EMPLOYMENT TRIBUNALS

Claimant: Mr Steven Toolis

Respondent: Bradbury House Limited

Heard at: Bristol (via CVP) **On:** 20 July 2023

Before: Employment Judge Gray-Jones (sitting alone)

Representation
Claimant: In person
Respondent: Mr David Mold (Counsel)

RESERVED JUDGMENT

1. The Tribunal has jurisdiction to hear the Claimant's claims for unfair dismissal, notice pay and unauthorised deductions from wages (subject to any defence based on time limits) insofar as such claims relate to matters arising between 01 September 2021 and 30 June 2022 as the Claimant was an employee of the Respondent during this period.

REASONS

Introduction

1. This case was listed for a Preliminary Hearing in public via CVP on 20 July 2023. The issue to be determined was the Claimant's employment status as at 30 June 2022. At the conclusion of the hearing the parties were notified that judgment would be reserved.

2. The Claimant, Mr Toolis, represented himself. The Respondent was represented by Mr Mote (Counsel).

3. At the outset of the hearing I raised with the parties the fact that the Tribunal's jurisdiction in respect of two of the complaints being pursued by Mr Toolis, namely the complaints of unfair dismissal and wrongful dismissal depended on his being an employee of the Respondent under

s.230(1) Employment Rights Act 1996. However, the Tribunal would have jurisdiction in relation to the third complaint being pursued, which was for unauthorised deductions from wages under s.13 Employment Rights Act 1996, if Mr Toolis was a "worker" under s.230(3) Employment Rights Act 1996 during the period relevant to the claim. I indicated to both parties that I thought that in determining Mr Toolis' employment status I should reach a conclusion not only on whether he was an employee of the Respondent but whether he was a worker and asked whether both parties were content to proceed on this basis and were able to deal with the issue. Both Mr Toolis and Mr Mote confirmed that they were and that they thought it appropriate that I determine both employment and worker status.

The hearing

4. I was provided with an agreed bundle of 159 pages and four witness statements. The Claimant submitted a witness statement and Mr Neil Bradbury and Mr Ossie Machona provided witness statements on his behalf. Mrs Polly Roach provided a witness statement on behalf of the Respondent. Mr Machona did not attend the hearing to give evidence in person and I gave his statement such weight as I considered appropriate, bearing in mind that he did not give evidence under oath and was not cross-examined. The other witnesses all gave evidence under oath and were cross-examined.

5. Both the Claimant and Counsel for the Respondent made closing submissions and Counsel for the Respondent also submitted a skeleton argument in advance of the hearing. The Claimant submitted copies of 4 authorities before the hearing.

6. In his skeleton argument and in cross-examination of the Claimant Counsel for the Respondent sought to put forward an argument that the consultancy agreement between the Claimant and Respondent was tainted by illegality and went so far as to suggest that there was attempt to make fraudulent representations to HMRC.

7. I decided that it was not appropriate to deal with this issue at the hearing. Firstly, an allegation of fraud or illegality should be pleaded. There was no reference to it in the Response and there was no application to amend the Response, either before or at the hearing.

8. Furthermore, it had not been identified as an issue for determination at the hearing. I did not consider that it would be appropriate to deal with it as an issue until all parties had been given notice of it, there had been disclosure of all relevant documents and the parties had been given the opportunity to deal with it in their witness statements. Furthermore, if I decided that the Claimant was neither an employee nor a worker of the Respondent at the relevant time then the issue would fall away, at least for the purposes of these proceedings.

9. In any event, I did not consider that the point being raised, which related to whether the consultancy agreement would or should have fallen within IR35, would assist the Tribunal in determining employment status. IR35 is tax legislation which was designed to counter tax avoidance by those who supply services to clients via an intermediary, such as a limited company,

and who would be regarded as an employee if the intermediary was not used. Those who fall inside IR35 are treated as employees for tax and NI purposes and those who fall outside it are treated, for tax and NI purposes, as contractors.

10. Whether or not the consultancy agreement fell, or should have fallen within IR35, is a matter for a tax tribunal and is not a question I can determine. IR35 is distinct from and does not affect this Tribunal's task of determining employment status. However, as is set out in my findings of fact below, I noted that the Claimant raised points concerning the tax status of his earnings in his discussions with the Respondent on the terms of the consultancy agreement.

The Claim

11. The Claim was presented on 27 October 2022. ACAS early conciliation ("EC") ran from 16 September 2022 until 13 October 2022.

12. The ET1 sets out three complaints: a complaint of unfair dismissal, a complaint of breach of contract in respect of an alleged failure to pay notice pay and a complaint of unauthorised deductions from wages. It should be noted that the unfair dismissal claim was advanced on the basis of ordinary unfair dismissal, and there was no suggestion that the reason for dismissal was one of the reasons deemed to be automatically unfair under the Employment Rights Act 1996. The Claim asserted that the Claimant had been employed since 01 September 1997 until it terminated by reason of dismissal on 15 September 2022.

