EMPLOYMENT TRIBUNALS

Claimant	**AND**	**Respondents**
Edwin Rothwell		FremantleMedia Group Limited

Heard: In person

On: 4, 5, 6, 9, 10 June 2025

Before: Employment Judge Adkin

Appearances

For the Claimant: In person
For the Respondent: Ms J Stone, KC
Mr T Elmsley-Smith, of Counsel

REASONS

1. Following the judgment given orally and confirmed in writing on 10 June 2025, written reasons were requested.

Summary

2. This hearing was to deal with the single question of whether the Claimant was an employee within the meaning of **s.230(3)(a) of the Employment Rights Act 1996**.

3. Having heard evidence and submissions I found that the Claimant was not an employee.

Evidence

4. I have had the benefit of

4.1. an agreed bundle of 2,669 pages;

4.2. a witness bundle with five witness statements in it, three from the Respondent (Leilah Mason, Julie Burfoot and Alex McBride) and two from the Claimant (Claimant himself and Debbie Clifford);

4.3. all witnesses also attended to give live evidence and answered questions.

Submissions

5. I have had the benefit of written submissions from both sides. Both sides produced an opening note. The Respondent additionally produced a closing note and both sides made submissions at the close of the evidence.

Hearing

6. This was a hearing in which the Claimant representing himself and Counsel for the Respondent were cooperative and courteous with one another which made the hearing run smoothly for which I was grateful. The Claimant was well prepared, maintained a sense of humour and asked intelligent questions in cross examination.

7. I dealt with an application to exclude evidence which related to matters contained within the Claimant's witness statement, reasons were given for that orally and in a separate judgment on the second day of the hearing.

8. There were also three applications to amend the Claimants claims. It was agreed that those would be dealt with after the decision on employment status principally because two of those applications would be expected to fall away depending on the outcome of this decision, which is what happened.

Findings of Fact

9. I have been very much helped by the parties producing an agreed chronology.

Work engagements

10. A document beginning at page 1,495 and running to 1,499 contains a table of the engagements that the Claimant worked for the Respondent for more than twelve years from February 2012 to 7 June 2024.

The Respondent

11. By way of background the Respondent is a television production company that makes a variety of well known light entertainment programmes such as **Britain's Got Talent** and **X Factor** as well as various other programmes.

12. The history of the organisation is in part from Thames Television which has a history going back to the late 1960s.

Period relevant to the claim

13. The period relevant to this claim is from 2010 to 2024 but it is really the period 2019-2024 that I am focusing on in particular although the earlier period is relevant background.

Claimant's career

14. The Claimant had a long history of association with the Respondent organisation.

15. In 2010 he had his first job for the Respondent working as a runner.

16. Over the years he progressed from that junior role to more senior roles of various sorts within televising production in particular in relation to Britain's Got Talent and X Factor but also other programmes.

17. By 2013 he was working as a researcher.

18. By 2016 the Claimant was performing senior researcher roles and from 2018 onwards he had different roles in production although the responsibilities were to some extent overlapping but with differences in emphasis.

19. Most often in the period from 2018 onwards he was a "post-production supervisor". In some cases he was "associate producer". On a couple of occasions the contract described his role as "media manager". On a couple of occasions, the contract says "postproduction supervisor", but the onscreen credit is "Edit AP" short for associate producer.

20. For each of the contracts in the table there is an individual listed as "manager-contract raiser". That varies project by project. Often it is the same person for several projects and then it changes. Most of the roles as I have said are either Britain's Got Talent or alternatively X Factor but there are some other programmes in which the Claimant has been involved.

Respondent's types of engagements

Permanent employees

21. The Respondent has employees on permanent contracts of employment typically for more senior roles which sit at a higher level above the level of the production team for individual programmes. That applied to some of the Respondents witnesses in the Employment Tribunal hearing.

Other engagements

22. When it comes to the majority of the work force working on different programmes the Respondent has a variety of different bases for engaging those that work for it.

