



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Jessica Mauve

**Respondent:** Plinian Capital Ltd

**Heard at:** London South (Croydon), in public, by CVP

**On:** 13 January 2025

**Before:** Employment Judge Tsamados (sitting alone)

## Representation:

Claimant: Mr J Williams, Counsel

Respondent: Ms A Fadipe, Counsel

## PRELIMINARY HEARING IN PUBLIC RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

- 1) The Claimant is not an employee and therefore the Employment Tribunal has no jurisdiction to hear her complaints of unfair dismissal, entitlement to a statutory redundancy payment and damages for breach of contract. Those complaints are dismissed;
- 2) The Claimant is a worker and therefore the Employment Tribunal has jurisdiction to hear her complaints of unauthorised deductions from wages and entitlement to payment in respect of annual leave.

## REASONS

### Background

1. By a claim form presented to the Employment Tribunal on 8 May 2024, the Claimant brought complaints of unfair dismissal and entitlement to redundancy pay, notice pay and other arrears of pay. This followed a period of Early Conciliation between 28 February and 10 April 2024. In its response, received on 6 June 2024, the Respondent denied the claim in its entirety on the basis that the Claimant was engaged by her own company,

Mentallogenic Mining Ltd (“MML”), as a self-employed consultant.

2. By letter dated 14 June 2024, the Tribunal sent notice of the final hearing set for 6 and 7 March 2025. That letter contained a number of standard Case Management Orders in order to prepare the matter for the final hearing.
3. By letter dated 15 July 2024, the Tribunal wrote to the parties on the instruction of Employment Judge (“EJ”) Ord asking the Claimant to respond in writing confirming her employment relationship with MML so that consideration could be given to joining them as a party to the proceedings. The letter also indicated that a preliminary hearing would be held to determine the Claimant’s employment status with the Respondent and any jurisdictional issues.
4. In an email dated 18 July 2024, the Claimant wrote to the Tribunal confirming that she is a director and employee of MML.
5. On 12 August 2024, the Tribunal wrote to the parties giving notice of today’s preliminary hearing listed for three hours. The letter stated that at the hearing an EJ will determine the Claimant’s employment status.
6. By letter dated 1 October 2024, solicitors instructed on behalf of the Respondent wrote to the Tribunal requesting an order to strike out the Claimant’s claim. This was essentially on the basis that the Claimant had confirmed that she is an employee and director of MML, and through MML provided services to the Respondent. By email dated 2 October 2024, the Claimant wrote setting out her objections to the strike out application.
7. In a letter dated 1 November 2024, the Tribunal wrote to the parties on the instruction of EJ Burge stating that it was not appropriate to strike out the claim ahead of determination of employment status, the matter to be determined at the hearing today. EJ Burge also set a series of Case Management Orders in order for this matter to be prepared for today’s hearing.

### **Documents and Evidence**

8. I was provided with a bundle of documents containing 504 pages and witness statements from the Claimant and Mr Bradford Mills, on behalf of the Respondent. I will refer to that bundle as “B” followed by the relevant page number where necessary.
9. I heard evidence from the Claimant and from Mr Mills. Mr Mills gave evidence from Houston in Texas in the USA. I was satisfied that the US government had no objection to evidence being given overseas to the UK in legal proceedings.
10. I also heard submissions from both representatives and was provided with written submissions and a joint bundle of authorities.

### **Conduct of the hearing**

11. The hearing was conducted by Cloud Video Platform ("CVP").
12. There was insufficient time in which to reach a decision and so I indicated that I would send out a reserved judgment. The parties agreed that if needs be I could set dates for outstanding case management issues relating to disclosure, provision of a bundle of documents, exchange of witness statements and an updated schedule of loss.

### **Findings of Fact**

13. I have only made findings on those matters that are relevant to the claims and issues before me, this is particularly so given that I did not want to stray into matters which are more properly the preserve of the Employment Tribunal dealing with the substantive claim if this matter continues.
14. Where any matters are in dispute I have decided them on the basis of what is called the balance of probabilities. I have also taken into account the relevant burden of proof and who it lies upon.
15. The central facts of this case are relatively straightforward and are largely not in dispute. Indeed, it is not even disputed by the Respondent that it owes the Claimant's limited company a substantial amount of money.
16. However, what made it difficult were a number of factors: the rather complicated arrangement between a number of different companies which needed some unravelling and explanation; the lack of an agreed written contractual agreement which made it necessary to examine the relationship between the parties from their written and oral evidence and contemporaneous documentation in some detail; and the somewhat loose use of terminology in describing that relationship and aspects relating to it..
17. The Respondent is a limited company incorporated in England and Wales. Mr Mills is a Company Director and majority shareholder of the Respondent. The Respondent raises capital in dedicated funds and the private equity market to invest in mining exploration projects or distressed mining companies, to explore and develop them or recover them back to profitability and then sell them for profit. There are three investment portfolios/funds: CE Mining ("CEM"); CEM Fund II; and CEM Fund III. They are known collectively as the "CEM Funds". There are three investment companies: Circum Minerals Ltd ("Circum"); Consolidated Nickel Mines Ltd("CNML"); and Mandalay Resources Corporation ("Mandalay"). The Respondent may take board and/or management roles in its investment companies for which it usually gets a paid management contract to monitor and/or operate the companies.
18. Between 2010 and 2024, there were four Directors in the Respondent company: Mr Mills; Mr Sanjay Swarup, the Financial Director, Dr Mark Sander; and the Claimant's husband, Mr Anton Mauve. Mr Mauve was also appointed as the CEO of CNML in 2019 until his employment terminated in 2023 for which he is bringing a complaint of unfair dismissal.

