EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video) **On:** 11 September 2023

Claimant: Mr Ventis Brown

Respondent: Wainwright and Cummins LLP

Before: Employment Judge Fowell

Representation:

Claimant In Person

Respondent Mr Ryan Clement of counsel

JUDGMENT ON A PRELIMINARY ISSUE

1. The claimant was not an employee within the meaning of section 230 of the Employment Rights Act 1996.
2. The claimant was an employee within the meaning of section 83 of the Equality Act 2010.
3. The claimant was a worker within the meaning of section 230 of the Employment Rights Act 1996 and of Regulation 2(1) of the Working Time Regulations 1998.
4. Accordingly, the claims of unfair dismissal (including automatically unfair dismissal) and of breach of contract are dismissed.
5. The claimant's remaining claims will proceed to a hearing on **10 October 2023** for case management.

REASONS

Background

1. This preliminary hearing was listed to decide on Mr Brown's employment status. He is a solicitor and worked on a consultancy basis for the respondent solicitors from 2018 to 2020, carrying out criminal work. That involved taking part in the

duty solicitor scheme where he would be introduced to clients and subsequently attend court on their behalf to conduct their defence. He says that he was employee, alternatively that he was a worker for the purposes of the Employment Rights Act 1996 and the Working Time Regulations 1998. That test of worker status is essentially the same as the test of employment for the purposes of discrimination law under the Equality Act 2010.

Procedure and evidence

2. Unfortunately this hearing has gone ahead in Mr Brown's absence. He failed to attend the hearing but an email was received by the tribunal and the respondent at 0956 this morning seeking a postponement and attaching a witness statement. The witness statement has today's date and says that he has vomited twice today and may have Covid. He also referred to a cyber-attack from late June to August 2023 which caused him to lose data and has made it impossible for him to comply with tribunal directions.

3. His covering email also referred to his health and this cyber-attack. It added, somewhat confusingly, "After I contact my GP I will contact the ET again but hope to get down to court by 1130 to 12 noon." From this it appears that Mr Brown may have been under the impression that this was a hearing in person or perhaps he had simply assumed as much without checking. In any event, he has not made any such contact or appeared, either by video or in person at the tribunal hearing centre.

4. This decision was put back till 3.30 pm to allow for time to consider all of the points raised and so he has had most of the day in which to make that contact.

5. Unfortunately this is not the first occasion on which such issues have arisen at the last minute. This hearing was due to take place on 23 and 24 January 2023. It was arranged following a preliminary hearing on 11 July 2022 and directions were given for the preparation of the bundle of documents and for witness statements to be exchanged by 15 December 2022. The respondent duly provided their witness statements by that date but there was nothing from him. He applied on the day of the hearing for an adjournment, which was refused. He then applied for a reconsideration of that decision which was also refused. The tribunal then had to consider an application by the respondent to strike out the claims on the basis that they had no reasonable prospects of success, alternatively on the basis that Mr Brown's conduct of the litigation had been scandalous, but those applications were refused. There was then a further application from Mr Brown to amend his claim to adjust the period in which he says that he suffered an unlawful deduction from wages. All that took most of the two-day hearing and there was insufficient time remaining to address the question of employment status. The hearing was therefore adjourned until 25 April 2023 and further directions were given for the exchange of documents and witness statements by 11 April 2023 so Mr Brown suffered no penalty for having failed to provide his

statement as previously directed and of course he had the opportunity to consider and respond to the statements provided on the other side.

6. Nevertheless he failed to do so. Nothing had been received from him by the time of the hearing on 25 April 2023, which was adjourned because Mr Brown said that he was in some pain due to a toothache. A medical certificate was subsequently provided. The matter was therefore adjourned again. It follows that Mr Brown has had over a year in which to provide a witness statement setting out his position in relation to his employment status and has only now done so on the day of the hearing.

7. At the last hearing, Mr Brown attended in person to explain that he was in pain. It is not clear why he was not able to attend by video on this occasion, particularly in circumstances where he felt that he might be able to attend in person by 1130 to 1200. In those circumstances I declined to adjourn the case.

8. I considered whether to strike out the claim in its entirety on the basis that Mr Brown had failed to attend the hearing but I took the view that there was too draconian, and is only appropriate in circumstances where the non-attendance indicates that the party in question has no real desire to continue to pursue the claim.

