EMPLOYMENT TRIBUNALS

Claimant: Mr J Morrell

Respondent: Manchester Money Ltd

Heard at: Manchester **On:** 28 February 2022

Before: Employment Judge Whittaker

REPRESENTATION:

Claimant: In person
Respondent: Mr Hoyle, Legal Consultant

JUDGMENT

The judgment of the Tribunal is that throughout the working arrangement between the claimant and the respondent, the claimant was a worker.

REASONS

Introduction

1. The claims of the claimant came before me first of all for hearing on Monday 22 November 2021. At that stage it was intended that I should deal with all issues arising from the claims of the claimant, and it was intended that the hearing on 22 November would therefore be a final hearing.

2. A preliminary hearing by way of case management had been held by Employment Judge Allen on 16 June 2021. The respondent had not participated in that hearing. With the assistance of the claimant, Employment Judge Allen was able to prepare a comprehensive written Case Summary and to send out equally comprehensive and clearly expressed Case Management Orders which the parties had to comply with. That was sent to the parties on 12 July 2021. This required exchange of relevant documents to take place by 30 August.

3. I subsequently prepared and sent out to the parties a record of the preliminary hearing which took place before me on 22 November 2021, and I do not propose to repeat here the content of that written summary which was made perfectly clear to everyone.

4. On 22 November 2021 Mr Barker for the respondent was unable to offer any explanation at all as to why the clear Case Management Orders which had been made at the preliminary hearing on 16 June 2021 had simply been ignored. On that basis there was no alternative but for the final hearing which was due to take place on 22 November 2021 to be adjourned until today, 28 February 2022, almost three months later.

5. The relevant Case Management Orders had been complied with before today's hearing, with one important exception. This time it was a failure on the part of the claimant. The respondent presented to the Tribunal two witness statements, one of Mr Barker, the sole Director/Proprietor of the respondent limited company, and another by Mrs Wallace, its Operations Manager. The Case Management Summary sent out by Employment Judge Allen following the hearing on 16 June 2021, where it referred to exchange of witness statements, had clearly at paragraph 3.1 indicated that there was an obligation to exchange witness statements and that "this includes the claimant". The claimant could not offer any explanation as to why he had not properly and carefully read the orders which had been submitted. In any event, he had not submitted a witness statement to the Tribunal, but he had however submitted a written witness statement by another witness, Joanne Thewlis. This statement was signed and the claimant confirmed that this witness would not be giving evidence and that the Tribunal would simply be asked to consider her statement and to give it such weight as was appropriate bearing in mind the witness would not be present.

6. Despite the fact that the papers sent to the parties had clearly indicated that the claimant should prepare and exchange a witness statement, the Tribunal expressed a surprise that upon receipt by the respondent's representatives of the witness statement of Joanne Thewlis, which was sent to them by the claimant, that nobody at the respondent's representatives had thought to contact the claimant to indicate that the Case Management Orders which had been issued required the claimant to prepare and exchange a witness statement. It must have been very obvious that he intended to give evidence. Indeed, it appeared to the Tribunal today that that had simply been ignored by the respondent and that in some way they had thought that they might take advantage of the fact that the claimant had not submitted a witness statement. The proper approach of those representing the respondent ought to have been to have carefully considered the wording of the overriding objective, and presumably being fully aware themselves of the requirement to prepare and exchange a witness statement on the part of the claimant, they should have raised this with the claimant and they should have asked him why he had not submitted a witness statement and they should have pointed out to him his need to do so. No such steps had been taken, and in the opinion of the Tribunal that was in breach of the overriding objective. The only reasonable step which the respondent's representatives ought to have taken would have been to have contacted the claimant, to point out his mistake, and then to have given him a reasonable opportunity to then prepare and exchange a witness statement. However, no such steps had been taken by the respondent's representatives.

7. The Tribunal therefore, for the second occasion, was faced with the dilemma of how to proceed. The Tribunal has limited and extremely valuable resources. The case had been listed for a final hearing in November 2021 but that hearing had to be cancelled because Case Management Orders had not been complied with, particularly by the respondent. The case had therefore ben re-listed, by me, to be heard today, and I had allocated a full day of hearing whereas in November 2021 only three hours had been allocated for the hearing. I believed therefore that it was entirely in accordance with the terms and principles of the overriding objective that the case should proceed by way of a final hearing today, and that in those circumstances the claimant could give evidence orally without reference to a written witness statement provided that at the conclusion of that oral evidence the respondent was given every proper and reasonable opportunity to take instructions from any representatives of the respondent that it needed to consult, in order to be able to properly conduct cross examination of the claimant. That was therefore the procedure which I adopted.

8. I believe it is important to note that for some time I took a volume of evidence from the claimant orally which I recorded by hand. I did so in order to understand what claims the claimant was pursuing and how they were constructed. Once I had understood that it then became clear that the claimant would need to be cross examined, and that he would need to confirm on oath that the information which he had given to me was true. Mr Hoyle took issue with the fact that the claimant had not been required to give all of his evidence on oath from the beginning. I pointed out to Mr Hoyle that it had always been my intention to very clearly require the claimant to confirm the evidence which he had given to me, and to confirm it on oath, and to confirm that it was true and to give him an opportunity to change any of that evidence if any aspect of it was untrue. That is the process which I followed. The claimant took the oath, confirmed that everything that he had said was true and accurate and that he did not wish to make any changes. He was then cross examined by Mr Hoyle and asked further questions by me, and all that evidence was given after the claimant had taken the oath. I was fully satisfied, therefore, that the process which had been adopted was fair and reasonable and that all the evidence given by the claimant should properly be considered as being evidence which was given on oath.

9. As I have said, the respondent submitted two witness statements, one from Mr Barker and one from Mrs Wallace. They both gave evidence in accordance with those statements and were cross examined. They both gave evidence on oath.

10. I was presented with a bundle of documents which comprised some 278 pages. I was referred specifically to some of those pages and I have considered other pages very carefully in arriving at this judgment, in particular the pages of the operating conditions of the respondent and the terms of the agreement which was reached between the claimant and the respondent at the outset. I was however only presented with a blank copy of that document. The claimant was adamant that a signed copy existed, but Mr Hoyle told me that the respondent had made all the reasonable searches that they could and that they could not produce a copy of the signed version. The parties however agreed that I should proceed on the basis that the unsigned document which was presented to me represented the document which had been agreed and signed by the claimant and the respondent at the beginning of the relationship between the claimant and the respondent.

11. Without providing any advance notice to me, Mr Hoyle indicated that he believed that the only fair and reasonable approach for me now to take was to divide today's hearing into two separate parts. No such representations had been made to me at the earlier hearing in November when the respondent was represented. I had been told at the hearing in November 2021 that the respondent was then represented by a Mr Tidy who told me that he was a solicitor. I made a written note to that effect. I have revisited the written notes which I made of that hearing. Mr Hoyle told me today that in fact Mr Tidy was not a solicitor in November 2021, and that in fact he was awaiting admission. It appeared therefore that I had been misled by Mr Tidy about his capacity. I do not consider that to be of any real consequence, particularly when Mr Hoyle told me that his own employer, an HR and Legal Consultancy, had removed Mr Tidy and replaced him with Mr Hoyle in view of Mr Hoyle's level of experience of Employment Tribunals and Employment Tribunal processes and procedure. Again he confirmed to me that he had had responsibility for this case on behalf of the respondent for approximately four weeks. However, at no stage had he written to the Tribunal or to the claimant to put either of us on notice that he now intended, for the first time, to suggest that the hearing should be divided into two separate parts. He said that I should first of all decide whether or not the claimant was a worker or not.

12. It was agreed between the parties that the claimant was never an employee. He was however bringing claims contrary to section 13 of the Employment Rights Act 1996, but it was obvious at a preliminary hearing that was held in June 2021 (which Mr Barker on behalf of the respondent did not participate in) or alternatively until the first hearing before me in November 2021, that neither the claimant nor any representative of the respondent had ever considered for a moment that the claims of the claimant did not require him to be an employee of the respondent company. He was only required to be a worker. I believe that it is extremely important to note that consistent with anything that was said to me today, in February 2022, that at no stage prior to the termination of the agreement between the claimant and the respondent did either the claimant or any representative of the respondent consider for one single moment that there was a third possible category which would define the relationship between the claimant and the respondent, namely that of a worker.

13. The claimant and all representatives of the respondent only ever considered that there were two possible categories, namely that of employee and that of self-employment. The category of "worker" was only something which they came to be aware of in respect of the claimant at the first preliminary hearing in June 2021 (which the respondent did not participate in) or alternatively in the case of the respondent when it received the comprehensive written case summary which was prepared by Employment Judge Allen and sent out to the parties at the beginning of July 2021. Throughout the whole of the relationship between the claimant and the respondent, therefore, both parties had been entirely ignorant and unaware of the possibility that the relationship of the claimant with the respondent might be that of a worker. The claimant freely accepted and acknowledged that in previous jobs he had been an employee, and that he understood that his relationship with the respondent was not that of an employee. He never had any rules or regulations or entitlement to sick pay or to holidays. He accepted that freely and without reservation. He believed that on that basis if he was not an employee then the only category available to him to classify his agreement and working relationship with the respondent was that of someone who was self-employed. However, Employment Judge Allen in June 2021 made it clear that that was not the case, and that the Tribunal need only be satisfied that he was a

worker and not an employee for his claims of non payment of wages to succeed under section 13 of the Employment Rights Act 1996.

