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# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

**Respondent**

Mr D Wallace

AND

MG Motor UK Ltd

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT Birmingham**

**ON 8 August and 27 September  
Reserved 19 October 2018**

**EMPLOYMENT JUDGE VC Dean**

### Representation

**For the Claimant:** in person

**For the Respondent:** Mr E Beever, of counsel

### RESERVED JUDGMENT

#### **The judgment of the Tribunal is that:**

1. The claimant's claim that he is an employee of the respondent within the meaning of section 230(1) of the Employment Rights Act 1996 does not succeed.
2. The claimant's claim that he is a worker of the respondent within the meaning of section 230(a) and /or (b) of the Employment Rights Act 1996 or Regulation 2 of the Working Time Regulations 1998 does not succeed.
3. The claimant's claim that he is entitled to a statutory and/or contractual redundancy payment to be paid by the respondent does not succeed.
4. The claimant's claim that he is entitled to a payment in lieu of notice from the respondent does not succeed.
5. The claimant has no entitlement to payment from the respondent of holiday pay whether due under the Working Time Regulations 1998 or contractual or at all.
6. The claimant's claim in respect of an employer's pension contribution to be paid by the respondent does not succeed.
7. The claimant's claim in respect of an employer's national insurance contribution to be paid by the respondent does not succeed.
8. The claimant's claim in respect of an entitlement to reimbursement of

- management fees to be paid by the respondent does not succeed.
9. The claimant's claim in respect of failure to comply with the Agency Workers Regulations do not succeed.
  10. The claimant's claims against the respondent do not succeed and are dismissed.

## **REASONS**

### Background

1. By way of background to the respondent company is engaged in the manufacture of motor vehicles and at the relevant time the respondent employed direct employees and the direct workforce was supplemented from time to time by the engagement of self-employed contractors or agency workers who are provided through a number of agencies including Consilium on a short and long term contractual basis.
2. The claimant was employed in the role of PR and internal communications manager from the 28 April 2010 until he was made redundant with effect from 9 August 2013. The claimant had been placed on a period of garden leave following a period of redundancy consultation on 12 July 2013 and his last day of work as an employee on site was 15 July 2013.
3. The claimant was offered and accepted the opportunity of what was envisaged to be short-term work as a self-employed contractor. The claimant provided his services to the respondent through Consilium who engaged the claimant's services through Guardian Contract Management Limited.
4. The claimant continued working at MG motors from 15 July 2013 until 31 December 2017 when the marketing team was relocated from Birmingham to Marylebone, London. Employees based in Birmingham were made redundant and the claimant's contract of services provided through Consilium were terminated on 2 weeks notice.
5. The claimant asserts that he was an employee of the respondent the entire time from July 2013 until December 2017 and he is entitled, amongst other things, to redundancy pay, notice pay, holiday pay, pensions payment etc. on the cessation of his contractual arrangements with the respondent.

### Issues

6. The parties agree that the issues that I have to determine are:
  - a. Was the claimant an 'employee' of the respondent within the meaning of section 230 (1) of the ERA 1996?
  - b. Was the claimant a 'worker' of the respondent within the meaning of section 230 (3) (a) and/or (b) of ERA 1996 and/or Regulation 2 the Working Time Regulations 1998?
  - c. Is the claimant entitled to a redundancy payment?

- i. Was the claimant an 'employee' of the respondent for the purposes of section 135 of ERA 1996?
    - ii. What is the correct amount of redundancy payment, pursuant to section 162 -163 ERA 1996?
  - d. Is the claimant entitled to PILON?
    - iii. What was the claimant's entitlement to notice? Does it arise in contract or otherwise?
    - iv. How much notice to the claimant in fact receive?
    - v. What some of any is the claimant entitled to?
  - e. Is the claimant entitled to an 'ex gratia' company redundancy payment?
    - vi. What was the claimant's entitlement to such a payment? Does it arise in contract or otherwise?
    - vii. What sum if any is the claimant entitled to?
  - f. Is the claimant entitled to outstanding holiday pay?
    - viii. Was the claimant a worker for the respondent the purposes of the working Time regulations 1998?
    - ix. To what extent has the claimant already been paid holiday pay?
    - x. What sum if any is the claimant entitled to?
  - g. Is the claimant entitled to claim in respect of employer pension contributions?
    - xi. On what basis is the claim made?
    - xii. Do pension payments qualify as 'wages' pursuant to section 27 ERA 1996?
  - h. Is the claimant entitled to reimbursement of employer national insurance contributions?
    - xiii. On what basis is the claim made?
  - i. Is the claimant entitled to reimbursement of management fees for processing monthly wages?
    - xiv. On what basis is the claim made?
  - j. The claimant claims an uplift of 10% in respect of failure to comply with the Agency Workers Regulations?
    - xv. On what basis does the claimant have an entitlement to seek an uplift?
    - xvi. What if any uplift is appropriate and upon which heads of loss?

