EMPLOYMENT TRIBUNALS

Claimant: Mr Andrew Slater

Respondent: Joined Up SaaS Limited

Heard at: London South (by CVP)

On: 21, 22 and 23 August 2024

Before: Employment Judge Carney

Representation
Claimant: In person
Respondent: Ms L Halsall, counsel

JUDGMENT having been sent to the parties on ***28 August 2024*** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and issues

1. By a claim form presented on 22 June 2022, Mr Slater brought the following claims against Joined Up SaaS Limited:
    a. Unfair dismissal;
    b. Unlawful deductions from wages in respect of (i) an alleged shortfall of wages, (ii) travel expenses, (iii) pension contributions and (iv) notice pay
    c. Breach of contract in respect of matters (i) to (iv) as set out in 1(b) above.

2. Early conciliation started on 24 March 2022 and ended on 27 April 2022.

3. The issues to be decided were agreed at a case management hearing held on 12 September 2023. The parties confirmed at the start of this hearing that the claims and issues to be decided remained the same. The agreed list of issues is set out in the appendix at the end of these reasons.

Procedure

4. The respondent was represented on the first day by counsel (Ms Laura Halsall). The claimant represented himself. I heard evidence from the

claimant and from Mr Sheffield, the owner and Managing Director of the respondent.

5. There had been a number of disagreements between the parties before the hearing about documents, the bundle and witness statements. The upshot was that there was not an agreed bundle and both the claimant and the respondent had prepared different bundles and submitted them to the tribunal. They had used the page numbers from their own bundles in their witness statements. There was also a disagreement about witness statements. I consider that both parties were at fault in these matters.

6. The claimant had prepared a 24-page witness statement for this hearing dated 16 August 2024. The respondent had prepared a 13-page witness statement dated 15 August 2024 and a 12-page supplementary witness statement (with attachments) dated 17 August 2024.

7. Both parties also had witness statements from September 2023 and January 2024 prepared for the case management hearing on 12 September 2023 and a hearing on 17 January 2024 which had been listed for the 3-day full merits hearing but was changed into a case management hearing on the day because the respondent was not prepared.

8. The claimant said that Mr Sheffield had been ordered in the 17 January hearing not to change his witness statement, other than to serve a supplementary witness statement dealing with new documents disclosed by the claimant and to amend the statement solely to correct references to bundle page numbers. The claimant originally asked for the respondent to be restricted to using that witness statement. Mr Sheffield said that his lawyers had filed the wrong draft of his witness statement in the January hearing and that the latest witness statement was the correct version that should have been filed then. The supplementary statement was to deal with the additional things he said the claimant had put into his new statement.

9. I refused the claimant's application. I accepted the respondent's evidence that the wrong statement had been filed. I noted that the claimant did not have permission from the tribunal to serve a new statement and that his new statement was considerably longer than his original one. And I took into account the fact that both parties were attempting to rely on new statements and that I would normally permit additional supplementary questions in the hearing in any event. I therefore permitted both parties to rely on their August 2024 statements and I permitted the claimant to cross examine Mr Sheffield on the differences between the January and the August statements, which was the difference between one figure in paragraphs 52 and 54 of the January statement.

10. Both parties wished to rely on their own bundles but this would have made the tribunal's job very difficult. Each bundle omitted some documents which the other side wanted included. The respondent's bundle contained more of the relevant documents than the claimant's bundle. And I did not have a copy of the claimant's bundle, the only bundle the tribunal staff had provided to me was the respondent's. In the circumstances, I decided we would use the respondent's bundle. We added 14 supplementary pages,

the claimant wished to rely on. The claimant later supplied me with a new version of his witness statement with corrected pages numbers relating to the tribunal bundle.

11. The claimant was also requesting some additional disclosure. The respondent provided everything they had in their possession but could not obtain copies of some phone records from a telephone provider they were no longer contracted with (Three). Some other documents the claimant requested did not exist.

12. The respondent also made an application for specific disclosure of the claimant's 2021/22 tax return which relates to the relevant period. Mr Slater agreed to provide it, however, he failed to do so.

13. I informed the parties that unless I was taken to a document in the bundle (as supplemented) I would not read it. Page numbers in these reasons relate to page numbers in the bundle.

