EMPLOYMENT TRIBUNALS

Claimant: Ms K Okonkwo
Respondent: Togetherall Limited

RECORD OF A PUBLIC PRELIMINARY HEARING

Heard at: Watford Employment Tribunal by CVP
On: 28 October 2025
Before: Employment Judge Alliott

Representation
Claimant: In person
Respondent: Mr Jonathan Waters (employed counsel)

RESERVED JUDGMENT

1. At all material times the claimant was disabled within the meaning of the Equality Act 2010 by reason of dyslexia.

2. Between 15 July 2020 and 17 September 2022, the claimant was not an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996. As such, the claimant does not have sufficient continuity of service to pursue a claim of unfair dismissal (constructive).

3. The claimant's claim of unfair dismissal is dismissed.

REASONS

Introduction

1. This public preliminary hearing was listed by Employment Judge Elliott on 28 March 2025 to the purpose of:-

   (i) Consider and determine issue 2.1 (Employment status);

   (ii) Consider and determine issue 4 (Disability status);

(iii) To make or vary any case management orders; and

(iv) To deal with any other issues arising at that stage, if time allows.

Disability

2. Since the case management preliminary hearing the claimant has obtained a 27-page report from a registered practitioner psychologist. This sets out a comprehensive review of the claimant's dyslexia and, in particular, recites her current situation in terms of the effects that the dyslexia has on the claimant's day-to-day activities.

3. Having seen the claimant's psychological report dated 29 May 2023, the respondent accepts that at all material times the claimant was disabled within the meaning of the Equality Act 2010 by reason of dyslexia.

4. The respondent disputes knowledge that the claimant was disabled within the meaning of the Equality Act 2010 and/or the nature and extent of the effect it had on the claimant's ability to undertake day-to-day activities. Those issues remain in dispute.

Employment status

5. The claimant was engaged by the respondent to work for it from 15 July 2020. On 31 July 2020, a letter was written to the claimant to confirm the terms of the agreement and that is titled "Consultancy Agreement".

6. There is no doubt that on 18 September 2022 the claimant was engaged by the respondent on a contract of employment.

7. The claimant resigned on 16 May 2024. If the claimant was not an employee from 15 July 2020 until 17 September 2022, then she lacks the requisite two years qualifying service to present a claim for unfair dismissal (constructive).

8. The claimant asserts that she was an employee from 15 July 2020.

The law

9. As per the IDS Handbook "Employment status":-

> "At 2.5
>
> …there is nowadays widespread agreement that the judgment of Mr Justice MacKenna in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433,QBD, provides a highly reliable starting point. His Lordship reasoned that a contract of service/employment exists if the following conditions are fulfilled:
>
> - The individual agrees that, in consideration of a wage or other remuneration, he or she will provide his or her own work and skill in the performance of some service for the employer.
>
> …

- The individual agrees, expressly or impliedly, that in the performance of that service he or she will be subject to the other's control in a sufficient degree to make that other an employer.

- The other provisions of the contract are consistent with its being a contract of service.

2.6

This three-part test has been unequivocally endorsed in later court decisions, and most recently by the Supreme Court in the employment case of Autoclenz Ltd v Belcher and others 2011 ICR 1157, SC, and in Commissioners for HM Revenue and Customs v Professional Game Match Officials Ltd 2024, UK SC 29, SC (an income tax case).

Inherent in the first part of MacKenna J's test is the requirement of personal service (i.e. that the individual should personally provide his or her own work and skill while undertaking the performance of a service for the employer). A genuine substitution clause enabling someone other than the putative employee to fulfil the principal obligations under contract is inimicable to employment status. Minted out of this is the concept of mutuality of obligation – a key factor characterised by an unqualified obligation on the individuals part to provide his or her work and skill in return for remuneration or some other benefit in kind, known as the wage-work bargain. In Nethermere (St Neots) Ltd v Gardiner and another 1984 ICR 612, CA, Lord Justice Stephenson opined that "There must, in my judgment, be an irriductable minimum obligation on each side to create a contract of service). That view was subsequently endorsed in the House of Lords in Carmichael and another v National Power Plc 1999 ICR 1226, HL, where Lord Irvine stated that a lack of obligation on one party to provide work and the other to accept work would result in "an absence of that irriductable minimum of mutual obligation necessary to create a contract of service".

2.7

Turing to the second factor in MacKenna J's cumulative test – the exercise of control over the individual's performance – the courts have clarified that, whilst this does not require that the individual be subject to the employer's actual supervision or control, it is necessary to show that, in practice, the employer can direct what the employee does or does not do… In these cases, the courts recognise that in the modern workplace many employees possess advanced levels of skill and expertise which afford them a high degree of autonomy such as effectively to outstrip an employer's capacity (or desire) to tell them how they should do their jobs. Even so, the employer may retain the practical right and ability to give instructions to the employee about what to do, how to prioritise it and whom he or she should report to. In that sense, even though day to day control may not be exercised by the employer, some form of ultimate control is. If at least that degree of control is exercised, this may well be sufficient to point to employee status. But if it is not, then the relevant contract is incapable of constituting a contract of employment.