23. There are casual staff vouchers shortened to **CSV** for engagements of 6 days or less.

24. Another arrangement is called "**loan out**" which is for a freelancer to engage with the Respondent via their own personal services company.

25. Of central relevance to the Claimants claim are **Schedule D** and **Schedule E**.

Schedule D

26. Schedule D individuals who meet the criteria in the appendix for self-employment (that's a HMRC document) are engaged under the general terms and conditions Schedule D which corresponds to self employed tax status.

27. These individuals retain full control of their personal tax affairs.

28. Those on Schedule D are paid in lieu of untaken holiday by invoice. They also invoice for the work that they have done and also for expenses. There is no requirement for them to ask for holiday. In practice holiday is typically taken between assignments.

Schedule E

29. Alternatively, the other main category relevant for this hearing is Schedule E.

30. Schedule E is where individual who the Respondent treats as workers for employment purposes are where the tax is dealt with on a PAYE basis and so they receive a pay slip.

Schedule D or E?

31. There appears to be a preference amongst many freelance workers in television production to be paid on the Schedule D basis. The individual typically receives a higher rate and the employer does not pay employer's national insurance contributions.

32. The Respondent's case is that any benefit to it as an organisation is relatively marginal and they give their workforce a genuine choice as to which status as between Schedule D or E they wish to have.

Pension provision

33. Individuals paid under the Schedules D or E are enrolled into the so called "people's pension" and contributions made.

34. That scheme is less generous than the pension scheme operated for permanent and fixed term employees who have a scheme operated by Scottish Widows.

35. The discrepancy in pension provision led the Claimant to challenge his employment status although the details of the pension payment discrepancies are not relevant for present purposes.

Details of Schedule D

36. Looking at some specific terms of Schedule D: clause 4.1 says that the individual shall be wholly responsible for all tax, national insurance and other social security contributions. The individual is required to indemnify the company in relation to taxes, including VAT arising out of any tax assessment.

37. Clause 12.1 provides that the company and the individual hereby agree that this agreement is a contract for services and not a contract of employment or an agency agreement.

Dinner per diems

38. There is an arrangement for dinner per diems. This was confirmed in an email by Debbie Clifford in August 2019:

> "anyone who is Schedule D or a limited (which I presume refers to limited company) needs to invoice me but if you are PAYE (researchers and runners, Schedule E) you can still claim cash."

US work permit application

39. As early as August 2013 the Claimant was asked to provide information that could be used to apply to the US immigration authorities for a work permit.

40. At around this time a draft memorandum was produced which referred to the Claimant having services to complete and any ongoing projects as they arise. His role was described as "media manager" and the time period was described as the 5 August 2013 to 4 August 2016 i.e. a three year period for the X Factor and Xtra Factor.

41. The Claimant quotes from that wording used for the US immigration application purposes which emphasises the degree of integration and in particular the fact that the members of the team:

> "possess intimate knowledge of each other's sense of timing, direction, artistic ability, aesthetic preferences, vision and necessities thus the members are equipped to act as a unified cast."

42. In the period March 2013 to June 2018 the Claimant was engaged by the Respondent on various individual contracts for different time periods as researcher or associate producer.

2017

43. In 2017 the Claimant was not engaged by the BBC on a contract for six weeks in the period February 2017 to April 2017 on a programme called "Right on the Money".

44. As a result, the Claimant turned down a contract for Britain's Got Talent auditions. He says because he was already working for the BBC and BGT auditions was not

something that he knew about so he would have to learn the ropes, he formed the view that it was not physically possible.

2018

45. The Claimant had a second engagement for BBC running from December 2017 to May 2018 a programme called “Making the News”.

46. In September 2018 based on an email exchange between the Claimant and Dawn Grey he was giving the credit “Edit AP” at that time he was working as far as the contract was concerned as a media manager.

47. December 2018 was the first time the Claimant was engaged as a post-production supervisor

2019

48. In April 2019 the Claimant had various WhatsApp exchanges with colleagues about consulting accountants. In fact he did not consult accountants but that was the topic of conversation.

