EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr H James	v	Caudwell Properties (CP109) Ltd

Heard at: London Central (in public; by video) **On:** 26 & 27 October 2023

Before: Employment Judge Klimov

Appearances:

For the claimant: in person

For the respondent: Mrs E Goodwin, retired solicitor

JUDGMENT having been given to the parties orally on 27 October 2023 and written reasons having been requested by the respondent on 31 October 2023, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided

REASONS

Background and Issues

1. By a claim form dated 3 July 2023 the claimant brought a complaint of unfair dismissal. The respondent resisted the complaint on the basis that the claimant was not an employee of the respondent but a self-employed contractor.

2. The respondent's response did not contain a defence as to the reason for the claimant's dismissal and the fairness of it. Therefore, as Mrs Goodwin rightly conceded at the start of the hearing, the claim turns on the claimant's employment status. If I were to find that the claimant was an employee of the respondent at the material time, it would follow that his complaint of unfair dismissal must succeed. That is because under s.98(1) of the Employment Rights Act 1996 ("**ERA**") the burden of establishing a potentially fair reason for

the dismissal is on the employer. If the employer fails to do that, the dismissal will be unfair.

3. Conversely, if I were to find that the claimant was not an employee of the respondent, his complaint of unfair dismissal must fail. That is because under s.94 ERA only employees have the right not to be unfairly dismissed.

Evidence

4. There were three witnesses for the claimant: the claimant himself, Mr Richard Emms, and Ms Saida Yusuf. The respondent called five witnesses: Mr Mark Griffith, Head of Procurement and Commercial, Mr Uri Mizrahi, CEO, Ms Kate Nunn, HR Manager, Mr Kevan Buckley, Chief Construction Officer, and Mr Adam Lawry, Director of Fit Out. All witnesses gave sworn evidence and were cross-examined.

5. I was referred to various documents in a 462-page bundle of documents the parties introduced in evidence. At the start of the hearing the respondent objected to the redactions applied by the claimant to one of the documents in the bundle. The claimant provided an unreacted version of that document. References below in the formal p.xx are to the corresponding pages in the bundle.

6. The claimant represented himself at the hearing. Mrs Goodwin appeared for the respondent.

Findings of Fact

7. The respondent is a limited liability company within Caudwell group of companies, operating in the field of construction and property development.

8. The claimant is the sole director and the controlling shareholder of a limited liability company, Building Integrated Guidance Solutions Limited ("**BIG Solutions**"). BIG Solutions operates in the business of providing consultancy services in the field of construction and property development.

9. Prior to the claimant's engagement by the respondent, Mr Mizhari and the claimant had known each other for some years through prior business dealings.

10. In February 2020, Mr Mizhari enquired through another person about the claimant's company. He received positive feedback. Mr Mizhari then contacted the claimant to set up a meeting to discuss a potential business engagement of the claimant's company for a large property development project of the respondent - Audley Square House ("**the Project**").

11. On 13 March 2020, the claimant attended the respondent's offices for a meeting. On the respondent's side the meeting was attended by Mr Mizhari, Mr Buckley and Mr Tony Wake (previous procurement and contract manager).

The respondent wanted Big Solutions to set up a programme and procurement strategy for the Project and monitor and coordinate work on the Project with the respondent's other suppliers and sub-contractors.

12. For the meeting the claimant presented a document entitled "*Building Integrated Guidance Solutions Limited, Company Capability Statement*". The document referred to the 15-year evolution history of Big Solutions, listed the company's core competencies, contained references to other projects Big Solutions was involved in, listed names of its clients. The document also contained details of the company's address, registration number and VAT number. The document referred to Big Solutions as "*we*". It did not refer to the claimant by name.

13. The meeting resulted in an agreement to engage Big Solutions as a consultant for the Project. The agreement envisaged that the services would be provided by the claimant on behalf of Big Solutions two days a week for a fixed monthly fee of £10,000 + VAT.

14. On or around 15 March 2020, the respondent and Big Solutions signed a confidentiality agreement with respect to the Project. The parties commenced negotiations of the services agreement, Short Form Appointment – Programme Manager Agreement ("**the Agreement**"), which was eventually signed on 6 August 2020 by the respondent and the claimant on behalf of Big Solutions.

15. As part of the procurement process the claimant provided to the respondent a certificate of professional indemnity insurance of Big Solutions for £1 million cover, which later was increased, at the respondent's request, to £5 million cover.

16. The Agreement contained the following key terms:

1 APPOINTMENT

This agreement confirms the Consultant's appointment as Programme Manager for the provision of the services within your area of expertise as may from time to time be required in relation to the Project, including without limitation the services set out in Schedule 1 **("Services")** in connection with the Project upon the terms set out in this agreement and in accordance with the Client's instructions and directions from time to time.[..]

3 COMMUNICATION

The Consultant shall liaise regularly and consult as necessary with all other professional advisers whom the Client appoints and notifies to the Consultant and have regard to any opinions or comments that they may have but the other professionals shall have no authority to vary the Services on behalf of the Client. The Consultant shall keep all such professional advisers and the Client fully informed of all matters relating to the Services.

