# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr John Ellis**

**Respondent: GB & I Limited**

**Heard at: London South (by video)** **On:** 12 and 13 June 2024

**Before:** Employment Judge Millns

**Representations**

For the claimant: Mr Jason Frater (consultant)

For the respondent: Mr Nick Smith (counsel)

# JUDGMENT ON PUBLIC PRELIMINARY HEARING

1. **The judgment of the Tribunal is that the Claimant was a worker within the meaning of s 230(3)(b) of the Employment Rights Act 1996 (ERA 1996) and that he falls within the definition of "employment" within s 83(2)(a) of the**

**Equality Act 2010 (EqA 2010) in that he was engaged in a "contract personally to do work" during the Relevant Period.**

2. **The Claimant's claim of constructive unfair dismissal (s 98 ERA 1996) is dismissed upon withdrawal.**

# REASONS

## Introduction

1. Mr John Ellis (the Claimant) brought claims of constructive unfair dismissal (s 98 Employment Rights Act 1996 "ERA 1996"), disability discrimination (s 15 & s26 Equality Act 2010 "EqA 2010"), failure to pay wages (s 13 ERA 1996) and failure to provide a statement of terms (s1 ERA 1996).

2. Broadly speaking, events relate to a period when Mr Ellis worked for GB&I Limited (the Respondent) in Dubai. The claim was initially pursued against a Second Respondent, Global Business & Investment LLP (GB&I LLP), which is now dissolved. The parties confirmed that the Second Respondent was removed from the proceedings at a prior case management hearing.

3. The Claimant asserted that he was an employee of the Respondent within the meaning of s230 (1) ERA 1996 and section 83 of the EqA 2010, and/or a worker within the definition of s230(3)(b) ERA 1996 and that he satisfied the wider definition of "employment" within the meaning of s 83 (2)(a) EqA 2010.

4. The Respondent initially disputed that the Tribunal had territorial jurisdiction to hear the claims, though the issue was conceded by the Respondent prior to this hearing.

5. In clarifying the issues to be determined, the parties confirmed that the Respondent was incorporated on 28 June 2018 and that the Claimant resigned on 11 September 2018. Therefore, if the Claimant was found to be an employee, his period of service with the Respondent, at only 2.5 months in duration, would mean that he lacked the requisite qualifying service to bring a claim of unfair dismissal. The Claimant sensibly withdrew his claim of (constructive) unfair dismissal following this discussion.

6. Both parties agreed that the Claimant's remaining claims were not contingent on the Claimant being an employee of the Respondent. It was therefore agreed by both parties that the Tribunal need only determine whether the Claimant was a 'worker' / the comparable s 83(2)(a) EqA 2010 provision.

## The issue

7. **The issue to be determined is whether the Claimant was a worker within the meaning of s230(3)(b) and the comparable wide definition of employment under s83(2)(a) EqA 2010 ("contract to do work personally") for the period 28 June 2018 to 11 September 2018 ("the Relevant Period").**

8. Whilst the Relevant Period is short, in order to gain a full picture of how the Claimant's working relationship, both parties agreed it was necessary to consider the chronology of events going back as far as 2014.

9. This hearing has been concerned solely with worker status, not with the substance of the Claimant's claims.

## The Evidence and the Hearing

10. This has been a remote electronic hearing by video under Rule 46 which has been consented to by the parties.

11. The participants were told that it is an offence to record the proceedings.

12. The evidence and submissions took place over two full days at the end of which I reserved judgment, explaining that full written reasons for the decision would be provided.

13. I was provided with a 359-page bundle of documents. I considered witness statements and heard oral evidence from the Claimant and Mr. Wong, a director of the Respondent. I considered all the documents in the bundle to which I was referred, as well as an additional 9 pages of documents attached to the Claimant's witness statement. I was provided with skeleton arguments and heard oral submissions from both representatives at the conclusion of the evidence.

14. The facts I have found to be material to my conclusions are set out below. If I do not mention a particular fact in this jugdment, it does not mean I have not taken it into account. All my findings are made on the balance of probabilities.

## The facts

15. In July 2014 the Claimant was speaking at a Welsh Government organised event in Newport, Wales, regarding business opportunities in the United Arab Emirates (UAE) for UK businesses. The Claimant had been working in Dubai since 2002, initially with the UK Regional Government and afterwards with the Fujairah Government. During this time the Claimant developed a strong network of business contacts within the UAE. It was at the Newport event that the Claimant

first met Mr. Wong and Mr. Hughes. At that stage and throughout the events that followed Mr. Wong and Mr. Hughes were directors and shareholders of a company called Lee Wakemans Limited ('Lee Wakemans'), a nearly 40-year-old development consultancy, based in Cardiff, providing construction project management and costs management services.

16. Mr. Wong and Mr. Hughes were interested in exploring whether Lee Wakemans might find construction work opportunities in the UAE and commenced discussions with the Claimant about the same in August 2014. At this time the Claimant was living and working in Dubai, as director and employee of UK Construction Limited.

17. During 2015 the Claimant, through UK Construction Limited, worked with Lee Wakemans by seeking out potential construction projects for it in Dubai. At this stage the Claimant was introducing work to Lee Wakemans. In his witness statement, the Claimant described Lee Wakemans as a client of UK Construction Limited. This working relationship allowed the Claimant and Mr. Wong and Mr. Hughes to get to know one another; the three of them got on well.

