Case Number: 3201079 / 2023

EMPLOYMENT TRIBUNALS

Claimant:	**Mr A Powell**	
Respondent:	**The British Council**	
Heard at:	**Cardiff**	**On: 10, 11 and 12 September 2024, 16, 17 and (when parties did not attend) 20 January 2025**
Before:	**Employment Judge R Brace**	

Representation:

Claimant:	In person
Respondent:	Mr P Mitchell (Counsel)
Interpreter:	Ms N Hurford (10-12 Sept 2024 and 16 January 2025) Mr S William (17 January 2025)

RESERVED JUDGMENT
PRELIMINARY HEARING IN PUBLIC

The judgment of the Tribunal is as follows:

Employment status

1. The Claimant was not an employee or worker of the Respondent at the relevant time.

2. The claim is therefore dismissed because the Tribunal does not have jurisdiction to determine it.

WRITTEN REASONS

Background and Introduction

1. This preliminary hearing has been conducted over the course of six days: three days in September 2024, when it was adjourned part-heard, and three days in January 2025, for completion of the evidence, submissions and deliberation (the parties did not attend on day six).

ET1 Claim and ET3 Response

2. The Claimant had filed a claim on 15 June 2023 [11], asserting that his employment with the Respondent as an International English Language Testing System Examiner ("IELTS Examiner"), had commenced on 24 October 2016. In the attachment to his ET1 Claim form [20], he stated that he was paid through a third party company that provided payroll services, but that he was not including that third party company within his ET1 claim as he did not consider that company to be relevant. He clarified that he claimed against the Respondent for:

    a) Holiday pay for annual leave taken for 2022;
    b) Refusal to pay for grading between December 2022 and February 2023; and
    c) Compensation for days when he was not working between December 2022 and February 2023.

3. He stated (§3 ET1 attachment [20]) that he believed the nature of his relationship with Respondent was one of employee and employer and that there was an implied contract of employment which was not a contract for service, but a contract of service. He referred to previous litigation against the Respondent and a company known as Carbon60, which he stated was the payroll company. He briefly set out the basis of his assertion that he was an employee of the Respondent and confirmed that the main motivation for his claim was for a Tribunal to determine his employment status.

4. The Respondent within its ET3 Grounds of Resistance denied any contact, express or implied, between the Respondent and the Claimant and further pleaded that it was not necessary to imply any contract to give the arrangements business efficacy and that the Respondent did not engage IELTS Examiners, whether on a self-employed/contractor or as workers or employees. Rather, they pleaded, a company known as Comensura Limited ("Comensura") provided a managed service programme which involved managing the relationship between the Respondent and employment businesses (within the meaning of the Employment Agencies Act 1973) which engaged and supplied temporary agency workers ("Temporary Agency Worker"), which included but was not limited to IELTS Examiners, to work on assignment to the Respondent.

5. The Respondent further pleaded that the Claimant was initially engaged as a Temporary Agency Worker by a company known as Carbon60 Limited ("Carbon60") and assigned to the Respondent as an IELTS On-Screen Marking

Examiner ("OSM Examiner") to undertake the marking of scripts and was subsequently engaged as a Temporary Agency Worker by a company known as Flexy Corporation Limited ("Flexy") that had supplied the Claimant on assignment to the Respondent as an OSM Examiner and also a Video Call Speaking Examiner ("VCS") Examiner, to conduct IELTS Speaking Tests through internet video connections.

6. The Respondent asserted that it was understood that Flexy, as had Carbon60, engaged its Temporary Agency Workers, including the Claimant, under a contract for services and provided the Temporary Agency Workers with statutory entitlements such as statutory sick pay, paid annual leave under the Working Time Regulations 1008 and pension; that Carbon60 and Flexy were entirely responsible for the payment of the Claimant's remuneration and for dealing with PAYE deductions.

Preliminary hearing issues

7. At case management preliminary hearing before Judge Jenkins on 10 November 2023, a three-day public preliminary hearing to consider the issue of the Claimant's employment status had been listed and directions for its preparation had been given. The list of issues for this preliminary hearing were set out that a preliminary hearing which included consideration of whether the Claimant was an employee, or alternatively a worker of the Respondent, as defined in s.230(1) and (2) or s.230(3) Employment Rights Act 1996.

8. The Respondent's representative has confirmed that this was their understanding of the Claimant's case and the Claimant was not restricted to only a claim that he was an employee.

9. That original preliminary hearing was postponed as parties were not ready due to the amount of disclosure in the case. The parties tell me that over 7,000 documents have been disclosed. The preliminary hearing was relisted for three days on 10-12 September 2024 as an in person hearing "September hearing").

10. The September hearing commenced on the first day as a hybrid hearing, permission having been given by an employment judge for a number of individuals who had written to the Tribunal in the days preceding the hearing requesting to observe the public hearing remotely by video (CVP). The Claimant, all witnesses and the Respondent's representatives, as well as the Judge and clerk attended in person at the chosen venue at Cardiff.

Interpretation

11. The Claimant is a litigant in person and a Welsh speaker. He has a legal right to speak Welsh. The parties were reminded of that and of s.22(1) Welsh Language Act 1993, at the outset of the hearing.

12. There was a discussion of the interpretation needs of participants in the hearing, not least for the benefit Welsh interpreter and for them to understand what would be required of them. For those who were not familiar with Welsh

translation, it was explained that Welsh interpretation is conducted simultaneously, not consecutively, which requires consideration to be given to how that interpretation can be conducted for the benefit of both those in the hearing room and those participating remotely.

13. The Claimant confirmed that he would be giving his evidence in the Welsh language. He referred to himself as being bilingual and confirmed that it was not simple for him to determine when he would use Welsh language and when he would use English at other times during the hearing, and that he had prepared some of his questions for cross-examination in English and some in Welsh. He confirmed that he would not need interpretation into Welsh for any spoken English.

14. All other witnesses, Respondent's counsel and the judge required all Welsh to be interpreted. Throughout, interpretation services were provided for the benefit of those who do not communicate in Welsh, the Claimant not requiring any interpretation of English.

15. It was agreed that after any case management, I would take the rest of the morning and up to 3pm of the first day, for reading time and that this time would be allocated to HMCTS to arrange for the interpreter to be re-located to another private room within the venue to enable them to translate for the benefit of both those in the venue and those observers participating by Microsoft Teams.

16. Due to the simultaneous nature of the translation, it was not possible to do so with the interpreter also being in the hearing room. When the hearing recommenced in the afternoon of the first day the interpreter, then participating remotely elsewhere in the venue, had connection difficulties at that point that had not arisen during the morning, and could not be heard by anyone on CVP or indeed, in the hearing room. As a result and at that point due to concerns regarding further delay, I converted the remainder of the preliminary hearing back into a wholly in-person hearing and invited all those participating remotely to attend in person the following day. A number did during both the September hearing dates and later, in January 2025, when the preliminary hearing reconvened ("January hearing").

17. The Tribunal thanks Mrs Hurford for her invaluable assistance and Mr William for his time and assistance on the fourth day of the hearing.

Further Case Management: Additional documents

18. Timetabling was discussed as part of case management on the first day, with the Respondent's representative indicating that he would need a day for questioning the Claimant, leaving the Claimant with one day to cross-examine the Respondent's three witnesses, and for summing up. It was noted that taking into account the substantial reading (79 pages of witness statements and an agreed 872 page bundle ("Bundle"),) and length of cross-examination anticipated, the inadequate length of the final hearing should have been raised by the parties prior to the commencement of the hearing. It had not been.

19. The Claimant further indicated that he had, in the previous two days, received from the Respondent, a further 300 pages of additional disclosure. Counsel for the Respondent confirmed that he had been concerned, after having been instructed and on reviewing his papers, to ensure that previous iterations of contractual documentation (already disclosed,) should also be disclosed as part of the ongoing duty of disclosure but that the Respondent would not be relying on them. The Claimant also confirmed that he would not be referring to them and there was no application by either party to add such fresh disclosure to the agreed bundle.

20. When the hearing resumed in the afternoon of the first day, I confirmed that I had not read all the documents and evidence would commence the following morning as a result.

21. At that stage, I also raised with the parties that I had noted that within the agreed Bundle a number of documents had been redacted, yet it appeared that no permission had been given for such redaction under rule 50 Employment Tribunal Rules 2013 or otherwise from the Tribunal (in particular, sections of the Managed Services agreement between the Respondent and Comensura Limited ("Comensura"), at [98] and [100]).

22. The Respondent's counsel indicated that the documents were not relevant and were commercially sensitive. A brief discussion, regarding the significance or lack of it of commercial sensitivity, took place. Counsel agreed to provide unredacted copies of those sections of the agreement to the Claimant and it was determined that a further discussion could take place at the commencement of the hearing on the following day as to whether the unredacted versions were relevant and should be included in evidence.

23. On the morning of the following day, after sections of the unredacted copy of the Managed Services Agreement had been disclosed to the Claimant, there was a discussion as to whether that should be included in evidence. The Claimant did not consider the agreement to be relevant at that stage and the discussion concluded. This issue was again revisited at the January hearing however, when again the Claimant sought to view a further unredacted section [127]. After an adjournment, when an unredacted copy of that page was provided to the Claimant, he accepted that this was not relevant and the hearing recommenced without further addition to the evidence before the Tribunal.

24. Prior to the commencement of the Claimant's evidence, we discussed that the Claimant had also sought to rely on and include in the evidence before the Tribunal, a further file of some 957 documents. These were essentially various iterations of IELTS manuals and test instructions, extracts of some were already included in the Bundle.

25. I made it clear to the parties that I would only be reading documents that were referred to in the witness statements, cross-examination or in submissions and that I would not be considering or reviewing all documents. The Claimant was thereby directed to identify selected pages of his additional documents that he considered were relevant and that he wished to refer to on cross-examination

or in submissions. He did so over the course of the evening of the first day and at the beginning of the second day, he provided a list of some 27 page numbers from that additional file of his that he considered relevant. Those documents, selected by the Claimant were admitted into the evidence before me by consent, as were some 8 pages of documents (entitled "Mistakenly Omitted Documents") that the Claimant had attached to his witness statement.

