Neutral Citation Number: [2023] EAT 85

Case No: EA-2021-000042-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 June 2023

Before :

HER HONOUR JUDGE KATHERINE TUCKER

- -

Between :

PLASTIC OMNIUM AUTOMOTIVE LIMITED	**Appellant**
- and -	
MR P HORTON	**Respondent**

- -
- -

Mr C Khan (instructed by Lanyon Bowdler Solicitors) for the **Appellant**
Ms C Jennings (instructed by Bexley Beaumont) for the **Respondent**

Hearing date: 25 November 2022

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JUDGMENT

SUMMARY

Employee, Worker or Self Employed

The Respondent employer appealed against a decision of the Tribunal that the Claimant (Respondent to the appeal) was not a worker. The appeal was allowed. The Tribunal found that the written agreement between the Respondent and service companies operated by the Claimant and through which he (and another individual) were supplied to the Respondent reflected the true agreement between the parties. In error, the Tribunal did not address this issue in its analysis. Relevant authorities, including **Sejpal v Rodericks Dental Ltd** [2022] EAT 91 and **Catt v English Table Tennis Association Ltd and others** [2022] EAT 125 considered and applied.

HER HONOUR JUDGE KATHERINE TUCKER

1. In this appeal, the Appellant putative employer (Plastic Omnium Automotive Ltd) seeks to appeal against a decision of Employment Judge Blackwell sent to the parties on 12 April 2021. By that decision, the Judge determined that the Claimant, Mr T Horton, was a worker within the meaning of **section 230 (3) of the Employment Rights Act 1996, ERA 1996.** He also concluded that the Claimant was not an employee.

2. In this Judgment, I refer to the Appellant as the Respondent, and to the Respondent to the appeal as the Claimant, as they were before the Tribunal.

3. The case was heard before the Employment Judge over three days in March 2021 by way of a Remote hearing. Judgement and Reasons were provided to the parties on 12 April 2021.

4. Before the Tribunal, the Claimant had contended that he was an employee within the meaning of **section 230(1) of the Employment Rights Act 1996**, alternatively, a worker. The Respondent contended that the Claimant was neither a worker nor an employee. Further, the Respondent contended that the contract between the parties was void for illegality.

5. The Employment Judge concluded that the Claimant was a worker, but that he was not an employee. Further, the Judge held that neither the contract, nor its performance, was illegal. The Judge found that the Respondent had unlawfully deducted wages from the Claimant and awarded the Claimant the sum of £28,500.

The Facts

6. There was little dispute between the parties about the facts when the case was argued before the Employment Judge. I have taken the following summary of the relevant facts from the Reasons and the agreed schedule of facts.

7. The Respondent is a subsidiary of a French owned multinational automotive components manufacturing group. The Claimant carried out work for the Respondent on projects for the Jaguar Land Rover group.

8. In February 2021 the Respondent entered into a written contract with a service company (described in the Schedule of Agreed Facts as "a service company of the Claimant") called ProMan Design Ltd ("ProMan") specifically for the performance of services to it by the Claimant. That contract made no provision for a substitute for the Claimant to be provided by ProMan. ProMan also supplied the services of another individual, DB, to the Respondent to perform engineering project management services from April 2011 to January 2012.

9. ProMan was first appointed to provide programme management services in connection with the L405 Base Program to the Respondent. Between 2011-2016 the Respondent was awarded a number of other contracts relating to different projects for which the Claimant acted as the Program Manager. In addition, for a period of time, the Claimant acted as Warrington Engineering

Manager. There was an issue between the parties about the basis upon which the Claimant's services were provided for that work and the time over which that work took place.

10. Wendy Cotton, who was, at the time, the Claimant's partner, was a 49% shareholder in ProMan. She was paid a salary from the company and drew dividends. The Claimant gave evidence to the Tribunal that Miss Cotton provided business ideas and also did some administrative work.

11. The Claimant, in providing the services in accordance with the contract, was required to report to the Respondent's Programme Director, initially Mr Oldham, then, latterly, Mr Cantrill. The number of days on which the Claimant's services were to be provided was to be determined by the Respondent.

12. In September 2018, the Claimant established a new service company, ProManOne Ltd (ProManOne). This occurred after his relationship with Wendy Cotton had broken down and was because of the breakdown of that relationship. ProManOne subsequently invoiced the Respondent in the same manner as ProMan had previously done.

