



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH by CVP

BEFORE: EMPLOYMENT JUDGE MORTON
Sitting alone

BETWEEN:

Mr C Kissane

Claimant

AND

AD Bly Construction Ltd

Respondent

ON: 13 January 2026

Appearances:

For the Claimant: Mr S Bennett, Counsel

For the Respondent: Mr R Crabtree, Consultant

Judgment

1. The claimant was on 28 August 2024 a worker within the meaning of s230(3)(b) Employment Rights Act 1996 ("ERA"). His claims under s47B ERA can therefore proceed.
2. The claimant was not at that date an employee of the respondent within the meaning of s230(1) ERA. His claims under s98 and 103A ERA cannot therefore proceed and are dismissed.

Reasons

1. By a claim form presented on 23 January 2025 the claimant brought claims under

the Employment Rights Act 1996 (“ERA”) that on 28 August 2024 he had been an employee of the respondent and had been unfairly dismissed under s 98 ERA or automatically unfairly dismissed for making protected disclosures under s103A. He also claimed that he was owed notice pay for a statutory notice period of 12 weeks. In the alternative he claimed that he had been a worker of the respondent and had been subjected to a detriment under s 47B ERA by the termination of a contract with the respondent.

2. ACAS was first contacted on 15 November 2024 and the certificate was issued on 27 December 2024. It is not in dispute that the claims were brought in time.
3. The respondent defended the claims on a number of grounds, including by asserting that the claimant was neither an employee nor a worker, but a self-employed contractor. Accordingly, a preliminary hearing was listed for the purposes of determining whether at the relevant time, namely 28 August 2024 when the claimant alleges that his contract with the respondent was terminated, he was either an employee or worker of the respondent or was self-employed.
4. The issues set out for determination at the hearing were as follows:
 - a. Was the claimant an employee of the respondent, i.e. were they employed under a contract of employment?
 - b. Was the claimant a worker of the respondent, i.e. (a) did they work under a contract to perform the work personally; and (b) was the respondent something other than a client or customer of the claimant’s profession or business?
 - c. If not, in the protected disclosure complaints only, was the claimant a worker under the expanded definition in section 43K Employment Rights Act 1996?
 - d. What date did the Claimant commence work/employment?
5. Of those issues it was common ground that issue 4(c) did not in fact arise as the parties agreed that the extended definition did not apply to the facts of the case.
6. I was also unable to determine issue 4(d) because the evidence presented to me at the hearing did not address that question in sufficient detail to allow me to arrive at a conclusion. That issue will therefore be held over to the final hearing, if it continues to be relevant. However given my finding that the claimant was not an employee, the claimant’s length of service is unlikely to be of continued importance in the case.
7. The hearing took place by CVP and I was satisfied that all participants could see and hear clearly, had access to the documents and witness statements in the case and were able to participate effectively.
8. I heard evidence from the claimant himself and on behalf of the respondent from Aaron McSkimming, Managing Director of the respondent and from Tony Dopson, the respondent’s contracts manager. I was provided with a bundle of documents consisting of 366 pages. Reference to pages numbers in these reasons are references to page numbers in that bundle. A small number of

additional documents were handed up at the start of the hearing and these were numbered sequentially.

The Law

9. S230 ERA defines “employee” and “worker” as follows:

(1) 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.

(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, 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;

and any reference to a worker’s contract shall be construed accordingly.

10. There is extensive case law on the subject of employment status, which I have taken into consideration where relevant. In particular I took into account the following cases (and where relevant other decisions referred to in them), as being clearly of relevance or referred to by the representatives in their submissions:

- a. Ready Mixed Concrete (South East) Ltd v Minster of Pensions and National Insurance 1968 1 All ER 433 on the definition of a contract of service;
- b. Nethermere (St Neots) Ltd v (1) Taverna (2) Gardiner 1984 IRLR 240 on the requirement for an irreducible minimum of obligation on each side in a contract of service (“mutuality of obligation”); Wilson v Circular Distributors Ltd 2006 IRLR 38 also addresses the question of mutual obligation and the need for the absence of obligation to be mutual;
- c. Uber BV and others v Aslam and others [2021] UKSC 5 which restates the importance, when considering whether the elements of the statutory tests in s 230 ERA are met, of the decision in Autoclenz Limited v Belcher [2011] UKSC 41. This requires an employment tribunal to focus on the actual terms of the arrangement as evidenced by the facts and circumstances and to set aside written terms that do not reflect the true nature of the relationship, although they may continue to have relevance in the ways described in the case of Terberg v Simply Smile Manor House Ltd and ors 2023 EAT 2;
- d. Pimlico Plumbers v Smith 2018 ICR 1511 CA on the right of substitution;
- e. Young and Woods Limited v West [1098] EWCA Civ 6 and Smith v Goodmayes Insulations Limited EAT/55/97 on the position of an individual who seeks to resile from the position that wanted to be considered as self-employed and the obligation on the tribunal to

consider the true nature of the relationship regardless of the individual's stance.

Findings of fact

11. The following findings are made on a balance of probabilities after hearing and reading all the witness and documentary evidence with which I was provided. I have not made findings of fact that it was not necessary for me to make to determine the issues that were to be decided at the hearing.
12. The Respondent is a groundwork, civil engineering and concrete structures specialist. The Claimant first began working for the respondent either in 1993, (the claimant's assertion) or in 1995 (Mr McSkimming's assertion). Either way it was not in dispute that he had a long association with the respondent. Both of the respondent's witnesses had themselves worked with the claimant over many years – in Mr McSkimming's case since 2001 and in Mr Dopson's case for about 26 years.
13. The end of the claimant's engagement with the respondent came on 28 August 2024, when he received a text message from Paul Helliard (page 85) which said:

“Hi Con: Unfortunately we don't have any further work for you @ the moment. So as Tony had already advised last week, we shall have to part company. Obviously any monies OS will be paid to you, along with any accrued holidays not taken. Please don't go to site tomorrow, as we won't be paying. Regards Paul.”
14. The claimant has undertaken no work for the respondent since receiving that message. He therefore asserts that the message amounted to a dismissal, if he was an employee, or a termination of his engagement, if he was a worker.
15. The respondent engaged with those working for it in a range of different ways. Some individuals were engaged as employees and paid under PAYE. There was evidence that they were given a choice in the matter. Mr McSkimming said so in terms in cross examination. I was also shown an additional document consisting of a text exchange between another of the respondent's workers and Mr Dopson in October 2022 which appeared to be a discussion about the financial consequences of a worker choosing to be paid via PAYE (a drop in net income would have been the result).
16. The claimant was not engaged in that way. He was in some respects treated and, in some respects, conducted himself as a self-employed subcontractor.
 - a. From time to time, including in 2019 he was issued with a contract that described him as a self-employed subcontractor (page 49) although he did not sign or return that document or any other in similar terms.
 - b. He was registered with the Construction Industry Scheme (“CIS”) applicable to contractors (pages 57-58).

- c. His payslips were described as 'Subcontractor Payment Advice' and for the most part included shift pay at a rate per unit, the units varying from Advice to Advice, but normally consisting of between 5 and 7 units, with 7 being the most common. Tax was deducted at a rate of 20%, consistent with the CIS requirements.
- d. The claimant filed tax returns describing himself as self-employed (page 288-365).

17. In other respects, he was treated as someone to whom the respondent owed obligations that were more akin to a worker or employment relationship.

- a. Mr Mc Skimming conceded in cross examination that the document at page 49 did not represent the entirety of the agreement between the parties and that there could be negotiation or amendment of various terms. The claimant said that he did not return the contracts because I was paid more in accordance with the terms of the contract of employment on page 61 (although it was not his case that he had ever signed such an agreement or been expressly engaged under those terms). He said that he was paid a daily rate and sick pay and that the contract for services contradicted everything that happened in practice. He was paid for holidays and bank holidays. The respondent supplied his boots and clothing. The claimant was frank in cross examination about the arrangement between the parties and the reason for it. The exchange was as follows:

Q It is the case that in the 20 odd years of the relationship you did not ask to have an employment contract?

A No because we knew the CIS was the cheapest way for them to operate and be competitive.

