contracting Services Limited were added to the claim as second and third respondents. The claim was withdrawn against those respondents on 14 April 2023 and now proceeds against the current respondent alone. All claims against the respondent except the harassment claim were also withdrawn by the claimant's former solicitor on his behalf on 14 April 2023 and dismissed on 18 April.

Issues

2. A Preliminary Hearing ("PH") was held before Employment Judge I McPherson on 18 March 2023 for the purposes of case management. The Judge made a number of orders following that Preliminary Hearing ("PH") including an order for witness statements for today's PH, which was fixed to consider the following preliminary issues:

   a. Employment status; and

   b. Time bar.

3. On 14 April 2023, the claimant's solicitor, Ms Ramiza Mohammed withdrew from acting for him. As discussed above, in her email notifying the Tribunal of her withdrawal, she also withdrew on his behalf the claims against the second and third respondents and the claimant's victimisation claim against the current (remaining) respondent. In the email she stated:

"In respect of the upcoming preliminary hearing we consider that 2 days for the hearing will no longer be necessary. The issue of whether the acts of discrimination are individually time barred or considered an ongoing series of events cannot be determined without making findings in facts therefore we

propose this be left to be dealt with in submissions at the full merit hearing. The only matter therefore that is required to be determined is the matter if status. [sic] *We therefore propose that this therefore be allocated to a 1 day only."* It was on this basis that today's hearing was reduced to one day.

4. EJ McPherson directed the respondent to revise the list of issues for the PH standing the various withdrawals. In addition to the issues discussed above, the respondent today made an application for strike out of the claim on the ground that the claimant had failed to produce a witness statement and that he had failed to progress the claim. The strike out application was determined at the outset of the hearing on 25 May 2023. An oral judgment refusing the application was issued with reasons.

Evidence

5. For the preliminary issues requiring evidence, the parties had prepared a joint bundle of documents and referred to them by page number ("J"). The claimant gave evidence on his own behalf. The respondent did not lead evidence.

Findings in Fact

6. The following facts were admitted or found to be proved:-

7. The claimant is a groundworker with a dumper and roller ticket. He is a member of the HMRC Construction Industry Scheme ("CIS") and is treated as self-employed by HMRC for tax purposes. The claimant has experience in preparing the ground for building and road works.

8. The claimant has been registered with a number of recruitment agencies from whom he has obtained work in the past three years. In or about early 2022, someone the claimant knew was working for an agency called Coyles Personnel Ltd ("Coyles"), based in Harrow, Middlesex. Coyles were looking for ground workers for a job on the M8 Viaduct near Glasgow and the claimant's acquaintance passed his name on to them. In or about March 2022 the claimant was contacted by John from Coyles, who asked him if he would be interested in working on the M8 job. The claimant said he would take the

job. He obtained a reference from a previous employer and sent this on to John. John told the claimant that the job was expected to last two or three years. He sent the claimant a link to an online contract with a company called 'Unity Contracting Services Limited' ("Unity")), which the claimant was required to sign and date. The claimant understood this to be a form for payroll purposes (J102). The contents were not discussed with him. There was no discussion or negotiation about either the contractual 'chain' or the terms of the contract. The form was entitled: 'Unity Contracting Services Contract for Services'. The claimant filled in his name and address and the date on the online contract form on 23 March 2022. He added his signature at the end as instructed. The form describes him throughout as "The Subcontractor". The claimant did not read the form before he signed it or at any stage. The form was a contract written by or on behalf of Unity. At this point, the claimant thought his agreement was with Coyles. The form states: *"It is hereby agreed as follows…"* and it thereafter provides, so far as relevant:

"1.4 The intention of the parties is to enter into a contract for services. Both parties agree that this Agreement shall not be construed as being a contract of employment or a worker's contract or confer any employment or worker rights to any person (including the Subcontractor) who provides services under this Agreement.

1.5 Both parties acknowledge and agree that as there is no obligation on the Subcontractor to provide services personally, and as such the Subcontractor does not meet the definition of an Agency Worker as defined in the Agency Workers Regulations 2010, nor of a worker in the National Minimum Wage Act 1998, the Pensions Act 2008, the Employment Rights Act 1996 nor the Working Time Regulations 1998.

1.6 The Subcontractor confirms his understanding of the fact that, as a self-employed Subcontractor, he has no claim to any employment or worker rights such as the National Minimum Wage, holiday pay, redundancy pay, grievance rights or sick pay (this list is not exhaustive) throughout the duration of this Agreement."