26. During the course of the September hearing, further documents were adduced by both the Claimant and the Respondent. After contemporaneous discussion with the parties, all were permitted to be included by consent.

27. At the end of the September hearing, the Respondent was directed to include all additional documents permitted into a supplementary bundle ("Supplementary Bundle") in anticipation of the adjourned January hearing. Documents in the Supplementary Bundle (eventually 75 pages long) are denoted by [SB[page number]] in these written reasons.

28. Finally, and in the period between the September hearing and the January hearing, the Claimant had sought to rely on an additional document, referred to as 'Summary for Examiners Chelmsford', the 'Chelmsford Document'). That document was also included by consent [Supp 62].

Evidence

29. Due to the considerable further case management, the Claimant did not commence giving evidence until late in the morning of the second day of the September hearing. He relied on a witness statement that was 24 pages long and which was taken as read. He was subject to questioning by the Respondent's counsel and some questions from the Tribunal.

30. The Respondent called three witnesses that also had prepared written witness statements which were taken as read. These too were subject to questioning by the Claimant and the Tribunal. The Respondent's witnesses were:

    a) Toby Kendall, Head of Service for Comensura;
    b) Mark Walters, Delivery Manager for the Respondent; and
    c) Tim Porter, Head of Examiner Standards at the Respondent;

31. Mr Toby Kendall also completed his evidence for the Respondent at the September hearing on day three, and the Respondent's remaining two witnesses gave evidence over the course of day four and day five on 16 and 17 January 2025.

32. On day 5 of the hearing an issue arose regarding the provenance of the Chelmsford Document and what, if any, investigation the Respondent had undertaken regarding that. Mr Porter was unable to give any evidence regarding the document but the senior legal counsel for the Respondent was in the hearing room and was able to provide some evidence. It was agreed by both parties that she would be called to give live evidence on oath and that I would ask specific questions regarding the Chelmsford Document and the Claimant could also question her. Ms Alison Gale, Senior Legal Adviser and

Solicitor at the Respondent also gave evidence on behalf of the Respondent on this basis.

33. The last day, day 6 was a day for deliberations when the parties were not required to attend.

Facts

The Respondent

34. The Respondent is an executive non-departmental public body and a charity that is the UK's organisation for cultural relations and education opportunities. It is a charity, with one of its aims (amongst others,) being the development of a wider knowledge of the English language and advancement of education standards, both within and outside the UK.

35. It pursues that aim by engaging in education activities through the International English Language Testing System ("IELTS"), an internationally recognised test that measures the language proficiency of people who want to study or work in environments where English is used as a language of communication and assesses the four language skills of listening, reading, writing and speaking [262]. It is recognised by UK Visas and Immigration ("UKV&I",) other countries immigration agencies and academic institutions for applications to study.

The IELTS Partnership

36. The British Council is part of an unincorporated joint venture, known as the 'IELTS Partnership'. A copy of any written joint venture agreement was not in the Bundle, but it is undisputed that there are three members of the IELTS Partnership: the Respondent, IDP Education Limited (an Australian limited company ("IDP",)) and Cambridge English (part of Cambridge University Press & Assessment and University of Cambridge ("CUPA")).

37. The IELTS Partnership has developed a set of certifications or qualifications, setting minimum standards that are required to be achieved for an individual to be able to be certified to become an IELTS Examiner mark written IELTS tests and rate IELTS speaking exams.

38. The IELTS Partnership, not the Respondent alone, also set standards that must be met by IELTS Examiners when they test or mark candidates irrespective of how they mark or assess. These standards are set out and recorded in a document known as a Professional Support Network Manual ("PSN Manual"). Whilst that PSN Manual is not available to IELTS Examiners, IELTS Examiners have access to codes of practice ("IELTS Code of Practice") that by and large mirror sections of the PSN Manual and are routinely updated [436], and an Examiner Handbook, which is a condensed version of the PSN Manual [279]. Guidance on the standards for IELTS Examiners is also produced by the Respondent (as well as IDP). These standards must be complied with on an ongoing basis by IELTS Examiners and compliance is monitored.

39. The three members of the IELTS Partnership have different responsibilities.

40. The Respondent and IDP (and affiliated Local Test Centres) have responsibility for training and certification of IELTS Examiners as well as ongoing compliance by the IELTS Examiners with PSN standards. The Respondent and IDP (and affiliated Local Test Centres) also facilitate the delivery of IELTS exams to candidates in the UK and worldwide. CUPA has responsibility for producing the IELTS test materials, including marking criteria, used to assess candidates' English skills.

41. The Respondent carries out these responsibilities in the manner set out below.

(1) Training and certification

42. The Respondent provides training to prospective IELTS examiners looking to obtain certification, training that is also provided by IDP and affiliated Local Test Centres, not just the Respondent.

43. Affiliated Local Test Centres are typically educational establishments. There are around 1,000 Local Test Centres across the UK and the rest of the globe. To become registered as a Local Test Centre, an organisation registers their interest with the Respondent (or IDP) to become a test centre and the Respondent (or IDP) then assesses whether the organisation is suitable to become a Local Test Centre. If it is suitable, it becomes registered as affiliated with either the Respondent or IDP, being the bodies responsible within the IELTS Partnership for delivering exams. The Respondent (or IDP) will then provide to them IELTS examination materials and guidance on best practice.

44. Applications from individuals wishing to become an IELTS Examiner can be made to the Respondent, IDP or an affiliated Local Test Centre, who then review such applications and, through pre-recorded tests (called certification sessions) assess those individuals to determine if they meet the minimum standards to mark IELTS Writing Tests, or deliver and rate IELTS Speaking Tests, to be an IELTS Examiner.

45. If they do, CUPA will award the individual an IELTS Examiner certification.

(2) Recertification, Monitoring and Compliance

46. Once qualified or certified, an IELTS Examiner is qualified to conduct IELTS examinations for a fixed period of two years after which they have to reapply to ensure proficiency is up to date. This IELTS Examiner re-certification is carried out by the individual IELTS examiner taking a series of tests created for this purpose by CUPA. It is CUPA that then determines whether the IELTS Examiner has passed or failed the re-certification assessment. The Respondent plays no part in the re-certification. If the IELTS Examiner does not pass, they have further opportunity to re-certify, but if the individual continually fails to pass, their IELT certification will be revoked by CUPA.

47. It is also a requirement on IELTS Examiners that they are also required to comply with the standards set by the IELTS Partnership set out in the Code of

Practice which IELTS Examiners are required to sign each time they are certified [422].

48. Ongoing monitoring of IELTS Examiners is also carried out by the Respondent, as well as the IDP and Local Test Centres. It is a condition of registration that Local Test Centres monitor the compliance of any IELTS Examiners that examine for them against the standards set, and in line with processes set out in the PSN Manual. This is to ensure that IELTS tests are being delivered in a consistent and standardised way and compliant with the PSN Manual standards and Guidance.

49. Monitoring takes different forms dependent on whether Writing or Speaking testing is being monitored.

    a) Monitoring of Writing test standards is undertaken by way of IELTS Examiners being provided with some 'seeded' scripts i.e. scripts that have already been reviewed and pre-marked by senior IELTS Examiners against required marking standards set by the IELTS Partnership through its Professional Support Network ("PSN") in the PSN Manual alongside other scripts. Using these seeded scripts, the Respondent (or IDP) can monitor how close to the required marking standard the IELTS Examiner is marking. If an IELTS Examiner is not marking to the standard, the Respondent (or IDP) can take steps to address this, from asking the IELTS Examiner to reflect on and review their marking and review, to requiring the IELTS Examiner to take specific action (such as attend training with the PSN or be subject to a temporary reduction in allocation of scripts to mark. Ultimately The IELTS Examiner might be subject to the revocation of their IELTS certification from CUPA.

    b) Speaking test monitoring, undertaken by the IELTS Examiner's main test centre, is undertaken by a selection of sample testing over a period of months, which are reviewed by an Examiner Trainer or Examiner Standards Manager in line with the PSN standards. If the IELTS Examiner fails to pass those standards, similar enforcement action can be taken. Feedback is typical. Specific monitoring of online delivery of the IELTS speaking tests is also undertaken once a year, known as Online Delivery Procedures, to ensure that the testing environment (physical set up, background lighting, behavioural aspects such as use of hands and eye contact) is standard and does not hinder performance.

50. IELTS Examiners for Writing Tests are also required to undertake a minimum marking commitment failing which, the IELTS Examiner would be subject to the re-certification and/or additional training [485]. In November 2023, the Respondent as part of the PSN team wrote to IELTS Examiners indicating that they had an expectation that a minimum of 150 scripts per fortnight would be marked to ensure effective monitoring of standards [804]. This was again repeated in April 2024 and they were informed that an examiner's assignment may be withdrawn by Flexy if they failed to meet the minimum volume [849].

Similar minimum requirements for monitoring were imposed for VCS Speaking Tests [821, 825].

51. Local Test Centres and the Global Hub (dealt with below and later in these reasons) refer matters of non-compliance with testing standards by any IELTS Examiner, to the Respondent or IDP either for guidance or to take them forward. If the Respondent (IDP or the Local Test Centre) considers that the IELTS Examiner is falling below these standards, professional enforcement action can be taken which can include withdrawal of their CUPA certification to mark or rate tests as an IELTS Examiner.

(3) Delivering the Tests

52. The Respondent (and IDP) is responsible for delivering the IELTS tests to candidates, which they do using IELTS Examiners. The Respondent (or IDP) enables candidates to undertake IELTS tests in two ways, either through an affiliated Local Test Centre; or one of two 'Global Hubs'. There are two Global Hubs: one, administered by the Respondent from the UK known as GB500, and one administered by IDP from Australia.