13. The ET1 stated that the Claimant *"was employed as both an employee and consultant during his employment with the Respondent."* It stated that the Claimant had been placed on three contracts: an employment contract from September 1997 to 31 August 2021, then a consultancy contract from 01 September 2021 until 30 June 2022 and then a further contract of employment from 20 June 2022 until 15 September 2022 (it was accepted in subsequent correspondence from the Claimant's former solicitors [p.43 of the bundle] that the reference to "*20 June 2022"* was an error and that the final contract had commenced on 20 July 2022). The ET1 asserted that notwithstanding the changing contractual arrangements during the time the Claimant had worked for the Respondent he had been an employee throughout this period.

14. The Response resisted the claims and raised jurisdictional defences in relation to qualifying service, employment status and time limits.

15. The Respondent contended that the Claimant had been employed by the Respondent from 1997 until 31 August 2021. On that date his employment had ended by mutual agreement. From 01 September 2021 an agreement was entered into between the Respondent and ST Care Consultancy Limited under which the Claimant, or a substitute, would provide services on a project-by-project basis. The Response then stated that this agreement had been terminated with immediate effect by the Respondent on 30 June 2022 due to fundamental breaches of contract by ST Care Consultancy Limited. The Response denied that the Claimant was an employee of the Respondent during the period 01 September 2021 to 30

June 2022.

16. The Response then stated that the Respondent decided to offer to employ the Claimant in an operational support role with effect from 20 July 2022 but that this contract of employment was terminated with immediate effect on 15 September 2022. The Respondent contended that the Claimant did not therefore have sufficient qualifying service to bring a claim of ordinary unfair dismissal as his length of service meant that he did not have the qualifying period required under s.108 Employment Rights Act 1996 for an ordinary unfair dismissal claim.

17. The Response also asserted that any claim for breach of contract or unauthorised deductions which arose in June 2022 was out of time. The Claimant's former solicitors disputed this in correspondence and in any event any issues relating to time limits were not before the Tribunal at the Preliminary Hearing.

18. Following submission of the Response the Claimant's former solicitors wrote to the Tribunal stating that the Claimant was now seeking to argue that the claim for unfair dismissal was in respect of the termination of the consultancy agreement on 30 June 2022 [pp.43 - 45]. The Respondent's solicitors wrote in response pointing out that the Claimant's employment status during the consultancy agreement was disputed and asking for a Preliminary Hearing to be listed to determine this issue. Following this exchange of correspondence the Tribunal listed the case for a 1 day hearing to determine employment status as at 30 June 2022.

Findings of Fact

19. The Respondent is a company providing care and support for people with learning difficulties and mental health needs, including autism. It runs ten residential homes in the South West of England which offer care services ranging from high dependency care to supported living, and two day care centres, one in Bristol and the other in Somerset.

20. The Claimant commenced employment with the Respondent in 1997. The Respondent accepts that this employment continued until 31 August 2021. The Claimant was not issued with a written contract of employment during this period. He held several roles with the Respondent during this time. The final role, and the role he held at 31 August 2021, was Commissioning Director. From 2018 to 31 August 2021 the Claimant was part of the Respondent's senior management team, along with Polly Roach, the Respondent's Managing Director and Kate Johnson, the Operations Director.

21. The Respondent is a family run business. It was originally founded by Neil Bradbury, who remains a major shareholder and director (he is addressed and referred to in the documents at "Nick" Bradbury). Polly Roach is Neil Bradbury's sister-in-law. The Claimant is Neil Bradbury's brother-in-law. In the background to the dispute between the Claimant and the Respondent is another dispute between Neil Bradbury and other board members, including Polly Roach, concerning the control and management of the Respondent. Neil Bradbury did not have a formal role in the business but during the period relevant to this claim would involve himself in it on an ad

hoc basis and would have final say on important operational decisions.

22. As Commissioning Director the Claimant had operational responsibilities, including involvement in HR processes and dealing with disciplinary and grievance matters. He also carried out commissioning work, which involved liaising with local authorities to assess the suitability of individuals with mental health and/or learning difficulties for placement in the Respondent's homes. From approximately 2018/19 he also directly managed three residential homes around Bedford which were operated through Lansdowne Care Services Limited, a subsidiary of the Respondent.

23. As Operational Director the Claimant in theory reported to Polly Roach but in practice would often deal directly with Neal Bradbury, particularly in relation to decisions which he disagreed with. Neil Bradbury believed that the Claimant was of great value to the Respondent and supported him when he was subjected to criticism by other managers. It was clear from her evidence that Polly Roach was unhappy about this. She also felt that the Claimant was displaying a lack of work ethic and accountability, being out of the office for long periods without any clear visibility as to his location and his activities, and that he also displayed a poor attitude towards other staff. She said that she raised concerns about the Claimant but felt that she was not able to do anything about them because Neil Bradbury would not agree to any action being taken against the Claimant, and, at that point, he had the final say on the matter. This changed after May 2022 when new investors joined the board, giving Polly Roach more influence over the way the Respondent was run.

