



EMPLOYMENT TRIBUNALS

Claimant: Mr K Doyle

Respondents: (1) Holborn Assets Insurance Brokers LLC
(2) Peter Wesley
(3) Robert Parker

Heard at: Manchester
(by cloud video platform)

On: 6 and 7 November 2023

Before: Employment Judge Porter
(sitting alone)

Representation

Claimant: In person

Respondent: Mr T Dracass, counsel

JUDGMENT having been sent to the parties on 10 November 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues to be determined

1. At the outset it was confirmed that the issues were:
 - 1.1 Whether the Claimant was employed by the first respondent under a contract of employment as defined by s. 230(1) and (2) Employment Rights Act 1996 (ERA 1996);
 - 1.2 If not , whether the claimant was a worker within the meaning of s.230(3)(b) ERA 1996;
 - 1.3 Whether the claimant was working under a contract personally to do work under s. 83(3)(a) Equality Act 2010.

Orders

2. A number of orders were made for the conduct and good management of the proceedings during the course of the hearing. In making the orders the tribunal considered the overriding objective and the Employment Tribunals Rules of Procedure 2013. Orders included the following.
3. The claimant made application for disclosure of the documents relating to the taxation of the income of the second respondent, Mr Peter Wesley, together with the contract under which Mr Wesley was engaged to provide services to the first respondent. The claimant asserted that:
 - 3.1 he believed that Mr Wesley was paid gross but the respondent refused to provide confirmation of Mr Wesley's tax status;
 - 3.2 he had been "benchmarked" against Mr Wesley and wished to use Mr Wesley as a comparator;
4. The respondent objected to the request and asserted that:
 - 4.1 the respondent had disclosed an offer letter to Mr Wesley (page 182);
 - 4.2 whether Mr Wesley was an employee or not was of no relevance to the employment status of the claimant;
 - 4.3 the claimant's witness statement confirms that the claimant had been disclosing on his internet blog documents relating to the time the claimant was working for the respondent, documents which are of a confidential nature;
 - 4.4 the claimant is now seeking disclosure of documents of a highly confidential nature for Mr Wesley and there is a strong risk that these documents will also be disclosed to the public on the claimant's blog
5. Having considered the submissions the tribunal rejected the request for disclosure of these documents because:
 - 5.1 it was not clear on what grounds the employment status of Mr Wesley was relevant to the employment status of the claimant;

5.2 it was not clear how the tax records of Mr Wesley were relevant to the issues to be decided;

5.3 the claimant could ask relevant questions of the respondent's witnesses as to the status of Mr Wesley, the way in which the first respondent treated him for tax purposes, and the disclosed offer letter. The employment judge could then reconsider the application, if pursued.

6. During the course of the hearing:

6.1. The respondent's witnesses indicated that they did not know whether Mr Wesley was paid gross or net of income tax;

6.2. Counsel for the respondent stated that a search had been made for the contract between the first respondent and Mr. Wesley, but the search had found no contract following the offer letter;

6.3. The respondent did not seek to use Mr Wesley as a benchmark, did not draw any comparison between the employment status of the claimant and Mr Wesley;

6.4. The claimant did not in evidence or in cross-examination of the respondent's witnesses raise any issue relating to Mr Wesley which was of any relevance to the issues to be decided as to the claimant's employment status and did not restate his application for disclosure;

6.5. The tribunal did not therefore review its original decision to refuse the application for disclosure.

7. The respondent made application for disclosure of the claimant's tax returns for the period he was working for the respondent on the grounds that the way in which the claimant had declared his income to HMRC was relevant to the issues to be determined.

8. The claimant objected to the request on the grounds that:

8.1. He had disclosed HMRC documents showing the amount of tax he had paid ;

8.2. He had disclosed documents prepared by his accountant to show the income received;

8.3. His tax returns were prepared by his accountant and were not relevant.

9. Having considered the submissions the tribunal ordered that the claimant disclose to the respondent his tax returns relating to the tax years in which he received payments of salary/commission from the first respondent because:

9.1. these were relevant to the issues to be determined;

9.2. The claimant accepted that he had declared income from the first respondent to the HMRC and that he could obtain copies of the tax returns submitted by his accountant on his behalf

Submissions

10. The claimant made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-
 - 10.1. The respondents focus heavily on the claimant's tax position. However, the first respondent does not operate the PAYE system and the claimant had no alternative but to declare his income from the first respondent. Once a year he gave his documents to his accountant to declare his total income for the year. His sole income was from the first respondent. It was for the accountant to complete the tax returns and the claimant did not interfere with the accountant's advice or the way in which the accountant drafted and made the returns on the claimant's behalf;
 - 10.2. The tax position of Mr Wesley is not clear;
 - 10.3. The claimant was clearly regarded as an employee at the beginning of his tenure, as illustrated by the written Contract of Employment provided to him. However, the first respondent now chooses to describe the claimant as self-employed;
 - 10.4. The respondent engages lawyers to deny the claimant his employment rights
11. Counsel for the respondent relied upon written submissions which the tribunal has considered with care but does not repeat here.