49. On 4 April, right at the end of the tax year, the Claimant wrote to Josh Hoskins the production manager:

> “I was wondering about going self employed and invoicing, would this be possible and would this affect the pay. I am not sure if I want to do this, but I suppose I have got until June to set it up if I decide to do it”.

50. Four days later on 8 April 2019 the Claimant sent an email to Samantha Cooke and Dereck Chiu

> “I would like to go self employed at some point and as it is the new tax year I thought it would be neat to switch over now for year 2019/2020 and so I wonder if it would be possible to change my contract to Schedule D.

51. Sam Cooke responded,

> “I don’t think we can pay you a Schedule D until you have a UTR number/LP10 letter from us. As soon as you get your UTR number we can change the contract to Schedule D and it would start from that point.

52. The Claimant responded five minutes later with the UTR (i.e. the Unique Tax Reference for HMRC purposes).

Claimant now Schedule D (one exception)

53. Later in the month on 25 April 2019 Vicky Tang who is a contractor’s assistant sent to the Claimant a contract for the X Factor celebrity series 16.

54. The Claimant responded saying that he had "gone Schedule D", so he would invoice and sort out his own taxes.

55. The Claimant was then engaged on various different engagements in the period April 2019 to October 2021.

56. There was one exceptional engagement when the Claimant went back onto Schedule E in the period 17 December 2019 to 5 May 2020 but apart from that all others in the period between October 2019 and November 2021 were Schedule D.

Five week break

57. The Claimant had a five week break in the period 18 March 2021 to 22 February 2021.

58. In February 2021 the Claimant worked over a weekend picking up two days work. By way of a comment this seems to be consistent with the Claimant's general approach. He was extremely hardworking and rarely declined any work request possibly to his own detriment. He evidently loved the work but seems to have sacrificed to some extent rest and recouperation.

59. In May 2021 the Claimant had a thirteen day break starting on 21 May 2021.

60. In June and July 2021, the Claimant worked 21 days out of a 41 day period for a programme called "Eating with my Ex" Series V. The table of roles contains this comment:

> No contract signed or returned. This contract is an overarching contract consisting of adhoc days. This contract overlaps with contracts on Family Fortunes and Thames Development.

61. The Claimant had an eight day break in the period between 24 October 2021 and the 2 November 2021 and then began an engagement for Britain's Got Talent Series XXV in November 2021.

62. The Claimant had a four week break commencing on 4 July 2022 although there were two *ad hoc* days that he worked in the period 8 August 2022.

Email

63. The Claimant had an email account that would generally work. In some cases the email account was switched off during his absence between engagements but often was not and he was able to respond to emails on occasion in breaks.

64. The Claimant then provided *ad hoc* services to a programme called Who Cares Wins II that was 8 and 13 August and then began working on that series between 13 August and 9 September.

65. The Claimant did some work on a programme called Purge Palace between 12 September and 5 October 2022 and then the day after that on 6 October commenced working for Britain's Got Talent XXVI.

Break

66. At the end of that contract on 9 June 2023 he had a sixteen day break until 26 June 2023 at which point he commenced two contracts which ran consecutively from 26 June to 15 December 2023 for Mama Mia I have a Dream.

Xmas break 2023

67. The Claimant then had a three week break from 15 December 2023 until 8 January 2024 with a half day worked on 20 December 2023.

Claimant discovers better pension

68. It was in September 2023 that the Claimant discovered that there was a more generous pension scheme for permanent employees employed under a contract of employment. He requested but was denied access to that more generous pension provision.