4 PERSONNEL

The Consultant shall use Harry James in connection with the performance of the Services and such persons services shall, unless the Client requires otherwise, be available for as long as may be necessary to ensure the proper performance by the Consultant of the Services.

5 FEE

5.1 The Client shall pay the Consultant £10,000 per calendar month exclusive of value added tax ("Fee") for the carrying out of the Consultant's obligations under this agreement subject to the provisions of this agreement and to any right the Client may have under this agreement or at law to withhold, deduct or set-off. [..]

6 PAYMENT OF THE FEE

6.1 The Consultant shall submit proper value added tax invoices to the Client not later than five days after any sums become due to the Consultant under this agreement (but not more frequently than monthly) showing the Interim Payment the Consultant considers due at the payment due date supported by such documents, vouchers and receipts as shall be necessary for checking the invoices and the basis on which the amount is calculated **("Interim Application").**

7 AUTHORITY

The Consultant shall not have any authority whatsoever to act on the Client's behalf or purport to bind the Client to third parties without first obtaining the Client's prior written approval.

11 INSURANCE

The Consultant shall procure and maintain professional indemnity insurance with insurers or underwriters of repute with a minimum limit of indemnity of Five Million pounds for each and every claim until the date of the twelfth anniversary of completion of the Project, provided that such cover is generally available in the United Kingdom market at reasonable premium rates and terms. The Consultant shall not make a claim for payment until it has produced to the Client satisfactory evidence of insurances. The Consultant shall, within seven days of any request, produce to the Client satisfactory documentary evidence that the insurance is being maintained.

17. The services to be provided by Big Solutions were set out in Schedule 1 of the Agreement:

SCHEDULE 1

Services

Basic Services

The Basis Services are the minimum services to be provided during the period of Part-Time resource.

• In conjunction with the client team develop and issue governance structure for the management of all programme associated with Audley Square House.

• Provide project programme management: this will include the preparation and issue of the master programme, design programme, procurement programme, 3rd party interfaces and commitments, construction programme(s) and the completion and occupation programmes to accommodate a soft landing, fitting out and occupation.

  o Whilst following procurement, contractual responsibility for time passes over to the main contractor, the Consultant will maintain ownership of the master programme.
  o The Consultant will monitor, tackle, challenge and provide certainty on project position throughout the construction period by constant review and publish his own assessments to ensure any blockers to progress are addressed and remedied

• Provide monthly reports as to programme status against the master programme

• Ensure that an integrated design team programme is established that enables Work Package design freeze dates to be achieved

• Develop project and/or Work Package Tender Event Schedules aligned with the integrated design team programme and project procurement strategy

• Attend / request / host any meetings as required - noting limited time

- Standard 4D model
- Analysis of current tender information including recommendations and risk analysis
- Review and comments on current contractor's program & logistics proposals during tender period or submissions

Additional Services

The Additional Services can be instructed individually by the Client in accordance with the terms of the appointment and/or will become the services to be provided in the event that the appointment is converted to a full time appointment.

- Detailed High Resolution 4D model
- Review and interrogate programmes prepared by third parties, including progress reports
- Review and comments on future contractor's program & logistics proposals during tender period or submissions
- Review and interrogate the future Contractor's construction stage logistics plan
    - Assist in the development of a construction stage logistics plan(s) for follow on trades and the programme requirements for the same
    - Provide strategic advice including how the project strategy can be developed, transparency on time frame and risks of any given element
    - Provide and independent peer review of the procurement strategy, considering the risks and opportunities that will present themselves during development as well as a consideration of the prevailing market forces
    - With collaboration with the consultant team develop a detailed commissioning schedule as part of the master programme
- Prepare associated documentation to be included within any tender issue.
- Analysis of future tender information including recommendations and risk analysis
- Support the client with any dispute arising on the project

18. The fees and the payment schedule were set out in Schedule 2

SCHEDULE 2

Payment schedule

£10,000.00 excluding VAT per calendar month based upon 11 working days.

The Consultant shall be based at the Clients offices located at 38 Park Street, London, Mayfair W1K 2JF

Month	Fee
April 2020	£5,000
May 2020	£10,000
June 2020	£10,000
July 2020	£10,000
August 2020	£10,000
September 2020	£10,000
October 2020	£10,000
November 2020	£10,000
December 2020	£10,000

The rates referred to in clause 12.4 are:

Person Rate per hour exclusive of value added tax Harry James (Director) £ 107

19. The Agreement provided that it shall apply to the services already carried out by the Consultant on the Project and contained the usual entire agreement clause. The respondent was entitled to terminate it for convenience on 30-day written notice. Big Solutions could not transfer or assign any right or any obligation or sub-contract the performance of the Services without the respondent's prior written consent.

