EMPLOYMENT TRIBUNALS

Claimants: (1) David Kerry Davies
(2) Pamela Rustem
(3) Ken Jacobie

Respondents: (1) Abatis (UK) Ltd (Creditors Voluntary Liquidation)
(2) Secretary of State for Business, Energy & Industrial Strategy

Heard at: Watford Employment Tribunal by CVP

On: 22-24 July 2024 & 25 July 2024 (in chambers)

Before: Employment Judge Annand

Representation

Claimant: Mr Davies, representing the Claimants
Respondents: No representation

RESERVED JUDGMENT

1. The Claimants' claims against the First Respondent for a statutory redundancy payment are well-founded and are upheld. The Tribunal found:
    a) The First Claimant, Mr Davies, was an employee of the First Respondent from July 2011 to July 2021.
    b) The Second Claimant, Ms Rustem, was an employee of the First Respondent from September 2014 to July 2021.
    c) The Third Claimant, Mr Jacobie, was an employee of the First Respondent from January 2017 to July 2021.

2. The First Respondent is ordered to pay redundancy payments to the Claimants in the following amounts:
    a) The First Claimant, Mr Davies, is owed £5,346.00
    b) The Second Claimant, Ms Rustem, is owed £3,207.60

c) The Third Claimant, Mr Jacobie, is owed £2,138.40

3. The Claimants are also awarded two weeks' pay under section 38(3) of the Employment Act 2002 in respect of the First Respondent's failure to provide written particulars of employment. The First Respondent is ordered to pay £712.80 to each of the Claimants.

4. The Claimants' claims for unauthorised deduction from wages, regarding the failure to pay National Minimum Wages, pension contributions, and holiday payments, are not well founded and are dismissed.

5. The Claimants' claims for holiday pay under the Working Time Regulations are not well founded and are dismissed.

6. The Claimants' claims for breach of contract are not well founded and are dismissed.

REASONS

Introduction

1. The three Claimants bring a range of claims against the First Respondent, a company that went into voluntary liquidation in July 2021. The Second Respondent has been joined as a respondent at its request. The Claimants have all been refused redundancy payments from the Redundancy Payment Service on the basis that they have not been employed for more than two years. They all disagree with that decision and say that they were employees for considerably longer than two years, and so bring claims for redundancy payments. They also bring claims of unauthorised deduction from wages relating to a failure to pay them the National Minimum Wage and pension contributions, a claim for holiday pay, a claim for notice pay, and they claim a remedy award arising from the First Respondent's failure to provide them with a written statement of employment particulars.

2. The Claimants employment terminated on the date the company entered into voluntary liquidation, 23 July 2021. The First Claimant contacted ACAS for early conciliation purposes on 9 February 2022, and a certificate was issued on the same day. The Claimants submitted a Claim Form on 16 February 2022. There is therefore an issue regarding the time limits for bringing a claim in respect of the claims for unauthorised deduction from wages, holiday pay, and notice pay. The First Respondent has conceded that there is not a time limit issue in respect of the claims for redundancy payments as the Claimants

had indicated their intention to claim a redundancy payment within the relevant period.

3. There were two case management preliminary hearings held on 10 February 2023 and 10 July 2023, at which a List of Issues was finalised. This case was listed for a final hearing for four days in October 2023, but it was postponed due to a shortage of judges. The First Respondent had intended to be represented at the hearing in October 2023. The final hearing was rescheduled to be heard over four days by video between 22-25 July 2024.

4. On 9 July 2024, the First Respondent's solicitor wrote to the Tribunal to say that the First Respondent was no longer planning to send representation to the final hearing for reasons related to cost. However, it was noted that the claims were still resisted and that the First Respondent's witnesses, Mr Allan and Mr Evans, would still attend to give evidence. The letter noted that another witness for the First Respondent, Mr Rothwell, resides in Switzerland and that while permission had been sought for him to give evidence from abroad, it had not been obtained in time. In the letter the First Respondent stated that the Tribunal staff had indicated it was unlikely that permission would be obtained before the hearing, and therefore Mr Rothwell would not be giving evidence at the final hearing, but they asked that the hearing proceed in any event. With the letter, the First Respondent sent in written submissions prepared by counsel who had previously been instructed by the First Respondent. The Second Respondent indicated in the Grounds of Resistance that it would also not be sending representation to the hearing.

5. At the start of the final hearing, I was provided with a bundle consisting of 459 pages and a witness statement bundle which contained witness statements from 7 witnesses. I heard oral evidence from the three Claimants and Mr Greenwood on behalf of the Claimants, and Mr Allen and Mr Evans on behalf of the First Respondent. I was also provided with a witness statement from Mr Rothwell, but as he did not attend to give evidence in person, I placed little weight on it. I was able to hear all the evidence from the six witnesses by Wednesday 24 July 2024 and had intended to give an oral judgment on Thursday 25 July 2024. My deliberations took longer than anticipated and therefore the parties were notified that my judgment would be reserved.

The facts

6. The First Respondent, Abatis (UK) Limited, was incorporated on 7 September 2005 and was majority owned by Mr Rothwell. Mr Rothwell also owns Abatis GmbH, a company registered in Switzerland which develops Hard Disk Firewall (HDF) security software to defend IT systems against malware and

cyber-attacks. The Respondent company was a reseller of products created and developed by Abatis GmbH.

7. In September 2007, the First Claimant, Mr Davies, started a Masters degree at Royal Holloway University where he was introduced by Professor Fred Piper to Mr Rothwell who was developing the HDF software at the Enterprise Centre on campus.

8. Between October 2007 and April 2009, while doing his degree, Mr Davies informally helped Mr Rothwell, providing him with business advice and assistance. This was unpaid work.

9. Starting in April 2011, there were discussions between Mr Davies and Mr Rothwell about Mr Davies working for the First Respondent.

10. On 12 April 2011, Mr Davies put forward a proposal which involved offering to invest £20,000 in exchange for a 20% equity stake in the business. He proposed that he be appointed CEO and asked for a notional unpaid salary of £70k per annum which he agreed not to take until such time as the board agreed that the First Respondent could afford it.

11. On 26 July 2011, Mr Rothwell wrote in an email to Mr Davies:

> "You agree:
> to take up 20% stake in Abatis on the following terms:
> your investment of £50K cash;
> your working full-time as Abatis's CEO for one year according to our agreed terms of engagement (including scope of duties and responsibilities); and
> your best endeavours to secure for Abatis fund/investment of not less than £1 million within one year's time."

12. On 31 July 2011, Mr Davies replied stating he agreed in principle and suggested the paperwork should be drawn up when Mr Rothwell returned (p120). Mr Davies also agreed to the suggestion he would work exclusively for the First Respondent for one year. Mr Davies suggested that he be engaged as CEO. He again asked for a notional unpaid salary of £70k per annum which he agreed not to take until such time as the board agreed that the First Respondent could afford it.

13. On 19 August 2011, an agreement was reached between Mr Davies and Mr Rothwell. It was agreed that Mr Davies would pay Mr Rothwell £50,000 for 20% shares in the First Respondent. Mr Davies was to be registered as a director. The agreement set out that Mr Davies agreed to work full time for the First Respondent only for at least two years with agreed terms of duties

and responsibilities. There was no specific mention of the salary of £70,000 and Mr Davies was not given a written contract of employment.

14. Mr Davies' evidence to the Tribunal, which I accepted, was that while there was no reference to a salary being paid until the company could afford it in the written agreement, this had been agreed between Mr Davies and Mr Rothwell. I accepted this was what was agreed because the other witnesses in this case, including Mr Allen who gave evidence for the First Respondent, understood the position to be the same in respect of their employment. They also understood that they would be paid a salary once the company could afford it.

15. In 2012, the First Respondent needed some technical support to perform a large roll-out of the HDF software to a client. Mr Davies says he suggested getting the Third Claimant, Mr Jacobie, to help on a one-off contract basis, which Mr Rothwell agreed was sensible. Mr Davies thought that Mr Jacobie had been paid for that work but subsequently learned he was not.

16. In 2014, Mr Rothwell moved to Switzerland and Hong Kong. He left the role of CEO but retained his role as chairman of the board. Mr Davies became CEO.

17. The Second Claimant, Ms Rustem, said that prior to Mr Rothwell leaving he asked Ms Rustem to join the company. Ms Rustem later sent an email to Mr Rothwell in which she set out her recollection, which was that Mr Rothwell said she should join the First Respondent but that he would need to "run it past" Mr Davies. Both Mr Davies and Ms Rustem said that she joined the business on the same understanding and the same terms as Mr Davies. In other words, that she would be paid a salary once the company could afford it.