19. In May 2013, the Claimant was offered a role within the Respondent company as a Project Manager working directly for Mr Mills. The appointment was on a work from home basis and she was only occasionally required to attend meetings in London or at the respondent's international operations. Her agreed remuneration was £5,000 per month gross. Her travel expenses were reimbursed.
20. The Claimant states that once the role of been verbally agreed, she attempted to get a written contract in place. However, she was advised by the Respondent's then legal representative that she should submit invoices through a limited company, as this was the preferred way for the Respondent to handle its staff. The Claimant already had a limited company of which she and her husband were Directors. She had established the company on similar advice in 2012. This is the company called Metallogenic Mining Ltd ("MML").
21. MML submitted invoices for work or expenses related to the Respondent and the CEM Funds, although since August 2015 all of the invoices issued have only been for work undertaken for the Respondent.
22. In May 2013, the Claimant drafted a consultancy contract between MML and the Respondent which is at B59-60. However, that agreement was never signed.
23. In evidence, the Claimant accepted that when she started providing services to the Respondent this was the agreement between the parties and that she was working under this agreement.
24. Later on in May 2013, the Claimant drafted a second contract. This was an Independent Contractor Agreement and would have documented the relationship between MML as the Contractor, the Claimant as the Representative and Circum, which was the company to which the Respondent outsourced her services. This document is at B 61-73. However, this document was never signed.
25. Mr Mills said in evidence that the Claimant was brought on to work with Circum to start with and most of the work she carried out was for that company until about 2020 when the Respondent "brought a flow through of funds for Circum". He continued, that "we took over the time she spent with them as we wound down the fund from 2020 onwards". He further stated in evidence that whilst he never signed this document, it reflected the terms of the arrangement for services to be provided by the Contractor, MML, through its Representative, acting as Project Manager and reporting directly to the Directors of the Company, Circum (at clause 2 (a) B63).
26. Indeed, he was taken to various other clauses which he agreed reflected the relationship between the Claimant and the Respondent. In particular, clause 2 (c) at B64 as to the prohibition against sub-contracting, assigning or delegation of the Services by the Contractor and the Representative, clause 6 as to Independent Contractor status at B66, clause 7 as to Confidentiality and Intellectual Property Rights at B66, clause 8 as to Corporate Opportunities at B67, clause 9 as to Non-Solicitation of Customers or

Representatives at B67. It was then put to him that aside clause 6, if he had a contract of employment with any member of staff it would be the same as this agreement. Mr Mills replied that it would be the same with any contractor that one had.

27. The Claimant's position is that both she and Mr Mills described her job as working for the Respondent and that she worked on tasks allocated to her directly by Mr Mills and not through MML. When she attended meetings with external agencies, she was always introduced as working for the Respondent and never as a consultant. Further, she states that Mr Mills never mentioned MML to her again until she began this litigation.
28. In 2018, following a review of employment contracts, Mr Mills asked the Claimant to assist in getting written contracts in place. The Claimant sought advice from the Respondent's legal counsel and in September 2018 she presented this advice to the Respondent. In oral evidence, the Claimant stated that she was told by the legal counsel that the contractual arrangements were incorrect and it needed to be changed (to reflect employed status). The advice was that six Respondent employees, the Claimant and Mr Mills, should be appointed as employees with standardised UK employment contracts. A further three people were identified as being contractors and that they must have "schedules of service". I was referred to the Claimant's email to Mr Mills dated 18 September 2018 and the attached document setting out key decisions needed, as per the first three points at B95 & 96-97. I was also referred to the Claimant's email to Mr Swarup dated 22 March 2019 at B98-99.
29. Mr Swarup authorised solicitors, Addleshaw Goddard, to draft the employment contracts but Mr Mills did not sign them. The contracts included a Service Agreement between the Respondent and the Claimant backdated to July 2018 (at B74-94).
30. The Claimant states that further attempts were made to get signed contracts in place. However Mr Mills would not agree to sign employment contracts. The contracts were revised again in March 2019 by the Respondent's legal counsel (at B108-127) but these were never signed. Indeed, both the Claimant and Mr Mills were in agreement in their evidence that this matter never went anywhere in the end. The Claimant said in oral evidence that her discussions with Mr Mills became acrimonious and he did not wish to proceed with the contracts and he was angry that she was pushing for it. She added that she pressed the matter again and again, although I was not taken to any contemporaneous documents in support of this and it was not put to Mr Mills in evidence.
31. The Claimant's position as to her employment is as follows:
  - 31.1 She was directed by the Respondent and Mr Mills to carry out work for the investment companies and was paid through her company MML;
  - 31.2 Her principal role was Project Manager of Circum for which she had a Circum job title, email address and business cards and she was a signatory on Circum's bank account she reported directly to Mr Mills in