13. The Respondent provided the Claimant with an access card to facilitate access to the Respondent's premises, a laptop computer and a Plastic Omnium email address. The Employment Judge found that on his first day of work, the Claimant was introduced and treated in exactly the same way as another newly employed Programme Manager. In addition, he reported to the Director in the same way as all other programme managers did. The Judge found that the Claimant was, "fully integrated into" the Respondent's business for a period of time, in excess of eight years.

14. Whilst working, the Claimant only had to 'sign in' and 'sign out' of sites which were not his base, or usual place of work. This was the same as for all employees. Further, the Claimant worked regular hours, Monday to Friday each week. In terms of homeworking, the Claimant requested to work from home and subsequently did so, it appears increasingly after 2017.

15. The Claimant attended training days paid for by the Respondent, alongside the Respondent's employees. He was paid his usual daily fee for attendance.

16. The Claimant's holiday reflected the same time employees had off from work, some 25 days per annum. The Tribunal found that the Claimant requested that leave, although occasionally forgot to do so, as was the case with other employees. His daily fee included a sum in respect of holiday pay.

17. The Claimant liaised with Respondent's client, Jaguar Land Rover, on the Respondent's behalf. There was no difference in the way he worked and the way employed Programme Managers worked. He had the same level of autonomy. The Claimant represented the Respondent in China and was tasked with developing the Respondent's relationship with a client there.

18. In broad terms, the Claimant was treated in the same way as all other Programme Managers. The only differences were that he did not have to clock in and out and he was not appraised on an annual basis or indeed on any basis. Nor was he subjected to any disciplinary procedure.

19. The Judge found that when the Claimant offered to perform the role of Engineering Manager of Warrington on a temporary basis, he acted in that role as an employee would have done.

20. The Respondent did not provide a mobile telephone to ProMan or to ProManOne for the Claimant. ProMan and ProManOne invoiced the Respondent for telephone and other expenses.

21. On or around 9 October 2019, the Respondent provided verbal notice to terminate the contract pursuant to which the Claimant provided services to it, with effect from 30th of November 2019. ProManOne invoiced the Respondent for 21 days of work, purportedly undertaken by the Claimant in November 2019. The Respondent made payment in respect of 19 days only.

22. The Respondent never made any payments directly to the Claimant. Invoices were submitted by the Respondent by limited companies in relation to all services performed by the Claimant: originally ProMan and, subsequently, ProManOne.

23. The Claimant drew income from his limited companies through a combination of dividends and salary. Dividends were also paid by ProMan Design Ltd to another shareholder, Wendy Cotton. The Claimant's limited companies did not apply **IR 35** in relation to such income.

24. The relevant contractual terms were set out in the written contract. Clause 2.3 of that contract provided as follows:

> **"2.3 For the avoidance of doubt these terms shall not be construed as a contract between any individual supplied or any representative of the contractor and any of the liabilities of an employer arising out of the assignment shall be the liabilities of the contractor."**

25. Clause 4.2 provided as follows:

> **"Subject to any agreement by the parties to the contrary the Contractor shall not be entitled to receive payment from the Client for time not spent on assignment whether in respect of holidays, illness absence for any other reason."**

26. The Judge found that the 2011 agreement reflected the true agreement between the parties; was clearly regarded as beneficial by the Claimant; and, that both parties complied with its terms.

27. There were two significant disputes of fact between the parties, both of which the Judge resolved in the Respondent's favour. First, the Judge found that in late 2015, or early 2016 the Respondent, on instructions from the Managing Director, approached the Claimant to see whether he would consider becoming an employee. The Judge found as a fact that Mr Oldham, who made the proposal to the Claimant, set out the typical main terms and conditions, i.e., a salary of £65,000 to £75,000 per annum, plus a bonus, plus a car allowance, plus a contribution to pension. The Judge found that the Claimant was satisfied that the arrangement that he then had was beneficial to him and that the offer was not of interest to him. In making that finding of fact, the Judge recorded that he preferred the evidence of Mr Oldham, on behalf of the Respondent, whom he found to be a candid and credible witness, to that of the Claimant's. The Judge found the Claimant's evidence to be evasive.

28. Secondly, the Judge found that on 10 January 2019, the agreement was reviewed by the parties. There was no suggestion from the Claimant at the meeting which then took place that the agreement did not reflect the true relationship between them. At that meeting the Claimant mentioned to Mr Cantrill that he could supply further contractors, but there was no other activity. The Claimant denied that that conversation had taken place, but the Judge preferred the evidence of Mr Cantrell.

The Tribunal decision

29. The Tribunal identified that there were two issues to determine: first, whether the Claimant was an employee of the Respondent within the meaning of **s.230 ERA 1996**; secondly, whether the Claimant was a worker within the meaning of that section. As noted above, the Judge determined that the Claimant was not an employee of the Respondent. However, he concluded that the Claimant was a worker within the meaning of **s.230(3) ERA 1996**.

30. Under the heading of "Submissions" the Judge stated:

> **"18. Ms Jennings submits that [the Claimant] was fully integrated into [the Respondent's business for more than 8 years. That I accept. Clearly, he was also under the control of [the Respondent] through either Mr Oldham or, latterly, Mr Cantrill. Clearly also, there was mutuality of obligation … [Counsel for the Respondent] relies on the case of Calder v Kitson Vickers Ltd, the Judgment of Lord Justice Ralph Gibson in which he stated:**
>
> > **"it is trite law that the parties cannot by agreement fix the status of their relationship, that is an objective matter to be determined by an assessment of all the relevant factors. But it is legitimate for a court to have regard to**

> **the way in which the parties have chosen to categorise the relationship and in a case where the position is uncertain it can be decisive."**
>
> **19. Mr Khan also submits that there was no contractual relationship as between [the Claimant] and [the Respondent] though it seems to me that that rather avoids the real issue. After the decision in Calder v Kitson Vickers Ltd, of course came the Supreme Court's decision in the well-known case of Autoclenz v Belcher & others [2011] IRLR beginning at 820. A short extract from the headnote reads as follows:**
>
> **"The question in every case is what is the true agreement between the parties; the approach of the EAT in Kalwak and the Court of Appeal in Szilagyi is to be preferred to that of the Court of Appeal in Kalwak."**
>
> **It goes on:**
>
> **"Where there is a dispute as to the genuineness of a written term in an employment contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. All the relevant evidence must be examined, including: the written term itself, read in the context of the whole agreement; how the parties conduct themselves in practice; and their expectations of each other. Evidence of how the parties conduct themselves in practice may be so persuasive that an inference can be drawn that the practice reflects the true obligations of the parties, although the mere fact that the parties conduct themselves in a particular way does not of itself mean that the conduct accurately reflects the legal rights and obligations …."**
>
> **20. The two first elements set out in the case of Ready Mix i.e. sufficient control and mutuality of obligation. However, it seems to me that the agreement of 2011 does reflect the true agreement between the parties. It was clearly regarded by [the Claimant] as beneficial and both parties complied with its terms throughout. That agreement is also plainly inconsistent with there being a contract of employment as between [the Claimant] and [the Respondent].**
>
> **21. I therefore find that [the Claimant] was not an employee of [the Respondent]."**

31. I pause here to note that in that passage, significantly, the Judge made a clear finding that the 2011 agreement reflected the true agreement between the parties, and that they acted in accordance with it.

32. The Judge then went on to consider whether the Claimant was a worker within the meaning of **section 230(3) of the ERA 1996**. He stated:

> **"22. … Mr Khan accepted that [the Claimant] worked under an express contract to perform work personally for [the Respondent].**
>
> **23. The issue here is whether [the Respondent] was client or customer of the business or undertaking of the ProMan Companies/[the Claimant]]? The relevant facts are of course set out above but, in addition, as follows.**
>
> **(a) The ProMan Companies supplied [the Claimant] to [the Respondent] over a period of more than 8 years.**
>
> **(b) it supplied the services of [another engineer] but that was at the request of [the Respondent] and was merely a vehicle to enable that relationship to exist.**
>
> **(c) Apart from [the Claimant] mentioning to Mr Cantrell on 10 January 2018 that he could supply further contractors, there was no other activity.**
>
> **(d) [The Claimant] denied that conversation but I prefer the evidence of Mr Cantrell.**
> **(e) [The Claimant] worked exclusively for [the Respondent] for the whole of the relevant period.**
>
> **24. As to the law, Ms Jennings relies on the e-80 case of Byrnes Bros (Formwork) Ltd v Baird [2002] ICR 667. The relevant paragraph as set out at paragraph 71 of the Uber decision, to which both counsel referred me. It reads as follows:**
>
> **"The policy behind the inclusion of limb (b) … Of that type of protection as employees stricto senso - workers, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of**