18. In July 2015, Mr Davies sent Ms Rustem an email which was titled, "confirmation of intention". In that email he confirmed that it was the First Respondent's intention to employ Ms Rustem as VP Sales and to provide a 2% share option to her as soon as the company had received an investment that appeared to be forthcoming (p378).

19. In late 2016, it became obvious to Mr Davies that the First Respondent needed more technical support to service the clients that the business was acquiring. Mr Davies and Mr Rothwell agreed that they wanted Mr Jacobie to join the company given his IT and Security technical knowledge. Mr Jacobie's evidence was that in September 2016, Mr Rothwell ask whether he would like to join the First Respondent, and that Mr Rothwell welcomed Mr Jacobie

into the company at the start of 2017. Mr Jacobie said that Mr Rothwell provided him with training in the company's HDF software.

20. Mr Davies and Mr Jacobie confirmed in their evidence that they understood Mr Jacobie was employed on the same basis as Mr Davies and Ms Rustem. While at that time the company was not generating and retaining sufficient revenue to be able to pay full-time salaries, they were agreed that they would all receive a salary once there was sufficient funds.

21. The evidence of Mr Davies, Ms Rustem and Mr Jacobie was that they all worked in excess of 40 hours per week. This was not contradicted by Mr Allen when he gave evidence on behalf of the First Respondent. Mr Jacobie pointed out that evidence which would have corroborated the long hours they worked, which included some weekends and whilst on holiday, was deleted from the server once the company went into voluntary liquidation. When asked who deleted the emails from the server, he said that he believed only Mr Rothwell had complete access.

22. In her evidence to the Tribunal, Ms Rustem said that at some point she worked as a consultant for a separate company for 6 months on a part-time basis. She needed to do this as she was struggling to pay her bills, given she was not receiving an income from the First Respondent. She could not recall exactly when she had done this but said it was before the First Respondent had their first big client, which was in around 2017. She said she spoke to Mr Davies about it, and he was happy for her to do this as he understood her financial position. She continued to work for the First Respondent at the same time.

23. From 2017, the Claimants' efforts resulted in the company becoming more successful and more financially stable, but it was still not retaining sufficient revenues to afford salaries. The directors agreed that 30% of sales revenue would be allocated to the team as commission payments. By this time, Mr Allen had joined the company working as CFO around one day per fortnight. Mr Allen's evidence to the Tribunal was that it was agreed that he too would not receive any remuneration until the company could afford it and that share options would be issued as compensation for his activities in the meantime. From December 2017, the commission on 30% of sales revenue was split so that Mr Davies received 10%, and Mr Jacobie, Mr Allen, and Ms Rustem would receive 5% each.

24. Between December 2017 and March 2021, Mr Davies received approximately £194,000 in commission payments, and Mr Jacobie and Ms Rustem received approximately £97,000 each.

25. Mr Davies' evidence was that between 2017 and 2019, he did not invoice the First Respondent for the commission payments, they were paid initially into his personal account, and he paid income tax on those payments. After September 2019, he did invoice the company for the commission payments, and they were paid into a service company. Ms Rustem said she believed she invoiced prior to 2019, and that that all the payments were made to her personal account. She could not recall if the situation regarding invoicing changed after 2019 but believed she continued to be paid into her personal account. Mr Jacobie had a service company set up before he started working for the First Respondent. He believed he invoiced for the commission payments pre and post 2019 and said some payments were made to his personal account and some to his service company account.

26. In 2019, it was agreed that a share scheme would be set up to offer the staff, namely Mr Davies, Mr Jacobie, Mr Allen and Ms Rustem, equity in the company. It was recorded in the board meeting minutes that the purpose of the scheme was intended to "provide an incentive by which to motivate and retain existing employees of the company" (p240).

27. Mr Davies' evidence, which was confirmed by Mr Allen, was that the First Respondent was advised by a legal firm, Bird & Bird LLP, that for the share scheme to be set up the staff needed to be paid by PAYE and to confirm that they worked for the company for a certain number of hours per week. In the Explanatory Booklet provided to the Claimants about the scheme it set out that any employee or director of the company that works at least 25 hours per week within the group was eligible to be granted options (p203). Minimum wage in 2019 was £8.21.

28. From September 2019 onwards, the Claimants, and Mr Allen, were each paid a gross figure of £1084 per month via PAYE. They were also enrolled in a pension scheme.

29. In July 2019, before they started receiving a salary, Mr Davies and Ms Rustem started a separate company called Salus Loquit Ltd. Mr Davies and Ms Rustem were registered as directors on 10 July 2019 and Mr Jacobie was registered as a director on 10 July 2020 (p425-426). The company intended to develop security for mobile phones. The evidence of the Claimants was that the setting up of the company took some work but otherwise they had not carried out work for the company. Salaries were recorded as being owed to the employees in the accounts but were not paid. Mr Davies and Ms Rustem said at the time they had thought the First Respondent's company was going to be bought, and so they set up the company for the future when their employment with the First Respondent ended.

30. There had been a royalty arrangement in place between Abatis GbmH and the First Respondent. In early 2020, Mr Rothwell wanted the royalty arrangement reviewed and on 13 May 2020 eventually a 50% royalty rate was agreed. This date was prior to a large order being received and a royalty dispute between the First Respondent and Abatis GmbH arose. The renegotiation of the royalty arrangement caused a complete breakdown in the relationship between Mr Davies and Mr Rothwell. In the course of the hearing, Mr Davies and the other Claimants made it clear what they thought of Mr Rothwell's motives, decision making, and his approach to running the business. Mr Greenwood gave evidence regarding Mr Rothwell's credibility. It is not necessary for the Tribunal to make any findings on these issues as they are not relevant to the issues I have to determine. Mr Rothwell did not attend the hearing. A witness statement was provided but I was not able to place any significant weight on it as the evidence was not challenged through cross examination.

31. In order to resolve the royalty dispute the parties entered into arbitration, which the First Respondent lost. In May 2021, it was recognised that the arbitration award was going to exceed the amount in the First Respondent's bank account.

32. Shortly before this, on 7 April 2021, Mr Davies wrote an email to Mr Rothwell raising his concerns that the Claimants were entitled to have been paid National Minimum Wage (NMW) for the period they worked for the company prior to September 2019. He wrote, "… whilst the company took the step of starting to pay at least the National Minimum Wage rate in October 2019, all employees (including me) are still entitled to back payment in respect of the period of employment prior to this. Further, I note that no employees have ever received other statutory entitlements (e.g. sick pay, holiday pay, pension, etc.)" He further noted, "It has now been brought to my attention that employees cannot in any event agree to contract out of key and fundamental rights such as minimum wage and holiday entitlements – this is a mistake that needs to be rectified."

33. On the same day, Bird & Bird LLP, acting for Mr Davies made a without prejudice offer subject to contract to compromise Mr Davies' claims for "national minimum wage, holiday and unfair dismissal rights" (p242-243). These documents were disclosed by the Claimants to demonstrate that the Claimants had received legal advice which indicated they were employees, and hence they were in the bundle of documents provided to the Tribunal.

34. On 13 May 2021, Mr Davies stated in a board meeting that the Respondent "has not paid the staff NMW for the years before they received NMW in

October 2019." It was recorded in the minutes that the total unpaid amount came to £216,000.

35. On 25 May 2021, Bird & Bird LLP wrote a further letter to the First Respondent on behalf of Mr Davies in which they noted, "Our client's claims in respect of outstanding national minimum wage and holiday pay payments, which would be brought in the High Court and Employment Tribunal respectively, are against Abatis UK…" (p246).

36. On or around 9 June 2021, Mr Rothwell contacted Insolvency Practitioners Firm, Antony Batty & Company LLP, stating that the company had lost at arbitration and because of the award the company appeared to be insolvent, and the board needed advice.

37. On 14 June 2021, Mr Stephen Evans from Antony Batty & Company LLP spoke with Mr Rothwell, Mr Davies and Mr Allen. The Board was advised that the company was insolvent, the company should cease trading immediately and take steps to go into insolvent liquidation.

38. On 19 June 2021, Mr Davies provided a spreadsheet to Mr Rothwell and Mr Allen estimating the First Respondent's liability for unpaid NMW (p401). The total amount set out was approximately £218,500. The email was also sent to Mr Evans, who was later appointed the Liquidator when the First Respondent was placed into creditors voluntary liquidation.

