EMPLOYMENT TRIBUNALS

Claimant: Mr K Theodoridis

Respondent: Intsol Recruitment Ltd

Heard at: Bristol (in public) **On:** 21 March 2025

Before: Employment Judge Cuthbert

Appearances
For the Claimant: Miss Clift (McKenzie friend)
For the Respondent: Mr Antonio (Director)

PRELIMINARY HEARING
RESERVED JUDGMENT

1. The claimant was **not** an "employee" of the respondent within the meaning of section 230 Employment Rights Act 1996. Accordingly the claimant's claim for breach of contract cannot proceed and is dismissed.

2. The claimant **was** a "worker" of the respondent within the meaning of section 230 Employment Rights Act 1996 until 23 March 2024. The claimant's claim for unlawful deduction from wages can proceed to a final hearing.

REASONS

Procedure and Issues

1. The case came before me as public preliminary hearing to determine (a) whether or not the claimant could pursue an unfair dismissal claim (including the issue of employment status) and also (b) whether a direct race discrimination claim should be struck out or subject to a deposit order.

2. The claims of unfair dismissal and race discrimination had been identified by an employment judge at a previous case management preliminary hearing as being the claims which the claimant was pursuing. The claimant had not ticked any of the boxes in section 8 of the ET1 form to indicate the claims he sought to pursue

and the narrative within section 8.2 of the form did not specify this either. He was not represented at that first hearing. English is not the claimant's first language.

3. The claimant was supported at the present hearing by a McKenzie friend, Ms Clift, whom he indicated he also wished to represent him, to which I agreed in the circumstances. The respondent was represented by Mr Antonio, a director.

4. At the outset of the hearing, Ms Clift explained that the claimant had not intended to pursue either a claim for unfair dismissal or race discrimination. Rather, she explained, he wished to pursue claims for alleged unpaid wages – he claimed that he was guaranteed fifty hours' work and pay per week by the respondent and that the respondent was effectively his employer at the relevant times. Accordingly, the claims for unfair dismissal and race discrimination were withdrawn and dismissed.

5. I considered the ET1 claim form, which the claimant had presented himself, and was satisfied that as a whole, it **did** indicate that the claimant alleged that he was owed wages and that he had claimed and alleged that he was guaranteed fifty hours' paid work per week by the respondent. This complaint, if proven, could *potentially* amount to:

    5.1. a claim for breach of contract (this would be the case only if the claimant was **employed** by the respondent **and** his employment had terminated before the point at which he presented his claim to the Tribunal); or
    5.2. a claim for unlawful deduction of wages, if the claimant was legally entitled to fifty hours' pay per week (the claimant could potentially pursue such a claim if he were an employee **or** worker of the respondent).

6. I told the parties of the potential claims above and explained that (in light of Rule 53(2) of the Employment Tribunal Rules of Procedure 2024) I could **not** decide, at the present preliminary hearing, whether or not the claimant had any entitlement to guaranteed hours/pay which he claimed. The respondent denied any such entitlement even in the event that the claimant were a worker/employee. Subject to the outcome of the present hearing, that issue of entitlement could only be determined at the final hearing.

7. The **only** remaining preliminary issue which I *could* decide was the **employment status** of the claimant, as that issue had effectively been included in the notice of the hearing (in accordance with Rule 53(2)).

8. The parties, who were both unrepresented at the previous hearing, had been given some generic directions at that hearing to prepare witness statements for the present hearing. The claimant had prepared a short witness statement, which did not address any of the necessary factual issues relating to employment status; the respondent had produced an extremely brief statement (an email) from a Mr Butler which also did not address employment/worker status issues. Mr Butler had not attended the hearing.

9. Consequently, I decided, in accordance with the overriding objective and with the agreement of the parties, to hear oral evidence from the claimant and then from Mr Antonio, who offered to be a witness. I asked each a number of questions

relevant to the employment status issues and then allowed the other party to cross-examine the witness.

10. I was provided with a 118-page bundle by the respondent, a 104-page bundle on behalf of the claimant and several further documents on behalf of the claimant during the hearing.