9. Nor did I consider it appropriate to strike out the claim on the basis of a failure to comply with tribunal directions. No notice had been given to him of any such possibility and this was also considered at the hearing in January. Although Mr Brown has remained in default of the tribunal's directions, little else has changed in that period.

10. I did however agree to have regard to the facts set out in Mr Brown's witness statement. Although it was provided at the last minute, it did not cause any particular prejudice to Mr Clement, for the respondent. In the main it is clear that there is substantial agreement about Mr Brown's working arrangements and how things operated in practice.

11. One of the respondent's witnesses, Mrs Mulhern, was in attendance and therefore briefly adopted her statement. The only significant factual dispute that appeared from a comparison of Mr Brown's witness statement with those of the respondent, was a statement to the effect that one of the partners, Mr Andrew Wainwright, had promised him a contract of employment which was never forthcoming. Mr Wainwright therefore also attended briefly and refuted that allegation. Otherwise I proceeded on the basis that there was no challenge to the facts set out in the respondent's witness statements, without requiring them to attend to be sworn and formally tender their evidence, and gave due weight to the claimant's witness statement also.

12. The evidence from the respondent therefore comprised accounts given by:

    a) Mrs Kathleen Mulhern, a partner at the firm whose job it was to act as supervisor for Mr Brown during his time with them;

b) Mr Andrew Wainwright, one of the two equity partners, who agreed terms with Mr Brown;

c) Miss Angela Kirlew, the Office Manager;

d) Miss Duchess Rollock, a paralegal at the firm who helped Mr Brown with his cases;

e) Mrs Sharon Williams, legal secretary who also assisted Mr Brown with administrative support;

f) Ms Ayesha Casely-Harford, a self-employed solicitor at the firm and head of their employment law department;

g) Mr Edward Atkinson, a solicitor and consultant at the firm who ran his own firm for 24 years.

13. There was also a bundle of about 143 pages. Having considered this evidence I make the following findings of fact.

Findings of Fact

14. Wainwright & Cummins LLP is a firm of solicitors with about 30 members of staff, some of whom are described as consultants. They have two offices in south-west London, one of them providing general high-street services and another dealing with crime and housing.

15. The criminal work involves attending police stations as part of the duty solicitor scheme run by the Legal Aid Agency (LAA). Although the hours of work may be uncongenial it is an opportunity to meet new clients and for the firm to then handle the case. Payment for those services is made by the LAA, which also has a supervisory role in ensuring that such work is carried out competently and efficiently.

16. In the past there were a number of duty solicitors who did little or no duty work. As a result the LAA introduced a requirement that in order to remain as part of the duty solicitor scheme each individual had to carry out at least 14 hours work per week on legally aided cases. This requirement was reinforced by regular audits of the cases in question to ensure that they were being handled appropriately. This involved the supervisor conducting a meeting every month with the file handler concerned, to discuss the caseload, any issues with the cases and to ensure that the 14 hour rule was being met. That duty fell to Mrs Mulhern.

17. It is common practice in this area for firms to use self-employed consultants, or at least to use people described in that way. By way of example, Mr Atkinson is one such consultant. As part of the duty solicitor scheme he attends police stations on a rota and attends court to represent defendants who are unrepresented and fall within the scheme. He has to comply with those supervision requirements and has to report his activities to ensure that the firm can show compliance with the 14 hour rule. That is also a benefit to him since his rewards depend on being able

to take part in the duty solicitor scheme and to acquire work in that way. His evidence, which I accept, is that his earnings fluctuate depending on the cases that come his way; he is free to take or decline any work offered to him; if he has insufficient work to be sure of complying with the 14 hour rule he will raise it with the office manager so that additional work is offered to him, but otherwise he is free to work as he pleases and this arrangement is entirely usual.

18. Mr Brown provided his services to the firm during two periods. The first was from 2014 to 2016, at which point he left them in order to set up his own company or to further develop it. Ventis & Co LLP was in fact established in 2013 and it appears that Mr Brown has continued to operate through this vehicle at periods since then.

19. During that first period of service with the firm he entered into a consultancy agreement [49]. This was template in regular use by the firm It is necessary to consider the contents in some detail, and the main points are set out below.