2 Subcontractor Provisions

2.1 The Subcontractor confirms that as an independent provider of services, the Subcontractor agrees that it has no authority to bind the Company in any way and the Subcontractor shall not represent that any such authority exists. The Subcontractor cannot and must not incur any liability on behalf of the Company and must not make any arrangement, formal or informal on behalf of the Company.

………….

2.3 The Company is not obliged to offer any work on any Assignment to the Subcontractor at any time and the Subcontractor is not obliged to accept any work on any Assignment at any time. The offer of work by the Company does not in any way oblige the Company to offer further work or prevent the Company from withdrawing any work on any assignment already offered. The acceptance of any work on any Assignment by the Subcontractor does not oblige the Subcontractor to accept any further work on any Assignment or prevent the Subcontractor from withdrawing from work on any Assignment already accepted whether it is before, during or after any particular period of work on any Assignment.

2.4 The Subcontractor confirms that he is free to provide the services in the way he deems appropriate. Neither the company nor any other person will or has the right to control the manner in which these services are provided by the Subcontractor. The Subcontractor, and any Substitute Operative, will have discretion as to the methods used to provide the Services whilst always ensuring that the relevant health, safety and site security measures are observed.

…………………

2.8 The Subcontractor is not required to perform the services personally. The Subcontractor has the right to send Substitute Operatives to provide the Services (in accordance with clause 2.9 of this Agreement). The

Subcontractor will be responsible for paying the Substitute Operatives and for the quality of their work.

2.9 Any Substitute Operatives may be rejected by the Company only if in the reasonable opinion of the Company and/or the Client the Substitute Operative does not possess the necessary skills, qualification, licences or clearances to provide the Services. The Subcontractor shall ensure that any Substitute Operative has the necessary clearances and/or licences to provide the Services. The Subcontractor will notify the Company immediately where any of the said licences are revoked, rescinded, invalidated, suspended or not operational.

2.10 The Subcontractor or any Substitute Operative is responsible for all of its own training and any associated fees. Where the Company or the Client provides any training, the Subcontractor shall be liable to pay the cost of such training which the Company will invoice the Subcontractor for payment within seven working days or the Company may set-off such costs against any sums due to the Subcontractor unless the Company, in its absolute discretion waives such costs.

2.11 Where a Substitute Operative is provided by the Subcontractor to provide the services, the Subcontractor will remain responsible for all and any employment matters, costs and claims, the quality of the workmanship and for payment to any Substitute Operatives and the Subcontractor will indemnify and keep the company indemnified in respect of any claims, demands, costs, liabilities or actions in respect thereof. The rate agreed with the Subcontractor includes any costs associated with the engagement of Substitute Operatives engaged by the Subcontractor. The Company will not have any contractual or financial relationship with any Substitute Operative engaged by the Subcontractor.

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2.13 The Subcontractor may be liable for any costs incurred by the Company or its Clients relating to the repair or replacement of any property, plant or equipment belonging to the Company or its Clients which has been damaged

or misplaced by the Subcontractor or any Substitute Operative. As such, the Company has the right to invoice the Subcontractor for any costs incurred by the Company or the Client in accordance with this clause within seven working days of the Company or Client incurring said costs and it is agreed the Company has the right to set-off such costs invoiced to the Subcontractor in accordance with this clause against any sums due to the Subcontractor by the company.

3 Quality of Service Provision

The Subcontractor, in determining the manner in which the Services are provided, will ensure that the Services provided on any Assignment (whether provided by the Subcontractor and/ or Substitute Operatives) are of the required standard and delivered in a safe way, adhering to any relevant health and safety rules and regulations.

………………..

4.2 The Subcontractor agrees to allow the Company to prepare self-billing invoices on its behalf and shall confirm to the company whether the Subcontractor is registered for VAT. Invoices raised shall, where applicable, constitute a VAT invoice.”

9. The M8 Viaduct construction project was being carried out by the respondent. The claimant began work on the project on or around 24 March 2022. The ‘contractual chain’ was that, although the claimant was originally contacted and recruited by Coyles, he was contracted and paid by Unity. Unity then supplied him to Coyles, who paid Unity for his services. Coyles then supplied the claimant under contract to the respondent who made work available to him. The claimant had no say in the contractual structure or in the terms of the contract, which he was told to sign.