14. Mr Hoyle therefore strongly argued that I ought first to decide whether the claimant was or was not a worker, and if I concluded that he was not a worker that I should not then go on to consider the value of any financial claims which the claimant would have against the respondent if he was self-employed. That had never been argued or suggested to me by the respondent's representative, Mr Tidy, at the hearing before me in November. I had indicated at that hearing that it seemed to me that even if the claimant was self-employed that he would in any event be able to bring his claims as damages for breach of contract in the County Court. I suggested therefore that it was in the interests of all parties that I should determine all the issues between the parties today so that there could be a conclusion to the disagreement between them. Mr Tidy, describing himself as a solicitor, did not say anything to suggest that in any way he disagreed with that. I therefore reflected those discussions and that agreement in the written summary which I subsequently sent to the parties following the hearing in November 2021. Despite my clearly expressed intentions, Mr Hoyle did not at any stage write to me prior to the hearing today, on 28 February 2022, to indicate that having taken over supervision of this file that he now felt that I should approach the matter in an entirely different way. This meant that the claimant had no advance notice whatsoever of the application which was to be made by Mr Hoyle. I was therefore anxious to ensure that if I proceeded in that way that the claimant had no objections to it and that he understood what in effect Mr Hoyle was urging me to do. Despite my reluctance at such short notice, and indeed even without any advance notice from Mr Hoyle of his application, I agreed to proceed in that way with the agreement of the claimant. This Judgment therefore addresses only the issue of whether the claimant was self-employed or a worker and does not address the claims of the claimant to be entitled to certain sums of money following the termination of the agreement between the agreement and the respondent. This is a Judgment which addresses the status of the claimant with the respondent from the beginning of his agreement with them until the date that it was terminated.

Findings of Fact

15. After considering the sworn evidence of the three witnesses who appeared in person, and after considering the written witness statement of Joanne Thewlis, and after considering the relevant pages of the bundle of documents (to which reference to relevant pages will be made as below) the Tribunal made the following findings of fact.

16. The claimant worked for the respondent from January or February 2019 until 3 July 2020. He was a Mortgage Adviser. He was remunerated based on cases in which a mortgage was arranged. He was paid a fee by the respondent for arranging the mortgage and he received a percentage of commission which was paid by the company which offered mortgage facilities to the client. This commission was paid directly to the respondent who then passed part of it to the claimant.

17. The parties had included in the bundle a document at pages 262-278 which was headed up "Terms and Conditions of Contract". The parties accepted that these were the terms on which they entered into a contract in January/February 2019. As I

have said above, the Tribunal was never presented with a signed copy of this agreement.

18. The Tribunal carefully considered the written terms of the agreement between the parties, particularly on the basis that the respondent remained adamant that the claimant was at all times self-employed, and Mr Barker refused to accept that was the case.

19. The very first paragraph of the contract between the parties says that at all times the claimant will be a "Registered Individual of the company". It makes no reference or suggestion to the agreement being one where the claimant is operating as someone who is self-employed and operating their own independent business, a business which is independent of the respondent. The claimant was described as "the Registered Individual of the company".

20. In the third paragraph on page 262 the contract addresses the basis on which the claimant will be paid. It confirms that the claimant will be paid for initial and renewal adviser charges. The Tribunal considers it essential to read that clause relating to fees and charges in conjunction with paragraph 5 of the agreement, which begins on page 266. At paragraph 5.1.1 there is clear reference to schedule 2 of the agreement, and this appears at page 277. That document makes it clear that although there is an initial agreement made between the claimant and the respondent about the rate of remuneration which he will receive, page 277 makes it clear that:

> "The rate will then be amended accordingly for the remainder of the Registered Individual's first 12 months projected adviser charges and client's fees received figure."

21. The Tribunal interpreted this as being on the basis of an assessment which would be made by the respondent and the claimant as to the value of those projected charges and fees which would be received by the claimant and the respondent. This clearly envisages, in the opinion of the Tribunal, a consideration by the parties about the level of work which would be completed by the claimant and equally the level of remuneration which the claimant would receive. There is reference to the retention rate "for 2016", and the Tribunal was not told that this had changed by the time that the claimant joined the respondent at the beginning of 2019. That schedule goes on to confirm that "the rate will be reviewed and amended where appropriate annually" and it also goes to say that "this contract will be reviewed annually from the date of appointment and more frequently if required by Manchester Money (Financial Services) Ltd". It goes on to confirm that the respondent will give a minimum of four weeks' notice if any subsequent changes to retention rates are required. In the opinion of the Tribunal, therefore, this clearly indicates that the respondent is retaining the right to review the rates of remuneration which would be available to the claimant and is reserving to itself, without any agreed input from the claimant and specifically without his consent, the ability to review the contract at least annually and if necessary to change it by giving a minimum of four weeks' notice.

22. The wording of this document is important because at pages 64-68 Mr Hoyle had suggested that the terms of that document amounted to a variation of the terms of the agreement between the claimant and the respondent. In the opinion of the Tribunal, the document at pages 64-68 did not amount to a variation. It simply

represented what had been set out by the terms of the agreement to which the Tribunal has referred above, and that included the right of the respondent to change the rate of remuneration and to do so with a minimum of four weeks' notice. In the opinion of the Tribunal, the document at pages 64-68 simply represented the contractual agreement between the claimant and the respondent as set out and described above.

23. Returning to page 262, the respondent sets out a definition of "company property". This makes it clear that the paperwork which would be generated by the work carried out by the claimant was clearly "company property". Indeed the respondent went to quite some lengths in that definition on page 262 to make that abundantly clear.

24. At page 269 under clause 8 there is extensive further information in respect of the protection of business information which is retained by the respondent, and at page 270 there is a series of restrictions which are placed on the claimant following the termination of the contract between the claimant and the respondent.

25. Insofar as the definition of "restricted business" is concerned at pages 262/263, in the opinion of the Tribunal this clearly indicates that it relates to any part of the business which was carried out by the company at the date of termination of the agreement. It relates to business which was carried out by the company during the six months immediately prior to date of preparation; it relates to any work which was being carried out by the claimant, as the Registered Representative, in the 12 months prior to termination. That definition is, in effect, wide enough to cover the whole of the work which was being conducted by the claimant under the terms of this contract with the respondent in the 6/12 months prior to termination. It does not in any way set out any independent business which is being conducted by the claimant in the course of his own business and which is therefore excluded from any restrictions post termination. This clause makes it clear that all the work which was being conducted by the respondent which was in connection with the contract the claimant had with the respondent was work which was classified by the respondent as restricted business. There was no exclusion.

26. Similarly, on page 263 the definition of "customer" and "potential customer" covers all the people that the claimant had contact with as a result of the contract between the claimant and the respondent. It does not set out any extensive exclusions where the claimant is said, for example, to be acting on behalf of his own clients or his own customers, which would not then fall under the restrictions which are imposed on the claimant following termination of employment. All the people that the claimant was dealing with in order to assist them in finding a mortgage would fall under the definition of "customer" or "potential customer". None of those people were considered by the claimant to be separate individual clients of the respondent in his own self-employed business operation.

27. Moving on to page 264, the claimant is again very clearly described as a Registered Individual. That phrase is repeatedly used. At clause 2.1 on page 264 the contract between the parties says, "The company hereby appoints the Registered Individual as its Registered Individual". The use of the word "its" is to be noted.

28. Clause 2.2 goes on to suggest that clients are to have applications submitted to institutions specified by the Registered Individual and approved by the company.

In effect what that meant was that the claimant was only able to submit mortgage applications to financial institutions which were approved by the respondent. The claimant was only in a position to specify certain institutions to clients by reference to an approved list which had been prepared by the company. That was the order in which the operation worked. The claimant was provided with a list of institutions that he could use, but that was a list which was specified and approved by the company.

29. At 2.2 the company reserves the right to exclude the claimant "from dealing with specific customers of the company, as decided and advised by the company". This was not a restriction which would apply, in the opinion of the Tribunal, if the claimant was genuinely operating his independent self-employed business. It would be for him to decide which clients he acted on behalf of and which clients he contacted. The respondent, however, clearly imposed a significant restriction on that at clause 2.2.

30. Returning to the definition clauses at page 263, the Tribunal also noted that a "customer" is defined as someone who was "a customer of the firm" and not a customer of the claimant or a customer of the claimant's own independent business. Furthermore, that definition goes on to confirm that a client is someone from whom the claimant had "obtained business on behalf of the firm". It was not business which the claimant was obtaining on behalf of his own firm. It was business which the claimant was obtaining on behalf of the respondent firm. Furthermore, it goes on to say that the claimant would provide or arrange goods or services "on behalf of the firm". Again, the claimant is not here described as obtaining these services or offering advice through his own independent self-employed business, but he is repeatedly described as doing so "for" "or on behalf of the firm".

31. The Tribunal believes that this wording should be read in conjunction with clause 9 of the agreement which began at page 270 and is headed "Consequence of Termination". On termination the claimant is required to provide a list of all his contracts. Furthermore, at clause 9.6 onwards the claimant is required to cease to promote or market or advertise or sell products on behalf of the company. There are then listed within clause 9 a series of restrictions on the conduct of the claimant by reference to clients that he would have been in contact with or may have had contact with during the course of his contract with the respondent. Again the Tribunal did not consider this to be consistent with the claimant running his own self-employed independent business. The people that he was in contact with, described as the clients of the respondent company, were retained as clients by the respondent company and significant restrictions are then placed on the claimant's ability to contact those people or indeed to have any contact with them or to continue to offer goods or services to them in the context of any alleged self-employed business. It is clear that these clauses are very similar to the type of restriction clauses which would appear in a contract between an employer and an employee. The claimant has acknowledged that he is not an employee but these clauses and the wording of clause 9 relating to restrictions following termination appear very much as if they are clauses which would directly apply in a contract between an employee and an employer. The Tribunal noted, therefore, the extent of the restrictions placed on the claimant.