Findings of fact

11. My findings of fact on the issues relating to employment status are as follows.

12. I heard evidence from:

    12.1. the claimant
    12.2. Mr Antonio. He was the Operations Director for the respondent's Sales and Recruitment team. He confirmed that he had been employed by the respondent during 2022 and 2023 when the relevant events occurred. He had no contact or dealings with the claimant personally in that time.

13. The claimant is a bus driver. He applied for work with the respondent via an online process. Mr Antonio explained that the respondent has received over 33,000 such applications. In December 2021, the claimant's application was evidently accepted and he completed/signed two documents which were provided to him by the respondent:

    13.1. A 19-page "employment contract" between the claimant and an 'umbrella' company which provided payroll services, called Max Your Pay Ltd ("**MYPL**"). The contract was dated 7 December 2021 and stated that the claimant's "employer" as MYPL. The contract made no mention of the respondent. The contract said that MYPL would allocate "client assignments" to the claimant. The contract said that there may be periods when the employee may not have an assignment but did "guarantee" at least 336 paid hours over the course of a 12-month period (clause 3.2). The agreement also said (clause 3.14) that there was no obligation on MYPL to pay the employee on days when their services were not required by the end client. The contract included provisions on holiday pay, sickness, working days/hours, disciplinary and grievance procedures and termination. There were some restrictions on other work (clause 20.6).
    13.2. A "bus application pack" with the respondent (with no reference to MYPL made within it). This included an "employee declaration" which required the claimant to certify as follows:

        I hereby declare that I AM NOT currently engaged in any paid work outside of my commitments to Integrated Solutions. I understand that it is my responsibility to inform Integrated Solutions immediately if this situation should change at any point during my employment.

        The same application pack document also included an obligation to inform the respondent if any matters affected the claimant's availability to work.

14. Mr Antonio said that copies of these two documents were retained by the respondent and also sent to MYPL by the respondent.

15. MYPL had been set up by two directors of the respondent (not Mr Antonio) and was sold in around early 2024. It entered into administration in December 2024 (revealed by a Companies House search I conducted during the hearing and explained to the parties). Mr Antonio explained that MYPL had originally traded from the same office building as the respondent, but had occupied a different floor but by the time of the claimant's contact with the respondent, it operated from a different location altogether. The respondent also worked with other umbrella companies in addition to MYPL, for payroll purposes.

16. Mr Antonio also explained that when the claimant had signed up with the respondent, he would have been given the option of working directly for the respondent as its employee, or becoming employed by MYPL. Mr Antonio said that the claimant would have chosen the latter, and that this meant that he could work for a number of different agencies at the same time, via the one umbrella company (although there was no evidence that the claimant in fact did so). The claimant said he was **not** given this option at the start of his work and it was offered only after he had worked for the respondent for a couple of months. He said that he was also told that if he joined the respondent as an employee, he could be sent to different employers on different days, whereas if he remained working via MYPL, he could work only on the First Bus assignment in Bristol (see below), which indeed remained the case until the end of 2023. I accept the claimant's account as to what was on offer (to the extent that it differed from Mr Antonio's) on the basis that Mr Antonio had no first-hand knowledge of what was offered to the claimant and there was no documentation to assist either way.

17. The claimant commenced work for a client of the respondent, First Bus, out of Bristol, in January 2022. He was provided with an accommodation allowance as part of his remuneration as he did not live in the Bristol area at the time.

18. On 22 January 2022, a letter was provided to the claimant from Paula Rola, "Head of Compliance", on the respondent's headed paper. The purpose of the letter was not clear. It said:

> *To whom it may concern*
>
> *This is to confirm that Konstantinos Theodoridis is employed by Integrated Solutions as a PCV driver since 15/01/2022 until present.*
>
> *Konstantinos's hourly assignment rate of pay is £18-20. On this contract there is 50 hours guaranteed. He is paid weekly, one week in arrears, the contract is ongoing with no end date.*
>
> *If you require any further information, please do not hesitate to contact me.*

Ms Rola had since left the respondent's employment.