24. The Claimant, in his questioning of Polly Roach, put forward the case that at no point had he been subjected to any disciplinary action in relation to concerns and that he had to spend long periods out of the office because of his commissioning work. It is not necessary for me for the purposes of this hearing to make any findings on whether Polly Roach's concerns about the Claimant were well-founded but it is clear that by 2021 the relationship between them had become extremely difficult.

25. At some point in Spring 2021 Polly Roach complained to Neil Bradbury that she believed that the Claimant had caused the resignation of the Respondent's Operations Manager and told him that something had to be done to address the situation because the Claimant was causing damage to the business.

26. Neil Bradbury then had a discussion with the Claimant. It is not clear exactly when this discussion took place but an email from the Claimant to Neil Bradbury headed "Redefined Job Role" dated 21 May 2021 [p.54 of the bundle] beginning, *"Appreciate the honest conversation last week..."*, indicates that it took place in the week commencing 10 May 2021.

27. In this discussion Neil Bradbury informed the Claimant of the allegation that he had been responsible for the Operations Manager resigning, although no further information was given to him to substantiate the allegation. The Claimant was informed that a change in his role would be required due to the breakdown in his relationship with Polly Roach. He was informed that his job was at risk but due to his family relationship with

Neil Bradbury and the value that Neil Bradbury thought he brought to the business the Respondent would try to look at alternatives to a dismissal or his resignation.

28. The alternative which Neil Bradbury put forward was that the Claimant would work for the Respondent under a consultancy agreement. Neil Bradbury's evidence, which I accept, was that he saw this as a solution to the problem created by the difficult relationship between the Claimant and Polly Roach. He said that this had created a working environment which was *"toxic"* and that if the Claimant was working under a consultancy contract this would reduce the need for him to work directly with Polly Roach, enable him to advance his career and enable the Respondent to continue to benefit from the value he brought to the business. He said that the arrangement was a solution to the fact that the Claimant and Polly Roach were not getting on and its purpose was to maintain the *"status quo"* and enable the Respondent to continue its relationship with the Claimant.

29. In the email of 21 May 2021 the Claimant set out a number of proposals on the proposed new working arrangement. On 28 May 2021 Polly Roach forwarded the email to Nick Bradbury with her comments [p.57]. As such I find that she was aware of the discussions on the new working arrangement and what it would potentially involve at a relatively early stage, although I accept that she had not put forward the initial suggestion and had not had that stage seen a draft of any consultancy agreement.

30. There were further exchanges of emails between the Claimant and Neil Bradbury in June and July 2021 setting out questions and proposals on the new arrangement.

31. On 1 June 2021 the Claimant sent an email to Neil Bradbury containing notes from a meeting the two had had earlier that day as well as other questions and thoughts [p.63]. The email started, *"Hi Nick. Thank you for today. Are there any other options should I decline to take the self-employed route. My overriding concern is job security. Being blunt, I do not want you to stitch me up in 18 – 24 months, cut me lose* [sic] *and I end up having to scramble around for work."* It doesn't appear that there was a reply to that email.

32. In a further email sent on 23 June 2021 [p.66] the Claimant sent a draft agreement to Neil Bradbury and stated in the email, *"By agreeing to this new way of working I will be giving up 24 years of unblemished (from an HR perspective at least) employment rights …".*

33. In a further email sent on 09 July 2021 [p68] entitled "IR35 issues" the Claimant stated, *"I clearly fall inside IR35 so I have looked at the agreement and added some few additional clauses...It would also make sense to keep "evidence" of emails where I have, for example, turned work down from BHL to focus on say LCS or BOS or vice versa. I would welcome some thoughts."*

34. On 21 July 2021 the Claimant set up a limited company called ST Care Consultancy Limited. The Claimant was the director and sole shareholder.