18. In the second half of 2015, Mr. Wong and Mr. Hughes heard that UK Construction Limited was struggling; the Claimant told them that he was not being paid and was seeking new work opportunities. The Claimant continued to live in Dubai with his wife and two children, who attended local private schools. Mr. Wong and Mr. Hughes saw this as an opportunity to work with the Claimant to build a new business. Recognising that pitching for projects in the UAE would be difficult and competitive, they considered a unique selling point for the new business venture would be to offer debt financing (particularly UK Export Finance) for construction projects. Rather than use Lee Wakemans to service that work (who carried out different work of project and costs management services), Mr. Wong and Mr. Hughes decided to start the new venture with a new brand and so registered Global Business & Investment LLP (GB&I LLP) on 30 July 2015. Each of Mr. Wong and Mr. Hughes were members of the LLP though the LLP was dormant until 2016.

19. Within their new business venture Mr. Wong and Mr. Hughes considered that the Claimant could provide a valuable link to potential clients in the Middle East, and the UAE in particular. Mr. Wong and Mr. Hughes had limited contacts in the Middle East and the Claimant had many, established over his years working in Dubai. They wanted the Claimant to carry out business development for GB&I LPP in the UAE by seeking project opportunities and introducing potential new clients for debt finance. They also considered that the Claimant had the advantage of being very familiar with the cultural differences which existed in Dubai and how they played out in completing successful business deals. For example, Dubai business deals worth significant sums of money were often agreed in principle at an in-person meeting, confirmed with only a handshake (with the finer details worked out later).

20. From November 2015 discussions took place between the Claimant and Mr. Wong and Mr. Hughes about their proposed working relationship. At this time, the

Claimant had been without salary from UK Construction Ltd and needed income, which Mr. Wong and Mr. Hughes knew. The three of them were optimistic that GB&I LPP would become profitable within a few months of trading. In the meantime, GB&I LLP had no cash in the business and as an interim measure Lee Wakemans loaned money to GB&I LLP to cover its initial costs.

21. From the outset of their discussions the Claimant, Mr. Wong and Mr. Hughes agreed that they would take an equal share of the profit generated by the new business venture, at 33 per cent (one-third) each. As the Claimant said in evidence, the three of them were "*in it together*." I find that this was the case from the start of their discussions.

22. The Claimant began working for GB&I LLP on 1 January 2016; the basis of this working relationship was not set out in writing. Keen to get started on their new venture, the parties agreed that the working relationship would be 'formalised later' once the Claimant had taken legal advice and extricated himself from UK Construction Limited.

23. On 26 January 2016 the Claimant sent the following email to Mr. Wong with the heading "Business cards for John" (bold text is my emphasis);

*Paul*
*Suggest the business cards for me for the time being until we are safely through everything is just* ***Specialist Advisor*** *or similar.* ***In due course to have a more effective title. Ideally I would like to be the main face of the company.***
*Address on card to show both Cardiff and Dubai if possible or it not the room then Dubai. No need for office number at this time just Dubai mobile.*

*Many thanks*

*John*

24. The phrase "*safely through everything*" was a reference to the Claimant extricating himself from UK Construction Limited. In practical terms, the Claimant did not want to advertise the true extent of his new joint business venture with Mr. Wong and Mr. Hughes until he had formally ended his business with UK Construction Limited. Until that happened the Claimant and the parties agreed that the Claimant was to be referred to as 'consultant' or 'specialist advisor' to GB&I LLP. As will be seen from events that followed, the Claimant soon acquired the title of 'Partner' with GB&I LLP, which reflected the reality of the Claimant, Mr. Wong and Mr. Hughes being equal partners in terms of profit share from the outset (as well as the extent of the Claimant's role). Consistent with the Claimant's desire to be the "main face of the company" he initially requested the job title of CEO, though this was refused by Mr. Wong and Mr. Hughes.

25. Prior to the Claimant starting work in January 2016, it was agreed between the Claimant and Mr. Wong and Mr. Hughes that in return for working for GB&I LLP

the Claimant would receive monthly payments of £8,450.00 ("the Monthly Payment"). The Monthly Payment was not contingent on the Claimant carrying out a minimum number of hours and was paid (broadly) at the same time each month in GBP into the Claimant's bank account. The Monthly Payment was not contingent on there being enough cash in the business to pay the Claimant. The Claimant had a family to support and needed an income; he could not have the uncertainty of not knowing if he would receive a Monthly Payment and did not agree to any such arrangement.

26. The Claimant also needed sums to cover the cost of his 'expenses' which comprised the rent on his accommodation in Dubai, fees for private school fees for his daughters, the costs of his personal assistant, Lisa Sage, and for travel and entertainment. These were previously paid by UK Construction Limited and as that relationship had ended, the Claimant needed these fees paid by some other means. It was agreed that GB&I LLP would pay the cost of those expenses to "*help with cash flow*".

27. In respect of the Monthly Payments and the expenses it was agreed that these would be paid to on the basis of a loan from Lee Wakemans to the Claimant. However, whilst a loan agreement was drafted for that purpose, the Claimant did not sign the same.

28. I reject Mr. Smith's submission that the Monthly Payments to the Claimant from GB&I LLP or the Respondent were varied and 'wholly fluid.' For a large part of the period under consideration the evidence shows that the Claimant received a minimum amount of £8450 each month from GB&I LLP. The variation of payments related to the expenses element of the agreement only, which by their very nature varied in amount each month: for example, school fees were payable termly.

29. The Claimant and Mr. Wong referred to the Monthly Payment received by the Claimant from GB&I LLP as '*salary.*' The use of the word '*salary*' by both parties was reflective of the agreement that the Claimant would be paid the Monthly Payment by GB&I LLP, whether there was profit or not. GB&I LLP knew that the Claimant's position in working for it would not be sustainable if these payments were not made.