19. The claimant explained that during 2022 and 2023 until 23 December 2023, when his assignment with First Bus ended, he worked exclusively for First Bus and for no other company. The only gaps in his work were weeks when he was on holiday. When he took holiday, he arranged the dates with First Bus, based on their rotas/staffing needs. He was paid holiday pay by MYPL.

20. I asked the claimant what happened if there were problems or issues at First Bus. He said that he contacted the respondent, which had a call centre. He recalled doing so occasionally, about overtime issues and if there were issues with his pay and with night shifts. He could not remember what happened if he were ill but he believed that he reported his illness to First Bus, rather than the respondent, and First Bus then arranged their own cover for the shifts.

21. Around once a week, a representative from the respondent attended the First Bus depot in Bristol, where the respondent had a number of assigned bus drivers. This was based on an arrangement between the respondent and its client, First Bus, Mr Antonio explained. The claimant recalled seeing this representative during breaks and discussing matters around pay, shifts and rosters.

22. Mr Antonio explained that if there were performance issues, for example lateness, the client (i.e First Bus) generally dealt with such matters directly with the individual concerned. If a more serious issue of potential gross misconduct arose, the client would inform the respondent and the respondent would relay this back to the individual and potentially end the assignment. The umbrella company, MYPL, did not intervene or become directly involved in relationships with the client.

23. The claimant was paid by MYPL – there were several pay slips in the bundle which were headed with MYPL's details. His understanding was the First Bus provided details of the hours he worked to the respondent. Mr Antonio clarified in his evidence that the claimant's hours were provided to the respondent by the client and the respondent in turn provided the hours to MYPL. Mr Antonio said that any expenses were dealt with by MYPL not the respondent. This was not challenged.

24. The claimant could not recall speaking to MYPL during his assignment to First Bus, only to First Bus and the respondent.

25. On 28 September 2023, the claimant signed/received various further documents from the respondent as follows:

    25.1. A 12-page "employment agreement" with MYPL. The terms were very different to the previous contract signed in 2021 but did still include reference to a guaranteed 336 hours a year. The document said at clause 6 that the claimant's contractual relationship was with MYPL, not the client (i.e. the respondent) or the end-user (i.e. First Bus).
    25.2. A "work-finding services agreement" with the respondent (7 pages). This document purported to set out the basis on which the respondent provided "its work-finding services" to the claimant "at no charge" to him.
    25.3. A "Key Information Document – Umbrella Intermediary (Maximum Pay)". This document said that the claimant would be engaged under a contract of employment, referred to the respondent as the "employment business", and

MYPL as the "employer" and "intermediary/umbrella company" with responsibility to pay the claimant. It said:

> *You are being paid through an intermediary or umbrella company: a third-party organisation that will calculate your tax and other deductions and then pay you for the work undertaken for the hirer. We will still be finding you assignments.*
>
> *The money earned on your assignments will be transferred to the umbrella company as part of their income. They will then pay you your wage. All the deductions made which affect your wage are listed below. If you have any queries about these please contact us.*
>
> *Your payslip may show you as an employee of the umbrella company*

26. The claimant said he was told that by the respondent that he must sign these documents, which he was told contained some minor changes, but that he did not really read them.

27. During December 2023, the claimant heard rumours from other drivers at First Bus that there were issues and that the work for First Bus may stop. He spoke with someone named "Alex" at the respondent and was told that the rumours were not true.

28. Then, on 23 December 2023, First Bus ended the assignment and the claimant ceased work immediately. The claimant again spoke with Alex and was told that the respondent was looking into it. After a week passed, the claimant said that he asked Alex why he had not been paid, as he understood that his pay was guaranteed. He was told to look for work and wait. The claimant said that he waited for several weeks but there was no further work and so he asked for a letter of termination from the respondent, but this was not forthcoming.

29. Mr Antonio said that the claimant had been offered other work via the respondent after the assignment to First Bus ended but that the claimant had not considered this suitable. The claimant did not dispute this but said that he expected to undertake further work with First Bus.