35. In an email dated 12 August 2023 to Neil Bradbury and Polly Roach [pp. 79 – 81] the Claimant stated, *"Wanting to avoid any IR35 issues it would be best if my invoices where* [sic] *kept simple and did not show that I have "worked" for either company for a whole month or show any hours of work. I have picked a fictious* [sic] *day rate of £390. This equates to 15 days a month at my gross salary of £5850* ***(although I have an employer pension contribution question here – see below).*** *This leaves me scope, in the eyes of the accountant and HMCR* [sic] *to obtain other clients. We can then mix this up, with me working more/less days for each Company and more/less days each month, which will balance out to my salary at the end of the year, we just need to keep a running total."*

36. On 17 August 2021 the Claimant sent an email to Neil Bradbury, copied to Polly Roach [p.78] in which he stated, *"This agreement was, in part, agreed upon the basis that I would no longer be managed by Polly. You made it very clear that this agreement was between me and you and that whatever we agreed would be accepted by the team as your request. I will of course report to Polly and the other board members as per the agreement. I am taking a significant risk with this venture, especially as we are all aware it is a fictious* [sic] *arrangement at best and I am handing over close to 25 years' worth of employment protection. Therefore I need to be comfortable with what I am agreeing. We talked a lot about trust and this is required from both sides. I have no intention of enacting these clauses. As we discussed, they are there for protection and peace of mind."*

37. The final agreement which was reached between the Claimant and Respondent is at pages 89 – 95. There are two agreements, with more or less identical wording, save for the names of the parties. In the second agreement references to "Bradbury House Limited" are replaced by "Lansdowne Care Services Limited". Each agreement has an annexe entitled "Description of Projects". Each is entitled "*Consulting* [sic] *Agreement*" and is stated as being effective from 01 September 2021. The parties on the first agreement are stated as being ST Care Consultancy Limited and Bradbury House Limited. On the second agreement the parties are ST Care Consultancy Limited and Lansdowne Care Services Limited. There are 15 clauses in the agreement, the most significant of which are as follows.

38. The agreement stated at clause 1, *"ST Care Consultancy Limited will provide Consultancy Services on a project-by-project basis as agreed by Bradbury House Limited"* (Lansdowne Care Services Limited in the second agreement).

39. Clause 2 states, *"ST Care Consultancy Limited responsibilities will be and not limited to; The overall responsibility for the safe, timely execution and within budget of all projects as agreed and on behalf of Bradbury House Limited* [sic]."

40. Clause 3 states, *"ST Care Consultancy Limited will deliver the agreed projects and their responsibilities in exchange for a daily payment rate of £407 which will be paid upon receipt of a satisfactory invoice, no later than the last working day of each month."*

41. Clause 5 states, *"ST Care Consultancy Limited is not governed by or entitled to any terms and conditions of employment."*

42. Clause 6 states, *"Bradbury House Limited shall not seek to exercise any supervision, direction and/or control over ST Care Consultancy Limited or its staff in the manner or execution of the agreed projects."*

43. Clause 7 states, *"ST Care Consultancy Limited shall have complete discretion concerning which of its personnel perform the services and may provide a substitute whenever necessary. ST Care Consultancy Limited will remain liable for the services completed by substitute personnel and will bear any costs."*

44. Clause 11 states, *"The time ST Care Consultancy Limited allocates should be such that will enable you to provide the services to the satisfaction of Bradbury House Limited. It is intended that the ST Care Consultancy Limited will have absolute discretion to determine how and when consultancy services will be performed. However, all services must be executed in a timely manner, timescales to be agreed with Bradbury House Limited on a project-by-project basis."*

45. Clause 12 states, *"It is not intended for there to be any mutuality of obligations* [sic] *between Bradbury House Limited and ST Care Consultancy Limited either during the agreed projects or upon termination of the same. Bradbury House Limited is under no obligation to offer future contracts to ST Care Consultancy Limited and it is does make any such offer, ST Care Consultancy Limited is not obliged to accept it."*

46. Clause 14 states, *"Outside of Commissioning Consultancy any other work will be on a request only basis. ST Care Consultancy Limited should not directly respond to any request for support and/or advice from any employee of Bradbury House Limited, unless confirmation to do so has been given by a member of the Borad* [sic] *of Directors of Bradbury House Limited".*

47. Clause 15 states, *"The length of this agreement is for an initial 24 month period, at which point a review will be held on the effectiveness of services provided and of this agreement."*

48. It is not necessary to reproduce the annexes to each agreement in full. Each sets out a detailed list of duties and responsibilities in relation to commissioning. In the case of the agreement with Lansdowne Care Services Limited there are additional responsibilities and duties in relation to managerial and compliance support.

49. It would be fair to say that the consultancy agreement is not a particularly elegant piece of drafting. In his evidence Neil Bradbury accepted that it had been *"cobbled together"* and said it was a product of consultation between the Claimant, himself and Polly Roach.

50. The Claimant's evidence was that from 01 September 2021, when he started working under the consultancy agreement, he continued working for the Respondent in exactly the same way as he had worked prior to 01 September 2021. He said that the role and responsibilities were

substantially the same and that he worked exclusively for the Respondent and Lansdowne Care Services Limited, as he had done prior to 01 September 2021.

51. After 01 September 2021 the Claimant was paid fees based on invoices submitted to the Respondent by ST Care Consultancy Limited. The Claimant says that his fees under the agreement were capped, so that he would continue to be paid the same as he had earned when he was employee. The agreed day rate, applied to a notional 15 working days per month, would provide an income equivalent to the salary and benefits he earned when an employee. This evidence is supported by Neil Bradbury. I accept this evidence, which is consistent with the correspondence entered into during negotiations on the terms of the consultancy agreement.