Q So you wanted the best for them?

A For both. I was benefitting financially and from the employment benefits I was getting.

Q So in 2019 – the letter refers to the possibility of being an employee.

A Yes but I could not afford that – I knew an employment relationship would entail a drop in wages which I couldn't afford.

- b. The claimant clearly was paid for holidays. This was confirmed in cross examination by Mr McSkimming, by the email at page 85 and, for example by the statement on the payslip at page 206 "includes the Saturday plus 1/2 for van -2 days holiday only as you have used it all and only have your Christmas remaining". There was also reference to holiday at page 155. Some of the claimant's payment advices included payment described as 'non-productive,' paid at the same rate as shift pay. The claimant confirmed that this was in fact holiday pay. His final payment in August 2024 included one unit of non-productive pay. He received "non-productive" payments for 3 weeks in July 2024 (pages 279-281) as well as in January and June 2024 (pages 258, 271, 274, and 275).
- c. Many of the payment advices contained food allowances, some

included overtime and some included reimbursement for car usage (eg page 259).

- d. During the Covid-19 pandemic he received an allowance of £200 per week.
- e. It was his unchallenged evidence that when he was working on projects he was integrated into a “chain of command” and took direction from other individuals rather than providing his services as if the respondent was his client.

18. I therefore find as a fact that the contract for services at page 49 did not reflect the reality of the relationship between the parties.

19. In addition to the payment arrangements there were two other aspects of the arrangement between the parties that were particularly important to the claimant’s employment status. The first is the question of whether the claimant was working continuously and if so whether any breaks were indicative of a lack of mutual obligation, or arose by arrangement between the parties in a way that did not vitiate the existence of an ongoing relationship characterised by mutual obligation. The second was the question of whether the claimant was entitled to provide a substitute to do his work, which, if established would be a fact inconsistent with the existence of a contract of employment, or with the requirement for personal service in s230(3)(b) ERA.

20. Dealing first with breaks in service, the respondent produced documentation that suggested the claimant took a number of breaks from work of varying lengths over the period of his engagement. At pages 68-75 there was document that set out a schedule of the dates on which the respondent said that the claimant worked between 30 March 2011 and 28 August 2024. This suggested that he was not working for the respondent for:

- a. a period of 14 weeks between July and October 2015;
- b. a period of two weeks in September 2016;
- c. a period of one week in July 2017;
- d. a period of 33 weeks between February and December 2018
- e. a period of 12 weeks between March and June 2020 (during the pandemic);
- f. a period of three weeks in November and December 2020;
- g. a period of 11 weeks between December 2020 and March 2021;
- h. a period of one week in June 2021;
- i. a period of three weeks in September and October 2022; and
- j. a period of 14 weeks between February and May 2023.

21. The bundle also contained a large number of payment advices for the period December 2019 to the end of the claimant’s engagement (pages 94-287). These do not cover the entirety of the period referred to in the previous paragraph and those that do, do not always correspond to the schedule of dates when the claimant allegedly did not work. For example, between December 2020 and February 2021, the payment advices end at week 40 in December 2020 and resume at week 48, in February 2021. That is a period of eight weeks, not 11 as

suggested by paragraph (g) above. In the last two years of this period there are no payment advices for weeks 27, 28, and 46-52 in 2022 and weeks 1-6 in 2023. That does in fact correspond with the gaps in work in September and October 2022 and February 2023 to May 2023 referred to at (i) and (j) in the previous paragraph. A missing payment advice for week 39 in 2023 is also confirmed by the table on page 68, but missing payment advices for week 33 in 2023 and weeks 1-8 and 21 in 2024 are not confirmed by the table. On a balance of probabilities, the claimant was working on those dates and the payment advices are simply missing from the bundle. I have treated the evidence of the claimant's overall work patterns with a degree of scepticism because of these gaps and inconsistencies in the evidence. It was also the case that none of the witnesses on either side were able to give a really satisfactory account of all the gaps in service and how they had arisen.