30. An email dated 22 January 2024 on behalf of the respondent from Paula Rola (see her previous correspondence above in January 2022) stated (sic):

> *Dear Konstantinos,*
>
> *I trust this email finds you well.*
>
> *I have carefully reviewed your complaint regarding the discontinuation of your contract without sufficient notice. Regrettably, I must inform you that we are unable to proceed with further consideration, and your request for a payment of £3000 is declined.*

To provide clarity, your employment with Intsol Recruitment commenced on 18/01/2022, in accordance with the letter issued on 26th January 2022 by myself.

The contract of employment with Maximum Pay, dated 07/12/2021, specifies in point 1.2.3 that your continuity of employment began on 01/03/2022.

Given that your last work engagement concluded on 23rd December 2023, your tenure with our company is less than two years. Consequently, paragraph 13.3.2 of your contract, which restricts termination without the notice, does not apply. Termination can occur with one week's notice from you or three weeks' notice from us until two years of continuous employment are achieved.

Also, we have been informed that clients informed you on the 11th of December that the contract is coming to an end on the 23rd December 2023.

Furthermore, our consultants from Intsol Recruitment extended alternative positions, but unfortunately, your interest was not expressed in any of them. In a goodwill gesture on 19th January 2024, our Directors offered payment equivalent to 50 hours at your umbrella assignment rate, which, regrettably, you declined.

31. The clamant commenced Acas Early Conciliation against the respondent on 22 January 2024 and was issued with an Early Conciliation certificate on 26 January 2024.

32. He presented his ET1 against the respondent on 9 February 2024. In the ET1, he ticked the box in section 5.1 indicating that he was “still employed” by the respondent and gave a start date (of 17 January 2022) and no end date.

33. The respondent’s position (as set out in the ET3 and not disputed) was that, since the claimant did not undertake any work after 23 December 2023, after three months its payroll system flagged this up and automatically processed a P45. It said that a submission to HMRC was made on 27 March 2024, although the date on the P45 was 24 December 2023. The P45 itself was not before the Tribunal and the claimant said that he had not received it.

34. Finally, Ms Clift drew my attention to a reference which the respondent provided for the claimant in May 2024 which said:

This is to confirm that Mr. Konstantinos Theodoridis was employed by IntSol recruitment as follows:

NAME: Konstantinos Theodoridis
JOB TITLE: PCV Diver
START DATE: 17/01/2022
LEAVE DATE: 24/12/2023

Relevant law

Unlawful deductions of wages

35. The relevant sections of the Employment Rights Act 1996 ("ERA 1996") are as follows:

> ***13 Right not to suffer unauthorised deductions.***
>
> *(1) An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
>
> *(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*
>
> *(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
>
> *(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
>
> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion...*
>
> *…*
>
> ***23 Complaints to employment tribunals.***
>
> *(1) A worker may present a complaint to an employment tribunal—*
>
> *(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2))…*
>
> *…*
>
> ***27 Meaning of "wages" etc.***

> *(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—*
>
> *(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,…*

Breach of contract claims in the Employment Tribunal

36. The relevant paragraphs of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 are as follows:

> ***3.*** *Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—*
>
> *(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*
> *(b) the claim is not one to which article 5 applies; and*
> *(c) the claim arises or is outstanding on the termination of the employee's employment.*
>
> *…*
>
> ***7.*** *Subject to article 8B, an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented—*
>
> *(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or*
> *(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated…*

Employment/worker status

37. "Employees" and "workers" are defined in section. 230 of ERA 1996.

"Employee"

38. The issue for the preliminary hearing is a problem which frequently arises when the status of a worker is in question; were services provided under a contract of employment or a contract for services? If the latter, the claimant was not an employee.

39. Under s. 230, an employee is an individual who entered into or worked under a contract of employment. A contract of employment is defined as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

40. The purpose of this definition is to distinguish between individuals dependent upon an employer for their livelihood on the one hand, and self-employed individuals, or

independent contractors, on the other; between those working under a "contract of service" and those working under a "contract for services"; between those who are paid to do the job and those who are paid to get the job done. However, the statute does not set down the circumstances in which an individual may be said to work under a contract of employment.