32. Returning to clause 2.3 on page 264, the Tribunal notes that the contract entitled the company to direct the claimant "at any time to cease, immediately and for any specified or indefinite/definite period from acting or holding itself out as acting on the company's behalf". The wording here is significant. The contract indicates that it

is the claimant who is "acting on the company's behalf". It is not suggesting that there is a relationship between the claimant and the respondent which is one of self-employment. It is indicating that it is a relationship where the claimant is at all times acting on the company's behalf. Furthermore, at clause 2.3.2 it also allows the company to direct the claimant at anytime to "act on the company's behalf in a specified manner or in respect of some but not other specified types of products". Again therefore the retaining to itself the right to impose specific restrictions on the conduct of the claimant in how he works and on the type of products which the claimant is entitled to offer to clients/customers.

33. The Tribunal then considered clause 2.4. That says that the relationship between the respondent and the claimant shall be strictly that of principal and Registered Individual. However, it does not in any way go on to explain what that actually means. It does go on to say that the relationship will not be that of employer or employee, but it does not go on in any way to address the possibility that the claimant might be properly classed as a worker as opposed to being classed as being genuinely self-employed.

34. Clause 2.4 however goes on to say that the company shall be responsible, vicariously liable, for any acts, omissions and representations of the claimant in carrying out "the business of the agency". "Agency" is set out with a capital "A". That would appear to suggest some significance of the use of the word "Agency", but nowhere does that word appear in the definitions headings which are inserted by the respondent at the beginning of the contract between the claimant and the respondent. If the agreement was genuinely intended to be that of principal and agent then no steps whatsoever are taken by the respondent in its written terms to suggest that that is the case, both beyond using the word "principal" and the word "Agency" without seeking to in any way explain to the claimant what those words mean and how they will in any way govern or direct the relationship between the claimant and the respondent.

35. Clearly the company also indicates in clause 2.4 that it will not be bound by acts of the claimant which exceed the authority granted under the provision of the contract. In those circumstances it is clear that the respondent in the terms of this contract is seeking to impose limits of authority and limits of conduct on the part of the claimant in the course of its relationship where, as a Registered Individual, he is introducing applications by clients. The agreement uses the word "client" but the word "client" is not defined in the definitions section. That only relates to the word "customer". As already indicated, "customer" is defined as being "any person or firm or company" who was a customer "of the firm". The Tribunal therefore believes that the word "client" can only be read in conjunction with the use of the word "customer" which is specifically defined at page 263 as being a customer of the firm and someone from whom the claimant has obtained business "on behalf of the firm". The phrase "on behalf of the firm" is repeated in the definition of "customer" at page 263.

36. In the opinion of the Tribunal, where the claimant is told that a policy of professional indemnity insurance is being taken out then that on the face of it is offering the claimant a necessary level of protection in the case of claims being made. That would be an extremely valuable and important protection for the claimant. The respondent is negotiating the terms of the policy and is responsible for payment of the premium. However, by apparent contradiction, even though that is offering the

claimant the protection of a professional indemnity insurance policy, the contract appears then to be suggesting that despite that, the respondent will be entitled to recover the cost of monies from the claimant. The clauses therefore appear to be inconsistent. The clause which provides the claimant with the protection of a professional indemnity insurance premium would clearly appear to suggest that accepting vicarious liability for the claimant is on the grounds that the claimant is working within the firm and organisation of the respondent, whereas if the clauses were genuinely suggesting that the claimant would be responsible for his own omissions and failures then he would clearly have been advised to have obtained his own insurance because the cost of having to pay back monies to the respondent could be prohibitively ruinous for the claimant. The Tribunal was not addressed by either the claimant or the respondent about this apparent inconsistency.

37. At clause 4 the respondent considers it important to set out an entire clause (page 264) which relates to the "Registered Individual's duties". It sets out a series of obligations which the claimant "shall abide by". The contract describes these as the following "rules and regulations".

38. At clause 4.2 it is important to note that the claimant is required to conduct business "only on the company's Terms of Business". He is not therefore conducting business on the basis of the terms and conditions of his own self-employed independent business. He is only doing so and only allowed to do so on the basis of the company's terms of business. Furthermore, the claimant is required to provide a copy of those to every client which would therefore sit in the mind of each client that the relationship between the claimant and the client was governed by the terms and conditions of the respondent and not governed by any terms and conditions which the claimant himself had drawn up on the context of his own independent business. Furthermore, the claimant was required "at all times" to comply with the latest compliance and business submissions standards of the company. They were not his own standards. They were those of the company.

39. Furthermore, the claimant was required to maintain adequate CPD as directed by the company at all times. Again the claimant was therefore not entitled to decide for himself what CPD he should undertake in order to ensure that he was completely up to date with his knowledge and development and what be best for the future development of his own business. It was the respondent that decided what CPD the claimant should undertake.

40. Furthermore, clause 4.2 ends by the claimant being required to maintain all other standards as directed by the company to meet their client obligations and regulations outlined by the FCA. It is the standards of the company which the claimant must at all times meet. It is not his own obligations and regulations which he has drawn up which will govern his relationship and registration with the FCA. It is the rules and regulations of the company.

41. Moving on to clause 4.4 the claimant was required at all times to describe himself as a "Registered Individual". He was not entitled to say that he worked in his own business and that he was nevertheless working with or alongside or through the respondent. He had to describe himself as a Registered Individual, in other words an individual who was registered with the respondent company. It was made clear that he must not hold himself as an employee of the company but he was clearly being

required to hold himself out as someone who was registered with the company. Clause 4.4 goes on to say that all correspondence, business cards or other similar literature must only be on that provided by the company. Again therefore the claimant was not entitled to use his own notepaper relating to his own self-employed business. He had to hold himself out as someone who was an individual registered with the company, and he was required to use their correspondence, business cards and all other literature.

42. At clause 4.8 the claimant is told that he must not publish any advertising material "whatsoever" unless it has been first submitted to and approved for publication by the company, and the company withholds to itself the right to withhold or modify such approval "at its absolute discretion". The respondent therefore was keeping a tight hold on the advertising material which the claimant was entitled to issue and indeed retained its "absolute discretion" as to what advertising material, if any, the claimant was entitled to use beyond that which was issued by the respondent company.

43. At paragraph 4.11.2 the claimant is obliged to allow access from an appointed representative of the respondent company to his own premises for the purposes of examining documents, information and material. In other words, if the claimant was running his own independent business he was under the terms of this contract allowing a third party to come in to examine his books of account and working papers at reasonable notice. I note that if documents are to be copied then the cost of those copies has to be paid by the claimant, despite the fact that the documents and copies would have been taken away for use by the respondent.

44. At clause 4.11.4 on termination the claimant has to immediately hand over all his records relating to business introduced to the company or carried out by the Registered Individual "of the company". Again if the claimant was operating his own self-employed independent business this is not a clause which would be consistent with that level of independence. However, this indicates a level of ownership and entitlement on the part of the company to immediate transfer of records on termination of employment.

45. Consistent with there not being the relationship of employee/employer between the claimant and the respondent, then it is right to acknowledge at clause 4.12 that the costs of any disciplinary investigation are to be borne by the claimant. This would be entirely inconsistent with any suggestion that the claimant was an employee.

46. At clause 4.12.4 the company says that it is allowed to communicate with any client of the claimant whenever, in the reasonable opinion of the directors of the company, it is necessary to do so. If the clients that the claimant was acting on behalf of were the clients of the claimant then it is difficult to see how such a clause would be consistent with the claimant operating his own self-employed independent business.

47. At clause 4.12.5 the company may also from time to time communicate with the client in order to provide a point of contact within the respondent and to assist the client in the absence of the claimant. If this was the claimant's own self-employed business then it would be for the claimant to make such arrangements and not have them imposed upon him by the terms of the contract between him and the respondent.

48. Turning then to clause 5 under the heading “Financial Provisions”, the Tribunal considered this clause a particularly important one, especially in relation to the changes which were made by the document at pages 64-68 to which the Tribunal has already referred. Clause 5.1.1 relates specifically to schedule 2 to which the Tribunal has already referred, because that sets out the initial agreement between the parties as to the rate of remuneration which the claimant would receive. There is specific reference to schedule 2. However, the final words of clause 5.1.1 go on to say that those terms “may be varied by notice in writing from the company to the Registered Individual”. There is no similar right on the part of the claimant to alter the fees by giving similar written notice to the company on the basis that the claimant is operating his own self-employed independent business and is therefore free to decide the financial terms on which his business will operate. When the respondent decided to change the financial arrangements between the claimant and the respondent as evidenced by the document at pages 64-68 then in the opinion of the Tribunal they were doing nothing more than relying upon the specific written authority which it had set out in the contract between the claimant and the respondent at clause 5.1.1.

49. At clause 5.5 and in a variety of other documents to which the Tribunal was referred the claimant had been advised that he would be self-employed and indeed on occasions had ticked various boxes to indicate that he was self-employed. However, at no stage had there been a third option for the claimant to select, that of recognising that he was a worker. On each occasion the claimant was offered two alternatives, namely accept that he was self-employed or accept that he was an employee. The claimant recognised that his relationship with the respondent was very different to that which he had had with previous employers where there was a proper relationship of employee/employer. The claimant therefore understood that if he was not an employee then he had to be self-employed. There was no alternative. Indeed, the respondent operated on exactly the same basis and the Tribunal has set out the background to that misunderstanding by both parties in some detail above. The Tribunal therefore did not consider that clause 5.5 was of any particular weight. It simply recognised that the claimant was being paid gross. He was not under the tax regime which would apply to an employee and both parties, both the respondent and the claimant, therefore felt that the only appropriate tax regime was for the claimant to be paid gross and for the claimant to submit his own accounts. That is equally consistent with the claimant being a worker as it is consistent with the claimant being self-employed, and yet the availability of the third category of the claimant being considered to be a worker was never ever considered at any stage whatsoever by the claimant or the respondent until the first preliminary hearing was held before Employment Judge Allen in June 2021.