Evidence

12. The claimant gave evidence.
13. The respondent relied upon the evidence of:-
 - 13.1. Mr Riyad Adamou, Chief Commercial Officer of the First Respondent; and
 - 13.2. Mr Simon Parker, Chief Operating Officer and an equity owner of the First Respondent
14. The hearing was held remotely by cloud video platform. The claimant and each of the respondent's witnesses was present in England and Wales when giving their evidence.
15. The witnesses provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.
16. An agreed bundle of documents, with 325 numbered pages, was presented. Additional documents were presented during the course of the Hearing, either in accordance with the Orders outlined above or with consent. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle. These additional documents

included the following documents disclosed by the claimant in accordance with the Order referred to above:

- 16.1. KD 2019 business tax comp (page 326)
- 16.2. KD 2021 business tax comp (page 327)
- 16.3. KD SA 5.04.19 (page 328)
- 16.4. KD SA 5.04.20 (page 329)
- 16.5. KD SA 5.04.21 (page 330)
- 16.6. KD tax overview 05.04.2019 (page 331)
- 16.7. KD tax overview 05.04.2020 (page 332)
- 16.8. KD tax overview 05.04.2021 (page 333)
- 16.9. Tax return by claimant to HMRC tax year 2020/21 (pages 342-357)

Facts

17. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.
18. The first respondent is a family business based in the United Arab Emirates (UAE) which specialises in providing financial advice to expatriates. This includes advice relating to property investment in the UK. Prior to 2018 property investment was a small part of the first respondent's business.
19. The first respondent engages some 200 salespeople (or Wealth Managers) who promote property investments (and other investments) to clients. The Wealth Managers referred clients to a number of property developers which were selling off-plan properties. The property developers took the order and carried out the sale of the property with the client directly. The first respondent was paid a referral fee or commission for the introduction of clients to the property developers. The commission was split between the first respondent and the Wealth Manager responsible for the referral. All of the Wealth Managers were self-employed and engaged on a commission only basis.
20. At the end of 2018 Mr Andrew Pigott, who had recently been dismissed by deVeres, got in touch with Mr Riyadh Adamou, the respondent's Chief Commercial Officer, looking for work. Mr Pigott was offering a franchise model by way of a turnkey property solution which, he said, would increase the commission that the first respondent could earn from property investments made by its clients (pages 107 to 112 and 230 to 238). The franchise model that Mr Pigott had pitched would be to provide training, source additional property developments, provide a good service, streamline the conveyance process and increase sales.
21. Mr Pigott pitched his services on the basis that, with the introduction of his model, the first respondent would increase its introductions from 50 to 100

property sales a year at 2% commission to 300 sales a year with a minimum commission of 5%. Mr Pigott proposed that he keep 1% of this commission with the remaining 4% going to the Wealth Manager who had made the introduction which resulted in the property sale. Any additional commission was to be reinvested into the business.

22. Mr Pigott asked the claimant, who remained in the employ of deVeres, whether he would be interested in joining him in the arrangement with the first respondent. The claimant was interested. Mr Pigott negotiated the contractual terms on behalf of both him and the claimant with Mr Adamou (see pages 74 -77). Those documents do not expressly identify whether the position is intended to be a contract of service (employment) or a contract for services (self-employed). They do however refer to a job title and the payment of a salary.
23. Following these negotiations, the claimant was provided with a written job offer (page 78) which he signed by way of acceptance. Extracts from that job offer read as follows:

Please see below the details of your offer with Holborn, the largest UK Financial Advisory firm in the Middle East.

Job Title: Property Operations Manager

Remuneration: 4000GBP per month for the first 6 months

Rate of commissions: 6% override on gross commission

6% override on all mortgages completed through the proposition.

Equivalent calculations will apply for varying gross commission agreements

Year 1 Target: 300 properties

Remit: To build and establish a comprehensive end to end property solution to be rolled out to globally to all Holborn staff and international offices. Your role will be to work alongside the Head of Property operations and the Head of Property sales to maximise potential revenues.

Reports to: Andrew Piggott - Head of Property Operations Riyadh Adamou - Chief Commercial Officer

24. Mr Pigott put forward his proposal on the basis that he and the claimant worked as a team. Mr Pigott's role was to find the property developments and property developers, negotiate the commission rates with them and promote the developments to the Wealth Managers at the first respondent. The Claimant did the back-office support work, uploading marketing material, dealing with promotional material on the website and processing the paperwork associated with any investments.

