EMPLOYMENT TRIBUNALS

Claimant: Mr D Makdani

Respondent: Newcode Partnership Ltd

Heard at: Liverpool

On: 31 October, 1 November 2024 and 3 December 2024 (in chambers)

Before: Employment Judge Barker

REPRESENTATION:

Claimant: Ms I Bayliss, counsel
Respondent: Mr L Baker, advocate

RESERVED JUDGMENT

1. The claimant was not an employee of the respondent within the meaning of s230(1) Employment Rights Act 1996 at the relevant time. The claim of unfair dismissal/automatic unfair dismissal is therefore dismissed because the Tribunal does not have jurisdiction to determine it.

2. The claimant was not a worker within the meaning of s230(3) Employment Rights Act 1996 at the relevant time. The claims for unlawful deductions from wages are therefore dismissed because the Tribunal does not have jurisdiction to determine them.

3. The claimant was not a worker within the meaning of s43K Employment Rights Act 1996 at the relevant time. The claim for protected disclosure detriment is therefore dismissed because the Tribunal does not have jurisdiction to determine it.

REASONS

Background matters issues for the Tribunal to decide

1. The Tribunal had the benefit of evidence under oath from the claimant and Mr Dev, the managing director of the respondent. There was also a bundle of documents which ran to approximately 300 pages. Both parties were legally represented and the Tribunal had the benefit of extensive written submissions from both representatives, for which I am grateful. Mr Baker for the respondent appeared before the Tribunal by video, and

the rest of the parties appeared in person. No technical issues occurred to disturb the hearing.

2. The list of issues for the Tribunal to decide had been agreed in advance between the parties and had been subject to judicial consideration earlier in these proceedings. Given the quality of the list of issues, no case management hearing was required.

3. There was some discussion at the start of the hearing about the submission of an amended witness statement from the claimant and a supplemental statement in response from Mr Dev, and the provision of some further documentary evidence. The parties were permitted to serve their amended/supplemental statements and the additional documents were introduced in evidence.

4. There is a preliminary issue in these proceedings that potentially determined the claims, which is the claimant's employment status. Were the Tribunal to find that he was neither a worker nor an employee, the Tribunal would have no jurisdiction to determine his claims.

5. This judgment deals therefore with this preliminary issue first. Having found that the claimant was self-employed at the material times, I have not gone on to consider his other complaints as I did not have jurisdiction to do so.

6. The agreed list of issues in relation to employment status is as follows:

    a. Was the claimant, at the material time, an employee within the meaning of s230 Employment Rights Act 1996;
    b. Was the claimant, at the material time, a worker within the meaning of s230 Employment Rights Act 1996;
    c. Was the claimant, at the material time, an employee within the meaning of s43K Employment Rights Act 1996; or
    d. Was the claimant, at the material time, a self-employed consultant who provided his services through another company, Anipay Ltd and then APMK Ltd, of which he was a director?

7. Had the claimant been successful in establishing employee status and/or worker status, the Tribunal would have considered his claims of protected disclosure detriment, automatic unfair dismissal, "ordinary" unfair dismissal, and unlawful deductions from wages.

Findings of Fact

8. The respondent company was incorporated in February 2017 and specialises in providing coding and marking to customers such as batch numbers, use-by and sell-by dates and QR barcodes. The respondent's managing director, Mr Dev, gave evidence to the Tribunal that the respondent has approximately 20 members of staff and three at management level.

9. The claimant is an accountant. He has level 1 and level 2 Chartered Association of Certified Accountants certification. He also has considerable experience. He began working for the respondent in October 2018 as a temporary worker through a recruitment agency. Before his temporary assignment ended on 31 December 2018, Mr Dev discussed with him whether he would be interested in carrying out bookkeeping

duties for the respondent. The claimant at the time provided his services through his own company, Anipay Ltd, of which he was a director.

10. The parties agree that the claimant and Mr Dev began discussing the terms of the claimant's future engagement in December 2018. It is the claimant's case that Mr Dev wanted the claimant to carry on as a contractor rather than via a recruitment agency, as this would save the respondent company money on agency fees. The claimant in his evidence under cross-examination said that he told Mr Dev that he had "a contract that we could adapt" and Mr Dev's evidence was that the claimant presented a contract to him for him to sign, to form the basis of their future working relationship. This contract is in the form of a letter dated 2 January 2019 and was before me in evidence. There was some dispute between the parties as to whether a probation clause was removed by negotiation, given that the claimant had already been working at the respondent for some months, but the parties agree that the agreement that, save for this one clause, the claimant presented to Mr Dev, was the one that the parties signed.