52. Polly Roach's evidence was that after 01 September 2021 the Claimant's duties changed, in that he ceased to be part of the senior management team. He would not attend managers' meetings unless specifically requested to do so. When he did attend he would not stay for the whole meeting. She also said that after the 01 August 2021 the Claimant no longer had any involvement with HR matters and ceased to have day to day operational responsibilities. She also said that after 31 August 2021 he did not make a final decision on commissioning recommendations, which he had been able to do when he was an employee. The Claimant disputed this and said that he did continue to make decisions. He said that he also continued to be involved with HR matters for Lansdowne Services Limited. This is supported by the list of duties set out in the annexe to the consultancy agreement for Lansdowne Care Services Limited, which includes, *"operational and performance management.*"

53. I have reviewed the emails in the bundles from the Claimant to the Respondent which set out examples of the weekly reports he was required to produce [pp.152 - 159] and note that they do not appear to show the Claimant putting forward recommendations on commissioning, but rather record the Claimant making decisions in relation to placements. I also note that the list of commissioning responsibilities annexed to the consultancy agreements is described as a *"nose to tail package of commissioning".* On balance I consider it likely that the Claimant's duties and responsibilities in relation to commissioning were the same under the consultancy agreement as those he exercised when he was an employee.

54. The Claimant accepted that he did not carry out operational duties for Bradbury House Limited after 01 September 2021. As such it is clear that after 01 September 2021 there was a change in the focus of his duties and he relinquished some responsibilities that he had previously undertaken.

55. After 01 September 2021 the Claimant was requested to report, via email, to the Board of Directors of the Respondent on a weekly basis and attend in person when necessary. Polly Roach accepted in evidence that the most managers of the Respondent were required to provide reports on their work on a weekly basis.

56. The Respondent's case was that there was no mutuality of obligation between the parties after 01 September 2021. Polly Roach stated in her witness statement, *"When the Claimant was providing services to the*

Respondent through Care Limited he determined how he was going to work, what he was going to focus on and when he was going to deliver any outputs or even if he was prepared to undertake particular work at all. For example, I recall him saying to me phrases like, "I'm too busy" or "I can't do it now." He would say that he could probably get to it in a couple of weeks. He decided what he was going to do and when he was going to do it."

57. The Claimant disputed that the Respondent was not aware of what he was doing on a week to week basis from 01 September 2021. He accepted that he was not supervised on a day to day basis but that this was entirely consistent with how he had worked as a senior manager of the Respondent prior to 01 September 2021. He said that he had to carry out the work which was provided to him and that at no time did he refuse to carry out any work. I accept this evidence. I also find that at no time did the Respondent decide not to provide work to the Claimant.

58. I find that after 01 September 2021 the Claimant was not supervised closely when carrying out work for the Respondent. It is also likely that Polly Roach may have felt that there was a lack of visibility as to what he was doing on a day to day basis. However, I find that this did not amount to any material change from the way that the Claimant had worked before 01 September 2021.

59. At all times the Claimant continued to provide his services personally to the Respondent under the consultancy agreement. The substitution clause in the consultancy agreement was never invoked and both the Claimant and Polly Roach agreed that the possibility of the Claimant using a substitute to provide his services under the agreement was never discussed.

60. It was the Respondent's case that there was no requirement for personal service under the consultancy agreement because the Claimant could have provided the services required under the agreement through a substitute [para 8 of the Response, p.36]. In her witness statement Polly Roach stated that ST Care Consultancy Limited could have used whichever personnel it chose to provide the services, and that she would have had no concern about other employees of ST Care Consultancy Limited undertaking work for the Respondent or Lansdowne Care Services Limited under the agreement, provided that they had the relevant skills and experience. However, when she gave evidence she accepted that anybody providing work to the Respondent would have had to fulfil criteria, including having relevant experience and would have had to have passed a DBS check.

61. The Claimant's evidence was that any substitute would have had to have similar knowledge and experience to himself and would need an enhanced DBS check and due diligence would have been needed in order to assess their suitability, given that he was dealing with cases which involved complex and challenging behaviours.

62. My finding is that is clear that any substitute put forward would have had to have been assessed for suitability, which would include the passing of a DBS check, given the nature of the work that the Claimant was carrying

out in his role.

63. The Claimant and Neil Bradbury said that the Claimant continued to book annual leave in line with the Respondent's annual leave policy. Polly Roach accepted that the Claimant continued to send in holiday sheets but that she did not know why he did this and that he did not need approval for time when he would not be working. Given that the Claimant was working for the Respondent in effectively a full time basis I think it likely that he was required to book annual leave when he wanted time off.