10. The claimant worked exclusively for the respondent, continuously and full-time on the M8 Viaduct project from around 24 March 2022 until 24 June 2022 when he raised with the respondent an alleged incident of racial harassment.

11. The claimant was part of a team on the project. On a typical day at work on the viaduct, the claimant would begin the day by attending a team meeting at which the respondent's team leader would give each individual instructions on the work they were required to do that day. The claimant would then go and do the work in the manner instructed using the respondent's dumper, roller and other equipment.

12. The claimant was paid weekly on a Friday by Unity by BACS directly into his bank account. Unity produced 'self-billing' invoices on his behalf with CIS tax liability deducted at 20% (J113 – 127). The claimant would fill in a tax return each year as a self-employed person for tax and National Insurance purposes. Coyles invoiced the respondent for work done by the claimant under the contract (J107 – 110) and the respondent paid Coyles for the claimant's work (J112).

13. The claimant reported to one of the respondent's team leaders named Scott. Scott was, in turn managed by Mick. The claimant regarded Scott and Mick as his bosses. He had worked with Mick previously at another firm and he knew him well. If the claimant was sick he would contact Scott, his team leader and let him know he would not be in that day. The claimant had a good relationship with Scott, who would say to him: "Take as much time as you need." The claimant did not receive sick pay or holiday pay.

14. The wording of paragraphs 1.5, 2.8 and 2.9 of the online form of contract signed by the claimant does not reflect the reality of the contract or the practice in the industry in the claimant's locality where, in the experience of the claimant, it does not happen that a person in the claimant's position sends a substitute to work in his place. The claimant was a skilled worker and in practice, he was in fact required to provide his services personally. If he needed time off, he was not replaced. Indeed, no one could replace him and the respondent simply did without him until he returned. At no point did he ever attempt to send a substitute, nor did he have any reason to do so.

Observations on the evidence

15. The parties had produced a joint bundle of documents. The claimant gave evidence on his own behalf. The respondent did not lead evidence. I found the claimant to be an honest witness. He made a number of appropriate concessions. He also answered Mr Rhodes' questions (some of which were necessarily quite technical) without appearing to understand their legal significance. Mr Rhodes cross examined the claimant on the terms of the contract document with Unity which the claimant had signed online (J102 – 103). As he was required to do, Mr Rhodes put to him the terms of that contract relevant to the issue of his status for the purposes of the Equality Act 2010. With reference to paragraphs 1.5, 2.8 and 2.9 of the document, the following exchange took place:

Mr Rhodes: "That paragraph [2.9] says that if there's a suitably qualified person who could be sent to do the job for Taziker on a particular day, that's someone you could have sent on your behalf? Is that a fair reading of what that clause says?"

Claimant: [reads paragraph]. I've read it. What was your question?

Mr Rhodes: I'm suggesting, based on what you've read at 2.9 that if you knew someone suitably qualified who could have done the job at Taziker, you could have sent that person on your behalf?

Claimant: I disagree with that. I've never ever heard of that. That's not the way it works. That's not what happens. This is news to me. Someone else coming in your place? I had no reason to ask to send someone else. That would be an absurd question to ask. I had no experience of that in this industry at all. Anytime I've needed time off no one ever replaced me. The very nature of my job.. I was self-employed and a skilled worker and could not be replaced.

Mr Rhodes: If there was someone as skilled as you are, you could send them?

Claimant: I have no experience of that in practice and of this clause. It was nothing that was ever spoken about. The day you were talking about I spoke to my line manager. He was my first point of contact - not to send someone

else, but to speak to my line manager and advise that I was not going to be in. I did not have the option to send anyone else if I was going to be off."

16. This was the oral evidence before the Tribunal regarding the Unity contract at pages J102 – 3 of the bundle.

5 **Applicable Law**

17. Section 41 of the Equality Act 2010 provides, so far as relevant as follows:

"41 Contract workers

(1) A principal must not discriminate against a contract worker –

(a) as to the terms on which the principal allows the worker to do the work;

10 *(b) by not allowing the worker to do, or continue to do, the work;*

(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

(d) by subjecting the worker to any other detriment.

15 *(2) A principal must not, in relation to contract work, harass a contract worker.*

(3) …

(4) …

(5) A "principal" is a person who makes work available for an individual who is –

20 *(a) employed by another person, and*

(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not the other person is a party to it)."