> **dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's- length and independent position to be treated as being able to look after themselves in the relevant respects."**

25. Ms Jennings also relies … on the words of Langstaff J in the case of Cotswold Developments Construction Ltd as follows:

> **"they focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principle as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls"**

26. Turning back also to Uber, as Ms Jennings correctly submits one does not have to be a valet of cars or a driver of taxis to have the benefit of the protection of worker status. Again, quoting from Uber at paragraph 38 as follows:

> **"38. The effect of these definitions, as Baroness Hale of Richmond observed in Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32 … Is that employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed to provide their services as part of a profession or business undertaking carried on by someone else …"**

27. The Bates van Winkelhof case concerned a solicitor and she was held to be entitled to the production of worker status. Again, from Uber at paragraph 73 as follows:

> **"73. In Hashwani v Jivraj [2011] UKSC 40 … The Supreme Court followed this approach in holding that an arbitrator was not a person employed under "a contract personally to do work" for the purpose of legislation prohibiting discrimination on grounds of religion or belief. Lord Clark, with whom the other members of the court agreed, identified … The essential questions underlying the distinction between workers and independent contractors outside the scope of the legislation as being:**
>
> > **"whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services."**

> **28. Mr Khan's submissions are … as follows: -**
>
> **…**
>
> **b. However, in matter of fact, each of the ProMan companies was undoubtedly a "business undertaking carried on by" the Claimant.**
>
> **c. Further, R was undoubtedly a ProMan "client or customer". That is exemplified by … Express terms of the contract … The circa 200 invoices they submitted to R; and, their internal company accounts (about which the Tribunal can draw the obvious inference).**
>
> **d. Further, the factors… Above point away from worker status being the answer. In particular, the Tribunal … The express terms … Even though this was the premise of the original bargain."**

33. The Judge set out his conclusion at paragraph 29 of the Reasons as follows:

> **"29. I am reluctantly drawn to the conclusion that Ms Jennings' submissions are to be preferred because [the Claimant] was clearly subordinate and dependent. I accept that his bargaining power was a good deal higher than those of the valet is in Autoclenz, the drivers in Uber or the construction workers in Byrne. Nonetheless, he remained in a subordinate or dependent position in regard to [the Respondent]. I am particularly persuaded by the quotation from Langstaff J's judgment in the Cotswold case. I therefore come to the conclusion that [the Claimant] is a worker within the meaning of section 230(3). I say reluctantly because that leads to the conclusion that [the Claimant] can pursue a claim for holiday pay that, on his own evidence, he accepts was already factored into his daily fee payable under the agreement".**

The Law

34. It is, perhaps, surprising that in 2022, decades after employment legislation was first enacted, there still remains uncertainty about how to discern the legal nature of relationships between organisations or individuals, and those who perform work for them in return for remuneration. In part, the difficulties arise from the ever-changing economic landscape; how businesses operate within that so that they can remain financially and economically competitive;

and, how individuals work and choose to, or prefer, to work. In respect of the latter, there is, generally, a greater recognition of the need for a more diverse workforce, enabling those from all parts of society to reap the benefits of working, whilst also meeting social and family commitments outside of the workplace, and, increasingly a recognition of the importance of a healthy work/life balance so that the workforce, and the society it serves, remains well and productive. Employment legislation is now applied in a social and economic context which simply did not exist in the 1970s or, indeed, early 2000s. To take an obvious example, the arrangements through which Uber drivers operate were (from the perspective of a pre-internet society) wholly unforeseen developments. Even in 1996, there was little appreciation of how the internet would impact upon, shape and alter the way in which society and economic enterprise operates.

35. Despite those changes, the legislation which is to be applied in order to ascertain an individual's legal status at work remains that set out in the **Employment Rights Act 1996 (**ERA 1996). Section 230:

> **"230 Employees, workers etc.**
>
> **(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.**
>
> **(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.**
>
> **(5) In this Act "employment"—**
>
> **(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and**
>
> **(b) in relation to a worker, means employment under his contract;**
>
> **and "employed" shall be construed accordingly."**

36. As noted by Baroness Hale in **Clyde &Co v Bates van Winkelhof, [2014] UKSC 32**, at paragraph 39, "there can be no substitute for applying the words of the statute to the facts of the individual case.". Yet, that simple mandate can, and has, led to multiple, lengthy appellate decisions about the correct approach, how that task should be approached in different types of cases, and mechanisms through which the correct answer might be gleaned in a particular category of case.

37. I agree, however, with this statement of HHJ Taylor in **Sejpal v Rodericks Dental Ltd [2022] EAT 91**: *"the dust is beginning to settle"*. I do not, however, underestimate, the apparent difficulty which can arise from complex factual situations, where some facts may indicate a decision one way, and others another. The way through that complexity is, in my view, and as advocated by HHJ Taylor in Sejpal: to adopt a structured approach to the application of the words of the statute:

> **"10. Accordingly, for an individual (A) to be a worker for another (B) pursuant to section 230(3)(b) ERA:**
> **A must have entered into or work under a contract (or possibly, in limited circumstances … some similar agreement) with B; and**
> **A must agreed to personally perform some work for B.**
>
> **11. However, A is excluded from being a worker if:**
> **a. A carries on a profession or business undertaking; and**
> **b. B is client or customer of A's by virtue of the contract."**

Sejpal v Rodericks Dental Ltd [2022] EAT 91, per HHJ Taylor, at paragraphs 10-11.

38. The decision in Sejpal was considered and referred to by the President of the EAT, Mrs Justice Eady in **Catt v English Table Tennis Association Ltd and others [2022] EAT 125**. In that decision Eady P emphasised the importance, when considering worker status, of an initial focus upon whether there was a contract between a Claimant and putative 'employer' through which the former undertook to perform work or services for the latter. On the facts, Eady J held that the Tribunal in that case had lost focus on that important issue, focusing instead on questions of vulnerability, subordination and dependency. Those, she noted, may well be very relevant, particularly where standard or other documentation provided by the more powerful party does not reflect the reality of the relationship between the parties. However, those issues should not distract from the important issue of whether there was a contact between the parties at all. Eady P stated:

> **"21. … the primary underlying question will be one of statutory rather than contractual interpretation in each case, there is no substitute for applying the words of the statute to the facts of the individual case (and see per Baroness Hale of Richmond DPSC at para [39] Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32.)**
>
> **22. The extensive case-law on the issue of worker status has seen various attempts to find a test of general application that might determine whether or not a particular individual is to be treated as a worker for statutory**

> **purposes. There is, however, a danger in treating any one factor, such as subordination, as determinative; as Baroness Hale observed in Bates van Winkelhof;**
>
> > **"[39] … there is no magic test other than the words of the statue themselves … [A] small business may be genuinely an independent business but be completely dependent upon and subordinate to the demands of a key customer … Equally … one may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into the other party's operation as to fall within the definition. As the case of the controlling shareholder in a company who is also employed as chief executive shows, one can effectively be one's own boss and still be a "worker". While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker."**

39. Eady P then noted that in the Uber case, it was not in dispute that the drivers worked under a contract, nor that they undertook to perform driving services personally: the issue was whether they were working with contracts with Uber London, or, as contended by the Uber company, they were to be regarded as performing services solely for and under contracts made with passengers through the agency of Uber London. She noted that it was not contended that any Uber company was a client or customer of the Claimants. She continued:

> **"Referring to Baroness Hale's cautionary words at para [39] of Bates van Winkelhof, Lord Leggatt noted that, whilst not necessarily amounting to subordination:**
>
> > **"[74] … integration into the business of the person to whom personal services are provided and the inability to market those services to anyone else give rise to dependency on a particular relationship which may also render an individual vulnerable to exploitation."**
>
> **Lord Leggatt observed that the correlative of the subordination and/or dependency of workers who were in a similar position to employees was control, exercised by the employer over their working conditions and remuneration, explaining:**

> **"[75] …It is these features of work relations which give rise to a situation in which such relations cannot safely be left to contractual regulation and are considered to require statutory regulation….**
>
> **[76] Once this is recognised, it can immediately be seen that 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 …""**

40. Eady P. referred to HHJ Tayler's judgment in Sejpal, noting his emphasis on the importance of a structured approach and of following the words of the statute. She noted that the EAT in Sejpal acknowledged that where there is a contract pursuant to which the individual undertakes to perform personally any work services for the other party, concepts of integration, control and subordination might assist in determining whether that individual was excluded from being a worker because they carry on a professional business undertaking of which the other party is a client or customer.

41. On the facts of the case in Catt, which concerned the employment status of a non-executive director of the English Table Tennis Association Ltd, Eady P considered that the Employment Tribunal's reasoning suggested that it had lost sight of whether there was a contract between the Claimant and First Respondent whereby the Claimant undertook to perform work or services for the First Respondent. Instead, the Tribunal focused on questions of vulnerability, subordination and dependency. Eady P noted that those issues may well be very relevant in some cases and:

> **"50. … in particular where the standard form documentation provided by the more powerful party does not reflect the reality of the relationship - but they were unlikely to provide material assistance in the circumstances of the present case."**

42. In her analysis, Eady P. observed that there was no dispute that the relevant director held an office whereby he personally undertook his duties for the Respondent organisation on a direct basis. However, there was a dispute about whether or not there was a relevant contract between the parties. She observed that therefore, the first issue the tribunal needed to resolve was whether there was a contract between the Claimant and the First Respondent at all, **"that is, whether they had entered into an agreement containing legally enforceable obligations such as to 'constitute the consideration from each party necessary to create the contract.'"** (Per Elias LJ in **Quashie v Stringfellows Restaurants Ltd [2012] IRLR 99**). She concluded that, in error, the tribunal had failed to provide a clear answer to that question, describing that issue as, "a necessary first step". (See paragraph 46).

The Grounds of Appeal and Submissions

43. The Respondent pursued two grounds of appeal. First, that the Judge erred by failing to explain how mutuality of obligation arose in the absence of a contract between the Claimant and Respondent, failing to consider whether the Respondent was in the position of "the Claimant's employer". Secondly, it was submitted that the Judge ignored, or, impermissibly pierced, the corporate veil.

44. In submissions, the Respondent contended that the Judge failed to grapple with the issue that there was never a contract, nor any mutuality of obligation between the Claimant and the Respondent, the only contract being between a personal service company and the Respondent. It was submitted that, in error, the Judge focused on issues of "subordination" and "dependency",

so as to find that the Claimant was a worker, but in doing so, skipped the essential, prior questions of whether there was a contract and mutuality between the Claimant and Respondent in the first place, and therefore, whether the Respondent was, "his employer" under **s.23(1) and s.230(4) of the ERA 1996**.

45. Secondly, it was submitted that the Judge, in reaching the conclusion he did, ignored or misapplied the established principle that a limited company has its own distinct legal personality, separate from its directors and shareholders, referring me to **Salomon v Salomon [1897] AC 22**. It was submitted that a Court or Tribunal can only piece, or go behind, the corporate veil in exceptional circumstances in order to hold the controller of the company to account for his personal obligations where an individual under an existing legal obligation or liability deliberately evades it by interposing a company under his control. **Petrodel Resources Ltd v, Prest [2013] UKSC 13**.

46. The Claimant asserted that the Judge did not err in law. The Judge made detailed and express findings of fact that the Claimant was fully integrated into the Respondent organisation, under its control, and that there was mutuality of obligation, referring me to paragraph 18 of the Judge's conclusions. It was submitted that whilst the reasons did not expressly state that there was a contractual relationship between the parties, it was evident that the Judge had accepted such a relationship existed from the findings made on the nature of the relationship where the Judge considered worker status. It was submitted that the Reasons were sufficiently clear so as to allow the parties to understand why one won and the other lost, and that the submissions made by the

Respondent, fell foul of the clear guidance of Mummery LJ in **Fuller v London Borough of Brent [2011] IRLR 41**:

> **"The employment tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over analysis of the reasoning process: being hypercritical of the way in which the decision is written; focusing too much on particular passages turns of phrase to the neglect of the decision read in the round: those are appellate weaknesses to avoid."**

47. It was submitted that the Judge implicitly found that there was a contract between the Claimant and Respondent and that what he did in his analysis was focus on the issue which was whether the Respondent was the client or customer of the Claimant. In submissions it was stated that during cross-examination, Mr Oldham for the Respondent, had accepted that he recruited the Claimant for his specific skills and relationships, and that there was a requirement for the Claimant to perform the work personally. The Judge was fully entitled to rely upon the passage he referred to from the decision in Cotswold. Further, my attention was drawn to the Judgement of Elias P., in **James v Redcats (Brands) Ltd 2007 ICR 1006**, that an alternative way of phrasing the test might be to ask whether the dominant feature of the contractual arrangement is the obligation personally to perform work. If so, the contract will sit in the employment field.