25. If a sale later went through, both Mr Pigott and the claimant would get a percentage of the commission, as per their contract, as would the appropriate Wealth Manager. Once a property development was sourced and promoted internally, whether or not the claimant and Mr Pigott later got paid their commission was dependant on a client investing in the property, the property sale completing and the developer paying the first respondent the commission or referral fee that had been agreed. The amount of commission received by the claimant did not reflect the number of hours that he worked. After the first six months of engagement there was a risk of the claimant not being paid at all. The claimant was not paid his commission unless and until this was received by the first respondent. There was a risk that he would not get paid if a client did not proceed with the property investment.
26. At the time they were negotiating the terms of the engagement, Mr Adamou believed that both Mr Pigott and the claimant were based in the UAE and would therefore be engaged under an UAE contract. Once the key terms were agreed, as set out in the job offer referred to at paragraph 23 above, Mr Adamou referred the matter to the Human Resources department (HR), based in the UAE, to issue the relevant paperwork.
27. The Claimant was asked by HR to complete an application for “International Advisors”. This document was used by HR as a means of gathering the required personal information for an UAE contract (pages 80 to 86). The Claimant was not an “International Advisor”.
28. HR sent to the claimant the Contract of Employment (pages 87-108) extracts from which read as follows:

28.1. The Company shall employ the Employee and the Employee shall serve the Company as a Financial Advisor on and subject to the terms and conditions specified herein.

Commencement of Employment

28.2. The Employment will commence on the date of the Ministry Contract and, subject to Clause 15, shall continue thereafter unless and until terminated by either Party giving to the other not less than 30 days prior written notice, such notice taking effect on or at any time after the end of such 30 day period.

28.3. Duties

The Employee shall

- (a) act as a consultant on behalf of the Company in promoting the sale of, soliciting and otherwise obtaining applications for Financial Products from persons situated in the Territory, and provide such other services to the Company in the field of financial services undertaken or offered by the Company as the Company may reasonably require from time to time;

28.4. **Place of Work**

The Employee's normal place of work will be the Company's Head Office in Dubai.

28.5. **General Rules**

26.1 This Agreement will not be valid unless and until the competent authorities of the UAE have approved the necessary permits for residence and employment in the UAE.

29. This Contract of Employment did not accurately reflect the claimant's place of work. The claimant worked from home in the UK, not in Dubai. This Contract of Employment did not accurately set out the claimant's job title or his duties in his role as Property Operations Manager. The claimant did not have a Ministry Contract. The claimant concedes that the reference to the Ministry Contract makes no sense. This Contract does not accurately reflect the agreement between the first respondent and the claimant relating to the payment of "salary" and commission.

30. Following receipt of this document the claimant queried its accuracy with HR. There is no satisfactory evidence as to how this query was resolved. The claimant has provided a copy of the Contract of Employment, signed by him. There is no satisfactory evidence that this Contract of Employment was signed by or on behalf of the first respondent. The tribunal accepts the evidence of Mr Adamou that he did not authorise or sign this Contract of Employment.

31. The claimant was engaged by the first respondent as Property Operations Manager from 1 January 2019. His engagement was not dependent upon receipt of approvals from the competent authorities of the UAE.

32. The claimant has failed to provide satisfactory evidence as to the nature and extent of his duties, the number of hours worked by him, the manner in which he received any orders to perform tasks and how he responded to any such orders. The claimant did not provide the respondents with a breakdown of his working hours, or a breakdown of the work completed by him. There is no satisfactory evidence that the claimant's work was monitored in any way by or on behalf of the first respondent. The claimant was not required to engage in the first respondent's staff appraisal scheme.

[The claimant has failed to provide satisfactory evidence to support his assertion that he kept people aware of what he was doing.]

33. The claimant worked on his own initiative from home in the UK. He did not visit Dubai. He has failed to provide any satisfactory evidence as to how he

decided what work to do, when to do it. He has provided no satisfactory evidence that he was given tasks to do by either Mr Pigott or the first respondent.