53. The Global Hub is the name given by the IELTS Partnership to the cohort of IELTS Examiners that, via an online platform mark IELTS Writing tests and/or assess IELTS Speaking tests. If an IELTS Examiner demonstrates the required competency with online delivery platform, they may be invited to join the Global Hub.

54. The Respondent's Global Hub was established in 2016 for Writing tests allowing IELTS Examiners to register with the Global Hub to mark such exams. It was extended to Speaking exams in around 2020 and since 2018, the Global Hubs also have responsibility for monitoring standards for all Writing tests.

55. Certified IELTS Examiners therefore can conduct or mark the IELTS tests by either:

    a) Applying to deliver the IELTS Speaking tests at one of the Local Test Centres; and/or
    b) Applying to become a member of a Global Hub to mark IELTS tests (both Written and/or Speaking tests) using an online examination platform.

56. To examine via the Global Hub:

    a) Existing certified IELTS Examiners register their interest in examining for the Global Hub by completing an online form requesting to have the Global Hub as one of their centres in addition to their current Local Test Centre via an online form; and

    b) New potential IELTS Examiners, who have not been certified, must complete an online application form to receive training to be an IELTS Examiner.

57. CUPA supplies both the Local Test Centres and the Global Hub with examination resources and the standards and guidance by the IELTS Partnership applies to the testing being undertaken at those sites.

58. The practical facilitation of any candidate undertaking any Speaking test at a Local Test Centre, is undertaken by the Local Test Centre where IELTS Examiners carry out and mark the IELTS Speaking test taken at that test centre. Whilst an IELTS Examiner may conduct Speaking tests for more than one test centre, they are assigned a primary or main test centre, which may be a Local Test Centre or the Global Hub.

59. It is that test centre that is then responsible for monitoring the IELTS Examiner on Speaking tests.

60. The practical facilitation of any Writing test being undertaken by a candidate at the Local Test Centre can be undertaken by the Local Test Centre, but Writing tests are not marked locally at the test centre. Rather, any Writing script, whether manuscript or on computer, is marked by an IELTS Examiner through the Global Hub.

61. Since 2016, all IELTS Writing tests have been managed by the Global Hub and are marked by IELTS Examiners that are registered with the Global Hub to undertake on-screen marking ("OSM"). This is the case whether the candidate has attended a Local Test Centre and taken the test on paper or on a computer, or has been referred by a local Test Centre and choses to take the test on computer from their own home. Since 2018, the Global Hub has acted as the main centre for all IELTS Examiners for Writing tests, including the Claimant, and has responsibility for monitoring standards in relation to the IELTS Examiners.

62. IELTS Writing tests or exams involves the candidate writing an essay-style response to an exam question that has been set by CUPA. In all cases the completed script, whether manuscript or online, is uploaded to the Global Hub for marking.

63. The IELTS Examiner that is registered with the Global Hub can access available scripts via a web browser that they uses to log onto the 'Examiner Portal' and access and mark scripts via an online marking platform known as Mark Manager'. Once the Writing test is marked by the IELTS Examiner the Writing test results are sent to the candidate [502-522].

64. All OSM IELTS Examiners have to be resident in the UK and the Respondent requires them to work from home [690]. Such an examiner is free to work as a Speaking Test IELTS Examiner for other Local Test Centres when not scheduled for OSM and the IELTS Examiner is prohibited by the IELTS Partnership Code of Practice from advertising OSM Writing Examiner status [696]

65. A candidate wishing to take a Speaking test can do so face to face with an IELTS Examiner at a Local Test Centre. The candidate however may wish to take the Speaking test by way of video, rather face to face. The candidate can do so by either at a Local Test Centre, using the test centre equipment, or from a computer at their own home.

66. The IELTS Speaking test involves the candidate, through video call, being asked a series of questions by an IELTS Examiners, registered to mark Speaking tests on the Global Hub, assessing their verbal skills.

67. IELTS Examiners provide their availability through what is termed the 'Examiner Portal' and are allocated Speaking test slots which will vary according to candidate demand and those IELTS Examiners who are registered and have indicated their availability are allocated speaking interview slots on a first-come first served basis. This is referred to as Video Call Speaking or VCS.

68. The majority of VCS exams are booked less than a week in advance and the number of candidates taking the VCS on any one day will vary according to demand, a demand that can have seasonal fluctuations. The number of VCS sessions is confirmed to the IELTS Examiner three days in advance and the IELTS will be paid for the number of VCS sessions confirmed at that point even if candidates cancel after that point.

69. IELTS Examiners who undertake VCS Speaking tests are also required to work from a single, home base. A second base is considered for IELTS Examiners that regularly spend time at a second residence [743]. Further, IELTS Examiners assessing VCS assessments are expected to dress appropriately and in lines with an effective 'smart-casual' dress code set by the IELTS Partnership [857],

70. Finally, if an IELTS Examiner has any queries regarding the content of the IELTS test itself, they can refer to the IELTS PSN Manual or, if in relation to marking/assessing via the Global Hub can contact the Global Hub's PSN team which is managed by the Respondent, by email. This service is available to those undertaking OSM and/or VCS or indeed any IELTS Examiner regardless of where they examine i.e. it is also available to those examining at a Local Test Centre.

Comensura Contract with Respondent

71. Comensura is a limited company based in the UK and is a managed services provider, or MSP and is part of the Impellam Group of companies ("Impellam Group"). Its core business is supplying to customers temporary or flexible staff on an ''as needs basis. It contends that it is not an Employment Business or an Employment Agency,[1] as it does not directly contract with workers and supply those workers to customers, an issue not in dispute in this case.

[1] As defined by the Employment Agencies Act 1973

72. Rather, it instead enters into sub-contracting arrangements with other companies, including other companies within the Impellam Group which in turn supply staff to Comensura's customers. One such company is Carbon60 Limited ("Carbon60"). Another such company is Flexy Corporation Ltd ("Flexy"). Both Carobon60 and Flexy are also part of the Impellam Group.

73. The Respondent's position is that it does not employ or even engage IELTS Examiners direct but that Comensura have agreed with them that it will procure that other employment agencies will provide and supply to them IELTS Examiners as temporary agency workers.

74. To facilitate the delivery of exams, the Respondent says it does not engage IELTS Examiners directly as its employees or workers, and that the Claimant has always been supplied via an employment agency, initially Carbon 60 Limited and subsequently Flexy Corporation Limited, both companies within the Impellam Group of companies, one of the largest managed service providers in the world.

75. It asserts that there are two main reasons for this:

    a) The demand for IELTS examinations fluctuates; that whilst there are seasonal peaks and troughs or 'dips' in demand, demand is outside the Respondent's control and can be unpredictable; and
    b) There is no need for the Respondent to have day-to-day control over the conduct of IELTS examinations conducted over the Global Hub as these are conducted by certified IELTS Examiners who do not need regular oversight.

76. Prior to the January hearing, the Claimant was permitted to add a further document to the supplementary bundle which he says evidenced that the contrary was true, that the Respondent did in fact employ IELTS Instructors direct, the Chelmsford Document. This was the document asserted to have been received by the Claimant in late 2024 from an undisclosed third party regarding IELTS testing for UKVI being conducted from Chelmsford in or around 2015 and which specifically referenced that those examiners seeking to undertake this work must be 'directly employed by the British Council' [Supp62].

77. As indicated in the introduction to these reasons, no-one could explain the provenance of such a document and Tim Porter, who was questioned on the document was unable to assist, not having worked at Chelmsford, highlighting only that it predated the Global Hub After Tim Porter had given evidence that there had been an internal investigation which had concluded that the information contained in that document was not correct, but confirming that he had not been involved in any internal inquiry following the Claimant's disclosure of the document, it was agreed that the Senior Legal Adviser from the Respondent, Alison Gale, who was in Tribunal hearing room, would be called to give evidence on the outcome of that investigation.

78. Her evidence was that the Respondent did not have documents from 2015 in relation to that test centre and could not establish why such a document had

been produced, but that the internal investigation following disclosure had concluded that the content of the Chelmsford Document, in terms of referencing directly employing employees was an error as all IELTS Examiners were non-permanent workers, whether engaged at the Local Test Centre or at Carbon60 at that time and that the Global Hub was not in existence at that time. To her knowledge the Respondent did not pay any IELTS Examiners direct and she did understand why the Chelmsford test centre had issued such a document.

79. I accepted that evidence from her and was not persuaded that this was compelling evidence to demonstrate that the Respondent did at any time directly employ IELTS Examiners, nor did I consider it of relevance or of any probative value to the Claimant's claim that he was an employer and/or worker as a result of his work through the Global Hub since 2016.

80. Since 2012 and through repeated tender processes, Comensura has provided a range of managed services to the Respondent in various roles including administration, specialist consultants and project managers, finance, HR, and IT and this includes IELTS Examiners. The prevailing managed services contract was dated 9 March 2021 ("MS Contract")[42-150]. That MS Contract was detailed.

81. In particular, Clause 2 provided that Comensura as the 'Service Provider' would provide the 'Services', defined as the provision of the managed services for Temporary Agency Workers and Specialist Professional Services (not relevant) as set out in Schedule 2 of the MS Contract [48] and that:

    a) 'Temporary Agency Workers' was, in turn, defined as temporary (non-permanent) worker offered and provided on 'Assignment' by an Agency to fulfil a specific role and that this included any workers engaged through Comensura's payroll service;

    b) 'Agency(ies)' was defined as Comensura and/or those agencies with whom Comensura would contract to supply Temporary Agency Workers to the Respondent'; and

    c) 'Assignment was defined as the required duties and period of time where a Temporary Agency Worker was working in the Respondent's organisation.