30. The Claimant did not receive the Monthly Payment through payroll and was responsible for paying his own tax.

31. In January 2016 the Claimant invoiced GB&I LLP the sum of £8450.00. There was one further invoice in March 2016, though a copy was not in the bundle. These two invoices were the only invoices sent by the Claimant to GB&I LLP. The January 2016 invoice contains no record of time spent, hours worked or hourly rate. No invoices were produced by the Claimant to the Respondent.

32. To obtain a visa to work in Dubai it is necessary for an individual to be 'sponsored' or attached to a company registered in UAE. Since 2012 the Claimant's visa and health insurance had been provided by a company called Blue Ocean under a 'barter' type agreement i.e. that in return for his visa and health insurance the Claimant provided unpaid work for Blue Ocean. Such work included chairing conferences and speaking at events on Blue Ocean's behalf, normally at the weekend. It was agreed by the Claimant and Mr. Wong and Mr. Hughes that the Claimant would continue this arrangement with Blue Ocean when carrying out work for GB&I LLP. This arrangement was beneficial to all, as setting up a Dubai-based company to provide the requisite work visa would be costly.

33. On 29 January 2016 a draft consultancy agreement was sent by GB&I LLP to the Claimant. The agreement was drafted as between the Claimant (as 'Consultant') and GB&I LLP (as 'Client').

34. The consultancy agreement included the following clauses:

**2. TERMS OF ENGAGEMENT**

2.1 The client shall engage with the Consultant and the Consultant shall provide the Services on the terms of this agreement.

2.2 The Engagement shall be deemed to have commenced on the Commencement Date and shall continue unless and until terminated:

(a) As provided by the terms of this agreement: or

(b) By either party giving to the other not less than 6 months' prior written notice.

**3. DUTIES AND OBLIGATIONS**

3.1 During the engagement, the Consultant shall:
(a) Provide the Services with all due care, skill and ability and use his best endeavours to promote the interests of the Client.
(b) Unless prevented by ill health or accident, devote at least [NUMBER] [hours OR days] in each calendar month to carrying out of the Services, together with such additional time, if any, as may be necessary for their proper performance; and...

3.2 If the Consultant is unable to provide the Services due to illness or injury, he shall advise the client of that fact as soon as reasonably practicable. For the avoidance of doubt, no fee shall be payable in accordance with clause 4 in respect of any period during which the Services are not provided.
...
.
3.6 The Consultant shall comply with the Client's policies as outlined in the Client's company handbook.

**4. FEES**

4.1 The Client shall pay the Consultant a fee of £[**AMOUNT**] per [hour **OR** day] [exclusive or inclusive] of VAT. On the last working day of each month during the Engagement, the Consultant shall submit to the Client an invoice which gives details of the [hours **OR** days] the Consultant [or any Substitute] has worked during the month, the Services provided and the amount of the fee payable (plus VAT if applicable) or the Services during that month.

**5. EXPENSES**

5.1 [The Client shall reimburse all reasonable expenses properly and necessarily incurred by the Consultant in the course of the Engagement. Subject to production of receipts or other appropriate evidence of payment OR the Consultant shall bear his own expenses incurred in the course of the Engagement.]

...

**10. INSURANCE**

...

10.2 The Consultant shall ensure that the Insurance Policies are taken out with. reputable insurers acceptable to the Client and that the level of cover and other terms of insurance are acceptable to and agreed by the Client.

...

**13. STATUS**

13.1 The relationship of the Consultant to the Client will be that of independent contractor and nothing in this agreement shall render him an employee, worker, agent or partner of the Client and the Consultant shall not hold himself as such;

13.2 This contract constitutes a contract for the of services and not a contract of employment and accordingly, the Consultant shall be fully responsible for and shall indemnify the Client for and in respect of:

(a) Any income tax, National Insurance and social security contributions and any other liability, deduction, contribution, assessment or claim arising from or made in connection with the performance of the services....

35. The draft consultancy agreement contains gaps in several key areas. For example, at clause, 4 (Fees) in respect of renumeration and at clause 5, (expenses) a section needs deleting for it to make sense. The interpretation section does not provide a definition of ‘Substitute’ featured at clause 4. There is no separate substitution clause.

36. On 29 January 2016 the Claimant indicated that he would be happy to sign the draft consultancy agreement, except for “minor adjustments.” However, further discussions about the terms of the consultancy agreement were not progressed because in March 2016 it was agreed that the Claimant would become a member of GB&I LLP. The draft consultancy agreement therefore became unnecessary.

37. It was agreed by all that the Claimant became a member of GB&I LLP on 4 April 2016, though this date was backdated to 5 January 2016 when registered at Companies House.

38. Lisa Sage was a personal assistant to the Claimant who began working with him from around 2014. When the Claimant started working with GB&I LPP from January 2016, he claimed the cost of Lisa Sage to him (£750 a month) as part of his expenses payment from the GB&I LLP. There was initially some confusion about whether Lisa Sage ought to be paid directly by GB&I LLP. It was later resolved that GB&I LLP paid Lisa Sage's fee to the Claimant for the Claimant to then pay her. After March/April 2016 Lisa Sage worked exclusively for the Claimant on work he did for GB&I LLP until around November 2017, when work levels dropped off.

39. During his time as a member of the LLP the Claimant's Monthly Payment and expenses payments continued as they had before he joined the LLP. However, under the terms of LLP agreement, these payments were classified as drawings against profit. In an email of 27 May 2016 from Mr. Wong to the Claimant headed "GB&I LLP Agreement" Mr Wong said as follows:
    ....