11. Mr Dev's evidence was that he was unaware of the complexities of employment rights and employment status. The contracts for his employees are drafted by Avensure, who they use for HR services. His evidence was that the contract with the claimant was not the subject of advice as it was "just between me and him". He said that he had trusted the claimant to "know what he was doing" because he was an accountant. I accept his evidence that he did not appreciate the effect of several of the terms of the contract.

12. The contract itself is entirely contradictory. On its face it is headed "Appointment to self employed professional as financial controller". It states, inter alia,

    a. that the respondent will "retain your professional services".
    b. "You have confirmed that you are self-employed by the attached document."
    c. "you will be personally liable for your own income tax and National Insurance contributions which you or your associated company may have to pay."
    d. "you must provide public liability insurance and your own employer's liability insurance where appropriate".
    e. "you will provide on average 40 hours per week to provide the services to our satisfaction and you should liaise with the directors to that effect".

13. However, it also states "you will be entitled to any of the statutory rights extended to an employee as defined by section 230 of the Employment Rights Act 1996 and set out in that act as a whole". The agreement also contains a right to paid annual leave and statutory sick pay. Mr Dev accepted that he provided BUPA healthcare benefits to the claimant after the claimant asked for this due to the ill-health of his wife.

14. The claimant's evidence when being cross-examined was that he understood that self-employed contractors automatically became classified as employees after 13 weeks. This is incorrect. He referred to being "given that contract to sign", but I find that both parties agree that the contract was created by the claimant. He did not accept, when asked, that the contract was worded with reference to "self employment". He said "I don't think so, it references employment rights and hours of work". His answers were contradictory and he said shortly afterwards "I was a financial controller and they cannot be self-employed. I was employed by the respondent on a self-employed basis as a financial controller."

15. The claimant accepted when asked that he could have exercised the right of substitution set out in the contract, albeit that he said he would need approval from Mr Dev and it would have been difficult to find someone suitable. However, he accepted that the clause was not a sham.

16. On 15 March 2021, the claimant provided the respondent with a letter which referenced the contract of 2 January 2019. The key paragraphs are repeated in full below:

> "Please due to the restructure of our business the contract that was signed on 02 January 2019 between Newcode Partnership Ltd ***and self-employed professional, Dhiresh Makdani***, the invoices of Dhiresh Makdani will now be raised by our associated company AMPK Ltd with effect from 01 April 2021.
>
> ***The terms and conditions will remain the same as per the self-employment contract*** of 02 January 2021 only the billing of my ***services*** (Dhiresh Makdani) will be coming from APMK. I trust Newcode will treat all the invoices received from APMK limited as invoices received from Dhiresh Makdani on the same basis as they were received Anipay Ltd. The contract between Newcode Partnership and Dhiresh Makdani will remain the same.
>
> ***Kindly note the bank details and VAT***, APMK details will be stated on the weekly invoices that will be sent to Newcode with effect from 01 April 2021." [my emphasis added]

17. When the contents of this letter were put to the claimant in cross-examination, that he referred to himself as a "self-employed professional" and that invoices were raised "for services", and that this showed that he was engaged on a self-employed basis, the claimant's answer was "yes, I've always said that". I also find that the dates referred to in the letter of 15 March 2021 of 2 January 2019 and 2 January 2021 in fact both refer to the contract of 2 January 2019, rather than the agreement concluded in early 2021 for the period January to March 2021, which is discussed below. I find that by15 March 2021, the short-term agreement for January to March 2021 had fallen away and the parties' intention was to revert to the original agreement from January 2019.

18. It was put to the claimant that he was not required to seek approval from Mr Dev for his annual leave. The claimant's evidence was again contradictory. He said "I had to seek approval from Mr Dev, I said to him "these are the dates I'm not in the office"." In an email dated 6 January 2023, it was clear that the claimant was notifying Mr Dev of his absence without seeking approval from him first. The claimant wrote "I had booked my time to work over this weekend to meet my commitments and ensure the relevant deadlines were met. I will not be able to work from 11 Jan 2023 pm hours. I am proceeding on my annual leave… from the 16 Jan 2023 and will be back in the UK on 12 February. The leave days I will be taking off will be amounting to 16 days, based on the 4 day a week which I work…."