20. Somewhat confusingly, clause 1 states that the agreement can be terminated by either party giving three months' written notice, but clause 11.1 it refers to giving one month's written notice.

21. The main provisions are these:

> "2.2 The Consultant shall supply a person to perform the assignment on its behalf or such other person whom the Firm and the Consultant so agree. The Consultant is not required to provide the Services personally if he is not able to undertake the work, an agreed substitute between the parties will be nominated to provide all or any of the Services."
>
> 2.3 The Consultant shall make herself (sic) generally available to the Firm but shall be under no obligation to accept each and every instruction that the Firm passes to him.
>
> 2.4 Under this agreement, the Firm is not obliged to offer work to the Consultant, nor is the Consultant obliged to accept offers of work from the Firm.
>
> 2.5 The Consultant shall be entitled to act for clients that he is currently or may in the future act for but all such clients shall be deemed to be clients of the Firm and the Consultant shall be bound by the terms and conditions of this agreement so far as such clients are concerned.
>
> 2.6 The Firm shall use its reasonable endeavours to provide sufficient work hand instructions to the consultant as will enable the consultant to reach agreed financial targets.
>
> 2.7 Nothing in this Agreement will prevent the Consultant from undertaking work for other practices provided that such other work does not materially interfere with the provision of the services to the firm by the consultant
>
> 2.8 During the term of the appointment the Firm shall be entitled at the Firm's sole discretion to include the Consultant's name as a Consultant on the Firm's headed notepaper and on their website.

3 The relationship

3.1 The relationship of the Consultant to the Firm shall be that of consultant dealing at arm's length. It is intended by the parties that nothing in this agreement shall be construed as creating a relationship between the parties of employer and employee

3.2 The consultant shall be wholly responsible for all taxes, national insurance or other contributions which are or may be payable out of, or as a result of the receipt of, any fee or other monies paid or payable in connection with this Agreement including, for the avoidance of doubt, any remuneration, benefits, expenses, PAYE or national insurance contributions payable in respect of the consultant or any substitute. …

4 Fees

4.1 In consideration of the Services the Firm will pay to the Consultant the following fees for the services

(a) 65% net litigator fee

(b) 10% net referral fee where the Consultant does not undertake the litigation work

(c) trials in the Magistrates Court £100 morning £200 for the day

(d) remands at the Magistrates Court £50 or £75 for pleas

(e) police stations 65% of the net fee or if the case is referred by the Firm £90 or £100 if the client is charged

(f) 65% net fee for duty solicitor at court

(g) Preliminary Hearings in the Crown Court £80

(h) an agreed set of retainer 1k per month

4.2 The Consultant shall provide an invoice not less frequently than once a month in respect of the fees claimed by him or her from the firm for the Services provided …

4.5 In addition to the payment of fees the Firm will be responsible for maintaining an adequate indemnity cover in respect of the services provided by the Consultant.

22. Other obligations included handling matters in an expert and diligent manner, keeping all necessary records for submission to the LSC (now LAA) or the firm and the Law Society (now SRA). Clause 7 provided that expenses would be paid. Clause 10 set out obligations regarding confidential information about the firm and the firm's clients.

23. In February 2018 Mr Brown approached Wainwright & Cummins again this with a view to resuming his consultancy work for them. That led to a meeting with Mr Wainwright when Mr Brown proposed a 50-50 fee-sharing agreement on the basis that he would be able to do the advocacy on his own cases as well as the litigation. That was seen as a favourable agreement from the firm's point of view and so they agreed orally to start again on that basis. There is an email from Mr

Wainwright confirming that he was "delighted to work with you in the future on a 50-50 basis. Let's suck it and see." That last remark was intended to suggest that the firm might well be prepared to increase the percentage if things were working well. And indeed he did so, with relevant rate being increased to 75% in due course.

24. No further consultancy agreement was issued but I am satisfied that there was oral agreement to contract again on the same terms subject to this financial alteration. The original contract does not appear to have been signed but there is no suggestion from Mr Brown that he was unfamiliar with the terms or that this was not the basis of the arrangement they had. His evidence was that Mr Wainwright agreed to provide a contract of employment in due course but I do not accept that that was the case, not only because of Mr Wainwright's evidence to the contrary but because that would be contrary to the entire scheme of the consultancy agreement which operated perfectly successfully in practice for a period of years. During the period Mr Brown continued to operate his own firm and there has been no previous suggestion that he ever hoped or wished to become an employee of Wainwright & Cummins.

