



EMPLOYMENT TRIBUNALS

Heard at: Bristol (by video) **On:** 9 and 10 November 2022

Claimant: Mr John Rowe

Respondent: TGE Gas Engineering Gmbh

Before: Employment Judge E Fowell

Representation:

Claimant In Person

Respondent Mr Richard Oulton of counsel, instructed by Knights plc

JUDGMENT ON A PRELIMINARY ISSUE

1. The claimant was disabled at the material times by reason of his cancer, respiratory lung impairment, leg pain, diabetes and depression.
2. The claimant was an employee for the purposes of the Equality Act 2010
3. The claimant was not an employee for the purposes of the Employment Rights Act 1996.
4. Accordingly the complaint of breach of contract is dismissed.
5. The claimant's remaining claims of discrimination on grounds of age and discrimination will proceed to a hearing on **13 March 2023**.

REASONS

1. These written reasons are provided at the request of the claimant following oral reasons given earlier today. They follow a Case Management Order on 2 August 2022 which listed this hearing to decide whether Mr Rowe was an employee at the relevant times for the purposes of his complaints of discrimination and of breach of contract, and also to consider whether his various health problems amounted to a disability.

Procedure and evidence

2. In addressing those issues I heard evidence from Mr Rowe, and on behalf of the company from Mr Das, the Project Manager who oversaw his work and who took the decision to dismiss him. Mr Rowe is undergoing chemotherapy and so all the usual difficulties and stress of a claimant representing himself at a hearing were compounded by the fatigue and other debilitating effects of his treatment. There is no question that he is *now* a disabled person and so I had regard to the Presidential Guidance on vulnerable witnesses. I encouraged Mr Rowe to ask if he wanted a break at any time, and I asked Mr Oulton to adjust his questions, both to keep them to a realistic minimum and to avoid any technical language as far as possible. In the event however, Mr Rowe was able to deal very well with the questions put to him, and to put his own points to Mr Das in cross examination.
3. There were a number of supporting witnesses for Mr Rowe, although their evidence largely went to the state of relations between Mr Rowe and Mr Das in the build up to his dismissal, not to the issues of disability and employment status. Mr Oulton did not have any questions for them, and so they were not required to give evidence. These witnesses were all former colleagues - Messrs Robert Donaldson, Stephen Blacher, Andy Wilson and Ms Carmen Holloway, together with Mr Bob James who worked for a supplier, called Excel.
4. There was also a bundle of about 250 pages. Having considered this evidence and the submissions on each side, I make the following findings. I will not go into every aspect raised, only those necessary to explain my conclusions. I record my gratitude for the diligent research shown by Mr Oulton in his skeleton argument and submissions, which set out the current state of the law very fairly in what is a developing area.

Findings of Fact

Employment status

5. Mr Rowe is now 68 and has spent his career in the oil and gas industry, working for a variety of large companies on projects around the world. Safety is critical in this sector, particularly the safety and integrity of weld seems on pressure vessels and pipelines, and Mr Rowe is a specialist in the process of welding, its certification and in the necessary testing arrangements.
6. He began as an apprentice with Shell in 1969 and stayed with them as an employee until 1984, so he now has an occupational pension from Shell in addition to his state pension. After leaving Shell he worked for three years for a company in Aberdeen running their welding school. That company went into liquidation and he then began to work on a freelance basis for large companies around the world such as BP or Mobil, starting in Saudi Arabia. His work took him to Norway, Thailand, and then in 1999 he first began to work for the

respondent, TGE, in Bonn, where they are based. Since then, he has been working on and off for TGE in various locations for about 20 years, generally on a contract for services, under which he was not regarded as an employee but submitted invoices.