69. He had a meeting with Layla Mason who is one of the Respondent's witnesses on 14 November 2023.

70. There was an email exchange on 20 November 2023 between Alex McBride, one of the Respondent's witnesses and Julie Barfoot another of the Respondent's witnesses, the heading "re: Edwin Rothwell". Ms McBride, HRBP wrote:

> …its ok for Edwin to be [Schedule] D for the BGT contract in January. His continuous service is long though, since August 2022, he will have had a couple of 3 weeks breaks between engagements. It's also helpful he has performed different role on different shows, on different rates, showing that contracts get renegotiated each time and he is not just guaranteed work.
>
> He will, however, really need to have a break after this BGT contract please, and not be guaranteed additional work straight off the back of it. Please can you share this info with the team so that they know not to engage him off the back of the BGT contract? This does not mean that he can't be contracted again of course - we just need to see a break in his continuous service if he wants to remain contracting as Schedule D for possible future engagements.

71. The Claimant was not copied into this exchange.

72. This extract does demonstrate a couple of points. First, it is right to say the Claimant did have different rates for different roles and there was some renegotiation. It also shows that to some extent the HR department had a role in policing ensuring that there were meaningful breaks that were taken. This was to ensure for Schedule D, which was for tax reasons.

Complaint

73. The Claimant submitted a written complaint on 4 December 2023.

74. He requested that either there to be a formal grievance or alternatively a complaint in the event that he was not an employee and would need to go down that alternative route procedurally. That letter included the following:

> I am raising this formal grievance/formal complaint as I want to highlight concerns that I have around sham self employment, the avoidance of recognising my permanent status, and the resulting unpaid wages due to enforced breaks in service. I would also like to seek a resolution to unpaid wages in the form of missing pension contributions.
>
> The problem which I have experienced relates to the following facts:
>
> The time worked under a "Contract for Service" since June 2018 amounts to approximately 5 years and 5 months.
>
> All of the breaks in my last 23 fixed term contracts have been at the request of the Company, and I believe that these breaks (apart from those related to coronavirus) have been put in place to allow the Company to avoid recognising the true nature of my service as a permanent employee, and therefore to deny my access to a range of benefits, in particular, the more generous pension scheme.
>
> On 20th September 2023, whilst looking at the newly-launched internal communications system, I discovered a webinar video describing a more generous pension scheme.
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>
> On 20th September 2023, whilst looking at the newly-launched internal communications system, I discovered a webinar video describing a more generous pension scheme.
>
> The Company has made an assertion that these regulations do not apply to me, on the basis that I am not, in their eyes, an Employee, however the label given to the relationship by the Employer is not decisive, and I refuse to accept that the right does not apply.
>
> I am also of the opinion that the Company has changed my tax arrangements to circumvent Employment law, this allegation is based on these events:
>
> Though I have no experience of using the following system, I am told that the IT database that generates contracts is apparently set up to

> flag when someone has been invoicing for an extended period, which was explained to me as being related to IR35 rules. The same contracts database apparently also flags when someone has accrued a continuous service period, and it alerts management to the need to impose a contract break, to maintain tax compliance, and to prevent employment rights from accruing.
>
> Based on an alert from this IT system, on 22nd September 2021, I was emailed by a manager explaining that I would have to move from invoicing to a PAYE arrangement. An HR Business Partner, Alex McBride, later confirmed that on the new PAYE contract I would be a
>
> "PAYE Worker". I have therefore been both "self-employed" and "worker" in exactly the same role that I have been doing for many years, and I had no choice in this. Again, whilst I accept that this is to legitimately follow tax rules, I believe this is done to also avoid the Company acknowledging my true status.
>
> …
>
> My current contract ends on 15th December 2023. I will then have another break (which was decided on by the Company) and return again on 8th January 2024 until 7th June 2024.
>
> On 29th November 2023, my manager called me to say that after the expiry of the 2024 contract, there would be another enforced break of a one month non-working period.
>
> Under the current arrangement, to prevent managers generating any flags on the contracts database, I also have been asked to pretend that I am unaware of any future contracts coming up, to maintain the "self-employed" tax position for the benefit of the Company. The reality is that I am informed of my next contract months in advance, however the information is not put into the contracts database until the last minute, to maintain compliance with tax rules.
>
> ….
>
> The mismatch between the terms of my contracts, and reality, is also demonstrated by the type of work I am doing, where my contract states that I am working on one project at a time, the reality is that I am working on matters unrelated to the contracted project, sometimes corporate events, and I am often spread across multiple projects.