18. Section 83(2)(a) Equality Act 2010 states so far as relevant that ""Employment" means – (a) employment under a contract of employment, a
25 contract of apprenticeship or a contract personally to do work."

Discussion and decision

Employment Status under section 83(2)(a) Equality Act 2010

19. The list of issues for today's Preliminary Hearing was revised unilaterally by the respondent on 26 April in accordance with EJ McPherson's orders. The claimant's solicitor had withdrawn from acting on 14 April 2023 and the claimant had no input into the revised list.

20. The revised list continued to ask whether the claimant was an employee of the respondent within the meaning of Section 39(4)(c) and (d) Equality Act 2010, which are concerned with a claim of victimisation. As the claimant's victimisation claim had been withdrawn on 14 April 2023 by his former representative in her parting email and had been dismissed by the tribunal on 18 April, it was necessary to have a discussion with the parties at the outset of the hearing to clarify the issues for determination at the PH. I checked with Mr Rhodes if, when revising the list of issues, he had considered whether the claimant was a 'contract worker' under section 41 Equality Act. He indicated that he had and that section 41 was potentially an alternative route to the same outcome. His view was that section 41(5) presented the claimant with the same difficulty as sections 39 and 40 in that a "principal" was defined as a person who makes work available for an individual who is "employed by another person". "Employed" is as defined in section 83 and so section 41 effectively applies the same "employment" test as section 40. On behalf of the respondent, Mr Rhodes therefore submitted and I accepted, that whichever route the claimant went down, the same test applied. The jurisdiction of the tribunal effectively depended upon whether the claimant was in "employment" as defined in section 83(2)(a) Equality Act 2010 ("EqA").

21. Section 83(2)(a) EqA states that *"Employment means – (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work".* The concept of "employment" for EqA purposes is wider than "employment" as defined in section 230 Employment Rights Act 1996. The EqA concept can embrace those who would be considered 'self-employed' under the classic (non EqA) test provided they are under a contract

personally to do work. (*Muschett v HM Prison Service* [2010] EWCA Civ 25; [2010] IRLR 451). Indeed, the claimant described himself in his evidence as 'self-employed'.

5 *Was the claimant in employment with the respondent under section 40 EqA?*

22. Turning to the issues, I considered first whether the claimant was in "employment" with the respondent within the meaning of section 40(1)(a) EqA. Clearly the claimant did not have an express contract of any kind with the respondent. I also accepted Mr Rhodes' submission that there was no implied 10 contract between the claimant and the respondent. Mr Rhodes submitted that the test for whether a contract should be implied in these circumstances is necessity (*James v London Borough of Greenwich* [2008] EWCA Civ 35 at 51). The question is not whether the working relationship would be better explained by the existence of a contract, it is whether it is necessary to imply 15 one to make sense of the relationship. Mr Rhodes referred to paragraph 24 of James in which the Court said: "*It would be fatal to the implication of a contract that the parties would or might have acted exactly as they did in the absence of a contract*". Mr Rhodes quoted with approval the following points from Unity's ET3, which he said, was all that was required to explain why the 20 claimant was working at the respondent's site. He submitted that it was certainly not necessary to imply a contract between the claimant and respondent in order to make sense of the relationship:

"The claimant contracted with Unity and was paid by them.

He was supplied to Coyles and they would make a payment for these services 25 *to Unity.*

Coyles then supplied the claimant to Taziker where he would carry out the services."

23. Mr Rhodes also referred to the following further undisputed facts in support of this argument:

a. Coyles Personnel Ltd invoiced the respondent for work done by the claimant (J107 – 110);

b. The respondent paid Coyles Personnel Ltd for work done by the claimant (J112);

5 c. Unity Contracting Services Ltd produced invoices on the claimant's behalf (in accordance with their contract with him) for them to pay him for his services (J113 – 127).

24. I accepted Mr Rhodes' submission on this point and find that the claimant was not an employee of the respondent for the purposes of section 40(1)(a) EqA.
10 Indeed, as Mr Rhodes submitted, there was no contract of any kind between the claimant and the respondent.

Was the claimant a contract worker under section 41 EqA?

25. I then turned to consider whether the claimant was a contract worker for the
15 purposes of section 41 EqA. By letter dated 12 June 2023, the Tribunal gave both parties an opportunity to make any further submissions they wished to make on the section 41 point and Mr Rhodes provided a supplementary skeleton argument ("SSA") on 27 June. This is referred to along with his oral submissions and his original skeleton argument. The claimant did not supply
20 additional submissions.