34. The claimant visited the UK premises of the first respondent 4 times in 2019. Thereafter he was prevented from visiting anywhere due to lockdown. The claimant has provided no evidence at all of any engagement with anyone at the respondent's business. He does not provide any satisfactory evidence of having participated in team meetings or briefings during the course of his engagement with the first respondent.
35. The claimant met Mr Adamou once during the course of his work with the first respondent. The claimant attended a single, expenses paid, invitation by the first respondent to an International Advisor awards ceremony in 2019.
36. The agreement between the first respondent and the claimant continued beyond the 12 month period referred to in the offer letter. No evidence of a new agreement has been presented to the tribunal. The claimant continued to be paid commission on the terms set out in the offer letter.
37. The claimant kept his own records relating to the work he had done. The first respondent did not have access to the claimant's record of sales, which were not shared on the first respondent's centralised system.
38. The claimant calculated the commission due to him on sales and invoices for payment of that commission were processed through the claimant.
39. During the course of his engagement with the first respondent the claimant was provided with a company e-mail address.
40. During the course of his engagement the claimant was paid the initial agreed "salary" for the first 6 months. Thereafter he claimed for and was paid commission in accordance with the terms agreed on his behalf by Mr Pigott.
41. The claimant was asked to sign a number of policies during his engagement, specifically, Generated Leads, Confidentiality, Client Transfers, Complaints and Data Protection (pages 253 to 284) by Human Resources. This is common practice for the first-respondent's self-employed individuals. Employees of the first respondent are provided with a full Staff Handbook covering a number of policies, including holiday, sick pay, family leave, probation, overtime, a disciplinary procedure and a grievance procedure (pages 285 to 323). The claimant was not provided with a Staff Handbook.
42. The claimant provided his own equipment, such as computer, stationery, car and mobile telephone, and a place to work.
43. The claimant was not entitled to a pension. He made no claim for and was never paid sick pay or holiday pay. The claimant decided when he took holiday. He did not need to seek prior authorisation from anyone at the first

respondent. He notified Mr Pigott and the first respondent of the dates of his holidays.

44. The claimant was paid gross and was responsible for paying his own income tax and national insurance.
45. The Claimant paid his own expenses arising from the performance of his duties, such as travel, internet and mobile telephone (pages 74, 133 and 137). The claimant did not at any time reclaim any expenses connected to his work from the first respondent.
46. The claimant was not subject to any disciplinary action, formal or informal, during the course of his engagement with the first respondent.
47. The agreement reached between the claimant and first respondent, as negotiated by Mr Pigott, was essentially that Mr Pigott was the “front man” who could build the business, achieve the remit, with his knowledge experience and contacts. Mr Pigott needed back up administration to achieve that aim and that back-up was to be provided by the claimant. The respondent’s witnesses were unaware of what the claimant actually did. There is no satisfactory evidence that anyone within the first respondent were aware of what the claimant actually did. When Mr Pigott left the first respondent and Mr Wilson took over control of the property division (see below) Mr Wilson started to ask questions as to what the claimant did, asked him for a list of the duties performed by him. It was not important to Mr Adamou or Mr Parker either how the back up administration service was provided or who provided it. The claimant could have delegated some or all of his work to a third party. The claimant did not provide any account of the services he provided, how many hours he worked, what he had achieved in the carrying out of the back-up administration. The claimant submitted his invoices for commission due based on the number of sales achieved. The level of the claimant’s involvement in any such sale or back up service was not a relevant consideration in deciding whether the claimant was entitled to the commission as claimed.
48. During the course of his engagement with the first respondent the claimant was the registered director of the following limited companies:
 - 48.1. • Music Soft Toys Limited. This was a business operated with a friend of the claimant. The company was incorporated in June 2021 and was dormant for approximately 12 months thereafter;
 - 48.2. Rentalbuddy Limited
 - 48.3. Build Concepts UK Limited.
 - 48.4. LADC Limited

48.5. Equestrian Affordable Housing Developments Limited.

49. The respondents were not aware of the claimant's involvement in these companies until after the commencement of these proceedings. The claimant did not seek the first respondent's consent to being involved in these companies.

50. Mr Andrew Pigott was also registered as a director for Build Concepts UK Limited, LADC Limited and Equestrian Affordable Housing Developments Limited.

51. The claimant was a shareholder and had an active involvement in the business of LADC Limited. Minutes of a company meeting on 29 March 2022 (page 155) show the attendees to include the claimant (referred to as Karl) and Mr Piggott (referred to as Andy). Extracts from the minutes include:

Current projects

...deal appears to have reached finality, with them requesting our banking details for payment. Andy is setting up a USD account to receive.

Rob also held an excellent meeting with an estate agent on Friday (25.3.22) with many plots of land looking for development but no access to funders or builders. Rob proposes LADC should acquire them *en bloc*, packaging them up into lots for funds.

Andy has interest from 2 fund managers in the Cotswolds and that attractive packages would be in £1m, £5m, £10m etc. bundles.

There is also interest in office blocks (not all PD) in London and the NE, but Karl said the NE had been problematic in the past and asked for more detail.

Objectives

The primary focus to date has been on finding opportunities for funds, but it was agreed that 'bread & butter' schemes like Oakley Wood also have a role to play in meeting the needs of retail/ HNW investors, many of whom come from Rob's contacts through IFAs.