14. At the end of the evidence, both parties provided written representations for me to consider.

Fact-findings

15. The respondent (Joined Up SaaS Limited) is a company that provides software services to the insurance industry. Mr Sheffield is its owner and Managing Director (MD). In addition to the respondent, Mr Sheffield is the owner and MD of two other companies: Operando Innovation Limited and Trident Cloud Limited (t/a Trackd). In these reasons I refer to them as "Operando" and "Trident" respectively, unless I am quoting from a document which refers to Trident as "Trackd".

16. Trident was a music platform with an app which allowed musicians to create and record music on an iPhone.

17. Operando was a software development company which had a piece of software which allowed insurance brokers to price insurance products for their customers.

18. The respondent was spun out of Operando to grow the InsurTech business and raise investment.

19. The claimant is a Chartered Management accountant.

20. Around May 2019 Mr Sheffield approached the claimant through an online platform for freelance contract service providers called "PeoplePerHour", where the claimant was marketing his services as a "Freelance Finance Professional" (p. 111).

21. The claimant was operating his consultancy through an unincorporated business called "Tribus Way". He had a business email address (Andrew@tribusway.com) and a website (www.tribusway.com). He subsequently incorporated the business on 19 April 2022 (after these events). The claimant's Tribus Way website and PeoplePerHour listing remained in place throughout all the events we are concerned with and were still up at the date of the hearing. The website highlights "Trackd" and

"Joined Up", as was well as other businesses (e.g. Broadstone Resourcing Limited and She Rose 165 Limited) as clients of Tribus Way.

22. The claimant's profile says "my background covers commercial, strategic, technical and analytics with strong FP&A [financial, planning and analysis] skills. Initially I worked in financial analysis and the preparation of statutory and management accounts, which I still complete for a number of clients. I progressed into financial planning & analysis, SOX, risk management and financial modelling. More recently working as a CFO, I was primarily focussed on stakeholder management, financial leadership and the development of financial infrastructure…. I now work on a freelance basis meaning you only pay for the support and services provided to your business saving you overhead costs".

23. The parties agree that at this time Mr Sheffield was seeking support for Trident, not for the respondent. He wanted help with financial modelling and business planning for Trident.

24. On 9 May 2019 the claimant emailed Mr Sheffield, having looked at documents Mr Sheffield had provided and said the P&L and financials need some work to be ready for potential investors, "especially as you are looking to raise £1m of investment". He said he would work with him to develop an investment strategy and complete all the financials required. The claimant said: "I would normally work on a day rate of circa £350-750 for CFO level projects, however, I don't feel that would really work for you and Trackd at this stage of the business. There is also potential longevity in the project for me and your cashflow is currently very tight. Taking this into account, I would like to propose an initial 2 days of work at a £250 day rate to remedy the issues with the P&L and subsequent financial statements. Then there are a couple of options in terms of move forward, [sic], in line with the conversation we had yesterday as well as how I operate with other clients. 1. A 2.5% ownership of the business (pre-money). Giving you access to all of my knowledge and experience at a CFO level, pre-raise and involvement post-raise as well. 2. A monthly retainer of £1000 per month, for the planned 3 months to investment raise for the same level of support" (p. 113).

25. The claimant provided services to Trident and invoiced it £500, as Tribus Way, in July 2019 as he'd suggested in his email (p. 114).

26. The claimant did not invoice any of the respondents' businesses after this point. Neither did he ever receive any wage slips. All payments to the claimant were made gross without deductions for PAYE or national insurance contributions.

27. On 7 October 2019, Mr Sheffield emailed the claimant about "Trackd shares" proposing to assign him shares for the "sweat equity" you're putting in at this crucial time" (p. 115). The claimant agrees he was to provide services to Trident on a sweat equity basis – if they raised money he would get paid (claimant's witness statement paragraph 15). This is in accordance with the claimant's own suggestion in his email that he should receive equity in exchange for financial advice.

28. From January 2020 Trident had raised enough money to start paying the claimant £1,500 per month. In his witness statement the claimant calls this "salary" and he says he was employed by Trident from 1 July 2019 to 28 February 2022 (paragraph 4a) but in his evidence before the tribunal in the hearing he was clear he does not think he was ever employed by Trident. On the claimant's own account therefore, this was a monthly retainer by Trident in accordance with the arrangement he himself had proposed under which he could provide freelance services.

29. Mr Sheffield was happy enough with the claimant's work around this time that he invited him to provide services to Operando from around February 2020. Payments from Operando to Mr Slater of £2000 per month can be seen on his bank statement (pp. 250 onwards).

30. On 11 February 2020, the claimant signed a consultancy agreement which covered work for Operando, Trident and the respondent (pp. 57–70). The respondent had not at this point started trading.