26. With regard to section 41 EqA, the question is the one identified by Mr Rhodes – whether the respondent was a "principal" for the purposes of subsection (5). That subsection provides: *"(5) A "principal" is a person who makes work available for an individual who is –*

25 *(a) employed by another person, and*

(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not the other person is a party to it)."

27. Thus, the first issue is whether the claimant was "employed" by Unity for the purposes of section 41(5)(a). "Employment" is again defined by section 83(2)(a), which states for ease of reference that it means: *"(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work".* I agree with Mr Rhodes that the claimant was not under a contract of employment (service) or apprenticeship with Unity. The remaining question is therefore whether he was under a contract personally to do work.

28. At paragraph 10 of his supplementary skeleton argument ("SSA") of 27 June, Mr Rhodes submits (and I accept for present purposes) that it is an uncontroversial principle of law that if a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with even the wider definition of "employment" contained in section 83(2)(a). Thus, as Mr Rhodes submits, the question of whether the claimant was under a contract personally to do work requires consideration of whether there was a genuine right of substitution. The claimant's evidence was that no such genuine right of substitution existed. Thus, there was a conflict between the respondent's documentary evidence (the Unity contract) and the claimant's oral evidence.

29. At paragraph 12 of his SSA, Mr Rhodes submits that the following clauses of the Unity contract (J102 – 3) are relevant to the question of whether there was a genuine right of substitution:

    a. Clause 1.5 and 2.8 provide that there is no obligation to provide personal service;

    b. Clause 2.4 provides that any substitute operative has discretion as to the manner in which the services are provided;

    c. Clause 2.8 provides that the subcontractor has responsibility for paying the substitute operative and the quality of their work;

    d. Clause 2.9 provides the circumstances in which Unity are entitled to reject a substitute operative and that the subcontractor has

responsibility for ensuring that the substitute operative has the necessary clearances and licenses;

e. Clause 2.10 provides that the substitute operative is responsible for their own training and associated fees;

f. Clause 2.11 provides that the subcontractor is responsible for all employment matters, costs and claims associated with the substitute operative;

g. Clause 2.13 provides that the subcontractor is responsible for any costs incurred in relation to replacement of any property damaged by the substitute operative; and

h. Clause 3.1 provides that the subcontractor is responsible for ensuring the services provided (including by a substitute operative) are of the required standard and delivered in a safe way.

30. Mr Rhodes submits that all the above points to there being a valid substitution clause. He submits that the claimant was aware of this as part of his contract for services with Unity. In fairness to Mr Rhodes, the note I have of the claimant's evidence is probably fuller than any note he would have been able to take whilst simultaneously cross examining. The claimant's evidence on this point (which I accepted) was that he did not read the contract at the time of signing it and was not aware of the substitution clause. When the clause was put to the claimant, his further evidence in cross examination (set out in the observations on the evidence above and quoted in the Tribunal's letter of 12 June inviting further submissions) was: *"I've never ever heard of that. That's not the way it works. That's not what happens. This is news to me. Someone else coming in your place? I had no reason to ask to send someone else. That would be an absurd question to ask. I had no experience of that in this industry at all. Anytime I've needed time off no one ever replaced me. The very nature of my job.. I was self-employed and a skilled worker and could not be replaced."* He also said: *"I did not have the option to send anyone else if I was going to be off."*

31. Mr Rhodes also submits that the right to provide a substitute is set out in the explanatory leaflet the claimant was given upon entering the contract (J104 point 3). The claimant was not asked about (J104) in evidence, so I do not have evidence before me that the claimant was given it and I have not been able to make findings in fact regarding this document.

32. The contract the claimant was asked to sign was written by or on behalf of Unity and was not discussed with him to any extent. His evidence was that he thought Unity was a payroll company and that was why he was being asked to sign the document. He did not read the document before he signed it. Mr Rhodes submitted that it is trite law that we are bound by the things we sign, whether we have read them or not. However, it appeared to me that whilst it is certainly true in the context of ordinary and commercial contracts that the signature rule applies, following the seminal cases of *Autoclenz v Belcher* [2011] ICR 1157 (see paragraphs 20 - 32) and *Uber BV v Aslam and Others* [2021] UKSC (Paragraphs 62 -76), in the context of employment contracts, a different approach has been taken.

