EMPLOYMENT TRIBUNALS

Claimant: Mr W Montgomery

Respondent: Stow Outdoors Limited

Heard at: Bristol (in public, by CVP) **On:** 3 April 2025

Before: Employment Judge Cuthbert

Appearances
For the claimant: Represented himself
For the respondent: Mr B Frew (Counsel)

PRELIMINARY HEARING
RESERVED JUDGMENT

1. The claimant was **not** an "employee" of the respondent within the meaning of section 230 Employment Rights Act 1996 between 22 September 2021 and 2 July 2022.

2. Accordingly, the claimant's claim for unfair dismissal against the respondent, with reference to an alleged effective date of termination (EDT) on 4 December 2023, is **dismissed** - the claimant did not have at least two years' continuous employment at the EDT, as required by section 108 Employment Rights Act 1996.

REASONS

Procedure and issues

1. The case was listed for a one-day public preliminary hearing to consider whether or not the claimant was an employee of the respondent and, if so, the dates of his employment and in turn whether he had sufficient length of service to pursue a claim for unfair dismissal. The claimant was in addition pursuing a claim for breach of contract in respect of alleged lack of notice, a claim also contingent upon him being found to be an employee at the effective date of termination.

2. I had been provided with five witness statements (three on behalf of the claimant and two on behalf of the respondent) and two bundles, one from each party, running to in excess of 500 pages.

3. The claimant gave dates of his alleged employment in the ET1 form and Particulars of Claim as being between 22 September 2021 and 4 December 2023. The respondent said that the claimant's continuous service for it had only commenced in around July 2022 (when one of the two directors left the business) but disputed that he was an employee at all. It was not in dispute that the claimant ceased to work for the respondent on 4 December 2023.

4. Following discussions with the parties, it was agreed, in accordance with the overriding objective, that the present hearing would focus solely on the initial period of alleged employment, namely the issue of **whether the claimant employed by the respondent from 21 September 2021 until 2 July 2022** (the **"Relevant Period"** for the purposes of these Reasons). If the claimant was unable to establish continuous employment during the Relevant Period, or at least from 4 December 2021 onwards, it would mean that he would lack two years' continuous service at the point when his work for the respondent ended, and his unfair dismissal claim could not proceed. If the claimant were found, at the end of the present hearing, to be an employee during the Relevant Period, the issue of his employment status during the subsequent working period between July 2022 and December 2023 would need to be determined at a further hearing (or the respondent may take a view on that issue).

5. Given the amount of evidence presented for a one-day hearing, I explained to the parties that judgment would be reserved and told the claimant what this entailed.

Findings of Fact

6. I heard oral evidence from the claimant and from Mr Rob Slatter, a director of the Respondent, and Mrs Karen Bradshaw, a former director of the respondent. I also read witness statements from two additional witnesses for the claimant but neither Mr Frew nor I had any questions for them. A limited number of documents in the bundles were referenced in the witness statements and during the hearing. Where relevant, I have mentioned the evidence below. The claimant had provided a written opening submission to the respondent the afternoon before the start of the hearing – this contained some matters of potential new evidence which were not mentioned in his witness statement – Mr Frew objected to those matters being adduced as evidence at a late stage. I refused permission for those new matters to be treated as evidence-in-chief, in accordance with the overriding objective after weighing up the potential prejudice to each side. In any event one of the main points (an alleged cash-in-hand payment in September 2021 was covered during oral cross-examination).

7. I made findings of fact as follows, relevant to the preliminary issue of the claimant's employment status and alleged continuous employment during the Relevant Period. If I have not mentioned below a fact or a detail referenced during the evidence before me, it is because it was not relevant to that preliminary issue.

8. The respondent is a small business, a shop operating as a franchise of the Rohan brand of outdoor clothing. Duringt the Relevant Period, Mr Slatter and Ms Bradshaw were the two joint directors, with a 50% share of the business each. The shop was typically staffed by one or two people (including the two directors).

9. In July and August 2021, the claimant met with Mr Slatter and they discussed the possibility of the claimant working for the respondent in a part-time role. The claimant had submitted his CV and a covering letter expressing an interest in part-time employment.