82. The Claimant has specifically raised issue regarding Clause 2.2.1 [76], which provides that Comensura will '*actively source (and work with Agencies to ensure provision of) an accessible pool of Candidates to mee the [Respondent's needs'* asserting that he was not supplied to work for the Respondent that matched the terms of this specific clause. Evidence was given by Toby Kendall on this issue. He accepted that the Claimant had been referred to Comensura by the Respondent as the 'end client' as he termed it and that the Claimant had not been 'recruited' by either Flexy or Carbon60 and/or introduced to the Respondent by those companies. In the Claimant's case, he had been referred to Carbon60 by the Respondent as

an individual that they would wish Carbon60 to engage as an agency worker.

83. The Claimant also asked Mr Kendall to agree that such a referral would not be unusual. He agreed. I therefore found that referrals, by an end user of any temporary worker to an agency, with the purpose of seeking that the agency then contract with that individual and supply that agency worker to the end user formed part of the normal process under this agreement.

84. In turn, Schedule 2 set out the description of the services to be provided by Comensura and, in relation to Temporary Agency Workers,:

a) At Schedule 2 Part A, (§2.4.23), Comensura undertook to ensure that all Temporary Agency Workers were '*completely aware that at no time will the [Respondent] class a Temporary Agency Worker as an employee and [Comensura] is responsible for the conduct, negligence, performance and quality of Temporary Agency Workers and other employment issues*' [82].

b) There was an obligation on Comensura to operate a process for addressing grievances that aligned with the Respondent's grievance process.

c) Schedule 2 Part B, detailed the services that were provided by Comensura to the Respondent [98].

d) This had been one of the sections of the MS Contract that had been redacted for confidentiality reasons and further had been the subject of the case management discussion on the morning of the first day. It identified how much of the Respondent's spend per annum was allocated to the IELTS examination work, with as other expenditure being allocated to other areas of the Respondent's business including HR, marketing and finance, matters unrelated to the current consideration of whether the Claimant was an employee or worker of the Respondent and not relevant.

85. Schedule 2A to the MS Contract set out Comensura's commitments to the Respondent, which was essentially to manage the supply of both Temporary Agency Workers, workers that included but were not limited to IELTS Examiners, as well as permanent employees, either directly or through sub-contractors (Clause 1 Schedule 2A) [104-120].

86. The commitments from Comensura to the Respondent in relation to Temporary Agency Workers were set out in Schedule 2A, in particular clause 3.1 and clause 3.2 set out obligations to procure that each Temporary Agency Worker would comply with matters such as signing non-disclosure agreement, not be entitled to holiday during an Assignment without the Respondent's prior knowledge and have the necessary competence, qualifications and expertise to perform an Assignment with

reasonable care and skill as well as ensuring that they familiarised and conducted themselves in accordance with the Respondent's policies [105].

87. Further provisions at clause 3.3 included obligations on Comensura to:

a) notify the Respondent if a Temporary Agency Worker was prevented from performing an Assignment due to illness/incapacity and to indicate the likely duration (3.3.1);
b) ensure that any Agency was contractually bound to make appropriate PAYE deductions for tax and national insurance (3.3.4). Provisions obligating Comensura to actually pay were contained in Clause 4;
c) ensure that any Agencies retained overall control of the Temporary Agency Worker and be responsible for their personnel issues (3.3.6) and that they would manage time recording, payroll, disciplinary, capability, conduct and performance feedback (3.3.7);
d) ensure that any contract aspects of any Assignment and records relating to each Temporary Agency Worker, were kept (3.3.8/3.3.9).

88. Further discrete provisions placed contractual obligations on Comensura to provide pre-appointment screening of Temporary Agency Works (Clause 6), manage and/or end Assignments of Temporary Agency Workers, and included ensuring that the Temporary Agency Worker was entitled to and received payment in respect of annual leave (Clause 3.4-3.7 [106]). Where the British Council introduced candidates to Comensura to be provided on Assignment, payroll services were to be provided including right to work checks (Clause 7) [110]. In practice this is undertaken by Flexy who conduct the ID checks and right to work for onboarding and notify the Respondent of the outcome. Flexy also sends IELTS Examiners additional documents including Confidentiality Undertakings [203] and the IELTS Code of Practice [485] as well as a copy of the Respondent's Code of Conduct [198]

89. Clause 4 provided an obligation on Comensura to provide an IT platform, known as 'c.net' that would facilitate the hiring process of Temporary Agency Workers (and more permanent staff). This web-based platform c.net, is used for all invoicing, assignment booking and timesheet authorisation, enabling IELTS Examiners to submit their timesheets on a weekly basis [740]. Schedule 3, Clause 10 of the MS Contract reflected that setting out the invoicing procedure [133] providing that :

a) Temporary Agency Workers were to record time in c.net, which they do by way of completing timesheets;
b) Comensura was obligated to ensure that the Temporary Agency Worker is paid by any Agency according to terms agreed between them;
c) That Comensura will provide VAT invoices to the British Council on a weekly basis; and that
d) The British Council would pay all compliant invoices within 14 days of invoice.

90. Payment owing to IELTS Examiners is therefore calculated by the IELTS Examiner completing a timesheet on the c.net system confirming the

number of Writing test scripts marked and/or VCS Speaking assessments held [185] which are uploaded by the individual IELTS Examiner to c.net for the Respondent to review that the invoices submitted by IELTS Examiners for work undertaken accorded with their own records of work. If it does, the timesheet is approved and sent to Flexy by the c.net system for payment to the IELTS Examiner by Flexy. An example for the Claimant was included within the Bundle [209]. If not, the timesheet will be rejected and a request is made to the IELTS Examiner to reissue an accurate record.

91. On a weekly/7 day basis Comensura calculates fees owed to it, including fees charged in respect of work undertaken by each Temporary Agency Worker and invoices the Respondent a sum which will include sums that the IELTS Examiner as a Temporary Agency Worker will receive from the Agency and any additional sum in respect of matters such as annual leave, pension contributions and NI, any management fee Comensura charges and any agency fee for the provision of its employment agency services. Comensura, or its subcontracted Agency, does not wait for receipt of funds from the Respondent but pays the agency workers, including the IELTS Examiners at the end of each week in arrears.

92. IELTS Examiners are paid by Flexy on a per script basis for OSM and on a per interview basis for the case of VCS [496-501].

93. In terms of the general nature of the IELTS Examiner flow of work from the Respondent, an IELTS examiner could only undertake work if such work was available. This was evidenced over the Covid-19 period where no work was available. To an extent, the flow of work was unpredictable save that parties would be aware of general trends in demand from candidates.

94. There was no contractual obligation for either the Respondent to provide work to IELTS Examiners, the Respondent's terms of use of the Examiner Portal at the Global Hub confirming no guarantee of work [489].

95. At times, the Respondent has increased the rate that it is prepared to pay for marking scripts as a means of incentivising IELTS Examiners to make themselves available through the Global Hub. On such occasions, the IELTS Examiner is not guaranteed that there will be any work available.

Practical arrangements

96. All IELTS Examiners' marking, whether marking Writing Tests or assessing Speaking Tests, is done in their own name. They all have their own unique IELTS Examiner number and there are no circumstances where an IELTS Examiner, including the Claimant, can ask another IELTS Examiner to mark or assess in their place as no IELTS Examiner, or other person, is permitted to log into another IELTS Examiner's account.

97. An IELTS Examiner marking on the Global Hub is encouraged to provide 10 days' notice of availability. This is not a requirement and failure to do so does not impact on the IELTS Examiner's ability to examine.

98. If, an IELTS Examiner has confirmed to the Global Hub that they are available to mark or assess, there is an expectation that they will then commit to that availability. If they become unavailable for whatever reason, the IELTS Examiner is expected is to inform the Respondent, when another IELTS Examiner will undertake the marking/assessment. Likewise, if a candidate is known to them, an IELTS Examiner does have an obligation to inform the Respondent when the Writing Test or Speaking Test will be re-allocated to another IELTS Examiner receive payment for that work.

99. All IELTS Writing test scripts that need to be marked through the OSM are pooled together on an online digital platform known as 'Mark Manager', which the IELTS Examiner access via the Respondent's 'Examiner Portal'. The IELTS Examiner logs onto the Examiner Portal in their own name, using their unique IELTS Examiner number to access and requests an OSM Writing Test script to mark from Mark Manager. The Mark Manager platform collates all the scripts (whether received by the Global Hub from a Local Test Centre or taken by a candidate directly with the Global Hub) and, in order of marking priority, allocates them to the first IELTS Examiner requesting an item to mark.

100. An OSM IELTS Examiner is not allocated any specific number of Writing scripts and can only mark if and when scripts are available to be marked and have been allocated to an examiner after the IELTS Examiner actively requests work by selecting 'Start Live Marking' on the Mark Manager platform. Once the mark has been saved, if there is a further script available for marking, this will be allocated to the examiner and displayed. If no further scripts are available, the IELTS Examiner is notified that this is the case.

101. Whilst the Claimant suggested that this allocation system for OSM may not be so automated, he provided no evidence to support such assertion and I accepted the live evidence from Tom Porter who had confirmed the position. I found that allocation was automated with no differentiation between IELTS Examiners and no positive control by the Respondent over which IELTS Examiner scripts were allocated to. Rather they were allocated on a 'first come-first served' basis, subject only the the caveat that they were not permitted to mark the script of a candidate that they know.

102. Whilst the IELTS Examiner can log onto 'Mark Manager' at any time, the IELTS Examiner cannot mark OSM scripts at any time as:
    a) scripts for OSM are only available for IELTS Examiners to mark on the Mark Manager platform between the hours of 6am/7am to 10pm/11pm (times have varied over the years);
    b) Scripts are not always available on a Monday, for maintenance downtime purposes; and
    c) Sometimes the Mark Manager platform is closed for maintenance generally or there can at times be errors or 'glitches' preventing IELTS Examiners, either all or individual IELTS Examiners, from accessing scripts.

103. OSM Writing Test scripts and/or VCS assessments are not always available for the IELTS Examiners due to lack of supply of candidates taking such tests. This will result in an IELTS Examiner logging onto the Examiner Portal only to find that no scripts are available to be marked and/or no VCS to be allocated to assess.