25. On this basis therefore Mr Brown resumed work for the firm. In practice he operated very independently. He did not work from the firm's premises and provided his own laptop and other equipment. The work which he picked up at court or at the police station was his to progress and it was open to him to instruct external counsel for a hearing, which is what he usually did, rather than use the firm's in-house advocates. If the case went on to the magistrates court he would be asked if he wanted to conduct the litigation. It was up to him.

26. Again, he was under the supervision of Mrs Mulhern, but she found it very difficult even to arrange a meeting with him. In fact on only one occasion during his second period as a consultant was she ever able to have a face-to-face meeting with him at the offices. Generally she had to content herself with discussions by telephone but she found that he was only willing to make contact when it was time to bill his files. He was also remiss in providing a schedule to demonstrate his 14 hours work, and in fact he never did so. On various occasions someone else at the firm had to step in to do work on his files when he simply dropped out of contact. On other occasions he simply failed to attend court, the court would ring up to see where he was and someone else would have to be provided at short notice. He was provided with one of the firm's email addresses and also with passwords to access the relevant portals for Crown Court and magistrates Court work, but on one occasion he used his own firm's email address to correspond with the police officer on a case. Eventually, in May 2020, Mrs Mulhern declined to continue any longer as his supervisor.

27. Administrative support was provided by Mrs Sharon Williams and he also had paralegal support from Miss Duchess Rollock. She arranged, as is standard practice, for his existing duty solicitor slots to be transferred over from his previous

firm. (I do not have any evidence about that firm but it appears he was with someone else, not working through his own firm.)

28. He was not of course on the payroll and he submitted invoices in accordance with the contract, accounting for his own tax and national insurance.

29. Every year the firm pays for the practising certificates for its solicitors and the cost of his certificate was paid as part of that transaction in 2019. It seems that in 2018 he claimed separately, having failed to provide details, and claimed the cost back off the firm.

30. He had some further involvement with the firm. When they were audited he was required to make himself available to speak to the auditors, and he was routinely invited to office parties and other social events. He was on the firm's organizational chart as a fee earner, and on their website.

31. He accepted in his witness statement that he was allowed to delegate his work or provide a substitute (paragraph 74) but says that he was encouraged to use other office staff if he could not attend the hearing and needed cover. It does not seem that he ever did provide a substitute, and on the occasions when cover was needed this was because he failed to attend and the firm had to scramble to find a replacement at short notice.

32. Essentially therefore he was operating independently of the firm's office, attending court and police stations in accordance with the rota, and thereafter conducting the litigation for the client in question, invoicing the firm at the end of the month.

Applicable Law

33. Turning to the applicable law, section 230(1) ERA defines an employee in a rather circular fashion i.e. as:

> "an individual who has entered into works under (or, where the employment has ceased, worked under) a contract of employment".

34. Section 230(2) defines a contract of employment as:

> "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

35. The purpose of this definition is to distinguish between individuals dependent upon an employer for their livelihood on the one hand, and self-employed individuals or independent contractors on the other; i.e. between those working under "a contract of service" and those working under a "contract for services."

36. Guidance on the approach to this question has been provided by the higher courts on a number of occasions. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** 1968 1 All ER 433 QBD the court set out the following three questions:

    a) Did the worker agreed to provide his own work and skill in return for remuneration?

b) Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of [using the language of the day] master and servant?

c) Were the other provisions of the contract consistent with its being a contract of service?

37. The House of Lords subsequently endorsed the view in **Carmichael v National Power plc** 1999 ICR 1226 that certain elements formed part of an irreducible minimum – control, mutuality of obligation and personal performance.

Workers

38. The definition of a worker in the Working Time Regulations is the same as in the Employment Rights Act 1996. It is set out in Regulation 2, the interpretation section. Among the various definitions there it states:

> "worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under) –
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer or any profession or business undertaking carried on by the individual."

39. The focus here is on the second limb of the test, the essence of which is whether Mr Brown was contracted to do work personally, other than for a business client or customer.

40. For the purposes of his discrimination claim, the Equality Act 2010 protects those "in employment", but employment is defined very broadly. By section 83(2) employment means:

> "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work"

41. Hence "employment" for discrimination purposes is the same as in the second limb of the previous definition – a contract personally to do work.