33. In *Autoclenz*, the claimants carried out car cleaning services on behalf of the respondent company. In order to obtain the work, they were required to sign contracts which stated that they were sub-contractors, and not employees, that they had to provide their own materials, that they were not obliged to provide services to the company, nor was the company obliged to offer work to them, and that they could provide suitably qualified substitutes to carry out the work on their behalf. In *Autoclenz*, the claimants sought to argue that they were 'workers' and thus entitled to be paid the National Minimum Wage and holiday pay. In the present case, the claimant accepts that he was self-employed and the issue is the more restricted question of whether he nevertheless comes within the broader definition of 'employed' for the purposes of the Equality Act (under a contract personally to do work). In *Autoclenz*, the employment tribunal found that the contractual documents the claimants had signed did not reflect the true agreement between the parties; that the claimants were required to perform their services under the direction and control of the company; and were obliged to carry out the work offered,

and to do so personally notwithstanding the substitution clause in the contract. The tribunal also found that they would not have been offered work if they had not signed the contracts, the terms of which were imposed by the company. The case ultimately went to the Supreme Court, which held that, in the context of employment, where, taking into account the relative bargaining power of the parties, the written documentation might not reflect the reality of their relationship, it was necessary to determine the parties' actual agreement by examining all the circumstances, of which the written agreement was only a part, and identifying the parties' actual legal obligations; and that, on the basis of the findings of the employment tribunal, it had been entitled to disregard the terms of the written documents in so far as they were inconsistent with those findings and to hold that the claimants were "workers".

34. As Mr Rhodes submitted, in *Autoclenz*, Lord Clarke (at paragraph 25) quotes the judgment of Elias J (as he then was) in *Consistent Group Ltd v Kalwak* [2007] IRLR 560. The full quotation is as follows:

"57 The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He said this (p 697G) 'Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham it will want to say so.'

58 In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.

59 . . . Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance . . . ."

35. In the *Uber* case, Lord Leggatt JSC, delivering the judgment of the Supreme Court, restated the *Autoclenz* principle at paragraph 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."*

36. As Mr Rhodes acknowledged at paragraph 19 of his SSA, Lord Leggatt went on to say in paragraphs 70 to 71 that it is important to take a purposive approach to statutory protection and that the purpose of employment legislation is to protect vulnerable workers*. "The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."*

37. In *Uber* at paragraph 71 Lord Leggatt quoted the Employment Appeal Tribunal in *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 as follows: *"The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis – a – 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."*

38. At SSA20, Mr Rhodes referred to paragraph 73 of *Uber* in which Lord Leggatt quotes with approval *Hashwani v Jivraj* [2011] UKSC 40; [2011] 1 WLR 1872 on the distinction between workers and the genuinely self-employed. In that case, the Supreme Court held that an arbitrator was not a person employed

under "*a contract personally to do any work*" for the purpose of legislation prohibiting discrimination on the grounds of religion or belief (now in the EqA*). "Lord Clarke, with whom the other members of the court agreed, identified (at para 34) the essential questions underlying the distinction between workers and independent contractors outside the scope of the legislation as being:*

> *"whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services."*

39. Mr Rhodes submitted (SSA19) that the relationship of the claimant to the respondent and to Unity was not one of subordination. He stated that the claimant had worked with agencies for some three years in total, and that he had worked for several different agencies and several different organisations on different jobs. He argued that the claimant was not integrated into the respondent's business such that he was unable to work for another end user and that the contract entitled him to do so at 2.2 (J102). I considered this argument but it appeared to me that since the claimant provided full time and exclusive personal service to the respondent for the duration of his placement with them and as he envisaged continuing to work for them in this way, full time for up to two or three years, it was not practically realistic that he would work for another end user and he *was* effectively in a state of economic dependence on a particular relationship.

40. Mr Rhodes further submitted that the claimant's own evidence was that he was a skilled worker and self-employed and that he could work on his own without direction. It is correct that the claimant confirmed all these points. However, whilst he agreed: *"Yes I can work on my own without direction"*; his answer to the question: *"Unity did not control how you did the job on a day to day basis?"* was: *"No, Taziker told me how to do the job."* Mr Rhodes submitted that any input of the respondent was limited to ensuring that the claimant understood what the task required of him was and ensuring it was performed to an appropriate standard. However, the claimant did not concede

that the respondent's input was limited in these ways. His position was rather that he was part of the respondent's workforce and directed by their team leader. Whilst it does not necessarily connote subordination, integration into the business of the person to whom personal services are provided and the inability to market those services to anyone else may give rise to dependency, as may control exercised over the individual's working conditions and remuneration. (*Uber* paragraphs 74 and 75).