50. The claimant was (at clause 5.6) required to keep and maintain accounting records. Although this was imposed on the claimant by the respondent, it is obvious that this would nevertheless be a requirement of anyone who was operating to the standards imposed by the FCA, and the Tribunal did not think that this imposition therefore imposed by the respondent was of any real significance.

51. The Tribunal then considered clause 6.4. This relates to “client ownership”. The respondent makes it very clear in this clause that ownership of the client belongs to the company and that on termination of the contract client ownership shall only be transferred to the claimant at the express written instruction of the client concerned. Again, a clear indication that the clients the claimant was assisting to provide mortgage

facilities were not genuinely the clients of the claimant but were in fact clients of the respondent, and indeed the ownership of those clients is specified at clause 6.4 to be ownership which is maintained and retained by the respondent.

52. At clause 7.1.1 the contract clearly indicates that the contract/agreement can be terminated by either party giving three months' notice. This is at complete odds to what Mr Barker told the claimant at paragraph 6 of his witness statement, on oath. He was adamant that in fact neither party was required at any time to give any period of notice, and that the claimant was entitled just to leave when he felt like it and that ultimately, having given three months' notice, that it was agreed between the claimant and Mr Barker that he would leave after one month. That evidence simply cannot be true. The terms of this contract are very clear. The claimant had to give three months' notice. He was required to do so under this contract. He gave three months' notice and it was then varied by agreement. It is difficult therefore to understand why Mr Barker said what he did in the terms of his witness statement when the wording of clause 7.1.1 is so very clear. It certainly suggests that he had not read the contract or at very least had not done so before preparing his statement and then confirming on oath that it was true-when it was not,

53. The Tribunal also noted, once again, the use of the word "Agency". Again this is described with a capital "A". The Tribunal repeats its observation which it has made previously, which is that that word does not appear in any definitions section and is a word which is not given any definition anywhere in the contract between the claimant and the respondent. It remains unclear therefore why it was used and what it means.

54. The Tribunal then considered carefully clauses 11.6 and 11.7 at page 278, that is the requirement to use the correspondence business cards and other literature as stated at clause 11.6. It is important to note, however, that the literature is to clearly state that the Registered Individual is a Registered Individual "of the company". Mr Barker acknowledged, quite properly, that the claimant could have been registered and authorised by the FCA if the claimant had decided to operate his own self-employed business. He would then have been free to establish his own relationships with clients and indeed to set out and abide by his own terms and conditions. He would obviously have been required to personally satisfy the requirements of the FCA. However, in this clause the claimant is required to be a "Registered Individual of the company" and his registration with the FCA is therefore through the respondent company and not through any self-employed independent business which the claimant is operating in his own right.

55. Furthermore, moving on to clause 11.7 it makes it clear that any act or omission by the claimant would be treated as an act or omission of the company and not an act or omission of the claimant as an individual or indeed an act or omission of any self-employed business that the claimant was operating independently of the respondent. It goes on to reiterate how important it is that the Registered Individual adheres to the "strict rules" which are laid down by the FCA and by the company's manuals. The reference to "manuals" is important. Not only is the claimant being required to adhere by the terms and conditions of this contract, but it is equally clear that he is being required to adhere to the strict rules which are set out in the company's procedures and manuals. He is not free to set out his own procedures and agree those with the FCA. He has to adopt and abide by those which are used by the company, and he is registered with the FCA as an individual with the respondent company and not as an

individual with his own self-employed independent business. That it made very clear indeed by clause 11.8. The claimant's membership with the FCA is entirely reliant upon his continued relationship with the respondent.

56. The Tribunal then considered 11.11 at page 273. Again, further restrictions are placed upon the conduct of the claimant whilst he is a Registered Individual of the respondent under the terms of this contract. Again there is reference to the fact that the clients that the claimant is dealing with are clients "of the company". If the claimant wishes to offer any further products beyond mortgages to any of those clients, who are obviously clients of the company, then the company requires that he obtains the consent of the company. Again therefore this is a further restriction on the way in which the claimant is entitled to operate.

Consideration of the sworn evidence of the witnesses

57. As above, the claimant gave evidence on oath and confirmed that the content of the earlier discussions which he held with the Tribunal were accurate.

58. The claimant told the Tribunal that, as far as he was concerned, at all times he worked within the structure of the respondent and that at all times he worked in accordance with instructions which were issued to him by the respondent. He referred in detail to the sales process which was described at pages 64-68. He pointed out that a call had to be made to the client within one hour of receipt of the client's details. The instructions went on to insist that if there was no answer a voicemail message must be left. The claimant pointed out that if no reply was received then the process had to be repeated.

59. The content of the individual bullet points on page 64 is clear and obvious. It sets out a very detailed analysis of the manner in which the claimant, as a Registered Individual of the company, must deal with the people that the claimant was assisting to find mortgage facilities. It goes on to say that the claimant must build rapport for a minimum of 2-3 minutes. There is a significant degree of micromanagement in the content of the individual bullet points on page 64. The sales process even dictates to the claimant that he must "just let them speak, don't interrupt". This is indeed a significant level of micromanagement. The final bullet point instructs the claimant to tell the client that he would come back to them within 24 hours.

60. The bullet points on page 65 follow a similar tone. It is of course extremely important to recognise and record that the fee which was to be set by the claimant for the work which he would carry out in obtaining a mortgage offer for the client was a fee which was set by the claimant and not by the respondent. However, the first bullet point on page 65 comes with a warning. It goes on to say "we" not "you" should not be losing a single client on fees unless "we" are charging too much. In the opinion of the Tribunal, this clearly indicates that there is an interest on the part of the respondent in the fees which are charged by the claimant.

61. The fourth bullet point on page 65 indicates that the claimant will be required to send "our client pack", referring to the client pack which is prepared by the respondent. The relevant questionnaire and documents and paperwork were at all times the documents which were prepared by the respondent and which the respondent insisted that the claimant use at all times.

62. Page 65 goes on to detail specific and very clear instructions from the respondent to the claimant as to how he is to deal with other aspects of the transaction with the client, including how he should approach the client when indicating to them that a mortgage offer has been negotiated successfully on their behalf. Indeed the claimant is even told to make sure that any indication must be done by telephone and must not be done by email.

63. There is then reference in the sale process that once they have a sale agreed that "we" can move forward with the full application. There is no reference to this being a suggestion where the claimant is operating his own business, and that on that basis he and the client can move forward in this process. There is a clear and repeated reference to "we" with the application process of each client, hopefully to a successful conclusion.

64. Moving on to page 66 the respondent sets out a clear timetable within which cases must go to offer. That must be within four weeks. That second bullet point goes on to confirm that the respondent will impose a financial penalty on the claimant in respect of any cases which exceed that four week limit. Again that wording goes on say that "we" are offering "our" clients a disservice by taking too long to get the offer out.

65. Page 65 goes on to again indicate that certain communications must be made by telephone and not by email. These are very clear and specific instructions which have been prepared by and issued to the claimant by the respondent.

66. As page 65 continues, it is clear that the final stages of the process are not to be handled by the claimant but will be handled by another representative of the respondent by the name of "Vic". They are the person who will mail out the offer document and they are the person who will keep contact with the client and chase to completion.

67. Turning to page 67 it is proper to recognise that the respondent states that of course there will be instances when this process cannot be followed to a tee, but "you need to be following it as near to 100% of the time as you can".

68. When giving his evidence the claimant made specific reference to what is said on page 67 by Mr Barker. Mr Barker says, "you have to put the hours in and be prepared to work 12/13 hour days, maybe weeks at a time". Mr Barker is being very specific about this. By contrast, somebody who is running their own independent business is clearly free to work as many hours as they themselves decide. Mr Barker goes on in that same paragraph to say that if the claimant is not prepared to work the hours which are specified then the earnings are likely to be in the region of £20,000 per annum "and people who only want to earn that will need to look for alternative roles". Furthermore, and the Tribunal considered this to be important, Mr Barker goes on to say that, "the business going forward needs advisers that are going to make significant financial contributions, otherwise we cannot grow". The Tribunal will return to that document when commenting on the evidence which Mr Barker gave on oath. However, it is appropriate at this stage to say that the impression given by Mr Barker when he gave evidence was that he expected that level of financial performance from all the people who were Registered Individuals, and he made great play of the fact that they were in effect required to perform at a certain level in order to ensure the

success of the respondent business. His emphasis was on the success of the respondent business. There was no suggestion that the claimant should work particularly hard in order to ensure the success of his own independent operation. Mr Barker was only concerned with the claimant operating at a specific level of performance in order to ensure the continued success and growth of the respondent business.

69. In the final paragraph at page 67 the note from Mr Barker says that "I will be sending out some new minimum standards/KPIs". As the claimant pointed out, these were standards which he was obviously going to be expected to work to and they were not minimum standards of KPIs that he had been consulted about. They were simply going to be issued and he was going to be expected to work to them. Again in that penultimate paragraph Mr Barker makes clear reference to "my expectations". Mr Barker, in the opinion of the Tribunal, is clearly indicating to the claimant that Mr Barker has certain expectations and that the claimant is going to have to work towards and meet those expectations, and if he does not then the claimant has to be "prepared for difficult conversations".