19. This shows, I find, that the claimant could choose to set his own working time and working hours and did so when required to meet deadlines, and also that he took leave when he wanted to, informing Mr Dev when he would not be available and without seeking his approval first.

20. Mr Dev's evidence to the Tribunal was that he had initially offered the claimant engagement on the basis of employment and he did not want it. Mr Dev's evidence was that there were several reasons for this; firstly that he wanted to be paid through his personal company (Anipay Limited, and then APMK Limited). He also said that the claimant's wife ran the family's Post Office business, which Mr Dev said took priority for the claimant. He needed the flexibility to run the post office with his wife and so did not want to be an employee. Mr Dev told the Tribunal "I couldn't tell him when to work – he was a law unto himself." Mr Dev did not accept that the claimant worked regularly at his desk in the office five days a week from 9.15am. This also does not accord with the claimant's description of his own working patterns elsewhere, including in the email of 6 January 2023.

21. Mr Dev told the Tribunal that if the claimant had other urgent matters to attend to, for example if his wife was ill and he was needed in the post office, he would simply not turn up to the office. The claimant accepted that his wife was ill and also that she ran a post office when it was put to him in cross-examination, but the Tribunal notes that this was not mentioned as part of his witness statement. Mr Dev also said that the claimant said he did not want to pay the higher rate of tax associated with employment, as opposed to self-employed status, and so preferred to claim for his time via invoices.

22. It was Mr Dev's evidence that the claimant took time away from the business as holiday, but was not paid for any holidays. There is no evidence of the claimant ever claiming paid holiday during his engagement with the respondent. Equally, the claimant would submit regular invoices for payment for his services to Mr Dev, but Mr Dev would regularly not pay them if the work had not been done. There is evidence of the claimant not having been paid for several weeks towards and his response was to send polite reminders to Mr Dev by email. I therefore find that the claimant had no expectation of being paid wages regularly in the same way that an employee or a worker would. He knew that him being paid depended on the work being completed. He also did not make any complaint about the lack of payment for periods of absence. I find that he knew that he was only entitled to be paid if he did the work and then submitted an invoice for it.

23. The relationship between the claimant and Mr Dev appears to have been fraught on a number of occasions between 2019 and 2022. Mr Dev told the Tribunal that he was unhappy at times with the claimant's performance but tolerated it on the basis that they had become friends. The claimant was, I find, unhappy that he had to wait for payment from Mr Dev but tolerated it on the grounds that the work was highly flexible and he was able to dictate his own working hours and his own methods.

24. Mr Dev told the Tribunal that he had engaged the claimant to sort out the company accounts. When the claimant and the respondent began to work together in 2018, the respondent company was relatively recently incorporated and I accept Mr Dev's evidence that he was aware that he needed someone with experience to manage the accounts day to day. It is accepted by the parties that during 2019 Mr Dev raised concerns about the claimant's performance and the claimant agreed to reduce his rates of pay in order to be kept on by the company.

25. At the end of 2020, Mr Dev told the claimant that he wanted him to leave, as a result of his performance. It was Mr Dev's evidence that the claimant drew up terms to cover what they both considered to be a short-term "notice period" from January to the end

of March 2021 to allow the claimant to leave and be replaced with the benefit of matters being up to date and his replacement having a proper handover. This was, I find, a short-term change to the terms and conditions agreed between the parties. It specifies the claimant's hours of work as specifically "4 days per week for £769.20 plus VAT… the working hours will remain 8 hours per day between 8.30am and 5pm with a flexible time adjustment of 30 minutes... this is to ensure that there is no misunderstanding."

26. I do not accept that this indicates that this was what the claimant had been working all along; on the contrary, the fact that the parties spelled matters out in such terms to ensure a smooth handover, I find, shows that this was not what had been happening to date.

27. The claimant did not leave at the end of March 2021. The parties, I find, reverted back to their original terms of engagement. The claimant provided Mr Dev with the letter discussed in paragraph 16 (above) dated 15 March 2021 which referred to the original agreement of 2 January 2019. It was therefore clear that by 15 March 2021 it had been agreed that he could remain with the respondent. I accept that matters improved for a time and Mr Dev was happy to allow the claimant to continue working at the respondent, but the improvement was short-lived and by August 2022, the respondent found it necessary to engage an external firm, McGinty, to do the bookkeeping. This was also because the bookkeeping assistant, Queeneth, had resigned by that point.