41. At (SA22) Mr Rhodes argued that as there was no substitution clause in *Uber* and as the matter to be determined in this case turns on s83(2)(a) EqA, the *Uber* case is not strictly on point with what the tribunal needs to determine. I agree that the facts of this case are not on 'all fours' with those of Uber and that, in particular, *Uber* was not concerned with a substitution clause per se. However, Uber further develops the principles in *Autoclenz*, which did involve a substitution clause. The issue of "a contract personally to do work" under section 83(2)(a) is analogous for present purposes to a contract under 'limb (b) of section 230(3) Employment Rights Act 1996. This point was recognised in *Hashwani v Jivraj* [supra] and at paragraph 73 of *Uber*. The note on section 83 EqA in Harvey on Industrial Relations and Employment Law/ Division Q Statutes/Equality Act 2010/Part 5 Work/83 Interpretation and exceptions [1525] is useful on this point: "*In Jivraj v Hashwani [2011] IRLR 827, SC (holding that an arbitrator did not come within this definition) the Supreme Court said that, as discrimination is now backed by EU directives, this definition must be considered in the light of EU case law. The case they relied on, however, emphasises that an essential part of the test is that it does not cover 'independent providers of services who are not in a relationship of subservience' (Allonby & Rossdale College C-256/01 [2004] ICR 1328, ECJ at para 68). This indirectly incorporates the exclusion of professional or business relationships which is express in the 'worker' definition, thus aligning the two definitions and meaning that cases on one are authoritative on the other: Secretary of State for Justice v Windle & Arada [2016 EWCA Civ 459…. Bates van Winklehof v Clyde & Co [2014] UKSC 32…."* The essential question here is the distinction between those individuals covered by the section 83(2)

EqA protection and independent contractors, who are outside the scope of the EqA.

42. Mr Rhodes accepted the point at paragraph 76 of Uber 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."*

43. Having considered the submissions of the parties, I am required to apply the words of the statute to the facts of this case. I must first decide whether the claimant was "employed" by Unity as defined in section 83(2)(a) Equality Act 2010. Since the claimant was not employed under a contract of employment or apprenticeship, I must determine whether he was under a "contract personally to do work". Though not irrelevant, the written contract should not be treated as the starting point. In applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation (paragraph 87 *Uber*). The purpose of these particular statutory words is to extend the protection of the Equality Act 2010 beyond the categories of employee and apprentice to those who are in a similar subordinate and dependent position to employees. By contrast, the protection does not apply to contractors who have a sufficiently arms-length and independent position. They are treated by the legislation as being able to look after themselves and not in need of this protection. I have to decide on which side of this line the claimant falls.

44. Viewing the facts realistically on the question whether the claimant was under a contract personally to do work to see whether they are consistent with or militate against the position set out in the contract: on the one hand, the

claimant is self-employed for tax purposes and pays his own National Insurance. He has obtained work from a number of recruitment agencies in the past three years. He does not receive sick pay or holiday pay. Mr Rhodes submits that the claimant's description of himself as self-employed (and presumably these associated features of self-employment), unlike employment, militate against a requirement to provide personal service. The respondent's position is that the claimant was an independent provider of services, and not in a relationship of subordination with the person receiving the services. The respondent points to the contract with Unity as evidence of the intention of the parties.

45. On the other hand, the following facts suggest the claimant was performing personal service for and under the direction of another person for which he received remuneration: the claimant was paid weekly by Unity subject to invoices they produced on his behalf with his CIS tax liability deducted at 20%. From 24 March to 27 June 2022 the claimant worked full-time exclusively for the respondent. His expectation was that the job with the respondent would last two or three years. Thus, the claimant did in fact render full-time and exclusive personal service to the respondent during the period of his engagement. This would have made it practically difficult for him to work for another end user and he did not do so. Although the claimant was self-employed, his economic dependence, subordination and lack of personal agency in relation to the terms and structure of his contract with Unity were more suggestive of an employee than someone actively marketing his services to customers. There was a level of integration into the respondent's business which was suggestive of personal service and subordination. He was part of a team and began each day by attending a team meeting at which he would receive instructions on the work he was required to do that day. The claimant would then go and do the work in the manner instructed using the respondent's dumper, roller and other equipment. If he was off sick he would report to his team leader who told him on one occasion to take as long as he needed.