41. In the absence of any comprehensive definition of a contract of employment, courts and tribunals have developed a number of tests over the years aimed at helping them identify such a contract. It is now accepted that no single factor will be determinative of employee status and a number of factors must be looked at.

42. There are **three essential elements** which must be present in every contract of employment. They are frequently referred to as the 'irreducible core' without which a contract cannot be regarded as a contract of service, taken from MacKenna's judgment in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433, QBD. They are as follows;

    42.1. There must have been an obligation for the Claimant to have provided the work **personally**;
    42.2. There must have been **mutuality of obligation**;
    42.3. The claimant must have been expressly or impliedly subjected to the **control** of the respondent.

Personal service

43. With regards to the first element, even if the contract contained a limited power to delegate, there may still have been the obligation present for the employee to have provided work personally, but where there was a clear express contractual term which did not impose personal obligations, that would ordinarily militate against an employment relationship unless it was a sham or had been varied (*Staffordshire Sentinel-v-Potter* [2004] IRLR 752).

Mutuality of obligation

44. With regards to the second element, an employer and an employee must have been under legal obligations to one another during the entire contractual period under focus. Ordinarily, the obligations will have been upon the employee to undertake work when required/asked and upon the employer to have paid for it.

45. Casual workers ordinarily fall outside of the ambit of this principle (*Carmichael-v-National Power* [2000] IRLR 43). Further, where the express terms of a contract made it clear that such obligations did not exist, there cannot have been an employment relationship.

46. Gaps between assignments were just as relevant as the assignments themselves when considering all of the circumstances (*Sec of State for Justice-v-Windle* [2016] EWCA Civ 459).

47. The mutuality of obligation test is most often relevant where an individual has carried out work on a casual, irregular or sporadic basis over a period of time. Such work may be variable but fairly constant; or it may be periodic, with long gaps between each "stint", as in the case of seasonal workers. The question is whether

mutuality of obligation subsists during those periods when the individual is not working, giving rise to a continuous "global" contract of employment spanning the separate engagements. The required obligation is generally seen to consist in an exchange of mutual promises of future performance.

48. In order to determine whether such mutuality of obligation exists, it is necessary to look at the working periods themselves, taking into account their frequency and duration. Where there has been a regular pattern of work over a period of time, a court or tribunal is more likely to infer from the parties' conduct the existence of a continuing overriding arrangement, itself amounting to a contract of employment, governing the relationship, despite the absence of any express agreement.

49. Even if no global contract exists, there may be a contract of employment in relation to each individual engagement. If so, the worker may be regarded as an employee in respect of each engagement, even though the employment relationship ends when the engagement is completed.

Control

50. Finally, the employer must have had a sufficient degree of control, in terms of the general sense of authority exercised over an employee, for such a relationship to have existed. 'Control' in this sense was not to have been equated to the undertaking of work under close supervision. The source of the necessity for control derived from *Ready Mixed Concrete-v-Minister of Pensions* [1968] 2 QB 497 at 514 but what constituted sufficient control would vary in every case.

Other surrounding circumstances

51. If the three essential elements were present, the relationship *can* have been one of employment, but it was **also** necessary to consider **all of the other surrounding circumstances** to finally determine its true nature. Those circumstances can include the degree of personal financial risk, the extent to which the individual provided his/her own equipment, whether the claimant was paid holiday and/or sick pay and whether he/she paid their own tax and national insurance or whether that was achieved through PAYE. There were many different factors that could have been relevant.

Agency workers as employees?

52. In *Wickens v Champion Employment* [1984] ICR 365, EAT, the EAT held that the terms under which agency workers were engaged were quite inconsistent with the normal features of a contract of employment. The EAT stressed the absence of mutual obligations to provide or to do work and the absence of 'the elements of continuity, and care of the employer for the employee, that one associates with a contract of service'. See also *Ironmonger v Movefield Ltd (t/a Deering Appointments)* [1988] IRLR 461, EAT – not "employment" despite the worker having worked for a particular company through the same employment agency for five years.