22. Some of the gaps in service were however explained and not the subject of material dispute between the parties. It was agreed by both parties for example, that between February 2018 and December 2018, the claimant took the decision to take unpaid time off, after working for the respondent on a contaminated site, which took a toll on him. He was not paid during this period but received some holiday pay. It was not the claimant's case that he was asked to take this time off – he said he asked for it and the respondent agreed.
23. There was also clear evidence of the gap in service that occurred early in 2023. In an email dated 26 January 2023 at page 75 from Mr Dopson wrote to various colleagues to say: "Speaking with Con today he is going to take 4 weeks or so off unpaid leave as travelling to Stratford is going to be too far whilst also having some things to catch up on at home". That corresponds with the gap in work in the period February 2023 to May 2023 referred to above.
24. With respect to the period between February and May 2023, Mr Dopson said the following in his witness statement:
 8. Con had been working with us at a site in Bolney but by late January 2023 it had progressed to the stage we did not need as many individuals. I spoke to Con on Thursday 26th January 2023 (and some others). Our other sites were ones where we already had sufficient labour, other than a new one at Stratford and so I asked him if he was interested, to start there the following week.
 9. Con told me that he did not want to go there as it was a bit further from his home and since he had some outstanding jobs to do around the house then he would do those instead for the next month. I said to him that if anything came up near where he lived after that time then we would give him a call. I think Con finished at the Bolney site that day.
 10. There was nothing nearer and so I did not phone Con and I cannot remember him phoning myself. However, he must have contacted me to see if there was any work as he returned to another of my sites, this time in Burgess Hill, at the end of April 2023. I cannot recall the exact particulars of the conversation (I have so many with contractors), but he would have called me to enquire if there was any available work on offer as the project in Burgess Hill was close to his location.
25. This accords with the claimant's own evidence on this point. He said:

After I completed the Bolney project at the beginning of February 2023, I volunteered to take a few weeks off on a temporary layoff as unpaid leave until the Burgess Hill project began in March 2023 [P75]. At the time, I spoke to Mr Helliard about this. We discussed the Burgess Hill project and the fact that I had been speaking to the MCS management team in relation to this. He explained that the Respondent had been promised the job but that the paperwork had not been signed. We had some banter about the bottle of champagne that would be coming my way, when the Burgess Hill contract was signed. I had also spoken with Mr Tony Dopson, the Contracts Manager, who had suggested that I go to one of the Respondent's jobs in Stratford, but this was too far for me to travel [P75]. Mr Dopson advised me that they had very little to do on the Burgess Hill project and were waiting for another company to complete their ground remedial work first. When I rang him on 25 April 2024, he allowed me to come back to work on 26 April 2024.

26. Mr Dopson sought in cross examination to resile from his description of the period as "unpaid leave", an expression he said he had used in error and which the claimant repeats in his witness statement. Having reflected on this evidence I find that what was in fact agreed is that the claimant would not work for a period of weeks because the work at Bolney had ended and it would not suit him to go to Stratford. This period was mutually agreed and entailed no sanction from the respondent. The claimant was able to choose not to go to Stratford because it was too far away and he had other priorities at the time. He was then able to ask to return to the respondent when he was ready, and work would be offered to him if it was available. The respondent accepted that the claimant would not be available during the periods in question and made no attempt to insist that the claimant went to work in Stratford. By deciding not to do so, the claimant implicitly accepted the risk that work might not be available when he was ready to return. I find that the respondent did not regard itself as under an obligation to offer further work and accepted Mr Dopson's evidence that when work did pick up at Burgess Hill, it had not immediately approached the claimant to offer it to him. At that juncture therefore the claimant did not feel he was obliged to go to work at the next site where work was immediately available and the respondent did not feel obliged to offer work to the claimant immediately it was available at the site that the claimant was interested in.

27. The second issue that is critical to the nature of the relationship between the parties is whether the contract between them contained a right of substitution. The parties were not in agreement about this. In his witness statement Mr McSkimming said this:

I do not dispute that he did provide the services himself. There is no requirement on a subcontractor to use a substitute or a subteam. It is an option that is available to them if they want to use it. It is a purely commercial decision for them. Whilst Mr Kissane did not use the option it does not mean that he could not have used the option. He could have engaged a subteam and worked elsewhere effectively making a profit. It is not the Company's job to chase a subcontractor to send a substitute it is entirely up to the subcontractor.