46. Turning to the written contract itself, and the extent to which it was evidence as to the contractual relationship between the parties and what they understood that relationship to be (SSA18), the claimant was contacted by Coyles and agreed to take a two or three year job on the M8. He was sent a link to a contract with a separate company (not Coyles) which he was asked to sign. There was no discussion or negotiation about either the contractual 'chain' or the terms of the contract. The claimant thought it was a form for payroll purposes.

47. The claimant's evidence in cross examination regarding the substitution clause is set out in the observations on the evidence above. I found him to be a credible witness and accepted his evidence. There was no other witness evidence before me. Accordingly, I found that the wording of paragraphs 1.5, 2.8 and 2.9 of the online form of contract signed by the claimant does not reflect the reality of the contract or the practice in the industry in the claimant's locality where, in the experience of the claimant, it does not happen that a groundworker in the claimant's position sends a substitute to work in his place.

48. As mentioned above, aside from the documents in the bundle referred to in evidence, the claimant's was the only evidence before me and I accepted his evidence. If the reality of the situation is that no one seriously expects that an individual will seek to provide a substitute, the fact that the contract expressly provides for an unrealistic possibility will not alter the true legal obligation. On the other hand, if a contractual right to send a substitute exists in reality, it does not follow from the fact that a term is not enforced that it is not part of the agreement. Mr Rhodes submitted that there was no evidence that the claimant had been prevented from exercising the right of substitution. In his SSA of 27 June (paragraph 17), Mr Rhodes took this point further. He submitted that because the claimant had never attempted to send a substitute, there would be no evidence to support a conclusion that the clause was not genuine. The difficulty with this argument is that the only oral evidence I have is the claimant's evidence which was not that he had tried to use the clause and been prevented but that the clause in the contract did not reflect the reality of the situation and was absurd.

49. Taking into account all the evidence before me I have concluded on balance that the reality of the situation in this case is that no one seriously expects that a groundworker will seek to provide a substitute (or refuse the work offered for that matter). Thus the fact that the contract expressly provides for these unrealistic possibilities does not alter the true nature of the relationship, which was that the claimant would be available in person to work daily for the duration of the groundwork job under a contract with Unity and that he was in fact required to do the work personally, notwithstanding the substitution clause in the agreement he signed. Thus I have concluded that he was 'employed' by Unity under a contract personally to do work for the purposes of sections 83(2)(a) EqA and 41(5)(a).

50. In terms of section 41(5)(b) EqA, the claimant was supplied to the respondent by Unity in furtherance of a contract to which the respondent was a party. It does not matter that there was a contractual chain or that there was no direct contractual relationship between Unity and the respondent. It follows that the respondent is a principal for the purposes of section 41(5) EqA and that the claimant was a contract worker.

Time bar

51. The last date the claimant carried out work for the respondent was Friday 24 June 2022. His case is that on that date he was racially assaulted at work and that having reported the assault to the respondent he was instructed to carry on working with the person who assaulted him. At 9:42 am on Monday 27 June 2022, John from Coyles sent the claimant a WhatsApp message (J111) in the following terms: *"Amran, I have been advised by Taziker that you are no longer required back at the Woodside Viaduct site."* The claimant argues that the respondent's action on 27 June 2022 in not allowing him to continue to do the work was discriminatory and was part of conduct extending over a period with the discriminatory harassment alleged to have gone before. If his case ultimately succeeds on that point, section 41(1)(b) EqA may apply. If it does, the claim would be in time. The date of receipt by ACAS of the

claimant's early conciliation notification against the respondent was 26 September 2022. The date of issue of his early conciliation certificate was 28 September 2022. The date he presented his ET1 against the respondent was 10 October 2022.

5 52. It appeared to me that the issue of time bar was so bound up with the merits of the claim that, in fairness to both parties, it would not be in line with the over-riding objective to try and determine it at this hearing.

10 **Employment Judge:** **M Kearns**
Date of Judgment: **20th July 2023**
Entered in register: **25th July 2023**
and copied to parties

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