53. In *Montgomery v Johnson Underwood Ltd and anor* 2001 ICR 819, the Court of Appeal held that **control** lay between the hirer/end client and the agency worker. The claimant was held not to be an employee of the employment agency as it had 'little or no control, direction or supervision' over her. Similarly, in *Dacas v Brook*

Street Bureau (UK) Ltd [2004] ICR 1437, CA, the Court of Appeal agreed with an employment tribunal that a worker was not an employee of an employment agency, despite working exclusively for the same end client for over four years until the arrangement was terminated. The employment agency was under no obligation to provide work, and the claimant was under no obligation to accept any work offered; nor did the agency exercise day-to-day control over the claimant or her work — that control had been exercised by the end client. The fact that the agency agreed to do *some* things that an employer would normally do (for example, paying wages) did not make it the employer.

54. In *Bunce v Postworth Ltd t/a Skyblue* [2005] IRLR 557, CA. P Ltd was under no obligation to provide work and B under no obligation to accept any. B was allotted 142 assignments before the contract was terminated. The Court of Appeal agreed with the tribunal's analysis that B was not an employee of the employment agency because the contract lacked the necessary requirements of control and mutuality of obligation.

"Worker"

55. Under s. 230 (3) of ERA 1996, a worker means an individual who entered into or works under - (a) a contract of employment, or (b) any other contract, whether express or implied and (if it was express) whether oral or in writing, whereby the individual undertook to do or perform personally any work or services for another party to the contract whose status was not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual. A worker who satisfied the test in sub-paragraph (b) is sometimes referred to as a "limb (b) worker".

56. In *Addison Lee Ltd-v-Lange* UKEAT/0037/18, the EAT upheld an employment tribunal's decision that drivers working for the same firm were 'workers', despite being described in their contracts as independent contractors. The contracts suggested that the drivers had been under no obligation to accept work and that the respondent had been under no obligation to offer it, but the tribunal took a 'realistic and worldly wise' approach and considered that worker status reflected the reality of the arrangements.

57. In *Pimlico Plumbers-v-Smith* [2018] ICR 1511, the Supreme Court considered the employment status of a plumber and held that a tribunal had been entitled to conclude that he had been a worker, despite the fact that his contract described him as an independent contractor and the fact that he was self-employed for tax purposes. It was significant that the dominant feature of the contract was seen to have been the obligation of personal performance and the claimant's fettered and limited right of substitution was not considered to have been inconsistent with it. The tribunal also took into account whole range of other factors; the claimant's wearing of the respondent's uniform, his adherence to strict terms regarding payment and the imposition of post-termination restrictive covenants. It concluded that the claimant was not in business on his own account; he was an integral part of the respondent's operations and was subordinate to it.

58. In *Clyde and Co LLP and Anor* v *Bates van Winklehof* [2014] SC, a female equity partner in a limited liability partnership fell within the definition of "worker" under s. 230 (3)(b) ERA and could pursue whistleblowing claim.

Sham arrangements

59. A number of cases are relevant to a consideration of situations in which a party alleges that the contractual documentation was a sham and did not reflect the reality of the parties' relationship in law; *Autoclenz Ltd v Belcher and Others* [2010] IRLR 70 CA and [2011] UKSC 41; *Consistent Group Ltd v Kalwak* [2008] IRLR 505 CA; *Firthglow Ltd (t/a Protectacoat) v Szilagyi* [2009] ICR 835 CA and *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786]

60. As confirmed in paragraphs 18 and 19 of Lord Clarke's judgment in Autoclenz in the Supreme Court:

> *"As Smith LJ explained in the Court of Appeal of paragraph 11, the classic description of a contract of employment (or a contract of service as it used to be called) is found in the judgement of McKenna J in Ready Mixed Concrete South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515C : "a contract of service exists if these three conditions are fulfilled: (i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service … Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be.*
>
> *Three further propositions are not I think contentious: i) As Stephenson LJ put it in Nethermere St Neots Ltd v Gardiner [1984] ICR 612, 623 "There must … be an irreducible minimum of obligation on each side to create a contract of service". ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: Express and Echo Publications Ltd v Tanton ("Tanton") [1999] ICR 693 per Peter Gibson LJ at p 699G. iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg Tanton at page 697G."*

61. In *Quashie-v-Stringfellows* [2012] EWCA Civ 1735, Elias J stated that the relationship between parties is 'an objective matter to be determined by an assessment of the relevant facts'. For a claimant to establish that the written documents did not accurately reflect the relationship between the parties, it was not necessary for them to demonstrate that both sides knew that they were inaccurate, as in *Snook-v-London and West Riding Investments Ltd* [1967] 2 QB 786. It was enough if a tribunal found that the true relationship was not accurately reflected within them, whatever their initial intentions.

62. Lord Clarke in *Autoclenz* in the Supreme Court discussed the cases where the written documentation may not have reflected the true reality of the relationship, including *Kalwak* and *Szilagyi* (above), and the Court of Appeal decision in *Aurtoclenz*. He stated that he preferred the approach of Elias J (as he then was) in *Kalwak*, and the Court of Appeal in *Szilagyi*, to that of the Court of Appeal in *Kalwak*. The question to be asked was what was the true agreement between the parties. Where there was a dispute as to the genuineness of the written terms, the focus of the enquiry was to be upon the legal obligations that fell on the parties. All the relevant evidence had to be examined, including the agreement, its context and how the parties conducted themselves in practice. Evidence of the latter could be so persuasive as to enable an inference to be drawn that their conduct reflected the true obligations of the parties. Their relative bargaining power also needed to be borne in mind. This, Lord Clarke said "may be described as a purposive approach to the problem. If so, I am content with that description".

63. It was also important to remember that a situation could change over time. As Lord Clarke further said in paragraph 30; *"The kernel of all these dicta is that the court or tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by"*. Certain rules of contract law may have to be overlooked in deciding that question.

64. *Ter-Berg-v-Simply Smile Manor House Ltd* [2023] EAT 2 set out the correct approach to determining employment status following *Uber BV-v-Aslam*; a tribunal often had to **look beyond the contract** at the wider context in which it sat. The EAT held that the Supreme Court's decision in *Uber* did not displace or materially modify the *Autoclenz* approach. The reference in Uber to it being wrong to treat the contract as a starting point formed part of the theoretical underpinning for that approach. It did not mean that the written terms were, in every case, irrelevant, or could never accurately have conveyed the true agreement of the parties. The EAT went on to hold that an employment tribunal did not err when it treated the written terms on which a dentist was engaged to work at a dental practice as the starting point in determining whether he was its "employee". The tribunal had looked beyond the written terms of the agreement and had considered the wider circumstances of the relationship between the parties as required by *Autoclenz* and *Uber*.

Closing Submissions

65. Both parties made brief oral closing submissions with reference to the facts. Insofar as these related to the questions of employee/worker status these were as follows (they strayed into the question of whether the claimant was owed any wages by the respondent).

66. Ms Clift submitted that the claimant believed and knew the respondent was his employer. He applied to the respondent for work and communicated with the respondent. She referred me specifically to the documents mentioned above dated January 2022 and May 2024.

67. Mr Antonio submitted that the claimant was not an employee of the respondent. He was employed by MYPL. He signed contracts with MYPL. The documents said

his employer was MYPL. The relationship between the respondent and the claimant was a normal agency-contractor relationship. All of his payslips were with MYPL. During the claimant's work, he had the choice of being directly employed by the respondent or paid through an umbrella company and he chose the umbrella option.

Conclusions

68. Applying the facts as I have found them to the law above, my conclusions on the issues of employment status are as follows:

Was the claimant an employee of the respondent?

68.1. I have concluded that the arrangements which existed in this case fell short the claimant establishing (the burden being on him) that he was employed by the respondent. The fact that he was mentioned in certain items of correspondence as being or having been an "employee" does not determine his legal status as such. The caselaw in respect of agency workers and employment businesses suggests that the essential requirements for "employment" of mutuality of obligation and control are often problematic for claimants. I have concluded that is so in the present case.