10. Mr Slatter explained that the respondent had a part-time member of staff, Marian, in respect of whom he stated in a series of emails dated 10 August 2021 with the claimant:

> *I am waiting on Marian to confirm her intentions re moving forward with work - she has promised me she will confirm whether she is leaving by the middle of August.*
>
> *Once she has let me know I can then crack on with planning rotas, hours and what we may be able to offer moving forward.*
>
> *…*
>
> *If Marian decides to retire, then that will help facilitate regular shifts etc.*

11. During the period which followed, the claimant said during his oral evidence (it was not in his witness statement) that he had worked a single shift in the shop on a trial basis in September 2021 (paid cash-in-hand) and then worked a shift in October 2021, a shift in November 2021 and three shifts in December 2021.

12. Aside from the alleged trial shift in September 2021, the *number* of shifts worked during this initial period from September 2021 until the end of December 2021, i.e. five in total, was not in dispute and was evidenced in a payment which the claimant received of £420 from the respondent on 4 January 2022, paid to the claimant's consulting business Ten Ltd. This followed the submission of an invoice to the respondent in the name of the claimant's consultancy business. The invoice itself had not been produced by either party to the Tribunal, amidst the 500+ pages of documents which had been adduced.

13. It was common ground that the claimant was paid £70 + VAT, i.e. £84 per shift during the initial period of work. The claimant said that this payment arrangement, i.e. outside of any PAYE system and with the claimant responsible for his own tax and national insurance, was at the request of the respondent in order for the respondent to avoid paying employer national insurance contributions; the respondent said that the claimant had asked to be paid in this way and it had agreed to do so. I found the respondent's evidence to be more plausible, and an arrangement in keeping with the claimant's existing self-employment business and the very occasional shifts which he was undertaking for the respondent.

14. I also preferred the evidence of the respondent's witnesses (Mr Slatter and Mrs Bradshaw) overall on the key disputes as to if and when the claimant worked during the period from September 2021 until the end of December 2021. I found the claimant's case that he worked around one shift per month from 18 October 2021, and that he had agreed to invoice the respondent "quarterly", to be less plausible than the respondent's case. Mr Slatter explained during his oral evidence, and I accept his evidence, that his existing part-time member of staff, Marian, decided to retire before Christmas 2021, as she was around 70 years' old and had grandchildren. This meant that the respondent needed staff over Christmas and so the claimant was offered and accepted some shifts during December 2021. This evidence was consistent with what Mr Slatter had told the claimant in the emails in August 2021. The claimant was then paid for those shifts in early January 2022. Mr Slatter denied that he had made a cash payment to the claimant in September 2021 and stated that the only cash payment made by his business over that period had been to its window cleaner. I accepted his evidence on that issue too.

15. Likewise for the period between January and April 2022, the claimant had not dealt with his alleged employment during this period in any detail in his witness statement. For the first time in his oral evidence, he said that he had worked around one day per month for the respondent. Mr Slatter's evidence was that the claimant had worked a number of shifts during March 2022, which had coincided with a business need on the part of the respondent, namely a range change. A second payment to the claimant's consultancy business, Ten Ltd, of £504 was made by the respondent on 19 April 2022 (i.e. six shifts at £70 +VAT).

16. In respect of this period, the claimant referred, during his cross-examination of Mrs Bradshaw, to an exchange of WhatsApp messages between himself and Mr Slatter, in particular the following messages:

> *[22/01/2022, 15:44:31] Rob Slatter: Are you free next Friday to work with me? Thanks*
>
> *[22/01/2022, 15:50:01] William Montgomery: Hi Rob. Absolutely. Friday, 28/01 in my diary. :)*
>
> *…*

17. Slightly later in the same document, I noted the following WhatsApp message from Mr Slatter to the claimant (sic):

> *[08/02/2022, 13:50:16] Rob Slatter: We have a shifts on Thursday 17th March and Wednesday 23rd March if you are available? If not, no probs. Thanks*

18. These exchanges suggest that the claimant probably *did* work a date in January 2022 and also probably some dates in March 2022. They also illustrate, very significantly, what was clearly a very casual working relationship between the claimant and the respondent at this time. The claimant was being *asked* by the respondent if he could work, not *told* or *instructed* that he was required or expected to work on the requested dates. The messages made it very clear that the claimant did not have to work on the dates in question.