39. On 24 June 2021, Mr Davies emailed Mr Evans attaching documents entitled "Information Required to Process Employee Claims" for each of the Claimants (p408 and p317-319). Mr Davies asked Mr Evans, "Could you please confirm that this is all you require in order to make your estimation of the quantum of the claim for back pay, holiday pay, etc."

40. On 23 July 2021, the First Respondent was placed into creditors voluntary liquidation. Mr Evans was appointed as the liquidator.

41. On 23 July 2021, Mr Davies and the other Claimant's engaged the services of Caroline Thomas at a claims management company called UKELC & Co Ltd.

42. On 5 August 2021, a letter was sent to the Claimants confirming that, due to the insolvency of the company, their employment was terminated with effect on 23 July 2021 (p174 – 175).

43. On 19 August 2021, Ms Thomas wrote to Mr Evans and sent draft employee data for the Claimants. She noted: "40 hours worked routinely before

overtime by all three employees. This is a very conservative figure – the real figure is much higher for each of the three – but it is impossible to produce sufficient hard evidence. I am not even sure their very basic salaries were paid to them at the correct Government NMW rate." (p417)

44. On 6 September 2021, Ms Thomas wrote to Mr Evans again. She noted, "I'm keen to get their RP1's in as soon as possible now as they are anxious."

45. On 10 September 2021, Ms Thomas wrote to Mr Evans again, noting "Without a comprehensive enough log to submit to support the very long hours they all independently refer to, I attach Kerry's email below – in reply to my attempt to move things forward with their agreement by being conservative. I suggested they declare 40 hours, a gross underestimation they all agreed, but gave their blessing nevertheless" (p412).

46. On 4 October 2021, Mr Evans wrote to Ms Thomas. In the email he noted that he considered the Claimants had started their employment in 2019. The following day, Ms Thomas responded with her comments and made a number of points about why the Claimants' start dates should be taken as being earlier than 2019.

47. On 11 October 2021, Mr Evans responded stating that having considered the evidence, he did not consider that there was sufficient evidence to allow a start date prior to October 2019. He noted that they appeared to be contractors.

48. On 22 October 2021, the Claimants made claims to the Insolvency Service for notice pay, unpaid wages from 1 June 2021 to 23 July 2021, and a redundancy payment (p254-274).

49. On 21 January 2022, Mr Davies was sent a letter saying a payment had been made by the Insolvency Service. The amount paid was for unpaid wages in June and July 2021, 14.46 days of accrued holiday pay and he was also paid one weeks' notice pay (p430).

50. On 24 January 2022, Mr Davies was informed that he would not be paid a redundancy payment by the Insolvency Service because they did not believe he had been continuously employed for at least two years prior to being made redundant.

51. On 7 February 2022, Mr Davies contacted ACAS for early conciliation purposes. A certificate was issued on the same day.

52. On 16 February 2022, Mr Davies, Ms Rustem and Mr Jacobie submitted a claim in the Employment Tribunal.

53. On 9 May 2022, a Response was submitted by Wedlake Bell LLP acting on behalf of the First Respondent.

54. The Second Respondent, the Secretary of State for Business, Energy & Industrial Strategy, also put in a Response and asked to be joined as a Respondent in the case on the basis that if they are not cited as a respondent then the Secretary of State is not bound to cover the payments made. In the Grounds of Resistance, it was noted that in addition to having paid Mr Davies arrears of pay, holiday pay and notice pay, they had made the same payments to Ms Rustom and Mr Jacobie.

The issues to be determined

55. The Claimants bring the following types of claim:

    a) Unlawful deduction of wages – National Minimum Wage claim.
    b) Unlawful deduction of wages or Working Time Regulations - Unpaid accrued holiday pay
    c) Unlawful deduction from wages – pension contributions.
    d) Wrongful dismissal / breach of contract – Statutory notice pay
    e) Statutory redundancy payment.

56. The issues to be decided are as follows:

Employment status

57. Were the Claimants an employee of the first respondent within the meaning of section 230 of the Employment Rights Act 1996? If yes, what date did that employment commence?

58. Were the Claimants a worker of the first respondent within the meaning of section 230 of the Employment Rights Act 1996? If yes, what date did that worker status commence?

Time limits

59. Were the unauthorised deductions complaints made within the time limit in section 23 of the Employment Rights Act 1996?

60. Were the claims made to the Tribunal within three months plus early conciliation) of the date of payment of the wages from which the deduction

was made (for deductions claimed from 1 September 2019) or the date when payment was contractually due (for deductions claimed prior to that date)?

61. If not, were there a series of deductions and were the claims made to the Tribunal within three months (plus early conciliation extension) of the last one?

62. If not, was it reasonably practicable for the claims to be made to the Tribunal within the time limit?

63. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, were they made within a reasonable period?

64. Were the unpaid holiday pay claims made within the time limit in Regulation 30 of the Working Time Regulations 1998?

65. Were the wrongful dismissal claims made within the time limit in art 3 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (1994 Order). The Tribunal will need to decide, if it was not reasonably practicable for the claims to be made to the Tribunal within the time limit, were they made within a reasonable period under art 7 of the 1994 Order?

Unauthorised deductions

66. Did the First Respondent make unauthorised deductions from the claimants' wages and if so, how much was deducted?

Holiday Pay (Working Time Regulations 1998)

67. What were the Claimants' leave years?

68. How much of the leave years had passed when the Claimants' employment ended?

69. How much leave had accrued for the year by that date?

70. How much paid leave had the Claimants taken in the year?

71. Were any days carried over from previous holiday years?

72. How many days remain unpaid?

73. What is the relevant daily rate of pay?

Wrongful dismissal / Statutory Notice pay

74. What were the Claimant's statutory notice periods?

75. Were the Claimants paid for the statutory notice periods?

A statutory redundancy payment (the Secretary of State to pay a redundancy payment following an application to the NI fund)

76. Based on the employment status determined above, what are the correct statutory redundancy payment for the claimants?

Remedy

77. How much should the claimants be awarded?

78. When the Claimants began proceedings, was the First Respondent in breach of its duty under section 1 Employment Rights Act 1996?

79. Is that duty a continuing duty owed to employees whose employment has been terminated in circumstances where the First Respondent is no longer trading?

80. Must the Tribunal make an award under section 38 Employment Act 2020 and, if so, how much?

The relevant law

Employment status - employee

81. An employee is defined in section 230(1) of the Employment Rights Act 1996 as "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment". Contract of employment is in turn defined as a "contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing" (section 230(2)).

Mixed test and the 'Irreducible minimum'

82. In recent years the courts and tribunals have adopted what has become known as 'the mixed test' when determining employment status. The mixed test involves weighing up all the relevant factors and deciding whether, on balance, the relationship between the parties is governed by a contract of employment. The courts have established that there is an 'irreducible

minimum' without which a contract of employment will not be found to exist. The 'irreducible minimum' entails three elements:

- Mutuality of obligation.
- Personal performance.
- Control.

Contract of employment/Written terms

83. When considering if there is a contract of employment, if there are written terms, the tribunal will need to consider whether it was the intention of the parties, objectively ascertained, that all the terms of the contract be contained in the documents. This is a question of fact (*Ministry of Defence HQ Defence Dental Service v Kettle* EAT 0308/06). If the tribunal is satisfied that the contractual documentation is a full record of the parties' agreement, then identifying the terms of the contract is straightforward. However, if the court or tribunal is satisfied that the written contract is not the start and end of the bargain struck by the parties, then it will look to the surrounding factual matrix, including such things as the conduct of the parties and any oral exchanges between them. This is also a question of fact (*Carmichael and anor v National Power plc* [1999] ICR 1226, HL).

84. In *Autoclenz Ltd v Belcher* [2011] UKSC 41, the Supreme Court held that, in the employment context, it is too narrow an approach to say that a court or tribunal may only disregard a written term as not part of the true agreement between the parties if the term is shown to be a "sham", and instead the court or tribunal should consider what was actually agreed between the parties, "either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded" (paragraph 32). Lord Clarke commented that the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.