7. In the last ten years or so his health has declined. He was diagnosed with prostate cancer in 2011. This was treated but returned in 2017 when he was working in China. More recently, and after the end of his time with TGE, he has been diagnosed with Mantle Cell Lymphoma Cancer. As I will go on to describe, he also suffers with scarring to his lung, which may be the result of asbestosis, also diabetes, asthma, depression and leg pain resulting from a back injury.
8. Mr Rowe's last project with TGE was the "Flogas" project in Avonmouth. TGE is a German company and has a small presence in the UK, but has not established a limited company here. Flogas engaged them to work on a gas storage facility in Avonmouth, converting it from liquefied natural gas (LNG) to liquid petroleum gas (LPG). Having obtained this contract, TGE set about assembling a suitable workforce. Much of the original planning and design for the work was carried out off site, but they had to put in place a site team to carry out the work, including the necessary inspections and quality assurance.
9. On 13 October 2020 Mr Rowe had a phone call from a Mr Pross about this project. They knew each other from Mr Pross's time as CEO of the company's Shanghai office. Mr Pross explained that they needed a Quality Assurance/Quality Control ("QA/QC") site manager, and Mr Rowe was interested. He sent over his CV by email and proposed a daily rate of £390. That led to some direct discussions with Mr Ashis Das, the Project Manager, who sent him a Job Description and asked him to submit a more detailed proposal.
10. The job description is at page 52. According to this the role was:

"Ensuring that the plant will be erected and supplied to the owner in line with all pertinent quality requirements. Implementation and supervision of a site quality management system in line with the corporate QHSE management system. Support of corporate QHSE manager in developing the corporate QHSE management system."
11. He was to report to the Construction Manager, who reported in turn to the Project Manager, Mr Das. The main activities were listed as follows:
 - Implement and run a site quality management system in line with TGE IMS and project requirements, in particular contractual requirements. His responsibilities include in particular but are not limited to:
 - Set up and run the organization for site inspections including the coordination with client and 3rd party
 - Follow up and prepare specific project procedures and quality specifications, if

required

- Supervise subcontractor's compliance with requirements, including their preparation of a proper final documentation
 - Represent TGE on any quality related issues towards the client
 - Organize and carry out quality audits of site TGE personnel and subcontractors
 - Organize filing of QC records and compilation of Final Documentation,
 - ensure compliance with ISO 9001 and ISO/TS 29001 and represent TGE in external audits
 - Carry out functions of a site QA/QC engineer where required
 - Supervise and support TGE site QA/QC engineers, where applicable
 - Compile site quality documentation during construction and commissioning.
 - Review and approve sub contract ITP for construction, ensure client HOLD/Witness point as per contract are captured.
 - Prepare monthly quality report for client.
 - Prepare site quality audits and perform.
12. The degree of integration in the business is apparent from this list of responsibilities. That is reinforced by the organizational chart at page 177. This is colour-coded and shows that virtually all of the staff employed on the project were on similar freelance terms, save for Mr Das and some other very senior managers. Mr Rowe was one of four people reporting to the Construction Manager, including two of his supporting witnesses, Mr Belcher and Ms Holloway, whose role is listed as Admin / Secretary. The Construction Manager himself was engaged on the same basis, as were his colleagues, the Subcontract Manager and the HSE Manager. Below Mr Rowe were a number of supervisors or coordinators, and below them on the chart is a large box entitled "various subcontractors"
13. On 26 October 2020, Mr Rowe submitted a two-page letter to Mr Das (page 55) headed
- "Offer to TGE Gas Engineering GmbH and J.E. Rowe who will utilise Gateway Solutions for invoicing and H.M.R.C. tax payments,
- Relating to Services on the Flowgas project in Avonmouth England UK."
14. This set out his proposals in more detail. For the project he would need to relocate from his home in Aberdeen to Bristol and there would be some preparatory work needed in November and December 2020 before moving down. He therefore proposed that his full-time services start on 1 January, at a daily rate of £400 plus VAT, that TGE would pay his flights on the first and last days, that they provide accommodation and travel expenses, a long weekend every month (Friday to Monday), with other holiday (by implication, unpaid) as agreed with the Project Manager and monthly invoices be paid within

14 days. Mr Rowe signed this letter and there was a signature block for someone to sign on behalf of TGE as accepting those terms.

15. By this stage in his career Mr Rowe was familiar with the usual terms and conditions for such arrangements, although normally TGE would provide him with such a document. He put this offer letter forward because nothing was forthcoming from the company and they wanted more detailed proposals. It is however clearly a proposed contract between *him* and TGE: Gateway Solutions are mentioned in the heading merely as a body which would provide invoices, and they are mentioned again in the section on invoices - "The services rendered by me are invoiced by Gateway Solutions Ltd..." There is nothing in this to suggest that they were a party to the contract.
16. During the time in which Mr Rowe had been providing his services on a freelance basis, various ways of working had been used, both by him and his "employers" to avoid him being regarded as an employee. This appears to have been common practice in his industry and no doubt had tax benefits for both sides. For a number of years Mr Rowe had provided his services through a limited company. The tax rules around the use of such limited companies had then changed and he had instead provided his services through an agency, which gave the appearance that he was being provided to the client company by the agency. That is what he had in mind on this occasion - that Gateway would contract directly with TGE to supply his services.
17. So, on 26 October 2020, the same day that he put forward his proposal letter, he also signed what purports to be a contract of employment with Gateway. According to this, he was their employee and they would supply him to clients, charging the clients appropriately for his expertise. There is little in the contract about employment status but it does provide, at clause 2.8 that

"Nothing in this Agreement shall serve to create an employment relationship between the Client and a Consultant. At all times, regardless of the length of any assignment, the Consultant shall remain a Consultant of the Company."
18. And at clause 6.9 it states:

It is not the responsibility of the Client to pay statutory sick pay, maternity pay, holiday pay or any other statutory benefit to which the Consultant may be entitled."
19. The contract did provide that Gateway would indemnify Mr Rowe against any claims for loss or damage and provide him with insurance.
20. A charge rate was specified as equivalent to the national minimum wage. There was then a Commission Plan, which was defined as equivalent to the income generated by him. Hence, his wages were regarded as national minimum wage only, and anything above that which he received from the client company was treated as a bonus. This was no doubt intended to reduce his tax liability.
21. The main feature of the agreement however, which is not clearly stated, is that Gateway would deduct 20% of the money received from TGE for their fees and

admin costs, they would then deduct the relevant tax and national insurance payable by Mr Rowe, and send him the balance. That 20% corresponds to the 20% extra paid by the company in VAT on top of the daily rate.

22. Once again, all this had some advantage for Mr Rowe in that he did not have to sort out his own taxes and he would be presented to TGE as an agency worker, and hence would have some additional rights and entitlements. Although he may not have considered it at the time, that would include protection against discrimination.
23. So, in tandem with this contract between himself and Gateway, Gateway also proposed a contract between themselves and TGE, to complete the picture. On 28 October 2020 they sent an email (page 76) to a Mr Panitzki, the company's senior procurement manager stating:

“We have been passed your details from John Rowe who has secured a contract through yourselves and wishes to use Gateway as their Umbrella Company.”
24. They attached their Standard Agreement for Services (page 78) which provided that they would be supplying Mr Rowe as a consultant, that the agreement would not make him an employee of TGE, that they had the right to substitute him with another consultant, which TGE was not obliged to accept, that the consultant would not be under any supervision, direction or control as to the manner in which the services are provided, and that any assignment may be terminated on 7 days' notice.
25. This document appears to have been ignored by TGE, and it was never signed by either party. Instead, on 3 November 2020, Mr Das sent an email to Mr Rowe thanking him for his offer letter, adding some comments to it and enclosing TGE's own general purchase conditions. That email was also copied to Gateway.
26. Mr Rowe was asked to amend this offer accordingly, whereupon TGE would be able to issue a purchase order. As a result, Mr Rowe sent a slightly revised version of his original letter to Mr Das on 4 November 2020. This time a signature block had been added for Gateway and it had been signed on their behalf.
27. In response, TGE sent out a purchase order for Mr Rowe. This was their normal business practice. It is very much the same document as might be used for any supply of materials or services. On this occasion the stated purchase was a QA/QC Manager, under “an Agreement for Services”, for a period of 320 days at £400 per day plus VAT, i.e. £153,600.
28. The purchase order was addressed to Gateway, on the basis that they were acting as agent for Mr Rowe, were handling his contract and would be providing the invoices.

29. The standard terms and conditions which accompanied the purchase order are also difficult to reconcile with the actual working arrangements. Mr Rowe's evidence was that he was familiar with this document and that it was only used for engaging with subcontractors or buying materials. It is certainly more appropriate for those purposes. Mr Das on the other hand said that they were used for all their recruitment of self-employed staff, which I accept, and so it must follow that all of Mr Rowe's freelance colleagues had these same terms and conditions.
30. Much of it is simply inapplicable and it is entirely generic. By way of example, Section 4 is headed " Scope of Supply / Service". The first sub-paragraph states:
 - 4.1 The supplier will transfer to the purchaser possession and ownership of the supplies, which include all technical documents (also for sub-suppliers) and other documents needed for manufacture, maintenance and operation of the supplies. Said technical documents must be in German or English language and based on the international SI standard system.
31. It goes on to discuss the planning, construction, and manufacture of the supplies, intellectual property rights in them, quality assurance requirements, delivery dates, spare parts, inspection and testing requirements, acceptance and handover procedures, cancellation terms, insurance, export control and much else, which have no relevance to an individual providing his services. It contains nothing whatever about employment status. Nevertheless, these are the terms and conditions which the company says apply, although the only clause on which they rely is one – clause 16 – which allowed them to cancel the purchase order at any time without setting a deadline and without giving reasons.
32. In summary therefore, Mr Rowe put forward a simple and straightforward two-page proposal covering the work, which was the underlying basis on which his services were accepted; he then engaged Gateway, who attempted to substitute their own contract; that second contract was ignored by TGE, who sought to add their own rather meaningless terms and conditions to the original two-page contract.
33. Nevertheless, Mr Rowe began work on a full-time basis from 4 January 2021, working in accordance with his original proposal and reporting to the Construction Manager. In that role he was fully integrated into the operation of the business. Although no fixed hours of work were stipulated, he always arrived early, and had a regular series of meetings on site with representatives of the client, Flogas, and attended inspections such as concrete pouring, to make sure that everything was done properly. Apart from the lack of a fixed start and finish time, it is difficult to identify any real respect in which his role was different to that of an employed member of staff, and even the hours point is largely illusory, as Mr Rowe was in early every day, often as early as 6 am.

34. He was provided with a laptop by TGE, which was the main piece of equipment he needed, although he continued to use his own mobile phone. He had a TGE hard hat or helmet to wear on site, and if he needed any other equipment such as a torch or spirit level he would draw it from the store, as did everyone else.
35. Because of the company's insistence that so many of its key staff members were in fact freelance, there was a lack of some normal business practices such as formal appraisals, and no disciplinary or other policies were issued. However, when I asked Mr Das what the company stance was about discrimination at work he thought that there was a written policy about it which applied to those in Mr Rowe's position, although it does not appear in the bundle.
36. Although no questions were put to them, the statements from Mr Rowe's supporting witnesses also shed some light on his involvement with the company. Ms Holloway explained in her statement that he took her under his wing and showed her how things worked. Mr Belcher mentions that on his second day in the job Mr Rowe took him to Wales to meet a subcontractor, Excel Power, who were doing the piping, structural and mechanical work, and who Mr Belcher was to manage. A lot of Mr Belcher's evidence concerned the lack of proper planning on the part of TGE, but he also explained that he and Mr Rowe were the subject of increasing criticism from Mr Das and the Construction Manager about Mr Rowe's inspection and testing plan (ITP) and this including interference by Mr Das in this plan, something which fell within Mr Rowe's area of expertise. That view is also supported by the statement from Mr James, who worked for Excel. He stated that when Mr Rowe arrived, he described the project more clearly and explained what was expected of them. He also carried out an audit of their facilities, including their welding credentials and fabrication activities. Later on, Mr Rowe gave them guidance and assistance on technical matters and came to the fabrication shop once or twice a week to perform quality control and quality checks.
37. It is clear from all these statements that the relationship between Mr Rowe and Mr Das eventually broke down. His contract was terminated on 12 November 2021. Somewhat ironically, given the extent of disagreement about the contractual terms, Mr Rowe was in fact given one week's notice, expiring on 19 November 2021. This was communicated to him directly, not via Gateway.

Disability

38. As already mentioned, and as recorded at the last hearing, Mr Rowe has had prostate cancer since about 2010. That is therefore deemed to be a disability under the Equality Act without further need for evidence. He also relies on three other conditions as disabilities:
 - a) lung re-section scaring
 - b) type II diabetes, and

- c) depression.
39. In his disability impact statement, Mr Rowe also relies on mantel cell lymphoma cancer and bone marrow cancer (both diagnosed on 29 June 2022) and his leg pain, which are both considered below.
40. Mr Rowe has now disclosed his medical records. Summarizing the main documents, there is a letter from his consultant clinical oncologist in June 2019 recording that he had recurrent prostate cancer, diabetes mellitus and “chronic pulmonary nodularity with bi-apical fibrotic change”. This is a reference to nodules in the lungs, perhaps associated with cancer. Mr Rowe is now awaiting the outcome of tests for asbestosis which he believes may also be the cause of these nodules. The lung scarring is therefore a feature of asbestosis or some other underlying condition.
41. He was seen by a consultant in the chest clinic in June 2019 who recorded recurrent chest infections with probable asthma, and the pulmonary nodules. Mr Rowe reported being breathless and fatigued. There was also mention of ongoing problems with degenerative pain in his spine with ongoing lower back pain and radiation from it.
42. These various conditions are all well documented in the subsequent literature throughout 2019 and 2020 and each is long-standing. There is also mention of previous marked asbestos exposure. His back pain was further investigated in March 2020 and now includes mention of right sided leg pain. The letter from his consultant orthopedic surgeon (at page 207) records that
- “Over the past year and a half he has been really suffering from lower lumbar back pain and pain radiating down the right leg, back of the thigh, lateral aspect of the knee and sometimes into the calf, not really into the foot. ... He feels that over the last year and a half the pain has remained the same, it has not really improved much and he needs a stick to walk any distance. He finds standing or walking even short distances impossible due to the combination of back and right sided leg pain. Sitting down for long periods also aggravates his pain.”
43. He was seen again in April 2020 in the chest clinic. The consultant reported that
- “He has breathlessness on exertion, severe cough and fatigue, out of keeping with objective parameters. He also has a history of high risk prostatic malignancy and chronic apical fibrotic change on imaging which does not fall into any particular pattern of lung disease after previous discussion with one of our Chest Radiologists.
44. His GP records also record treatment over many years for depression. He has been diagnosed with Sertraline since 2007. He also received Citalopram from 2008 to 2020 to combat panic attacks, and both Zopiclone and Promethazine for insomnia.

45. He's also been online range of medication for his cancer treatment, for high blood pressure and for diabetes, together with painkillers for his back and leg pain. The diabetes appears to have been manageable and Mr Rowe accepts that the only real effect was that his left leg retained water and would swell up, making it harder to get around. This essentially compounded the difficulty with his leg pain. In order to avoid the leg pain, he would sit down, at which point the leg would swell up and he would have to move around. However, in March 2021 he was assessed by his doctor as in the pre-diabetic range and under control.
46. Mr Rowe felt that his depression did not have much effect on his work, given his medication, although at times it would be difficult to motivate himself.
47. The main physical difficulty appears to have been caused by his leg pain. He explained, and I accept, that half an hour walk around the site would take him two or three hours. For that reason, he had to come in early so that he could cover his responsibilities, but he would be out of breath and have to rest on a regular basis. It was accepted by Mr Oulton that this would be a substantial adverse effect if it took place on a regular basis, and it seems to me that Mr Rowe was indeed expected to be out and about on site every day.
48. Having set out those findings of fact I will deal separately with the applicable law and my conclusions on employment status and disability.

Employment Status

Applicable law

49. The question of employment status has become a highly technical area come up with a good deal of confusion over terminology. The main statute dealing with employment rights is the Employment Rights Act 1996. That contains definitions of employees and of workers. The definition of a 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 or any profession or business undertaking carried on by the individual.”
50. So, all employees are workers, and workers form a broader category, with a more limited range of rights such as those provided by the Working Time Regulations or to the National Minimum Wage Act.
51. Given these two tests – (a) and (b) – workers are often referred to as “limb (b) workers” for clarity. The essential requirements are simply that there is a

contract, under which someone agrees to do work personally. There is then an exclusion if that work is being done for a client or customer as part of a profession or business undertaking. That would include all sorts of traditional short term work such as engaging a plumber or window cleaner, and also to professional services like that of a barrister or architect. Any number of examples could be given.

52. Claims of discrimination however derive from the Equality Act 2010, which has its own definition of employee. By section 83(2) employment means:

“employment under a contract of employment, a contract of apprenticeship or a contract personally to do work”

53. All that is required therefore is a contract personally to do work. There is no mention of the exclusion for clients or customers of a trade or profession. However, it is now well established that this additional wording makes no real difference. The Employment Appeal Tribunal in **Alemi v Mitchell** [2021] IRLR 262, EAT explained at paragraph 9:

“The position is now reasonably clear. There are three basic categories: (1) those employed under contracts of employment – "employees in the narrow sense" who obtain all of the statutory protections; (2) those who work under contracts to do work personally who are to an extent self-employed but work in circumstances that are akin to employment, who benefit from some statutory protection – often referred to as "limb (b) workers" for the purposes of the **Employment Rights Act 1996** and similar provisions, or "employees in the extended sense" for the purposes of the **Equality Act 2010**; and (3) the "genuinely" self-employed, who are in business on their own account and undertake work for their clients or customers; they benefit from none of the statutory protections.

54. The position of workers was considered even more recently in **Sejpal v Rodericks Dental Ltd** [2022] EAT 91 where it was held that a structured application of the statutory test has to be used in determining whether an individual (A) is a worker for another person (B). Hence:

- a) the first requirement is that A has entered into or worked under a contract with B;
- b) secondly he must have agreed to do some work or provide some services personally for B.
- c) finally, there is still an exclusion if A carries on a profession or business undertaking and B is a client or customer of A's by virtue of the contract.

55. It is this last point which is the most significant here. TGE accept that Mr Rowe was providing services to them personally, under a contract, and the only remaining question is whether he was doing so as part of a professional business whereby they were a client or customer of his.

56. They have in the past being lines of authority dealing with the case of limb (b) workers and separate lines of authority dealing with the test for employment

under the Equality Act, but it is clear from these recent cases that there is now no distinction to be made.

57. In **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181 it was held that in order to determine whether a worker is in fact self-employed (i.e. within this area of exclusion), a focus upon whether the purported worker actively markets his services as an independent person to the world in general, or whether he is recruited by a principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls.
58. It is worth adding one further consideration. Many cases have concerned terms and conditions of employment which the worker in question claims were a sham. The status and relevance of such contracts was considered in **Autoclenz Ltd v Belcher** [2011] ICR 1157 SC. Lord Clarke described the tribunal's task as identifying the "true agreement" between the parties. However, in the Supreme Court decision in **Uber BV v Aslam** [2021] UKSC 5, Lord Leggatt thought that the theoretical basis of **Autoclenz** was unclear. According to counsel for Uber, the written documentation determined the agreement unless the working practices were so inconsistent with it that it had to be regarded as a sham. However, Lord Leggatt held that that neglected the statutory dimension to the enquiry:
- "Critical to understanding the *Autoclenz* case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation ... In short, the primary question was one of statutory interpretation, not contractual interpretation".
59. The question was whether the worker protection legislation, construed purposively, was intended to apply to the relevant relationship, viewed realistically. He went on:
- "The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterized in the written documents determine, even prima facie, whether or not the other party is to be classified as a worker".
60. So, a purposive approach has to be taken in such situation. In other words, did parliament intend that someone in Mr Rowe's position, working full time for a period of months for a single company, should have protection against discrimination at work? That was the purpose of my question to Mr Das about the company's approach to discrimination, and the significance of his response that he believed they did have a written policy preventing it.

Conclusions

61. It requires little further to set out my conclusions on this aspect.

62. The first question is whether there was a contract, and that is accepted by the respondent. The precise terms are unclear, although that is rather a hypothetical point since there are no particular terms in the purchase order terms and conditions on which the company places any reliance.
63. My clear view is that the contract put forward by Gateway to TGE and which was never signed, had no bearing on, and did not form any part of, the contractual relationship. If it did, it would undermine the two page proposal put forward by Mr Rowe, which was the only document which reflected the reality of the working relationship. The right of substitution in the Gateway document therefore has no relevance.
64. That proposal document from Mr Rowe described him as a consultant, providing services on a daily rate and submitting his own invoices, but those points are not significant in the context of a decision about worker status. He is not claiming to be an employee “in the narrow sense”. In this context, the submission of invoices is a fairly neutral factor. In his claim form Mr Rowe described himself as a freelance worker, but there is nothing in the word freelance to prevent him also being a worker. Again, applying the wording in **Alemi v Mitchell**, the category of workers includes those who are “to an extent self-employed”.
65. Applying the test set out above in **Cotswold Developments Construction Ltd v Williams**, it is true that in a broad sense, over the course of his career, Mr Rowe marketed his services as an independent person, but he was then recruited to work for TGE as an integral part of their operations for a substantial period, and that seems far more significant here.
66. This is not a checklist exercise. It is a matter of fact and degree. An architect might provide her services for many clients at the same time; or she may spend a few days or a week on a particular project before moving onto others; but after signing up to a contract for 320 days working exclusively on a particular construction project, that in my view is a very different matter arrangement.
67. That view is reinforced by the degree of integration Mr Rowe had in TGE’s organisation. He was not a *single* outside professional, brought into provide his expertise on a particular area - everyone else he was working with, with very few exceptions, was also on the same terms and conditions. It is very difficult to see how it can be argued that none of them was integrated into the business, or subject to direction and control in the way in which they carried out their duties, in those circumstances. I also bear in mind the specific evidence about Mr Das altering or amending the inspection testing plan which Mr Rowe had drawn up, something about which Mr Rowe chose to cross examine him. All this indicates high degree of direction and subordination.
68. Accordingly I conclude that Mr Rowe was an employee for the purposes of the Equality Act 2010. He was in truth a consultant in name only.

Disability

Applicable Law

69. The test in s.6 Equality Act 2010 is as follows:
- A person (P) has a disability if—
- (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
70. The Equality and Human Rights Commission (EHRC) provide guidance on this question in their [Code of Practice on Employment](#), which may be used in evidence in legal proceedings.
71. According to this (page 286 onwards):
7. There is no need for a person to establish a medically diagnosed cause for their impairment. What it is important to consider is the effect of the impairment, not the cause. What is a 'substantial' adverse effect?
 8. A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.
 9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.
 10. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how they carry out those activities. For example, where an impairment causes pain or fatigue in performing normal day-to-day activities, the person may have the capacity to do something but suffer pain in doing so; or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time.
72. Normal day-to-day activities are also described, in the same terms used in the case management order.
73. In looking at the effect on Mr Rowe of his condition, I also have to ignore the effect of any treatment, such as his medication.
74. Applying these principles it is clear that Mr Rowe's conditions take him well beyond the definition of disability, both collectively and individually.
75. It is apparent from his medical records that the scarring in his lungs has not yet been given a definite diagnosis. It may be the result of asbestosis, or even if a secondary cancer, but in any view it results in severe breathlessness, which makes it very difficult to walk any distance. It is no doubt compounded by his asthma. His position is that he did not rely on asthma as a disability but there

is a danger in being too particular about the condition in question. It is perfectly possible for the adverse effect to be the result of more than one underlying condition, and there is no question that his asthma is also a long-term health problem. From whatever underlying cause therefore, I accept that Mr Rowe has a lung condition, amounting to a disability, which causes severe breathlessness. That appears to be a more appropriate description than lung scarring, with a difference in my view semantic. Mr Rowe describes it in his impact statement as a respiratory lung impairment, and I am happy to accept that description.

76. The next major problem appears to be his back and leg pain. This was attributed by his consultant orthopaedic surgeon to arthritis, and Mr Rowe's position is that he does not rely on arthritis as a disability. Again there is danger in being too particular about the definition, particularly given that Mr Rowe is unrepresented. Whether or not the pain in question is linked to arthritis, applying the ECHR guidance there is no need for a particular medical diagnosis, and it is clear that his leg pain satisfies the definition of a physical impairment.
77. I have given careful consideration to the fact that Mr Rowe's leg problem is not mentioned in his disability impact statement. In those circumstances there is a real risk of unfairness to the respondent in including a condition which they were not prepared to contend with. However I also bear in mind that Mr Rowe is unrepresented and in particular that he may not appreciate that there is no need for a particular diagnosis in every case. Further, he has made Full disclosure of his medical records, being cross examined about this aspect, and as already mentioned, Mr Bolton was prepared to accept that the time it took him to get around the site would be a substantial adverse impact if it was carried out fairly regularly. In those circumstances I see no real prejudice in including this significant additional impairment.
78. The effects of depression are more difficult to assess. My starting point here is that Mr Rowe has been receiving not one but several types of medication over many years. The test of substantial is, again, whether it is "more than minor or trivial". From a common sense point of view it would be surprising if someone went to their GP for treatment for a condition that was minor or trivial, and particularly for so long. It would also be surprising if the GP were then to give a diagnosis and provide treatment over that period.
79. The effect of the depression has to be assessed in the absence of the medication. It is difficult if not impossible to prove, or even to obtain medical evidence about, how he would be in the absence of his medication. In a recent e-mail to the Tribunal he has described the medication he is on and given his views about what would happen if he was deprived of it. He described a return to anxiety, insomnia, headaches, dizziness, tiredness, irritability, flu-like symptoms and nausea. Inevitably there is a degree of conjecture in this. However, given the long period in question and the extent of treatment,

including regular depression questionnaires on seeing his GP, I accept that this condition had a more than minor or trivial effect on his ability to carry out normal day-to-day activities, which will include working, socialising, and motivating himself to carry out the daily chores and personal administration like shopping and cooking.

80. Mr Rowe also relies on his diabetes which is Type 2. This too is difficult to assess, very much for the same reasons, because it was under control at the relevant time, i.e. not causing Mr Rowe any particular ill effects. He is receiving three types of medication for this – metformin, gliclazide and clenin modulate, without which he says that his blood sugar would return to abnormally high levels resulting in risk of heart disease, stroke, kidney disease and other problems. These potential ill effects are well known. Again therefore, on the basis that this is a longstanding condition which has been the result of significant treatment over a long period, and which would otherwise have an adverse effect on his ability to function normally, I accept that this too meets the test for disability.
81. The final question concerns his recent diagnosis with lymphoma. He says that this was diagnosed in June 2022 and was already at stage 4. Hence, it will have been in his system for at least 18 months. I can find no medical evidence to that effect and so that seems an unsatisfactory basis on which to conclude that he had this additional disability in November 2021. The point may be academic. Clearly if he was not aware of it at the time there is no question but that the respondent was unaware of it too, so it is not a condition he would be able to place any reliance on at the final hearing. It also adds little to his existing and accepted diagnosis of prostate cancer.
82. In summary therefore I accept that the following conditions amounted to a disability at the material times i.e. in November 2021:
 - a) prostate cancer;
 - b) respiratory lung impairment;
 - c) leg pain;
 - d) diabetes, and
 - e) depression.
83. The case will therefore proceed to a final hearing on **13 March 2023**. Arrangements without hearing will be set out in a separate case management order.

Case Number: 1404700/2021

Judgment & Reasons sent to the parties:
24 November 2022

FOR THE TRIBUNAL OFFICE