70. Importantly the Tribunal considered the final few words on page 67 and those on page 68. Mr Barker, at the foot of page 67, says "I want the business to be a huge success". He is referring to the business of the respondent. There is no reference to any independent business of the claimant being successful. Moving on to page 68 Mr Barker says that he wants "everyone to be a part of it". This is obviously a reference to being part of the respondent's business. Mr Barker goes to say, however, that he will "not carry anyone in the future". Mr Barker concludes by saying that he considers this intended approach on his behalf to be a plus that he is taking from the last six weeks and he goes on to confirm that it has changed his mindset and "how we do things in the future".

71. The claimant confirmed that he was sent a list of names of people by the respondent who were looking to find a mortgage to be able to buy a property. The claimant agreed that he was able to cherry pick the leads. The list gave him a brief synopsis of each client and the leads were sent in the form of a list. The claimant himself was free to decide which clients he decided to contact. He decided to specialise in adverse credit cases because they would need a specialist lender. The claimant was adamant, and the Tribunal accepted this as common sense, that more work would be needed to find a mortgage for someone who had adverse credit scores than someone who was in full-time employment and had a positive credit rating. Furthermore, the clients with an adverse credit rating would only be taken on by a specialist lender, and that therefore obviously limited the number of mortgage lenders that the claimant could approach on behalf of this type of client.

72. The claimant was referred to page 38 (which was his online CV) in which on a number of occasions he indicated that he was self-employed, but as the Tribunal has said on a number of occasions this was in complete ignorance of the possibility that the claimant could be a worker. Time and again the claimant was presented with only two alternatives, that of employee or being self-employed. The claimant knew that he was not an employee. He did not receive a steady salary. He did not have sick pay or holiday arrangements. He readily accepted that he knew that he was not an employee but he equally very clearly told the Tribunal that he thought that the only alternative to that was to be classed as being self-employed. The existence of the

category of "worker" only became clear to the claimant at the preliminary hearing held with Employment Judge Allen. Prior to that the claimant knew absolutely nothing about a possible category of worker, and it was equally clear to the Tribunal that neither did Mr Barker on behalf of the respondent. At all times they proceeded in all their negotiations and dealings on the basis that there were only two possible categories, that of employee or self-employment. The Tribunal did not therefore believe that there was anything significant at all by the repeated reference in different documents from both parties to indications and apparent acceptance on the part of the claimant that he was self-employed. The claimant was in ignorance of the fact that there was a third possibility, namely that he was engaged as a worker.

73. Similarly, the claimant accepted that he had to declare his income through a set of accounts and that he was never engaged through a system where the respondent deducted tax and national insurance or made pension arrangements which would be consistent with him being an employee. However, this case is not about whether the claimant was an employee. It is about whether the claimant was a worker. Clearly if the claimant was not an employee then the only basis on which he could arrange to pay the appropriate tax and make the appropriate national insurance contributions was by declaring his income to HMRC. That would be equally consistent with the claimant being categorised as self-employed as it would be if he was categorised as a worker but not as an employee.

74. Returning to the list of leads which was provided by the respondent to the claimant, it was put to the claimant that the fact he was free to choose as many or as few leads to pursue from that list he could choose what he wanted. It was very clearly put to him that that was a matter of personal choice. However, the claimant as adamant that "that was the theory". The claimant told the Tribunal who accepted that was not how it worked in practice. As soon as the respondent believed that the level of leads that he was pursuing fell below their expectations then someone from the respondent would contact the claimant and indicate that they were dissatisfied with the level of leads that he was pursuing and would tell him to increase the level of leads that he was pursuing. In the opinion of the Tribunal, this would be consistent with the written documentation to which the Tribunal has referred above in which Mr Barker expresses his very clear views about the level of performance and what he expects from the Registered Individuals and the consequences of failing to meet the standards which were expected by Mr Barker on behalf of the respondent.

75. Mrs Wallace then gave evidence on behalf of the respondent and again did so on oath. She confirmed that as the Tribunal was at this stage only deciding the status of the claimant that paragraphs 1-5 of her witness statement were the only ones which were relevant.

76. It is right to record that there was a disagreement between Mrs Wallace and the claimant about the existence of a list of "cold" leads that the claimant said had been sent to him which he had then been instructed to follow through. Mrs Wallace denied that that list existed, but the claimant was equally adamant that it did. However, both parties had had months and months in which to produce the relevant documentation and the Tribunal pointed out that if the claimant believed that this document was so important then he ought to have requested it from the respondent and ensured that it was included in the bundle. In the absence of any such search having been conducted, and in the absence of any such document being included in the bundle,

the Tribunal was unable to resolve this complete disagreement between the claimant and the respondent. The Tribunal did not take evidence about the existence or content of such an Excel spreadsheet into account in reaching this judgment.

77. Mrs Wallace confirmed that she carried out the administration connected with and associated with the mortgage applications which the claimant was submitting for clients. She carried out this role between August 2018 and January 2020. After that she confirmed that until his contract was terminated the claimant managed the administration on his own. However, the Tribunal noted that the reason why the respondent had taken some of the fees which were charged by the claimant from the outset was to reflect the fact that the respondent was supplying administration assistance to the claimant. The claimant as therefore charged for that by the respondent through the fee arrangement which applied from the time that the contract began. However, it was obvious that even though the administration services of Mrs Wallace ended, the fee arrangements between the claimant and the respondent never changed to reflect the fact that he was now doing that administration on his own. The claimant did not complain about that to the Tribunal.

78. The final point that was put to Mrs Wallace was what her understanding of "worker" was. She indicated that in all honesty she had no idea what a "worker" was and had no idea that there was a third category of "worker" in addition to someone being self-employed or being an employee. When she asked what she thought a "worker" was, she said that she thought that it would be the equivalent of somebody who was an employee.

79. The Tribunal then turns to the evidence of Mr Barker, which was again given on oath. At paragraph 4 of his witness statement Mr Barker had written that he believed that the claimant was "free to conduct cases in the manner that they chose". Here he was referring not only to the claimant but to other Registered Individuals. The Tribunal has already commented on the evidence of Mr Barker when indicating that the claimant was not, under the terms of the contract, required to give notice to terminate that contract. It is very clear that he was. Again, however, the Tribunal considered that this evidence by Mr Barker relating to how Registered Individuals conducted work for the company, that it was something that they were free to choose how to do, was completely inconsistent with the very detailed written instructions which were issued by the respondent, and indeed therefore issued by Mr Barker. Indeed the Tribunal believes that it amounted to a significant level of management and instruction, even micromanagement.

80. It was therefore very clear to the Tribunal that this evidence given by Mr Barker was simply not a true or accurate description of the arrangement between the respondent and the claimant. There was a very significant level of supervision and instruction which was issued by the respondent to the claimant and, in the opinion of the Tribunal, represented a picture which was very far removed from a suggestion that in fact the claimant was free to conduct cases however he chose.

81. Mr Barker also then discussed how he viewed the relationship between the respondent and the Registered Individuals, including the claimant. Mr Barker very clearly told the Tribunal that the company needed advisers who would make a significant financial contribution to the company. He told the Tribunal very clearly that his company had costs to cover and that if the Registered Individuals, including the

claimant, were not properly contributing and not providing the respondent with enough money to run the company then he needed to be able to make changes. He said that it was necessary therefore for the respondent to impose minimum standards in order to make his business work. He told the Tribunal that the respondent needed to do "what we need to do collectively". He went on to say that he expected the claimant to "help us grow our business" and he then added that in his opinion the relationship with the claimant was "a collective". Mr Barker made it very clear that everyone needed to contribute and grow the business of the respondent. There was no reference or suggestion on the part of Mr Barker to the claimant operating or growing his own independent operation. The whole of the emphasis of the evidence given by Mr Barker was the contribution which the claimant was required to give to the respondent business in order to enable Mr Barker to grow his own business. He went on to say that the Registered Individuals, including the claimant, "have to be bothered about the business". Again there was a very clear emphasis in the evidence given by Mr Barker about the obligation on the part of the claimant to contribute to the business of the respondent, and indeed to continue to contribute to its financial success and indeed its growth.

82. In his closing speech on behalf of the respondent Mr Hoyle made the following points:

(a) He claimed that it was obvious that the intention of the parties was that the claimant should be self-employed from the outset. However, in the opinion of the Tribunal, that ignores the obvious and clear ignorance on the part of both the claimant and the respondent about even the existence of the category of worker. Mr Hoyle said that the Tribunal should find that there was no mutuality of obligation. He pointed out that the claimant did not receive a salary, but then the claimant was not suggesting that he was an employee. Mr Hoyle quite rightly and fairly pointed out that the fees that the claimant charged were set by the claimant. However, in the opinion of the Tribunal, that was more theory than practice. Ultimately, the respondent made it clear that the overall level of fees which was generated by the claimant had to significantly contribute to the ongoing success and growth of Mr Barker's business. The notes which were sent by Mr Barker to the claimant indicated that a certain level of input was required from the claimant and a certain level of income was required, not only to provide the claimant with a level of personal income but equally to provide a significant and appropriate contribution to the financial circumstances of the respondent which would ensure its survival and allow it to grow.

(b) Mr Hoyle indicated that, with the exception of the memo at pages 64-68, there was in fact no evidence of any control being applied by the respondent over the business of the claimant. The Tribunal, however, has made very detailed reference to significant parts of the terms of the contract which was agreed between the claimant and the respondent at the very outset of the arrangement between them. In the opinion of the Tribunal, it is very clear that there are repeated and significant references in that contract to control being implemented by the respondent on work which was conducted by the claimant.