42. The question of worker status has been the subject of many recent decisions. In the case of **Byrne Brothers Ltd v Baird & others** [2002] IRLR 96 (EAT) Mr Recorder Underhill (as he then was) gave the following guidance on the position of such workers:

> "The intention behind the regulation is plainly to create an intermediate class of protected worker who, on the one hand, is not an employee but, on the other hand cannot in some narrower sense be regarded as carrying on a business. The policy behind the inclusion of limb (b) can only have been to extend the protection accorded by the Working Time Regulations to workers who are in the same need of that type of protection as employees in the strict sense – workers, that is, while viewed as

> liable, whatever their employment status, to be required to work excessive hours. The reason why employees were thought to need protection is that they are in a subordinate and dependent position vis-à-vis their employees. The purpose of regulation 2(1)(b) 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."

Conclusions

43. I will start with the test for employment. Once again, my finding is that this was an oral agreement to enter into a second contract based on the original written consultancy agreement terms subject to modification about the percentage to be paid, but fundamentally Mr Brown was to be paid on a case-by-case basis and the contract specifically provides that he would not be regarded as an employee. In those circumstances there is little more to be said. This is not a situation which the contract in question is a sham, or where working arrangements in practice differed from the ostensible written agreement, it was a perfectly usual arrangement which was of mutual benefit to him and to the firm whereby he could obtain access to clients and consequent fees and the firm would in turn make a commission on his efforts. That is in accordance with well-established business model of having a core of employed staff supported by self-employed consultants.

44. Indeed, this arrangement seemed to suit Mr Brown since it gave him flexibility to work for other firms or indeed through his own firm, at the same time provided him with access to the templates and systems together with administrative support to handle cases efficiently and appropriately.

45. The other features of the contract which are inconsistent with employed status are numerous but the main feature is that was paid on a case-by-case basis and he invoiced for the work done rather than being paid through the payroll like an employee, and accounted for his own tax and national insurance. Accordingly I have no difficulty in concluding that at no point was Mr Brown an employee within the meaning of section 230 Employment Rights Act 1996.

Worker status

46. All that is required to establish worker status is that there is a contract to provide services personally for remuneration.

47. It does not matter how that remuneration is structured. Hence, the importance of the substitution clause here. It is well established that a valid right to provide a

substitute, someone else to perform the services, is inconsistent with an obligation to perform them personally.

48. In the Court of Appeal decision in Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51, the principles were summed up as follows (at para 84):

> "In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance.
>
> Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally.
>
> Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional.
>
> Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance.
>
> Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance.
>
> Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

49. There is a slight caveat in the wording here which restricts the unfettered right to provide a substitute. It adds:

> "…if he is not able to undertake the work, an agreed substitute between the parties will be nominated to provide all or any of the Services."

50. This introduces a requirement for the firm to agree to any substitute, and there is no restriction on their ability to refuse. Applying the fifth principle set out above, this is not a valid substitution clause and is consistent with personal service.

51. I also note that the right to provide a substitute was never in fact exercised, so this is somewhat hypothetical.

52. The question is therefore larger than a yes / no consideration of whether there was a valid substitution clause.

53. In **Uber BV v Aslam** [2021] UKSC5, the Supreme Court made it clear that in applying legislation introduced for the protection of workers and employees, the primary question is one of statutory interpretation, not contractual interpretation – ie, regardless of what the contract says, does the individual meet the statutory definition?

54. That case, which concerned the worker status of Uber drivers, involved the detailed consideration of the contract in question which had been prepared by lawyers for Uber with a view to minimising the risk of the individual drivers being regarded as workers.

55. The present case does not depend so greatly on the relevance of written contract terms to the statutory status. In the case of **Autoclenz v Belcher** [2011] UKSC 41; [2011] 4 All E.R. 745. Lord Clarke described the tribunal's task as identifying the "true agreement" between the parties, which might deviate from the terms of the signed written contract. That was a case in which a group of car valetters were given terms of service which did not accord with the reality of their status. They were economically vulnerable and essentially worked on a full-time basis for their employer. The principle in *Autoclenz* therefore allowed tribunal is to look beyond the written terms and consider the reality of the working arrangements.