    1. ***"Monies**. It needs to run on a cash positive basis. In other words, you can only take out the monies that are actually in there. To date the monies you have received are predominantly loans from Lee Wakemans. Mike is going to schedule this, it's about 50K. Lee Wakemans need to see these monies come back. We also now need to run the GB&I account in a cash positive manner. So it is important to get the debt collecting going. As discussed, we will do this from Cardiff. As Lee Wakemans we give very little latitude to late payers and issue legal notices very quickly; it's a three-step process. The first step advises that the debt is outstanding and requests payment, or it will be referred to our lawyers. We will set up regular Week 3 Skype call to go through fees.*

    ...

    *3.Working Time. Although you are full time in GB&I Mike and I will be predominantly working with Lee Wakemans but part time in GB&I...."*

40. In July 2017 the Claimant suffered significant burns to his feet and spent eight days in hospital. During this time, he was unable to work most of the time, though he did make some business calls from his hospital bed. During this period of incapacity, the Claimant continued to receive his Monthly Payment and expenses by way of drawings from the LLP.

41. In or around November 2017, during his membership of the LLP, the Claimant raised the possibility of his wife becoming more involved in the business so that she could attend meetings if he was unable. The motivation for this discussion was the Claimant's concern that if may become unwell and unable to work in the future,

and therefore may lose out on his one-third share of the profits. The Claimant anticipated that it may be some time before some of the deals which were 'in the pipeline' came to fruition and he did not want to miss out on those profit payments by reason of ill health. In an email dated 21 November 2017, headed 'JE personal matters' Mr. Wong declined the Claimant's suggestion to involve his wife in GB&I LLP, stating as follows:

" ***3. Involvement of Maya****. It is not appropriate to be sharing GB&I business information with your wife as she is not an employee of GB&I. This breaches confidentiality agreements and you should cease doing this immediately. Neither is she part of the GB&I plan. Should something happen to you unexpectedly which leaves you incapacitated to work then GB&I will resolve the way forward on existing commitments."*

42. Mr Wong's witness statement and Mr Smith's skeleton argument refer to this exchange as an "attempt at substitution" by the Claimant, in support of the Respondent's case that the Claimant was self-employed and there was no requirement for personal service. Consistent with the lack of a substitution clause within the draft consultancy agreement, I find there was no express agreement at any time with either GB&I LLP or the Respondent that the Claimant was entitled to provide an alternative person to carry out his role. Further, I note that I was not invited by the Respondent to imply a term in the contract that the Claimant was able to provide a substitute. I find that in practice the Claimant did not provide a substitute to carry out his work. I further find that the Claimant's discussion with Mr. Wong about his wife's potential future involvement was insufficient evidence to imply such a term.

43. Within a few months of the Claimant joining the LLP it was clear that GB&I LLP was not producing enough profit to cover drawings taken by the Claimant causing a significant debt to be accrued and a tax liability to Mr. Wong and Mr. Hughes. Whilst Mr. Wong's email of 27 May 2016 had insisted that the business would only run on cash positive basis, the Claimant continued to able to take drawings when the LLP had no cash. Loans continued to be provided by Lee Wakemans to GB&I LLP to cover those drawings though the situation was not sustainable.

44. During October and November 2016, GB&I LPP was still awaiting the first major commissions to come in from work it had undertaken. The lack of cash coming in meant that the Claimant and Mr. Wong discussed options to try and reduce costs. This was a collaborative process motivated no doubt by a common desire to make profit. Both were acutely aware of the difficulty of running GB&I LPP without good cash flow and the ongoing burden on the business in making the Monthly Payments and expenses payments to the Claimant.

45. Given the difficult financial position GB&I LLP and after taking advice from their accountants, Mr. Wong and Mr. Hughes decided that the Claimant should be removed from the LLP.

46. Upon his exit from the LLP the Claimant was not asked to sign a consultancy agreement nor was he provided with any further loan agreement. Once again, remarkably, nothing was put in writing to set out the nature of the working relationship.

47. The Claimant's membership of the LLP ended on 29 December 2017, though this was backdated to 1 August 2016 when registered at Companies House.

48. Following the Claimant's removal from the LLP the profit-sharing agreement (of 33% each) continued unchanged. It is not in dispute that until at least July 2018 GB&I LLP continued making Monthly Payments to the Claimant of £8450.00 despite the LLP not making profit every month. It is also common ground that upon his exit from the LLP the Claimant was not provided with a written loan agreement in relation to any payments made to him following his exit from the LLP.

49. Mr. Wong's evidence was that it was agreed with the Claimant that after he exited the LLP the Claimant would revert to the position of consultant as he had been before entering the LLP and would become self-employed. I find that the job title 'consultant' was not agreed with the Claimant at this stage, nor was there any discussion or agreement that the Claimant would be 'self-employed'. The Claimant continued to be called a Partner in the business after this exit from the LLP. Save for the issue of job title, I accept that the parties did revert to the financial agreement that existed pre-LLP: i.e. the Claimant would be paid £8540.00 each month plus expenses and that these payments would be made as a loan on account of anticipated profit.

50. Towards the end of 2017 work slowed down and it was evident that Dubai was heading towards recession. The Claimant remained optimistic about the projected future income of GB&I LLP, and the parties continued to work together.

51. In March and April 2018, the Claimant and Mr. Wong again discussed possible cost savings for GB&I LLP. Part of that discussion involved a suggestion of the Claimant re-locating to the UK. Mr. Wong did not direct that the Claimant must return to the UK; this was simply part of a sensible and pragmatic discussion about reducing costs. The Monthly Payment and expense payments were becoming a significant burden for GB&I LLP, and costs need to be saved. The discussion was a collaborative process, as the Claimant also recognised and appreciated the financial difficulties of the Respondent.