Structure/ compliance etc.

The opportunity to share an office with Niche Capital in Chiswick W4, using it as an auxiliary London base, was noted with approval.

Meetings should recur once a week, early Monday mornings, for time being.

52. By email dated 21 February 2022 Mr Pigott sent an email to the claimant (page 146) headed "LADC Letter to Walsall developer" stating as follows:

To whom it may concern

The Build to Rent (BtR) sector has experienced exponential growth over the past 12 months with 80% of BtR developments funded by institutional investors. Due to the nature and scale of BtR schemes such as the Walsall project a funding agreement will provide Total Homes & Developments certainty that the construction phase is paid for in advance

The Walsall BtR project is a scheme that is ideally suited to a funder. LADC have discussed funding options with institutional investors who have confirmed would be interested in providing funding for the Walsall project.

This project also leads itself to retail sales , via our sister company Holborn Property we have sold several projects very similar to this to our clients though our network of 250 agents across the world

53. It is clear from this minute and email that the claimant was actively engaged in a business operated by LADC Limited in property investment while he was engaged in similar work with the first respondent.

[The claimant has given unsatisfactory evidence on this point. The tribunal rejects the claimant's unsupported evidence that he had no involvement in any such business activity, that he was involved in this and other companies as part of a scam perpetrated upon himself by a third party]]

54. There was an exchange of emails in 2021 between Mr Pigott and Mr Bob Parker of the first respondent in which Mr Pigott provided Mr Parker with information about the running of the property division . In one answer dated 22 January 2021 to Mr Parker's question : "I understand you work 100% from home? Have you set up your own company for UK tax purposes?" Mr Pigott replied:

With no operating budget both myself and Karl work form home, before lockdown I was on the road 2 days a week, I have a UK company but for Holborn I'm self employed

55. The first respondent is based in Dubai and does not pay wages under the UK PAYE system. Monies paid by the first respondent to the claimant under the terms of the agreement were paid gross. The claimant declared those earnings to the HMRC. He employed a qualified accountant to prepare accounts and submit his tax returns. In accordance with the Order made at the outset of the hearing the claimant disclosed and provided copies of his tax return for the tax year 2020/21 (pages 342-357). That tax return was prepared by the claimant's accountant. In that tax return the accountant declared on behalf of the claimant that he was self-employed, describing his business as "commission agent". The claimant claimed for deduction of business expenses from his income including car, van and travel expenses, rent, rates, repairs and maintenance of property and equipment, phone fax stationery and other office costs, advertising and business entertainment costs, interest on bank and other loans. The claimant has failed to provide satisfactory evidence as to how the claimed business expenses related to the work he did for the first respondent.

56. During COVID the claimant applied for a SEISS government grant for a sum in excess of £13,000. In making the application and receiving that government grant the claimant declared himself as self-employed.
57. In or around August 2022 Mr Pigott stopped working with the first respondent. Mr Peter Wesley was appointed as Managing Director of the Property Division and began to raise questions with the claimant about the duties he performed and the claiming of commission payments. The claimant objected to Mr Wesley raising these questions.
58. In September 2022 the respondent terminated the relationship with the claimant, giving one month's notice. No disciplinary hearing was held prior to the termination, which was notified by email dated 27 September 2022 (page 196).

The Law

59. Section 230(2) of the Employment Rights Act 1996 states: "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".
60. Whether someone is an employee involves consideration of all the relevant factors of which the control and organisational tests form part. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole (*Hall (Inspector of Taxes) v Lorimer* [1994] ICR 218). The Tribunal must consider all aspects of the relationship, no single factor being in itself decisive and each of which may vary in weight and direction, and having given such balance to the factors as seems appropriate, to determine whether the person was carrying on business on his own account. *Kelly & others v Trusthouse Forte plc* [1983] ICR 728. In considering the factors the Tribunal should take into account the "irreducible minimum" without which no contract of employment can exist – control, mutuality of obligation and personal performance before going on to consider other relevant factors. One additional factor is financial consideration. A person in business on his or her own account will carry the financial risk of that business. Payment of a regular wage or salary is a strong indicator of employment. The label given to and the amount of any payment is not necessarily important. The incidence of income tax and National Insurance contributions is another relevant factor. Payment under the PAYE system suggests employment. Intentions of the parties may be a relevant factor but the Tribunal must look at the substance of the matter not at any label attached to it by the parties. In *Market Investigations Ltd v Minister of Social Security* 1969 2 QB 173, QBD, Mr Justice Cooke approached the question of whether a worker was an employee by asking the question: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If so, the contract was one for services and the worker was self-employed.

This so-called 'economic reality test' looks at matters from the opposite perspective to the organisational test. The organisational test considered how far the worker was integrated into an organisation; the economic reality test considers how independent the worker is of the organisation. In the Market Investigations case Cooke J stated that the factors which may be of importance in determining whether someone is in business on his or her own account included such matters as whether the worker performing the services 'provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task'.

61. There are many forms of control - for example, practical and legal, direct and indirect. It is not necessary for the work be carried out under the employer's actual supervision or control. As Lord Phillips remarked in *Catholic Child Welfare Society and ors v Various Claimants* and ors 2013 IRLR 219, SC the notion of control has moved on from the time when the relationship of employer and employee could correctly be described as 'master and servant'. In his view, it is no longer 'realistic to look for a right to direct how an employee should perform his duties... Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus the significance of control today is that the employer can direct what the employee does, not how he does it.'
62. Mutuality of obligation is usually expressed as an obligation on the employer to provide work and a corresponding obligation on the employee to accept and perform the work offered. Relevant considerations include whether there are any notice requirements or whether a worker is free to leave at any time in favour of alternative work.
63. One of the requirements of the test for a contract of service laid down by Mr Justice MacKenna in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* 1968 1 All ER 433, QBD, was that the employee must have agreed to provide his or her own work and skill. He noted: '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 be.'
64. The requirement of 'personal performance' is not only relevant to determining whether a contract is one of employment. It also arises when determining whether an individual is a 'worker' for the purposes of s230 (3) ERA 1996 and whether an individual meets the expanded definition of 'employee' for the purposes of the Equality Act 2010 (see below).
65. Section 230 (3) Employment Rights Act 1996 provides that '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 undertaking carried on by the individual;

66. There are three elements to the definition. First, there must be a contract to perform work or services. Second, there must be an obligation to perform that work personally. Third, the individual will not be a worker (or indeed a home worker) if the provision of services is performed in the course of running a profession or business undertaking and the other party is a client or customer.

67. The definition of employment under the Equality Act is broad, covering, inter alia, individuals working under a contract of employment, apprentices, and self-employed people working under a contract personally to do work - S.83(2)(a)

68. In *Mirror Group Newspapers Ltd v Gunning* 1986 ICR 145, CA the Court of Appeal emphasised that, in order to fall within the scope of 'a contract personally to execute any work or labour', the execution of such personal work or labour must be the dominant purpose of the contract. Personal responsibility for the carrying out and efficiency of the work

69. The applicability of the dominant purpose test was considered by the Supreme Court in *Jivraj v Hashwani* 2011 ICR 1004, SC. While the Supreme Court accepted that the dominant purpose of the contract is relevant, it is not the sole test for determining employment - the relationship between the parties should also be considered. Lord Clarke stated the view that the ECJ in the case of *Allonby* had identified the essential questions for determining whether a person is in 'employment' for the purposes of the discrimination legislation — namely, whether:

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

He considered these to be broad questions, the answers to which depend on the circumstances of the particular case and a detailed consideration of the relationship between the parties. Having reviewed both ECJ case law and the domestic case law on the dominant purpose

test (see 'Dominant purpose' above), he concluded that the dominant purpose of the contract, though it may be relevant, cannot be the sole test. This was because there could be circumstances where the dominant purpose of a contract is personal work but not personal work under the direction of the other party to the contract.

68. The central question in every case is: what was the true agreement between the parties? (See *Autoclenz Ltd v Belcher* [2011] IRLR 820 (SC)).

69. A written contract does not necessarily represent the true agreement. *Uber BV v Aslam* [2021] UKSC. The terms of a written contract may not represent the true intentions or expectations of the parties, either at the inception of the contract or if appropriate, as time goes by *Protectacoat Firthglow Ltd v Szilagyi* [2009] IRLR 365.

70. The tests as to who is a worker under s230 ERA 1996 and who is an employee under s83 Equality Act are essentially the same. In *Bates van Winkelhof v Clyde and Co LLP and anor (Public Concern at Work intervening)* 2014 ICR 730, SC Lady Hale stated: 'the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them.The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else'

71. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues

72. This includes, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence.

73. In determining whether the claimant was an employee within the meaning of s230 ERA 1996 the tribunal has considered all the circumstances of the case including the following.

74. The tribunal has considered with care the document, the 'Contract of Employment at page 87 of the bundle. The tribunal notes that:

74.1 This document does not accurately describe the job which the claimant was engaged to do. The role, place of work, agreed commission arrangements are incorrect. The claimant accepts that. He did query the contents of this Contract of Employment at the time it was sent to him.

74.2 There is no satisfactory evidence that this contract of employment was ever signed by the first respondent. It is unclear why the claimant would sign this document when it clearly misrepresented the terms which had been negotiated on his behalf by Mr Piggot and which appear in the offer letter (page 78), the terms under which the claimant was engaged and paid until the termination of his relationship with the respondent;

74.3 Clause 26.1 of the Contract of Employment required approval of the necessary permits for residence and employment in the UAE by the competent authorities. This was included in the contract as it was a necessary condition for an employee intending to live and work in the UAE. The claimant had no intention of living and working in the UAE.

In all the circumstances the tribunal finds that this document, this "Contract of Employment" did not represent the true intentions or expectation of the parties. It did not reflect the reality of the relationship between them.

75. The tribunal has considered the way in which the relationship between the claimant and the respondent began.

76. The claimant used to work with Mr Piggot at deVere's. When Mr Piggot left DeVere's he put forward a business proposal to the first respondent. Mr Piggot put himself and the claimant forward as a team who could increase the revenue of the respondent in its property investment market. This led to the offer letter being sent to the claimant (page 78) which largely reflected the terms that had been negotiated by Mr Piggot on behalf of himself and the claimant with the first respondent. The tribunal has considered with care whether this offer letter shows the intention of the parties as to the nature of the contractual arrangement between them. It is noted that the offer letter makes no reference to either "employment" or "self employment". It refers to payment of salary for the first 6 months, thereafter commission only, and makes a reference to "job title". That may indicate an intention to create a contract

of employment. However, there is no reference to any working hours, holiday entitlement, expenses or other typical employee benefits. There was no job description, no list of duties to be performed. It stated the Remit as “To build and establish a comprehensive end to end property solution to be rolled out globally to all Holborn staff and international office– your role being to work alongside the Head of Property Operation and the Head of Property Sales to maximise revenues”

77. The tribunal has considered the way in which the agreement was performed.

78. The claimant and Mr Pigott worked as a team. Mr Pigott was the front man with contacts in the business and the claimant provided administration and technical support.

79. There were no minimum hours of work required of the claimant. The first respondent had no idea how many hours the claimant worked. The claimant was not required to provide a list of hours worked. He did not provide the first respondent with details of the number of hours worked by him or the nature of the work. There was no obligation on the first respondent to provide the claimant with any work and no obligation on the claimant to undertake any work. It was essentially up to the claimant how much or how little work he did. There was no mutuality of obligation.

80. There was no control by the first respondent over the claimant's work. The nature of the working relationship between the claimant and Mr Pigott is not clear. The claimant has failed to provide satisfactory evidence as to the nature of the work conducted by him and Mr Pigott, how they decided what work to do, how they split the work between them. They clearly worked together as part of a team. The claimant suggests that Mr Pigott was his line manager. However, there is no satisfactory evidence that Mr Pigott was employed by the first respondent and/or that he acted as manager of the claimant on behalf of the first respondent. To the contrary, the documentary evidence indicates that Mr Pigott regarded himself as self-employed. The claimant did not travel to Dubai. He met Mr Adamou only once during his entire time working with the first respondent. The claimant was largely left to work on his own. He decided when to carry out his work and how to carry out his work. He was never given a detailed job description. He was not subject to any annual performance appraisals.

81. The Claimant provided his own office facilities and all his own work equipment (laptop, mobile phone, stationary etc). The respondent did not provide the claimant with any facilities or equipment. The claimant did not at any point reclaim any expenses connected to his work from the first respondent.
82. There was no restriction on the claimant undertaking other business activities and/ or having a number of other business interests whilst working with the first respondent. The claimant held several director positions in other limited companies during his time working with the first respondent. The claimant did not seek the first respondent's permission to do so. The claimant was actively pursuing other business opportunities. He was a director and shareholder of LADC Ltd, Documentary evidence shows that the claimant was actively involved in the business of that company which was operating in a similar area of the market to its "sister company Holborn Property".
83. The tribunal has considered the nature and duration of the engagement. The contract entered into by the claimant and Mr Pigott was intended initially to last for 1 year, as set out in the offer letter, and was for the delivery of a specific end result ("Remit - To build and establish a comprehensive end to end property solution to be rolled out globally to all Holborn staff and international office– your role being to work alongside the Head of Property Operation and the Head of Property Sales to maximise revenues".) The contract extended beyond that initial 12 month period but there is no satisfactory evidence that there was a revision to the terms of engagement at that time. The claimant continued to claim and be paid the commission rates as originally agreed. After the initial 6-month period the claimant was remunerated on a commission-only basis. He got paid commission as invoiced by him when the first respondent received its share of the commission.
84. The claimant had no entitlement to sick pay or holiday pay and did not claim or receive any. The claimant decided when he took holiday. He did not need to seek prior authorisation from anyone at the first respondent.
85. There was an element of financial risk involved in this enterprise. The claimant could carry out a large amount of operational/ administrative support work, but if the investments he was working on ultimately did not proceed (or the property did not complete) he would never receive any remuneration for that work undertaken.

86. The tribunal has considered the question of whether there was integration of the claimant in the business of the first respondent. The claimant never visited the first respondent's company headquarters in Dubai and very rarely attended any of its office locations in the UK. He visited the UK premises 4 times in 2019. Thereafter he was prevented from visiting anywhere due to lockdown. However, the claimant has provided no evidence at all of any engagement with anyone at the respondent's business. He does not provide any satisfactory evidence of having participated in team meetings or briefings. The claimant maintained all his own records, and these were not shared on any central system or database operated by the first respondent. The attendance of the claimant at a single, expenses paid, invitation to an International Advisor awards ceremony in 2019 is not by itself indicative of employee status and/or integration within the company. The claimant was given a respondent company email address for use in the performance of his services. That is consistent with being either self-employed or an employee. In all the circumstances the tribunal finds that there was a lack of integration between the claimant and the first respondent.

87. The tribunal has considered the taxation/ tax status of the claimant in relation to the earnings he received from the first respondent. The tribunal notes that this is not conclusive as to the nature of the relationship. It is simply one of the matters to be taken into account. It is noted that the first respondent was not in a position to deduct tax at source under UK PAYE arrangements, The claimant accounted to HMRC for his own tax and national insurance. The claimant elected to treat himself for tax purposes as a self-employed sole trader, rather than as an employee. He was able to off-set certain 'business-related' expenses against his declared 'business income'. There is no satisfactory evidence to indicate how those business related expenses related to the business of the first respondent. The claimant was also able to take advantage of the preferential national insurance rates that apply to those who are self-employed. The tribunal does not accept the evidence of the claimant that he did not knowingly declare income as a self-employed trader. The claimant used a qualified accountant to prepare and submit his tax returns. It is simply not credible that the accountant would have submitted returns without the authority of the claimant. Further, the claimant accepts that, by virtue of his self-employed status with HMRC, he applied for and obtained a SEISS covid government grant of over £13,000. He applied for this grant knowing that he was representing himself as self-employed. The tribunal rejects the claimant's evidence that he only obtained the grant in response to a notification that he was entitled to it.

88. The next question is whether there was a requirement for personal service. This is also a key issue in determining whether the claimant was a worker within the meaning of s.230(3)(b) ERA 1996). For worker status under s. 230(3)(b) ERA 1996, there must be a contract between the worker and putative employer, that contract must require personal service and the other party to the contract is not the customer or client of any business undertaking carried on by the individual claiming to be a worker
89. This is also a key issue in deciding whether the claimant was working under a contract personally to do work (under s. 83(3)(a) Equality Act 2010.
90. The tribunal notes that it is well-established by case law that the tests for whether a claimant is a worker under s230(3)(b) ERA 1996 and/or an employee under s83(3) Equality Act are essentially the same.
91. Having considered all the evidence and the circumstances of the case tribunal finds that there was no contractual requirement that the claimant provide his services to the first respondent personally. It did not matter to the first respondent who performed the tasks that the claimant undertook. It was Mr Pigott who brought the business idea to the respondent. It was Mr Pigott who introduced the claimant as the person who Mr Pigott would prefer to provide the back up /administration and/or technical support that Mr Pigott needed to achieve the remit. The respondents did not in reality know what services the claimant did provide. He worked by himself without instruction from the respondents. There was no job description, no appraisal or monitoring of the claimant's work. It was only after Mr Pigott ended his relationship with the respondent that the respondent sought clarity on what the claimant actually did. The claimant objected to this and shortly afterwards the contractual arrangement between the claimant and the first respondent came to an end.
92. Having considered all the circumstances the tribunal finds that the true nature of the relationship between the claimant and the first respondent was that the claimant was providing his services as a person operating in business in his own right and that the first respondent was effectively his client/ customer. This is consistent with how the contractual relationship began (Mr Pigott pitching his and the claimant's services to the first respondent) and how the claimant conducted himself thereafter. The claimant was clearly engaging in other business enterprises –

whether successful or not. He declared himself as self employed to the HMRC and obtained a government grant as a person in business. The respondent had no involvement in that.

93. In all the circumstances the tribunal finds that the claimant did not work for the first respondent under a contract of employment within the meaning of s230 ERA.

94. The claimant was not a worker within the meaning of s230(3)(b) ERA 1996

95. The claimant was not an employee within the meaning of s83(3) Equality Act.

96. It follows that the tribunal does not have jurisdiction to hear the claims brought by the claimant. Each of the claims is therefore dismissed.

Employment Judge Porter

Dated: 19 December 2023

SENT TO THE PARTIES ON

22 December 2023

FOR THE TRIBUNAL OFFICE