31. The consultancy agreement does not provide for sick pay, holiday pay, or pension contributions. It says that the companies will not be responsible for expenses unless previously agreed in writing. It also says that the claimant will render monthly invoices. (As set out above, the claimant never issued any invoices after the first one.) It says it can be terminated forthwith if the other party commits a material breach or by the client on notice to the consultant with immediate effect (pp.64–65). It is silent on what days or hours are expected to be worked and simply says the consultant will provide "business advisory, financial advisory and chief financial role" consultancy services (p. 82).

32. The claimant says that at this point he was being paid £2000 per month by Operando and that he continued to be paid £1,500 per month by Trident Cloud until in May 2020 Mr Sheffield swapped the payments around between the companies (witness statement paragraphs 18, 19 and 22).

33. The claimant was made a director of Trident on 1 March 2020. He was made a director of the respondent on 19 October 2020 and of Songs Start Here on 21 September 2020. I did not hear any evidence about Songs Start here, other than that it was a business set up to ensure compliance with Apple's terms and conditions regarding payments on behalf of Trident. The claimant was not at any point a director of Operando.

34. In or around November 2020, Trident lent the claimant various pieces of equipment, including a computer, a phone and a monitor. The claimant says that this shows he was an employee because he was being given equipment to do his job. This equipment was not provided by the company he says was his employer but by the company he says he was never employed by but to whom he did provide services as a freelance contractor. This equipment has never been returned by the claimant. Given he was performing freelance services for Trident, I find that the equipment was loaned to him by that company for the purpose of performing those services.

35. Around the second half of 2020, Mr Sheffield and the claimant and other people working in the business made plans to spin business out of Operando and into the respondent. This was to try and use the respondent as a vehicle for raising investment. They believed it would be easier to raise money as an "InsurTech" business if the company was purely focused on that type of work, rather than having a mixture of different business interests, as Operando did.

36. The respondent started trading on 1 January 2021. Operando's client, URIS, terminated its contract with Operando and signed a new contract with the respondent. An intellectual property (IP) agreement was signed between the respondent and Operando whereby Operando's IP was sold to the respondent for £3 million. The respondent was to pay £300,000 to Operando in instalments over 2 years and the balance of the money owing on the sale of the respondent. The claimant says that this IP agreement was backdated. I don't think it makes any difference to these claims whether it was or not.

37. The claimant says that he was employed by Operando immediately before 1 January 2021 and on this date TUPE transferred to the respondent on the transfer of the business to the respondent. At the time he says he did not realise he was an employee and that is why he completed a due diligence document saying there were no employees and no TUPE issues (p. 181). In the same document the claimant wrote that "PAYE would be rolled out once investment is completed" (p. 180).

38. The parties agree that the other people working in Operando (including Mr Sheffield, Mr Eccleshall (Chief Technical Officer), Mr Glenn Murley (developer), and Mr Simon Chapman (Senior Developer)) did not believe they were employees but thought they were self-employed contractors.

39. The claimant, signed a new consultancy agreement with the respondent on 1 January 2021 (p. 71–84). This replaced the agreement the claimant had made with Operando, Trident and the respondent dated 11 February 2020. This consultancy agreement contained the same terms as the previous consultancy agreement about expenses and termination. And, as before, it did not provide for holiday pay or sick pay or pension contributions and is silent on days and hours to be worked.

40. The claimant accepts that after he started working for the respondent, he was being paid by both the respondent (£1500) and Trident (£2000) (claimant's witness statement paragraph 25).

41. Around the end of 2020 and the beginning of 2021 Mr Sheffield and the claimant were trying to attract investment into the new vehicle. They started working with White Horse Capital who undertook to provide support to raise venture capital (VC) investment for which they would take a success fee.

42. Both Mr Sheffield and the claimant agree that White Horse Capital told them they would both need service agreements with the respondent in order to raise the investment or a VC firm would not think they were sufficiently committed to the business. There is a service contract at pp.

85–102 of the bundle. It is signed by Mr Sheffield on behalf of the respondent and by the claimant. The date on the front cover is 1 January 2021. However, that would make it the same date as the second consultancy agreement, which seems highly unlikely. On the first page of this service contract it says "this contract is made the 1st day of July 2021". The agreement says the commencement date is "the date of this contract". The claimant claims he understood the commencement date to be 1 July 2021. The agreement provides for an annual salary of £80,000 as well as for pension contributions and travel benefit of £1000 per month. It is on the argument that this contract was in force that the claimant rests his claim for breach of contract and unlawful deduction from wages.