85. In *Uber BV others v Aslam and others* [2021] UKSC 5, the Supreme Court held that the determination of 'worker' status is a question of statutory interpretation, not contractual interpretation, and that it is therefore wrong in principle to treat the written agreement as a starting point. The correct approach is to consider the purpose of the legislation, which is to give protection to vulnerable individuals who are in a subordinate and dependent position in relation to a person or organisation who exercises control over their work. On the facts of the case, the Court upheld the employment tribunal's conclusion that the drivers were workers. The Supreme Court noted at paragraph 85 in the judgment of *Uber BV and others*:

"In the Carmichael case there was no formal written agreement. The Autoclenz case shows that, in determining whether an individual is an employee or other worker for the purpose of the legislation, the approach endorsed in the Carmichael case is appropriate even where there is a formal written agreement (and even if the agreement contains a clause stating that the document is intended to record the entire agreement of the parties). This does not mean that the terms of any written agreement should be ignored. The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other. But there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it."

86. In *Ter-berg v Simply Smile Manor House Ltd and ors* [2023] EAT 2, the EAT considered that the Supreme Court's decision in *Uber* did not displace or materially modify the *Autoclenz* approach. *Uber* did not mean that the written terms are, in every case, irrelevant or could not ever accurately convey the true agreement of the parties. Rather, it means that in a case where the true intent of the parties is in dispute, it is necessary to consider all the circumstances of the case which may cast light on whether the written terms truly reflect the agreement and to do so applying the broad approach which *Autoclenz* describes, rather than the stricter approach that conventional contractual principles would allow. It is not the case that the question of whether a person is an employee has become purely one of status with no role at all for contract. But it would also be wrong for a tribunal to regard the written terms as having a primacy that constrains the tribunal from making findings as to what terms the parties truly intended to agree.

Mutuality of obligation

87. The requirement that there be 'mutuality of obligation' means that there is an obligation on the employer to provide work and a corresponding obligation on the employee to accept and perform any work offered. The Court of Appeal held in *Nethermere (St Neots) Ltd v (1) Taverna (2) Gardiner* [1984] IRLR 240 that: "For there to be a contract of service there must be an irreducible minimum of obligation on each side. If such mutuality is not present, there can be no contract of service".

Personal performance

88. One of the requirements of the test for a contract of service laid down in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433, QBD, is that the employee must have agreed to provide his or her own work and skill in exchange for a wage or other remuneration.

Control

89. In *Montgomery v Johnson Underwood Ltd* [2001] ICR 819, CA, the Court of Appeal held that control is a separate factor, no less vital to the creation of an employment relationship than mutuality of obligation. Therefore, since the tribunal had made a finding of fact that there was no control of the claimant, he could not be its employee.

90. In *White and anor v Troutbeck SA* [2013] IRLR 949, CA, the claimants had agreed to manage and maintain the house and grounds of the respondent's small farm estate and had signed an agreement to that effect which referred to them as being 'employed' by the respondent, a Panamanian company owned by a Nigerian family. The tribunal, however, decided that they could not be employees because the respondent had delegated the day-to-day running of the farm to the claimants. The EAT overturned that decision and found that the tribunal had misunderstood the control test. The question was not whether the respondent exercised day-to-day control over the claimants' work but whether it had, to a sufficient degree, a contractual right of control over them. On the facts of the case, it was clear that the respondent retained a sufficient degree of control in that, for example, it decided on maintenance that required expenditure and gave instructions concerning the upkeep of the house and grounds. The EAT substituted a finding that the claimants were employees. On further appeal, the Court of Appeal held that the EAT had correctly set aside the tribunal's decision. Viewed in the round, the parties' relationship evinced the principal elements of employment: the claimants worked, in return for a reward plus annual holiday pay, at a workplace designated by the respondent and for its continuing benefit. Furthermore, the respondent retained a degree of control over the claimants' work that was sufficient to preclude them operating as independent contractors.

91. In *Wright v Aegis Defence Services (BVI) Ltd and ors* EAT 0173/17 the Appeal Tribunal noted that there had been a large number of appellate cases on the question of employment status where the EAT had sought to ascertain whether control had been exercised in practice. In some of those cases much of the discussion related to whether the evidence showed that orders had been given by the employer and whether the claimant had availed him or herself of the rights an employee might be expected to utilise. However, the EAT noted that this approach concentrated on practical manifestations of

day-to-day control, rather than the individual's contractual entitlement, which was critical. The EAT concluded that the question does not depend upon the practical demonstration of control by drawing attention to particular instances when control has or has not been exercised, but rather on what is known of, or may be inferred from, the contract between the parties that is said to give rise to the employer's right to direct the individual in relevant respects.

Other factors relevant to employee status

92. In a case where the irreducible minimum of control, personal performance and mutuality of obligation is not present, other factors will not shift a court or tribunal from the conclusion that a contract is not a contract of employment. However, if all these elements (a contract, personal service, mutuality of obligation and control) are present, the contract may be one of employment and other factors can be considered.

Payment

93. Payment by commission only, or the right to set the rate charged, or to participate in the profits usually point towards self-employment, and the payment of a regular wage or salary is a strong indicator of employment. However, as confirmed in *Keith Carter and Co v Trotter EAT 388/95,* financial considerations are only one factor to be taken into account. The fact that a worker is paid on a commission-only basis does not preclude a tribunal from holding that he or she is an employee where there are other factors which point to this conclusion.

94. In *Williamson and Soden Solicitors v Briars* EAT 0611/10 the fact that a solicitor's remuneration changed from an annual salary of £55,000 to a 'guaranteed profit share' of £55,000 plus a small fixed percentage of the firm's net profits was not inconsistent with his continuing as an employee where he remained at all times under the control of the firm's equity partners.

95. In *Europanel Processing Co Ltd v Nimmo* EAT 732/91, a company manager did not draw a salary for ten months despite working full time. The EAT held that other advantages which he enjoyed (payment of expenses, pension contributions and the use of a company car) were sufficient to preserve the employment relationship during the ten-month period.

96. In *Secretary of State for Business, Innovation and Skills v Knight* [2014] IRLR 605, EAT, the Appeal Tribunal upheld the decision that a managing director and sole shareholder remained employed under a contract of employment when she opted to cease taking the salary she was contractually entitled to.

97. Payment of tax and national insurance on a 'self-employed' basis is not conclusive proof of status (*Enfield Technical Services Ltd v Payne; BF Components Ltd v Grace* [2008] ICR 1423, CA) and being part of the PAYE scheme and paying employees' national insurance contributions is not conclusive evidence of employee status (*O'Kelly and ors v Trusthouse Forte plc* 1983 [ICR] 728, CA*)*. However, these factors are relevant considerations.

98. Registration for VAT will normally be a strong pointer towards self-employment, although in *Cascade Aluminium Windows Ltd v Powlson EAT 321/82* this factor was outweighed by the extent of the worker's integration into the company and the degree of control exerted over him.

99. In *Catamaran Cruisers Ltd v Williams and ors* [1994] IRLR 386, EAT, the Appeal Tribunal held that the fact that the worker had formed a limited company and supplied his services through that company did not affect his employment status in circumstances where the written agreement did not reflect the parties' true relationship. The EAT stated that there was no rule of law that the importation of a limited company into the relationship prevents the existence of a contract of employment. If the true relationship was one of employment under a contract of service, putting a different label on it would make no difference. The formation and existence of a company had to be evaluated in the context of all the other facts found.

100. Other factors that may indicate the existence of a contract of employment include any prohibition on working for other companies, and control by a disciplinary code laid down by the employer.

101. In *Hall (Inspector of Taxes) v Lorimer* [1994] ICR 218, CA, the Court of Appeal cautioned against using a checklist approach in which the court runs through a list of factors and ticks off those pointing one way and those pointing the other and then totals up the ticks on each side to reach a decision. 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. Not all details are of equal weight or importance in any given situation.

<u>Directors and shareholders</u>

102. In *Clark v Clark Construction Initiatives Ltd and anor* [2008] ICR 635, EAT, the EAT set out a list of factors that a tribunal faced with deciding whether a majority shareholder has 'employee' status might find helpful:

1) where there is a contract ostensibly in place, the onus is on the party seeking to deny its effect to satisfy the court that it is not what it appears to be. This is particularly so where the individual has paid tax and national insurance as an employee and thus, on the face of it, has earned the right to take advantage of the benefits that employees may derive from such payments

2) the mere fact that the individual has a controlling shareholding does not of itself prevent a contract of employment arising. Nor does the fact that, in practice, he or she is able to exercise real or sole control over what the company does

3) the fact that the individual is an entrepreneur, or has built the company up, or will profit from its success, will not be factors militating against a finding that there is a contract in place. Indeed, any controlling shareholder will inevitably benefit from the company's success, as will many employees with share option schemes

4) if the conduct of the parties is in accordance with the contract, that would be a strong pointer towards the contract being valid and binding. For example, this would be so if the individual works the hours stipulated or does not take more than the stipulated holidays

5) conversely, if the conduct of the parties is either inconsistent with the contract, or in certain key areas is in fact not governed by the contract as one would expect, that would be a potentially very important factor militating against a finding that the controlling shareholder is an employee

6) if contractual terms have not been identified or reduced into writing, that will be powerful evidence that the contract was not really intended to regulate the relationship in any way

7) the fact that the individual takes loans from the company or guarantees its debts could exceptionally have some relevance in analysing the true nature of the relationship, but in most cases such factors are unlikely to carry any weight. There is nothing intrinsically inconsistent in a person who is an employee doing these things. Indeed, in many small companies, such practices may well be necessary, and

8) although the courts have stated that the existence of a controlling shareholding is always relevant and may be decisive, that does not mean that this alone will ever justify a tribunal in finding that there was no contract in place.

103. In *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and anor* [2009] ICR 1183, CA, the Court of Appeal made the following modifications to the eight factors identified by the EAT in *Clark*:

Factor 1: where an individual's employment status is in dispute, the court or tribunal must be satisfied that any relevant document is a true reflection of the claimed employment relationship, and for this purpose it will be relevant to know what the parties have done under it. The alleged employee may, therefore, have to do rather more than simply produce the contract itself, or a board minute or memorandum purporting to record his or her employment

Factor 6: the EAT may have overstated the potential negative effect of the terms of the contract not being in writing. While this was an important consideration, if the parties' conduct pointed to the conclusion that there was a true contract of employment, tribunals should not seize too readily on the absence of a written agreement to justify rejecting the claim

Factors 7 and 8: loans, guarantees and the existence of a controlling shareholding would ordinarily be irrelevant but 'never say never' is a wise judicial maxim.

104. The Court of Appeal also clarified that exercising control of a company as a shareholder does not prevent the control test for an employment contract being met. The Court also commented that the fact that a controlling shareholder/director does not draw his or her salary could point against the existence of a contract of employment if his or her remuneration had been irregular. However, if he or she was contractually entitled to a salary, the fact that he or she did not take it could not retrospectively diminish this right.

105. In *Secretary of State for Business, Innovation and Skills v Knight* [2014] IRLR 605, EAT, the EAT found it was open to the employment judge on the evidence to conclude that the claimant had not brought her contract to an end by failing to enforce her contractual right to pay. The fact that an employee decides against requiring his or her company to pay his or her salary does not necessarily lead to the conclusion that the employee must be taken to have entered into an agreed variation of his or her contract or a discharge of that contract.

Employment status - Worker

106. Section 230(3) of the Employment Rights Act 1996 (ERA) defines a 'worker' as an individual who has entered into or works under (or, where the employment has ceased, worked under): a contract of employment ('limb (a)'), or 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 ('limb (b)').

107. Limb (a) of the statutory definition of 'worker' means that anyone who is an employee is also a worker. Under limb (b), for an individual to fall within the definition of 'worker':

    1) there must be a contract, whether express or implied, and, if express, whether written or oral
    2) that contract must provide for the individual to carry out personal services and
    3) those services must be for the benefit of another party to the contract who must not be a client or customer of the individual's profession or business undertaking.

Time limits

108. **Unauthorised deductions from wages**: Under section 23(2) ERA, a claim for unauthorised deductions from wages must be made to a Tribunal within 3 months, less one day, from the date of the deduction, although time is extended for early conciliation purposes. Where a complaint is brought under this section in respect of a series of deductions, the claim must be made to a Tribunal within 3 months (less one day) from the date of the last deduction. Where a tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

109. **Holiday pay**: A claim for holiday pay can be made under Regulation 30(1)(a) or (b) of the Working Time Regulations (WTR), or as an unauthorised deduction from wages claim. A claim under WTR can be made when an employer failed to pay the whole or any part of any amount due by way of payment in respect of statutory annual leave. Under the WTR there is no 'series of deductions' provision. Under regulation 30(2) WTR, there is a three-month time limit. Where a tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

110. **Breach of contract**: Under article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order SI 1994 1994/1623, a claim for breach of contract must be made to the Tribunal within 3 months (less one

day) starting with the effective date of termination, although time is extended for early conciliation purposes. Where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within 3 months starting with the effective date of termination, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

111. **Redundancy payment**: Under section 164(1) of ERA, an employee does not have any right to a redundancy payment unless, before the end of the period of six months beginning with the relevant date—

(a) the payment has been agreed and paid,
(b) the employee has made a claim for the payment by notice in writing given to the employer,
(c) a question as to the employee's right to, or the amount of, the payment has been referred to an employment tribunal, or
(d) a complaint relating to his dismissal has been presented by the employee under section 111.

Extension of time for early conciliation purposes

112. Under section 207B(3) ERA, when determining whether a time limit has been complied with, the period beginning the day after the early conciliation request is received by Acas up to and including the day when the early conciliation certificate is received or deemed to have been received by the prospective claimant is not counted.

113. Under 207B(4) ERA if a time limit is due to expire during the period beginning with the day Acas receives the request and one month after the prospective claimant receives the certificate, the time limit expires instead at the end of that period.

Not reasonably practicable test

114. When a claimant seeks to argue that it was not reasonably practicable to present his or her claim within the specified time limit, three general rules apply:

a) The relevant sections should be given a 'liberal construction in favour of the employee' (*Dedman v British Building and Engineering Appliances Ltd* [1974] ICR 53, CA)
b) What is reasonably practicable is a question of fact (*Wall's Meat Co Ltd v Khan* [1979] ICR 52, CA)

c) The onus of proving that presentation in time was not reasonably practicable rests on the claimant (*Porter v Bandridge Ltd* [1978] ICR 943, CA.)

115. In *Lowri Beck Services Ltd v Brophy* [2019] EWCA Civ 2490, CA, Lord Justice Underhill set out that the statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was 'reasonably feasible' for the employee to present his or her claim in time. If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in his or her case, the question is whether that ignorance or mistake is reasonable. If it is not, then it will have been reasonably practicable for the employee to bring the claim in time. However, it is important to note that, in assessing whether ignorance or mistake are reasonable, it is necessary to take into account any enquiries which the employee or his or her adviser should have made. If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee.

116. A tribunal should consider two issues: a) if the presentation of a claim in time was not reasonably practicable, and then b) whether the claim was presented within such further period as the tribunal considers reasonable.

Ignorance of rights and/or the time limit

117. A claimant's complete ignorance of his or her right to bring a claim may make it not reasonably practicable to present a claim in time, but the claimant's ignorance must itself be reasonable. As Lord Scarman commented in *Dedman v British Building and Engineering Appliances Ltd*, where a claimant pleads ignorance as to his or her rights, the tribunal must ask further questions: What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?

118. In *Porter v Bandridge Ltd* [1978] ICR 943, CA, the majority of the Court of Appeal, having referred to Lord Scarman's comments in *Dedman*, ruled that the correct test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them. The Court upheld an employment tribunal decision that the claimant, who took 11 months to present an unfair dismissal claim, ought to have known of his rights earlier, even if in fact he did not.

119. In *Trevelyans (Birmingham) Ltd v Norton* [1991] ICR 488, EAT, Mr Justice Wood said that, when a claimant knows of his or her right to bring a claim, he or she is under an obligation to seek information and advice about how to

enforce that right. Failure to do so will usually lead the tribunal to reject the claim.

Fault of the advisors

120. In *Dedman v British Building and Engineering Appliances Ltd*, Lord Denning MR noted: "If a man engages skilled advisers to act for him — and they mistake the time limit and present [the claim] too late — he is out. His remedy is against them."

121. In *Wall's Meat Co Ltd v Khan* [1979] ICR 52, CA, Lord Justice Brandon clarified the *Dedman* principle, explaining that ignorance or a mistaken belief will not be reasonable if it arises either from the fault of the complainant or from the fault of his or her solicitors or other professional advisers in not giving him or her such information as they should reasonably in all the circumstances have given him.

122. In *El-Kholy v Rentokil Initial Facilities Services (UK) Ltd* EAT 0472/12 the EAT rejected the submission that the claimant's ignorance of the time limit was reasonable where solicitors had advised him throughout the appeal against his dismissal and, following its rejection, had advised him to instruct specialist employment solicitors to submit his unfair dismissal claim. He did this but by then the normal time limit had already expired. The EAT upheld the employment tribunal's finding that, bearing in mind their professional status, the solicitors initially acting for the claimant should have advised him (even if he had not specifically asked) about the time limit for lodging the claim.

123. In *Ashcroft v Haberdashers' Aske's Boys' School* [2008] ICR 613, EAT, the EAT held that the principle that negligence or delay by an adviser in presenting a tribunal claim is to be ascribed to the claimant applies to employment law consultants even though they are not qualified solicitors.

Unauthorised deduction from wages

124. The right not to suffer an unauthorised deduction is contained in section 13(1) ERA: "An employer shall not make a deduction from wages of a worker employed by him unless—
    (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
    (b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

125. Section 23 ERA gives a worker the right to complain to an Employment Tribunal of an unauthorised deduction from wages. Employees or workers can bring claims.

126. Section 27 ERA sets out the definition of "Wages". Section 27(1) provides that "wages" means "any sums payable to the worker in connection with his employment". In *University of Sunderland v Drossou* [2017] IRLR 1087, the court found that employers' pension contributions do not fall within the definition of wages and so cannot be claimed as an unauthorised deduction from wages claim.

127. Under section 23(4A) ERA, a claimant can only claim in respect of a series of deductions going back two years from the date the claim form is presented. The limitation period applies to 'wages' as defined in section 27(1)(a) ERA – "any fee, bonus, commission, holiday pay or other emolument referable to employment, whether payable under the worker's contract or otherwise".

National Minimum Wage

128. By virtue of sections 17 and 18 of the National Minimum Wage Act 1998 (NMWA 1998), a worker who has not been paid the National Minimum Wage (NMW) is deemed to be contractually entitled to the difference between what he or she is paid and the NMW. A worker can therefore bring a claim for unauthorised deduction from wages under the protection of wages provisions in order to enforce the right to the NMW.

129. In order to determine whether an individual is being paid the NMW, it is necessary to ascertain his or her hourly rate of pay. As the rate to be considered is the average hourly rate, there are two figures that need to be established:
    - the total pay received in the relevant pay reference period, and
    - the total number of hours worked during that period.

130. Regulation 6 of the National Minimum Wage Regulations 2015 SI 2015/621 (the NMW Regulations) states that the pay reference period is a month or, if the worker is paid by reference to a period shorter than a month, that shorter period. After determining the relevant pay reference period, the next step is to calculate national NMW pay, i.e. the pay received by the worker that goes towards discharging the employer's liability to pay the NMW. Gross pay (the pay the worker receives from the employer before deductions for tax and national insurance) includes basic salary and incentive payments, including commission payments.

131. Regulation 7 of the NMW Regulations provides that the hourly rate paid to a worker in a 'pay reference period' is determined when the renumeration in the pay reference period, determined in accordance with Part 4 of the Regulations, is divided by the hours of work in the pay reference period, as determined in accordance with Part 5 of the Regulations. The result is the worker's hourly rate of pay that should be compared with the applicable NMW rate.

132. Broadly speaking, to calculate the worker's average hourly rate it is necessary to divide the total qualifying remuneration received in a given pay reference period (including commission payments) by the total number of qualifying hours worked in that period.

Holiday entitlement and pay

133. Under the Working Time Regulations 1998 SI 1998/1833 ('WTR'), workers are entitled to a minimum of 5.6 weeks of paid annual leave (consisting of four weeks' basic leave and 1.6 weeks' additional leave). The entitlement to 5.6 weeks' leave is subject to a cap of 28 days.

134. The Working Time Regulations provide that a worker has the right to receive a payment in lieu of unused annual leave on the termination of his or her employment (Regulation 14). The Regulations approach the calculation of holiday pay by importing the concept of a 'week's pay' from sections 221-224 of ERA 1996.

135. The payment to be made in lieu of accrued unused holiday is the amount specified in a 'relevant agreement' covering this situation, or if there is no relevant agreement, the amount of holiday pay that would have been paid to the worker if they had already taken their accrued unused holiday entitlement as holiday, calculated according to a set formula: (A x B)–C, where:

- A is the period of leave to which the worker is entitled under Regulations 13 and 13A
- B is the proportion of the worker's leave year which expired before the termination date (expressed as a fraction), and
- C is the period of leave taken by the worker between the start of the leave year and the termination date.

Notice period and pay

136. Section 86 of ERA 1996 sets out minimum periods of notice required to terminate a contract of employment. The notice required to be given by an employer to terminate the contract of employment of a person who has been

continuously employed for one month or more is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years.

Redundancy payments

137. When calculating if an employee's entitlement to a redundancy payment is established (i.e. whether the employee has two years' continuous service) the relevant date is the effective date of termination. Therefore, a Tribunal should consider if by the effective date of termination, the employee has been employed for two years.

138. The amount of the redundancy payment is also calculated as at the effective date of termination. The relevant statutory maximum week's pay is the one that was in effect at the employee's effective date of termination.

139. The amount of statutory redundancy pay an employee is entitled to depends on his or her age, length of service and pay. The employee is entitled to one and a half weeks' pay for each complete year of service after reaching the age of 41, one week's pay for each complete year of service between the ages of 22 and 40 inclusive, and half a week's pay for each complete year of service below the age of 22.

Failure to provide written particulars

140. While there is no general legal requirement that a contract of employment be in writing, employers are under a statutory obligation to provide workers with a written statement of the particulars of their main terms and conditions of employment. The right to a written statement under section 1 of ERA applies to 'workers'. Section 1(2) ERA provides that the written particulars required must be given 'not later than the beginning of the employment'.

141. A tribunal has the power to award compensation under section 38 of the Employment Act 2002 where, upon a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5 to that Act, it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under section 1 of ERA. In other words, compensation for breaching the provisions relating to an employer's obligation to provide a written statement can only be awarded in circumstances where the tribunal has heard, and found to be substantiated, one or more of the claims listed in Schedule 5 to the EA 2002, which includes claims for redundancy payments.

142. Under section 38(2)(b) and (3)(b) EA 2002, the date for determining whether the employer was in breach of the rules on written particulars is the date on

which the main proceedings were begun by the worker. In *Govdata Ltd v Denton* [2019] ICR D8, EAT, the Appeal Tribunal held that the tribunal had erred in making an award for failure to comply with section 1 of ERA as the respondent was not in breach of its duty under section 1 when the proceedings began. It had been in breach of the duty by failing to provide a statement within two months of the commencement of the claimant's employment but had complied with the duty prior to the commencement of the proceedings.

143. Under sections 38(2)-(5) EA 2002, where the tribunal finds that the employer breached its duty to provide full and accurate employment particulars, it must award the 'minimum amount' of two weeks' pay (subject to exceptional circumstances which would make an award or increase unjust or inequitable), and may, if it considers it just and equitable in the circumstances, award the 'higher amount' of four weeks' pay.

The Tribunal's findings

Employment status

Were the Claimants an employee of the first respondent within the meaning of section 230 of the Employment Rights Act 1996? If yes, what date did that employment commence?

144. I have found all three of the Claimants were employees of the First Respondent.

145. In respect of Mr Davies, I have found that he was an employee of the First Respondent from July 2011 to July 2021. In respect of Ms Rustem, I have found that she was an employee of the First Respondent from September 2014 to July 2021. In respect of Mr Jacobie, I have found that he was an employee of the First Respondent from January 2017 to July 2021.

Mr Davies

146. Mr Davies entered into a written agreement with Mr Rothwell on 19 August 2011. While it was agreed that he would be a director and purchase a 20% share of the business, Mr Davies was not a controlling shareholder.

147. It is apparent that the written agreement only set out a broad outline of the terms agreed, and the document was not intended to contain all the agreed terms. It stated at paragraph 5, "[The First Claimant] agrees to work full time in Abatis only, for at least 2 years with agreed terms of duties and responsibilities." The details of those agreed terms regarding duties and

responsibilities are not set out in the document, which indicates that Mr Davies and Mr Rothwell had reached an oral agreement on other matters which were not contained within the written document. This is consistent with what Mr Davies said in his evidence to the Tribunal.

148. As I was of the view that the written terms were not the start and end of the agreement reached between Mr Rothwell and Mr Davies, I considered the surrounding factual matrix, including what was agreed orally.

149. I found that Mr Davies' relationship with the First Respondent had the elements of mutuality of obligation, control and personal performance.

150. Mr Davies agreed to work for the First Respondent exclusively for two years under the terms of the agreement reached. I accepted his evidence that he was required to undertake the work he was directed to do by Mr Rothwell. He did not have the option to decide not to work and he was obliged to carry out his role as per the terms he had agreed.

151. Mr Davies explained in his evidence that he was not able to send out marketing material or technical material without Mr Rothwell's permission. Nor was he allowed to make any significant financial decisions without Mr Rothwell's approval. Mr Davies had to report progress against a plan each month to Mr Rothwell. This is consistent with the role of an employee who has to seek authorisation from his superior before he can take certain steps and who needs to regularly report back on the company's progress.

152. I found that Mr Rothwell had an element of day-to-day control over Mr Davies, in that when Mr Rothwell asked Mr Davies to do something, Mr Davies was required to do it, but I also found that the First Respondent had a contractual right of control over Mr Davies. This is consistent with the written term which set out that Mr Davies had agreed duties and responsibilities.

153. Mr Davies also gave evidence that it was Mr Rothwell who made the key decisions, and where they disagreed, Mr Rothwell was the person who had the final say. While Mr Rothwell was the majority shareholder, and this is consistent with his performance of that role, it is also consistent with a finding that he had contractual control over Mr Davies.

154. There was also no doubt that Mr Davies was required to undertake the work himself and he was not able to send a substitute as may have been an option if he were an independent contractor.

155. As a result, I found the irreducible minimum, the three necessary elements, were present in this case. I then went on to consider the other factors that were relevant, including what was agreed regarding pay.

156. As set out above, I accepted Mr Davies' evidence that Mr Rothwell and Mr Davies agreed that Mr Davies would be paid a salary of £70,000 once the company could afford it. As I indicated above, I accepted this because Ms Rustem, Mr Jacobie, and Mr Allen all had the same understanding about the payment of a salary for each of them. They all understood that they were agreeing to work for the company and would be paid a salary when the company could afford it. While none of the Claimants were paid a salary until September 2019, I accept that at the time they each started working for the First Respondent they did so on the understanding that they would be paid a salary in due course. I find that to be consistent with an intention on both sides that they work for the First Respondent as employees.

157. I did not find the fact that Mr Davies was not paid a salary from the outset to mean he was not an employee. The agreement was that he would be paid a salary in due course. I find it likely that if the company had been able to afford a salary for him when he started, he would have been paid a salary then. The fact that he was not paid a salary because the company could not afford it did not undermine the fact that when he joined it was agreed a salary would follow.

158. Furthermore, Mr Davies was initially paid commission payments at a rate of 20% of sales revenue (before it was agreed that 30% of the sales revenue would be split with Mr Allen, Ms Rustem and Mr Jacobie) and this money was not invoiced for, was paid into his personal account, and he paid income tax on the amounts received, which is consistent with employee status.

159. While I accept that an agreement that workers will be paid commission only could point away from employee status, in this case at the time that all the Claimants started working for the First Respondent it was agreed that they would be paid salaries when it could be afforded. In respect of Ms Rustem and Mr Jacobie it was only agreed later, in 2017, that they would also be paid commission. An agreement that the Claimants would be paid initially a salary, and then later also paid commission payments, is more consistent with employee status than that of an independent contractor.

160. I did not find the fact that Mr Davies and Ms Rustem set up a new company in July 2019 undermined the argument that they were employees of the First Respondent. I accepted Mr Davies and Ms Rustem's evidence that at that time they anticipated the First Respondent was going to be sold, and they set up the company for when they were no longer employed. They did not carry

out any significant amount of work for that company and did not receive a salary from it. I do not find the establishment of a company on this basis to be inconsistent with a finding that they were employees of the First Respondent. Furthermore, from September 2019 onwards the First Respondent accepts that all the Claimants were employees.

161. I accepted the evidence given by the Claimants that nothing changed before and after September 2019 in terms of their employment status. While they started being paid under the PAYE system in September 2019, in order that the share scheme could be set up, there was no material difference in terms of the work they did, the hours they worked, or how they worked. They did not reach a new agreement about their employment status at this time. They were not provided with contracts of employment at that point. They simply continued as they had been working before, the only difference was that they were paid a salary under PAYE. Therefore, I accepted the Claimants argument that it would be incorrect to conclude they only became employees in September 2019.

162. In reaching my decision I also took into account the fact that the First Respondent paid for Mr Davies' membership to various professional institutions, paid for him to attend CPD events, training events, paid his professional indemnity insurance, and paid for various work events that Mr Davies organised for the staff. I found these factors to be consistent with employee status and inconsistent with self-employed status.

163. Overall, I accepted that the evidence in this case indicated that Mr Davies was an employee working for the First Respondent from July 2011 to July 2021.

<u>Ms Rustem</u>

164. As already indicated above, I accepted the evidence of Ms Rustem that she agreed to work for the Respondent on the basis that she would be paid a salary once the company was able to afford it. That is consistent with the email sent on 15 July 2015 from Mr Davies to Ms Rustem, which said it was hoped the company would be able to pay her a salary once certain expected investments were received. The email suggests they had previously discussed paying a salary to Ms Rustem, and Mr Davies apologised for the fact it had taken longer than expected.

165. The evidence given by both Mr Davies and Ms Rustem indicated that the essential elements of mutuality of obligation, control, and personal performance were present throughout the period that Ms Rustem worked for the First Respondent. Ms Rustem's evidence was that Mr Davies was her

superior and she was required to carry out the work that he asked her to do. She was not able to send out any materials without them being seen and approved by him. She was not able to simply not do the work asked of her. Mr Davies explained that another employee, who did not carry out the work he was asked to do, was dismissed. That did not arise with either Ms Rustem or Ms Jacobie because they were professional and hardworking and did whatever work they were asked to do.

166. I accepted Ms Rustem's evidence that she worked long hours for the First Respondent, and that she made herself available even while on holiday. The evidence all the Claimants gave about the way in which they worked together, suggested they were all closely integrated into the company.

167. In addition, the payments that Ms Rustem received for commission, from December 2017 onwards, were paid into her personal account and not into a service company, and the First Respondent paid for Ms Rustem's expenses where they related to her role, including paying for professional memberships. These are factors which are indicative of employee status.

168. While Ms Rustem did some consultancy work for a 6 month period this was on a part time basis and only with Mr Davies' consent. I do not find this to be inconsistent with employee status. Often employees are permitted to take on additional work outside their employed role, although that can require the consent of their employers.

169. Overall, I accepted that the evidence in this case indicated that Ms Rustem was an employee working for the First Respondent from September 2014 to July 2021.

Mr Jacobie

170. As set out above, I accepted the evidence given by Mr Davies and Mr Jacobie that when he started, Mr Jacobie was employed on the understanding that he would be paid a salary when the company could afford it.

171. The evidence given by both Mr Davies and Mr Jacobie indicated that the essential elements of mutuality of obligation, control, and personal performance were present. When Mr Jacobie started working for the First Respondent he was given training by Mr Rothwell about the product. Mr Jacobie was regularly sent to client's sites to help with technical issues, and the First Respondent paid all his expenses. He had to be available to carry out the duties given to him by Mr Rothwell and Mr Davies. He did not have the option to refuse to work. If he had not carried out the work expected of him, he would have been dismissed as Mr Davies said in his evidence.

172. Mr Jacobie had to check with Ms Rustem that it was possible for him to take holidays on specific days and if there was something that he would be needed for over that period, he would take his holiday at a different time. This is inconsistent with being self-employed.

173. In addition, Mr Jacobie worked long hours, including evenings, weekends, and over one particular Christmas. He did not work for anyone else from the start of 2017 to July 2021. The evidence presented to me was indicative of an employee who was closely integrated into the company.

174. Overall, I accepted that the evidence in this case indicated that Mr Jacobie was an employee working for the First Respondent from January 2017 to July 2021.

Were the Claimants a worker of the first respondent within the meaning of section 230 of the Employment Rights Act 1996? If yes, what date did that worker status commence?

175. As the Claimants have all been found to be employees under the definition set out in section 230 of ERA, they also come within the definition of worker.

Time limits - Were the unauthorised deductions complaints made within the time limit in section 23 of the Employment Rights Act 1996? Were there a series of deductions the last of which was in time?

176. The Claimants last received a payment from the Respondent on 31 May 2021. In order to bring a claim in time about any unauthorised deductions from this payment, or about a series of deductions, they would need to have contacted Acas for early conciliation purposes by 30 August 2021.

177. Mr Davies contacted Acas for early conciliation purposes on 6 February 2022. The certificate was issued on the same day and the Claim Form was submitted on 16 February 2022. As a result, the Claimants' claims for unauthorised deduction from wages are out of time.