19. During the Relevant Period, there was one further payment of £490 in respect of work done in that period, made by the respondent on 11 July 2022, to the claimant personally in that instance rather than to his consultancy business. By this time, the respondent's accountants had advised it against paying VAT on the claimant's invoices and he submitted them personally and free of VAT, rather than in the name of his business and subject to VAT. So, the £490 payment evidently represented seven shifts worked in the three months or so since the previous payment in April 2022.

20. The earliest invoice in the (respondent's) hearing bundle was dated 31 August 2022, expressed as from "WGM" to "Rohan" for "retail support", and was concerned with a shift on 2 July 2022 and 6 days in August 2022, at £70 each (total £490).

21. In total, leaving aside the alleged cash-in-hand trial shift, the claimant worked a total of 18 shifts in the Relevant Period (10 months or so).

22. From the end of September 2022, payments to the claimant became fairly regular, around once a month, and more substantial and his shifts became much more frequent, but I am not concerned for the purposes of this decision with that later period - unless the claimant can establish continuous employment from no later than 4 December 2021 onwards (until he ceased working for the respondent on 4 December 2023 – the alleged dismissal), he would be unable to proceed with his unfair dismissal claim.

The relevant law – "employee" status

23. The backdrop to the preliminary issue is that claims for unfair dismissal can (subject to limited exemptions not relevant in this case) only be pursued by "employees" who have two years or more continuous employment at the effective date of termination of that employment (sections 94 and 108 Employment Rights Act 1996 (ERA 1996)).

24. Under section 230 ERA 1996, 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.

25. 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" (employment) 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.

26. 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.

27. 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;

    27.1. There must have been an obligation upon the claimant to have done the work **personally** (personal service);
    27.2. There must have been **mutuality of obligation**; and
    27.3. The claimant must have been expressly or impliedly subjected to the **control** of the respondent.

1. Personal service

28. With regards to the first element, even if the contract contains 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).

2. Mutuality of obligation

29. 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 provided work and paid for it.

30. Casual workers (see below) ordinarily fall outside of the ambit of this principle (*Carmichael-v-National Power* [2000] IRLR 43) – see further below.

31. Further, where an express term of a contract makes it clear that such obligations did not exist, there cannot have been an employment relationship.

32. Gaps between assignments (see also below in terms of continuity) are just as relevant as the assignments themselves when considering all of the circumstances (*Sec of State for Justice-v-Windle* [2016] EWCA Civ 459).

3. Control

33. Finally, the employer must have had a sufficient degree of control, in terms of the general sense of authority exercised over an employee, for an employment 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 the well-known judgement of McKenna J in *Ready Mixed Concrete-v-Minister of Pensions* [1968] 2 QB 497 at 514 but what constitutes sufficient control will vary in every case.

Other circumstances

34. If the three essential elements above were present, the relationship *can* have been one of employment, but it is also necessary to consider **all of the other surrounding circumstances** to finally determine its true nature.

35. 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/payroll. There are many different factors that can be relevant.

Mutuality of obligation; umbrella contracts and breaks or gaps

36. In the case of a so-called "global" or "umbrella" contract, the question will be whether there is an obligation to provide and perform any work which becomes available and whether that obligation continues during non-working periods; in other words, whether mutual promises as to future performance have been made.

37. For example, in *Clark-v-Oxfordshire Health Authority* [1998] IRLR 125, CA, the Court of Appeal held that a nurse who was retained by a health authority to fill temporary vacancies in hospitals did **not** have a global employment contract spanning her various individual engagements because there was no mutuality of obligation during the periods when she was not working. The fact that the claimant was bound by an ongoing duty of confidentiality even during non-working periods was insufficient, since any such obligation would have stemmed from previous single engagements, and no continuing obligation whatever would have fallen on the health authority. However, the Court did accept that the mutual obligations required to found a global contract of employment need not necessarily consist of obligations to provide and perform work: for example, an obligation on the one party to accept and perform work and an obligation on the other party to pay a retainer during periods when work was not offered would be likely to suffice.