64. In her witness statement Polly Roach stated that the Claimant did not receive holiday pay. However, in her email to another director, Conor McCullough dated 23 June 2022 [p.122] Polly Roach referred to the Claimant receiving, in addition to his fees under the agreement, *"8 weeks paid leave and expenses."* I find that after 31 August 2021 the Respondent continued to pay the Claimant for annual leave.

65. There is no reference in the consultancy agreement to the Claimant being entitled to sick pay. However, Neil Bradbury's evidence, which was not challenged, was that the Claimant continued to receive sick pay under the consultancy agreement.

66. After 01 September 2021 the Claimant continued to use the company phone and laptop which had previously been issued to him by the Respondent. He also continued to use his company credit card for payment of business expenses. He did not have his own liability insurance.

67. In June 2022 the Claimant discussed with Neil Bradbury the possibility of providing consultancy services to Bradbury Outreach Services Limited (BOS) for a fee of £1000 per month. BOS was a separate company to the Respondent, but shared offices with the Respondent and is clearly related to it, as Neil Bradbury is listed as a director and majority shareholder. The emails recording these discussions are at pp.125 - 126 of the bundle. In the event the Claimant was not engaged to provide work to BOS. The Claimant explained that there had been a negotiation but he did not do work for BOS as his existing workload for the Respondent left him with insufficient time to do so.

68. On 07 February 2022 ST Care Consultancy Limited invoiced Bristol City Council for transition services and mileage. The invoice amounted to £3318 [p.109]. On 22 February 2022 ST Care Consultancy Services invoiced NHS Kernow CCG for transition services and mileage [p.115]. The invoice totalled £2796.

69. It was the submission of these invoices which led, on the Respondent's case, to the termination of the consultancy agreement with ST Care Consultancy Limited. Polly Roach's evidence was that these invoices were for services which the Claimant should already have been providing to these organisations on behalf of the Respondent and Lansdowne Care Services Limited. As such the Respondent considered the submission of the invoices to be a fundamental breach of the consultancy agreement. Her evidence was vague on when she says she first became aware of the invoices.

70. The Claimant's evidence, which was supported by Neil Bradbury, was that these invoices were submitted in relation to work with two specific and difficult service users with the agreement of Neil Bradbury in order to incentivise the Claimant. Their evidence was also that Polly Roach was aware of the invoices when they were submitted.

71. I consider that I only need to make findings in relation to the submission of these invoices insofar as these are relevant to the issue of the Claimant's employment status. I find that Neil Bradbury was aware of the invoices when they were submitted and that they were submitted with his agreement. I don't consider it necessary to make further findings on the extent of Polly Roach's knowledge or whether the submission of the invoices was a breach of any duty the Claimant, or his limited company, owed to the Respondent.

The Relevant Law

72. The definitions of "employee" and "worker" for the claims brought in these proceedings are set out in s.230 of the ERA 1996 which states,

Section 230, ***Employee, workers etc.***

(1) In this Act, "employee" means an individual who has entered into or works under (or where employment has ceased, worked under) a contract of employment.
(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing
(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) -
(a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing,
whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business or undertaking carried on by the individual.

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

73. Accordingly, the statute identifies three types of people:

1) Those employed under a contract of employment;
2) Those self-employed people who are in business on their own account and undertake work for their clients or customers; and
3) An intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else.

See **Uber BV and Others v Aslam and Others [2021] ICR 657** per Lord Leggat at [38].

74. All employees are workers but not all workers are employees. As such, it is only necessary to consider other categories if the individual in question is not an employee.

75. The judgment of MacKenna J in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497**, which was approved by the Supreme Court in **Autoclenz Ltd v Belcher and Others [2011] ICR 1157** is provides a useful starting point for determining employment status. The test set out by MacKenna J provides that there will be a contract of employment if:

    i) The worker agrees to provide his or her own work and skill in return for remuneration;
    ii) The worker agrees expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee;
    iii) The other provisions of the contract are consistent with it being a contract of service.

76. As such, the requirements of control, personal performance and mutuality of obligation must be present for there to be a contract of employment.

77. In relation to the question of control MacKenna J cited a passage from the judgment of Dixon J in **Humberstone v Northern Timber Mills [1949] 79 CLR 389** in which it is stated:

"The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether any actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions."

78. This approach was approved by the Court of Appeal in **Montgomery v Johnson Underwood Ltd [2001] ICR 819** where Buckley J stated at [19] that was what required was a *"sufficient framework of control"*.

79. In **Troutbeck SA v White & Todd [2013] IRLR 286** the EAT held that the question is whether there is, to a sufficient degree, a contractual right of control over the worker. It is not whether, in practice, the worker has day to day control over his own work. Control requires that ultimate authority over the purported employee in the performance of his or her work rests with the employer. That decision was subsequently upheld by the Court of Appeal: **White and Another v Troutbeck SA [2013] IRLR 949**.