his capacity as a Director of Circum;

- 31.3 Over the years she also helped with general administration issues for the Respondent. It was clear to everyone that her line manager was Mr Mills and he was responsible for employing her but occasionally another of the Respondent's partners (a title which appeared to be used in a non-legal sense) would ask her to help with a task;
- 31.4 Mr Mills communicated the general task allocation verbally, either on their weekly calls or in private scheduled calls. She refers to email documenting some of these task allocations at B145, 148 and 183;
- 31.5 In her written evidence, the Claimant stated that during her time working for the Respondent, the company set the hours she was required to work and the work she was required to undertake;
- 31.6 In oral evidence she stated that she had general tasks to undertake, such as taking minutes and preparing reports, and that Mr Mills gave her general tasks to undertake as well. Further, she stated that it was up to her to decide how to carry out those tasks within the time available. She also stated that the Respondent did not tell her when to start work or when to take breaks but the understanding was with most managers that you had to be available when the job had to be done;
- 31.7 Certain meetings were scheduled in the afternoon within UK and USA and other countries working hours. Aside from attending schedule meetings, the Claimant was free to manage her time as long she met all deadlines. She was required to complete all of the work herself and not permitted to send a substitute in her place, if she was unavailable on the day that she was required to work;
- 31.8 She worked home and use her own computer, mobile phone and landline but any other expenses she incurred in the process of undertaking her job were reimbursed by the Respondent provided she submitted receipts;
- 31.9 She took 20 days' leave per year which was always cleared in advance with Mr Mills. Her invoices were never varied to reflect holiday's taken. She was always paid the same monthly amount (up to the point when payments reduced and then stopped being made);
- 31.10 The Claimant relies on an email to Mr Mills dated 24 June 2021 at B184 as indicative of her having to get approval for her holiday. It was put to her that this email does not read like that. It reads like her simply stating when she intends to take a month's leave in July to August 2021, although she does generally state "I trust this meets with your approval" referring to the entire first paragraph. In cross examination, the Claimant explained that it was a reminder to him of a conversation that had already taken place in a call. However, the wording of the email does not support that explanation. Nevertheless, Mr Mills said in cross examination that any contractor would have to notify of holiday absences and he accepted that the Claimant was seeking his approval

in this email;

- 31.11 The Claimant submitted her own tax returns declaring her earnings which were entirely derived from the Respondent. She had no other income. I was referred to her HMRC Annual Tax Summaries for the years 2020/21 and 2021/22 at B485-486 and 487-488 respectively;
- 31.12 In cross examination, the Claimant was referred to the Annual Tax Summary at B485 and it was pointed out that £5,000 per month amounted to £60,000 per year but this document only showed a total annual income of £46,888. This was a difference of approximately £14,000. She was asked what happened to the difference? Her response was that she did not empty MML's bank accounts every year. It was then put to her that she had decided to pay herself that amount (of £46,888) and her response was yes, because MML had "some expenses as well".
32. In 2020, the Respondent lost the Circum contract and the Claimant's role was changed as a result. I was referred to in email exchange on 11 June 2020 at B146. From then, on a large part of the Claimant's role became data management. This involved dealing with highly confidential records which are disclosed to potential prospective investors and financial institutions and their appointed agents when trying to raise funding. The electronic documents are stored in a Virtual Data Room ("VDR"). The Claimant was given full access to the Respondent's and the Funds' VDR's and no steps were taken to limit her access to confidential data.
33. The Claimant asserts that it would have been a major breach of confidentiality by the Respondent to allow her such access if she was not an employee of the Respondent. She refers to a particular occasion on which Mr Mills was asked by the Vice President of Rambler Mines to confirm whether she "is with Plinian Capital and that it's okay with you to let her into our data room?" And his response was "yes and yes" (at B489).
34. Mr Mills' position as to the Claimant's engagement is as follows.
- 34.1 The Claimant was a representative of MML and designated as a Consultant for the Respondent, providing consulting services as a Project Manager on a part-time basis. She was not entitled to and did not receive any employee benefits, such as holiday pay, sick pay or pensions. She was free to provide services to other clients during the term of her part-time agreement. The Consultancy Agreement at B61-73 evidences the relationship between the parties;
- 34.2 The Service Agreement at B74-94 was not drafted by the Respondent and was never entered into;
- 34.3 Whilst his witness statement at paragraphs 4 and 5 appears to segway from the agreement at B61-73 to the agreement at B74-94, I am satisfied that in paragraph 5 the reference is to the former agreement given the references to clauses at paragraph 6;