### The Law

7. I remind myself that the issue to be determined by me at this hearing is whether or not the claimant enjoyed the status as an employee of the respondent, in which case it is acknowledged that his engagement was terminated by reason of redundancy and the claimant will be entitled to a redundancy payment and I will go on to consider what payment is due to an employee.
8. Under the provisions of Section 230 of the Employment Rights Act 1996 an employee is defined as an individual who has entered into

or works under “a contract of employment”. I am reminded of the law in Autoclenz Ltd -v- Belcher & Others [2010] IRLR 70 CA. In particular at paragraphs 87-89:

*“Express contracts (as opposed to those implied to the conduct) can be oral, in writing or a mixture of both. When terms are put in writing by the party and it is not alleged that there are no additional oral terms to it, then those terms will, at least prima facie represent the whole of the party’s agreement. Ordinarily the parties are bound by those terms where a party has signed the contract....”*

*Once it is established that the written terms of the contract were agreed, it is not possible to imply terms into a contract that are inconsistent with its expressed term. The only way it can be argued that a contract contains a term which is inconsistent with one of those express terms is to allege that the written terms do not accurately reflect the true agreement of the parties.*

*Generally, if a party to a contract claims that a written term does not accurately reflect what was agreed between the parties the allegation is that there is a continuing common intention to agree another term, which intentionally was outwardly manifested but, because of a mistake (usually a common mistake of the parties) but it can be a unilateral one) the contract inaccurately recorded what was agreed. If such a case is made, a court may grant rectification of a contract.”*

9. I refer to the learned judgments of the Court of Appeal in Autoclenz -v- Belcher, and in particular to Aikens LJ’s reference to the guidance in Lady Justice Smith comments at paragraph 52 of the judgment:

*“The Court or Tribunal must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement or contractual obligations) not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them.”*

Lady Justice Smith continues at paragraph 69:

*“However it seems to me that, even where the arrangement has been allowed to continue for many years with question on either side, once the Courts are asked to determine the question of status, they must do so on the basis of the true legal position, regardless of what the parties have been content to accept over the years.”*

10. The Court of Appeal in Autoclenz Ltd -v- Belcher [2011] UKSC and in Coalwork was preferred and Lord Clerk giving the lead judgment in the House of Lords confirmed:

*“The question in every case is, as Aikens LJ put it at paragraph 88 quoted above, what is the true agreement between the parties.”*

11. Although not referred to by Mr Beever in his submissions I take heed too of the judgment of Lord Clarke in Autoclenz at para 38:

*“It follows that, applying the principles identified above, the Court of Appeal was correct to hold that those were the true terms of the contract and that the ET was entitled to disregard the terms of the written documents, in so far as they were inconsistent with them.*

12. The respondents have reminded me that personal service is a necessary but not sufficient factor for a contract of employment to exist, Stevenson LJ in Netheremere (St Neats) Ltd -v- Gardener [1984] IRLR 245:

*“A degree of control and consistency of other provisions in the contract are the key factors in determining whether employment relationship subsists”.*

13. As per McKenna J in Ready Mix Concrete (South East) Ltd -v- Minister of Pensions and National Insurance [1968] 1ER 433 at 439/440 and in Quashie -v- Stringfellow's Restaurants Ltd [2012] IRLR 536. It was confirmed that the degree of control exercised over the individual may be determinative in some circumstances. Leigh -v- Chung & Shun Shing Construction and Engineering Co Ltd [1990] IRLR 236 confirms;

*“the fundamental test to be applied is this: is the person who has engaged himself to perform these services performing them as a person in business on his own account?”.*

14. The case identifies factors which may be of importance in determining whether or not someone is self-employed which includes:

*“Whether the man performing these services provides his own equipment, whether he has his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.”*

15. Massey -v- Crown Life Insurance Co [1978] 2 ER576 confirmed that the fact that a person who has been obtaining tax advantages by claiming to be self-employed may itself be a factor against allowing him to change that label later. The Court of Appeal in Young & Woods Ltd -

v- West [1980] IRLR 201, at 208 confirmed that an employee should not be stopped from contending that he is an employee merely because he has been content to accept self-employed status for some years (Autoclenz at paragraph 69).

16. In determining the question, if not bound by the terms of the written contracts, what the terms of the engagement by the respondent of the claimant are I must consider whether the claimant is a “worker” or an “employee” and I turn therefore to consideration of s 230 of the Employment Rights Act 1996 which provides:

*“s230 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. ”*

## **Evidence**

17. The claimant has given evidence and his 14 page statement and the documents to which he has referred have been adopted as his evidence in chief.
18. I have also heard evidence on the claimant’s behalf from Judy Finan a former colleague working as a contact centre executive for MG Motor UK who in the absence of Keith Harris, Events and Marketing Manager would be supervised by the claimant. Mr Keith Harris, who was formerly

employed as Events and Sponsorship Manager for the respondent gave evidence. They each adopted their witness statements as the evidence in chief.

19. For the respondent I have heard only from Louise Carter who was and remains employed by the respondent in the role of Head of Human Resources and his employment with the respondent began in January 2007 and his current position has been held since June 2011. Ms Carter has adopted her witness evidence in chief.

### **Findings of Fact**

20. Having considered all of the evidence, I make the following Findings of Fact.

21. The Claimant began employment originally with the Respondent on the 28 April 2011. He was employed as a PR Manager working for the Respondent company based at their Longbridge site in Birmingham. The contract was a temporary one. The terms and conditions of the contract were set out in the letter of offer [33-34] and the job description for the role of PR & Internal Communications Manager was provided. The job offer was dated 23 April 2010 and the Claimant began employment on the 28 April 2010. The role was one working a basic 37 hours per week and was described as temporary, was terminable on 2 weeks' notice from the company to the Claimant or statutory notice if longer. The Claimant's job role involved a variety of duties and responsibilities on a day-to-day basis including: -

- Providing copy for the use in external publications
- Arranging Press events
- Negotiating with Press Agencies
- Creating relationships with different Media Agencies
- Event Management
- Internal Communications

22. During the course of the Claimant's employment with the Respondent, the role he undertook developed as the business grew and developed its product range from selling one product, the MG6 to three new products MG3, MGGS and MGZS. Sales targets grew and the role PR and Internal Communications Manager undertaken by the Claimant was required to significantly change.

23. In July 2013, the Respondent identified that the role of PR and Internal Communications Manager required an expertise in marketing on social media, a skill which the Claimant did not possess. The Respondents identified that the Claimant's role required a significant change and they began consultations with the Claimant which culminated in a meeting on the 11 July 2013 and noted the confirmation of his position being made redundant. The Respondents wrote to the Claimant on the 12 July 2013 [38-39] confirming his proposed redundancy and giving notice that his

last day of working would be the 12 July 2013 and he would be paid his pay and benefits up to the 9 August 2013 under the terms of his contract, when his existing position would cease. The Claimant did not appeal the decision to terminate his employment by reason of redundancy and that contract of employment was brought to an end. The Claimant was paid a severance payment including his statutory redundancy payment, his ex-gratia payment and all monies owing and due to him as outlined in the schedule of payments [40-41] and the Claimant received a total payment of £11,111.54.

24. Mrs Louise Carter, nee Lane the Senior Human Resources Manager at the Respondent held meetings with the Claimant, and the Claimant was offered what would seem as a temporary role undertaking fundamentally different tasks than he had in his position as PR Manager. In response to the Claimant's query of whether there were any different opportunities available within the company, Mrs Carter described an opportunity that was available that the Claimant may wish to consider. The company had been planning to promote "site tours" at the Longbridge Plant and had identified that as the Claimant had a wide knowledge of the business and its projects and their future ambitions, the Claimant had the suitable skills to fulfill the role.
25. I have heard evidence from Mrs. Carter that given the fluctuating need for resource of an individual to promote site tours, it was made plain to the Claimant that the role would be on a self-employed basis. The Claimant who had not previously worked on a self-employed basis enquired of Mrs. Carter what he needed to do to undertake the proposed self-employed role. Mrs. Carter informed the Claimant of the contact details for Consilium Recruit who supplied various contractors to the Respondent company. It is an agreed fact that with effect from 17 July 2013, the company Consilium Group provided the supply of PR Management Services to the Respondent for an initial 28-week period for 40 hours per week and a quote was provided [42].
26. On receipt of the quote, the Respondent raised a purchase request and supplier evaluation form [43] of the provision of PR Management Services.
27. During the course of cross-examination, the Claimant confirmed that during the course of the redundancy consultation with him in 2013, the Claimant had acknowledged that the role of the PR & Social Media Manager [172] was a vacant role that was one for which he did not apply. The Claimant indicated that he had been informed by Louise Carter and Guy Jones with whom he had meetings and that he did not have the skills for the job. The Claimant confirmed that he was not skilled in digital media and had not been trained in that role.
28. The Claimant denies that it had been he who had asked whether there were any opportunities to remain within the company, but acknowledges that the Respondent's then Managing Director had indicated that the



Claimant was liked and they would like to continue a role within the company for him. I find that the position of coordinating site tours was one with an indeterminate future and that if the Claimant wished to engage in that position, it would be either as a Limited Company, as a Sole Trader, or working as a Contractor. The Claimant having had an employment history of entirely employed status, made contact with David Davies from Guardian and the Claimant was aware that for the time that he continued to work at the MG Motors site he was paid by Guardian Contracts. The Claimant completed monthly timesheets that he submitted to Consilium and Guardian and the timesheet was countersigned by an MG Manager and it was sent through to Consilium. The Claimant was paid monthly for the hours that he was recorded as providing the services by the MG Manager and he was paid by Guardian direct. The Claimant received monthly payslips and it is a telling omission that the Claimant has not included within the bundle any pay slips in respect of his employment by Guardian.

29. Notwithstanding the absence of pay slips, I have been referred to a schedule of payment histories of sums paid to the Claimant by Guardian (Contract Management) Limited [201-204]. The record summaries, printed on the 17 May 2018 reflect the payments made to the Claimant from the 23 August 2014 until a final payment made to him on the 12 January 2018.
30. Although the Claimant has failed to provide his payslips with Guardian, there is one exception [213] which is a pay advice slip for the week ending 4 February 2018. The Claimant was paid a basic hourly rate of £7.50 and holiday pay payment at the rate of .91 pence in respect of each hour worked. The pay records demonstrate that on a monthly basis the hours worked by the Claimant varied significantly from month to month, although the majority of the Claimant's payslips have not been produced, the Claimant confirmed that they were all payslips provided by Guardian that his pay reflected the hours that he worked as were countersigned by the Respondents which in turn generated an invoice from Consilium Group Limited for the contract placement of the Claimant as evidenced from the invoices from Consilium Group Limited to the Respondent [70-123] which evidenced significant variations in the number of hours per week that Consilium Group Limited charged the Respondent for the provision of the Claimant's services to the Respondent.
31. The Claimant confirmed that although his pay from Guardian had initially not identified a separate payment for holiday pay in the 2 years immediately preceding the termination of his working at MG Motor UK Limited., the payslips he received from Guardian identified a separate hourly payment for holiday pay.
32. The Claimant confirmed in answer to questions in cross-examination that he did not suggest to MG Motor UK Limited that he was their employee after the redundancy in August 2013, nor did he receive any pension

payment.

33. Having reviewed as best I can, the contractual documentation between Consilium Group Limited and MG Motor UK Limited. I found that MG Motor UK Limited contracted with Consilium Group Limited for the provision to them of the services of the Claimant Doug Wallace for the supply of PR Management Services. Consilium engaged Guardian for the provision of payroll services in respect of which Consilium paid Guardian. The service provided is identified as marking support service, that service being provided by Doug Wallace [45, 46, 47].

34. I find that Mr Wallace who has suggested that he received nothing in writing from either Guardian or Consilium in relation to any contract of employment or Agency arrangement with them, acknowledges that his pay was paid by Consilium and that his timesheets had to be countersigned by the Respondent and sent to Consilium. The Respondent, in making enquiries for this hearing, received an emailed confirmation from Mr David Davies of Guardian who confirmed in answer to her queries by an email dated the 30 July 2018 that: -

*"I can confirm that Doug Wallace was indeed engaged by the Consilium Group on his assignment with MG Motors and that Guardian (Contract Management) Limited was his employer. Guardian incidentally are no longer trading.*

*I can confirm that his pay rate for this sum was £7.32 per hour as I recall, and that this rate included an uplift to reflect employer NI contributions and holiday pay. Had it not been for the uplifted rate, his equivalent PAYE rate of pay for the job would have been in the region of £13.76 per hour. I can confirm that holiday pay was paid to Doug in accordance with this contract and that all employer NI contributions were made to HM Revenue & Customs. He was not enrolled in any pension scheme and no pension deductions were made at any point during his engagement".*

35. I conclude that as the Claimant accepts, he was paid by Guardian (Contract Management) Limited on a monthly basis based upon the hours that he worked via Consilium Group on his assignment with MG Motors.

36. I find that the Claimant's employment with the Respondent terminated with effect 9 August 2013 on his redundancy. The Claimant did not at the relevant time complain that the termination of his employment was not genuinely because of redundancy, nor did he suggest that the termination of his employment was unfair.

37. I have heard evidence from the Claimant and from Keith Harris who was formerly employed by the Respondents as an Events and Sponsorship Manager and whose employment was terminated by reason of redundancy on the 31 December 2017 that Mr Harris was de facto, the person at the client MG Motors Limited who gave direction to the Claimant in terms of the work that he did on behalf of Guardian's client MG Motor UK Limited.

38. In light of the Claimant's confirmation that he was not qualified to, or experienced in on-line marketing and PR, I found that the Claimant's position in the role of PR and Internal Communications Manager was genuinely redundant with effect from 12 July 2013 and his employment in that role terminated on 9 August 2013.
39. It is clear from the evidence I have heard from the Claimant, Mr Harris and from Mrs. Carter that the Claimant was a well-liked and respected employee at MG Motor UK Limited when his employment was terminated when his job was made redundant and his employment with MG Motor UK Limited terminated on the 9 August 2013. I find that the Respondent, who were appreciative of his skills and enthusiasm working for the business and its values, sought to provide the Claimant with an opportunity to continue to work for the business albeit in a different role.
40. I find that the ongoing role that the Claimant was initially offered that of organising factory tours was different from that previously undertaken by him in accordance with his job description [35] as PR and Internal Communications Manager. The Claimant has suggested that the delivery of factory tours was not a role which occupied all of the time that he spent working at the Respondent's site. I accept the evidence that has been given by both the Claimant and Mrs Carter that in addition to conducting the tours, he organised them and liaised with parties who were interested in attending the tours. I accept that Mrs Carter acknowledged in cross-examination that she had not been aware the Claimant had undertaken work for the Respondent over and above the organisation of acting as a tour guide. Mr Wallace acknowledges that the Respondents intention that he would be working as a tour guide initially had been well intentioned, however, he undertook additional duties. Mrs Carter acknowledged that her role in HR meant that she was not his manager and that who allocated tasks on a day-to-day basis and those managers are no longer with the organisation.
41. I accept the evidence Mr Wallace gave that, as he was perceived as a safe and enthusiastic pair of hands, he would "pitch in" to get the job done and as well as organising and delivering tours, he undertook PR and promotional work for the Respondent business, that included attending promotional activities, not only in Birmingham, but beyond to London and on occasions abroad. When the Claimant incurred expenses away from Longbridge, his expenses were authorised and paid for by the Respondent directly.
42. The Claimant confirms that his contact with his employer Guardian was limited, however he acknowledges that it was necessary to speak to David Davies from Guardian from time to time, although his communication was mainly by email and usually in respect of queries relating to his pay. The Claimant acknowledges that when he reached state retirement age on the 22 August 2015, employer National Insurance contributions were no longer deducted from his pay.

43. The Claimant acknowledges that when he began working for Guardian, in a different role at the client MG Motors UK Limited, he returned to work on different pay and conditions. He was paid an hourly rate, he was not entitled to any pension payment, although he was not initially paid a sum which identified specifically holiday pay. In the latter years of his employment with Guardian, holiday pay was separately referred to on his pay advice slips. The Claimant acknowledges that as far as he is aware he was fully paid up in respect of retained holiday entitlement up until the time he left Guardian's employment in 2017.
44. The Claimant acknowledges that under the new working arrangements he would work and submit timesheets for the hours that he worked in each week, however unlike employees at the Respondents, when he worked additional hours on particular days, he did not work others. It is indicative of the good working relationship that the Claimant had with Mr Keith Harris that the Claimant notified Mr Harris of days when he would not be on site to deliver the PR Management Services that were supplied by the Consilium Group.
45. The Claimant has referred me to a number of the tasks that he undertook whilst working for the Respondent by Consilium and Guardian.
46. I conclude that from the 15 July 2013 until December 2017, the Claimant worked at the Respondent's premises as an Agency worker supplied to deliver PR Management Services, initially intended to be that of organising and delivering factory tours and to include generally PR and Management Services as was required by the client of Consilium Group Limited the end-user MG Motor UK Limited from time to time.
47. I find that the working arrangement was initially identified to last for a limited period of up to 6 months and the Claimant entered into an agency-type arrangement whereby he was employed by Guardian (Contract Management) Limited and that Guardian contracted with the recruitment agency Consilium Group Limited to work at the Respondent's workplace.
48. Unlike the Respondent's direct employees, the Claimant was not required to clock in and out of the Respondent's premises, he submitted timesheets that were verified by the Respondents to claim his pay from Consilium through the Guardian payroll. The Claimant's hours at work varied considerably from week-to-week and month-to-month. It is not inconsistent with the Claimant's status that when expenses were incurred by him on behalf of the Respondent's business, those expenses were reimbursed directly by the Respondent. Although the Claimant had formerly been a direct employee of the Respondents, I conclude that the circumstances under which he continued to work at the Respondent's site were significantly different to the basis upon which previously he worked as a direct employee.
49. Mr Harris, on the Claimant's behalf, has given a frank account and

complimentary account of the Claimant's work ethic whilst at the Respondent. Mr Harris has himself confirmed that he was aware of the Claimant's change in status from a permanent staff employee to an Agency worker. It speaks to the Claimant's loyalty to the Respondent that he was perceived by colleagues in the workplace who were direct employees of the Respondent as having no different status to themselves. The Claimant's commitment to working and providing PR Management Services to the Respondent led to him being a recipient of awards as team player. When undertaking promotional work for the business, he was part of the Respondent promotional team who wore MG Motor branded clothing that was initialed given the longevity of his involvement [37] with the team. The Claimant has produced a copy of his business card [36] which he says confirms that although he was an Agency worker, he was treated as part of the Respondents Sales and Marketing Department and he retained his office telephone numbers, email and mobile phone.

50. The Respondent does not dispute that the Claimant worked closely with others in the PR and Marketing Department, reported to Mr Harris who was the Events and Sponsorship Manager and from time to time gave direction to more junior members of that events and sponsorship team.
51. The Claimant in his witness evidence has referred to the fact that when he was made redundant from his employment with the Respondent and he was not required to work his notice period, the Claimant returned to work for the Respondent as a worker through arrangements with Consilium to do a different job. The Claimant has acknowledged in his evidence that the role he undertook was not the same as before, he was required to organise and deliver tours. I find that whilst he may from time-to-time have undertaken some of the tasks that he previously had as PR and Events Manager the job was not the same and it was foreseen to be for a short term.
52. The Claimant in his witness evidence has indicated that in 2013, he was close to his 63<sup>rd</sup> Birthday and was keen to continue to have an opportunity to work. The Claimant has sought to assert that when he worked for the Respondent under the arrangements through Consilium and Guardian, he parked in the same parking space, sat down at the same desk, logged on to the same computer and used the same password and used the same mobile phone as the one he had been provided by the Respondents whilst their direct employee. He explains that he did not go through the new starter process despite the fact that in his assignment details [page 50-51] the document refers to Health & Safety being "*to be explained by the client as part of the site induction process*" and that the Respondent had not undertaken the site induction process with the Claimant. I find that given the nature of the assignment that had been identified in the schedule, the Client "MG Motor UK" would be required to provide a parking space, a desk and a computer which should be pass-worded to access the Respondent's systems and provide a mobile phone if that was one of the pieces of equipment

required to enable the person delivering the services to complete those services. I have no hesitation in finding that the Claimant, who had been an enthusiastic member of the Respondents direct PR and Marketing Team, would not have behaved any differently when delivering the service through Consilium, albeit in a role different from that which he undertook as an employee.

53. I find that the Claimant was not in a position to send a substitute in his place to provide the PR Manager Consultancy Services to the Respondent, the Respondent had contracted with Consilium that the assignment should be undertaken by an individual with knowledge of the Respondent company and its products and the Claimant had been engaged by Consilium to deliver that service on the basis of his existing knowledge.

54. I find that the Claimant was aware that there was a different job to be done by him and acknowledged that fact.

55. I find that the record of the time spent by the Claimant as a contractor provided by Consilium [70-123] evidences the variations of the number of hours worked in different weeks across different months.

56. Whilst the Claimant has given evidence that the appointment of Raj Mann and Laura Biss to the new direct employee role and he is critical of their skills and he does not dispute the fact that those individuals, whatever their shortcomings he felt they had, fulfilled the new responsibilities of the role and to the extent that they remained they undertook a number of the aspects of the job that the Claimant had undertaken. Whilst the Claimant may well have sometimes carried on doing certain aspects of the role he previously fulfilled, I find that the role was substantially different and that the new role was a new arrangement and the tasks he undertook were substantially different to those he had undertaken previously. There was a new agreement and their relationship was different. The Claimant was well aware that he was no longer an employee of the Respondent, that his previous position had been made redundant and he accept payment of contractual and statutory redundancy payments and notice from the Respondents and the terms set out in the severance schedule paid to him [40-41].

57. I find that the new working arrangements were not a sham. The new working arrangements were that the Claimant was paid an hourly rate by Guardian based upon the hours that he worked in any given month. The Claimant sent to Consilium who were the employment agency, timesheets that were authorised by the Respondent's Managers who oversaw the service that he delivered.

58. Having heard evidence from Mrs. Carter, I find that the contractual arrangements between the Respondent and Consilium was agreed on a 6-monthly basis subject to the Respondent's Manager having identified that there was a requirement for PR Executive Services to be provided

in excess of the substantive direct employee resource. The PR Executive assistance provided through Consilium changed over the passage of time from when a resource was required to organise and deliver factory tours that was initially the substantial part of the Claimant's role. Subject to the company having an approved budget, a purchase requisition form was raised by the PR and Marketing Department to authorise the purchase of PR Executive Services from Consilium who provided the Guardian employee, Mr Wallace to deliver the service .

59. The Respondent's need to deliver factory tours ceased in 2014 when the promotional tours were brought to an end.
60. I have heard evidence from Mrs. Carter, which is not challenged, that every 6-months the PR and Marketing Manager would have to create a new purchase requisition form to be authorised to purchase the additional support from Consilium of Mr Wallace as an agency worker. Once the purchase requisition form had been raised and approved, a 6-month budget was apportioned to the service of PR Executive purchased from Consilium.
61. The Claimant has acknowledged that during the time that he worked for the Respondent, through the Consilium agency, he undertook a variety of different job roles, he latterly was based in the call centre which is a contact call centre dealing with queries. I have heard evidence from Ms. Jodie Finan who confirmed that whilst she worked for the Respondents, for a period of 2 years and 3 months, Mr Wallace would provide day-to-day supervision of her when Mr Keith Harris was not on site as her managerial control, Mr Wallace standing in as an impromptu supervisor. Ms. Finan confirmed that unlike Mr Wallace, she and her colleagues all scanned themselves in and out of work to record their hours in contrast to Mr Wallace who only submitted timesheets.
62. Most tellingly, in answer to questions to clarify my understanding of the situation, the Claimant confirmed to me that in the latter part of his working at MG Motors, he had been based in the contact centre and he worked there to fill in gaps in the staffing levels within the Respondents business. It was not unusual for him to start the week based in the contact centre and if Keith Harris had a staffing problem, for example at the Piccadilly London Showroom, the Claimant would be redeployed there, or on other occasions if the company were providing a car to a VIP customer, he would make the delivery of the car to the customer.
63. The overriding impression that I have gained having heard evidence from the witnesses in this case, is that Mr Wallace was well liked, was enthusiastic and conscientious and tried to help whenever he could. It is evident that in the latter years of the time that the Claimant worked for the Respondent, the budgetary constraints set by the Respondent sought to limit the hours that the company contracted with Consilium for the Claimant to be available to an average of 40-hours per week. The

Claimant and Mr Harris agree that when additional hours in excess of those contracted to be provided by Concilium had been worked in one week, the use of the Claimant to provide the service was reduced in others. The Claimant describes the days when he did not work as being time off in lieu. I find that the Claimant's hours were constrained by the contractual arrangement made between MG Motors and Consilium to the budget of no more than 40-hours per week.

64. The Claimant does not dispute that the hourly rate that he was paid was the sum determined by Guardian. The Respondent negotiated the hourly rate to be paid to Consilium for their providing PR Executive Services through Mr Wallace which was an hourly rate negotiated between the Respondent and Consilium and not with Mr Wallace [191-192].
65. Striking in the evidence or absence of it that I have heard from Mr Wallace is documentary evidence between himself, Consilium and Guardian. The Claimant has produced only one pay advice slip between himself and Guardian, although he acknowledges that that pay advice slip was not dissimilar to all of the other pay advice slips, save that in the early period of his engagement by Guardian, he was paid a rolled up sum on an hourly rate that was inclusive of holiday and latterly the holiday rate was described separately in his pay statement. Although the Claimant has confirmed that he queried all matters relating to pay that he had with Guardian and Consilium, the Claimant has not provided me with any documentary evidence relating to the terms of his contracting with those agencies. It is evident that the Claimant throughout the period August 2013 to December 2017 worked only at the premises of the Respondent.
66. The Claimant has given an account that he didn't take time off work for sickness during the relevant period. When the claimant wished to take holiday, he would approach Mr Harris and ask if the times he was proposing to take holiday were ok, and Mr Harris confirmed that he would try an accommodate Mr Wallace's proposal and that if the proposed timing was not convenient, they would try and reach an agreement. Similarly, the Claimant gave evidence that he would inform Mr Wallace of what he, the Claimant was going to be doing from day-to-day so that Mr Harris knew where the Claimant was going to be.
67. I find that whilst the Respondent from time-to-time set a limit on the budgeted resource that was allocated to contracting with Consilium to provide PR Executive support, the Claimant was paid by Guardian for the hours that he worked. The Claimant participated in the working environment at the Respondent's premises and perhaps as a mark of his enthusiasm, the Claimant was nominated for an award as "Best Sport of 2015" [49]. The eligibility of the award was not conditional upon an individual being an employee of the Respondent.
68. The Respondent accepts that the Claimant was integrated into the Respondent's Sales and Marketing Department, however, I find that the



Claimant's integration which had led to him being the recipient of an award and a payment with the award of £250.00 for his outstanding contribution to the business [48] is explicable by the Claimant's conscientious and enthusiastic work ethic and no doubt explicable by his prior employment relationship with the Respondent's workforce.

69. In giving his account to the Tribunal, the Claimant has confirmed that on the expiry of the first 6-months of the arrangement whereby he was contracted to work at the Respondent by Consilium, he had approached Guy Jones of the Respondents about the possibility of his position becoming that of a direct employee, the Claimant says that he was told by Mr Jones that it was best not to raise this subject. I find that certainly having completed his first 6-months as an agency worker at the Respondent's site, the Claimant was informed that the issue of changing his status to become an employee, was not to be pursued.
70. The Claimant has given an account that "sometime later" which he has not been able to identify in his evidence, he spoke with Matthew Shane, the Head of Sales & Marketing, again to discuss the possibility of changing the arrangement from his being employed by Consilium on the payroll of Guardian to direct employment with the Respondent. Mr Shane declined to discuss a change in the arrangements and I find that the Claimant was under no illusion that he was no longer a direct employee of the Respondent and there was no prospect of a permanent position as a direct employee of the respondent company being offered to him. The claimant remained employed by Guardian and Consilium, the Employment Agency supplied Mr Wallace's services to their end-user MG Motor Limited.
71. Although the Claimant was given direction by Mr Harris as to the tasks that needed to be undertaken by him, those tasks were wide-ranging and varied. The service provided under the contract with Consilium ranged from initially organising and delivering factory tours and writing press releases, to attending product launches and visits to promote the Respondent business both in the UK and abroad, to delivering cars, attending product launches and included the claimant attending launches holding himself out as being a representative of the Respondent's business. Latterly the claimant was working in the contact call centre dealing with enquiries.
72. At the end of 2017, the Respondent took a decision to relocate their Sales & Marketing Department to London and the entirety of the Department were placed at risk of redundant. The Respondent took a decision that they no longer required employees to undertake the duties undertaken by individuals within that Department at their place of work in Longbridge. The Sales & Marketing employees were all made redundant and the Claimant was aware of the consultation about the redundancy and had been in attendance at meetings at which the proposed relocation was announced. The Claimant was given 2-weeks' notice of the Respondent's intention to terminate his engagement on the

17 December 2017 [52]. The Claimant's complaint is about the fact that whilst the Respondent no longer required to contract with Consilium to provide the services of PR Executive at Longbridge, he was not in receipt of the redundancy payment made to the Respondent's S & M employees who were paid a statutory redundancy payment together with an ex-gratia company redundancy payment equivalent to 2-months' salary.

## Conclusions

73. In considering whether or not the circumstances under which the Claimant worked for the Respondent amounted to a relationship as an employee, a worker or not either of the respondent I have to determine the claimants status is any in his relationship with the respondent.
74. The status of a worker who is supplied by an employment agency to an end-user is entirely fact sensitive. In this case, as in many others of its kind, there is no express contract between the Claimant and the end-user MG Motor UK Limited. The fact, which it is not in dispute is that the Claimant is paid by Guardian and he is accepted for the purposes of the Inland Revenue to be an employee of that organization, does not automatically mean that it militates against the worker being an employee of an end-user where, over a period of years, the agency worker has been supplied to the end-user where a contractual relationship may in limited circumstances be applied.
75. In James -v- Greenwich London Borough Council 2007 ICR577EAT Mr Justice Elias then President of the EAT set out a comprehensive review on the law of the employee status of agency workers, the guidance laid down by Elias P in James has since been followed and has been confirmed by the Court of Appeal who adopted the EAT's approach in setting out guidance to assist Tribunals in deciding whether to imply an Employment Contract between an agency worker and an end-user.
76. The way in which the contract has been performed, so that it has been renewed, albeit continuously over a number of years and the Claimant has undertaken different and flexible tasks during the course of the engagement and has been paid by Guardian, the contract albeit not reduced to writing between the Claimant and Consilium and Guardian is entirely consistent with agency arrangements. The Claimant himself has accepted that the contractual arrangements had been consistently that he was not a direct employee of the Respondent despite him having sought to agree a change to the arrangements so that he would become a direct employee, albeit without success.
77. I have found that the agency arrangements that operated between the Respondent MG Motors UK Limited and Consilium and Guardian generally and accurately represent the relationship between the parties. Although certain aspects of the way in which the Claimant provided the service of PR Executive with an almost roving portfolio at the Respondents would not have been inconsistent with an employment

relationship, the true relationship I find has been that of an agency. The Respondent reviewed on a regular basis their business needs and the proposed expenditure within the budget for the purchasing of PR Services which, as the Claimant has himself described, were used to fill in where there were gaps.

78. Although the Consilium named the Claimant as the person who would be providing the PR Executive assistance to the Respondent under the arrangements, the circumstances of this case are such that that is one factor that I take into account and I have little doubt that had the Respondent not contracted with Consilium to provide the somewhat peripatetic and fluid assistance that he did, would have been able to source such a reliable contractor elsewhere, I have no doubt that that is precisely what they would have done to provide the flexibility that was required.
79. In light of the evidence of the Finding of Fact that I have made, there is nothing that leads me to consider that it is necessary to imply a contract of employment between the Claimant and the Respondent, where the Agency arrangements accurately represent the relationship between the contracting parties.
80. I have considerable sympathy with the Claimant who worked at the Respondent's business and was provided to work only at the Respondent's premises by Consilium.
81. This is a case where the Agency arrangements were brought into effect at the end of an existing contractual relationship of employer/employee between the Claimant and the Respondent when the Claimant's position was made redundant in July 2017. However, the particular circumstances do not lead me to imply a contract of employment in this case.
82. I find that it is not necessary for me to imply a contract of employment between the Claimant and MG Motor UK Limited as it is not necessary to do so to give business reality to the situation. I have found the Agency arrangements to be genuine and accurately represent the relationship between the parties.
83. I am mindful that the reason this case comes before the Tribunal, is because the Claimant complains that during the redundancy programme operated by the Respondents. When the Respondent made the decision to relocate all PR and Marketing for the business from Birmingham to London the contract for the claimant to provide the service at the Longbridge site was terminated. The Claimant, who was not considered to be an employee of the respondent, was not paid a redundancy payment that he would have been paid had he continued as an employee of the Respondent business from August 2013. The fact is the claimant was made redundant and paid his then full redundancy entitlement when his employment terminated in July 2013.

84. Having regard to all the Authorities to which I have been referred, I conclude that this is a case in which it would not be appropriate for me to find the claimant was a direct employee of the respondent. I have found that a number of facts are consistent with the Claimant being supplied as a contract worker to the Respondent and it is not necessary to imply an employment contract. The passage of time is not sufficient to give rise to an employee status. Whilst I have no doubt the Respondent accept that the Claimant performed his service in a variety of roles with enthusiasm and dedication to the Respondents business, it is not sufficient simply that the Claimant wished to avail himself of the benefits of the redundancy package paid to direct employees of the Respondents working in the PR and Marketing Department, to lead me to exceed to the Claimant's wish to be treated as an employee.

85. In light of the findings of fact that I have made and the conclusions I have reached I address my mind to determine the factual and legal issues that are posed by the complaints.

86. **Was the Claimant an employee of the Respondent within the meaning of Section 230(1) of ERA 1996?** For the reasons I've set out above, the Claimant was not an employee of the Respondent.

87. **Was the Claimant (a) "A worker of the Respondent within the meaning of Section 203(3)(a) and/or (b) Of the Employment Rights Act 1996 and/or Regulation 2 of the Working Time Regulations 1998"?**

In light of the Findings of Fact I have made, I am mindful of the test of necessity that needs to be applied to determine whether there was a collateral contract between the Respondent and the Claimant. I conclude that the Claimant as an individual has not entered into a contract of employment or any other contract whether express or implied, verbally or in writing with the Respondent. The same factors relating to necessity of implying a contract are present in considering the definition and for the same reasons outlined above, I conclude that the Claimant was not and had not entered into a contract with the Respondent. On the contrary, his contractual arrangements were expressly with Consilium and with Guardian. To the extent that the Respondent gave notice to the Claimant that their requirement for him to work at the business would cease on the expiry of 2-weeks' notice on the 31 December 2017 I find that does not evidence a direct contract with the Respondent. Rather I find that the respondent communicated a statement to the claimant of the economic and business reality of the respondent's business at Longbridge and its impact upon the claimant as they no longer required Concilium to provide the service to them.

88. **Is the Claimant entitled to a redundancy payment?**

The Claimant would only be entitled to a statutory redundancy payment under the terms of Section 135 of the Employment Rights Act if he were an employee. I have found that the Claimant was not an employee of the Respondent and therefore no redundancy payment is payable. Indeed were the Claimant to have been an employee, the amount of any

payment of redundancy would reflect the fact that in July 2013, the Claimant had received an earlier redundancy payment to take account of the continuity of his service that he had with the Respondents from 23 April 2010.

**89. Is the Claimant entitled to a payment in lieu of notice?**

The Claimant would be entitled to a period of statutory notice under Section 86 of the Employment Rights Act only if he were to be an employee of the Respondent. The Findings of Fact that I have made and the conclusions that have been reached confirm that the Claimant was not an employee and is not entitled to 2-weeks' statutory notice that he would have been entitled to were he to have been an employee.

In any event, the Respondent informed the Claimant on 2-weeks' notice that his engagement under the terms of the contractual arrangement that they had with Consilium was to end with effect 31 December 2017. There being no privity in the contract between the Respondent and the Claimant, whether an employee or a worker, the Claimant is not entitled to notice or payment in lieu thereof from the Respondent.

**90. Is the Claimant entitled to an ex-gratia company redundancy payment?**

The Claimant is found by the Tribunal to be neither an employee nor a worker of the Respondent. There is no factual and legal basis upon which the Claimant can claim an entitlement to an ex-gratia company redundancy payment.

There has been no evidence put to me that there was a contractual right for the Claimant to receive an enhanced payment, whether by express or implied terms.

**91. Is the Claimant entitled to claim outstanding holiday pay?**

The Claimant is not found to be an employee of the Respondent and the right to receive holiday payment or payment in lieu thereof is brought under the Working Time Regulations. Were the Claimant to be "a worker", that is sufficient for him to accrue an entitlement to a payment in lieu of Working Time Regulation holiday.

In light of the Findings of Fact I have made, I conclude that the Claimant's contract was with Consilium and was with Guardian and the Respondent's contract was with Consilium. In any event, the Claimant accepts that he was paid holiday pay in the payments made to him on a monthly basis by Consilium. The Claimant's complaint has been brought against the Respondent. It does not succeed as the Claimant had no contractual arrangements directly with the Respondent and moreover the Claimant accepted in his evidence that he had been paid for his holiday throughout the relevant period by his employer Guardian.

**92. Is the Claimant entitled to claim in respect of employer's pension contributions?**

The Claimant has accepted in his evidence that he understood that there

would be no pension payment made to him on any view. Based on the Findings of Fact, the Claimant was not employed by the Respondent, there is no express or implied contractual agreement between the Respondent and the Claimant that they would pay him pension contributions.

**93. Is the Claimant entitled to reimbursement of employer National Insurance Contributions?**

The Respondent is not the Claimant's employer. The Claimant's claim, whether against the Respondent or his employer as identified by his pay advice slips Guardian is based upon a misunderstanding of the information conveyed in his payslip. The single pay advice slip to which I have been referred [204] and [213] identifies that the sum identified as "NI ERS" was the reflection of the sum paid by his employer, Guardian and not the amount taken from the Claimant's gross taxable pay. There is no factual basis upon which the Respondents or indeed Guardian are liable for reimbursement of employers National Insurance Contributions.

**94. Is the Claimant entitled to reimbursement of management fees for processing monthly wages?**

The reference to a monthly amount of £35.00 being charged by Guardian and deducted from the amount paid by Consilium [£168.00] represents an agreement between Consilium and Guardian. The agreement reached between third parties does not intrude upon the Claimant's entitlement to the sums agreed to be paid to him by Guardian. The Claimant is a man who has enjoyed a long working life. He is savvy and entered into a bargain for the payment of an hourly rate of the time that he worked, whilst employed by Guardian to provide Consilium's services of PR Executive to the Respondent, the Claimant has no entitlement to reimbursement of the management fees.

95. The Claimant has not established any material of non-compliance with the Agency Workers Regulations in respect of which I am able to make a finding.

96. The Claimant's claims fail in their entirety, there was no contractual arrangement between the Claimant and the Respondent, whether expressed or implied at all.

Employment Judge Dean  
Date: 2 July 2019