48. As to the second ground of appeal, it was submitted that the Tribunal did not ignore the contractual documentation and the relevant legal identities. In particular, the Judge expressly referred to the Respondent's submission in this regard, noting that that avoided the real issue. (Paragraph 19 of the decision). It was submitted that this ground of appeal was a misguided attempt

to undermine established case law regarding employment status, noting that contractual labels placed on a relationship do not change the true relationship of employer and employee.

Analysis and Conclusions

49. From the authorities to which I have been referred, I have drawn a number of points.

50. First, an accurate determination of the employment status is best resolved by adopting a structured analysis and structured application of the legal principles set out in **section 230 of the ERA 1996**. The passage quoted from HHJ Taylor's decision in Sejpal may be helpful at that stage:

> **"10. Accordingly, for an individual (A) to be a worker for another (B) pursuant to section 230(3)(b) ERA:**
>
> **"1. Has A entered into or work under a contract (or possibly, in limited circumstances … some similar agreement) with B; and**
> **2. Has A agreed to personally perform some work for B.**
> **3. Is A excluded from being a worker because:**
> **a. A carries on a profession or business undertaking; and**
> **b. B is client or customer of A's by virtue of the contract."**

51. Secondly, those legal principles must then be applied to the myriad situations in which individuals provide their work or services to others, in return for payment. Those situations may be complex or may be novel. Consequently, the second step, though easily stated, requires Tribunals and Employment Judges to make careful and detailed findings of fact, something which, in my view, they are well equipped and particularly skilled to do.

52. Thirdly, having carried out that exercise, the Tribunal will need to place such weight as it considers appropriate on the different factors which militate in favour of, or against, worker status. Again, this is something easily stated, but requires reflection upon, not only, the legal appearance of the situation, but also the reality of it. Tribunals and Employment Judges, again, given their experience and expertise in this field, are best placed and skilled for the task.

53. For example, in the case of a skilled professional, the fact that the individual works with a high degree of freedom and autonomy may be of relatively little probative value. Conversely, the fact that a relatively low-paid worker is provided with written contractual terms which they sign (on a 'take the job or leave it" basis) may be of more significant probative value when considering whether that document represented the true agreement between the parties. That, evidently, may be very different to a contract negotiated between equals, even if one is a potentially important client of the other.

54. Finally, I consider that it is unlikely to be helpful to set out any more general points given the plethora of appellate authorities in this field. This, in my view, may be a situation where less, is more.

55. Returning then to the facts of this case, the Employment Judge found as a fact, and clearly so, at paragraph 20 of the Reasons that, **"the 2011 agreement reflected the true agreement between the parties, and that they acted in accordance with it."** The Judge therefore concluded that there was a contract in existence pursuant to which the Claimant provided services, personally,

to the Respondent. In addition, the Judge concluded that that contract reflected the reality of the agreement between the parties. What the Judge did not do, however, was to consider who the parties were to that agreement. The agreement was not between the Claimant and the Respondent. Instead, it was between ProManProManOne (entities with their own legal personality) and the Respondent.

56. The Judge dismissed the relevance of that issue by stating, at paragraph 19, that the absence of a contractual relationship between the Claimant and Respondent "avoids the real issue", and then set out passages from Autoclenz. The passages cited however specifically referred to situations where there was an issue as to whether the written document or term is genuine or reflects the true agreement between the parties. The Judge went on to conclude the Claimant was not an employee. The finding that the contractual arrangements were reflective of the true agreement between the parties was, however, of significance, or should have been, when the Judge went on to consider worker status.

57. In respect of worker status, the Judge recorded that it was accepted that the Claimant worked under an express contract to perform work personally for the Respondent. That was undoubtedly the case: the agreement was between the ProMan companies that they should provide the Claimant, specifically, to work for the Respondent, and, at some other times, another worker.