83. By contrast, the claimant indicated that he did not wish to make a closing speech and simply indicated that now being aware of the status of "worker" that it was his opinion that he had been a worker from the moment that he entered into the contract with the respondent.

The Law

Statutory Provisions

84. The definition of an employee appears in section 230(1) of the Employment Rights Act 1996:

> **"(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."**

85. The legislation goes on to define in section 230(3) the concept of a worker. An identical definition appears in the Working Time Regulations 1998 and the Employment Relations Act 1999. The definition is as follows:

> **"In this Act "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."**

Employee

86. The statutory definition simply incorporates the common law concept of what is a contract of service or a contract of employment, traditionally distinguished from a contract for services which is a contract for a self-employed arrangement. There is a wealth of decided cases on what will amount to a contract of employment, beginning with the well-known summary in **Ready Mixed Concrete (South East) Limited v Ministry of Pensions and National Insurance [1968] 2 QB 497**:

> **"The contract of service exists if these three conditions are fulfilled:**
>
> **(1) 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.**
>
> **(2) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.**
>
> **(3) The other provisions of the contract are consistent with it being a contract of service."**

That remains the starting point even though, of course, the language of master and servant is something from which the law has moved on.

87. More recently in **Carmichael v National Power Plc [1999] ICR 1226** the House of Lords confirmed that there is an "irreducible minimum of mutual obligation necessary to create a contract of service". It follows, as was confirmed in **Montgomery v Johnson Underwood Ltd [2001] ICR 819**, that unless there is mutuality of obligation and a sufficient degree of control, there cannot be a contract of employment.

88. If those irreducible minimum requirements are met, the other considerations include how the parties have labelled or characterised their relationship, which is relevant but never in itself conclusive, the treatment of tax and national insurance, and any other matters that form part of the working relationship. Ultimately the task for the Tribunal is to look at all the relevant factors and form an impression, looking at the picture as a whole, as to whether the contract in question is one of employment or not.

Worker

89. The different statutory provision means that there is not the same requirement for mutuality of obligation, control or integration that is necessary for there to be an employment relationship. As Underhill LJ put it in paragraph 24 of his judgment in **Secretary of State for Justice v Windle [2016] ICR 721,** for the claimant "the passmark is lower." That case was concerned with the Equality Act definition of "a contract personally to do work", but the point remains valid.

90. The definition and principles which relate to an employee require a contract "of service" but this is not a requirement of the definition of worker. The emphasis on a worker is less stringent for obvious reasons.

91. Once again it is a matter of overall impression, although the factors which are significant in any particular case may differ depending on the context (see **Hospital Medical Group Ltd v Westwood [2013] ICR 415**). Whether there is a relationship of subordination is frequently important, although one must bear in mind the caveat expressed by Lady Hale in paragraph 39 of her judgment in **Clyde & Co LLP v Bates van Winkelhof [2014] ICR 730** that:

> **"….. there is "not a single key to unlock the words of the statute in every case". There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of "subordination" to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves. As Elias J recognised in [James v Redcats (Brands) Ltd [2007] ICR 1006], a small business may be genuinely an independent business but be completely dependent upon and subordinate to the demands of a key customer (the position of those small factories making goods exclusively for the "St Michael" brand in the past comes to mind). Equally, as Maurice Kay LJ recognised in Westwood, one may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into the other party's operation as to fall within the definition. As the case of the controlling shareholder in a company who is also employed as chief executive shows, one can effectively be one's own boss and still be a "worker". While subordination may sometimes be an aid to distinguishing workers**

> **from other self-employed people, it is not a freestanding and universal characteristic of being a worker.**

Subordination

92. One of the factors which can prove decisive is whether the claimant is in a subordinate position to the respondent or in truth in business on his own account. In **Clyde & Co v Bates van Winkelhof [2014] ICR 730,** which concerned a partner in a solicitors' limited liability partnership, the majority judgment of the Supreme Court delivered by Lady Hale cited a number of other "worker" cases in which the relevance of subordination was discussed.

93. They included **Byrne Brothers (Formwork) Limited v Baird [2002] ICR 667** in which Mr Recorder Underhill QC as he then was said:

> **"The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-a-vis their employers: the purpose of the regulations is to extend protection to workers who are substantively and economically in the same position… ... It is sometimes said that the effect of the exception is that the Regulations do not extend to the "genuinely self-employed"; but that is not a particularly helpful formulation since it is unclear how "genuinely" self-employment is to be defined."**

94. However, subordination is a concept which must be treated with some care. Lady Hale also referred to **James v Redcats (Brands) Limited [2007] ICR 1006** in which Elias J (as he then was) said**:**

> **"The fact that the individual may be in a subordinate position, both economically and substantively, is of itself of little assistance in defining the relevant boundary because a small business operation may be as economically dependent on the other contracting party, as is the self employed worker, particularly if it is a key or the only customer.**
>
> **What the Courts must essentially try to do here, it seems to me, is to determine whether the essence of the relationship is that of a worker or somebody who is employed, albeit in a small way, in a business undertaking."**

95. Ultimately Lady Hale concluded (paragraph 39 of **Clyde & Co**) that:

> **"There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of "subordination" to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves. As Elias J recognised in Redcats, a small business may be genuinely an independent business but be completely dependent upon and subordinate to the demands of a key customer (the position of those small factories making goods exclusively for the "St Michael" brand in the past comes to mind). Equally, as Maurice Kay LJ recognised in Westwood, one may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into the other party's operation as to fall within the definition. As the case of the controlling shareholder in a company who is also employed as chief executive shows, one can effectively be one's own boss and still be a "worker". While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker."**

96. Further, in **James v Redcats** Elias P suggested that the broader definition of "employment" in discrimination law (now section 83(2) Equality Act 2010) could be

considered a useful source of guidance when construing the 'worker' definition. That discrimination definition was considered by the Supreme Court in **Jivraj v Hashwani [2011] UKSC 40** in deciding that an arbitrator did not fall within it. The Supreme Court relied on **Allonby v Accrington and Rossendale College [2004] ICR 1328**, a decision of the European Court of Justice where (paragraph 68) the ECJ said that:

> **"It is clear …. that the authors of the Treaty did not intend that the term 'worker', within the meaning of article 141(1) EC, should include independent providers of services who are not in a relationship of subordination with the person who receives the services ….."**

97. Lord Clarke summarised it as follows in **Jivraj v Hashwani** (paragraph 34)

> **"The essential questions in each case are [. . .] those identified in paras 67 and 68 of Allonby [. . .] namely whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration; or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services. Those are broad questions which depend upon the circumstances of the particular case. They depend upon a detailed consideration of the relationship between the parties. As I see it, that is what Baroness Hale meant when she said that the essential difference is between the employed and the self-employed. The answer will depend upon an analysis of the substance of the matter, having regard to all the circumstances of the case."**

98. Accordingly, if, as seems desirable, the domestic law definition of "worker" with which this case is concerned should be interpreted consistently with the Equality Act definition of "employment" derived from European law, the need for a relationship of subordination has ECJ and Supreme Court approval.

99. The Tribunal was not referred to any case law by either the claimant or by Mr Hoyle. The law and principles relating to status as either an employee or a worker or self-employed has however been the subject of considerable discussion and decision at a high judicial level in the last few years. By way of reminder of those principles the Tribunal considered the case of **Pimlico Plumbers [2018] UKSC 29** in the Supreme Court. That case report highlights a number of the issues which, in the opinion of the Tribunal, need to be considered in this case in order to decide the correct status of the claimant. In that Judgment the following points are made:

(a) The Tribunal should consider whether or not the claimant is presented by the respondent business as being part of their workforce or whether the claimant was genuinely self-employed in business on his own account. These two positions are inconsistent.

(b) The Tribunal should look carefully at the measure of control which is exercised by the respondent over the claimant.

(c) The Tribunal should carefully consider the terms of the contract which was agreed between the claimant and the respondent. In this case it is important for the Tribunal to record that at no stage was it suggested on behalf of the respondent that the terms of the contract to which the Tribunal has referred in great detail above were inconsistent with what happened in practice. The Tribunal therefore approached this Judgment on the basis that the terms of the contract are consistent with the way that the relationship between the claimant and the respondent operated in

practice. In many such cases the representations made by the parties are that the wording in the contract is utterly consistent with what happened in practice on a day-to-day basis. That was not suggested to be the case here. The claimant indicated that he was adamant that the contract represented what happened on a day-to-day basis, and it was not suggested on the part of the respondent that the clauses to which the Tribunal has referred were inconsistent with what happened on a day-to-day basis.

(d) The Tribunal must of course remember that it is a requirement of the status of "worker" that there should be personal performance.

(e) The Tribunal is also required, if the claimant is to categorised as self-employed, to identify how the claimant was a client or customer of the respondent. In order for the claimant to be genuinely self-employed that would have to be the genuine nature of the relationship between the claimant and the respondent.

(f) The Tribunal is reminded by this decision that it has to carefully consider whether there was a genuine obligation on the part of the respondent to offer work to the claimant if he was to be categorised as a "worker", and whether or not there was equally an obligation on the part of the claimant to do work for the respondent if it was offered to him.

(g) To be self-employed and to be truly independent the Tribunal would need to be satisfied that the claimant was operating as an independent person who advertised his services to the world or whether in fact in fact he was recruited to be an integral part of the business of the respondent as a Registered Individual.

(h) The Tribunal would also be required to consider whether or not the picture painted was one of the claimant performing services under the direction of the respondent.