- 34.4 At no point was there an employment contract between the Claimant and the Respondent. The reason why the Claimant prepared employment contracts but he did not sign them was because the Respondent did not intend to create an employment relationship with the Claimant and had decided it only wanted to continue to engage as a Consultant. Whilst there was some discussion within the Respondent organisation as to consideration of changing the structure, this did not occur. The decision was taken that it was not the correct structure for the Respondent. The Respondent ultimately has never had any employees, is not set up to support employee management of tax payments and pensions, and did not have the capacity to manage employees, part-time or otherwise;
- 34.5 Whilst the Claimant is correct that she was informally sub-contracted to carry out work for the investment companies, it is not correct that the Respondent paid her. Mr Mills cites Circum as an example of this. When the work for Circum came to an end, the Claimant continued to provide services to other investment companies via MML in her role as a Consultant for which the Respondent paid MML;
- 34.6 The Claimant through MML had control over how and when the services were provided. He refers to the email at B147 in which the Claimant emailed him to advise that she had been asked to continue working for Circum for the time being as they had not managed to schedule a time for a handover. She then explains that most of the Circum admin stopped and she can be available to work on other Respondent projects if required.
35. During 2020, the Respondent fell into financial difficulties and in February 2021 had to instigate cost-cutting measures. As a result, Mr Mills wrote to the Claimant on 19 February 2021, advising her that the services provided by MML were cut by 50%. This had the effect of reducing the monthly payment to £2,500. In that email Mr Mills states that the reduction to half-time reflects reduced workload which he defined as “no Circum, Sale of Mandalay, Hopefully CNM and Rambler as well” and further states that he is happy to discuss the matter and this that it was still subject to final approval. The email is at B182.
36. In the email above this one, the Claimant wrote to Mr Swarup on 22 March 2021, forwarding Mr Mills’ email, and notified Mr Swarup that Mr Mills only sent notification of the reduction in mid-February and so her January invoice needed to be paid in full.
37. In the email above that one, Ms Mulrajani, the Respondent’s accountant, responded stating that “all of the executives’ salaries were withheld until the budget was finalised and was (sic) only released once the structure was agreed”.
38. The Claimant asserts that this suggested to her that she was considered to be an executive, working exclusively for the Respondent and earning a salary, despite the fact that this payment was, at the time made via MML, at the Respondent’s request.



39. Mr Mills asserts that the Claimant accepted the reduction to half-time and at no point argued that there had been any breach of contract, which would have been the case if she had been an employee. He also asserts that this adjustment further underscores the flexibility of the business-to-business arrangement between the parties, which allowed the Respondent to vary the scope of the services as required by business needs without the obligations associated with an employment relationship.
40. On 24 June 2021, the Claimant sent an email to Mr Mills setting out the tasks and work which she was undertaking, including her upcoming leave plans, the hours worked and seeking payment of overtime worked, for which she indicated she would be billing at her previous monthly rate for the next few months. This is the email referred to above, at B184. The Claimant relies on this as an indication that she was accountable for her time and seeking the Respondent's approval for these various matters. Mr Mills relies on this as further evidence that the Claimant did not consider herself an employee but rather as a Consultant employed by MML.
41. On 7 July 2021, Mr Mills responded querying an invoice which that the had submitted and stated that the only work she was doing for the Respondent was managing the Monday calls and helping with the quarterly reports and if the invoice was in relation to the CNM-Data Room, etc, then this was a direct CNM charge and could be paid out of the Respondent's funds if Anton (the Claimant's husband) approve the amount. This email is at B185.
42. Following this, the Claimant made arrangements to work part-time for the CFO of the CNML, Ms Swash. I was referred to an email exchange at B173. This arrangement was on similar terms as to how she worked for the Respondent, i.e. MML sent invoices to CNML.
43. After a few months, the Claimant alleges that Mr Mills stopped the Claimant from undertaking this work against Ms Swash's wishes and authority. I was referred to an email at B168. Ms Swash still wanted her to undertake the work and repeatedly approached with offers of work e.g. in both February and June 2022 (at B166). However, the Claimant alleges that Ms Swash was repeatedly prevented from engaging Claimant by Mr Mills.
44. This matter was not put to Mr Mills in evidence. In cross examination, Ms Fadipe put to the Claimant that it was not true that Mr Mills had stopped her from working for CNML. The Claimant's response was that Mr Mills had told her she should source people in Zambia to undertake the work, which was not a problem, but she did not think that was a genuine reason.
45. The Claimant also relies on the following documents as evidence of her employment states, which were not disclosed to her in these proceedings but she obtained by way of a Subject Access Request under the data protection legislation:
  - 45.1 An email sent by the Respondent's accounts department to Mr Swarup on 30 November 2021 referring to the salaries of a number of people including Mr Mills and her (at B492);