80. "Mutuality of obligation" means that there is an obligation on the employer to provide work and to pay remuneration and a corresponding obligation on the employee to accept and perform the work offered.

81. "Personal service" means that the employee must have agreed to provide his or her own work and skill in exchange for a wage or other remuneration. As such, the existence of a valid substitution clause in an agreement may prevent the agreement being a contract of employment.

82. In **Pimlico Plumbers v Smith [2018] ICR 1511 [SC]** Lord Wilson JSC, with whom the other members of the court agreed, stated at [32],

"The sole test is of course the obligation of personal performance; any other so-called sole test would be an inappropriate usurpation of the sole test. But there are cases, of which the present case is one, in which it is helpful to assess the significance of Mr Smith's right to substitute another Pimlico operative by reference to whether the dominant feature of the contract remained personal performance on his part."

83. In **Stuart Delivery Ltd v Augustine [2022] ICR 511** the Court of Appeal emphasised that the judgments of the Court of Appeal and the Supreme Court in **Pimlico Plumbers v Smith** establish two principles: that an unfettered right of substitution is inconsistent with an obligation of personal service, and that a conditional right of substitution may or may not be inconsistent depending on the nature and degree of the fetter.

84. Other elements which may be relevant to the determination of whether or not a contract of employment exists are:

1) Whether the worker was paid gross or whether they received their wage or salary with tax and NI deducted at source. The former is consistent with self-employment, the latter with employment;
2) Whether the agreement provided for payment of sick pay and holiday pay;
3) Whether the worker had to provide their own tools and equipment;
4) The extent to which the worker was integrated into the purported employer's organisation.

85. The fact that a worker has formed a limited company and provided services through that company does not by itself exclude employment status: see **Catamaran Cruisers Ltd v Williams and Others [1994] IRLR 386**.

86. The correct approach to determining employee status, and in particular the relevance of any contractual documentation to that issue, is set out in the decisions of the Supreme Court in **Autoclenz v Belcher [2011] ICR** 1157 and **Uber v Aslam [2021] ICR 657.**

87. In **Autoclenz v Belcher** it is stated at [35], *"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."*

88. In **Uber v Aslam** Lord Leggat JSC stated at [85],

"...The Autoclenz case shows that, in determining whether an individual is an employee or other worker for the purposes of the legislation, the approach endorsed in the Carmichael case is appropriate even where there is a formal written agreement (and even if the agreement contains a clause stating that the document is intended to record the entire agreement of the parties). This does not mean that the terms of any written agreement should be ignored. The conduct of the parties and other evidence may show that the written terms were in fact and agreed to be a record, possibly an exclusive record, of the parties rights and obligations

towards each other. But there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it.
Furthermore, as discussed, any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded."

89. Where there is a contract under which a person undertakes to do perform personally any work or services for another person, it is necessary to consider whether the person undertaking the work is excluded from being a worker because they carry on a profession or undertaking of which the other person is a client or customer. The concepts of integration, control and/or subordination may assist in these tasks: **Sejpal v Rodericks Dental Ltd [2022] ICR 1339** at [33].

Conclusions

90. Both parties agreed that from 1997 until 31 August 2021 the Claimant worked for the Respondent under a contract of employment. The Respondent's case is that from 01 September 2021 the Claimant became self-employed. The Claimant's case is that any changes were cosmetic and the reality of the situation was that he continued to work under a contract of employment.

91. I will deal first with mutuality of obligation. I reject the Respondent's submission that there was no mutuality of obligation. The written consultancy agreements between the Respondent and Lansdowne Care Services Ltd and ST Care Consultancy Limited provided that there was an obligation on the Claimant to carry out the detailed range of duties set out in the annexes to the agreements for the duration of the agreements, which was from 01 September 2021 until 01 September 2023. Although clause 12 stated that there was no *"mutuality of obligations"* between the parties I find that in reality neither party contemplated that they would be entitled to refuse to provide work, in the Respondent's case, or, in the case of the Claimant, to carry it out. The fact that the parties may have been entitled to review the agreements and their continuation at the conclusion of the agreements (ie. 01 September 2023) does not mean that there was no mutuality of obligation during the term of the agreement. During the terms of the agreements the Respondent was not entitled to and did not cease to provide work to the Claimant and the Claimant did not, and was not entitled to, refuse to work.

92. I also find that the Claimant was obliged to carry out work personally for the Respondent and Lansdowne Care Services Ltd after 01 September 2021. Indeed, the dominant purpose of the agreement was to enable the Respondent and its subsidiary company to continue to benefit from the Claimant's services. I find that the substitution clauses in the written agreements do not reflect the reality of what was actually agreed. Indeed, the fact that the agreements purported to confer an unfettered right to provide a substitute is an indicator that it was never seriously contemplated that the clauses would be invoked. Given the nature of the Respondent's business and the work being carried out by the Claimant

under the agreements a substitute could only have been provided under such an agreement if they fulfilled stringent criteria as to their suitability, character and experience.