28. The claimant did not get on with McGinty. As part of his evidence, he criticised their standard of work and their methods which it is clear did not match his working methods, which he had been using since starting work with the respondent. However, Mr Dev began to form the opinion that the claimant was the problem with sorting out the accounts of the company. Whose fault it is, is not directly relevant for the purposes of these proceedings. By 9 December 2022, Mr Dev wrote to the claimant in strong terms to give him the information that his engagement with the company was to end. Mr Dev wrote:

"I am not happy that we are so far behind on the accounts and the accounts work to me is not accurate because of the balance sheet... you seem to have a problem working effectively with people... you constantly blame other people on what they're doing wrong and as such the culture you are setting is bad... You are hit and miss when you come in... on top of that you were on your mobile phone too much in the office... You have clearly lost your way and are disenchanted with me and the company.

In summary, you are paid as a contractor to complete work. I am 100% unhappy. I want a meeting on Monday to A- go over how you will get the accounts up to date B- go over what money is owed and make sure your account is reconciled. I was aware of a £3000 overpayment on the account in June. To be honest C - we need to talk about you doing a handover and you move on as we are back to where we were one year ago and it is simply not working. So we need to discuss notice periods etc.

29. The parties exchanged a number of messages about the terms on which the claimant's engagement would end. Of relevance to the issue of the claimant's employment status is an e-mail he sent to Mr Dev on 5 January 2023. He wrote:

"I want to have a smooth handover. I am willing to offer you my services up to 31 March 2023 and if necessary during my leave travelled with the work laptop so I attend to my emails and other daily any important or other matters. However Martin for me to continue provide any of my services from today onwards, Martin I need to be paid my December 22 bills… January 23… February 23… and March 23... total of £15,300. …..

You and I have had good relationship in the past but I am sorry to say at this stage I don't have the trust I had in you. Please also note contractors do come under the employment rules and they are entitled to leave pay for the period they have worked, or payment in lieu. However I cannot provide my services any further if I am not paid. Filing of the accounts etc can be done once you have paid me."

30. The Tribunal notes in particular the phrase "please also note contractors do come under the employment rules and they are entitled to leave pay..." This Is a fundamental misunderstanding of the law in this area but goes some way to explaining the inherent contradictions in the contract provided by the claimant to the respondent in January 2019. It also shows in the clearest terms that even at this stage in their relationship, the claimant considered himself to be a "contractor".

31. Mr Dev objected to the contents of this e-mail and considered that the claimant was in effect blackmailing him. The claimant was insisting on payment at the beginning of January 2023 for three months' wages before he did any of the work.

32. The claimant now says that on 6 January 2023 he made a protected disclosure to Mr Dev that the amount that the respondent wanted to submit on the VAT return was wrong and that this was against the law. The Tribunal notes that none of this information is referred to in any of the e-mail correspondence between the claimant and Mr Dev. There are instead a short series of text messages where they discuss the amount of the VAT figure and the claimant agrees to submit a figure of £61,000, revised from his initial figure which was approximately £116,000.

33. I note that the intention of the parties was, despite this alleged protected disclosure, to continue to discuss the terms of the claimant's departure. The expectation on the part of the claimant was that his request for full future payment would be met. However, on 10 January 2023, Mr Dev summarily terminated the claimant's engagement, on the grounds of his performance.

34. In his reply, which is dated 12 January 2023, the claimant at no point raises the issue of the VAT and the protected disclosure or his employment status in the light of the summary termination, but instead seeks to defend the criticisms about his performance. He also does not say that Mr Dev has no right to terminate his contract immediately because he is an employee or a worker. The claimant simply states "you will have to pay my notice which included my leave". As indicated above, it is the claimant's view that contractors are entitled to claim annual leave, a view which is legally incorrect, although I accept that it was a term of his original contract from January 2019.

35. The claimant sent a further e-mail to the respondent on 27 February 2023 which states that the respondent is in breach of their contractual agreement for failure to pay termination notice and leave pay. The claimant makes a veiled reference to pursuing this via legal proceedings. At no point does he say either that he has made a protected

disclosure or that he is an employee or that he is a worker and that the grounds on which he will be recovering the money is unlawful deductions from wages, or through an unfair dismissal claim.