- 45.2 A budget listing her name, Mr Mills and the Respondent's other partners under the hearing "Partners Salaries and Bonus" (at B495);
- 45.3 An email to Mr Swarup dated 14 January 2022, again referring to the salaries of a number of people including Mr Mills as her (at B497);
- 45.4 An Excel Workbook entitled "CE Fund Modelling of costs since inception 2021 (v2)". This she states contains details of income and expenses of the Respondent and the CEM Funds. I was not provided with the entire document but extracts from it were referred to. One sets out the Respondent's admin expenses and contains a list of at least 20 different companies providing a range of professional services (at B500). Whilst the Excel Workbook refers to the Claimant by her name on 6 occasions, it does not mention MML at all. I was referred to B495, 499 and 504 as examples of where the Claimant is referred to.
- 46 Mr Mills was referred in cross examination to B501, a spreadsheet headed "Plinian admin expenses" in particular, the reference to payments of Employers' National Insurance Contributions from 2017 onwards. His response was that to his knowledge the Respondent never paid any National Insurance Contributions because it did not have any employees.
- Similarly, he was referred to B495 and 496, spreadsheets entitled "Advisor Budget", covering other companies and also indicating payment of Employers' National Insurance Contributions. Mr Mills's response was that without having his CEO here, he did not know what this means, but he was adamant that the Respondent never had any employees.
42. Mr Mills was also referred to B204, a document headed "Partners Remuneration (Plinian)" which contains a list of names, including the Claimant (shown as "Jessica") and setting out remuneration by year. It was put to him that clearly the Claimant was not a partner but she is being treated as a member of staff. Mr Mills replied that those named were all under different types of service contracts but were not members of staff.
43. Mr Mills stated in evidence that as the Respondent's financial situation did not improve, a number of invoices went unpaid, including those of MML. He further stated that it was agreed with MML that the invoices would be satisfied once the Respondent received payments that it was owed via CEM. He additionally stated that unfortunately the Respondent has still not received those payments and is still therefore unable to make those payments to MML.
44. From November 2021 onwards, the Claimant was experiencing difficulties and delays in receiving payment of her invoices. As referred to in email at B211 from Ms Mulrajani to the Claimant with regard to her "November pay".
45. This continued into 2022, when in February 2022, the Respondent stopped paying the Claimant. The Claimant emailed Ms Mulrajani in May 2022 querying the position (at B211) but received no written response.
46. In October 2022, following her discussion with Mr Mills regarding the lack of

payment, she put her concerns to him in an email I was referred to email correspondence from the Claimant to Mr Mills and Mr Swarup at B210-211. The Claimant did not receive any response to her emails.

47. On 12 June 2023, the Claimant sent an email to Ms Mulrajani attaching a Statement of Amounts Due from the Respondent to MML for her ongoing services to the company (at B221).
48. On 27 November 2023, the Respondent advised the Claimant that her services through MML would no longer be required. I was referred to B226-228 in this regard.
49. On 30 November 2023, the Claimant emailed the Respondent attaching her invoices to the end of 2023. The email stated that her understanding was that this should be settled in full around 11 December 2023 but Mr Mills had said she should speak to someone about arranging a settlement plan. The email attached a settlement plan for approval. In response, the Respondent indicated that it was "good" with the statement and suggested it would be helpful if the Claimant spoke with Mr Mills and Mr Swarup directly. These emails are at B217-218.
50. Mr Mills' position is that the Claimant did not carry out any further work via MML for the Respondent beyond December 2023 and he advised her that no further invoices from MML would be accepted after 31 December 2023. However, the Claimant submitted further invoices for January to April 2024 (at B273-276).
51. On 22 January 2024, the Claimant sent an email to Mr Mills attaching a proposed payment plan regarding indebtedness to her in excess of £60,000. The plan was on MML headed notepaper, referred to the sum as debt and included interest charged at 8% per annum. The Claimant's stated position was that it was not possible to terminate the agreement whilst there was a debt outstanding and therefore the payment plan included accruals for the months that the Respondent intended to continue the relationship. At the end of the payment plan is a table showing the amounts due each month between February 2022 and October 2024, the relevant invoice numbers and labels the amount due as salary. I refer to the email and the attachment at B235-237. In cross examination, the Claimant accepted that she was treating what was owed as a loan if Mr Mills accepted some kind of payment plan and so on this basis interest was payable.
52. The Claimant sent further emails on 26 January and 3 February 2024 regarding payment (at B232-233). Mr Mills responded on 5 February 2024 advising that he did not know where she was going with this, that her engagement ended in December 2023 and that there were no funds to pay her account until the respondent receives proceeds from sale of assets (at B232).
53. The Claimant subsequently submitted invoices from MML for the period January 2022 to April 2024. These are at B249-276.
54. Mr Mills does not deny that the Respondent owes fees to MML. However

those fees are not owed to the Claimant with whom it has no direct relationship. For this reason, the Respondent believes that the Employment Tribunal does not have the requisite jurisdiction to hear this claim which should be taken as a civil claim in the County Court brought by MML.