75. The Claimant also mentioned his concerns more generally about the effect on him financially and psychologically.

IT database/flags

76. It was clear from evidence heard in this hearing that the Claimant was correct when he mentioned an IT database which flags up when someone has been invoicing for an extended period. The Respondent's case is that this is to ensure compliance

with IR35 (i.e. an HMRC regulation designed to combat tax avoidance by workers supplying their services to clients via an intermediary, such as a personal service company, but who would be an employee if the intermediary was not used. The Claimant contends that this system flag is also relating to continuous service.

Final engagement

77. On 20 December 2023 the Claimant provided *ad hoc* services to the Respondent to find clips of BGT for the TV choice awards. After this he was engaged from 8 January to 7 June 2024 for BGT. That is the last contract which was not extended or renewed.

Grievance/complaint investigation

78. There were a number of interviews carried out by the Respondent in which witnesses, including the Claimant himself were interviewed by Clare Mulvana. The Claimant confirmed the points made in his letter.

79. The Respondent also interviewed Helen Moore, Julie Burfoot, Leilah Mason, Alex McBride, Josh Hoskins

80. During that investigation Julie Burfoot was asked about ***control*** and said as follows:

> "Julie says Edwin has a more refined knowledge of the productions and what he does day-to-day.
>
> Julie doesn't seem to know about the control, she says Edwin can ask for holiday, but that they wouldn't want him to take days off during the BGT Judge Tour as those are busy days where he'll be needed. The working hours is something they fixed for this year, as previously Edwin was working very long hours and the production team wanted this to be more structured so people don't work too much. Julie says the nature of the production is that you work long hours sometimes, but did not want Edwin to be doing this constantly."

81. Alex McBride in her interview said:

> "Alex says that it looks like Edwin is offered work while already engaged on another contract, which is allowed, and freelancers do not have to have finished a contract in order to have a new contract drafted once their original contract has ended."

Grievance/complaint outcome

82. The outcome to the grievance/complaint was provided in a letter dated from David Oldfield dated 23 January 2024 who was one stage CFO for the Respondent.

83. In that letter Mr Oldfield rejected the complaint stating that the Claimant had significantly overestimated the value of pension lost to him.

84. He did not accept that the contract database was used to enforce breaks.

85. He acknowledged that the Claimant sometimes worked on more than one show, but highlighted that some of the contracts contained the type of flexibility that employees would not enjoy e.g. ad hoc days to be worked by agreement. He also highlighted to the Claimant that his rates had varied and that he had control about the performance of his role. He concluded that there had been genuine breaks such that the Claimant had not attained four years' continuous service and that the Claimant was re-hired for subsequent contracts because he was considered suitable for the role by different production managers.

86. Mr Oldfield emphasised that the Claimant was anxious to maintain his Schedule D status from 2019 onward and that he was registered for VAT even though his earnings were well below the required threshold. He highlighted communications in which the Claimant was robustly trying to maintain his Schedule D status.

Option to refuse work

87. When it came to future assignments, the Claimant would be asked about his availability and given the option to refuse. Specific examples are as follows:

87.1. There is one single example which shows him refusing when he was working on the BBC contract.
87.2. On 7 September 2018 Dawn Gray asked whether he was interested in working on BGT 13 running into the following year.
87.3. In May 2020 Ashley Whitehouse sounded the Claimant out about his availability for an idea to potentially run later in the year.
87.4. In March 2021 Paul McDonagh was sounding the Claimant out for a new reality show "Just asking before I reach out to others". The Claimant said he was interested but flagged up that his rate had increased.
87.5. A couple of months later, in May 2021, Mr McDonagh wrote about the Real Dirty Dancing to check whether the Claimant was available: "No worries if not, just wanted to give you first option as we had you down for the old dates."

Trading names

88. The Claimant has created the trading name "Show Play", and his invoices also show another couple of other trading names "Singdaq" and "Hit Different".