28. From this evidence I inevitably find that the claimant did not as a matter of fact ever use a substitute – both parties agree that he did not. Both the respondent witnesses said that the claimant could have provided a substitute had he wanted to and that it was merely happenstance that he had not done so. It is the respondent's case that that fact alone is inconsistent with an obligation of

personal service.

29. The claimant disagreed and was clear in his evidence that it would not have been practical for him to provide a substitute. His work did not lend itself, he said, to handing it over to another individual, even a suitably qualified one. He went further than that and asserted that the respondent would not have found it acceptable for him to send a substitute, a state of affairs that the respondent now disputes. He was asked about the substitution arrangements referred to in Mr McSkimming's witness statement and said that those working relationships were not comparable to his own, but involved discrete tasks that could be more readily delegated. He became integrated into the projects on which he was working in such a way that it would simply not have been feasible to hand the job over to someone else on an ad hoc basis.

Conclusions

30. The arrangement between the parties worked well for both sides for a long period of time. The claimant was obviously a hard worker and a trusted one. He was loyal to the respondent and committed. The pay arrangements were advantageous for both sides from the tax perspective, and for tax purposes the claimant was content to represent himself as self-employed. He had in some respects the best of both worlds over a long period of time.
31. I conclude that it is clear that that for employment purposes the claimant was not self-employed, despite the position he took in his tax return. He did not have other clients and there was no evidence to suggest that he was in business on his own account, except for the representations in the tax returns. The respondent provided him with paid holiday, sick pay from time to time, protective equipment, a fuel card and allowances for food and other expenses. He worked under the direction and control of others on the projects in which he was engaged. These factors are incompatible with self-employment.
32. Whilst I found the issue of substitution not entirely straightforward, I also concluded that there was no real right of substitution in the actual contract that subsisted between the parties (as distinct from the written terms at page 49). The claimant had not signed and returned the contract of service that provided a right to provide a substitute because in that and other respects it did not reflect the reality of the working relationship. The right had never been exercised in some 30 years of work by the claimant for the respondent. The examples of substitution arrangements pointed to by the respondent did not concern foremen, like the claimant, but individuals providing specific jobs or expertise that could be more readily delegated. The claimant was adamant that a substitution arrangement would not have been possible given the nature of the work he did. I was reliant on the evidence of the witnesses on this point, as a result of there being no evidence of the right ever having been actually used. I accept that that does not by itself negate the existence of the right, but I accepted the claimant's evidence about the nature of his work, its safety critical nature, the level of responsibility it entailed, the complexity of the role he undertook, the necessity for a detailed understanding of the projects on which he was working and for established relationships with the personnel and chain of command involved. Taking those

factors into consideration, I conclude that during the periods when the claimant was working for the respondent the right was no more than theoretical and could not practically have been exercised. Accordingly, there was no genuine right of substitution in this case that vitiated the requirement of personal service.

33. The claimant was therefore either an employee or a worker of the respondent.

34. As to which of these categories he fell into, I also did not find this point straightforward. The engagement had many of the hallmarks of an employment relationship in terms of the regularity of work, the payment for equipment, subsistence, training, expenses, holiday and from time to time sick pay. The claimant was in a chain of command at work and there was a high level of control over matters such as working hours. As he was engaged for his skill expertise and knowledge, he was not closely managed and supervised on a day-to-day basis, but his evidence was that if something went wrong it would be brought to his attention by means of a phone call. I considered therefore that on the subject of the degree of control to which the claimant was subject there was sufficient control for a contract of employment to have arisen. On the elements of personal service and control therefore the claimant's relationship with the respondent had the hallmarks of employment.