104. At such times and irrespective of the reason, IELTS Examiners do not get paid for work lost as a result of system inaccessibility or if work is not available.

105. IELTS Examiners who examine via the Global Hub are not required to wear a specific uniform (general dress code standards for all IELTS Examiners having already been dealt with) and do not have a Respondent email address or telephone number.

106. The IELTS Examiners have to provide their own equipment and, save from an exception made at the start of the Covid-19 pandemic when a small number of devices were lent out, are not provided with devices to undertake OSM or VCS. They must log onto the web page to access the Examiners Portal of the Global Hub using their own device.

107. IELTS Examiners undertaking OSM or VCS do contact the Respondent direct if they need assistance in relation to the digital platforms when they can and do contact the PSM/VCS Support teams, a support service offered by the Respondent.

The Claimant

108. The Claimant is a certified IELTS Examiner, having first achieved his certification in 2009, as a Speaking IELTS Examiner. Since initially certifying in 2009, the Claimant has successfully recertified every two years to be an IELTS Examiner [205-207].

109. The nature of the arrangements between the Claimant and the Local Test Centres prior to 2016, has not been the subject of much or any scrutiny in these proceedings save that the Claimant did work as an IELTS Examiner, both Speaking tests and Writing tests, through the named Local Test Centres who facilitated exams and monitored the Claimant's examination work using standards set from time to time by the PSN of the IELTS Partnership.

110. During that period and from at least 2018 until February 2024, the University of Manchester as a Local Test Centre had been the Claimant's main test centre as an IELTS Examiner for Speaking tests. As a result, it has been the University of Manchester that has had responsibility for, and has undertaken monitoring and recertifying the Claimant to be an IELTS Examiner for the Speaking tests in accordance with the standards set out in the PSM Manuals. Whilst the Claimant continues to conduct Speaking tests at University of Manchester (and indeed the University of Liverpool) [565],

in February 2024 he requested a change in his main test centre for Speaking tests, from the University of Manchester to the Respondent's Global Hub/GB500. As such, it will be the Global Hub that will in future monitor and be responsible for the Claimant's IELTS Examiner Speaking certification.

111. For Writing certification, and up to 2018 (save for OSM) the Claimant has been undertaking his writing examining work through Bangor University. As a result and during that time, it had been that educational institution as a the Local Test Centre that that had responsibility for monitoring and recertifying the Claimant to be an IELTS Examiner for the Writing tests in accordance with the standards set out in the PSM Manuals. From 2016, the Global Hub was responsible for monitoring the Claimants OSM marking and since 2018, all Writing test examination has been exclusively through the Global Hub and in turn, has had responsibility for monitoring the Claimant.

112. The Claimant confirmed that he is not claiming that he is an employee or worker of the Respondent by reason of any of the work that he has undertaken between 2009 to 2016. He claims that he is an employee or worker of the Respondent by reason of his work undertaken through the Global Hub since 2016.

113. The Claimant has given evidence that in 2016 he went through a recruitment process directly with the Respondent, which involved him being trained by the Respondent to be an IELTS Examiner for OSM.

114. As indicated, OSM through the Respondent's Global Hub commenced in 2016 and having undertaken some test pilots overseas, by May of that year the Respondent was writing to IELTS Examiners confirming that it was looking for a number of OSM IELTS Examiners to be based in the UK and that it would be recruiting in the following weeks [668].

115. The Claimant completed an application form around 18 May 2016 [669-676]. The application form confirmed that the Respondent would be assessed by staff at the Respondent and made no reference to the Claimant's work status or that a third party body would be involved in the contractual relationship.

116. Some months later, on 3 October 2016, the Claimant was sent an email from the Respondent, again confirming that they were looking to recruit a small number of OSM examiners for the period late October to December 2016 for the remainder of the launch of OSM [Supp34]. The Claimant was asked if he would be interested, and was provided dates of training. He was informed that he would need to be available for marking from home 2-3 days per week Tuesday to Thursday with optional work Fridays and occasionally weekends. It was confirmed to him that OSM could take place working from home and that whilst there was flexibility, it was expected that the IELTS Examiner would be online by 10am and would finish marking 80% of any day's work by 5pm. The email concluded that any hardware and environment requirements might require an initial investment from the IELTS Examiner and that current payment was set at £148.50 per full

marking date with the expectation that 85 items would be marked per day with an aim to move to a per-item rate.

117. The Claimant responded by return confirming that he was interested [Supp 34]. He was asked to complete and return documentation the following day, 4 October 2916 [Supp33]. It was unclear what that attached documentation was, it not being included within the Bundle or Supplementary Bundle.

118. At some point the Claimant met the Respondent's OSM team and other IELTS Examiners, the Claimant's email of 10 October 2016 to the Respondent referring to such a meeting [Supp33]. I concluded that this was more likely than not to have been conducted on 7 October 2016, a day that the Claimant evidenced he had attended a training day conducted by the Respondent on how to conduct OSM. The Claimant asked if he could work from an alternative location and provided his availability for November and December 2016, indicating that he was handing in his notice from his job to focus primarily on OSM. He was thanked for his availability. The Claimant was optimistic about the income stream that OSM could bring.

119. Later that day, the Claimant, along with a number of other individuals, was sent further documentation by the Respondent that they were asked to complete [Supp36]. Again, it was unclear what that documentation was, it not being before me in the Bundle or supplementary bundle.

120. On 21 October 2016, the Claimant was sent a further email from the OSM Team at the Respondent [678]. That email confirmed that certain security information had not been confirmed which might delay the Claimant being 'set up on the Carbon 60 payroll system' and this might delay the Claimant's ability to claim for his first week's work.

121. On 8 November 2016, the Claimant was sent an email from Carbon60 Limited ("Carbon60"). Within that email, the Claimant was informed that Carbon 60 worked with Comensura. It is fair to say that the covering email was far from clear for the Claimant, confirming to him they would be '*running your payroll and ensuring you get paid*'. The email also indicated however that in order to issue the Claimant with a contract, they wanted him to complete and sign that attached document as soon as possible and his right to work documents. They asked him to confirm the role and location that he would be working [Supp37]. The attached document was indicated to be a '*Terms of Engagement Temp – Carbon 60 document*' and a 'Carbon 60 PAYE Compliance and health screening document'.

122. A further email was sent on 10 November 2016 to the Claimant by Tim Porter at the Respondent [679], then part of the OSM Team. The email confirmed the necessary security checks had been completed, that the Claimant's name had been sent to 'Carbon 60' for registration on the payroll system and for the Claimant to submit his timesheets, and that Comensura/Carbon 60 would be in touch to explain how he could log onto their systems. The email included a statement that this was an '*outsourced company managing payment to OSM…….examiners for British Council*'

123. Within the main Bundle was a contract between the Claimant and Carbon60, entitled 'Terms of Engagement of Temporary Workers (Contract for Services')[168-171], a document that included the Claimant's signature at the end of that written agreement. It was dated 15 November 2016 and I found that it was likely that this was the document that had been attached to the email that Carbon60 had sent to the Claimant on 8 November 2016 and that the Claimant had signed the agreement returning it to Carbon60 on or around 15 November 2016 ("Carbon60 Agreement"). The Claimant claims that the contract does not represent the reality of his employment with the Respondent.

124. That Carbon60 Agreement provided that:

a) the agreement constituted a contract for services between Carbon60 (that was defined as the 'Employment Business) and the Claimant, who was referred to as the 'Temporary Worker' (Clause 2); an 'Assignment' was defined as the period during which the Claimant was supplied to render services to the 'Client', namely the body requiring the services of a temporary worker.

b) Clause 3 provided that Carbon60 would endeavour to obtain suitable Assignments for the worker to work as an IELTS On-Screen Marking Examiner;

c) Clause 3 also provides that the Claimant acknowledged the nature of the temporary work meant that there may be periods when no suitable work was available, that the suitability of the work would be determined by Carbon60, that Carbon60 incurred no liability to the Claimant should it fail to offer opportunities and that no contract shall exist between the two during periods when the Claimant was not working on an Assignment.

d) Clause 4 provided remuneration terms and Clause 5, statutory leave, which provided that for the purposes of calculating entitled to paid annual leave pursuant to the Working Time Regulations 1998 ("WTR"), the Claimant was entitled to 28 days' paid leave per leave year, with specific provisions on calculation of holiday accrual within Clause 5.2.

e) Clause 7.1 specifically provides that at the end of each week of Assignment the Claimant would deliver to Carbon60 a time sheet completed to indicate the number of hours worked in the preceding week.

f) Clause 7 further provided that Carbon60 would pay the Claimant for all hours worked regardless of whether it received payment from the Client for those hours and incorporated an obligation on the Claimant to deliver to Carbon60 time sheets at the end of each week of an Assignment.

g) Finally, Clause 8 was relevant in that it provided that the Claimant was not obligated to accept any Assignment offered but that if he did, during every Assignment, there were obligations on the Claimant including in

broad terms and amongst others, co-operation from him with regards to the Client's instructions, supervision and rules.

125. It appears that the Claimant had in fact undertaken his first OSM prior to this Carbon60 Agreement being signed by him, the Claimant evidencing that his first marking for OSM was carried on in week ending 4 November 2016 and Schedule A to that Carbon60 Agreement indicating the Claimant's start date of his first assignment to the Respondent was 24 October 2016 [171, 200]. The Claimant's assignment to the Respondent was repeatedly extended in the following years and a further agreement was signed by him 2018 in similar terms to the 2016 Carbon 60 Agreement [172-181].

126. The Claimant's live evidence had been that he could not recall being told at that training session that Carbon60 would be in touch and/or that he would be 'hired' by Carbon law. Despite no evidence from the Respondent witnesses on the issue, I concluded that it was likely that at that training session, this would have been said particularly as the documentation that the Claimant was then sent came from Carbon60 which the Claimant signed without question.