43. There is disagreement between the claimant and Mr Sheffield about this service contract. The claimant says it came into force on 1 July and had to do so in order to obtain investment. He says that he and Mr Sheffield agreed that they would not take the salary immediately but that the balance would be left in the business to provide working capital and could be drawn out subsequently. Mr Sheffield completely disagrees. He says there was no such agreement and that it was clearly understood that the service contract would only come into force if and when they obtained the investment.

44. The claimant continued to receive the same amounts as previously until October 2021, rather than the salary and other benefits provided under the service agreement, and there is no evidence that he ever objected to this before October 2021.

45. I find that I prefer the evidence of Mr Sheffield on this issue. I do so because I believe that if Mr Slater had really agreed to postpone this amount of salary and benefits he would have confirmed this arrangement in writing, even if just by an email or Slack message. The claimant's account is also not supported by his subsequent emails, in particular the ones I mention below nor by the way he completed the due diligence document mentioned above.

46. I find that the reality of the situation is that there was certainly a hope that investment would be raised and he could then become an employee on these terms but that the service contract was principally created to give the impression to prospective investors that the Chief Financial Officer, Mr Slater, was an employee. It was window dressing to be shown to prospective investors because White Horse Capital had told them they needed it in the data room.

47. In around August or September 2021, the claimant became aware that other people providing services to Trident and the respondent were getting more money than he was.

48. There is an exchange of Slack messages dated 8 October 2021 in which the claimant asks for more money (p. 199). He does not say he is owed the salary set out in the employment contract. He asks Mr Sheffield to "increase my money to £5K a month". He also does not say that if his monthly payment is increased by that amount, it will come out of the balance of his salary he claims Mr Sheffield had agreed was being held for

him in the company. This message is completely inconsistent with the claimant believing that the service agreement was in force and that he was currently owed that salary.

49. The claimant tells Mr Sheffield he has two options: increase my money to £5K a month or "reduce my commitment and look for additional work". Mr Sheffield replies, "the salaries in the plan were always predicated on raising sufficient funds, which to date we have not … rather disappointingly, I think we have to look at option 2 until we have them" (p. 199). In other words, Mr Sheffield makes it clear he is not going to increase the money. Mr Sheffield also makes no mention of this supposed salary balance that the claimant says Mr Sheffield knew was being held in the company. And the claimant does not respond to this refusal by saying *you have to pay me because that is salary I am owed*, instead he says "really disappointed you feel unable to share the limited resources in a fair fashion".

50. The claimant's evidence was that, despite Mr Sheffield's clear refusal to pay more money in these messages, Mr Sheffield subsequently agreed orally to increase his payments to £3000 per month. There is nothing in writing to substantiate this claim.

51. From October 2021, the claimant increased the payments to himself to £3000 per month. At this point he was an authorised signatory to the bank account and had been making payments to various persons working in the business. Mr Sheffield says this increase in money was not agreed and was a unilateral action by the claimant. He says he did not find out until December about the increased monthly payments. He also says the claimant took £1620 without consent to pay a housing firm, Caxtons, in connection with moving house.

52. The claimant says Mr Sheffield has forgotten he agreed to increased monthly payments. But he accepts Mr Sheffield had not agreed to pay the £1620 for Caxtons and that Mr Sheffield had offered unspecified help of "financial support" and the Claimant had taken this sum without getting prior agreement.

53. I prefer Mr Sheffield's account to the claimant's and find that Mr Sheffield did not orally agree the pay increase. I prefer Mr Sheffield's evidence because I find it unbelievable that Mr Sheffield would have forgotten agreeing an increase to Mr Slater at a time he was obviously worried about cashflow. Mr Sheffield's worries about cashflow at the time can be seen from his contemporaneous messages (see pp. 199, 212, 214).

54. Mr Sheffield's account is also consistent with his messages at the time, in particular his message of 22 December 2021 (pp. 214–215). The claimant says that Mr Sheffield's thumbs up emoji in this message shows he agreed the increased payments. I do not accept this. That thumbs up could be a response to any part of that message, including just acknowledging the apology the claimant had made for taking the Caxtons money.

55. The claimant says that Mr Sheffield would have known that the increased payments had been taken from October because he would have had updates on his phone from Starling Bank. I accept Mr Sheffield's evidence that this function was not turned on on his phone.

56. The claimant says that the recording transcript of the 1 March 2022 so-called "compromise zoom call" shows that Mr Sheffield admits he knew about the increased payments from October (p. 304). I do not accept this. The transcript is consistent with Mr Sheffield's account that he is talking about finding out in December that the payments had been taken from October.

57. Mr Sheffield's then spent January investigating the unauthorised payments to the claimant before he took any further action.

58. On 28 February 2022, the claimant received an app notification from Starling Bank that someone had been removed as a director. The claimant says he believed the respondent's bank account had been compromised and he therefore transferred £5,000 from the account to his own personal account. He sent a message to Mr Sheffield saying he had done this (p. 232). Mr Sheffield replied immediately saying there was no hack and instructing him to put the money back. The claimant did not return the money and has not done so to date.

59. The claimant was removed as a director of the respondent on 28 February 2022. The claimant's engagement was ended on 1 March 2022 at a zoom meeting between Mr Sheffield and the claimant.

60. Throughout the period the claimant says he was an employee of Operando and then the respondent, he continued to do paid work for two other clients, as well as Trident: Broadstone Resourcing Limited (p. 117, 118, 119) and She Rose 165 Limited (Jo Oakley) (p. 221–224, p. 252). The claimant says they were friends and I accept this but they were also clients.

61. The claimant agreed in cross examination that he did not need permission from the respondent to take holiday but he said he would put the dates in Mr Sheffield's diary. He says he did not need to ask permission because of the level he was working at (C-level).

62. The claimant was paid in respect of a period he was off sick. The claimant acknowledged in cross examination that he had completed all the work he had to do in this period. It was never identified anywhere at the time as sick pay. So, I find that this is not sick pay but payment for work done.

63. The claimant was also paid his normal monthly amount when he was on holiday. He says this was holiday pay. Mr Sheffield denies this. It was never identified at the time as holiday pay. I find that this was not holiday pay but the monthly retainer and was paid on the same basis as other payments – because agreed work had been completed.

64. The claimant admits he did not have set hours. He says there was an "understanding" he would be available in work hours for meetings but could not say this had ever been discussed, or that he'd ever been

required to work those hours or to attend those meetings. Mr Sheffield denied any such understanding and I prefer his account. There is nothing to indicate that the respondent had a contractual right to tell the claimant how many or what hours he should work or where he should work.

65. The consultancy agreement provides that the claimant should not sub-contract without the consent of the respondent (p. 79). But this clause was never tested as he never asked to send a substitute. Mr Sheffield's evidence was that the claimant could not send a substitute because of the confidential nature of the work he did (witness statement, paragraph 46).

66. The claimant says he had a respondent email address which he says was provided to him as an employee. However, he also accepts he had a Trident email address, which company he says he was never employed by. And he did not have an Operando email address, even though he says he was employed by Operando before TUPE transferring to the respondent. In the circumstances, I prefer Mr Sheffield's explanation that the email addresses were provided because the claimant was a statutory director of the two companies and they were trying to present him to potential investors for those companies in the most professional way.

67. The claimant pointed to various emails and other messages from Mr Sheffield which were asking him to do various tasks or checking whether or not he had completed them. He says that taken collectively these showed Mr Sheffield was exercising a level of control over him and his work which was the type of control an employer would exercise over an employee. These messages do show that Mr Sheffield was requesting the claimant perform certain work. Whether or not this was an "employer" level of control, I deal with in my conclusions.

68. The claimant could choose where to work and provided his services from home or from co-working spaces with occasional visits for face-to-face meetings.

69. The claimant says he was invited to work social events for the respondent company indicating his integration. Mr Sheffield says they were social events for Trident. I prefer Mr Sheffield's explanation, as he was able to give corroborating detail of how, for example, an event was a charity music quiz and Trident was working in the music business whereas Operando and Joined Up were not.

70. The claimant was being paid a monthly amount by a company he says employed him (Operando and later the respondent) and also by a company he says did not employ him (Trident). He invites us to find this was salary from the company he says employed him. I find that both payments were retainers to him on a self-employed basis, as he himself had suggested at the beginning of the working relationship. And that he was also being promised equity to remunerate him for self-employed services.

Law

71. The right not to be unfairly dismissed is contained in section 94 Employment Rights Act 1996 (ERA).

72. Section 94(1) ERA says that "an employee has the right not to be unfairly dismissed by his employer". The right to bring a claim is therefore contingent on being an employee.

73. The right not to suffer unauthorised deductions from wages is contained in section 13 ERA.

74. Section 13(1) ERA says that "an employer shall not make a deduction of wages of a worker employed by him […]". The right to bring a claim for unauthorised deductions is therefore contingent on being a worker.

75. The law on the right to bring a breach of contract claim in the employment tribunal is set out in section 3 Employment Tribunals Act 1996 and the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (the "1994 Order").

76. Article 3 of the 1994 Order says that "proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages […]". It therefore limits the right to bring a breach of contract claim in the employment tribunal to employees.

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

78. Section 230(3) of the ERA defines a worker as "an individual who has entered into or works under (or where the contract has ceased worked under) —

    a. a contract of employment; or

    b. any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual". [Workers working under this contact are often called 'limb b' workers after the sub-section of the statute.]

79. A worker is a person who provides personal work to someone else, other than on a self-employed basis. In contrast, a self-employed contractor carries on a professional or business undertaking on their own account to provide work or services to clients or customers.

80. There is a lot of caselaw on what makes an employment contract (also known as a "contract of service"). The starting point of any consideration of the issue is usually the case of *Ready Mixed Concrete (South East) Ltd*

v Minister of Pensions and National Insurance [1968] 2 QB 497, in which MacKenna J held:

> *A contract of service [i.e. a contract of employment] exists if these three conditions are fulfilled. The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. The other provisions of the contract are consistent with its being a contract of service … Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be.*

81. Other courts have followed the *Ready Mixed Concrete* decision to establish that there is an "irreducible minimum" without which it will be all but impossible for a contract of service to exist (see *Nethermere (St Neots) Ltd v Gardiner and anor* [1984] ICR 612 CA, cited approvingly by the House of Lords in *Carmichael and anor v National Power Plc* [1999] ICR 1226 HL).

82. The "irreducible minimum" is:

    a. Control;

    b. Mutuality of obligation; and

    c. Personal performance.

83. The Court of Appeal in *Hall (Inspector of Taxes) v Lorimer* [1994] ICR 218 CA cautioned against using a checklist approach in which the 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. In so doing, it upheld the decision of Mr Justice Mummery in the High Court who stated that:

> *this is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. 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. It is a matter of evaluation of the overall effect of the detail… Not all details are of equal weight or importance in any given situation.*

84. The Supreme Court in *Autoclenz v Belcher and ors* [2011] ICR 1157 SC set out that the court may have to look behind the written terms of a signed contract in an employment situation. Lord Clarke (who gave the sole judgment of the Court) considered that the question in every case is "what was the true agreement between the parties?".

85. In *Uber BV and ors v Aslam and ors* [2021] ICR 657 SC, the Supreme Court considered the question of "worker" status and held that the determination of worker status is a question of statutory not contractual interpretation and therefore it is 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 organization who exercises control over their work.

86. In *Ter-berg v Simply Smile Manor House Ltd and ors* [2023] EAT 2, the EAT considered the *Uber* decision and held the Supreme Court did not say that the written terms are always irrelevant or could not 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.

87. On the issue of "control", the case of *White and anor v Troutbeck SA* [2013] IRLR 949 CA, held that the correct question is not whether the respondent exercised day to day control over the claimant's work but whether it had to a sufficient degree a contractual right of control over them.

88. There are some kinds of work where the scope for controlling how the work is performed is more limited (e.g. highly skilled work such as brain surgery). The question is whether the contract between the parties gives the employer a right to direct the individual in various respects. It's not about whether the employer exercises day to day control over the work. The employee may have a skill which the employer does not have or chooses not to perform (e.g. an inhouse solicitor or a chauffeur) but they are still an employee (*Wright v Aegis Defence Services (BVI) Ltd and ors* EAT 0173/17).

89. Indirect control under which a party could choose to terminate the contract if the other party fails to meet the required standards of skill, integrity and reliability is not sufficient. This level of control is the same as a party to any other contract (such as a contract for services) would possess.

90. On the question of mutuality of obligation, the question is whether there was an obligation on the claimant to do at least some work for the respondent and a correlative obligation on the employer to pay for it (*Dakin v Brighton Marina Residential Management Co Ltd* EAT 0380/12).

91. Control, mutuality of obligation and personal service are the required minimum of a contract of employment. But this does not mean that contracts that contain the irreducible minimum are necessarily contracts of employment. The case of *Ready Mixed Concrete* (see above) set out a condition that the other provisions of the contract also have to be consistent with it being a contract of employment. Such other factors can include financial arrangements (invoicing, wage slips, tax arrangements), the label the parties place on the arrangement, whether or not the respondent provides work equipment, other activities undertaking by the claimant (such as providing work to others), whether the individual has been integrated into the organisation, who takes the financial risk and reward, and what benefits are provided (such as holiday pay, sick pay and other benefits).

92. In *Quashie v Stringfellow Restaurants Ltd* [2013] IRLR 99, CA (in which a lap dancer who had accepted contractually that she was self-employed could not claim unfair dismissal) Elias LJ said:

    It is trite law that the parties cannot by agreement fix the status of their relationship: that is an objective matter to be determined by an assessment of all the relevant factors. But it is legitimate for a court to have regard to the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain it can be decisive.

93. Limb (a) of the statutory definition of "worker" in section 230(3) ERA means that anyone who is an employee under the ERA is also a worker.

94. In contrast to an "employee", a "limb (b) worker" is defined in the legislation, and "there can be no substitute for applying the words of the statute to the facts of the individual case" (per Lady Hale in *Bates van Winkelhof v Clyde & Co LLP and anor (Public Concern at Work intervening)* [2014] ICR 730 SC).

95. In *Byrne Brothers (Formworks) Ltd v Baird* [2002] IRLR 96 EAT, a case under the Working Time Regulations 1998, the EAT said that consideration of who is a worker would involve the same sorts of factors as are considered in deciding who is an employee, "but with the boundary pushed further in the putative worker's favour".

Conclusions

Control

96. The claimant suggested that emails from Mr Sheffield show he was subject to an "employer/employee" degree of control by the respondent. I do not accept this. Mr Sheffield was anxious about whether work the claimant was contracted to do was being done. In the same way, if I contracted with a house painter to paint my house, I would raise it with them if they painted it in the wrong colour. This does not indicate control in the sense of the control an employer exercises over how an employee provides work.

97. The claimant also seems to confuse the control Mr Sheffield exercised over his various companies with the control the respondent would exercise over the claimant if in an employment relationship. Mr Sheffield clearly controlled and had the right to control the various companies he owned and for which he was MD.

98. The cases I set out above (*White and anor v Troutbeck* and *Wright v Aegis Defence Services (BVI) Ltd and ors*) talk about whether the respondent had in sufficient degree a contractual right of control. This is different from whether or not day to day control is exercised over work. The sort of questions which determine whether an "employer's" control is being exercised, are: does the respondent have a right to determine the length of the claimant's working day? Or to determine what days or hours he should work? Can the respondent tell the claimant when he can take holiday and what processes he must follow to obtain permission? Does the respondent have an ability to determine the claimant's place of work?

99. There was no evidence that the respondent tried to tell the claimant where he should work. In practice the claimant worked from home, but that in itself is not particularly revealing, as these days employees as well as freelancers often work from home. There is no evidence the respondent controlled – or had the contractual power to control – where the claimant performed his work.

100. I found that the claimant did not have to request permission to take holiday and never did so. I do not agree with the claimant that a "C-level" employee is not subject to control over when he takes holiday. The service agreement for Chief Financial Officer position shows that, if he were an employee under that agreement, the company's Board should approve his holidays (p. 89).

101. I have found that Mr Sheffield or the respondent could not determine what days or hours Mr Slater worked.

102. The respondent could not direct the claimant in these significant respects and the contract with the claimant is therefore lacking a sufficient degree of control and is thus missing one of the "irreducible minimum" requirements necessary to be a contract of employment.

Personal service

103. The consultancy agreements appear to provide that the claimant could sent a substitute provided he obtained prior agreement but this was never tested in practice. Mr Sheffield did not deny that the claimant was obliged to provide his services personally and I therefore find that there was an obligation of personal service.

Mutuality of obligation

104. All contractual relationships have some degree of mutuality of obligation, as each party contracts to do something in return for the promises of the other party (for example, I promise to wash your windows and you promise to pay me for it). It is the nature and the extent of the mutuality of obligation which determines if there is a contract of employment. I find that the claimant and the respondent did not have sufficient mutuality of obligation for an employment relationship to exist. I note in particular the exchange I refer to above when the claimant says he will "reduce my commitment and look for additional work" if he does not get more money. This is not an exchange that would take place between employee and employer. You might as an employee ask for a pay rise. But if it were refused you would not consider that you had the unilateral option to work a few less hours for your employer and take on a few more hours somewhere else. An employee could not do this because she or he would be under an obligation to continue to work their contractual hours in return for the salary promised unless the terms of the contract were varied by agreement or it was terminated completely.