20. The Agreement was later amended by Additional Services Letters ("**ASL**") signed on 29 September 2020 (ASL1), 10 December 2020 (ASL2) and 27 October 2021 (ASL3). Those amendments expanded the scope of services to be provided by Big Solutions and provided for additional fees for such services. In addition, ASL3 provided for an increase of the fee on an annual basis by the Consumer Price Index. ASL2 and ASL3 also provided that the fee was based on the services to be provided 16 days per month and included 4 weeks holiday over 48 weeks of services.

21. The claimant remained the person responsible for the provision of the Services under the Agreement.

22. All fees were invoiced by Big Solutions by way of VAT invoices and all payments were made to the Big Solutions' bank account. The claimant was not paid directly by the respondent or provided with any other benefits, such as life assurance, medical insurance, pension contributions. The respondent did not deduct any tax or national insurance contributions from any payments for the claimant's services.

23. The claimant worked partially from his home office and partially from the respondent's office. The arrangements were informal. Typically, the claimant would decide himself when to attend the respondent's office. During the Covid pandemic the claimant was asked to advise the respondent's HR in advance if he was planning to be in the office for health and safety reasons, to allow the respondent to adjust the rota and keep the number of people in the office to a minimum. During the pandemic, when on the respondent's premises, the claimant had access to and could use personal protective equipment ("**PPE**"), as all other employees, contractors and visitors.

24. The claimant was provided with the respondent's email address. When working on the Project he was signing his emails as Head of Programme Management with the respondent's credentials. This was specifically authorised by Mr Mizhari to ensure that the respondent retained copies of all communications related to the Project.

25. The claimant alongside other contractors was included in the respondent's organigrams. However, their boxes were shaded grey with the explanation – "Consultants".

26. The claimant did not have any staff reporting into him. His performance on the project was supervised by Mr Buckley.

27. The claimant was included in the respondent's document/process workflow electronic system. He was able to review and approve certain documents related to the Project. He did not have the authority to legally bind the respondent vis-à-vis third parties or to commit to any procurement purchases on behalf of the respondent.

28. The claimant attended business meetings with the respondent's employees and third parties in connection with the Project on a when and if required basis.

29. The claimant was not subject to the respondent's HR policies and procedures, such as a disciplinary and grievance procedures. When a complaint was made against the claimant by another contractor, on 24 March 2020, about the claimant's conduct towards that contractor, it was not handled via the respondent's disciplinary policy, but by way of an informal discussion between the claimant, Ms Nunn and Mr Mizhari.

30. The claimant was not subject to the respondent's annual performance review process of its employees. However, on 14 July 2021, Ms Nunn asked Mr Mizhani whether the claimant and other consultants should also have reviews. Mr Mizhani responded saying yes because "*it will be good to meet with them as well for us to gain valuable information in particular in moving forward to a larger internal structure*".

31. The claimant was provided by the respondent with office support, such secretarial and administrative services. Such support was provided by the respondent to all contractors to relieve them from administrative tasks, so that they could concentrate on high value work. The claimant was not obliged to use office support offered by the respondent.

32. The claimant brought to the respondent's office his/Big Solutions' printer, which he used when working on the Project.

33. The claimant took holidays when he wished. He would typically advise Mr Buckley in advance that he would be taking time off. He did not seek prior approval from Mr Buckley to take holidays, and Mr Buckley did not authorise the claimant's holidays.

34. During his engagement on the Project the claimant went off sick with Covid. He did not provide a medical certificate to the respondent. The respondent continued to be paid the agreed monthly fee to Big Solutions notwithstanding the claimant's unavailability due to sickness. No separate sick pay was paid to the claimant.

35. At the same time as working on the Project for the respondent, the claimant via his company, Big Solutions, was working on other projects and business leads for other clients and potential client of Big Solutions, including from the respondent's office. For some of such projects the claimant sub-contacted

work to other companies/contractors, and his involvement in the day-to-day running of such projects was minimal.

36. In his tax return for the 2021-22 tax year the claimant declared that he was an employee/director of Big Solutions and had received in that tax year the total pay from that employment of £8,777.29. The claimant separately declared that he had received dividends of £145,125. That was the dividend the claimant paid himself as a shareholder of Big Solutions.

37. Big Solutions accounts for the year ending 31 May 2021 and draft accounts for the year ending 31 May 2022, show that in addition to the revenue from the Project, Big Solutions received other revenue streams from third parties. The accounts show that in the reporting period the company had one employee – the claimant.

38. On 31 January 2023, at a meeting between the claimant, Mr Mizhari and Mr Buckley, the claimant was told that the respondent would be terminating the Agreement, because the respondent was not satisfied with the services provided by the claimant. The termination on 30-day notice was confirmed in writing on 1 February 2023 by Mr Griffith.

39. On 1 February 2023, the claimant raised a complaint against Mr Mizhari.

40. On 13 February 2023, the respondent instructed the claimant to stop any work on the Project with immediate effect and collect his personal belongings.

41. On 14 February 2023, a call took place between the claimant and Mr Richard Bosson about the claimant's complaint against Mr Mizhari. At that call Mr Bosson told the claimant that it was not a grievance meeting, and the respondent may or may not provide the claimant with any outcome or feedback on his complaint. The respondent did not provide the claimant with any outcome or feedback after the call.