56. In one respect it is necessary to do so here. The contract provides that there is no obligation on the firm to provide work and no obligation on his part to accept it, but that is inconsistent with the obligation to do at least 14 hours per week of legally aided work. It also fails to reflect the supervision and reporting requirements. I cannot therefore construe this as a genuinely casual arrangement. There is also, I note, a fixed monthly retainer of £1,000.

57. This approach to the contract was considered again in the Uber case. As Lord Leggatt explained (at [68]), the emphasis on the contract neglected the statutory dimension to the enquiry:

> "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 … In short, the primary question was one of statutory interpretation, not contractual interpretation" (at [69]).

58. There is therefore a need in such cases to adopt a purposive approach, in which the question is whether the worker protective legislation was intended to apply to the relevant relationship, viewed realistically (see also, *Uber* at [70]). It is necessary therefore to consider such aspects as the degree of subordination, of inequality and of economic dependence.

59. Worker status involves important statutory protections including the right to be paid the minimum wage and to receive paid annual holidays together with daily and weekly rest breaks. On the basis that the same definition applies in discrimination cases, it includes the right not to be harassed or victimised or otherwise discriminated against.

60. There are few indicators of dependence here. Mr Brown operated very independently. He was in fact rarely to be seen. There was a regulatory and supervision regime which did not in practice impinge very greatly on him, despite the firm's efforts. The fact that he only ever had one face-to-face meeting with Mrs Mulhern at the office is significant. There was clearly no control over the way in which he conducted his cases, and indeed it was only when the respondent

intervened in some of his cases towards the end of the relationship, when he was difficult to contact, that he protested and the working relationship broke down. He was therefore averse to any interference.

61. He was providing professional services, and the degree of subordination in his case was very much less, for example, than that of an Uber driver. The contract was agreed following a negotiation between the parties and the firm accepted the terms he put forward, subsequently increasing the percentage that he drew, and so there was no marked inequality in the relationship. Nor is there any obvious economic dependence. That is shown by the fact that Mr Brown absented himself frequently and on occasion chose to pursue cases through his own firm.

62. Overall therefore he was the one who decided how he did, when and where he did it, and charged accordingly. He was the largely master of his own affairs and not at the beck and call of the firm.

63. On the other hand, I remind myself that the relevant test involves a contract to provide work services personally unless it is to "a client or customer or any profession or business undertaking carried on by the individual." Can it be said that Wainwright & Cummins LLP was such a client or customer?

64. Although I have evidence that Mr Brown had set up its own law firm, and in fact has continued to operate through that at times, and that on occasion he used an email address from that firm rather than his allocated email address from Wainwright & Cummins, I have no information to suggest that, for example, he provided his services through other law firms. He was free to do so under the contract but it seems unlikely. The 14 hour obligation is quite substantial, and it seems that he was previously working through another firm, on the duty solicitor rota, not through several.

65. He was also submitting invoices in his own name, not through his own firm, so it is not like he was charging fees through the medium of Ventis & Co LLP to a range of law firms. This all suggests that they were not just his clients or customers.

66. He was to some extent involved in the business, appearing on their website et cetera, which, although it may seem a slender indication of involvement, is at odds with the idea of him providing his services separately from the firm. From the point of view of the public he was presented as part of their operation.

67. A finding that he was genuinely self-employed would mean that if, for example, during a supervision meeting, he was subject to racial comments or sexual harassment he would have no right to protection. Although there is a danger in working backwards from the right in question to work out the status of the individual, it would be a strange conclusion that in those circumstances someone in his position, who appeared on the firm's website and was required to be present for these supervisions, was not protected from discrimination.

68. Overall therefore, although Mr Brown was clearly not an employee, and although he was far from being at risk of exploitation by the firm, there was no real right to

provided a substitute, and the circumstances are not sufficiently distant to avoid the conclusion that he was a worker, and hence by extension entitled to protection under the Equality Act 2010.

69. It follows that the claims of unfair dismissal and of breach of contract, which depend on employee status, are dismissed.

70. A hearing has already been listed for 10 October 2023 for a reconsideration in relation to the breach of contract claim, but in view of this conclusion that is now no longer relevant. It will be used instead for a case management hearing. Mr Brown should be aware that if he fails to attend the hearing the tribunal has power to strike out the claim in its entirety.

Employment Judge Fowell

Date 11 September 2023