## **Submissions**

55. I received a skeleton argument from Mr Williams and written submissions from Ms Fadipe. Both Counsel also made oral submissions. I do not intend to set the submissions out in this Judgment unless I specifically refer to them. However, I have fully taken them into account.

## **Essential Law**

56. I am grateful to Ms Fadipe and Mr Williams for setting out the relevant law within their written submissions and skeleton, respectively. I do not propose to set the statutory provisions out again within this Judgment but of course will refer to them where appropriate in my conclusions.
57. But essentially, this case involves a consideration of section 230 of the Employment Rights Act 1996 ("ERA") as to the definitions of "employee" and the definition of "worker" and the relevant case law. Regulation 2 of the Working Time Regulations 1998 ("WTR") in effect repeats the definition of "worker" within ERA.

## **Conclusions**

58. In order to claim unfair dismissal (as well as other rights, such as entitlement to itemised pay statements, redundancy, statutory minimum notice of termination and the ability to bring a breach of contract claim in the Employment Tribunal) a person must be employed (ie work under a contract of service).
59. A person who is self-employed (ie working under a contract for services) is not entitled to bring a claim, although she may still fall within the definition of worker under section 230(3) of the Employment Rights Act 1996 (ERA 1996) for the purposes of a claim of unauthorised deductions from wages (and entitlement to annual leave under the WTR).
60. There is no clear guidance given by case law by which Employment Tribunals are able to distinguish between those who are employed and those who are self-employed. An "employee" is defined simply as someone who has entered into, or works under, a contract of employment (section 230(1) ERA 1996). A "contract of employment" means "a contract of service or apprenticeship, whether express or implied, and (if it is express), whether it is oral or in writing" (section 230(2) ERA 1996).
61. There is no single test which determines whether a person is employed or self-employed although there have been a large number of cases which have tried to establish the approach to be adopted to determine this issue. The usual approach taken is referred to as the multiple test which requires all aspects of the relationship to be considered and then to ask whether it could

be said that the person was carrying on a business on his/her own account (O'Kelly v Trusthouse Forte plc [1983] IRLR 369,CA). The multiple test requires the consideration of a number of factors.

62. The first consideration is whether there is a mutual obligation to supply and perform work, ie is the employer contractually obliged to provide work and the person obliged to carry it out? This is the most important single factor. If no such obligation exists, then the person is not an employee (Carmichael v National Power plc [2000] IRLR 43, HL).
63. It is also a vital component that the Respondent has a sufficient framework of "control" over the person, although direct supervision and control is absent in many kinds of employment today (Montgomery v Johnson Underwood Ltd [2001] IRLR 269, CA) If the person controls when, where and how s/he performs the work, this degree of autonomy would suggest that s/he is self-employed. However, if the employer has the power to tell the person when, where and how to perform, it would indicate that the person is an employee (Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance [1968] 2 QB 497).
64. Another factor is that the other provisions of the contract must be consistent with its being a contract of service. The Tribunal needs to consider the purpose of the contract and what the parties intended when they formed it. It is the nature of the agreement and the actual performance of the contract which counts, not simply the label attached to the relationship by the parties. For example, just because a person is told by an employer that s/he is self employed does not mean that is the true legal position.
65. The method and mode of payment to the person could be a relevant factor. If pay is referable to a period of time rather than productivity, this suggests that the person is more likely to be an employee. She is also more likely to be an employee if she gets paid sick leave and is subject to the usual disciplinary and grievance procedures. However, again this is not necessarily conclusive of employee status.
66. The above assumes that it is clear what the contract terms are, but this may not be the case. When deciding what terms have been agreed between the parties, the first step is to look at any written contract. This can be a problem. People sometimes sign pro forma contracts which are designed to prevent them from being an employee, eg by stating that there is no mutuality of obligations or that they have the right to send along a substitute (see below). However, if there is evidence of the true nature of the agreement this should be considered (Autoclenz Ltd v Belcher & Ors [2011] IRLR 820, SC; Protectacoat Firthglow Ltd v Szilagyi [2009] IRLR 365, CA; Consistent Group Ltd v Kalwak & Ors [2008] IRLR 505, CA; and Redrow Homes (Yorkshire) Ltd v Buckborough & Sewell [2009] IRLR 34, EAT). This was most recently emphasised in Johnson v G T Gettaxi (UK) Ltd [2024] EAT 162.
67. Certain employment rights apply to "workers". For example, entitlement to annual leave and holiday pay, the National Minimum Wage and the ability to bring a claim in respect of unauthorised deductions from wages.