The Law

36. A worker is defined by S.230(3) ERA as an individual who has entered into or works under (or, where the employment has ceased, has worked under):

    •a contract of employment (defined as a 'contract of service or apprenticeship') — S.230(3)(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 — S.230(3)(b).

37. To come within the scope of s230(3)(b) as a worker, a claimant must show:

    •the existence of a contract

    •that he or she undertakes to personally perform work or services for another party, and has only a limited right to subcontract

    •that the other party is not a client or customer of a profession or business undertaking carried on by the individual. It does not cover those who are genuinely carrying out a business activity on their own account.

38. The cases of *Uber BV and others v Aslam and others [2021] UKSC 5* and *Autoclenz v Belcher [2012] UKSC 41* confirmed that Tribunals can look behind the contractual documentation to the reality of the relationship between the parties. This was to prevent, amongst other issues, an attempt to use the contracts to deny the true status of the parties. *Uber* [paragraphs 85 and 86] noted that 'the written terms should not be ignored, and the conduct of the parties and any other evidence may show that the written terms were understood and agreed to be a record…of the parties rights and obligations towards each other.'

39. Relevant issues to determining worker status were said by the Supreme Court in *Uber* to include:

    a. Questions of the levels of remuneration and who fixed these;
    b. Who drafted and imposed the contractual terms;
    c. Whether the individuals were obliged to provide services and was the company obliged to offer work;
    d. Could suitably qualified substitutes be provided to carry out the work on their behalf?

40. This was part of a set of facts that the Supreme Court in *Uber* found showed a system tightly controlled by Uber for its own benefit with little input from the drivers.

41. The issue of personal service and whether an individual is able to send a substitute has been found to be a key issue in determining worker (as opposed to self-employed) status. In *Cotswold Developments Construction Ltd v Williams [2006] IRLR 181, EAT*

where there was insufficient mutuality of obligation to indicate a contract of employment, the issue was then whether the claimant was obliged to do a minimum, or reasonable, amount of work personally to qualify as a "worker".

42. Harvey on Industrial Relations and Employment Law, "Categories of Worker – Independent Contractors" (para 95,96) notes that "an independent contractor is one who enters a contract for services as opposed to a contract of employment. The employer buys not so much the right to the worker's service, as the right to the end product of his or her labour. He pays them not so much to do the job as to get the job done.….The contractor is independent in the sense that he or she is responsible for making their own decisions in performing the job, by way of contrast with the employee who is subject to the directions of the employer."

43. Harvey also notes that where labelling a relationship as "independent contractor" when it is in fact an employee/worker relationship amounts to "an abuse of the law" ("Categories of Worker – Independent Contractors" paragraph 99) and where this is uncovered by the courts, it is open to HM Revenue & Customs to revisit the tax position going back six years or more, to re-categorise the worker/contractor and levy extra tax on both parties.

44. An employee is defined in s230 Employment Rights Act 1996 as:

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

45. As a result of the development of case law over time (*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 2 QB 497, QBD, Carmichael and anor v National Power plc 1999 ICR 1226, HL, Express and Echo Publications Ltd v Tanton 1999 ICR 693, CA; and Hewlett Packard Ltd v O'Murphy 2002 IRLR 4, EAT*) it is clear that four factors must be present for a contract of employment to exist. There must be:

•a contract (between the worker and the alleged employer)

•an obligation on the worker to provide work personally

•mutuality of obligation, and

•an element of control over the work by the employer

46. In relation to issues over the status of an individual in a protected disclosure claim as a "worker", the extended definition of such in s43K Employment Rights Act 1996 applies, which is:

"43K.— Extension of meaning of "worker" etc. for Part IVA.
(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who—
(a) works or worked for a person in circumstances in which—
(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them….."

Application of the law to the facts found

- **Was the claimant an employee?**

47. Applying the law as set out above to the facts found, I find that the claimant was not an employee of the respondent. Although there was a written agreement between them which purported to give the claimant statutory protection via the Employment Rights Act 1996, the essential elements of mutuality of obligation and control over the work by the employer were not present in the parties' day to day relationship.