58. Again, however, the Judge did not consider which individuals or legal entities were parties to the relevant contract. Reading the Reasons as a whole, the only reason for the absence of consideration of that issue is the passage referred to above, that the Judge considered that that was

"not the real issue". The Judge identified that 'the issue' was whether the Respondent was a client or customer of the business or undertaking of the companies operated by the Claimant, or the Claimant. Having set out relevant factual matters, he concluded that the Claimant was a worker because he was "clearly subordinate and dependent", placing particular reliance on the passage set out at paragraph 25 of the Reasons from the Judgement of the EAT in the Cotswold case. The question of whether the Respondent was a client or customer of the Claimant's business was a relevant question, but one which, in my judgment, fell to be determined after the contractual issue was addressed and having regard to the answer, within the relevant factual circumstances.

59. I consider that the Judge erred in law by failing to engage with what was, in my judgment, a real issue in the case: that the contract was not between the parties. (In the terms of the structure of analysis set out by HHJ Taylor, there was no contract between 'A' and 'B'; the contract was between another, 'C' and 'B'). Further, the Judge found that the contract was an accurate reflection of the parties' agreement. The Judge also made a finding that the Respondent had asked the Claimant to consider becoming employed by it, but that the Claimant declined that offer, preferring the existing basis upon which he worked for the Respondent.

60. The finding that the Claimant was subordinate to others within the Respondent, and dependent (presumably upon the Respondent) as its primary or sole client, did not mean that the Judge could simply step around, or ignore that significant issue. Those issues could have been relevant to whether the written agreement reflected the reality of the agreement between the parties, or, for example, whether the structure created by it was unilaterally imposed upon the

Claimant. Yet, the Judge concluded that the written agreement was in accordance with the reality, and the parties' agreement, and of benefit to the Claimant.

61. Had the Judge applied the statutory language, perhaps using the structure set out above, he would have identified that the first issue was in fact significant: the Claimant had worked 'under' a contract, but, importantly, not one between him and the Respondent. It was between a company which he had set up and through which he, personally, was provided to work for the Respondent by the company and through which one other member of staff was provided to work for the Respondent. I accept the submissions of the Respondent: in error, the Judge simply did not engage with that important issue.

62. Further, the Judge found that the contract was an accurate reflection of the reality on the ground and the parties' relationships; I understand from that finding that the contractual arrangements were not a sham or falsely conceived arrangement. They worked to the Claimant's benefit. When offered the possibility of doing so, he declined to become an employee. The company could have provided more staff to the Respondent had the latter needed or wished it to. Ms Cotton was a shareholder of ProMan was paid a salary from it, drew dividends, provided advice and did work for the Company. Those factors were relevant to the question of whether ProMan and ProManOne were businesses through which the Claimant worked, and whether the Respondent was a client of those businesses. Those issues should have been considered once (if it was appropriate to do so) the Judge had determined that there was a contractual agreement between the parties through which the Claimant agreed to provide work, personally to the Respondent, as

opposed to the only agreement being the contractual agreement between the separate legal entities of ProMan/ProManOne and the Respondent.

63. I therefore allow the appeal. In terms of disposal, the Claimant invited me to remit the case to a Tribunal, the Respondent to substitute a decision that the Claimant was not a worker.

64. My initial view (having regard to *Jafri v.Lincoln College* [2014] IRLR 544) is that there are, in fact, no further factual issues to be determined. However, before reaching a conclusion on this issue, I wished to provide the Claimant with an opportunity to specifically identify what those additional facts are.

65. I invited short additional written submissions on those points.

66. The Claimant made no further submissions, save to state that there were no further factual issues to be determined. The respondent submitted that there is only one legally correct outcome available; that the Claimant is fixed with two findings, namely that the contract was between the ProMan entities and that, on the Tribunal's own finding, this reflected the parties' true agreement. The Respondent submitted that those two facts point to an irresistible conclusion: that the Claimant was not a worker. The Respondent submitted that that decision should be substituted for the decision of the Tribunal.

67. I agree. There are no further factual issues to determine. On the facts found by the Tribunal, and set out above there was, in my judgment, only one legally correct outcome. I therefore allow the appeal and substitute a finding that the Claimant was not a worker.