52. The Respondent was incorporated on 28 June 2018 with the purpose of replacing GB&I LLP and taking over its activities, which I find it did. Upon incorporation of the Respondent, the working arrangements for the Claimant did not change, except that the obligation to pay the Claimant a Monthly Payment and expenses (as a loan on account of profit) was now on the Respondent. I make no findings about whether Monthly Payments were in fact made by the Respondent to the

Claimant during this period, as this potentially forms part of issues to be determined on another day.

53. The Claimant started treatment for cancer in the UK during August 2018. The Claimant resigned by letter dated 11 September 2018, claiming, amongst others matters, that he was an employee of the Respondent.

**The Claimant's day to day working arrangements**

54. For the avoidance of doubt and unless otherwise set out, the findings of fact I make about the Claimant's day to day working arrangements cover the whole period of the Claimant's work from January 2016 to 11 September 2018. I note the this covers the following 4 sub-periods:
**Period 1**: From 1 January 2016 to 3 April 2016 when the Claimant worked with GB&I LLP.
**Period 2:** From 4 April 2016- 29 December 2017 when the Claimant was a member of GB&I LLP.
**Period 3**: From 30 December 2017 – 27 June 2018 when the Claimant worked with GB&I LLP.
**Period 4**: From 28 June 2018 – 11 September 2018 when the Claimant worked with the Respondent.

55. From around January 2016 GB&I LLP took on a small, serviced office space in Dubai, which provided a postal address for the new business and allowed GB&I LLP the ability to book and use meeting rooms within the same building. The Claimant worked from home. The Claimant provided his own laptop and mobile phone.

56. From April 2016 onwards the Claimant was given and used the title 'Partner of GB&I LLP'. This title did not change upon his exit from the LLP (see page 283-284 as an example). The Claimant used a GB&I LLP email address. The Claimant was permitted access to GB&I LLP's shared project folders on its IT system. However, the Claimant was not able to work on the IT protocols and did not access the system in that way. The Claimant was provided with GB&I LLP/the Respondent business cards which referred to him as a 'Partner'.

57. The Claimant did not have his own professional indemnity insurance nor was he asked by GB&I LLP to provide it with a copy of such a policy.

58. The Claimant worked long hours, sometimes as many as 80-100 hours each week for GB&I LLP/ the Respondent. Unsurprisingly, the Claimant was keenly interested in the success of GB&I LLP and the Respondent, because he was entitled to one-third of any profit made. The Claimant anticipated some deals may bring about large commissions of up to 500k.

59. From around March /April 2016 onwards the Claimant did not work for anyone else (except for some unpaid 'barter' work for Blue Ocean – as set out at above) and from that time onwards the Claimant brought all business opportunities that came his way straight to GB&I LLP.

60. The Claimant did not 'market' his services as a separate business via a website or otherwise. On one occasion the Claimant was directly approached by an Indian company operating a training academy and university in India to work 1 week every month for £4,000. The Claimant drew the offer to Mr. Wong's attention as part of a discussion about potential ways to save costs for GB&I LLP. The offer was not progressed by the Claimant.

61. In terms of his day-to-day work, there were two main elements to the Claimant's role, which for ease I will call the First Element and the Second Element.

62. The First Element was to introduce clients to GB&I LLP/the Respondent who needed to raise investment funds for projects. GB&I LLP/the Respondent raised funds with debt funding and helped clients source designers and contractors for projects; from these deals commissions would be paid to GB&I LLP/the Respondent.

63. In respect of the First Element, on a practical level, the Claimant would bring potential projects to the attention of Mr. Wong and Mr. Hughes, and (from their Cardiff office) they would carry out further work to understand and evaluate the viability of those projects. This evaluative process might involve one or more business meetings with the potential client in Dubai (which Mr. Wong and/or Mr. Hughes and the Claimant would attend), which the Claimant of Lisa Sage would arrange.

64. The Claimant continued to be present at meetings throughout the process of negotiations in a financing deal, not only because he made the initial introductions, but because he had good understanding and knowledge of the cultural aspects of negotiating and closing deals with Arab businessmen. These meetings would nearly always take place in person, in Dubai. The Claimant would be copied in on emails about the progression of each deal and was also involved in reviewing fees owed (p157) and in some cases asked to chase fees owing (p204). The progression of each deal would also be discussed at weekly (sometimes twice weekly meetings) at which the Claimant was present.

65. The 'Second Element' of the Claimant's role was to assist UK companies to develop business in the UAE

66. Integral to the Second Element the Claimant worked closely with clients of GB&I LLP/the Respondent in assisting them to develop business opportunities in the UAE. At any one time 7-8 different companies paid GB&I LLP/the Respondent for these services by way of a monthly retainer fee. One such company was C&P

Engineering. The Claimant was directly involved with setting up a Dubai office for C&P Engineering. On behalf of C&P Engineering the Claimant also sought to engage Gower College (as C&P's subcontractor) to carry out some training in Dubai on C&P's behalf. Whilst the Claimant contacted Gower College directly, this was not, as suggested by Mr. Wong, part of the Claimant's other project work as an independent consultant as part of his own business undertaking. The contact with Gower College was part of the Claimant's work for GB&I LLP/ the Respondent.

67. As part of this role with the GB&I LLP / the Respondent the Claimant also worked with some companies from Canada (who paid a monthly retainer to GB&I LLP/the Respondent), in assisting them with developing business opportunities in Dubai.

68. The Claimant had complete freedom as to his working hours, though his long hours gave him little flexibility. He was not required to provide time sheets or record his hours. Save for the few occasions in early 2016, the Claimant did not produce invoices.

69. With regard the First Element of his role, the Claimant was given free rein to find businesses to introduce to GB&I LLP/ the Respondent. I reject the suggestion by the Claimant that Mr. Wong and Mr. Hughes instructed him who to target.

70. With regard to the Second Element of the Claimant's role, free rein was not present, because the Claimant was required to undertake work exclusively for the clients of GB&I LLP/the Respondent who paid a monthly retainer fee to GB&I LLP/the Respondent.

71. The Claimant attended weekly meetings with Mr. Wong and Mr. Hughes to discuss the First Element i.e. current deals and potential deals, and ongoing work in respect of the Second Element. The Claimant had to provide agenda documents before meetings and circulate those to Mr. Wong. The meetings increased to two meetings a week when work got busier.

72. The Claimant would prepare documents for use at client meetings, which would be shared with and edited by Mr. Wong and Mr. Hughes. The three of them did not always agree on the same approach to fees/commission, nor did they agree on the level of detail required at the beginning of negotiations to get the deal agreed. For example, the Claimant preferred a more simplistic approach to get the deal done, whereas Mr. Wong and Mr. Hughes wanted more detail and precision from the start. On one occasion, the Claimant produced a single-page document to record the heads of terms. Mr. Wong and Mr. Hughes were not happy that the document was sufficiently detailed and produced a lengthier document which was the document that used; the Claimant blamed their approach for the loss of the deal though did not dispute their ability to have the final say. Ultimately, Mr. Wong and Mr. Hughes had the final say on the issues of fees and documentation and whether a deal would be made or not.

73. In terms of holidays, the Claimant took very few, but informed Mr. Wong and Mr. Hughes when he was away. The Monthly Payment remained the same irrespective of holiday. The same approach was taken to sickness absence.

The law

74. A worker is defined under s230(3) of the Employment Rights Act 1996 (ERA) as"

"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 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."

75. This case is concerned with s230(3)(b). Individuals who are not employees but who satisfy the worker test are sometimes referred to as "limb (b) workers." The question as to whether an individual is a limb (b) worker has been subject to extensive consideration by the tribunals and appeal courts to determine what types of working relationships fall within its scope.

76. Section 83(2) of the EqA 2010 provides:
"(2) "Employment" means -

(1) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;"

77. Whilst the extended definition of employment under section 83(2) of the EqA 2010 is worded differently to the limb (b) worker definition, the two definitions are treated as meaning essentially the same thing (see ***Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32***, at paragraphs 31 and 32, and ***Pimlico Plumbers Ltd v Smith [2018] UKSC 29,*** at paragraphs 13 to15).

78. In ***Bates van Winkelhof*** Baroness Hale (as she then was) delivered the leading judgment, which summarised the leading cases and identified key factors which the tribunal might assess and weigh in its overall consideration of status (my bold emphasis ):

*"32. In Allonby v Accrington and Rossendale College (Case C-256/01) [2004] ICR 1328: [2004] ECR I-873 the European Court of Justice was concerned with whether a college lecturer who was ostensibly self-employed could nevertheless be a "worker" for the purpose of an equal pay claim. The court held, at para 67, following Lawrie-Blum v Land Baden-Württemberg (Case 66/85) [1987] ICR 483; [1986] ECR 2121:*

> "*There must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration.*"

*However, such people were to be distinguished from "independent providers of services who are not in a relationship of subordination with the person who receives the services" (para 68). The concept of subordination was there introduced in order to distinguish the intermediate category from people who were dealing with clients or customers on their own account. It was used for the same purpose in the discrimination case of Hashwani v Jivraj [2011] ICR 1004.*

*33. We are dealing with the more precise wording of section 230(3)(b). English cases in the Employment Appeal Tribunal have attempted to capture the essential distinction in a variety of ways. Thus, in Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667, para 17(4) Mr Recorder Underhill QC suggested:*

> *"The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-a-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects."*

*34. In Cotswold Developments Construction Ltd v Williams [2006] IRLR 181, para 53 Langstaff J suggested:*

> *"a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."*

*35. In James v Redcats (Brands) Ltd [2007] ICR 1006, para 50 Elias J agreed that this would "often assist in providing the answer" but the difficult cases were those where the putative worker did not market her services at all. He also accepted, at para 48:*

> *"in a general sense the degree of dependence is in large part what one is seeking to identify—if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached—but that must be assessed by a careful analysis of the contract itself. The fact that the individual may be in a subordinate position,*

> *both economically and substantively, is of itself of little assistance in defining the relevant boundary because a small business operation may be as economically dependent on the other contracting party, as is the self-employed worker, particularly if it is a key or the only customer."*

*36. After looking at how the distinction had been introduced into the sex discrimination legislation, which contained a similarly wide definition of worker but without the reference to clients and customers, by reference to a "dominant purpose" test in Mirror Group Newspapers Ltd v Gunning [1986] ICR 145, he concluded, at para 59:*

> *"The dominant purpose test is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependent work relationships, or is it in essence a contract between two independent business undertakings? ... Its purpose is to distinguish between the concept of worker and the independent contractor who is on business in his own account, even if only in a small way."*

*37. The issue came before the Court of Appeal in Hospital Medical Group Ltd v Westwood [2013] ICR 415, a case which was understandably not referred to in the Court of Appeal in this case; it was argued shortly before the hearing in this case, but judgment was delivered a few days afterwards. Hospital Medical Group Ltd ("HMG") argued that Dr Westwood was in business on his own account as a doctor, in which he had three customers: the NHS for his services as a general practitioner, the Albany Clinic for whom he did transgender work, and HMG for whom he performed hair restoration surgery. The Court of Appeal considered that these were three separate businesses, quite unrelated to one another, and that he was a class (b) worker in relation to HMG.*

*38. Maurice Kay LJ pointed out, at para 18, that neither the Cotswold "integration" test nor the Redcats "dominant purpose" test purported to lay down a test of general application. In his view they were wise "to eschew a more prescriptive approach which would gloss the words of the statute". Judge Peter Clark in the appeal tribunal had taken the view that Dr Westwood was a limb (b) worker because he had agreed to provide his services as a hair restoration surgeon exclusively to HMG, he did not offer that service to the world in general, and he was recruited by HMG to work as an integral part of its operations. That was the right approach. The fact that Dr Westwood was in business on his own account was not conclusive because the definition also required that the other party to the contract was not his client or customer, and HMG was neither. Maurice Kay LJ concluded, at para 19, by declining the suggestion that the court might give some guidance as to a more uniform approach: "**I do not consider that there is a single key with which to unlock the words of the statute in every case.** On the other hand, I agree with Langstaff J that his 'integration' test will*

*often be appropriate as it is here." For what it is worth, the Supreme Court refused permission to appeal in that case: [2013] ICR 415, 427.*

*39. I agree with Maurice Kay LJ that there is not "**a single key to unlock the words of the statute in every case". There can be no substitute for applying the words of the statute to the facts of the individual case.** There will be cases where that is not easy to do**.** But in my view, they are not solved by adding some mystery ingredient of "subordination" to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves. As Elias J recognised in the Redcats case [2007] ICR 1006, a small business may be genuinely an independent business but be completely dependent on and subordinate to the demands of a key customer (the position of those small factories making goods exclusively for the "St Michael" brand in the past comes to mind). Equally, as Maurice Kay LJ recognised in Westwood's case [2013] ICR 415, one may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into the other party's operation as to fall within the definition. As the case of the controlling shareholder in a company who is also employed as chief executive shows, one can effectively be one's own boss and still be a "worker". While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker."*

79. Of paramount importantance to consideration of limb (b) worker status is careful examination of the wording of the relevant statute to assess whether the Claimant can satisfy the definition. The question of worker status is a question of statutory interpretation, rather than contractual interpretation. Further, when assessing worker status, the purpose of the legislation must be kept in mind. In ***Uber v Aslam and others [2021] UKSC 5*** giving the sole judgment, Lord Leggatt said as follows:

"*In determining whether an individual is a "worker", there can, as Baroness Hale DPSC said in the Bates van Winkelhof case [2014] ICR 730, para 39, "be no substitute for applying the words of the statute to the facts of the individual case." At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discusse*d, *a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work, or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who is employed under a "worker's contract"."*

80. Further important considerations were identified by the Supreme Court in ***Uber*** as being relevant to the question of whether a putative worker was in business on his own account. The factors include: the level of subordination of putative worker to putative employer; the degree of control exerted by the putative employer over the putative worker; the degree of dependence by the putative worker on the putative employer; the extent to which the putative worker is free to develop their own extended business; who deals with complaints and determines whether there should be refund to the customer; which party dictates the terms on which they trade with the 'end client' or 'consumer'; who has the most control over contact with end clients: and the degree of integration of the putative worker within the putative employer's organisation.

81. In ***Sejpal v Rodericks Dental Ltd [20220 EAT 91***, the EAT, following ***Uber,*** emphasised the need for a structured application of the statutory test. Concepts such as "mutuality of obligation", "irreducible minimum", "substitution", "dominant purpose", "subordination", "control" and "integration" are tools that can sometimes help in applying the statutory test but are not themselves tests.

82. Regarding the issue of substitution, the significant body of case law on this point was summarised by the Court of Appeal in ***Pimlico Plumbers Ltd v Smith [2017] ICR 657*** (upheld on appeal to the SC: [2018] ICR 1511). Following a review of the authorities, Sir Terence Etherton MR (with whom Davis LJ agreed, and with whose reasons Underhill LJ "essentially" agreed) stated at [84]:

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

**Conclusion: application of the statutory definition to the facts**

83. In following a structured approach, I note that there are three parts to the limb (b) worker definition:

    (i) The requirement for a contract between the worker and the putative employer;

    (ii) The requirement that the contract is to do or perform any work 'personally'; and,

    (iii) The requirement that the putative employer is not the customer or client of any business or undertaking or profession carried on by the putative worker.

84. In his submissions, Mr. Smith accepted there was a contract between the Claimant and the Respondent. I therefore do not need to consider the first part of the definition as it is agreed there was a contract during the Relevant Period.

85. The Respondent does not accept that the second part of the definition has been satisfied. I must therefore consider whether there was a requirement for personal service during the Relevant Period. This question may sometimes be answered by considering the concepts of "substitution" and "dominant purpose" though they are no substitute for applying the words of the statute.

86. The sole submission made by the Respondent about the second part of the definition was as follows: "...*C by his own actions considered he could substitute himself for his wife if he was unable to work [245]*". The reference to the Claimant's 'own actions' was him making enquiries of Mr. Wong about the Claimant's wife attending meetings on his behalf if he was incapacitated by illness. The relevant findings can be found in paragraph 41-42 above.

87. There was no express or implied agreement that the Claimant was entitled to provide a substitute. In practice this did not happen. The Claimant's discussion with Mr. Wong about his wife's potential future involvement in the event he was incapacitated was insufficient evidence to persuade me that the contract did not require personal service. At best, these facts would more closely fit with the Claimant asserting a right of substitution only when he was unable to carry out the work. Whilst it was not the Respondent's case that such a substitution clause formed part of the contract, I nevertheless note the comment in ***Pimlico Plumbers*** that, subject to exceptional facts, such an agreement would be consistent with personal performance.

88. Further, I conclude that a substantial objective of the contract was for the Claimant to provide his specialist and direct knowledge of the UAE market (obtained over many years) for the benefit of the Respondent and its clients.

89. Applying the words of the statute, I find that the requirement of the contract was for the Claimant to perform work personally.

90. The main dispute is in relation to the third part of the definition. I must consider whether the Respondent was, by virtue of the contract, a client or customer of any

profession or business undertaking carried out by the Claimant during the Relevant Period. In my judgment, it was not. In reaching that conclusion, remembering the words of Maurice Kay LJ in Westwood case that there is "no single key with which to unlock the words of statue in every case" I have in particular taken the following matters into consideration: -

a. The Claimant was entitled to be paid the Monthly Payment each month and expenses when they arose. The Claimant received the Monthly Payment by GB&I LLP/the Respondent on about the same day each month whether there was profit in the business or not. The Monthly Payment was referred to as 'salary' - that was reflective of the agreement that it would be paid each month come what may.

b. That the Monthly Payment and expenses were provided as a loan on account of profit provided meant there was an element of risk for the Claimant of the loans being recalled if the Respondent was not profitable. That risk is not the same as the risk taken by a person running their own business servicing the needs of clients who are not concerned as to the profitability of that person's business.

c. Except for two occasions in the early part of the relationship the Claimant did not invoice GB&I LLP/ the Respondent.

d. The Claimant was paid the same amount of Monthly Payment and expenses in months when he took holiday or was sick.

e. The Claimant used an email address and business cards provided by the Respondent.

f. From April 2016 the Claimant worked exclusively for GB&I LLP/the Respondent until his resignation in September 2018.

g. The Claimant was recruited to undertake the work personally for GB&I LLP/the Respondent. This was the dominant feature of the contract. It was the Claimant's specific knowledge of both contacts and the cultural aspects of the working in the UAE which were sought out by GB&I LLP/the Respondent as well as his ability to work with the Respondent's clients in closing a deal and providing those clients business development assistance in Dubai.

h. The Claimant was approached with an offer for him to work with an Indian university. That the Claimant took this offer to Mr. Wong as an idea for potential cost saving for GB&I LLP is inconsistent with the Respondent being his client. If the Claimant was a client of the Respondent, and conducting his own business undertaking, it seems unlikely he would share

this information in this way but would instead weigh up the pros and cons of the offer privately.

i. In his closing submissions Mr. Smith argued that the Claimant was "*used exclusively to gain a foothold*" or "*created a doorway only*" for the Respondent in the UAE market. Mr. Smith also submitted that the Claimant was paid to "*use his talents to generate leads' and* "*not much else*" and after introducing the clients to Mr. Wong and Mr. Hughes the Claimant remained at '*arm's length*' from the Respondent. If those assertions were supported by my factual findings based on the evidence, I accept that they may well direct towards a finding that the Claimant was carrying out a business undertaking with the Respondent as his client. However, I reject those submissions. The Claimant was involved in the business of GB&I LPP / the Respondent in a significant way as set out at paragraphs 61-67.

j. From April 2016 onwards and throughout the Relevant Period the Claimant held the title 'Partner' of GB&I LLP/the Respondent. Whilst the label adopted by the parties cannot alter the "true relationship" I find it is nonetheless relevant because it is reflective of the extent of the Claimant's integration within the business.

k. The geographical distance from Dubai to Cardiff was in practical terms, irrelevant because the Claimant collaborated with Mr. Wong and Mr. Hughes on a regular basis via Skype. As part of a team, the three of them worked closely to complete deals and provide services to those clients of the GB&I LPP/ the Respondent. As part of that team, the Claimant was, in effect, the 'face' of the Dubai office of GB&I LLP/the Respondent.

l. Whilst the Claimant had a high degree of autonomy when finding and introducing new clients, the reality of his day-to-day work, particularly with the Second Element of his role, did not provide him with the ability to pick and choose what work he did. The Claimant was required by GB&I LLP/ the Respondent to provide business development services to those clients of the Respondent who paid a monthly retainer. In that sense GB&I LLP exercised control over what work the Claimant undertook.

m. Finally, there was an element of subordination in the relationship. The Claimant was subject to oversight and control by Mr. Wong and Mr. Hughes. In respect of the First Element of his role, as set out in paragraph 72 above, Mr. Wong and Mr. Hughes had the final say on certain matters in respect of the clients of GB&I LLP/the Respondent. Further, the Claimant was obliged and directed to undertake the Second Element of his role, including chasing down fees of GB&I LLP/the Respondent at Mr. Wong's and/or Mr. Hugh's direction.

## Overall conclusion

91. In my judgment the Claimant was a worker within the meaning of of s 230(3)(b) of the Employment Rights Act 1996 (ERA 1996) and falls within the definition of "employment" in s83(2)(a) of the Equality Act 2010 (EqA 2010), as he was engaged in a "contract personally to do work".

92. I have made directions via a separate case management order to get the matter ready for the final hearing.

Employment Judge Millns

**29 June 2024**

JUDGMENT AND REASONS SENT TO THE PARTIES ON

**3 July 2024**

FOR THE TRIBUNAL OFFICE