(i) The Tribunal should also look at whether or not the claimant bore any of the commercial risks arising out of the business of the respondent. The Tribunal would equally need to consider whether the business/work which was completed by the claimant was completed by him in a separate economic unit or whether it was work which was conducted within the business of the respondent and was auxiliary to the business of the respondent.

(j) In the **Pimlico Plumbers** case one of the questions considered was whether or not the respondent had a right to supervise or otherwise interfere with "the manner" in which the claimant did the work that he performed. That was therefore an issue which needed to be carefully considered by the Tribunal.

(k) Another consideration for the Tribunal was the terms and method by which the claimant was paid. On what basis were these terms negotiated between the parties?

Decision/Judgment

100. The Tribunal reminded itself that it must concentrate on the statutory wording of the definition of a worker. The Tribunal reminded itself of the legal principles as set out above. In essence, the Tribunal had to decide whether or not the claimant was a key customer of the independent business of the respondent. It had to remind itself that the claimant could be completely dependent upon and subordinate to the demands of the respondent as a key customer as per the comments of Elias J and Lady Hale as set out in the quotations above. The alternative, as per Maurice Kay LJ, was that there could be a picture painted of someone with a high degree of personal autonomy but that nevertheless they were so closely integrated within the business of the respondent so that the claimant fell within the definition of worker.

101. The Tribunal also reminded itself that it must not make its decision on the basis of any one single factor. The obligation of the Tribunal was to consider all the relevant facts available to it and to then stand back and consider, in accordance with the relevant legal principles, what the genuine picture painted was. Was it a picture of the claimant running an independent business, or was it a picture of the claimant being integrated within the business of the respondent to the extent that the claimant was a worker?

102. The decision/judgment of the Tribunal is that throughout the working relationship between the claimant and the respondent the claimant was a worker, and that he was never at any time operating his own independent business. The claimant was at all times presented by the respondent business as being part of their workforce and the claimant was never ever allowed to present himself as being genuinely self-employed in business on his own account. The Tribunal, as below, has carefully looked at the measure of control which was exercised by the respondent over the claimant. It has equally carefully considered the terms of the contract which was agreed between the claimant and the respondent. It has, as below, considered the question of personal performance and equally considered, so far as it is relevant, the question of mutuality of obligation. Was there an obligation on the part of the respondent to offer work to the claimant, and equally was there an obligation on the part of the claimant to do the work? It was essential for the Tribunal to consider the reality of the position and not to consider those principles in the form of isolated legal argument.

103. When considering the essential element of the requirement on the part of the claimant to carry out responsibilities personally in accordance with the definition in section 230 of a worker, the Tribunal considers that it is very clear that the claimant was required to carry out his duties personally. Mr Hoyle, on behalf of the respondent, argued that the clause at page 272 in the bundle, clauses 10.2 and 10.3 of the contract, indicated that the claimant was not required to carry out his responsibilities personally. The Tribunal politely disagrees with that. Clause 10.2 simply says that the claimant was not entitled to employ a sub-registered individual without permission. However, there was no reference to what this actually meant within the body of the contract. In the opinion of the Tribunal, that wording does not in any way affect what the claimant

was expected and even obliged to do in accordance with the terms of the contract between himself and the respondent. The reality of the working relationship was that there was never at any time any suggestion that the arranging or mortgages, the core business of the respondent, would be carried out by the claimant as a registered individual of the respondent other than by the claimant. The reality was that the work was at all times carried out by the claimant. There was never any discussion or suggestion that it would or indeed could be carried out by someone else. The respondent expected the claimant to carry out that work, and the claimant acknowledged that he was obliged to carry out that work personally. It never entered into his head, and it never ended the head of the respondent, that those responsibilities would ever be carried out by anybody other than the claimant. He carried out those responsibilities at all times throughout the existence of the contract and the Tribunal was therefore fully satisfied that he had at all times carried out that work personally in accordance with the definition of a worker in section 230 of the Employment Rights Act 1996. A vague reference in clauses 10.2/10.3 to employing someone else but without any clarification or explanation did not, in the opinion of the Tribunal, alter or affect the day-to-day factual working relationship between the parties.

104. The Tribunal was urged by Mr Hoyle to accept that there was no mutuality of obligation. In other words, that the respondent was never obliged at any time to offer leads to the claimant which he could then seek to convert to mortgages. It was also urged to accept that there was no obligation on the part of the claimant to accept any of the leads. In the opinion of the Tribunal, that was completely contrary to the factual relationship between the parties. Mr Barker was very clear indeed, even forceful, when giving his personal sworn evidence to the Tribunal. He had very high expectations of the claimant and indeed of any other Registered Individual. They were expected by Mr Barker to make a proper and meaningful contribution to the success of his business. They could only do that by accepting (and indeed converting) an acceptable level of the leads which were supplied by the respondent to the claimant. The agreement was that he was expected to accept a certain number of leads and he was expected, in order to make a proper and meaningful contribution to the overall success of the respondent's business, to convert a certain number of those leads. That was the only way in which the claimant would make a meaningful and acceptable contribution to the financial success of the respondent's business. Mr Barker was very clear indeed when giving his evidence about this. He expected, perhaps even demanded, a certain level of contribution from the claimant because without that, as he bluntly pointed out to the Tribunal, the respondent's business would fail. Its income was generated by the Registered Individuals including the claimant. If they did not convert enough of the leads into mortgages then the level of fees required to make the respondent business successful would not be generated, and the level of commissions necessary to make the respondent's business successful, payable by the different financial institutions, would also not materialise. Mutuality of obligation does not exist simply because of the use of various words and phrases. The obligation of the Tribunal is to look at the reality of the relationship between the claimant and the respondent. That reality was best represented by the forceful and clear evidence given by Mr Barker about the need and expectation of the claimant to make a proper and meaningful contribution to the financial success of the respondent.

105. The Tribunal acknowledged that the claimant had a choice as to which leads he pursued but ultimately, as represented by pages 64-68, those choices exercised by the claimant did not produce what Mr Barker considered to be an acceptable level

of financial contribution to the business of the respondent. The response of Mr Barker was clear for all to see. He expected, even demanded, a minimum level of contribution from the claimant. That required a conversion rate and a level of fees generated by the claimant which would make a contribution to the respondent's business which Mr Barker found acceptable. The decision therefore, in the opinion of the Tribunal, is that there was genuinely mutuality of obligation. It would be impossible for the claimant to make the required contribution to the financial success of the respondent business if the respondent business failed to provide the necessary number of leads to the claimant. Similarly, it would be impossible for the claimant to make the necessary financial contribution to the success of the respondent business if he did not generate a sufficient and acceptable level of fees. In the opinion of the Tribunal the respondent company therefore was obliged to send a sufficient number of leads to the claimant to enable him to convert a sufficient number of leads to make the required financial contribution to the success of the respondent company. The Tribunal therefore found that there was mutuality of obligation between the claimant and the respondent.

106. The Tribunal found a number of significant factors which further contributed to its conclusion that the claimant was closely integrated within the business of the respondent as a worker, and found equally that there was a significant number of factors which demonstrated that the claimant was never at any time a key customer in the independent business of the respondent. These factors were – the paragraph numbers as referred to in the Findings of Fact:

(a) Paragraph 19 – The claimant was referred to as a Registered Individual "of the company". Someone who was registered with and met the requirements of the FCA within his own independent business would then engage with the respondent as one of its key customers. However the reality and the wording of the contract did not paint such a picture. He was a Registered Individual of the respondent and not a Registered Individual of his own independent business.

(b) Paragraph 21 – The respondent retained the right to itself to amend, unilaterally, the financial terms of the agreement between the claimant and the respondent. It confirmed that the claimant would need to give a minimum of four weeks' notice. In any event, however, it was the respondent who had the right to change the financial terms between the claimant and the respondent. In the opinion of the Tribunal this was inconsistent with the claimant operating his own independent business. There was no similar right under the terms of the written contract between the parties for the claimant to alter the rates of remuneration and to effectively say to the respondent, if it were a key customer, that the claimant was only going to continue to work with the respondent if the respondent allowed the claimant to change his financial terms of business. It was one-sided contractual right of retention of change in favour of the respondent. This was a significant point which again indicated to the Tribunal that the claimant was not operating his own self-employed independent business.

(c) Paragraphs 23 and 24 – The business information relating to the business written by the claimant was at all times retained by the respondent. If the claimant was operating his own independent business, then the business

information generated in connection with that independent business would not be the information of the respondent but would be the information of the claimant's own independent business.

(d) Paragraphs 25 and 26 – A variety of restrictions were imposed on the claimant following termination of the contract between the claimant and the respondent. As the Tribunal has commented, these are very similar to the type of restrictive covenants that a Tribunal would expect to see in a contract of employment between an employee and an employer. They represent significant restrictions on the future behaviour of the claimant if the written agreement between the parties is terminated. Again this is very much a one-sided set of restrictions. They are all written in favour of the respondent in order to protect the respondent's business. There are no similar restrictions which are written into the agreement which, on termination, will protect the independent business interests of the claimant. In the opinion of the Tribunal, therefore, this again indicates that a significant level of control is being exerted by the respondent over the claimant, not only during the existence of the written contract between them but also following termination of that contract.

(e) Paragraph 27 – As the Tribunal has recognised, the claimant is repeatedly described as being a Registered Individual **"of the company".** Alternatively, the claimant is referred to as **"its**" Registered Individual. This is not the claimant asserting or the respondent recognising that the claimant was a Registered Individual but working within his own independent business.