68. If the person is an employee then they will also satisfy the definition of worker. But sometimes the problem is to prove that the person is a worker as opposed to self-employed.
69. The definition of worker within section 230 (and for other claims reliant on this status) is wider than the restrictive definition of employee. It covers those who have entered into, or work under, a contract of employment and any other contract 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.
70. A worker is different from someone who is self-employed. Self-employed individuals can make their own choices as to what work they do and when and where they do it. They work for themselves. Although the practical realities of getting work mean they must satisfy (often quite stringent) requirements of those who engage their services, ultimately the choices are their own to make (O'Brien v Ministry of Justice [2013] IRLR 315, SC).
71. There are three key elements to the definition of worker in the legislation: 1) there must be a contract between the individual and the "employer"; 2) the individual must be required to work "personally" for the employer; and 3) the individual must not be working for someone who is in reality her client or customer. As long as these apply it does not matter if the individual is in business on her own account (Hospital Medical Group Ltd v Westwood [2012] IRLR 834 CA.)
72. As a general rule a good distinction will be the difference between an individual who markets her services to the world in general and someone who works in a subordinate position in circumstances where she is integrated into the employer's business (Windle & Anor v SS for Justice [2014] IRLR 914, EAT). Although there are some borderline situations where it is difficult to determine whether a person is a worker, recent case law has the effect that the definition should widely apply.
73. It is particularly important that the person is required to do the work "personally". Someone who is allowed to send a substitute to work in his/her place (Premier Groundworks Ltd v Jozsa UKEAT/0494/08 applying Express & Echo Publications Ltd v Tanton [1999] IRLR 367, CA.) However, a limited amount of delegation does not necessarily mean that a person is not a worker, eg that the person can only arrange a substitute if s/he is unable (as opposed to unwilling) to do the work, or that a substitute can only be provided with the employer's prior approval (ibid).
74. It is also important to consider the true contractual position as indicated above. Although any written contract will be the starting point, it may be possible to prove that the document does not reflect the true agreement between the parties. But this will need strong evidence.
75. The definition of worker excludes people who carry on a business or profession where the other party is a client. This would exclude professionals such as solicitors, doctors and dentists and also sole traders and taxi drivers.

There can be marginal situations where the person is not in one of these obvious categories yet is working for more than one “employer” at the same time. This does not necessarily mean the person is treating the employer as a client. A good indicator in many, but not all cases, is to consider the extent to which the individual is integrated into the employer’s business (see Westwood above).

76. Turning then to this case and first considering whether the Claimant was an employee.
77. The difficulty in the case before me is that there is no written document evidencing with an absolute degree of certainty what the relationship was between the parties.
78. The closest we get to it, and this is acknowledged by the Claimant, is the document at B59 which was drafted in May 2013 by the Claimant but is unsigned. This states in essence that an individual appointed by MML would be provided to the Respondent to act as a Project manager for a monthly fee of £5,000. In this agreement, the Respondent was a client of MML and the Claimant was provided as the Project Manager. The Claimant was an employee and director of MML by her own admission. However, does that reflect the true nature of the arrangement and in her admission does the Claimant effectively resile from her asserted employment status as employee? So it is necessary to look at what actually happened.
79. I do not think there can be any doubt that this arrangement when it was set up was clearly on a self-employed basis with the Claimant engaged through her own company to provide services to the Respondent for which her company invoiced (at least initially) and received payment of £5,000 gross per month (until this was reduced to £2,500 per month).
80. This was clearly the intention of the parties. It was in effect endorsed by the Claimant on two occasions by the drafting of self employment contracts, albeit the Respondent did not sign either of them. And when there were attempts to set up employer employee contracts, these were also not signed by the Respondent. Mr Mills’ clear evidence was that this was not the relationship that existed and was not an arrangement that the Respondent could accommodate.
81. However, by the time that the relationship had ended and the Claimant was seeking payment of outstanding amounts due to MML, her view of her employment status had changed but this appears to have been rather belatedly given the nature of the correspondence evidencing her attempts on behalf of MML to enforce payment.
82. Further, in her email to the Employment Tribunal dated 18 July 2024 (at B44) she confirms that she is a Director and an employee of MML. Although she did state that this was a standard response she had given for years to requests for information, I did not find this a convincing explanation.
83. In terms of mutuality of obligation, it does appear to me that in as far as £5,000 was paid to MML in return for the Claimant’s services and this amount

remained in payment even when the Claimant took holidays, then it is fair to determine that it existed (albeit whether that was between the Claimant and the Respondent directly is another matter). But in itself, whilst an essential ingredient of an employer/employee relationship, it is not determinative. Equally it also could reflect a consultancy arrangement whereby as long as the work as done payment was made.