48. Although the claimant was provided with regular work by the respondent, in that he was engaged to manage the company's accounts and invoicing day-to-day, Mr Dev provided him with no instructions as to how this should be done and left it to the claimant to manage and organise the work how the claimant wished. Mr Dev engaged the claimant because of his particular skills and experience and did not issue day to day management instructions, other than that the claimant was required to produce regular management accounts for the respondent to consider. In every other respect, the claimant managed himself. He was not subject to appraisals, he did not have a job description, if he was late or absent he was not subject to warnings or disciplinary processes.

49. I also find that there was insufficient mutuality of obligation on the parties. Although the respondent always had a lot of work for the claimant to do, the claimant was not obliged to turn up to work every day to do it. I accept Mr Dev's evidence that the claimant was "a law unto himself" as to when he attended. I find that this flexibility suited the claimant due to his personal circumstances and his home life. Mr Dev also changed aspects of the claimant's work without his consultation or agreement, in that he engaged McGinty in the second half of 2022 without the claimant's consent to carry out bookkeeping work that had previously been done by Queeneth, who had been managed by the claimant.

50. I also accept that the substitution clause in the contract was not a sham. Mr Dev did not have any requirement that the claimant personally did the work, so long as it was done. The qualifications on the substitution clause limit the claimant's power to delegate only to a suitable alternative person. I do not accept the claimant's submissions that the restrictions on the right to delegate would have made it unworkable in practice; there was no evidence that Mr Dev would have made stringent demands as to the quality of any substitute, particularly since his evidence was that he had relied on the claimant's judgment as to the management of the respondent's accounts generally, at least in the earlier years of their working relationship.

51. There were a number of further issues in the factual circumstances that I deemed relevant. The claimant's payments were made after the submission of an invoice, and were payable to his personal company. Payments were delayed on several occasions either because the claimant had not sent in an invoice, or because Mr Dev did not consider the claimant to have completed the work required. The claimant took the financial risk of this and I find he appreciated that if Mr Dev did not pay him, that he

would have little recourse to ask for the money as an employee, or as unlawful deductions from wages as a worker.

52. Indeed, this was the origin of the parties' dispute in January 2023. The claimant, knowing that the relationship was coming to an end, tried to insist on advance payment for a 3 month notice period as a precondition of him doing any more work. He told the Tribunal that he had done that because he knew that otherwise, Mr Dev would likely not have paid him. Had he been an employee or a worker, he would have had far less cause for concern, as he could have insisted on his wages being paid, and would similarly have received a regular wage during his time with the respondent whether his work was completed or not.

53. Furthermore, I find that it was the claimant's clear intention that he remain a self-employed contractor. On every occasion on which he had cause to identify his employment status with the respondent (such as in the letter of engagement in January 2019, on the variation of contract letter 15 March 2021, and in his invoices to the respondent), he labelled himself as a contractor. I also find that Mr Dev considered him to be a contractor. The claimant was not subject to attendance policies, absence management, or disciplinary policies. His contract was not subject to review by Avensure as the respondent's employee contracts were. He was given an annual leave allowance but there is no evidence he was every paid for this leave, or that he expected to be paid. He was able to retain the flexibility of contract work and the tax advantages of classification as a company director. He sought to mitigate these risks by including clauses in the terms of engagement in January 2019 as to holiday pay, sick pay, and the Employment Rights Act, but I do not find that this was done because the claimant genuinely believed he was an employee, but to reduce the financial risk he knew that his self-employed status carried. The claimant's cross-examination answers confirmed that this was the case.

54. The claimant was not an employee therefore, and he has no right to bring an unfair dismissal claim as a consequence. This claim is dismissed.

- **Was the claimant a worker?**

55. As set out above, to come within the scope of s230(3)(b) ERA and be a "worker", a claimant must show the existence of a contract, that he or she undertakes to personally perform work or services for another party, and has only a limited right to subcontract and that the other party is not a client or customer of a profession or business undertaking carried on by the individual. It does not cover those who are genuinely carrying out a business activity on their own account.

56. That there was a contract between the parties is not in dispute. The contract indicates a limited right of substitution and a number of clauses such as preventing the claimant working for a competitor of the respondent without prior permission. It also suggests a degree of intention that the service should be carried out personally by the claimant and not his company.