38. The Court of Appeal reviewed the requirements for the existence of a global contract in *Stringfellow Restaurants Ltd-v-Quashie* [2013] IRLR 99, CA. There, Lord Justice Elias held that, for a global contract to exist, it is necessary to show that there is at least "*an irreducible minimum of obligation*", either express or implied, which continues during the breaks in work engagements. He pointed out that the significance of the irreducible minimum is that it determines whether a contract exists at all during the periods of non-work. There must be something from which a contract can properly be inferred. Terms conferring mutual obligations cannot usually be implied into a contract contrary to obvious express terms.

Mutuality of obligation – "casual" workers

39. Casual workers who take on jobs as and when it suits both parties are generally treated by the hirer as independent contractors/workers rather than employees. It is a characteristic of these relationships that there is no obligation upon the hirer to provide work and no obligation upon the worker to accept it. Such workers are free to work when they wish and hirers are free to hire when they wish. Claims by casual staff of "employee" status often fail for lack of mutuality of obligation, an essential prerequisite for the existence of a contract of employment under s.230 ERA 1996.

40. *Hellyer Brothers Ltd v McLeod and ors; Boston Deep Sea Fisheries Ltd v Wilson and anor* 1987 ICR 526, CA concerned a number of trawlermen, many of whom had worked for the same employer for the whole of their working lives. They would be taken on for each voyage, the duration of which would vary from several weeks to several months. The period of time in between voyages also varied but was often not more than a few days. At the end of each voyage, they were discharged by mutual consent. In January 1984, the employer decommissioned all its trawlers and the trawlermen subsequently claimed redundancy payments. The issue for the Court of Appeal was whether they were employees under a global contract of employment. The Court held that there were no facts from which it could properly be inferred that the men had ever placed themselves under a legally binding obligation to make themselves available for work in between crew agreements or to refrain from seeking or accepting employment from another trawler owner during such periods. In addition, there was no continuing obligation on the employer to offer employment to any particular individual. There was no *'continuing overriding arrangement which governed the whole of [the parties'] relationship and itself amounted to a contract of employment'*.

41. Mutuality of obligation was also absent in *O'Kelly and ors v Trusthouse Forte plc* 1983 ICR 728, CA, where the workers were wine butlers in a large hotel and were known as 'regular casuals'. They were given preference in the work rotas over other 'casual' staff and had no other work apart from that assigned by TF plc. Nonetheless, the Court of Appeal agreed with the tribunal that they were **not** employed under contracts of employment, either in the sense of there being a global contract in place or in the sense that each stint of work was carried out under a contract of employment. Although the relationship had many characteristics of an employment contract, one essential ingredient was missing — namely, mutuality of obligation. The workers had the right to decide whether to accept work and were free to obtain work elsewhere: the fact that it would not have been in their interests to do so was another matter. Nor was the employer under any contractual obligation to provide any work, although in fact it regularly did so. The Court concluded that the workers were hired under successive contracts for services.

42. In *Clark v Oxfordshire Health Authority* 1998 IRLR 125, CA, the Court of Appeal again held that no overarching contract can exist in the absence of mutual obligations subsisting over the entire duration of the relevant period. Thus, a nurse who was retained by a health authority to fill temporary vacancies in hospitals did **not** have a global employment contract spanning her various individual engagements because there was no mutuality of obligation during the periods when she was not working. The Court did accept that the mutual obligations required to found a global contract of employment need not necessarily consist of obligations to provide and perform work: for example, an obligation on the one party to accept and perform work and an obligation on the other party to pay a retainer during periods when work was not offered would be likely to suffice.

43. Similarly, in *Carmichael and anor v National Power plc* 1999 ICR 1226, HL, the House of Lords held that casually employed tour guides had **no** contractual relationship at all with the tour guide operator when not actually working because there were no mutual obligations to offer and perform work. The documents that existed simply provided a framework for a series of successive ad hoc contracts of

service, or contracts for services, which the parties might subsequently enter into: *'the parties incurred no obligations to provide or accept work, but at best assumed moral obligations of loyalty in a context where both recognised that the best interests of each lay in being accommodating to the other'.*

44. In *Nethermere (St Neots) Ltd v Gardiner and anor* 1984 ICR 612, CA, the Court of Appeal reluctantly upheld a tribunal's decision to the effect that the long-standing relationship between homeworkers and the company for which they worked ***had*** developed into a global contract obliging the company to provide and pay for work, and the workers to accept the work provided.