84. Looking then at control. From the evidence, I formed the view that the Claimant had certain tasks which she had to undertake with certain deadlines but was free to determine when and how she undertook her functions, save for attendance at meetings at certain times given time differences between the UK and other countries. She was free to go on holiday when she wished and MML was paid the same rate during periods of holiday absence and of course had to notify the Respondent and to seek approval. But this would be the position of a contractor as well, as Mr Mills stated. When she was informed that the rate paid to MML would be cut by half, she did not respond by way of protest or dispute but simply to challenge to the date of implementation. At times she was undertaking work for the Respondent but then for other companies, albeit connected to the Respondent. To that extent she was a free agent.
85. I was not convinced that the other matters that the Claimant asserted relating to Rambler and CNML amounted to control were any more indicative of an arrangement whereby there were certain parameters over which the Respondent directed the Claimant to undertake services.
86. The Claimant provided her own equipment to do her job: computer, mobile phone, Wi-Fi, and was paid travel expenses. All matters that are more indicative of a non-employee.
87. Whilst the Claimant asserted that she was paid 20 days holiday per year, I make no finding on this. Certainly, I heard evidence as to one occasion where it is indicated she was going on a month's holiday and sought approval, I also heard evidence that payment was made in full even when she was on holiday. Whether this amounts to holiday pay or not or as to her yearly entitlement is more a matter for the Employment Tribunal dealing with the final hearing.
88. As to the mode and method of payment. Well clearly this was made through MML and the Claimant submitted her own self-employed tax returns and declared an income of less than the amount paid by the Respondent to that company. This appears to reflect the internal arrangement between the Claimant and MML, that she was an employee of that company and receiving a salary in a lesser amount than that received from the Respondent. I saw no evidence to indicate that payment was made directly by any of the Respondent's other companies.
89. The arrangement with the Respondent continued throughout the time that the Claimant was engaged and endured after the period of time that the Claimant acknowledged that the Respondent's legal advisers indicated that she and others were employees. Indeed, whilst the Claimant stated that she continued to raise the matter, this is not reflected in any documentation I was taken to. It appears more probable than not that those discussions came to



nothing, the matter was not further challenged and the existing arrangements continued.

90. When the Respondent ceased paying MML, the Claimant's response was not as one would expect from an employee challenging the non-payment of a salary, but on a business to business basis from MML, demanding payment, as a debt, and adding on interest and asserting that the arrangement was continuing.
91. Whilst there are references to the Claimant directly within documents and to her being a "partner" and to her "salary", I do not see these matters as conclusive of the relationship that the Claimant asserts existed. Indeed, there are as many indications from the Claimant in correspondence that the opposite relationship exists. What I formed was the impression of an organisation that used such terms loosely to describe working arrangements but not as terms of art. Whilst Mr Mills could not provide an explanation for the references to National Insurance Contributions, I did not see that this gave any further indication as to the Claimant's employment status. I accepted his evidence that the Respondent had no employees. This is underlined by the historic attempts to execute employment contracts which came to nothing.
92. Whilst the Claimant refers to what, in short, is her integration within the Respondent's business, again I do not see this as conclusive of an employer employee relationship. This is the way that the Claimant is presented to third parties or the "outside world" and is not necessarily conclusive that she was an employee. If anything it is more conclusive of worker status.
93. Taking all of the above into account the overall conclusion that I reach from my findings is that the Claimant was not an employee.
94. The Employment Tribunal therefore has no jurisdiction to determine the Claimant's complaints of unfair dismissal, entitlement to a statutory redundancy payment and damages for breach of contract.
95. Turning then to whether the Claimant was a worker.
96. It is clear that the Claimant was working under a contract whereby she undertook to do or perform personally any work or services. There was no suggestion that she or MML could provide someone else in her place to do the work. There was no right of substitution to put it more formally.
97. The Claimant was undertaking the work for the Respondent and it cannot be said that her status was by virtue of the contract that of a client or customer of any profession or business undertaking that she carried on. She provided services as a Project Manager to the Respondent and its other companies. She did not provide services outside of the Respondent and its other companies. She was paid through her company MML for those services. She was not marketing her services to the world in general but working in a subordinate position working for the Respondent in circumstances where she was integrated into the Respondent's business. Whilst she worked from home, providing her own equipment to do her job and was paid travel expenses, this

is not fatal to her employment status as a worker. Similarly, neither is the true intention of the parties if the Claimant falls within the statutory definition.

98. In all of the above circumstances, I reach the conclusion that the Claimant was a worker and therefore the Employment Tribunal has jurisdiction to determine her complaints of unauthorised deductions from wages and entitlement to holiday pay.

Employment Judge Tsamados  
12 February 2025

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