(f) Paragraph 28 – The respondent placed restrictions on the financial institutions that the claimant could approach in order to place mortgage business. It is entirely conceivable that if the respondent was a key customer of the claimant's independent business the respondent may have placed similar restrictions on the claimant. However, if the claimant was operating his own independent business then the Tribunal would equally have expected to have learnt from the claimant that he had other clients he was providing mortgage advice to and that in those cases, independent of the respondent, he was free to make such recommendations as the claimant independently felt were appropriate. There was no evidence whatsoever to suggest that the claimant ever worked for anybody else or for or on behalf of any other clients than those of the respondent during the time of the contract between the claimant and the respondent. Outside the relationship between the claimant and the respondent, therefore, there was no other evidence of the claimant operating any other business under the auspices of his own independent business.

(g) Paragraph 29 – This is self-explanatory.

(h) Paragraph 30 – Again the Tribunal believes that this wording is self-explanatory.

(i) Paragraph 31 – Again the Tribunal considers this wording to be self-explanatory.

(j) Paragraph 32 – Again this wording is self-explanatory.

(k) Paragraphs 34/35/36 – The wording of the relevant clauses referred to is confusing, and that confusion was never addressed by the parties. In the Tribunal's opinion it would be very significant indeed for the respondent to offer indemnity and to accept vicarious liability for the actions of the claimant, and indeed to then offer the claimant the benefit of a policy of insurance which was taken out and indeed paid for by the respondent. If the claimant was operating his own independent business and the respondent was a key customer of that independent business then the responsibility of liability for errors and mistakes and any claims made would be the liability of the claimant, and it would be his responsibility to arrange indemnity insurance for himself. He would not expect to be able to rely upon the indemnity insurance of the respondent as one of his clients. If there was some confusion as to what was exactly meant by the terms of the contract, it is clear that the claimant was offered the protection of indemnity insurance and that the indemnity insurance would be paid for by the respondent. This again indicated the existence of the status of a worker and not that of the claimant operating his own independent self-employed business.

(l) Paragraph 37 – Turning to the issue of control and integration within the business of the respondent, the Tribunal considered it to be particularly relevant that the respondent had taken care to set out a very comprehensive list of the "Registered Individual's duties". Furthermore, the claimant was told that he "shall abide by" them. This is not the claimant setting up his own rules and regulations – it might be said that it would be extremely odd for the claimant to do so if he was the only person involved in his own independent business. However, the fact that the respondent is setting out such a comprehensive list of duties which the claimant must abide by demonstrates (in the opinion of the Tribunal) a significant level of control and integration in the business of the respondent.

(m) Paragraph 38 – There is often conflict between the terms of business of two different parties. If the claimant was operating a genuine self-employed business then it would be expected to have its own terms and conditions. However, if the respondent was then a key customer of that business then the respondent may still have its own terms of business. In commerce there is often a disagreement as to which terms of business will apply. However, in this case there was no question of discussion about that. The respondent was setting out its own terms of business and making it clear to each and every client that business was being conducted on the respondent's terms of business only. Furthermore, the claimant was required to provide a copy of that to each and every client and in dealings with each of the clients the claimant was "at all times" required to comply with the latest compliance and business submissions standards of the company. Again this demonstrates a significant level of control exerted over the claimant by the respondent.

(n) Paragraph 39 – The Tribunal found this to be particularly significant. If the claimant was operating his own independent business then it would obviously be for him to decide what continuing professional development was best for his business. That simply did not happen. In the relationship between the claimant and the respondent, it was the respondent who retained to itself the right to dictate to the claimant what his continuing professional development (CPD) should be. This again demonstrated to the Tribunal a significant level of both integration and control.

(o) Paragraph 40 – This, in the opinion of the Tribunal, is self-explanatory.

(p) Paragraph 41 – Again this, in the opinion of the Tribunal, is self-explanatory.

(q) Paragraph 42 – Again this is self-explanatory. Any independent business would obviously expect to generate and distribute its own marketing and advertising materials. The company reserved to itself the right to withhold approval of any such information which the claimant wanted to distribute. It retained an absolute discretion to do so. Again this very much pointed towards the existence of a relationship of worker and not one where the claimant was operating a self-employed business which was beyond the control and decisions of the respondent.

(r) Paragraph 43 – This is not of particular significance but if the claimant was genuinely operating his own business then it would, in the opinion of the Tribunal, be most unusual, even extraordinary, for a customer to be allowed access to the working papers of an independent business, and it would certainly be extraordinary for the claimant to be then responsible for payment of any documents which the respondent required to be copied.

(s) Paragraph 44 – If the claimant was operating a self-employed business then its working papers and records would, in the opinion of the Tribunal, belong to the claimant. However, ownership of those documents is retained by the respondent, and indeed have to be handed over on termination to the respondent. The conclusion of the Tribunal was that this indicates a level of ownership and entitlement on the part of the company which would be inconsistent with the claimant running his own independent business.

(t) Paragraph 45 – The Tribunal has reminded itself and reconsidered what it said at paragraph 45.

(u) Paragraph 49 – The Tribunal has made a number of references to what Mr Hoyle, on behalf of the respondent, urged the Tribunal to accept was an obvious conclusion, which was that because the claimant had repeatedly indicated that he was self-employed that he was actually self-employed. The Tribunal does not accept that as a proper or reasonable submission. At no stage did the claimant or the respondent at any time even consider that there was a third category of “worker”. If the claimant was not an employee then it was suggested and acknowledged at all times by both the claimant and the respondent that the only alternative was that

of being self-employed. That is just not the case. The Tribunal did not believe therefore that it was appropriate to attach any significance to the declarations which the claimant had made because they were made entirely in ignorance, on the part of both the claimant and the respondent, of the existence of the category of "worker" under section 230 of the Employment Rights Act 1996. Similarly, the conclusion of the Tribunal in respect of the tax status of the claimant is clearly set out in paragraph 49, and again the Tribunal found this to be of no real significance.

(v) Paragraph 51 – The Tribunal found it difficult to see how, if the claimant was operating his own business, the people that he arranged mortgages for as a result of the leads which were supplied by the respondent, would not be the clients of the claimant and not the clients of the respondent. However, in the terms and conditions of the agreement between the claimant and the respondent, they were at all times described and indeed retained by the respondent as the clients of the respondent. The purpose of the respondent was in obtaining a continuous supply of leads to the claimant from different financial institutions. The responsibility of the claimant was then to convert those leads into business. The people that he was contacting and working with were at all times, under the terms of the agreement, the clients of the respondent. It is very difficult indeed therefore for the Tribunal to see where there is any existence of a self-employed business if the people that the claimant is working for and on behalf of are at all times the clients of the respondent. The respondent retains considerable rights of ownership of those clients and all the information relating to those clients, not only during the existence of the contract between the claimant and the respondent but following termination of that contract in the terms to which the Tribunal has referred above.

(w) Paragraph 54 – The Tribunal considered this to be of particular significance and that it demonstrated that the claimant as "its" Registered Individual was required at all times to use the correspondence, business cards and other literature which was generated and approved by the respondent company. The Tribunal adopts the comments and observations which it has set out in paragraph 54. If the claimant was operating his own independent business then any independent business would design and distribute its own advertising literature. The claimant would describe himself as being someone who worked for his own independent business and he would on his business cards and other literature indicate the name and title of that business to the people that he was arranging mortgages for. It is difficult to see how any of the people that the claimant was assisting would have any idea or suggestion whatsoever that the claimant was anything other than someone who worked within the business of the respondent company. He was "its" Registered Individual. He provided the respondent company's literature and business cards and terms of business to the people that he was assisting in obtaining a mortgage. How therefore would any of the people that the claimant was assisting think anything other than the fact that the claimant was part of and operating within the business of the respondent company? The only way that the Tribunal can answer that question is in

the negative. The Tribunal concludes that the claimant was operating within and was closely integrated in the business of the respondent.

(x) Paragraphs 57-70 inclusive – The Tribunal was urged very strongly by Mr Hoyle on behalf of the respondent to conclude that pages 64-68 represented a complete and significant variation in the contractual relationship between the claimant and the respondent. The Tribunal rejects that suggestion. The Tribunal is satisfied that those pages, where they set out a series of clear instructions and expectations from Mr Barker on behalf of his own respondent company, demonstrated an existing and continuing entitlement on the part of the respondent to control the work of the claimant and to insist that it met a certain minimum level of performance. The Tribunal's clear view is that those pages reflected the true nature of the relationship between the claimant and the respondent from the outset and did not in any way represent any variation to those terms and conditions. That was one of the reasons why the Tribunal refused the requested adjournment which was made by Mr Hoyle. Those pages simply endorsed the level of control and the level of integration which had existed between the claimant and the respondent from the outset.

107. For all the above reasons the Tribunal, when standing back and considering how the relationship between the claimant and the respondent was actually performed on a day-to-day basis whilst at the same time considering carefully of course the written terms of the contract between the claimant and the respondent, the overwhelming view of the Tribunal was that the picture that was painted was one where the claimant had some degree of personal autonomy as to leads he accepted and which he did not, but once he had decided which leads he would accept then after that the relationship between the claimant and those people was very closely and carefully controlled and directed by written instructions, policies and procedures issued by the respondent. He did not therefore have a high degree of personal autonomy. Indeed, it would be fair to say that he had very little personal autonomy in how he conducted his relationship with the people that he was trying to arrange mortgage facilities for. On the other hand, there was a significant level of both control and integration of the claimant within the business of the respondent, and as the Tribunal has indicated above it is almost inconceivable to think how any of the people that the claimant was assisting in finding a mortgage would think anything other than the fact that the claimant was somebody who worked for and within the business of the respondent.

108. The decision of the Tribunal therefore is that at all material times the claimant was a worker within the business of the respondent company.

_____

Employment Judge Whittaker

Date: 14th April 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

10 May 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.