127. I did not accept as likely, the Claimant's evidence that he had not read that agreement before signing it or indeed later extensions or agreements. I also considered it more likely than not that the Claimant, as an intelligent educated person, would not have simply signed the agreement without query if he had not been anticipating such documentation, whether he 'skimmed' the document, as he suggested in cross-examination or read it in detail. He did not at that point in time suggest to the Respondent that the Carbon60 Agreement was a sham and he did not sign the Carbon60 Agreement under protest.

128. I found that in signing that Carbon60 Agreement, the Claimant agreed to provide his services as a temporary agency worker contracted by Carbon60 and that it was not likely that at that point he held the belief that Carbon60 was a payroll company only.

129. The Carbon60 Agreement contained an assignment schedule indicating that the 'Client' was the Respondent and that the services had started on 24 October 2016 and that the 'End Date' would be 31 March 2027 [171]. That agreement was extended on a number of occasions in 2017 [172, 174 and 175] and again, the Claimant signed accepting the extension on the basis that all other terms of the agreement of 15 November 2016 would remain the same. A new agreement appears to have been signed on the same terms in 2018 but nothing appears to turn on this issue [176] with a contract extension being signed in September 2020 [180] and again in April 2021 [181].

130. In 2018, the Claimant signed an Agency Worker Confidentiality Agreement committing to retain the Respondent's information confidential [198].

131. In the intervening period and from March 2020, Covid-19 was upon us. The Claimant and other IELTS Examiners were looking for clarity as to whether they would receive financial support through the Government's Coronavirus Job Retention Scheme ("CJRS"), commonly known as furlough [45]. In the spring of 2020, the Claimant personally wrote asking for clarity on whether as an agency worker, he would receive such furlough from the Respondent, the stream of work as an IELTS Examiner clearly having dwindled considerably as a result of the world-wide Covid-19 travel restrictions. In such correspondence he referred to himself as a temporary worker, with the Respondent hiring the services of Carbon60 who managed the payroll. Although the Claimant gave evidence that at that time he did not use different terminology as arguing over employment status at that time was, as he termed it, likely to have been the last thing on his mind, I did not consider this to be credible and did not accept that evidence.

132. At the September hearing, the Claimant asked Toby Kendall if Carbon60 had made an application to the government for CJRS/furlough monies for its agency workers. Toby Kendall did not know if Carbon60 had made a direct application and could not say what happened, but that he believed that Carbon60 had an obligation to pay the agency workers and in order to do so they would have charged any furlough monies paid to agency workers that back to the Respondent. Likewise, at the January hearing, when questioned on what applications had been made for CJRS monies for agency workers, Tim Porter also could not assist on whether Carbon60 or Comensura invoiced the Respondent for any furlough payments that Carbon60 had paid to the Claimant.

133. I was taken to correspondence from the Claimant in the April of 2020 [Supp42], but nothing in that documentation assisted to deal with whether an application had been made for CJRS funding, only that general and sympathetic comments were made regarding the position of agency workers working for public sector bodies.

134. The arrangement with Carbon60 continued until 2022, when the employment business providing supplying the workers to the Respondent transferred from Carbon60 to another company within Impellam Group, Flexy Corporation Limited ("Flexy"). At around the same time, the Claimant took on an additional examination work as a VCS Speaking Examiner.

135. The Claimant was informed of the change and his assignment as an IELTS OSM Examiner was terminated by Carbon60 [Supp54]. It was confirmed by Carbon60 that he would be issued with a P45 from Carbon and that future payments would be from Flexy [Supp53].

136. The Claimant signed and entered into a new written agreement with Flexy, dated 11 February 2022 ("Flexy Agreement"). Again the Claimant signed that Flexy Agreement confirming that he had read and understood the terms and agreement. The Flexy Agreement was entitled 'Terms of Engagement of Temporary Workers' and had similar definitions of 'Assignment', 'Client',

with Flexy being the 'Employment Business' and the Claimant, the 'Temporary Worker'. Further relevant provisions included:

a) Clause 2, providing that the agreement and the schedule to the Flexy Agreement included the Claimant's statement of terms of engagement as required by s.1 Employment Rights Act 1996 and constituted a contract for services between Flexy as the employment business and the Claimant as the Temporary Worker and that no contract existed between them between Assignments as defined;

b) Clause 3 included similar provisions to Clause 3 of the Carbon60 agreement acknowledge the nature of the work and included similar, albeit more detailed provisions to Clause 5 of the Carbon60 Agreement, in relation to leave from Flexy under the Working Time Regulations 1996;

c) Clause 6 provided that the Claimant would be entitled to Statutory Sick Pay from Flexy provided he met the statutory criteria;

d) Clause 8 provided terms regarding hours of work and that Flexy would pay the Claimant's remuneration (Clause 8.3);

e) Clause 11 indicated that there were no disciplinary or grievance procedures applicable to the Claimant and that if he was dissatisfied with any decision to terminate the agreement or was unhappy about any aspect of his work or the working relationship he should contact Flexy;

f) Clause 12 included confidentiality provisions stated to protect Flexy and any 'Client';

g) Finally, clause 15 set out provisions regarding Flexy's pension scheme for workers indicating that the Claimant may be entitled to become a member and his enrolment may be automatic.

137. The agreement with Flexy was extended with various contract amendments and copies of those were included in the Bundle indicating the commencement of each assignment and how much the Claimant would be paid for each Written Test OSM script marked for the Respondent [194-197].

138. For the avoidance of doubt and from 2016, the Claimant has been paid by Flexy for all OSM and all VCS marking/assessments undertaken by him through the Global Hub [217-237].

The Law

139. The law on employee and worker status is governed by statute and set out at paragraph 230 Employment Rights Act 1996 as follows:

(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.
(3)In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or
(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly

140. I have been referred to a number of authorities, in particular within Mr Mitchell's Skeleton Argument, and those that are relevant to my decision in this Judgment are as follows:

a) **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 2 QB 497 confirming three conditions which must be fulfilled for an employment relationship to exist:
   (i) An agreement that in consideration of a remuneration a person will provide their own work and skill in performance of some service for the other;
   (ii) An express or implied agreement that in performance of the service he will be subject to the other's control in a sufficient degree to make that other person "master";
   (iii) That the other provisions of the contract are consistent with it being a contract of service;

b) **The Aramis** [1989] 1 Lloyd's Rep 213 in which the 'necessity' test (referenced in **Tilson**) is explained by Bingham LJ (page 224) that it is for the claimant to show that it is *'…. necessary [to imply a contract]…..in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist'* ;

c) **Heatherwood and Wrexham Park Hospitals NHS Trust v Kulubowila** [2007] All ER (D) ER (cited in **Tilson**) reminding tribunals that it is not enough to form a view that because the claimant looks like an employee, acts like an employee and was treated as an employee;

d) **James v Greenwich Council** [2008] IRLR 302 where the CA considered that in the case where a third party, such as an employment agency supplies an individual to work at an end user, there will normally be no need to imply a contract where there is an express contract of or for services between that individual and the agency; that the facts and the relationships between the parties are explicable by genuine express contracts between the worker and the agency and the end user so that an implied contract cannot be justified as necessary;

e) **Autoclenz Ltd** v **Belcher and Others** [2010] IRLR 70 CA and [2011] UKSC 41 where the Supreme Court held that for a contract of employment to exist, there had to be an irreducible and minimum obligation on each side;

f) **Tilson v Alstom Transport** [2011] IRLR 160, the burden is on the claimant to establish that a contract should be implied, and only if it is necessary to do so;

g) **Uber v BV and others v Aslam** and others [2021] ICR657, 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 dependant position in relation to a personal organisation who exercises control over their work;

h) **Ter-berg v Simply Smile Manor House Ltd** and ors 2023 EAT 2 where the EAT considered that when deciding whether a claimant is an employee or worker, or neither, and determining whether the terms of a document relied upon reflect what the parties agreed, the Tribunal should follow the approach set out in **Autoclenz,** including not applying certain rules of contract law that would apply when considering other types of written contact, an approach confirmed by the Supreme Court in **Uber.**

Respondent Submissions

141. The Respondent relies on written submissions, which are incorporated by reference into this reserved judgment, which were supplemented by additional submissions in response to queries I raised.

142. In doing so I was reminded that the Claimant had chosen not to bring proceedings against Flexy and had declined for Flexy to be joined as a second respondent

143. I was reminded that the Claimant has to show that he has a contract with the Respondent; that the Claimant does not claim that he has an express contract but that it is implied and that an implied contract between the Claimant, as an

agency worker, and the Respondent, as the end user, can only be implied if it is necessary to do so (**Tilson**) and that much of the evidence from the Claimant and the cross examination of the Respondent's witnesses did not relate to that.

144. Whilst it was accepted that the possibility of the agency arrangements being a sham does arise in the context of agency workers, it is only in 'in some very extreme cases' that it is necessary (**James (**para 10)).

145. I had asked the Respondent to address me on the impact of the Supreme Court's decision in **Autoclenz** and **Uber** and I was referred specifically to paragraph 20 of **Autoclenz**, approving the dicta of the Aikens LJ in the Court of Appeal (para 88) that '*Once it is established that the written terms of the contract were agreed, it is not possible to imply terms into a contract that are consistent with its express terms. The only way it can be argued that a contract contains a term which is inconsistent with one of its express terms is to allege that the written terms do not accurately reflect the true agreement of the parties.'* It was submitted that the Claimant was an agency worker and has been at all times and that the express contacts, between the Respondent and Comensura, and in turn the Temporary Agency Work agreements between Flexy and the Claimant, explain the express contractual relationship.

146. It was submitted that the Claimant's reliance on the agreements being a 'sham' was misplaced and that the Claimant could only establish a sham if express terms did not reflect the reality of the arrangements.

147. Finally, with regard to the 'Chelmsford Document', [Supp62] it was submitted that the Respondent did not know the provenance of a document dating back to 2015; the Claimant had not disclosed when he had received a copy of the document or who he had got a copy from and no one could assist as to how it came into being but in any event, the Respondent submitted that the content was wrong and nothing in the document suggested that it did or would have applied to the Claimant, predating his work at the Global Hub by nearly a year.