42. On 27 March 2023, the claimant wrote to the respondent chasing outstanding payments. In that letter, the claimant referred to the terms of the Agreement and the invoices issued by Big Solutions for his services.

The Law

43. Under s. 94 of the Employment Rights Act 1996 ("ERA") *"[a]n employee has the right not to be unfairly dismissed by his employer*."

44. Section 230(1) ERA defines 'employee' as '*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment*'.

45. Section 230(2) of ERA provides that a contract of employment means '*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing*'.

46. Over the years several legal tests have developed to identify relationship between parties, which should be regarded in law as being under a contract of employment, and how these should be distinguished from those falling outside that category. In making such determination a tribunal must consider all relevant factors. The irreducible minimum for employment relationship to exist requires control, mutuality of obligation and personal performance, but other relevant factors also need to be considered (see *Nethermere (St Neots) Ltd v Gardiner and anor* 1984 ICR 612, CA, and *Carmichael and anor v National Power plc* 1999 ICR 1226, HL).

47. The mutuality of obligation is usually expressed as an obligation on the employer to provide work and pay a wage or salary, and a corresponding obligation on the employee to accept and perform the work offered. In essence, mutuality of obligation is the first of the three conditions for a contract of service identified in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* 1968 1 All ER 433, QBD: '*the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master'*. This is often described as a "wage/work bargain".

48. One of the requirements of the test for a contract of service laid down by Mr Justice MacKenna in **Ready Mixed Concrete**, is that the employee must have agreed to provide his or her own work and skill in exchange for a wage or other remuneration. He said: '*Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, although a limited or occasional power of delegation may not b*e.' That is what became known as personal performance requirement.

49. The control element of the employee status test also goes back to ***Ready Mixed Concrete***, and since then has been developed and refined by subsequent case law. In summary, control requires that ultimate authority over the purported employee in the performance of his or her work rests with the employer. However, indirect control, which exists by virtue of an employer's right to terminate the contract if the worker fails to meet the required standards of skill, integrity and reliability, is not by itself sufficient. Some elements of more direct control over what the worker does is needed.

50. These three elements (mutuality, personal performance and control), however, are just an irreducible minimum, without which a contract of employment cannot exist. Importantly, the ***Ready Mixed Concrete*** case also sets down another condition: that the other provisions of the contract are consistent with it being a contract of service.

51. The case law suggests the following are relevant factors a tribunal should consider when deciding whether there are provisions in the contract that are consistent or inconsistent with it being a contract of employment:

    a. *Who carries financial risk*: Payments linked to achieving of a particular result, the right to set the rate charged, participate in the resulting

profits, and bearing responsibility for losses will usually point towards self-employment. Conversely, payment of a regular wage or salary is a strong indicator of employment.

b. *Provision of benefits and tools of trade*: The provision of benefits such as sick pay, holiday pay and pensions will suggest a contract of employment, while the provision by the worker of their own tools, equipment and premises from which the service is provided will tend to point towards self-employment.

c. *Tax and national insurance*: Deductions at source point to employment; gross payments suggest self-employment. However, this will rarely be a conclusive factor.

d. *Organisational integration*: The degree to which the worker is integrated into the employer's organisation is a material factor. The more the worker forms part of the organisational structure, and the more he or she is given the powers and responsibilities as other employees, the more likely his or her relationship with the employer will be one of employment.

e. *The presence of intermediary companies*: Performing services via an intermediary company suggests self-employment. However, this is not a decisive factor. For example, in *Catamaran Cruisers Ltd v Williams and ors* 1994 IRLR 386, EAT, the EAT held that the fact that the worker had formed a limited company and supplied his services through that company did not affect his already established employment status. The EAT stated that there was no rule of law that the importation of a limited company into the relationship prevents the existence of a contract of employment. If the true relationship was one of employment under a contract of service, putting a different label on it would make no difference.

f. *Intention of the parties*: The parties' stated intention as to the status of their working relationship in law may be a relevant factor, but the courts must always look at the substance of the matter, even if the parties expressly agree on a particular label (see *Autoclenz Ltd v Belcher and ors* 2011 ICR 1157, SC and *Uber BV and ors v Aslam and ors* [2021] UKSC 5), recognising that the inequality of bargaining power in the employment context may require to look "*beyond the terms of any written agreement to the parties' 'true agreement'*" (***Uber*** at [78])

Tripartite arrangements

52. With respect to agency staff (and these principles are equally applicable in other tripartite relationship), the leading case is *James v Greenwich London Borough Council* 2007 ICR 577, EAT, where Mr Justice Elias, then President of the EAT, laid down the following guidance to assist tribunals in deciding whether to imply an employment contract between an agency worker and an end-user:

a. the key issue is whether the way in which the contract is performed is consistent with the agency arrangements, or whether it is only consistent with an implied contract of employment between the worker and the end-user,

b. the key feature in agency arrangements is not just the fact that the end-user is not paying the wages but that it cannot insist on the agency providing the particular worker at all,

c. it will not be necessary to imply a contract between the worker and the end-user when agency arrangements are genuine and accurately represent the relationship between the parties, even if such a contract would also not be inconsistent with the relationship,

d. it will be rare for an employment contract to be implied where agency arrangements are genuine and, when implemented, accurately represent the actual relationship between the parties. If any such contract is to be implied, there must have been, subsequent to the relationship commencing, some words or conduct that entitle the tribunal to conclude that the agency arrangements no longer adequately reflect how the work is actually being performed,

e. the mere fact that an agency worker has worked for a particular client for a considerable period does not justify the implication of a contract between the two,

f. it will be more readily open to a tribunal to imply a contract where, like in *Cable and Wireless plc v Muscat* 2006 ICR 975, CA, the agency arrangements are superimposed on an existing contractual relationship between the worker and the end-user. The same principle was applied by the EAT in the earlier judgment in ***Catamaran Cruisers Ltd*** where the employee had established a company, through which he was then paid, at the suggestion of the employer, after the Inland Revenue had advised that the earlier arrangements were considered to give rise to a contract of employment.

53. On appeal (*James v Greenwich London Borough Council* 2008 ICR 545, CA) the Court of Appeal agreed with the EAT's approach and confirmed that a tribunal will only be entitled to imply an employment contract between an agency worker and an end-user where it is necessary to do so to give business reality to the situation, which would not be necessary where agency arrangements are genuine and accurately represent the relationship between the parties.

54. In ***Cable & Wireless Plc v Muscat*** the Court of Appeal said that in a typical "triangular" case, the employment tribunal had to consider on the whole of the evidence whether the legal consequences of the arrangements between the worker, employment agency and end user included an implied contract of employment between the worker and the end user.

55. The same principles apply when, the contractor's services are provided to the end-user through other intermediaries (see Tilson v Alstom Transport 2011 IRLR 169, CA). In that case, LJ LJ Elias said:

    "*It is not against public policy for a worker to provide services to an employer without being in a direct contractual relationship with him. Statute has imposed certain obligations on an end user with respect to such workers, for example under health and safety and discrimination legislation, even where no contract is in place between them. But it has not done so with respect to claims for unfair dismissal. It is impermissible for a tribunal to conclude that because a worker does the kind of work that an employee typically does, or even of a kind that other employees engaged by the same employer actually do, that worker must be an employee.*"

Analysis and Conclusions

Was the contract between the claimant's company and the respondent a sham?

56. The claimant puts his case very high. He says that the Agreement was a sham transaction. He also says that the subsequently concluded ASLs were equally a sham. He says these documents were designed to disguise the true intention of the parties to create employment relationship.

57. The claimant went as far as to suggest that it was done to deceive HMRC. When I asked him why the respondent would be interested in creating such a sham structure to assist the claimant in deceiving the Revenue, the claimant suggested that the respondent's interest might lie in avoiding showing the high level of remuneration agreed with the claimant to its other employees who were on much lower salaries.

58. All the respondent's witnesses vehemently denied that the Agreement was a sham, or that there were any conversations with the claimant about employing him as an employee of the respondent. They pointed me to the contemporaneous documents showing that the claimant had been introduced to the respondent as a representative of BIG Solutions, and it was BIG Solutions that pitched business to the respondent. The claimant did not apply for any vacancy at the respondent. He did not present his personal CV, but the Capability Statement of Big Solutions.

59. I find that the Agreement and the ASLs were genuine commercial agreements, which reflected the parties' true intention at the time. I prefer the respondent witnesses' evidence on this issue. I say that for the following reasons.

60. It was not the claimant's case until he took the witness stand that the Agreement was a sham. It is not in his pleaded case in the ET1, it is not stated in his witness statement. It is not something he raised at the time when

his engagement was terminated. His letter of complaint of 1 February 2023 does not suggest that the Agreement was a sham.

61. Whilst the claimant was persistent in his evidence that it was known to both parties that the Agreement was entered into to disguise the intended employment relationship, the claimant presented no reliable evidence, from which I could come to that conclusion. I find it highly surprising that not only the claimant was unable to present any documentary evidence, from which one could at least get a niff of such a deception, but he did not lead any evidence about any conversations with any of the respondent's staff where that plan to create a sham contract had been conceived.

62. The claimant himself acted in accordance with the Agreement both in dealings with the respondent and third parties, such as HMRC. The claimant relied on the Agreement in seeking to enforce his company's rights under it, when demanding the outstanding payments in March 2023.

63. I find the claimant's suggestion that the respondent would be prepared to go along and create such an elaborate sham contractual structure (which undoubtedly would carry serious financial, tax, reputational and other risks for the respondent) to essentially avoid upsetting its other employees if they somehow were to find out the level of remuneration agreed with the claimant, as simply fanciful. I reject it.

64. I accept that the created contractual structure was financially beneficial to the claimant, as can be seen from his tax return. There is nothing inherently wrong or illegal with the parties entering into a transaction of this kind. It is not an unusual method of engaging professional consultants in various fields of their expertise. This, however, rather than showing the lack of intention to create contractual relationship of this kind, on the contrary, serves as evidence of the parties' mutual intention to organise their legal relationship in that way.