Other factors

105. Because I have found there was no control or mutuality of obligation, the conclusion follows that the claimant was not an employee. I go on now to consider all the other relevant factors for the sake of completeness and to determine whether or not the claimant was a "limb b" worker.

106. The claimant was running his own business before he started working for the respondent. He had equal bargaining power and it was his proposed terms that were adopted. For this reason, he was not a vulnerable individual in a subordinate and dependent position as described in the *Uber* case.

107. The claimant maintained his PeoplePerHour profile and kept his website updated with details of the work he was doing for Mr Sheffield's companies (as well as work he was doing for others). This is consistent with continuing to market himself as an independent contractor whilst he was working for the respondent and the other group companies.

108. The claimant continued to provide freelance services to Trident all the time he claims he was employed by Operando and then by the respondent. The claimant also provided independent consulting services to at least two other businesses. I find that all these businesses were clients of the claimant's independent business undertaking. I have taken into account the fact that the claimant charged them and that he also used their business names on his website as examples of clients he had worked for. His Tribus Way website existed for the purpose of advertising his services and trying to grow his business. That it continued to exist and he kept it updated is consistent with being in business on his own account and inconsistent with being an employee of the respondent.

109. The equipment the claimant says was given to him by the respondent to perform his duties as an employee was actually provided by Trident – the company he acknowledges he continued to provide freelance services for. I found that the equipment was loaned to him for the purpose of performing those services. The loan of this equipment does not therefore point to worker status.

110. I have found that the fact that the claimant had a respondent email address was because he was a director of the respondent. It does not point towards worker status.

111. I have found that the claimant was not paid sick pay or holiday pay, just paid his monthly retainer for work he did that month. And I have found that he was not paid a salary and did not attend work social events for the respondent.

112. The claimant and the respondent both thought he was an independent, self-employed, contractor until just before these proceedings were issued. (The claimant says he subsequently got legal advice which showed him he was in reality an employee.) No PAYE or national insurance contributions were deducted at any point. The claimant paid tax on a self-employed basis. The label the parties both put on it was self-employment.

113. It is possible to be a statutory director and not an employee. The claimant was a director of the respondent but also of Trident (a company he was providing consultancy services to but says he was never employed by) and of Songs Start Here (a different company to which he was not providing consultancy services). And he was not a director of Operando (a

company he says also employed him). This all indicates that, even on the claimant's own account his statutory directorships were not linked to employment. I agree and find that the claimant's directorships were irrelevant to his employment status.

114. Standing back as the case law instructs me to do, rather than taking a check list approach I find the picture painted by the balance of this evidence shows that the claimant was in business on his own account and the respondent was one of his clients. The claimant was therefore a self-employed contractor and not a worker.

115. As I have found the claimant was not an employee or worker of Operando or the respondent, the question of TUPE does not apply. But in any event the claimant has not proved there was a TUPE transfer. Given no other staff transferred, it is questionable that the ending of URIS's contract with Operando and URIS signing a new contract with the respondent, together with an IP agreement, is sufficient to amount to the transfer of an undertaking. But I do not need to make a finding on this and do not do so.

116. The claimant committed a fundamental breach of his contract (the consultancy agreement) by unilaterally increasing his payments and by taking without authorisation and not returning when instructed to do so the £5000 from the bank account. This entitled the respondent to terminate his consultancy contract without notice. The claimant has also retained property belonging to Trident after the contract was terminated and I can see no lawful basis for him retaining this property.

117. As the claimant was not an employee, he cannot succeed in his claims of unfair dismissal or breach of contract. Both require him to be an employee (and any contractual breach to be outstanding) at the point of termination.

118. The claimant cannot succeed in a claim of unlawful deduction from wages unless he is a worker and I have found that he was not.

119. In any event, I have found that the terms of the employment contract of June 2021 did not apply, so there can be no claim for breach of that contract. The terms of the consultancy agreement did not contain the terms argued for by the claimant and the respondent was entitled to terminate the consultancy agreement without notice because the claimant had committed a material breach. There was therefore no breach of the consultancy contract either.

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Employment Judge **Carney**
23 September 2024

REASONS SENT TO THE PARTIES ON
27 September 2024

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FOR THE TRIBUNAL OFFICE

Appendix

LIST OF ISSUES