Claimant's Submissions

148. It was submitted that the Respondent's Skeleton failed to properly engage with the key legal principles and that the Respondent understated the degree of control of the Claimant's work that was exercised by the Respondent or that the express written contracts with Carbon60/Flexy did not reflect the true agreement or working relationship with the Claimant and the Respondent; and that there was undue weight placed on his ability to decline work. He argued that it was necessary and appropriate to imply a contract of service between him and the Respondent to reflect the true agreement and reality of the relationship; that the express agency contracts were not genuine and did not preclude the implication of an employment contract between him and the Respondent.

149. He accepted that the key legal question is whether it was necessary to imply a contract between the parties as per **James** and **Tilson** and that necessity

had to be assessed in light of all circumstances. He submitted that the mere existence of an express agreement did not automatically preclude a contract with the end user where the reality was not reflected in the agency contract (per **Tilson**) and that I must examine whether the written terms reflected what was actually agreed and the true intention of the parties (**Autoclenz**).

150. He considered that relevant factors pointing to an implied contract include the high degree of control, integration requirement for personal service and obligation to accept/perform some minimum work per **Heatherwood**.

151. He argued that the Respondent exercised a high degree of control over him: that;

a) he was contractually obligated to conduct work in accordance with very detailed procedures standards and requirements set out in the PSN Manuals of which the Respondent had the right to intervene at its own discretion and that if he failed to conduct his work in accordance with that, he could be subject to suspension or termination;

b) the Respondent constantly monitored and audited his performance against its stipulated standards (from within and without the PSN Manual) and conducted regular training, giving him skills that he can use only for the Respondent's benefit and had the power to suspend him from work or to reduce his marking quota if he fell short of expectations; that whilst not all training is mandatory, much of the upskilling training was mandatory for continued service with the R/ continue as an examiner;

c) he was subject to Respondent policies on matters such as H&S, Dress Code, disciplinary, confidentiality, whistleblowing, fraud awareness and child protection;

d) the Respondent controlled his working time and location, scheduling his interviews for Speaking tests and setting the working window in terms of hours for marking Writing tests (which they change and have changed at little/no notice or consultation); that the flow and availability of items was entirely in control of the Respondent.

152. He considered that this demonstrated a level of control going well beyond mere quality standards and that arguments that similar controls applied before 2016, when he worked elsewhere was a red herring as his case that he became the Respondent's employee when he started working for the IELTS Test Centre GB500, in 2016; that the control exercised must be viewed in context of all the other factors.

153. He submitted that the express agency contracts did not reflect the true agreement between the parties or the reality of the working relationship; that they were not genuine and should be disregarded.

154. When I queried what specifically the Claimant meant by 'not genuine', he argued that the material terms were generic and inconsistent with practice and that he had reasonably understood from his pre-contract discussions with the Respondent that the relationship would be solely and entirely with the Respondent and that he had only been presented with an agency contract after he had already commenced working with Respondent and had resigned from his previous full time employment in local authority in reliance on assurances given to him directly by Respondent (para 81-85 CWS) and that Carbon 60 involvement was merely as a payroll provider for the Respondent.

155. He submitted that the language and format of the contracts were consistent with a mere payroll arrangement, focussing mainly on payment processes, and the contracts did not completely define the Claimant's working conditions or full parameters of the working relationship that had been sent by the Respondent outside of the written agreements (referring specifically to written communications from the Respondent setting out the expectations on pay (Supp [34]). In those circumstances, the written contacts should not be seen as matching the true intentions of the parties and that the Tribunal had to look beyond the written arrangements to see the real relationship (**Autoclenz**).

156. He did not accept that his case was that any flaw in the written arrangements invalidated any contractual relationship but rather that the Temporary Worker agreements did exist, but did not capture the full reality and extent of his relationship with the Respondent leaving room for implication of employment contract governing his day to day relationship.

157. He argued that the Respondent had overstated the significance of his ability to decline work and that he had regularly been offered work which he was expected to accept, and had accepted on an ongoing basis for the last 8 years; that he devoted his working time to the Respondent primarily and the notional ability to refuse work did not negate the overarching duty of mutuality of obligation and that the Respondent imposed a minimum amount of work to be delivered as a condition of IELTS Examiner status and that if he failed to make those minimum thresholds of examining then he would be terminated.

158. Finally, he submitted that the Respondent had downplayed how much he was integrated into the Respondent's business but that the facts demonstrated that he operated as part of the Respondent's core business as a Global Test Centre where he has worked continuously for over 8 years and where his role was not casual or ancillary and he had been relied on as a key professional examiner. He reminded him of his evidence that he had attended a recruitment event for the Respondent acting as its representative and had been reimbursed for doing so being treated like staff and receiving personalised cards. In conclusion, he argued that implying an employment contract was necessary to give business reality to their relationship and reflected the actual agreement between the parties and the way that the parties had conducted themselves only made sense if a direct employment relationship when taking into account the payment system; that being paid piece rate created an implied term that work would be provided as no reasonably minded person would enter into work arrangement on basis of piece rate without there being

a mutually understanding that items would be available to be done in quantity enough to make it worthwhile the time for both parties. He invited me to find that his was one of those rare case contemplated in **James** and to further find that he was employed by the Respondent under an implied contract of service

Conclusions

159. The Claimant agrees that the third party referred to in his ET1 claim form, is currently Flexy and that he has no express contractual relationship with the Respondent. It is further an agreed fact that as a result of his contractual relationship with Flexy, the Claimant receives holiday pay, entitlement to sick pay and other statutory entitlements, whether as a worker or employee of Flexy, from Flexy.

160. Whilst it is right that the Claimant has not pleaded that he has an express contractual relationship with the Respondent, he is a litigant in person and has at the same time asserted in evidence that he had been recruited as an employee of the Respondent as an OSM IELTS Examiner in 2016 and as a VCS Speaking Examiner in 2022 and that the email of 3 October 2016 amounted to a s1 Employment Rights Act 1996 statement of main terms and conditions from the Respondent has his employer, suggestive of an express contractual contract of employment.

161. The Respondent has submitted that this cannot be right and that the email was effectively no more than an invite an expression of interest. Alternatively, if this was an express contract with the Respondent, it was an express contract for a defined short term and not the contract which the Claimant relies on for his case in any event, which is an implied one.

162. Whilst the Claimant had given evidence that he felt he had been through a 'recruitment process' with the Respondent, and I had found that the Claimant had been referred to Carbon60 as an IELTS Examiner that the Respondent had wanted to engage to undertake OSM, I accepted the argument from the Respondent that the email of 3 October 2026 was in isolation no more than an invite for IELTS Examiners to express an interest in OSM, and did not find that this email amounted to a commitment or offer from the Respondent to employ the Claimant directly, or a s.1 ERA 1996 statement of main terms and conditions of employment.

163. That said, I did think it likely that some direct and express contractual relationship had arisen between the Claimant and the Respondent in respect of the work that the Claimant had undertaken in the period from 24 October 2016, when the Claimant commenced some marking work for the Global Hub, albeit it appears that none of the parties had put their minds to that at the time and had permitted the Claimant to commence some work for the Global Hub before the contractual arrangements were finalised.

164. I further concluded that from 15 November 2016, when the Claimant signed the terms of temporary work with Carbon60, any such direct agreement had been varied and superseded by not just that November 2016 Carbon60

Agreement, but the subsequent agreement signed by the Claimant with Carobon60 in 2018, and again the agreement signed by the Claimant with Flexy in 2022.

165. I did not consider that this undermined my finding that from 15 November 2016 the Claimant had entered into a direct and express contractual relationship with Carbon60, having accepted the terms of the Carbon60 Agreement and that from 15 November 2016, there was no direct express contractual relationship between the Claimant and the Respondent, as a result of the communications between the Claimant and the Respondent prior to that date.

166. Further, I did not consider that any of the evidence that was before me in relation to the CJRS/furlough monies that had been paid to the Claimant by Flexy in 2020, held any evidential weight to support the Claimant's assertion that there was a direct employment relationship with the Respondent. Rather, the witnesses could not assist and the documentation in the supplemental bundle referenced agency workers being paid from public funds only.

167. The Claimant claims however that despite the express contractual agreements in place, the true contractual relationship is that of a direct and implied contract of employment between him and the Respondent, that the written contractual arrangements that are in place are a 'sham'. He relies on specific clauses in the contract documents and more generally relies on the high degree of control that the Respondent exercises over IELTS Examiners.

168. In considering this question, I particularly had in mind:

a) Having concluded that there was no express contract between the Claimant and the Respondent, a contact can only be implied if I was persuaded that it was necessary to do so, with the burden of proof being on the Claimant (**Tilson**); that it was 'necessary' to imply a contract in order to give business reality to a transaction and to create enforceable obligations between the parties dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist (**The Aramis**);

b) the guidance in agency cases given in **James** that the '*question of whether an 'agency worker' is an employee of an end user must be decided in accordance with common law principles of implied contact and in some very extreme cases by exposing sham arrangements';* and

c) the analysis in the EAT decision of **Ter-Berg** by HHJ Auerbach of of the Supreme Court decisions of **Autoclenz** and **Uber** in relation to 'sham':

> "43. "*Uber* does not … mean that written terms to which the parties have ostensibly signed up should generally now be disregarded. It does not signify that we have reached a point in the development of the law where the question of whether someone is a worker or an employee has become purely one of status with no role at all for contract…

> 44. … The starting point, as always, is the words of the statute. Section 230 requires that there be a contract of employment, or to be a worker, a contract that fulfils the section 230(3) definition. The Autoclenz approach does not simply bypass or ignore the contract. It travels through it, but, in a case where the true intention of the parties is contentious, it requires that the journey not end there, and that, in such a case, the contract be approached differently than a contract forged in a commercial or other conventional context would be. It allows the possibility that, having completed that exercise, the tribunal may conclude that what in reality the parties intended and agreed is not conveyed by some, or possibly all, of the terms of the contract….
> 46. … where… it is asserted that the wider factual circumstances suggest that the written terms do not, in some material way, reflect the reality of what was agreed, then the tribunal … must look beyond those terms to all the relevant circumstances, applying the purposive approach described in *Autoclenz* and *Uber*. Provided that it does so, however, it is not … an error for the tribunal to begin its analysis by considering those written terms. But it must not treat that as both the beginning and the end of its inquiry…".