45. Similarly, in *St Ives Plymouth Ltd v Haggerty* EAT 0107/08, the EAT upheld an employment tribunal's decision that a course of dealing over a number of years (1998 to 2007) had given rise to the expectation that H would be available for, and be offered, a reasonable amount of work. This expectation was sufficient to create an umbrella contract between the parties, even though there was no obligation on the employer to offer a minimum amount of work and the individual was free to refuse to accept a particular offer of work if made.

Gaps in employment and continuity

46. Where there are breaks in any employment relationship of **more than a week** that are **not** governed by a contract of employment, continuity will be broken unless it can be established that those weeks are covered by one of the statutory exceptions set out in section 212(3) ERA 1996. Section 212(3) applies where the employee is:

    46.1. incapable of work in consequence of sickness or injury – s. 212(3)(a)
    46.2. absent from work on account of a temporary cessation of work – s. 212(3)(b), or
    46.3. absent from work in circumstances such that, by arrangement or custom, he or she is regarded as continuing in the employment of the employer for any purpose - s.212(3)(c).

47. For the first of these (s. 212(3)(a)), the employee must have been *incapable* of work - not merely absent from work - because of sickness or injury. This meant that only those who were genuinely sick or injured will be covered.

48. The second (s. 212(3)(b)) comprises three elements: there must be a cessation of work, the cessation must be temporary and the reason for the employee's absence must be the cessation of work. The Court of Appeal addressed this issue in *Cornwall County Council v Prater* [2006] ICR 731, CA. P worked as a home tutor for the Council from April 1988, before becoming officially employed in 1998. A tribunal held that her employment was continuous from her start date on the grounds that whenever P worked on an assignment there was sufficient mutuality of obligation to create a contract of employment, and the periods between assignments were temporary cessations of work within the meaning of s. 212 (3)(b). The Council appealed to the EAT and then to the Court of Appeal, arguing that mutuality of obligations had to exist throughout the entire period, not just in relation to individual assignments. The Court of Appeal, however, held that if P had been seeking to prove that there was a long-term or global contract of employment,

the fact that the Council was not obliged to offer her any work and that, if it did, she was not obliged to accept that offer would, no doubt, mean that no such global contract existed. But P had put forward a different argument: that the individual engagements, once entered into, constituted contracts of employment. In the Court's view, there was no need for P to establish an overarching mutuality of obligation throughout the ten-year period. Once a contract was entered into, and while that contract continued, P was under an obligation to teach the pupil assigned to her and the Council was under an obligation to pay her for teaching that pupil. That was all that was legally necessary to support the finding that each individual contract was a contract of service. Section 212(3) then took care of any gaps *between* contracts in that particular case.

49. To fall within the third, s.212(3)(c), the employee must be absent from work in circumstances such that, by arrangement or custom, he or she is regarded as continuing in the employment of his or her employer for any purpose. As the EAT emphasised in *Mark Insulations Ltd-v-Bunker* EAT 0331/05, the statute thereby requires tribunals to find that there was some discussion or agreement (or, indeed, custom) to the effect that the parties regarded the employment relationship as continuing for some purpose, despite the termination of the contract of employment. In order for there to be an arrangement or custom in this context, it is only necessary that employment is regarded as continuing for *some* purpose, not all purposes. In order for s.212(3)(c) to apply, any "arrangement" upon which a claimant seeks to rely must have been made *before* the absence began. In effect, what is required to be shown is a custom or arrangement whereby the employee is treated as "on the books" of the employer during the period(s) in issue (see judgment of Elias P in *Vernon v Event Catering Management Ltd* at para 27).

50. The Court of Appeal's decision in *Curr v Marks & Spencer* makes three points clear; whilst expressed in relation to arrangements, the points seem equally applicable where it is a custom which is in issue. The points made are: (i) that the arrangement must be understood by both parties to have the requisite effect; (ii) that the requisite effect is that the employee is regarded as *continuing in the employment* of the employer; and (iii) that it is sufficient if he or she is so regarded for *any* purpose, not necessarily for all purposes.

Closing submissions

51. I heard oral closing submissions from both parties and each party had also provided a written opening submission. I had explained to the claimant that, to the extent that his written and oral submissions contained matters of potential evidence which had not been set out his witness statement or which had been given during his oral evidence, I would not take such new evidence into account (and I have not mentioned it below).