2.8

In earlier case law, the notion of an irriductable minimum of mutual obligation and the need to establish a sufficient level of control led to the proposition that courts and tribunals could confine themselves to a consideration of just these two factors. In other words, these factors were viewed as being decisive of whether a contract of employment existed, rendering irrelevant any other considerations. More recently, however, the courts have made clear that this is an erroneous approach in that it ignores

the crucial third stage of MacKenna J's test set out in the Ready Mixed Concrete case – namely, consideration of whether other provisions or terms of the contract are consistent with it being a contract of service. This element requires the court or tribunal to examine all relevant factors – both consistent and inconsistent with employment – and to determine, as a matter of overall assessment, whether a contract of employment exists. The need to apply such a "multiple test" was explained in detail by the Court of Appeal in Revenue and Customs Commissioners v Atholl House Productions Ltd 2022 ICR 1059, CA (a tax case), and subsequently endorsed by the Supreme Court in another tax case, Commissioners for HM Revenue and Customs v Professional Game Match Officials Ltd. In these cases, it was firmly established that, while mutuality of obligation and the right of control are necessary preconditions for a finding that a contract is one of employment, they are not necessarily sufficient in themselves. If the minimum threshold in respect of them is not met, then there can be no question of the contract being a contract of employment. But even if the threshold is met, the court or tribunal must move on to consider all other relevant factors – including the level of control and the degree of mutual obligations required by the contract – to make an overall determination as to whether a contract of employment actually does exist. As regards what those other factors may be (apart from mutuality and control), they include financial considerations (e.g. what tax regime is applied in respect of the individual's earnings); the extent of the putative employee's integration into the putative employee's organisational structure; and the parties' self-charactersation (i.e. the label they themselves attach to the contractual arrangements that govern their working relationship.

…

Two final matters should be borne in mind when considering whether an individual has employee status. First, if that consideration arises in the context of a claim based on statutory employment rights, then the courts have held that what happens in practice may be more significant than what any written contracts states. At first instance, an employment tribunal will be concerned to assess whether the express terms truly represent what was agreed between the parties, and the truth of the matter will often need to be gleaned from a consideration of all the circumstances of the case, of which the formal written agreement will form only one aspect. This is particularly true where the contract contains express substitution clauses permitting the putative employee or limb (b) worker to fulfill performance obligations under the contract by replacing him or herself with a suitable subcontractor. Furthermore, the label attached by the parties to the contract in question is not decisive and will not trump evidence of the reality of the situation, although it may be a factor in the overall consideration of whether the contract is, in substance, one of employment…

2.9

Secondly, while it is clear that all relevant factors should be taken into account, that does not mean that a tribunal should adopt a mechanistic "tick-box" approach of running through a list of factors and ticking off those which point towards employee status against to those that point to the opposite conclusion. Instead, a tribunal should seek to paint a picture from the accumulation of detail and then stand back to make an informed, considered, qualitative assessment – see Hall (Inspector of Taxes) v Lorimer 1994 ICR 218, CA"

10. And at 2.86, dealing with the third condition identified by Mr Justice MacKenna:-

"In revenue and Customs Commissioners v Atholl House Productions Ltd 2022 ICR 10 59, CA (a tax case), the Court of Appeal observed that a strict reading of the third

> condition might exclude consideration of any factor beyond the express and implied terms of the contract. However, while some of the authorities had interpreted it in that way, the court preferred the many other authorities that proceeded on the basis that a wider range of factors can be taken into consideration when determining employment status. In the court's view, the more difficult question was identifying the limits that should be placed on any choice of such factors, which should be answered by returning to the first principles of contract law. Thus, it considered that the issue of whether – judged objectively – the parties intended to create a relationship of employment "is to be judged by the contract and the circumstances in which it was made. To be relevant to that issue any circumstance must be one which is known, or could reasonably be supposed to be known, to both parties."
>
> 2.87
>
> The Court of Appeal in the Atholl House Productions case also expressed the view that the existence of the necessary preconditions of mutuality of obligation and control does not create a prima facie presumption that a contract of employment exists. The court reiterated this point in Kickabout Productions Ltd v Commissioners for HM Revenue and Customs 2022 EWCA Civ 502 CA (another tax case), where it confirmed that the courts or tribunal's task at the third stage is to examine all relevant factors (both consistent and inconsistent with the employment) and determine, as a matter of overall assessment, whether an employment relationship exists."

The facts

11. As already indicated, the claimant was engaged pursuant to a document titled "Consultancy Agreement."

Personal service

12. The claimant was engaged for services in consideration of payment. Clause 2.6 provides:-

> "Save where we have given you written permission, you will not be entitled to substitute or delegate the services to be provided."

13. Pursuant to the agreement the claimant was required to undergo training and was subject to a six-month review period. The claimant was provided with her own email account and the agreement provided for her to refer to herself as a 'Wall Guide'.

14. In my judgment, the substitution clause was not a genuine substitution clause. It is fanciful to contemplate that the claimant would have been in a position to send a suitably trained substitute in her place.