57. However, applying the principles in *Uber* there are several key differences in the circumstances of this case that are relevant. The first is that the agreement was almost exclusively drafted by the claimant and was on the terms provided by him. Mr Dev, I accept, did not negotiate with him over the terms of the agreement and did not seek

legal advice on it. It can therefore be concluded that the terms were included by the claimant as he considered them to be beneficial to him. The agreement on its face describes him as a "self-employed professional". This leaves me with two possible options, the first of which is that the claimant intended to be classified as a self-employed professional and understood that this would mean that, in exchange for significantly reduced statutory employment protections, he enjoyed a much greater degree of freedom and flexibility (including to assist his wife in the post office) and significant tax advantages before HMRC. As an accountant, I find that he would have had a far greater understanding of this than the majority of those agreeing to similar terms.

58. The other option is that the claimant always knew or understood that he was an employee or a worker, but sought to nevertheless hold himself out as self-employed before HMRC in order to claim a tax advantage to which, as an accountant, he would have known that he was not entitled, and that he would also have known would have amounted to a fraud on the Revenue.

59. Assistance in deciding on this issue is available from the *Uber* decision. As set out above, the relevant issues to determining worker status were said by the Supreme Court to include:

    a. Questions of the levels of remuneration and who fixed these;
    b. Who drafted and imposed the contractual terms;
    c. Whether the individuals were obliged to provide services and was the company obliged to offer work;
    d. Could suitably qualified substitutes be provided to carry out the work on their behalf?

60. The Supreme Court in *Uber* found that the answers to these questions showed a system tightly controlled by Uber for its own benefit with little input from the drivers. I find that this cannot be said to be the case in these proceedings. The claimant drafted and imposed the contractual terms. The levels of remuneration were the subject of negotiation and agreement, including in relation to an agreed reduction in pay in 2020.

61. The claimant and the respondent agreed broad tasks for the claimant to do, but given Mr Dev's lack of knowledge and experience of bookkeeping and accounts, the scope of this, the manner in which it was done was entirely up to the claimant. In this regard, the respondent was effectively a customer of the claimant and not a manager.

62. The claimant decided when and how he provided the services. It is clear that in 2023 during his so-called notice period, he decided that he would leave the country for 16 days and work around this to complete his tasks. I accept that when he had urgent other business to attend to, he did not turn up for work at the respondent but instead would work at weekends to get the job done.

63. Mr Dev engaged McGintys to do some of the work within the claimant's scope and the claimant had no say over this. Given Mr Dev's lack of interest in who did the work, so long as it was done, I do not accept that the claimant's right of substitution would have been unworkable in practice. Mr Dev, to all intents and purposes left the claimant to run matters himself, in whatever way worked for him, so long as the job was done. This

cannot, unlike Uber, be said to be a "system tightly controlled by [the respondent] for its own benefit with little input from the [claimant]."

64. That the claimant had negotiated that some elements of the benefits afforded to a worker or an employee was included in his written terms (such as annual leave) does not mean that the claimant was not an independent contractor. He sought, through his negotiation of terms, to limit the financial risk that he was otherwise carrying, through the inclusion of these terms.

65. However, in summary, I find that he understood that he was a self-employed contractor. Were this not the case, the claimant's terms provided to Mr Dev and dated 2 January 2019 would amount to a deliberate attempt by an experienced accountant to evade income tax and National Insurance.

66. The so-called variation of contract between January 2021 and March 2021 was a short-term engagement that ended at the end of March, after which the parties reverted to the terms of the agreement of 2 January 2019. The claimant did not assert that he was a worker for this period of time, but even if he was, any claims arising out of any change in status during that period would be significantly out of time to pursue as part of these proceedings.

67. Finally, the claimant does not fall within the extended definition of "worker" in s43K Employment Rights Act 1996. Assuming that the claimant is able to satisfy s43K(1)(a)(i), that he is or was introduced or supplied to do that work by a third person (being the recruitment agency, or possibly his personal service company Anipay), he is clearly not able to satisfy s43K(1)(a)(ii), which is that the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them. The terms on which he was engaged to do the work, those of 2 January 2019, were almost entirely determined by the claimant himself.

- **The claimant was an independent contractor**

68. In conclusion, I therefore find that the claimant was self-employed. The Tribunal therefore has no jurisdiction to consider his claims. They are hereby dismissed.

Employment Judge Barker
4 December 2024

Judgment sent to the parties on:
12 December 2024
For the Tribunal:

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

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Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/