169. In this case, I began by looking at the written terms acknowledging that this was not the end of the enquiry and also acknowledging that **Autoclenz** will not assist a claimant where there is no contract, express or implied, with the end user, in this case, the Respondent.

170. What the status of the Claimant was, as a result of his arrangements with the Local Test Centres of the universities of Manchester, Liverpool and/or Bangor, for his delivery of marking and assessing as an IELTS Examiner through their respective test centres, was not specifically relevant, although I do deal with this later regarding the Claimant's arguments on 'control'. The Claimant confirmed twice during the live hearing that his arguments are solely based on the delivery of the examination work he does as an IELTS Examiner for the Global Hub and not based on any work he delivered through any of the Local Test Centres. As such, I am tasked with considering the status of the Claimant as a result of the work he has delivered as an IELTS Examiner for the Global Hub and not prior to 2016.

171. I was not persuaded by the Claimant however that his case was one where it was necessary to imply any direct contractual relationship, whether one of employment or otherwise, between the Claimant and the Respondent, accepting the Respondent's argument that there was no necessity to imply a contract of any kind to explain the marking work that the Claimant did for the Respondent's Global Hub.

172. The express contractual arrangements that were in place; the express quadripartite contractual relationship whereby the Claimant had agreed with Carobon60/Flexy to be supplied as an agency worker to an end 'Client', the

British Council, and the overarching and express contractual arrangements between the British Council and Comensura whereby Comensura as part of the MS Contract agreed to supply temporary flexible staff to the Respondent through third party agencies such as Carbon60 and Flexy, was the business reality of all the transactions in this case.

173. I found and concluded that the business reality from 2016 was that:

a) the third party agency, first Carbon60 and latterly Flexy, contracted directly with the Claimant to supply him to clients as an agency worker and paid his remuneration including holiday pay and sick pay;
b) Carbon60 and again later Flexy, dealt with any concerns raised by the Claimant regarding his work with the Respondent as the 'Client;
c) the Claimant had no ability to raise concerns or a grievance with the Respondent as the 'end user', save for limited practical issues such as IT issues with the OSM marking platform; and
d) the Claimant has paid tax since 2016, identifying Flexy since 2022 as his 'employer' for tax purposes;

174. As is the general nature of when agency workers are supplied to an end user as the client, the Claimant had a lengthy run of assignments with the Respondent as the end user in this business relationship. That was not a factor to lead me to conclude an implied contract between the Claimant and Respondent should be implied as one of 'necessary inference' (**James** and **The Aramis**) or that the working relationship was other than one of agency worker and end user. Passage of time was not sufficient to give rise in isolation to employee or worker status.

175. I concluded that it could not be said that the way in which the contract had been performed was only consistent with an implied contract of employment between the Claimant and the Respondent. The way that the contract had been performed was in fact consistent with typical supply of temporary agency worker arrangements. I further concluded that the agency arrangements, reflected in the written and express contractual arrangements, were genuine and accurately represented the relationship between the parties.

176. In coming to this conclusion I also considered whether there was anything subsequent to the relationship commencing to conclude that these arrangements did not reflect how the work was actually performed.

177. The Claimant seeks to argue that the whole quadripartite contractual relationship, between the Respondent, Comensura, Carbon60 and/or Flexy, and the Claimant, (as opposed to specific terms) is a sham and that in reality he has a direct contractual relationship of employment with the Respondent.

178. The Claimant has asserted that he cannot be an agency worker, despite the express contractual arrangements, relying on specific terms in both the MS Contract and the Temporary Agency Worker agreements that he entered into with both Carbon60 and Flexy that he asserts did not reflect the reality of the working relationship.

179. The Claimant relies in particular on clause 2.2.1 Schedule 2 Part A to the MS Contract [76] which he says is a sham as Comensura has not '*sourced a pool of candidates to meet [the Respondent's] demands'* and that it was the Respondent that actively sourced the Claimant as a candidate to meet their needs. In further support of that argument he relies specifically clause 2.2.20 Schedule 2 [81] and clause 3 Schedule 2 Part B to the MS Contract [105]; that was not 'supplied' to the Respondent by another party and had been referred to Carbon60 by the Respondent in October/November 2016.

180. I refer to my findings and my acceptance of Mr Kendall's evidence that it was not unusual for a Client as the end user to identify to an agency, an individual that they want to engage as an agency worker and that this did not undermine these standard clauses or result in my conclusion that the whole agreement was a sham.

181. Whilst I did find that the communications between the Respondent and the Claimant to be problematic, in that Carbon60 was only referred to as a payroll provider within the emails of 21 October 2016 and 8 November 2016, as a result of my findings on the MS Contract, the Carbon60 Agreement (and in turn Flexy Agreement,) and from my acceptance of the evidence from the Respondent's witnesses as to the working arrangements that are in place, I was satisfied that Carbon60 was more than just a payroll company and that this was an incorrect description. That however did not lead me to conclude that the whole relationship between the Claimant and Carbon60 and/or the Respondent and Comensura, was a 'sham'. Rather, the implication that it was 'just' a payroll company was just incorrect and did not mean that the whole contact with Carbon60 was invalid or ineffective.

182. The Claimant says that Clause 3, providing Carbon60 would endeavour to obtain suitable Assignments for the worker to work as an IELTS On-Screen Marking Examiner was also a 'sham'[2] in support of his argument that the whole of the agreement between him and Carbon60 was ineffective. He does not explain what specifically he relies on to make such an assertion. I therefore placed no weight on this and concluded that the Claimant had not proven that such a contractual commitment within that specific clause was a 'sham' or impacted on the totality of the contractual arrangement between the Claimant and Carbon60 and/or the Respondent.

183. The Claimant has also specifically claimed that Clause 7.1, providing that at the end of each week of Assignment the Claimant would deliver to Carobon60 a completed time sheet indicating the number of hours worked in the preceding week, is also a 'sham'. He says that this was not the reality of the situation relying on the fact that the timesheet indicated the number of items marked on the OSM/number of interviews on the VCS only and there was no ability for him to include the time he spent in logging onto the Portal/Mark Manager and/or checking for items. Whilst this might be the case, I did not

[2] CWS72

conclude that this rendered this clause a ‘sham’ or the agreement between him and Carbon60/Flexy a sham.

184. I was not persuaded that the Claimant’s obligation to maintain the Respondent’s confidentiality and comply with certain of its policies to indicate that the written agreements in place were a sham or indicated an extreme case whereby the Claimant was an employee. Such provisions, to protect the intellectual property of the end user client are not unusual and does not indicate that the arrangements were sham arrangements.

185. The Claimant has not sought to argue that the work that he carried out as an IELTS Examiner through the Local Test Centres including those at the universities of Bangor, Manchester and/or Liverpool is relevant in establishing that he has a direct contractual relationship with the Respondent. I do consider that this is to an extent relevant however when considering what is, in my view, the Claimant’s primary argument on the Respondent’s ‘control’ of his work as an IELTS Examiner.

186. He argues that it is necessary for me to expose the contractual arrangements as sham arrangements as this is one of those extreme cases, where the factual circumstances of that ‘control’ suggest that the written terms do not in a material way reflect the reality of what was agreed in those contracts.

187. My conclusion is that the evidence in relation to this issue did not indicate either a relationship between the Claimant and the Respondent, as the ‘end user’ as one of employment or under s.230(3)(b) ERA 1996 for the following reasons.

188. I did conclude that the control exercised over the work undertaken by IELTS Examiners, in terms of certification, recertification, monitoring and requiring the standards set were to be complied with (set out in the PSN Manuals or otherwise) was significant. I repeat my findings in relation to those issues.

189. I had listened to evidence and made detailed findings of fact in relation to the certification/re-certification, monitoring and in turn professional standards enforcement action that could be taken by not just the Respondent but by IDP and ultimately CUPA (if the individual IELTS Examiner’s certification was to be revoked). I concluded however that such ‘control’ was taken by the Respondent in a regulatory capacity and in the context of its role in the IELTS Partnership and not in its capacity of being the end user in the delivery of examinations.

190. In that regard, that control and the standards set out in the PSN Manuals applied and had applied equally to the work that the Claimant had undertaken for the Local Test Centres at the universities of Bangor, Manchester and Liverpool and would be controlled by the Respondent, in its capacity as a regulator, in the same way irrespective of where the Claimant worked and irrespective of whether the Claimant undertook any work through the Global Hub.

191. That did not lead me to find that it was either necessary to imply a direct contractual relationship between the parties nor was it reflective of a sham arrangement. It did not lead me to conclude that there was a contract of employment between the Claimant and the Respondent or a contract that fulfils s.230(3) Employment Rights Act 1996.

192. In the same way, that the Respondent requires its agency workers to mark and assess in accordance with its requirements on location, scheduling/work windows, did not indicate that the agency arrangements were a sham. Rather, this degree of control of the work undertaken by an agency worker does not mean that it is necessary to imply a direct contract between the worker and the end user even if it did appear to mimic an employment relationship.

193. For those reasons, the Claimant's claim that he was an 'employee' within the meaning of s.230(1) Employment Rights Act 1996 and/or that he was a 'worker' within the meaning of s.230(3) Employment Rights Act 1996 is not well founded, and is dismissed.

Employment Judge Brace
6 February 2025

RESERVED JUDGMENT
SENT TO THE PARTIES ON

24 February 2025
Kacey O'Brien
FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS