EMPLOYMENT TRIBUNALS

Claimant: **Mrs W Lynch**

Respondent: **HELP-LINK UK Ltd**

Heard at: **Leeds**

On: 7 & 8 March 2019

Before Employment Judge Dr E Morgan

Representation

Claimant: Ms Mankaun (Counsel)
Respondent: Mr Nuttman (Solicitor)

JUDGMENT

1. The Claimant was not an employee within the meaning of section 230 of the Employment Rights Act 1996.

2. The Claimant was not a worker within the meaning of section 230 of the Employment Rights Act 1996 and/or regulation 2 of the Working Time Regulations 1998.

3. The claims of unfair dismissal, wrongful dismissal and unlawful deduction from wages relative to holiday pay are dismissed on the ground that the Claimant lacks legal capacity to advance such claims.

4. In the event the status issues had been resolved in favour of the Claimant, the contractual arrangement would not have been unenforceable by reason of illegality.

5. The substantive hearing listed for 26 March 2019 is vacated.

REASONS

THE CLAIM

1. By her claim form, the Claimant advances claims of unfair dismissal, wrongful dismissal and unlawful deductions from wages relative to non-payment of holiday pay under the Working Time Regulations 1998 (as Amended). Those claims are resisted. In the course of the Response, the Respondent has raised the question of the Claimant's status and disputes that the Claimant was at any time an employee or worker. Upon this basis, the Respondent contends that the Claimant is unable to advance her various claims. Further, and without prejudice to its primary case, the Respondent advances a further impediment to the viability of the claims, namely: illegality.

PROCEDURAL HISTORY

2. On 14 August 2016, case management orders were issued listing the status questions for preliminary determination. The usual orders were made concerning the provision of disclosure and exchange of witness statements. The preliminary hearing was itself listed for 18 October 2018. However, by September 2018, the parties had run into difficulties concerning the issue of disclosure. Taken shortly, the Respondent sought disclosure of financial and related documentation from the Claimant. Those requests were resisted. On 18 October 2018, Employment Judge O Neill granted the Respondent's application for specific disclosure and, having adjourned the preliminary hearing, gave additional directions to enable the parties to file additional evidence addressing the additional disclosure exercise. The preliminary was relisted for 7 and 8 March 2019.

3. In readiness for the preliminary hearing, the parties exchanged witness evidence. However, in doing so, and for the first time, the Claimant indicated her intention to adduce witness evidence from 5 additional witnesses. Following objection from the Respondent, application was made to the Tribunal at the commencement of the preliminary hearing. The application was refused. However, a separate application to admit an email of 22 June 2016 was granted; with the Respondent granted permission to disclose and rely upon additional correspondence arising out of the subject matter of that email.

SCOPE OF THE HEARING

4. There were no other preliminary or housekeeping matters before the Tribunal. However, during the course of the hearing, the parties invited the Tribunal to address within its ruling a determination of the arguments on illegality. This issue had not been identified as one of the matters for determination upon the preliminary hearing. However, on behalf of the

Respondent it was submitted that it was consistent with the overriding objective for the issue of illegality to be addressed by the same Tribunal determining the status issues. Counsel for the Claimant confirmed her agreement to this approach; with the result that the parties' submissions extended to this issue also.

EVIDENCE

5. The Tribunal was provided with what was described by the parties as an agreed bundle of documents extending to 513 pages. At the outset of the hearing, and having clarified the issues requiring determination, the Tribunal confirmed it would only have regard to those documents to which it was expressly referred. The parties proceeded upon this basis. In addition, and pursuant to the application for reception of email correspondence, the Respondent provided the Tribunal with an additional clip of email correspondence [p514 et seq].

6. The Tribunal heard evidence from:

6.1 On behalf of the Claimant: the Claimant herself; and

6.2 On behalf of the Respondent: Mr Ian Anfield, Managing Director of Hudson Contract Services Ltd; and Mr Simon Kennedy, Regional Sales Manager of the Respondent.

FINDINGS OF FACT

7. Having had the benefit of hearing the evidence of the parties and upon the balance of probabilities, the Tribunal makes the following principal findings of fact:

7.1 The Respondent is concerned in the supply and installation of domestic heating systems and related services. It is operated as a private limited company and markets its services throughout the United Kingdom;

7.2 Hudson Contract Services Ltd (Hudson) is a separate limited company. It is a wholly separate entity to the Respondent. There is no commonality of shareholders, directors, or officers. As an independent company, Hudson provides a wide range of construction and specialist sector related services. These services extend to providing access to the contractor scheme authorised by HMRC and known as the Construction Industry Scheme (CIS). Where Hudson is satisfied that a particular operative is undertaking work activities or providing services which are eligible for inclusion under CIS, the operative becomes a party to a direct contractual relationship with Hudson. Pursuant to the terms of that relationship, Hudson facilitates the collection of fees from the third party clients and makes payments to the registered contractor operative in accordance with the CIS regime;

7.3 The services delivered by Hudson provide both the operative and the ultimate beneficiary of her services with two principal forms of protection. First, payments are made in line with prior the understanding reached between the operative and the end client or user. Second, the financial and tax implications of those payments are addressed by Hudson in a manner which protects all parties, including HMRC, from issues around deduction of tax and authentication of tax status;

7.4 In keeping with these practices (and the objectives to which they are directed) all operatives wishing to avail themselves of the CIS scheme are obliged to draw upon the services of Hudson, or, another entity enjoying authorization to administer the CIS Scheme. Where an operative wishes to enter into an arrangement with Hudson, she is required to confirm her agreement in writing. As will be noted in what follows, the documentation incorporates a number of declarations on the part of the operative. In addition, following inception of the arrangement, the operative receives periodic notices of the sums which are to be paid to them. At all times material to these proceedings, it was (and remains) the practice of Hudson to issue a monthly notification to the operative. This notification required the operative to confirm that she remained eligible for inclusion within the CIS Scheme and there had been no change in her circumstances.

7.5 Further, the form of monthly account issued by Hudson incorporated on its reverse, the terms and conditions of the CIS Scheme included the following: "*the declaration of self-employed status at the time of work being offered to you should reflect your intentions for the entire duration of your attendance with our client*…";

7.6 During the course of September 2011, the Claimant was a party to conversations with Mr Alan Dickinson, a manager employed by the Respondent. Whilst the Claimant had no real recollection of those conversations, the Tribunal is satisfied that they involved an intimation from Mr Dickinson to the effect that the Claimant could be offered the opportunity to undertake work for the Respondent. Matters culminated in a meeting on or around 25 September 2011;

7.7 There is a dispute between the parties as to whether there was any discussion around the possibility of the Claimant undertaking work as an employee, or, self-employed person. The Tribunal has not had the benefit of any evidence from Mr Dickinson on this issue. There is no suggestion of any application form having been completed; merely that the Claimant was a party to some informal discussion with Mr Dickinson. This is compounded by the suggestion on the part of the Claimant to the effect that she did not read, consider or otherwise engage with documents which she in fact signed on that day. The Tribunal is unable to accept this evidence. In the view of the Tribunal, the Claimant is an accomplished, mature individual and effective communicator; not averse to asking or dealing with difficult questions. In the view of the Tribunal, the Claimant attended her meeting with Mr Dickinson prepared to undertake

work upon a self-employed basis. She came equipped with her driving licence and passport for the purpose of preparing her registration. There is no evidence to suggest that she was subjected to any form of pressure to undertake the work in question, or, to adopt self-employed status. As the Claimant's own evidence makes clear, this was a decision which was clearly explained to her and voluntarily agreed to;

7.8 There is no dispute that the Claimant signed the documentation now relied upon by the Respondent. The two documents extend over 3 pages [p42-44] one of which may properly be described as detailing close script. The first document begins with an express reference to "*Contract for the future provision for Services (self-employed)*…" Immediately following the section of the form requiring completion of bank details (which has been completed by the Claimant) there appears in standard sized font the following: "*The Freelance Operative agrees in confirming the pay basis that negotiation has taken place between himself and the client…and the rate of pay includes all other types of pay rolled up and all-inclusive…*" The Claimant has also applied her signature next to the annotation: "*Freelance Operative Signature*". The document also contains a start date of 25 September 2011. The remaining terms are detailed within the contract document Issue 14 [p43];

7.9 On the same date, the Claimant signed a further document entitled '*Declaration'*. It begins with the statement: "*I understand that my contract is with Hudson Contract Services Ltd and I have no contract with the client company (as defined below)…*" Within the same document, which has been signed by the Claimant, there is a declaration affirming the Claimant's acceptance that she has been commissioned upon a self-employed basis, was free to provide her services by means of a substitute, not under the control of the Client or Hudson, not obliged to work, and free to work elsewhere. The document also incorporates the following phrase:

"*2. I chose to be self-employed due to the financial advantages this provided, I understand that I will not have the rights enjoyed by an employee or worker…"*

7.10 Contrary to her evidence, the Tribunal is satisfied that the Claimant had both read and understood the terms of the agreement she was electing to enter into;

7.11 Having received the necessary documentation, Hudson included the Claimant within the CIS arrangement. However, this immediately generated a difficulty concerning the level of tax to be deducted from payments due to the Claimant. This in turn prompted discussions between the Claimant and Hudson and the Claimant and HMRC. The only note of those discussions appears within the course of the subcontractor database entry upon Hudson's system [p46]. Whilst incomplete, the Tribunal is satisfied that the document accurately records the fact that the Claimant wished to challenge an arrangement by which tax deduction of

30% were being made from payments due to her. The determination appears to have been made by HMRC and caused Hudson to “Red Flag” the Claimant’s participation under CIS. The annotation of a “Red Flag” reflected two concerns: a) the appropriate deduction rate to be applied to the Claimant; and b) whether the Claimant was eligible for inclusion under CIS at all. The Tribunal is satisfied that these issues prompted the Claimant to make representations to HMRC in which she affirmed her self-employed status (confirming her eligibility for inclusion under CIS) and sought to reduce the rate of deduction for income tax purposes to the customary 20%. The Tribunal is also satisfied that the Claimant informed Hudson that the query had arisen due to the fact that she had been employed and self-employed in the past. In the events, following her representations to HMRC, the Claimant remained within the CIS arrangement subject to the appropriate rate of deductions (i.e. 20%). In consequence, the terms and conditions adopted by the Claimant on 25 November 2011 continued to apply to her. This remained the position until January 2015;

7.12 Within the period September 2011 to January 2015, the Claimant undertook the work of Heating Surveyor. In essence, this involved the Claimant attending at domestic premises for the purposes of pre-arranged appointments. Once there, the Claimant would advise the occupier concerning the options for replacement heating systems, the potential cost of a replacement system and, inter alia, the means by which the supply and installation of the replacement system might be financed. For this purpose, the Claimant was required to undertake some modest survey of the domestic premises themselves. Not being a qualified engineer, this aspect of the Claimant’s role was to limited to the potential location of the heating boiler and the adequacy of the proposed system to meet the needs of the household;

7.13 The appointments attended by the Claimant were themselves identified and allocated by the Respondent. Initially, notification of appointments was undertaken telephonically. However, at a later stage, the Claimant was provided with an iPad or Tablet device. This device served a number of practical purposes. First, it enabled the Claimant and other surveyors to access an electronic diary system upon which prospective appointments were recorded. Second, it was loaded with the software applications necessary to process applications for financial approval from third parties;

7.14 The Claimant was paid upon a commission only basis. As such, she participated in the commercial risk that unless the appointments attended by her translated to a completed sale, the Claimant would not derive any income from them. However, the commission to which the Claimant was otherwise entitled in the event of a sale, was significantly in excess of that paid to employed surveyor colleagues;

7.15 Whilst the Claimant might receive proposals or prospective appointments, she was not obliged to undertake them. She was, like her

self-employed colleagues, able to decline particular appointments, on account of time, geographical distance, or simple personal preference. The email correspondence before the Tribunal confirms that the Claimant was aware of this right and utilised it from time to time, as did others. In the view of the Tribunal, therefore, the allocation of appointments to a particular surveyor was recognised as being provisional and subject to the wishes of the individual operative;

7.16 As previously noted, where the Claimant's attendance at a particular scheduled appointment did conclude in an order, she would be paid a rate of commission. Within the period September 2011 to January 2015, all such payments were processed by Hudson and detailed within monthly statements issued to the Claimant. As previously noted, those statements were annotated so as to affirm the Claimant's self-employed status and contained on their reverse, the terms of agreement between the Claimant and Hudson (e.g. p55). It is not disputed that each such statement was preceded by a text communication which reminded the operative of the need to declare any change in circumstances which might be relevant to their continued eligibility for participation in the CIS regime. Further, at the end of each financial year, Hudson provided the Claimant with an annualized statement. It was the evidence of Mr Anfield, and the Tribunal accepts, that the documentation issued at that time affirmed the Claimant's self-employed status;

7.17 Within the period September 2011 to January 2015, the Claimant was not subjected to any form of supervision or direct control from either Hudson or the Respondent. Both the level and frequency of appointments remained within her discretion. Further, insofar as there were any discussions between the Claimant and the Respondent's managers, they were intended to serve as an opportunity for the Claimant to provide feedback in relation to the potential enhancement of sales processes. The claimant was not at any time subjected to any key performance indicators (KPI) or performance review. Insofar as such discussions were held between the Claimant and management, they were – in the view of the Tribunal- in the manner of pastoral support to maximise the potential of the individual operative and/or enhance their awareness of issues likely to have a bearing upon their interaction with actual and prospective clients. Further, whilst the Respondent operated a team of surveyors which comprised employed and self-employed operatives, its promotional ethos was such that success was recognised from within both cohorts and non-monetary awards allocated accordingly;

7.18 At some point, the Respondent introduced the use of identity cards. In short, there was a recognition that certain householders derived comfort from the use of identification cards. Upon this basis, the Respondent issued ID Cards to all personnel, employed and self-employed. The Claimant suggests that the provision of such a card demonstrates some element of control over her putative trading activities and affirms the reality that the Claimant was acting on behalf of the Respondent and under its control. In the view of the Tribunal, the issue

of this card was to enable the Claimant (and others in her position) to provide official, recognizable means of identification to facilitate access to a client's home and nothing more;

7.19 The contractual documentation issued by Hudson declared the Claimant's right to send another person to attend and carry out the required services. This provision was neither tested nor challenged by the Claimant. If and to the extent a Surveyor chose to send a substitute, there was no obligation upon the surveyor to inform Hudson or the Respondent. Indeed, it was the unchallenged evidence of Mr Kennedy (para 13.8) that practices had developed by which operatives did collaborate in a manner which enabled others to attend in their stead. In fact, as detailed later in this judgment, the contractual right was not so limited in the period September 2011 to January 2016;

7.20 Hudson had first become involved in the application of the CIS arrangement for heating surveyors undertaking work with the Respondent in 2010. However, by the autumn of 2014, Hudson had conducted an audit concerning the applicability of the CIS regime to those individuals. By that means, Hudson was alerted to the fact that a number of the heating surveyors were not in fact undertaking 'fitting' work. This caused Hudson to conclude that the work undertaken by those individuals were primarily measurement and sales; with the result that those operatives were not eligible for inclusion within the CIS arrangement. This in turn prompted Hudson to work with the Respondent to identify a means by which the services of the affected individuals could be retained upon terms which continued to be acceptable to the individuals themselves;

7.21 It is the evidence of Mr Anfield, which the Tribunal accepts, that this prompted the Respondent to offer all of the CIS self-employed heating surveyors direct employment. The Tribunal is satisfied that this included the Claimant. The proposal was met with considerable resistance. It is clear that some of the operatives adopted PAYE status, only to revert to self-employed status very shortly thereafter. Ms Bibi's payslips and email correspondence confirm this to the case. As a result of the level of resistance, the Respondent decided to invite all affected operatives to elect whether they wished to be employed or self-employed. This exercise was undertaken in January 2015 and included the Claimant;

7.22 The Tribunal is satisfied that within the ensuing process, the effected operatives were informed of the difficulties around retention of the CIS arrangement and the potential to revert to employed status. The Claimant elected to remain upon a self-employed basis. However, the inapplicability of the CIS regime removed the commercial need and justification for the involvement of Hudson. As a result those who, like the Claimant, elected to remain upon a self-employed basis were invited to enter into direct contractual relationship with the Respondent. The Claimant did so on 5 January 2015;

7.23 The documentation signed by the Claimant [p103 et seq] referred to the Respondent as the 'Engager' and identified the Claimant as a 'Freelance Sales Surveyor'. Clause 2.1 confirms the nomination of the Claimant was upon a non-exclusive basis. The same terms and conditions include an entire agreement clause and detailed restrictions upon variation. Appendix A to that document addressed the issue of commission, and the potential for the Respondent to exercise a form of clawback or set off. On or about 9 January 2015, the Claimant signed a form of declaration. The document affirmed the Claimant's understanding of the terms of the arrangement she had entered into with the Respondent. The same document also recorded the Claimant's acceptance of her self-employed status, her ability to send another person to carry out her duties, the absence of any obligation to accept the work in question and/or her freedom to work elsewhere. The document further recorded the absence of any obligation on the Respondent to provide work to the Claimant. As in the case of the documentation previously entered into with Hudson, the Claimant denied any knowledge or appreciation of these terms; going so far as to suggest she had not in fact read them at the time. The Tribunal is unable to accept her evidence on this issue. In the view of the Tribunal, the Claimant was (like her self-employed colleagues) acutely aware of the difficulties which had arisen in connection with the CIS regime and, for good reason, was concerned to ensure that her own preferences were accommodated in the structure of any continued relationship with the Respondent;

7.24 The Claimant was provided with a copy of the Respondent's "External Consultant Information Pack" [p109]. This included some guidance concerning dress codes. It is not in dispute that the Claimant was encouraged to introduce the Respondent's brand to the prospective customer, including some reference to the history, performance and ethos of the company. It is equally not disputed that the Claimant was provided with some limited branded clothing. The Tribunal is satisfied however, that there was no obligation on the part of the Claimant to wear any uniform properly so called and in fact, she did not do so. The dress code information [p113] corresponds with this arrangement and the practice adopted by the Claimant;

7.25 The External Consultant Information Pack expressly declared that those who were freelance were free to 'set their own hours'. The table of appointments provided to the Tribunal [p160] confirms that the Claimant exercised this right. The document confirms that within the period January 2015 to January 2018, the Claimant attended as few as 2 appointments in a week and as many as 18 in other weeks. The same table also records weeks during which no appointments were undertaken. No challenge was made to the accuracy of this document. Given the continued trading activity of the Respondent, the Tribunal considers this to be indicative of some preference being exercised on the part of the Claimant. However, the additional email correspondence within the bundle confirms the Claimant did in fact periodically withdraw her services and instructed that her diary should be blocked (e.g. p168, 171, 174 and 180). The email

correspondence from the Claimant also confirms that there were occasions when no or little work was available for her. The additional correspondence adduced by the Respondent in response to the Claimant's application on the first day of the hearing, confirms that the Respondent had no issue with non-attendance at any appointment, only that they be informed in order to relay the information to the prospective customer. The same documentation confirms that a similar approach was taken to the issue of attendance at training; with the Claimant and her colleagues being invited to confirm whether they were interested in attending such training;

7.25 These arrangements continued throughout the period January 2015 to January 2018. It is common ground that the relationship was at that time terminated by the Respondent. The reason for this decision and its sustainability is not a matter for determination upon the preliminary hearing. Nonetheless, throughout that period, the Claimant continued to file accounts with HMRC and declare herself to be self-employed in that process. The Claimant accepts that (insofar as may be relevant) she discussed the compilation of those documents and her status with her accountant. Whilst the Claimant was questioned upon certain inconsistencies in her filed financial statements, the Tribunal does not make any express finding in respect of them. They are not germane to the issues before the Tribunal and save for issues of credibility have no evidential bearing upon the matters requiring determination at this stage.

ISSUES REQUIRING DETERMINATION

8. The previous case management order confirmed the purpose of the preliminary hearing as:

"The preliminary hearing will determine the issue of employment status under section 230 Employment Rights Act 1996 and whether the Claimant is an employee under a contract of employment or a worker or neither."

9. For the reasons previously set out, this judgment also engages with the consequential question of illegality.

SUBMISSIONS

10. Both parties helpfully provided written skeleton arguments which were amplified by way of oral submission. No discourtesy is intended to either party by the absence of any detail recital of either document.

11. On behalf of the Claimant, counsel submitted that it was necessary for the Tribunal to adopt a multi-factorial assessment of the arrangements which were entered into 2011 and 2015 respectively. She submitted that there were numerous indices present in this case, including mutuality, which support the contention of employment and/or worker status. She further submitted that the 2011 agreement entered into between the Claimant and Hudson was so detached from reality that it was necessary for the Tribunal to imply a contract of employment. For this

purpose, Counsel relies upon the guidance *James v Greenwich* and *Autoclenz v Belcher*. It is said that this same approach applies to the Tribunal's scrutiny of the 2015 contractual documentation.

12. On behalf of the Respondent, it is submitted that the contractual arrangements adopted between the parties were commercially driven and justified. In this respect, Mr Nuttman laid heavy emphasis upon the fact that the Claimant had herself elected to participate in these arrangements; they were not foisted upon her. Further, there was, he says, good reason for her to do so; not least being the flexibility which these arrangements introduced and the higher rate of commission to which the Claimant had access in contrast to her employed colleagues. He categorized the Claimant as a voluntary participant within an optional regime. He further submitted that the essential indices of employment were conspicuously absent.

THE STATUTORY FRAMEWORK

13. Section 230 of the Employment Rights Act 1996 (ERA) provides as follows:

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

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

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

(a)a contract of employment, or

(b)any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

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

14. Regulation 2 of the Working Time Regulations 1998 (as amended) (WTR) contains a similar definition to that to be found in section 230 ERA, namely:

"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;"

THE LAW

15. In **Ready Mixed Concrete v Minister of Pensions and National insurance [1968] 2 QB** Mckenna J observed:

"a contract of service exists if these three conditions are fulfilled: (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master; (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control to a sufficient degree to make that other master; (iii) the other provisions of the contract are consistent with it being a contract of service."

16. He continued:

"An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract…"

17. More recently, the senior courts have affirmed these requirements. However, in doing so they have recorded a need for vigilance on the part of Tribunals to ensure that the deployment of standard terms in circumstances in which there may well be an inequality of bargaining position ought not to be allowed to deflect judicial attention away from the commercial realities of the relationship between the parties.

18. In **Hudson Contract Services Ltd v HMRC [2007] EWHC 73(Ch),** the Court was concerned with the role played by Hudson in arrangements identical to those to which the Claimant became a party in September 2011. The issue before the court was not whether it generated a contract of employment as between Hudson and the contractor, but rather whether there was a contract for services as between the contractor and the client; with the result that Hudson's participation was rendered otiose. It followed that, if this were the case, Hudson could not be discharging the purposes required by the CIS regime. Pumfrey J proceeded from the proposition that, absent, the contention of a sham, the documentation adopted by the parties must be received as consistent with their intentions.

19. A similar starting point was endorsed by the Court of Appeal in **James v London Borough of Greenwich [2008] EWCA Civ 35.** Like the case before Pumfrey J, *James* was also concerned with the classification of a

tripartite relationship; albeit the context was that of agency workers. In the course of his judgment, Mummery LJ distilled the threshold for implication of a contract of employment in the following terms:

"[T]he ET correctly stated that it had to consider 'whether, if in the absence of an express employment contract, an implied contract of employment between the worker and the end user may be deduced from the conduct of parties and from the work done…"

20. He later added:

"In conclusion, the question whether an 'agency worker' is an employee of an end user must be decided in accordance with common law principles of implied contract and, in some very extreme cases, by exposing sham arrangements…As indicated in the authorities there is a wide spectrum of factual situations. Labels are not a substitute for legal analysis of the evidence…"

21. It is clear from the remainder of the decision that the threshold for implication of such a contract is necessity; not desirability.

22. The issue was further considered in **Autoclenz v Belcher [2011] UKSC 41**. In the course of that case Lord Clarke recited the issue which was before the Employment Tribunal and observed:

"This involves consideration of whether and in what circumstances the ET may disregard the terms which were included in a written agreement between the parties and instead base its decision on a finding that the documents did not reflect what was actually agreed between the parties or the true intentions or expectations of the parties."

23. Thereafter, Lord Clarke emphasised that the essential question in each case is and remains what were the terms of the agreement in question? He was equally clear in affirming that the terms of the contract were to be determined by means of established common law principle, including the principle that once the terms of the express contract are established, it is not possible to imply terms which are inconsistent with them; the only route open being an assertion that the express terms do not accurately reflect the agreement between the parties. The weight of the Claimant's case rests firmly upon this same proposition.

24. In **Tilson v Alstom Transport [2010] EWCA Civ 1308**, an agency worker relied upon the so-called commercial reality of the working arrangements to which he was subject; including, so the argument ran, the fact that he had been 'absorbed' into the undertaking of the respondent and, for practical purposes, was performing exactly the same work as that of employed colleagues. Elias LJ made clear that unless the threshold of necessity was made out, there was no basis for implying a contract of any kind. Similarly, he confirmed it was 'impermissible' for an Employment Tribunal to classify an individual as an employee simply on account of the fact that they undertake work which an employee would ordinarily undertake. He observed:

"[I]f as a matter of law, the arrangements have in fact achieved the objective for which they were designed, tribunals cannot find otherwise simply because they disapprove of the employer's motives."

25. He continued:

> "First, the mere fact that there is a significant degree of integration of the worker into the organisation is not at all inconsistent with existence of an agency relationship in which there is no contract between worker and end user. Indeed, in most cases, it is quite unrealistic for the worker to provide any satisfactory service to the employer without being integrated into the mainstream business, at least to some degree…"

26. The issue of implication of a contract of employment was again considered in **Smith v Carrillion (JM) Ltd [2015] EWCA Civ 209.** In the course of delivering judgment in that case, Elias LJ recited the principles governing the importation of a contract; including the fact that the burden was upon the Claimant to show that such a contract should be implied.

27. A similar approach was adopted by Slade J in **Archer Holbin Contractors Ltd v MacGettigan [2009] UKEAT.** In that case, the appellant sought to rely upon a right of substitution contained in the agreement to which Mr MacGettigan was a party. This was classified by counsel for the Appellant as an 'unconditional right' to substitute. In determining that appeal, Slade J rejected the suggestion that the validity of a substitution clause was dependent upon the manner in which the contract had in fact been performed or was otherwise influenced by the perception of the putative worker:

> "Since the EJ did not accept that the substitution clause was a sham provision, on a fair reading of the judgment, the EJ must have concluded that the right it conferred was qualified and so was not inconsistent with the status of 'worker'. In reaching such a conclusion, in my judgment the EJ erred in taking into account the perception of Mr MacGettigan that he was personally obliged to perform the work of a steel fixer and the fact that he personally worked for the company throughout the duration of the contract. In my judgment, on a proper construction of the substitution clause Mr McGattigan was given an unfettered right to delegate the performance of his duties. As a matter of law, such a right is inconsistent with an obligation to perform personally any work or services within the meaning of WTR Regulation 2(1)."

28. A similar point of construction was raised in **Stevedoring & Haulage Services Ltd v Fuller [2001] EWCA Civ 651.**

29. Not surprisingly, both advocates referred the Tribunal to the decision of the Supreme Court in **Pimlico Plumbers Ltd v Smith**; with Counsel for the Claimant placing particular reliance upon the guidance adumbrated by HH Judge Serota in the judgment of the Employment Appeal Tribunal in the same case.

30. The 'contractors' in the *Pimlico* case attended clients pursuant to appointments arranged by the company. In doing so, they were required to wear uniforms and use vehicles bearing the *Pimlico* livery. Significantly, the Employment Tribunal found that these same contractors were required to work a 5 day week; with a minimum of 40 hours per week. The Employment Tribunal concluded that the arrangements precluded employment under section 230 ERA, but that the contractor was a worker within the meaning of section 230(b) and Regulation 2 of the WTR. The Employment Appeal Tribunal upheld this view. Advocating the need for

an holistic approach, the Appeal Tribunal attached particular importance to the notion of *integration*. It also rejected the suggestion that work for more than one putative employer did not *per se* mean that the statutory criteria for 'worker' are not met. In delivering the judgment of the Employment Appeal Tribunal, HHJ Serota observed:

"Although there is no express provision requiring the Claimant to carry out the work personally, that appears to be the purpose of the agreement…
25. Again it is noticeable that there is no reference to any substitution. There are detailed requirements as to timesheet procedures and invoice procedures…
27. The details set out at page 134 clearly envisage the operative will be carrying out the work personally...I feel bound to say that my overall impression is that the Claimant was very closely controlled as the Respondent monitored the whereabouts of its operatives through use of GPS trackers fixed to all the vans."

31. The Court of Appeal upheld the Employment Tribunal's earlier finding that the operatives were workers within the meaning of section 230 (3) (b) of ERA and Regulation 2 of WTR. In doing so, it was emphasized that a qualified right of substitution may or may not be inconsistent with an obligation of personal performance. In this respect, Etherton MR observed:

"I agree with Mr Linden that the issue whether Mr Smith undertook to do or perform personally work or services for PP turns entirely on the terms of the contract between them."

32. Unsurprisingly, the case proceeded to the Supreme Court. In the course of the ensuing judgment reported at [2018] UKSC 29, Lord Wilson observed:

"If he was to qualify as a limb (b) worker, it was necessary for Mr Smith to have undertaken to 'perform personally' his work or services for Pimlico. An obligation of personal performance is also a necessary constituent of a contract of service; so decisions in that field can be legitimately mined for guidance as to what, more precisely personal performance means in the case of a limb (b) worker."

33. Having adverted to the principal authorities, Lord Wilson continued:

"Mr Smith's contracts with Pimlico, including the manual, gave him no express right to appoint a substitute to do his work…But the tribunal found that Mr Smith did have a limited facility to substitute …he would be allowed to arrange for the work to be done by another Pimlico operative…"

34. In addition to the authorities to which reference has already been made, Mr Nuttman referred the Tribunal to a number of first instance decisions in which the Hudson contract has been scrutinized and claims of employer and worker status been rejected. Certain of those judgments are also relied upon by the Respondent in support of its submission on the illegality issue. Whilst read and considered, those decisions are clearly directed to the factual matters detailed within them; such that no wider guidance or point of principal may be derived from them.

DISCUSSION AND CONCLUSIONS

35. From the authorities, the Tribunal derives *inter alia* the following matters of general principle:

35.1 Absent an assertion that a contractual document is a sham, the Tribunal is entitled to proceed upon the basis that the memorandum of agreement generated by the parties at the inception of their relationship is an authentic record of the transaction adopted by them. Where challenge is made to the validity, legitimacy or accuracy of the memorandum of agreement, the burden of proof is upon the Claimant to make good that challenge;

35.2 The classification of the resultant contractual relationship is a matter of legal analysis for the Tribunal. In this respect, the labels adopted by the parties are not determinative. In discharging this task, the Tribunal must be astute to ensure that the commercial realities of the resultant relationship are not ignored;

35.3 Before a Tribunal may imply a contract of employment, it must be satisfied that it is necessary to do so. It is self-evident that desirability is not enough. Rather, the Tribunal must be satisfied that the imposition of such a contract is necessary in order to accurately reflect the commercial realities and commercial dynamic between the parties;

35.4 If it is to be classified as a relationship of employment, the Tribunal must be satisfied that there is *in the least* both an obligation on the part of putative employer to provide the work in question and an obligation upon the putative employee to perform it;

35.5 The question whether a contractual regime confers a right of substitution is a matter of construction; not performance. In consequence, if and to the extent that, the Tribunal is satisfied that the contractual regime confers a right of substitution, this will be unaffected by the subjective perceptions of the putative employee. The fact that the putative employee considered herself bound to perform the work in question does not operate to undermine the quality of that right; albeit that this may inform the Tribunal's assessment as to the commercial realities which may have influenced the exercise of that right itself;

35.6 The classification of the resultant contractual relationship will invariably be dependent upon the Tribunal's assessment of a number of factors, including matters such as control, supervision, personal performance and mutuality of obligation. The assessment of each is fact-sensitive;

35.7 In considering the third component identified by McKenna J in *Ready Mixed Concrete*, the Tribunal is entitled to have regard to those matters which are not only inconsistent with the classification of the

relationship as one of employment, but, also those which are hostile to it; and

35.8 As was noted in **Byrne Brothers v Baird [2001] ICR**, the Tribunal should not lose sight of the fact there may be those who are economically and substantively in the same position of employees, and subject to the same form of dependence upon the putative employer.

The 2011 Hudson Contract

36. The findings of fact made by the Tribunal record that the Claimant throughout intended to participate in this arrangement upon a self-employed basis. At the time of the initial discussions with the Respondent, both parties understood that any work was to be undertaken upon the basis that the Claimant was an independent sub-contractor. Furthermore, the Claimant not only provided Hudson with information to enable her to be registered under the CIS arrangement but also made representations to HMRC as to her eligibility to participate in the scheme itself. In contrast to a number of the cases where contractual terms are in issue, it is not suggested by the Claimant that the terms and conditions to which she confirmed her agreement at the time were the product of undue pressure, disparity of bargaining position, or ignorance. Nor is it suggested that any particular provision of the resultant agreement is inaccurate, or, materially incomplete. Rather, it is submitted by Counsel on behalf of the Claimant that the scheme detailed within the terms and conditions are so far removed from commercial reality as to justify their rejection and the implication of a contract of employment.

37. There is no disputing the fact that the documentation issued by Hudson in September 2011 contained standard terms. Within those terms, the Claimant is identified as a “Freelance Sales Surveyor”. This term is defined by clause 1.3 as extending to the surveyor’s “employees or agents.” Clause 2.1 confirms the appointment by ‘The Engager’ upon a non-exclusive basis. There are specific provisions concerning the standard by which any consultations are to be undertaken (clause 2.3). Read in conjunction with clause 1.3, these standards would apply to the Freelance Sales Surveyor or their employees or agents. Significantly, there is also a duty to notify the Engager in the event that he intends to provide services to any similar entity. There is nothing within this provision (clause 2.5) to preclude the Surveyor from undertaking such work. The clause is confined to a duty of notification. Similarly, whilst the terms include reference to representative status (clause 2.6) it is qualified with a limitation upon authority. More fundamentally, the terms record that there is no obligation upon the Engager to provide work for the Freelance Sales Surveyor (clause 5.2). Furthermore, and subject to ongoing obligations of confidentiality, it is expressly provided that the Freelance Sales Surveyor is free to work for others (clause 7.1) and may decline to accept or act upon any contact provided to her. The terms and conditions also include an “Entire Agreement” Clause. As is customary, this provision affirms the absence of any reliance upon any prior representation.

38. It is not suggested that the terms signed by the Claimant are a sham. Rather, as previously noted, the submission made is of a more general character. In the view of the Tribunal, the commercial realities were quite simple. The Claimant had discussed her position with Mr Dickinson of the Respondent. She had indicated her wish to proceed upon a self-employed basis in circumstances which would not only provide her with flexibility and enhanced commission rates, but would also ensure a high degree of autonomy. Further, in the view of the Tribunal, the Claimant wished to participate in this arrangement upon the most advantageous financial terms. It was for this reason that she expressed her desire to participate within the CIS arrangement operated by Hudson. The Claimant made representations to HMRC to ensure that she did so. Upon this basis, the Tribunal is satisfied that the arrangement represented an option which was voluntarily adopted by the Claimant.

39. The question thus arises whether or not it is necessary for the terms adopted by the parties to be discounted and substituted with the implication of a contract of employment. The Tribunal has no hesitation in concluding that this question is ‘no’. In reaching this conclusion, the Tribunal bears in mind that Hudson was providing access to the CIS arrangement for the benefit of both the Claimant and the Respondent. This is not therefore a situation in which a corporate entity has been interposed between a putative worker and employer, in order to evade the legal consequences likely to arise upon a true classification of their underlying relationship. Rather, the Tribunal is satisfied that this is a case in which the introduction of a tripartite arrangement of the type contained within the terms and conditions adopted by the parties was itself a necessary component if the Claimant’s wish to retain self-employed status was to be achieved. This was not a result which could be achieved upon the basis of a direct contractual arrangement as between the Claimant and the Respondent at that time on account of the fact that both wished for the added assurance of the CIS arrangement. Pursuant to that arrangement, as the terms and conditions record, the Claimant had the right to undertake work for third parties, to decline work offered by the Respondent (or any other Engager) and or to secure the delivery of any requested services by means of third party agents or employees. As a matter of construction, these matters are clear from the terms adopted by the parties at that time.

40. It is no answer for the Claimant to suggest that she did not in fact express any interest in, or, read the terms which were presented to her for signature. The fact of the matter is that they were signed by her. Her signature denotes her acceptance of the applicability of those terms and conditions. More fundamentally, the exercise of construction is not directed to the identification of the parties’ subjective intentions; but the intentions which may be attributed to them upon a proper construction of the agreement which has been entered into. To paraphrase Lord Hoffman in the **Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR**, the construction exercise is concerned with the legitimate

expectation of the parties, having regard to the manner in which they have chosen to record their agreement.

41. Applying these principles to the scheme as recorded in the terms and agreement adopted between the parties in September 2011, the Tribunal is satisfied that the agreement incepted at that time was and remained binding upon the parties as a legitimate and accurate memorandum of the quality of the relationship which had been entered into. In short: the arrangement reflected the parties intentions. This conclusion is supported not only by the Claimant's ready adoption of this arrangement, but also the numerous occasions upon which the Claimant was reminded of the need to re-affirm her eligibility to participate in the CIS arrangement.

42. In the view of the Tribunal, the agreement adopted by the parties in 2011 was not capable of conferring employment or worker status upon the Claimant and did not have that effect. In reaching that conclusion, the Tribunal has drawn upon the following matters:

42.1 There was no obligation upon the Engager to provide work;

42.2 There was not any time any obligation on the part of the Claimant to undertake work personally; whether to the Engager or Hudson;

42.3 The agreement (both in its definition section and in the recital of the Claimant's obligations) recognized the right and entitlement of the Claimant to nominate or appoint others to undertake any work which was to be undertaken. This remains unaffected by the issue of confidentiality;

42.3 Not only was the arrangement non-exclusive in character, it recognized the right of the Claimant to undertake work for third parties. Whilst this right was expressed as being subject to issues of confidentiality, that feature did not operate to alter the character of the scope of the right; only the measures likely to be required to safeguard the wider commercial arrangements of any Engager;

42.4. Whilst there were obligations upon the Claimant (or her nominee) to refer to a relationship and representation of the Engager, there was no form of control exercised over the Claimant; and

42.5 Even where the Claimant had previously communicated a wish to participate in work, she was – like her colleagues -able to withdraw from those arrangements without giving any predetermined form of notice.

The 2015 Agreement

43. As previously noted, the need for a re-evaluation of the Claimant's status arose following the conduct of an audit by Hudson in 2014. This led to the proposal of direct employment with the Respondent. Like her colleagues, the Claimant elected to remain upon a self-employed basis.

Having done so, she was invited to sign a Declaration. She did so on or about 9 January 2015. In the course of that document, the Claimant affirmed her self-employed status, acknowledged her right to send "*any person of my choice who has appropriate skills, qualifications and experience to deliver the services to an acceptable standard…*"(clause 5.2). The same document recorded the Claimant's right to reject the work (clause 5.4) and the absence of any obligation on the part of the Respondent to provide such work (clause 6). These provisions were the subject of repetition and expansion in the course of the adjoining terms and conditions. As such, there is an express provision that: (a) references to the Claimant included reference to her servants or agents (clause 1.3); (b) the Claimant had the right to decline to undertake any work provisionally allocated to her (clause 2.2); (c) the Claimant had the right to substitute; (d) the Respondent was qua Engager, not obliged to provide any work to the Claimant (clause 5.2); and (e) it is expressly provided that the Claimant is free to undertake work for others (clause 7.1).

44. By this means, the Claimant preserved her much cherished flexibility and autonomy, together with continued access to enhanced rights of commission. Like her colleagues, the Claimant wished to exercise control over the frequency with which she worked, the manner of her working and the hours she was prepared to work. There were no fixed hours under this arrangement. The Claimant was not at any time required to undertake any minimum number of appointments. Whilst she was encouraged to communicate the profile of the Respondent, the manner in which the Claimant otherwise carried out her duties were left to the Claimant to determine. The Tribunal is satisfied that the terms as recorded and signed by the Claimant reflected the commercial realities of the relationship which the parties intended to create and give effect to. As such, the necessity for the implication of any alternative employment contract does not arise.

45. In the view of the Tribunal, the agreement adopted by the parties in 2015 was not capable of conferring employment or worker status upon the Claimant and did not have that effect. In reaching that conclusion, the Tribunal has drawn upon the following matters:

45.1 There was no obligation upon the Respondent to provide work;

45.2 There was not any time any obligation on the part of the Claimant to undertake work personally for the benefit of the Respondent;

45.3 The agreement recognized the right and entitlement of the Claimant to nominate or appoint others to undertake any work which was to be undertaken. This remains unaffected by the issue of confidentiality;

45.3 Not only was the arrangement non-exclusive in character, it recognized the right of the Claimant to undertake work for third parties. Whilst this right was expressed as being subject to issues of confidentiality, that feature did not operate to alter the character of the

scope of the right; only the measures likely to be required to safeguard the wider commercial arrangements of the Respondent;

45.4. Whilst there were obligations upon the Claimant (or her nominee) to refer to a relationship and representation of the Respondent, there was no form of control exercised over the Claimant; and

45.5 Even where the Claimant had previously communicated a wish to participate in work, she was – like her colleagues -able to withdraw from those arrangements without giving any predetermined form of notice or reason for doing so.

46. It follows that the Tribunal is satisfied that the Claimant was not an employee or worker for the purposes of section 230 ERA and regulation 2 WTR. In consequence, the Claimant lacks the capacity to advance her claims before the Employment Tribunal and the same stand dismissed.

THE ILLEGALITY ISSUE

47. Given the determination of the status question, the issue of illegality does not arise and it is not necessary for the Tribunal to engage with the question of illegality. However, having been expressly requested by the parties to determine this issue, the Tribunal considers it appropriate to do so to indicate the conclusions it would have reached in the event that employee or worker status had been established under section 230 ERA and/or regulation 2 WTR.

48. On behalf of the Claimant, it was submitted that the issue of illegality does not arise. It is said that in reality, the Claimant did nothing more than participate in an arrangement which was incepted with the participation of the Respondent. Given this position, it is submitted that the Claimant cannot be said to have acted in a manner which rendered the resultant contractual relationship illegal by reason of the manner of its performance. On behalf of the Respondent, it is submitted that in both 2011 and 2015, the Claimant went beyond the role of passive participant and made positive representations to HMRC.

49. In relation to this issue, the Tribunal was referred to the judicial guidance provided in **Enfield Technical Services Ltd v Payne [2008] EWCA Civ 393** and **Patel v Mirza [2016] UKSC 42.** In the course of delivering judgment in *Enfield*, it was said that a genuine claim to self-employment unaccompanied by false representations did not necessarily amount to unlawful performance of a contract of employment. Within the Employment Appeal Tribunal, it was recognised that a bona fide participation in an arrangement to which the wrong tax classification was applied did not generate any issue of illegality of performance. However, subsequent cases point to a more nuanced approach; especially where the arrangement in question has arisen as a result of the positive choice of the putative employee and involves some form of misrepresentation the

purpose of which is to conceal the true state of affairs. In the course of that case, Pill LJ observed:

> "27. For present purposes, I am prepared to assume that there could be tax advantages for the Claimants in claiming to have self-employed status. I do not accept that, of itself, such advantage renders a contract subsequently found to have been a contract of employment unlawfully performed. I do not accept that a characterisation of the relationship held to be erroneous necessarily prevents an employee subsequently claiming the advantages of being, or having been, an employee.
> 28. A contract of employment may, as the cases show, be unlawfully performed if there are misrepresentations, express or implied, as to the facts…."

50. In the same case, Lloyd LJ expressed the matter in similar terms:

> "[I]t is not sufficient, in a case of this kind, to show that the employer's fiscal obligations were not complied with, and that the employee knew of the facts which led to this, namely the mis-characterisation of the relationship as being not one of employment, and participated knowingly in that mis-characterisation.

51. The evidence before the Tribunal confirms that the Claimant did indeed make representation to HMRC in connection with the 2011 contract entered into with Hudson. If that had been and remained the only contractual relationship available to the Claimant, this may well have justified a determination of illegality. However, it is not. It is common ground between the parties that this arrangement was itself superseded by the direct arrangement incepted between the Claimant and the Respondent in 2015. It is this contractual relationship upon which the Claimant relies in support of her claims of unfair dismissal, wrongful dismissal and unlawful deduction from wages. Unlike the earlier arrangement, there is no evidence to support the proposition that the Claimant did anything more than participate in the classification of this relationship as one of self-employment. The Tribunal has determined that the relationship thereby created did not operate to confer employee or worker status upon the Claimant.

52. In the event that the Tribunal had determined the status questions in favour of the Claimant, it would not have ruled that the Claimant was prevented from enforcing the underlying contract with the Respondent by reason of illegality.

Employment Judge Morgan

DATE 15 MARCH 2019