Tribunal claims

89. The Claimant brought two claims in the Employment Tribunal that is 19 February 2024 and the second claim on 11 August 2024.

HMRC guidance

90. I have been taken to HMRC guidance by the Respondent. The role of "post production supervisor" is one of the roles listed by HMRC as appropriate for a self-employed tax status that is at page 2032 of the bundle. There is also HMRC guidance at 26.12 which says this:

> "the fact that an individual has been appointed on a successful track record on say a previous series or a programme does not of itself mean the next engagement is not capable of being a genuine separate engagement."

91. I bear in mind that this guidance has been produced for purposes and a different exercise to the one that I am carrying out.

Law

Employment status generally

92. Only employees as defined in **section 230(1) of the Employment Rights Act 1996** can bring a claim of unfair dismissal. That definition is as follows:

> 230 Employees, workers etc.
>
> In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

93. The classic definition of employment status MacKenna J in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 2 QB 497, 515 (endorsed by the Supreme Court in Autoclenz Ltd v Belcher 2011 ICR 1157, SC) identified three particular features of an employment relationship, which is sometimes described as a "contract of service":

> "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."
>
> [emphasis added]

94. Subsequent case law has made clear that other factors may be relevant and the Tribunal should stand back and look at the overall picture, but three elements should be considered: (i) mutuality of obligation; (ii) personal performance and (iii) control.

95. The approach is sometimes described as a multi-factorial test.

Significance of written contract

96. In the context of employment contracts the Supreme Court in **Autoclenz Ltd v Belcher and ors** [2011] ICR 1157, SC, endorsed a line of cases which stressed that the circumstances under which employment contracts are agreed are often very different from those under which commercial contracts are agreed, with employers largely able to dictate the terms and held that there was less restricted

approach to the circumstances in which a court might look behind the wording of a written contract. Relative bargaining power should be taken account of in deciding whether written contract reflects the truth of the agreement.

97. It is not necessary before a court will look behind the contractual documentation that there is a sham or an intention by the parties to deceive others (**Protectacoat Firthglow Ltd v Szilagyi** [2009] ICR 835, CA). In that decision (cited in Autoclenz above) Smith LJ said that a tribunal faced with a 'sham' allegation must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations) not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them. Lord Justice Aikens warned that, when seeking out the 'true intentions' of the parties, tribunals should not concentrate too much on the 'private' intentions of the parties. Ultimately, what matters is what was actually agreed at the time the contract was concluded

98. In **Uber BV and ors v Aslam and ors** [2021] ICR 657, SC, the Supreme Court held that not only is the written agreement not decisive of the parties' relationship, it may not be even the starting point for determining employment status:

> "**it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker"**. To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. **The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker**." (emphasis added)

Personal service & substitution

99. The leading authority on personal service and the significance of substitution is the decision of the Supreme Court in **Pimlico Plumbers v Smith** [2018] UKSC 29; 2018 ICR 1551. In that case the employment judge found that there was not an unfettered right to substitute at will. There was no such right given to Mr Smith by the contractual documents and no evidential basis for such a practice. In practice engineers with the company swapped jobs around between each other, and also used each other to provide additional help where more than one person was required for a job or to do a job more quickly, and there was evidence that external contractors were sometimes required to assist a job due to the need for further assistance or to conduct specialist work, the fact was that Mr Smith was under an obligation to provide work personally for a minimum number of hours per week or on the days agreed with the company.

100. Lord Wilson, giving judgment in the Supreme Court held:

> "34. The tribunal was clearly entitled to hold, albeit in different words, that the **dominant feature** of Mr Smith's contracts with Pimlico was an **obligation of personal performance**. To the extent that his facility to appoint a substitute was the product of a contractual right, **the limitation of it was significant**: the substitute had to come from the ranks of Pimlico operatives, in other words from those bound to Pimlico by an identical suite of heavy obligations. **It was the converse of a situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done.** The tribunal was entitled to conclude that Mr Smith had established that he was a limb (b) worker – unless the status of Pimlico by virtue of the contract was that of a client or customer of his."
>
> [emphasis added]

101. At the Court of Appeal below in the same litigation (*Pimlico* [2017] EWCA Civ 51, [2017] IRLR 323) Etherton MR had summed up the case law on substitution clauses in some detail as follows:

> "[84] … In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.'