68.2. Irrespective of the fact that the claimant seemingly worked continuously on the First Bus assignment from early 2022 until late 2023 this does not of itself demonstrate mutuality of obligation. The fact that when work at Frist Bus ceased, the claimant was offered alternative assignments by the respondent, but was able to decline these, strongly indicates *against* there being sufficient mutuality of obligation in reality for an employment relationship to have existed. If the claimant was an employee of the respondent, he would have been obliged to carry out work which was reasonably assigned to him by the respondent and he would not have been free to decline it.

68.3. Similarly, in terms of control, the day-to-day control of the claimant's work was exercised by First Bus, not the respondent. The claimant's contact with the respondent was limited, as I have found above – around once a week with a representative from the respondent at the First Bus site during a break in his work for First Bus, and occasional telephone contact about pay issues and the like. Rosters were drawn up by First Bus and the claimant arranged his holidays around those. There was no sense of meaningful control by the respondent over how the claimant carried out his role for First Bus on a day-to-day basis.

68.4. Given the lack of mutuality of obligation and the lack of control, I readily concluded that the claimant was **not** an employee of the respondent.

Was the claimant a "worker" of the respondent?

69. I now turn to the question of whether or not the claimant was a "worker" of the respondent.

69.1. I have concluded that the arrangements in this case did meet the lesser test for the claimant being a worker of the respondent. The reality was that he

provided personal service to the respondent's agency throughout 2022 and 2023. The respondent provided the claimant with work for most of that period and continued to offer him some work after the assignment to First Bus ended.

69.2. Whilst the arrangements fell well short of meeting the definition of the claimant being an "employee", I am satisfied that they overcame the lesser hurdle of him being a worker, who agreed to perform work personally for the respondent.

69.3. The umbrella company arrangement by which the claimant was paid and purportedly employed was no more in this case than a mechanism for payment in reality. It was the respondent agency for whom the claimant worked in reality (albeit that he was not their "employee").

69.4. The claimant's relationship with the respondent as a worker ceased on 23 March 2024 when a P45 was issued after three months of the claimant not having undertaken any work for the respondent, following the end of the First Bus assignment. I make no findings for the purposes of this decision as to what, if any, entitlements to work/wages the claimant had during that period when he did not carry out any work for the respondent.

"Employee" status likely to have been academic in any event

70. It should be noted that the claimant's breach of contract claim would in any event have been highly problematic for the claimant even if I had found him to be an "employee" of the respondent. On his own case, his "employment" with the respondent was still ongoing when he presented his claim to the Tribunal (as he stated in the ET1). If that were the case, and his employment had **not** ended at the point when he presented his claim, the Tribunal would have no jurisdiction to hear the claim in any event, given the wording of the 1994 Order and the limits on Tribunal jurisdiction for breach of contract, which only applies to claims for breach of contract to be made after the employment has ended for sums arising from or outstanding on termination (see above).

71. If, on the other hand, the claimant's (notional) "employment" had ended prior to the presentation of the ET1, there could be no breach of contract claim post-dating the end of employment (and the contract) - the claimant would have no claim for sums due beyond the termination date, save potentially for notice pay, likely to be a week's statutory notice pay at most given the duration of his work for the respondent (i.e. less than two years). He would not be able to claim for any on-going loss of pay, as he seeks to do in these proceedings.

72. As such, the question of whether the claimant was an employee or not for the purposes of any breach of contract claim was probably wholly, or at least largely, academic in any event.

Summary of the outcome on the preliminary issue of employee/worker status

73. As the claimant was not an employee of the respondent, the Tribunal has no jurisdiction to hear his claim for breach of contract, which is dismissed. The claimant was a worker for the respondent and so his claim for unlawful deduction from wages can proceed to a final hearing.

Employment Judge Cuthbert

Date: 6 April 2025

Sent to the parties on
23 April 2025

Jade Lobb
For the Tribunal Office