The respondent's submission

52. Mr Frew submitted as follows:

    52.1. The respondent's position had been set out in the opening skeleton and the present hearing was focused on the first area in time of the alleged employment [i.e. the Relevant Period as I have termed it].

52.2. The claimant's proposition was that he had been an employee from 2 September 2021, but the evidence simply did not reflect as being a start date and more importantly, that proposition did not reflect the status of the relationship between the parties.

52.3. The respondent set out in its skeleton argument the legal position on casual worker status and self-employed worker status – it sounded more from the evidence that the claimant was in the position of a casual worker, save for way in which he invoiced and charged VAT for the contracted services. Save for that, he firmly fitted into a casual worker relationship.

52.4. To assist the claimant, he said, Mr Frew read out "fairly settled law" from the IDS Brief Handbook on Employment Status concerning "casual and irregular work", Chapter 2, paragraphs 2.6.2 and 2.6.3. These passages stated "*it is much less common for casual staff to be classified as 'employees'. It is a characteristic of these relationships that there is no obligation to provide work and no obligation to accept it, and therefore claims by casual staff to employee status generally fail through lack of mutuality of obligation"…" informal working relationships encompass a wide spectrum of different situations. On the one hand, an individual may supply a few days' work to one employer or another here and there"…"the requirement for mutuality in the context of an alleged global or umbrella contract will not be satisfied if the person or company that is in receipt of the putative employee's services is under no obligation to offer work or, if offered, the putative employee is under no obligation to accept it".*

52.5. In relation to the self-employed element, if the Tribunal took the view that the claimant was operating as a company, he was not a casual worker or an employee. Mrs Bradshaw had said *"we can't employ a company"* during cross-examination.

52.6. The claimant was upset and demanding of the fact that he says he worked shifts *each month*, starting from September 2021, Mr Frew said. Even if he was right, taking his case its highest, it was sporadic, ad-hoc work without mutuality of obligation. It was a casual contract and he was a "worker" at most. He was not employed and cannot bring an unfair dismissal claim.

52.7. The evidence suggested that he worked for a short period in December 2021, submitted an invoice and was paid, and the same again in March 2022. This identified (save for operating as a business in terms of payment) that he was a casual worker.

52.8. There was no global or umbrella contract – see the *McMeechan* case (above). The requirement for mutuality will not be satisfied if there is no obligation to offer work and the employee is not obliged to accept it (*Carmichael*).

52.9. The WhatsApp message (the first message set out above) showed Mr Slatter offering work to the claimant but no mutuality of obligation. It was a casual worker experience save for charging the respondent through his company.

52.10. There was also a requirement for continuity of employment and no more than a week's gap between contracts. There are exceptions and a temporary cessation of work is such an exception. However, in *Byrne v Birmingahm DC* 1987 ICR 519, the Court of Appeal held that there was no temporary cessation of work in a case involving a casual cleaner – their work was simply allocated to other employees – it was just a redistribution of the same amount of work. Applying that to present case, the work in the shop did not stop

during the period in question. It was just that when there was an emergency chance of work – when Mrs Bradshaw was on holiday or leaving the respondent or when the respondent was busy at Christmas or in March 2022 – that the respondent offered work to the claimant, who could then choose to accept the work or not.

52.11. Even taking the claimant's case at its highest, he cannot be an employee during the [Relevant Period]. Maybe for the second, later period he can run the same argument, but if he failed during the [Relevant Period], there would be no jurisdiction to hear his claim for unfair dismissal as he had less than two years' service.

53. After a break, at the claimant's request, I then heard the claimant's oral closing submissions, as follows:

53.1. The burden of proof is the balance of probabilities – was it more likely than not that the claimant was an employee.
53.2. The respondent had started going down the subcontractor route after the current proceedings started. In all of the evidence there was not one single reference to the claimant being a subcontractor – he was "staff", "colleague", "friend" etc.
53.3. He was in employment every month from October 2021.
53.4. The caselaw referred to actual control and personal service – these were determinative, despite a label of self-employed status.
53.5. It had not crossed the claimant's mind to supply online calendars to the Tribunal – he said he did not think that the respondent would deny him working there. He asked to submit new evidence by way of invoices [which I refused, given the lateness and the volume of material before the Tribunal, in accordance with the overriding objective].
53.6. He said that the respondent's witnesses were not credible. The claimant had provided evidence of shifts he had worked.
53.7. He was never given a subcontractor contract. He regarded himself as an employee and he started on 22 September 2021. He worked from that date continually, for every single month thereafter.