65. Furthermore, when the Agreement was entered into, the claimant had already been operating his business via BIG Solutions for at least 15 years (judging by the information he provided in the Capability Statement document), through which he served many other clients. BIG Solutions was not specifically created as a vehicle to engage the claimant on the Project. It was not created on the respondent's instigation.

66. For these reasons, I reject the claimant's case that the Agreement or any ASLs was a sham.

Implied contract of employment?

67. This, however, does not resolve the issue before me. Just because there was a contract between the company controlled by the claimant (BIG Solutions) and the respondent does not necessarily mean that they could not have been an employment contract between the claimant himself and the respondent.

68. I remind myself that under s.230 ERA an employee is '*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment*', and a contract of employment means '*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing*'.

69. I must focus on the reality of the situation, and the task is one of statutory, rather than contractual, interpretation. That is because the right not to be unfairly dismissed is derived from the statute. However, there must be *a legal contract* between the parties of some sort, for there to a contract of employment.

70. It is common ground there was no written contract between the claimant and the respondent. The claimant did not argue, and it is not part of his case, that there was an oral contract of employment between him and the respondent.

71. This leaves me with the question whether there was an implied contract of employment between the claimant and the respondent.

72. As I stated earlier, when setting out the relevant legal principles, in tripartite relationship (be it through an agency or a personal service company), where such arrangements are genuine and, when implemented, accurately represent the actual relationship between the parties, it will be rare for an employment contract to be implied. Such implication is only permissible where it is necessary to do so to give business reality to the situation.

73. To put it in simple terms, I can only imply a direct contract between the parties if I find that what was happening between the parties in reality cannot be properly explained by the tripartite arrangement between them (i.e. between the respondent as a client of Big Solutions, and between the claimant as an employee/director of Big Solutions), because the reality of the situation is so divorced from what the tripartite arrangement provided for or envisaged, that it cannot be sensibly said that in acting in a way the parties did they were acting pursuant to that arrangement.

74. As I stated earlier, it was not the claimant's case that his business, that is his company, was specifically created for the purposes of the claimant entering into this arrangement with the respondent. As I found the claimant's business served before and during the relationship with the respondent other clients. The level of the claimant's personal involvement in such other business is not a decisive factor.

75. In that sense, the situation in the present case is very different to the one in the ***Catamaran Cruises Ltd*** or ***Cable and Wireless*** cases where a personal service company (in the former) and an agency arrangement (in the latter) were superimposed on the existing relationship between the employer and the worker.

76. The claimant relies on various matters arguing that those demonstrate that his relationship with the respondent was in reality one of employment. I deal with each in turn.

Place of Work

77. I find nothing unusual in the fact that the claimant was required to be present on the respondent's premises when performing his services. There are thousands of examples where contractors need to be present on the client's premises in order to perform their services – from construction sites to hospitals, from catering to cleaning services.

78. I also accept Ms Nunn's evidence that if the claimant chose not to come to the office, she would not necessarily know that, and even if she became aware of his non-attendance she would not follow the usual HR procedure by contacting the claimant to enquire about the reason for his non-attendance.

79. More importantly, as the claimant accepted himself in answering my question during his evidence, him being required to come to the respondent's office was consistent with the provisions of the Agreement.

80. Therefore, I find the fact that the claimant had to attend the respondent's office from time to time does not in any way imply the existence of employment relationship between the parties. It was simply the consequences of the service provision requirements under the Agreement, which the claimant had to follow in order to perform the services.

Staff Structure

81. The fact that the claimant was included in the respondent's organograms does not assist the claimant either. That is because in all those charts he was clearly identified as a contractor. I do not accept his submission that because his title was "programme manager", and there was no word "consultant" in his title, that somehow made him an employee of the respondent. That was simply a short descriptive title of what the claimant was meant to be doing in the respondent's overall business structure, which structure included employees, other consultants and contractor-organisations.

82. Equally, the fact that he was reporting into Mr Buckley by itself is insufficient to find employment relationship. There were other consultants reporting to Mr Buckey and to other employees of the respondent, as can be seen from the organograms. I also accept Mr Buckley's evidence that it was not reporting in the sense of an employee reporting to his/her manager, but rather supervision by Mr Buckley, as the person nominated by the client, of the performance of the claimant as a representative of the supplier – Big Solutions. I find nothing remarkable in that. Someone at the respondent's organisation had to supervise and assess the consultants' work.

Attendance of meetings

83. Again, I find nothing inconsistent between the relationship established through the Agreement with the claimant's company and the claimant's attendance of the respondent's management meetings. It was specifically stated in the Agreement as one of the service tasks he had to undertake. The claimant accepted that in cross-examination.

84. The fact that BIG Solutions were not mentioned in the meeting schedules is not relevant. The claimant was contracted via BIG Solutions and was attending the meetings in that capacity as a contractor. Whether the claimant was specifically introduced at those meetings as a contractor or a consultant is irrelevant too. He was not introduced as an employee of the respondent either. Even if, and there was no evidence before me to establish that as a fact, and I, therefore, make no findings on that, but even if third parties' attendees at such meetings came out with a wrong impression that the claimant was an employee of the respondent, their erroneous conclusion on that question cannot give rise to actual employment relationship between the claimant and the respondent.

85. I also observe that under the terms of the Agreement the claimant was obliged not to act on the respondent's behalf or purport to bind the respondent to third parties without first obtaining the respondent's prior written approval.

86. Equally, the fact that the claimant might have attended more meetings than other consultants does not make him an employee.

<u>*Annual Reviews*</u>

87. I accept Ms Nunn's evidence that the consultants' reviews were conducted separately from employees' reviews. This is further supported by the contemporaneous documents. As can be seen from the emails at p.137, 138 the claimant was not included in the initial list of employees for review. It was only after Ms Nunn enquired whether the consultants should also be reviewed, the reviews were extended to three consultants, including the claimant, and that was done for a specific reason "*to gain valuable information in particular in moving forward to a larger internal structure*".

88. I also accept Ms Nunn's evidence that the contents of the review meetings with employees and with the consultants were different. With the consultants, their individual aspirations were not discussed, their salaries were not reviewed. The consultants' reviews were about how they progressed performing on the projects assigned to them. These were business and not HR reviews.

89. This shows that the respondent treated the contractors' reviews different to performance reviews of its employees.

90. I also find that such reviews were not inconsistent with the provisions of the Agreement. The respondent, as the client of Big Solutions under the Agreement, was entitled to review the performance of the claimant as the

consultant performing the services on behalf of Big Solutions under that Agreement. Mr Buckley gave evidence to that effect, which I accept.

Email address and signature

91. I accept Ms Nunn's evidence as to why the claimant was given the respondent's e-mail address. Her evidence on this issue is supported by the contemporaneous documents (pp 66-68). This was not because the respondent intended to make the claimant and employee. On the contrary, it was treated as an exception and a special approval sought from Mr Mizhari.

92. As in the case of business meetings, even if the claimant's signing his emails with the respondent's credentials might have created a mistaken belief on the part of a recipient of such an email that the claimant was an employee of the respondent, that is not sufficient to establish employment relationship between the parties.

93. Furthermore, I find that the respondent authorising the claimant to sign his emails with the respondent's credentials was not inconsistent with the terms of the Agreement. Clause 7 of the Agreement gives the respondent the right to authorise the claimant (as a representative of the Consultant) to act on behalf of the respondent in dealing with third parties. That is what the respondent did by authorising the claimant to have the respondent's email address and sign his emails related to his work for the respondent with the respondent's credentials.

Holidays

94. As the claimant himself states in his witness statement, ASL2 and ASL3 explicitly included holidays as part of the agreed fee. He also accepted that he was paid a fixed monthly fee, and if a given month had public holidays there would be no deductions for those days as a non-working day, and that is because the Agreement did not provide for such deductions. Accordingly, I the fact that the claimant was paid a fixed fee, which also covered his absence due to holidays is fully consistent with the terms of the Agreement.

95. I accept Mr Buckley's evidence that he was not approving the claimant's holiday requests, but simply acknowledging that the claimant would not be available because he was taking time off.

Approvals

96. I accept Mr Buckley's evidence that the claimant had authority to review and approve various documents within the respondent's electronic document management process, and that was part of the claimant's role as the programme management consultant on the Project. However, the claimant was not authorised to commit procurement spent on behalf of the respondent. The claimant did not argue that he was so authorised.

97. I find that the scope of the approvals given to the claimant was consistent with the terms of the Agreement. Clause 3 of the Agreement required the claimant (in his capacity as a representative of BIG Solutions) to "*liaise regularly and consult as necessary with all other professional advisers whom the Client appoints and notifies to the Consultant and have regard to any opinions or comments that they may have but the other professionals shall have no authority to vary the Services on behalf of the Client. The Consultant shall keep all such professional advisers and the Client fully informed of all matters relating to the Services*".

98. The description of Basic Services (p. 82) states that project programme management service that the claimant was required to provide include various matters that would necessarily require the claimant to review and approve various documents. See, for example, the last two bullet points.

- *Analysis of current tender information including recommendations and risk analysis*
- *Review and comments on current contractor's program & logistics proposals during tender period or submissions*

<u>*Management Role*</u>

99. Much of what I have said about Approvals, equally applies to this matter, contended by the claimant as the evidence of employment relationship. In short, I accept Mr Buckley's evidence that, with the possible exception of one item (*11.1.7 Colour choice for the external temporary structure*), what the claimant describes as his management role squarely falls with the scope of services he was contracted to provide as a consultant acting on behalf of BIG Solutions, pursuant to the terms of the Agreement.

100. For the sake of completeness, with respect to item *11.1.7 - Colour choice for the external temporary structure*, the claimant refers in his witness statement to pp. 439-448. I have reviewed the pages. This is an email chain between various parties, initiated by Steve Payne of Careys, asking two people in Mace group whether they would prefer the gantry steel work to come with a light or dark grey primer. The claimant is included in the subsequent emails, but he does not reply to any of them. In fact, it is Mr Buckley who directs the claimant to guide Elizabeth O'Brien to the dark grey as standard. Therefore, I cannot see what management role the claimant says he undertook in relation to this particular matter even if it fell outside the scope of the contracted services under the Agreement.

<u>*Office support*</u>

101. I accept Mr Buckley's evidence that such support was provided to all contractors for efficiency purposes to relieve them from admin tasks, so that they concentrate on high value work. I also accept his evidence that it is common practice in the industry.

102. In any event, just because the claimant had the benefit of office support by employees of the respondent does not make him an employee of the

respondent. It was not the claimant's case that he had any people management responsibilities over any such support staff.

103. Additionally, I do not find that such assistance was inconsistent with the Agreement. Whilst it does not appear to be a contractual requirement for the respondent to provide such office support, it was certainly within its gift to offer it. In any event, the claimant's case is that he was "encouraged" to use it, he was not obliged to use it.

Sick Pay

104. I accept Ms Nunn's evidence that she was not aware of the claimant's sick absences and that he did not report those in accordance with the respondent's sick policy.

105. The claimant simply mischaracterises a part of his fixed monthly fee as sick pay. There is nothing inconsistent with the Agreement that the respondent continued to pay Big Solutions the set monthly fixed fee, even when the claimant was not available for work due to him being unwell.

106. Whilst clause 5.2 of the Agreement gives the respondent the right to adjust the payment if the services were suspended or delayed, the Agreement does not contain an automatic fee adjustment mechanism for the time the claimant is off sick. The respondent simply continued to pay the agreed fixed monthly fee because Big Solutions continued to invoice the respondent for it. None of the invoices describe any part of the invoiced fee as the claimant's sick pay.

PPE

107. The claimant argues that because when he was attending the respondent's office at the time of the pandemic, he was given access to the respondent's PPE for him to use, that indicates that he was an employee of the respondent. I find this argument wholly unsustainable.

108. Ms Nunn's evidence, which I accept, is that PPE was provided to all employees, contractors and visitors. PPE was provided to the office attendees not because of their particular employment status vis-à-vis the respondent, but because the respondent as the occupier of the premises was simply obliged under the relevant health & safety regulations to make such PPE available to them.

IR35

109. I find the results of the HMRC IR35 online tool assessment are of little, if any, relevance. Firstly, this was the claimant's assessment undertaken by him personally, by answering the questions in the HMRC online tool, as he chose to answer them. That does not mean that his answers were correct or represented the true position. Secondly, he did the assessment on 3 July 2023, the date he issued these proceedings against the respondent. The

result is hardly surprising based on the claimant's answers. Therefore, in that sense, it is self-serving evidence of little, if any, probative value.

110. In any event, what is considered as being in employment for tax purposes under the IR35 rules and being an employee within the meaning of section 230(1) ERA are two different matters.

111. As I said during the claimant's closing submissions, whether or not the claimant was a worker of the respondent within the meaning of section 230(3)(b) ERA (which test would be more aligned with the employment test under the IR35 rules) is not an issue before me. Unlike employees, so-called limb (b) workers do not have the right not to be unfairly dismissed under section 94 ERA. The ***Pimlico Plumbers Ltd v. Smith*** case the claimant quoted in his closing submissions is of little assistance, as it deals with the issue of whether an independent contractor was in fact a limb(b) worker.

Reality of situation

112. Stepping back and looking at the entire picture in the round, I find that the reality of the situation was fully consistent with the provisions of the Agreement, which implemented the intended arrangement between the parties. During the entire period of the claimant's engagement by the respondent (and indeed after the termination of the Agreement) both parties acted in accordance with the terms of the Agreement.

113. The respondent, in the way it acted towards the claimant, was very clear that it was not considering the claimant its employee and was not treating him as such (see my findings of fact at paragraphs 23-34 and 41). Equally, the claimant in his dealings with the respondent acted as a representative of Big Solutions and was treating the respondent as one of the clients of his business (see my findings of fact at paragraphs 12, 15, 22, 35 – 37 and 42).

114. All the specific matters, upon which the claimant relies in contending the existence of employment relationship between him and the respondent, are perfectly explainable and consistent with the tripartite arrangement arising from the Agreement between the respondent and BIG Solutions and the claimant's relationship with his personal service company, BIG Solutions, as its director/employee

Overall conclusion

115. For all these reasons, I find that there are no legitimate grounds for me to imply any direct contract between the claimant and the respondent of any kind. Consequently, there could not have been a contract of service between the parties.

116. It follows that the claimant was not an employee of the respondent and therefore did not have the right under s.94 ERA not to be unfairly dismissed.

117. His claim for unfair dismissal fails and is dismissed.

Employment Judge Klimov

14 November 2023

Sent to the parties on:

15/11/2023

For the Tribunals Office

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant (s) and respondent(s) in a case.