15. Consequently, I find that this was an agreement for personal service.

Mutuality of obligation

16. Clause 2.1 of the agreement provides as follows:-

> "You shall use your best endeavours to promote our interests and, unless prevented by ill health or accident (in the event of which no payment shall be made by us), devote at least two sessions per week of six hours per session in each calendar month to carrying

> out the services as outlined in the Wall Guide Handbook (a copy of which has been provided to you) as may vary from time to time (services). Your hours will be set by us, in advance, and agreed with you in writing."

17. That is a contractual obligation on the claimant to work for at least two six-hour sessions per week.

18. As with most contracts of employment, the agreement is silent on the provision of work by the respondent. More pertinently, as is sometimes seen in subcontractor or zero hour contracts, there is no clause stating that the respondent is under no obligation to provide work.

19. In my judgment, it is an implied term of this agreement that the respondent would provide the claimant with a minimum of two sessions of six hours per week work. I imply that term by virtue of the officious bystander test and to give business efficacy to the agreement.

20. Consequently, I find that there was mutuality of obligation.

Control

21. As already set out, the claimant's hours were set by the respondent. She was required to undertake initial training and I find that she was required to undertake training for specific clients. In addition, she was required to undertake training such as GDPR. When working the claimant worked as a Wall Guide in a team of four with one lead. The lead could issue instructions.

22. The claimant's work was reviewed for six months, and indeed thereafter weekly.

23. The claimant was expected to attend meetings weekly and undertake CPD training.

24. The claimant was required to carry out the services in the Wall Guide Handbook (clause 2.1); was required to be based at home or such other place as the respondent would agree (clause 2.2); was required to report illness or injury as soon as reasonably practicable if she was unable to provide the services (clause 2.4); had to, at all times, comply with the respondent's policies (cause 2.5); and had to ensure that she was available at all times on reasonable notice to provide such assistance or information as the respondent may require (clause 2.7).

25. The claimant and her colleagues were entitled to decide that they did not want to work on any particular shift. It is clear that there was a practice of them emailing each other to see if they could arrange cover. However, if an individual was unavailable and no cover was volunteered by others, then the team would be short for that shift. Further, the claimant could take her holiday when she wanted to.

26. Nevertheless, I find that the extent of the control exercised by the respondent over the claimant was sufficient to make the respondent potentially an employer.

The other provisions of the contract

27. The contract is unequivocally declared to be a consultancy agreement. The opening clause provides as follows:-

> "Subject to the satisfactory completion of your training, you shall provide your services, as a self-employed contractor, to us from 15 July 2020 unless and until this agreement is terminated by either party giving to the other not less than four weeks prior written notice or as otherwise provided in this letter."

28. The agreement has a section entitled "Status":-

> "10.1 You will be an independent contractor and nothing in this agreement shall render you our employee, worker, agent or partner and you shall not hold yourself out as such.
>
> 10.2 As an independent contractor, you agree that you are not entitled to any benefits that would, ordinarily be available to our employees including, without limitation, holiday pay, pension, and sick pay. Neither will you benefit from any form of employment protection.
>
> 10.3 You shall be responsible for your own tax and National Insurance contributions.
>
> 10.4 As an independent contractor, you shall provide, at your own expense, your own equipment and broadband connections and any other equipment required commensurate with the provision of services."

29. Thus, whilst some provisions of the agreement are consistent with it being a contract of service, many others are wholly inconsistent with it being a contract of service.

Organisational integration

30. As already observed, the claimant was provided with training, an email account and lead when she worked on a team. I find that she had a high degree of organisational integration.

Other factors

31. At the time the claimant worked for the respondent she was also employed elsewhere providing 21.5 hours therapy over three days. In addition, the claimant took up a course of study during this time. I have seen emails which indicate that the flexibility that the arrangement with the respondent provide suited the clamant in being able to juggle her shifts as required. It is noticeable that in the lead up to being offered a contract of employment on 18 September 2022 the claimant enquired as to whether it was mandatory because the flexibility of the existing contract suited her.

32. In the claimant's new contract of employment from 18 September 2022, it is expressly stated that she does not have continuity of employment before that.

33. Lastly, I need to stand back to make an informed, considered, qualitative assessment. I find that there are factors that point towards the claimant being an employee such as personal service, mutuality of obligation, control, and

integration. However, I also find that there are factors that point towards the claimant not being an employee such as the agreement itself, the fact that the claimant sent invoices, was paid gross and was responsible for her National Insurance and tax and could take days off and holidays whenever it suited her. In my judgment, the parties did not intend to create a relationship of employment as is clear from the wording of the agreement itself, and the claimant conducted herself and treated the agreement as if she was not an employee.

34. Consequently, I find that the claimant was not an employee between 15 July 2020 and 17 September 2022.

35. Consequently, the claimant does not have the requisite two-year qualifying service to present a claim for unfair dismissal and, as a result, it is dismissed.

Approved by:

Employment Judge Alliott

Date: 11 November 2025

JUDGMENT SENT TO THE PARTIES ON

8 December 2025

FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

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www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/