Conclusion

54. I have carefully considered whether the claimant has established that he was employed by the respondent under a contract of employment during the Relevant Period.

55. There was no written employment contract and very few relevant documents at all concerning that period.

56. The witness evidence of both sides showed that the working arrangement between the claimant and the respondent during the Relevant Period was sporadic, casual, occasional and ad-hoc. An infrequent enquiry was made by the respondent as to whether the claimant was available for work and, if he was, he could evidently choose whether to accept that work or decline it. The claimant worked just 18 shifts for the respondent during the Relevant Period – it really made no difference at all whether those shifts were around one or two per month as the claimant claimed, or whether, as the respondent claimed, a number were clustered around December

2021 and March 2022, with fewer in between as a result. The end result, in terms of whether there was an employment contract in place during the Relevant Period, is the same.

57. The very casual nature of the relationship was very clearly illustrated by the WhatsApp messages set out above, in which ad hoc requests for availability were made by the respondent, with no expectation that the claimant would necessarily undertake what was offered. *"If not, no probs"*, Mr Slatter said in one message in the event that the claimant chose to decline the shifts he had offered.

58. As the weight of the caselaw summarised above indicates, casual workers will usually struggle to establish sufficient mutuality of obligation to found the basis of an employment relationship with the alleged employer. This case was no different and was not one of those unusual cases - see *Gardiner* and *Haggerty* above - in which a relatively casual working relationship contained sufficient mutuality of obligation so as to give rise to "employment status" – both of those cases involved, amongst other things, long periods of working arrangements between the hiring business and the worker over many years.

59. In short, I have concluded that there was insufficient mutuality of obligation in the working arrangements during the Relevant Period for the claimant to establish that an employment contract with the respondent existed during any of that time. For that reason alone, the claimant's case at this Preliminary Hearing fails, but I have gone on to consider other relevant points for completeness, as follows.

60. Looking at the surrounding circumstances and whether these are consistent with the working relationship being one of employment, the nature of the payment arrangements between the claimant and the respondent suggested otherwise. The arrangement during the Relevant Period was that the claimant submitted invoices, charged VAT for much of the period, and received payment outside of PAYE, with the claimant being responsible for his own tax and national insurance. This is not consistent with an employer/employee pay arrangement. It would have strongly pointed away from "employee" status on the facts of this case, in conjunction with the infrequent, casual nature of the work.

61. I turn to the issue of the gaps in work in this case and section 212 ERA 1996. The claimant worked just 18 days in the Relevant Period. Had the claimant established employee status at all (which he has not), breaks in that employment of over one week would break continuity, subject to limited exemptions. Even on his own case at its highest, there were multiple gaps in the work of more than one week during the Relevant Period. These gaps did **not** amount to mere temporary cessations of work. There was no evidence of any discussion or arrangement as to each cessation or as to when further work might be offered/accepted. It was entirely ad hoc. The working relationship, which only came into being from September 2021 did not include any "arrangement or custom" to the effect that any employment relationship subsisted during the gaps. The multiple gaps in the alleged employment during the Relevant Period would also have been fatal to any finding of continuous employment during any of that period.

62. In all of the circumstances, given the lack of mutuality of obligation, the gaps in employment which fell outside the exemptions in section 212(3) ERA 1996 and the payment arrangements, I have concluded that the claimant was **not** an employee of the respondent at all during the Relevant Period, or for any continuous period. As a consequence, he cannot have had the necessary two years' continuous service when the alleged dismissal occurred in December 2023, irrespective of whether or not he was an employee during the later working period from July 2022 until December 2023 (a point yet to be determined).

63. The Tribunal therefore does not have jurisdiction to hear the claimant's claim for unfair dismissal against the respondent, in light of sections 94 and 108 ERA 1996, and so that claim is **dismissed**.

Employment Judge Cuthbert

Dated: 13 April 2025

Sent to the parties on
28 April 2025

Jade Lobb
For the Tribunal Office