102. The Supreme Court did not disagree with this approach, and indeed subsequently the EAT has followed it.

103. Ultimately, based on **Pimlico**, a limited right of substitution does not preclude the conclusion that a person is a worker.

104. By contrast a genuine and absolute right to substitute would suggest that the individual is not a worker (**Independent Workers' Union of Great Britain (IWGB) v RooFoods Limited (t/a Deliveroo)** [2018] IRLR 84).

Submissions

Claimant's submissions

105. What the Claimant says is that the Respondent has engineered a deliberate flip flop or movement between PAYE and self-employment to circumvent employment law. He says that he has provided personal service and that his work is always carried out personally. He contends there is not an ability to send a substitute and that is supported by his witness Mrs Debbie Clifford who says it would not be feasible for someone else to do the work given that this would be letting people down and that is evidently the Claimant's approach as well.

106. The Claimant says that in respect of control he is at the control of the Respondent in respect of which project, which rate of pay, the days and hours worked, the location, his uniform, he wears a branded T-shirt and in fact produced a branded T-shirt during the course of this hearing. I should say the Respondent disputes that T-shirts are mandatory and suggest that this practice is dying out although it does not deny that there is stock of branded T-shirts available for crew members to wear. It seems to be common ground that these T-shirts could not be worn outside of work.

107. The Clamant says that he was essentially at the "beck and call" of the Respondent during all hours and days of the week during a course of an assignment. He says that the call sheet for an assignment would show the location, timing and contacts on a given production day, also set out the behavioural standards, the anti-bullying and harassment policy. It does not seem to be in dispute that he would not be subject to disciplinary or other employment policies.

108. The Claimant emphasises the degree of integration, he emphasised the way it has been described in documentation put forward for the US immigration process. He has an email with a footer of branded logo. He says that on occasion he worked on programme development matters not just individual programmes but actually development in between programs. He says that he worked for more than one programme simultaneously. He gave me an example of working over weekend or on one occasion being loaned from one project to another. He emphasises his degree of integration during the course of the assignments and that I note company provides him with a laptop for security reasons.

109. In summary, the Claimant says and invites me to conclude that the contractual position is a sham, that it does not reflect the commercial reality which is that he is highly integrated into the team, he is almost invariably always working there either on a programme or development, he emphasises he answers emails and the like in between assignments. The breaks he argues are generated by the HR database and are in reality artificial and artificially in post for tax reasons. He says that he has been pressurised into becoming a Schedule D.

Respondent's submissions

110. The Respondent does not dispute that during each individual engagement the Claimant met the *irreducible minimum* requirement of personal service and control. That must be right. The Claimant could not simply substitute someone else. As to *control* he fitted within closely knit team with people above him and people below him. There was a degree of integration which is noted by the commentary in the US immigration application.

111. The Respondent submits however that the character and terms of the engagement were not those of an employee, and what they emphasise is this: the Claimant's engagement was assignment by assignment. There were breaks, meaningful breaks and it was clear that the Claimant did have the option to refuse.

112. The Respondent's fundamental submission is the contract was not a sham but the Claimant elected to be "Schedule D" and deliberately made other decisions specifically to be consistent with self employed status.

113. The Respondent argues that first its an express term of the contract that the Claimant is Schedule D and that this is not a contract of employment as per those terms. Second, that the Claimant has worked elsewhere, for example at the BBC and there was evidence of another independent television production company that he had worked at during the material history.