35. However, what persuaded me that the claimant was not in fact an employee was his ability to take periods of absence from work, without sanction or question. Mr Bennett sought to persuade me that these periods of absence did not prevent a contract of employment from arising. He reviewed the entirety of the claimant's engagement and the periods of absence referred to in paragraph 20 of these reasons. He submitted that the fact the relationship persisted as long as it did and that when C chose not to take a job he was treated as on "unpaid leave", suggests that there was an enduring obligation. He submitted that the respondent was treating the gaps as agreeable, even though the claimant was suggesting them for his own reasons, for example after a difficult work patch on a contaminated site, or where he did not want to isolate in a hotel during Covid. Even during 2015 it is clear, he submitted that the respondent was willing to accept these periods. Where parties are both agreeing, he argued, it can appear that neither has an obligation to another. However, where there are periods of agreed time off described as "unpaid leave" and holiday pay is paid he suggested that the arrangement is more similar to a case that falls within s 212 ERA.

36. However, Mr Bennett agreed that the arrangement made in February 2023 was difficult to characterise in that fashion, because the respondent was slow to alert the claimant to the possibility of work. Despite that, he said, it was necessary to consider other aspects of the relationship – the fact that in the Covid period of 2020, the respondent had paid a retainer and in August 2024, the respondent actually terminated the agreement as if this step was needed. He submitted that despite the specific arrangement made in February 2023, a clear contract of employment arose between the period of unpaid leave in 2023 and August 2024 when the engagement was terminated and that contract was characterised by the irreducible minimum required for a contract of employment to arise. This is a case, he said, where notwithstanding that the claimant, opted not to take work at one stage, mutuality was not vitiated entirely such that an employment

relationship did not arise.

37. I considered those submissions carefully. I noted in paragraph 26 that the claimant's ability to tell the respondent in 2023 that he would rather have some time off than go to work for it at the Stratford site, and the respondent's tardiness in telling him once work was available, meant that at that point in time the contract lacked mutuality of obligation. It therefore lacked a term that was essential for the relationship to have been one of employment. In an employment relationship the respondent would have considered itself entitled to instruct the claimant to attend work at Stratford and would not have expected any resistance. The fact that the claimant was able to exercise that choice without repercussions was therefore inconsistent with an employment relationship existing at that point. Mr Bennett suggests that in the period following the claimant's resumption of work in April 2023, the terms of the contract changed and the arrangement became one of true employment. In my judgment that was not the case. There is no evidence that anything changed in the way the parties related to each other, or that either party expected to be operating on a different basis from that which had prevailed over the previous almost 30 years. The fact that the claimant expected that work would usually be available did not amount to an obligation on the respondent to provide work at all times. The flexibility was moreover not one way – the claimant availed himself of it for significant periods on at least two occasions, in 2018 and 2023. The fact that it was not in dispute that the claimant had at least once previously, in 2018, had no difficulty in negotiating a break from work, reinforces my view that this lack of mutuality of obligation was an ongoing characteristic of the relationship between the parties.
38. Given that I do not accept that there is any evidence of the nature of the relationship having changed after April 2023, I conclude that when the engagement was brought to an end by Mr Helliar in August 2024, it was one lacking all of the elements required for a contract of employment to exist.
39. I also give some weight to the fact that the claimant was content to represent himself as self-employed for tax purposes over a very long period of time. He had also applied for a self-employed support scheme grant during the Covid pandemic. I emphasise that is by no means a determining factor in this case, but some weight must I think be given to the fact that it was not convenient for the claimant, for financial reasons, to present himself to the outside world as an employee and he chose not to do so. As noted, he was open in his evidence about not wanting, for financial reasons, to enter into a PAYE arrangement with the respondent. This too shows that the arrangement was mutually beneficial and not put in place solely for the respondent's benefit.
40. The claimant's claims under ss98 and 103A ERA cannot therefore succeed and will be dismissed.
41. There remains the question of whether the claimant was a worker within the meaning of 230(3)(b) ERA. I conclude that he was. There a number of features of the relationship that were incompatible with this being a relationship of client and independent business, for reasons set out above. There was a sufficient degree of control over the work the claimant did. The actual contract as distinct

from the written terms at page 49 did not contain a right of substitution and that there was therefore a requirement of personal service. I therefore conclude that although he was not an employee, the claimant was at the relevant time a worker under s 230(3)(b) ERA and his claim under s47B ERA can proceed.

Employment Judge Morton
Date: 9 February 2026

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