Was it reasonably practicable for the unauthorised deduction from wages claims, and the other claims under the Working Time Regulations (WTR) and the claim for breach of contract, to be made to the Tribunal within the time limit?

178. It is apparent that not only are the Claimants' claims for unauthorised deductions from wages out of time but so are the Claimants' claims under the WTR and the claims for breach of contract.

179. The Claimants' effective date of termination was 23 July 2021, the date on which the First Respondent went into voluntary liquidation. In order to bring a claim in time, about any payment which they say was owed on termination of employment, they would need to have contacted Acas for early conciliation purposes by 22 October 2021. As noted above, Acas was contacted on 6 February 2022.

180. All three of these types of claims (unauthorised deductions from wages, a claim under WTR, and a claim for breach of contract) require the Tribunal to consider if it was 'reasonably practicable' for these claims to have been brought within time. I have therefore decided that it is appropriate to consider this point in respect of these claims together.

181. As the starting point for the time limit is different for the different claims, I have to decide if it was reasonably practicable for the Claimants to have contacted Acas for early conciliation purposes by 30 August 2021, and then have submitted a claim to the Employment Tribunal within a month of the Early Conciliation certificate having been issued, with regards to the claims for unauthorised deduction from wages, and I have to decide if it was reasonably practicable for the Claimants to have contacted Acas for early conciliation purposes by 22 October 2021, and then have submitted a claim to the Employment Tribunal within a month of the Early Conciliation certificate having been issued, with regards to the claims for holiday pay under the WTR and the claims for breach of contract regarding notice pay.

182. I have concluded that it would have been reasonably practicable for the Claimants to have contacted Acas for early conciliation purposes by 30 August 2021 in respect of the claims for unauthorised deduction from wages and to have contacted Acas for early conciliation purposes by 22 October 2021 in respect of the claims for holiday pay under the WTR and claims for breach of contract regarding notice pay.

183. This is not a case where the Claimants were ignorant of their rights. On 7 April 2021, Mr Davies brought to Mr Rothwell's attention his concern that he and the other Claimants were owed National Minimum Wage. He also referred in this email to the fact the First Respondent had not paid holiday pay or pensions. On the same day Bird & Bird LLP sent a letter on Mr Davies behalf (p242-244). In that letter it states that Mr Davies is owed back pay for wages, at the rate of the National Minimum Wage, holiday pay, and unpaid pension contributions. It was noted the same were owed to Ms Rushem and Mr Jacobie. There is reference in the letter to the fact the Claimant may need to pursue the claims by way of formal proceedings. It is apparent from this letter that Mr Davies had been advised of his ability to bring claims, and thus

he was not ignorant of his rights or his ability to pursue those rights in the courts.

184. On 25 May 2021, Bird & Bird LLP sent a further letter to the First Respondent on Mr Davies behalf. In the letter it noted, "Our client's claims in respect of outstanding national minimum wage and holiday pay payments, which would be brought in the High Court and Employment Tribunal respectively, are against Abatis UK…" (p246). The reference to bringing proceedings in the High Court for back pay for National Minimum Wages is likely to have been included because the Claimants cannot claim for more than two years of unauthorised deduction from wages in the Employment Tribunal.

185. In any event it is clear that in April and May 2021 Mr Davies had legal representation. It would appear he had been given legal advice on bringing claims for unpaid National Minimum Wage, holiday pay and pension contributions. If Mr Davies was not advised or was not correctly advised about the time limits for bringing a claim by his advisors, then the case law set out above, is clear that his remedy lies against those advisors. I have not been persuaded that Mr Davies was not correctly advised about the time limits by either the solicitors he instructed or by Ms Thomas when she was instructed to assist him and the other Claimants in July 2021. In short, Mr Davies and the other Claimants had the benefit of assistance from two sources several months before the time limits expired.

186. Mr Davies explained that the reason why the Claimants did not act within the time limits was due to the delay from the Insolvency Practitioner in confirming his position with regard to their claims, and then due to the fact that they waited to hear from the Redundancy Payment Service. They suggested that the Insolvency Practitioner deliberately delayed so that their claims would be out of time. I did not accept the suggestion that Mr Evans deliberately delayed so as to prevent them from being able to make claims. There are emails between Mr Evans and Ms Thomas throughout the relevant period, and it is clear that Mr Evans found it difficult to reach a view on whether the Claimants were employees and if so from when. This is undoubtedly a complicated issue and therefore it is understandable that it took him some time to reach a decision. In any event, he reached a decision and notified Ms Thomas on 11 October 2021, which was before the deadline of 22 October 2021. The Claimants could therefore have contacted Acas within time at that point.

187. Mr Davies said that if the Claimants had been paid a redundancy payment, then there would have been no need for them to resort to litigation. He pointed out that the aim of the overriding objective is to avoid litigation and resolve matters where possible without having to resort to the courts and tribunals. That is a fair point, and one that might explain the reasons for delaying with regards to a claim for a redundancy payment. It does not however explain the

reason for delaying bringing claims for unpaid National Minimum Wage, holiday pay owed for days which the Claimants claim had rolled over from previous years, or pension contributions. The Claimants had only claimed for unpaid wages for June and July 2021 and had only claimed for their holiday entitlement in their final year from the Redundancy Payment Service. Therefore, the claims for unpaid National Minimum Wage, holiday pay owed for days which the Claimants claim had rolled over from previous years, or pension contributions were not claims that were going to be resolved by an application to the Redundancy Payment Service.

188. I am of the view that Mr Davies and the other Claimants had the benefit of legal advice considerably before the limitation dates in August and October 2021. Therefore, it was reasonably practicable for them to have presented their claims in time. As a result, the Claimants' claims for unauthorised deductions from wages, the claims under the WTR, and the claims for breach of contract are out of time and are dismissed.

Based on the employment status determined above, what are the correct statutory redundancy payment for the claimants?

189. As I have found the Claimants were all employees who worked for the First Respondent for more than two years, they are all entitled to a redundancy payment. The First Respondent accepted that their claims were in time.

190. I accepted the Claimants' evidence that they all worked at least 40 hours per week. I have therefore based their redundancy payments on a weekly wage of 40 hours of national minimum wage pay at the time at which they were dismissed (£8.91). This is £356.40 per week.

191. Based on their length of service and their ages at the date of dismissal (10 years for Mr Davies (58yrs), 6 years for Ms Rustem (62yrs) and 4 years for Mr Jacobie (58yrs)), I have calculated that they are owed:

    a) Mr Davies - £5,346.00
    b) Ms Rustem - £3,207.60
    c) Mr Jacobie - £2,138.40

Remedy - When the Claimants began proceedings, was the First Respondent in breach of its duty under section 1 ERA 1996? Is that duty a continuing duty owed to employees whose employment has been terminated in circumstances where the First Respondent is no longer trading? Must the Tribunal make an award under s.38 Employment Act 2002 and, if so, how much?

192. The First Respondent was in breach of its duty under section 1 of the Employments Rights Act 1996 to provide the Claimants with statements of initial employment particulars. This was not provided at the outset of their employment, during their employment, at the point they moved to PAYE in September 2019, and was not provided at any point prior to the Claimants commencing proceedings in the Employment Tribunal.

193. The Claimants have been successful with their claims for a redundancy payment, which is a claim listed under Schedule 5 to the EA 2002.

194. As I found that the First Respondent breached its duty to provide full and accurate employment particulars, I must award the minimum amount of two weeks' pay, subject to exceptional circumstances which would make an award or increase unjust or inequitable.

195. Given the way in which the questions on this matter have been phrased in the agreed List of Issues, I assume the First Respondent had intended to argue it would be unjust or inequitable to award two weeks' pay in circumstances where the First Respondent was in voluntary liquidation by the time the Claimants' commenced proceedings. However, this argument was not set out in the written submissions submitted on behalf of the First Respondent. Furthermore, I note that the First Respondent accepts that the Claimants were employees from September 2019 when they were paid via PAYE and pensions were set up for them. There has been no explanation from the First Respondent why employment particulars were not provided to the Claimants at that time. As a result, I do not find it would unjust or inequitable to make an award of two weeks' pay.

196. As a result, I award each Claimant two weeks' pay based on the same calculation set out above. Each Claimant is to be paid a further £712.80.

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Employment Judge Annand

Date: 26 July 2024

JUDGMENT SENT TO THE PARTIES ON
6 August 2024

FOR THE TRIBUNAL OFFICE

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