93. Having found that there was an agreement under which the Claimant was obliged to work personally for the Respondent I have considered whether the Claimant was carrying out a business or undertaking of which the Respondent was a client or a customer. In my view the circumstances in which the consultancy agreement was entered into are relevant when determining this issue. I find that the Claimant only entered into the consultancy agreement because the alternative presented to him was that he would have to cease to work for the Respondent. This was not a situation in which he decided of his own volition to start a new business.

94. Moreover, it is clear that the Respondent did not enter the consultancy agreement with the Claimant because it had decided to outsource the work which the Claimant was carrying out. The consultancy agreement was devised by Neil Bradbury as a means of resolving difficulties in the working relationship between the Claimant and Polly Roach, while at the same time protecting the interests of the Respondent by ensuring that the Claimant would continue to provide his services to it and also ensuring that the Claimant would not suffer a reduction in his income. The fact that there was a family relationship with the Claimant may have played some part in the decision.

95. Although the Claimant was paid on the basis of invoices submitted to the Respondent, which is usually an indicator of self-employment, in this case I find that in practice the monies he was paid were calculated on the basis that he would continue to receive remuneration equivalent to the salary he had earned prior to 01 September 2021.

96. The Claimant did some work for parties other than the Respondent and Lansdowne Care Limited, namely Bristol City Council and NHS Kernow CCG and submitted invoices for this work. I have considered carefully whether this should be taken as indicating self-employment. I have concluded that in this case it does not. These invoices were closely related to the work he was doing for the Respondent and were submitted with the knowledge and approval of Neil Bradbury. It does not in my view show that the Claimant was operating a consultancy business on a self-employed basis and does not outweigh the other factors indicating an employment relationship. All other work carried out by the Claimant was carried out for the Respondent and Lansdowne Care Limited.

97. As stated above in my findings of fact the Claimant continued to receive holiday pay and sick pay after 01 September 2021 and continued to use the equipment which had been issued to him by the Respondent prior to 01 September 2021.

98. I have considered extremely carefully the fact that the Claimant was on the face of it providing his services to the Respondent via a limited company. This would usually be a significant indicator of self-employment, and if it represented the genuine agreement between the parties would negate both employment and worker status, as there would be no contract between the Claimant and the Respondent. However, the fact that

services are provided via a limited company cannot itself negate either employment or worker status if the other factors present indicate an employment or worker relationship.

99. In my view the reality of the agreement was that it was an agreement between the Claimant and the Respondent under which the Claimant would continue to carry out, to a significant extent, the same duties that he had carried out for the Respondent as an employee, in exchange for the same remuneration. He continued to be integrated into the business of the Respondent to the same extent he had been prior to 01 September 2021. The Respondent and Lansdowne Care Services Limited were not clients or customers of the Claimant. The Claimant only agreed to this working arrangement because the alternative presented to him was that he would cease to work for the Respondent altogether. As such in the rather unusual circumstances of this case I do not find that the fact that the agreements purport to be between the Respondent and Lansdowne Care Services Limited and the Claimant's' limited company negates employment or worker status.

100. Given that the Respondent accepted that the Claimant had worked for it as an employee for a considerable number of years prior to what they said was a change in his employment status from 01 September 2021, in my view the extent to which there was a material change in the relationship between the Claimant and the Respondent after 01 September 2021 is relevant to the issue of employment status. There were some changes, in particular in relation to duties carried out by the Claimant, and he no longer worked directly with Polly Roach. However, these are changes in his duties and reporting line which are not in themselves indicative of a change in employment status. In my view the substance of the relationship between the Claimant and the Respondent did not materially change after 31 August 2021 and the Claimant remained an employee of the Respondent. It follows that he was also a worker of the Respondent for the period in question.

Consequential Directions

101. As I indicated above, I did not consider it appropriate to deal with the illegality issue raised by the Respondent at this hearing. If illegality is an issue this should be dealt with by the Tribunal at the final hearing of the claim.

102. The Respondent should within **14 days** confirm whether it wishes to raise illegality as a defence to the claim and provide an Amended Response.

103. Even if the Respondent decides that it does not wish to raise illegality as a defence this may be an issue which the Tribunal is required to take account of in any event and so the parties should ensure that any documents relevant to this issue are disclosed and that it is dealt with in their witness statements.

104. The case will then be listed for a case management discussion by telephone in order to fix a date for the final hearing and make appropriate directions. If the parties are able to agree a time estimate and directions

they may apply for this hearing to be vacated.

Employment Judge Gray-Jones
Date: 28 September 2023

Judgment sent to the Parties on 16 October 2023

For the Tribunal Office

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