114. Third, that it is the Claimant's own choice to be Schedule D. The Respondent's case is there is genuine choice between Schedule D and E and possibly other options. The Claimant has bargaining power since he is negotiating on which basis he is being paid on and his rate and that the Claimant has made a deliberate decision to maintain self employed status for his own personal tax purposes and there are communications to this effect. For example, in June 2022 specifically not wanting to be on the contracts database, in June 2022 and 2023 needing a break and agreeing to make things look "*ad hoc*". The Respondent submits that until recently the Claimant has always been keen to be treated as self employed for tax purposes, that he is consistently sought to arrange his contract to ensure that the Respondent would contract him on Schedule D terms. At the Respondent's insistence the Respondent emphasises the Claimant was engaged on Schedule E terms since then he has been engaged solely on Schedule D terms.

115. The Respondent emphasise that the Claimant took the preparatory steps to be able to become a Schedule D worker. He has created the trading name "Show Play", and his invoices also show another couple of other trading names "Singdaq" and "Hit Different".

116. The Respondent's submit that he is registered for VAT when this was not necessary since he was below the VAT threshold and this is purely done to emphasise his self-employed status. The payment arrangements are invoices not PAYE and there are significant breaks in continuity. Not only does the Claimant take breaks altogether but he has also got different roles and he is doing different things.

117. Finally, it is emphasised that the fact that the Claimant pitched ideas under his capacity under his trademark company names and tax arrangements fits squarely with self-employment status.

Conclusion

118. I found this a difficult case.

119. There are various different features of the Claimant's working relationship with the Respondent pointing both toward and away from employment status.

120. I have to bear in mind that with a couple of exceptions the vast majority of the Claimant's work is tied to a particular assignment. If the television programme is not "green lit" i.e. agreed by a broadcaster or a streamer the programme is not made and there is not work for the Claimant to do so the assignment does not happen.

121. I accept the Respondent's submissions that the Claimant work was assignment by assignment, that the Claimant's work was broken up by meaningful breaks and that the evidence demonstrated that he had the right to refuse assignments which he exercised.

122. If I had formed the conclusion that the Claimant had been pressurised into accepting Schedule D terms when that was not what he wanted, that might have been enough for me to conclude that the contract did not reflect the reality of the situation. That is not the conclusion that I came to. I have seen what WhatsApp exchanges which suggests that it was the topic of conversation between the Claimant and his colleagues including Paul McDonough. The tone of the conversations is light and friendly. From my perspective I do not find evidence that there was anything more than personal recommendations from colleagues in the direction of Schedule D.

123. I accept the evidence from the Respondent's witnesses that they did not push their workforce toward Schedule D rather than Schedule E. It is clear that there is evidence that HR became involved on at least one occasion to suggest that Schedule E was appropriate for the Claimant. He actively took steps to counter act that; it was not the case that the business was pressurising him.

124. There was evidently a period where the Claimant was mulling over the question about Schedule D or Schedule E. Ultimately however I find that he made his own decision on that. He was not being unduly pressurised by someone else, he is intelligent and has made his own assessment. This was I find a genuine choice.

125. The way that Mr Rothwell worked is similar to the way that many people performing similar production roles worked. I find that is reflected by both the witness evidence I have received and the HMRC guidance which is to chose to be self employed principally for financial reasons, i.e. to receive more money in his pocket than if he was Schedule E and PAYE deductions were made. Having made that assessment and that decision the Claimant has taken deliberate steps to underline and emphasise his self employed status: taking breaks, registering for VAT, and registering trade names for his sole trader status. I find that he has taken those

steps willingly. He was pursuing the goal of ensuring that he had the benefit of self employment as regards his tax situation.

126. The question of self employment for tax purposes is not the precisely the same exercise that I have carried out. Nevertheless there are a number of features of the working relationship which impinge upon both questions.

127. It has evidently been a source of considerable upset and frustration when the Claimant discovered in 2023 that his self employed status while advantageous with some aspects had a drawback in particular with regard pension provision.

128. I reiterate that I have found this a difficult decision but on balance I have found that the Claimant's status was not as an employee.

Employment Judge Adkin

12 August 2025

Sent to the parties on:

15 August 2025

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For the Tribunal:

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