EMPLOYMENT TRIBUNALS

Claimant: Mr G Maclauchlan

Respondent: Short Richardson & Forth Solicitors Ltd

Heard at: Newcastle (via remote CVP link) On: 12 & 13 January 2021

Before: Employment Judge A.M.S. Green

Representation

Claimant: Mr D Northall - Counsel
Respondent: Mr D Flood - Counsel

REASONS

1. The respondent has requested written reasons. For ease of reference, I refer to the claimant as Mr Maclauchlan and the respondent as SRFS or LLP (the predecessor limited liability partnership).

2. I conducted a public preliminary hearing on 12 January 2021 remotely using the CVP platform to determine whether the Tribunal has jurisdiction to hear his claim. We worked from a digital bundle. The following people adopted their witness statements and gave oral evidence:

    a. Mr Maclauchlan.

    b. Mr Berg, a director of SRFS.

    After I heard the evidence, the representatives made closing oral submissions.

3. In reaching my decision, I have considered the documents in the hearing bundle, the oral evidence, and the closing submissions. The fact that I have not referred to every document produced to the Tribunal should not be taken to mean that I have not considered it.

4. By way of general observation, I have no concerns with the witnesses; they were reliable. They answered the questions that they were asked, and they were neither vague nor evasive.

5. Mr Maclauchlan must establish that the Tribunal has jurisdiction on a balance of probabilities.

6. Mr Maclauchlan has claimed holiday pay for the period that he worked for SRFS. A preliminary point has arisen as to whether the Tribunal has jurisdiction to hear his claim because his status is in contention. He claims that he was a worker for the purposes of the Working Time Regulations 1998 ("WTR"), whereas SRFS maintain that he was truly self-employed offering his services to them initially as a sole trader through his business, the Bottom Line ("BL"), and subsequently through his company Kingsmere Finance Directors Ltd ("Kingsmere"). If Mr Maclauchlan is correct, then the Tribunal has jurisdiction. If SRFS is correct, then the Tribunal does not have jurisdiction.

7. On 6 November 2019, Employment Judge Aspden conducted a private preliminary hearing. She identified the issues to be determined at this public preliminary hearing. These were as follows:

    a. Whether Mr Maclauchlan was a worker in relation to SRFS within the meaning of that term in regulation 2 of WTR and Employment Rights Act 1996, section 230 ("ERA") at any time in the relevant period.

    b. If Mr Maclauchlan was not a worker under those provisions, and if he so contends, whether he was a worker in relation to SRFS within the meaning of that term in regulation 36 of WTR at any time in the relevant period.

    c. If Mr Maclauchlan was a worker, whether the worker's contract between him and SRFS:

        i. existed throughout the relevant period (i.e., an umbrella or overarching contract); or

        ii. existed only over shorter periods (e.g., for the duration of an assignment).

8. At the start of the hearing, Mr Northall helpfully clarified his understanding of the issues. He stated that the core question for the Tribunal to answer was whether Mr Maclauchlan was a worker in relation to SRFS within the meaning of that term in regulation 2 of WTR and ERA, section 230 at any time in the relevant period. He invited me to disregard the second question because, under that provision, the obligation to pay holiday pay arises where work has been provided through an agency. In this case, Mr Maclauchlan was not claiming to have supplied his work through an agency. Regarding the third question, there was a contract throughout the relevant period (i.e., from December 2014 to March 2019). It was not the case that there was a stop/start relationship nor was the work assignment based. Mr Maclauchlan provided his work throughout the totality of

relationship. Finally, Mr Maclauchlan was not contending that there had been a series of contracts. Mr Flood agreed with this analysis and I have, accordingly, modified the issues which I must determine.

9. Having considered the evidence, I make the following findings of fact.

10. Mr Maclauchlan has an accountancy background. He first met Mr Berg in 2002. Mr Berg is a solicitor, and, at that time, he was a partner in a firm called Last Cawtha Further. Mr Maclauchlan was the part-time finance director of that firm. Mr Berg left that firm and joined a firm called Short Richardson, which is a predecessor of SRFS.

11. Mr Maclauchlan and Mr Berg met again on 22 March 2012 at an event and they arranged to meet for lunch on 27 April 2012. The two men remained in contact with each other following that meeting and they would go out to lunch regularly, normally on a monthly basis. They would discuss problems at Mr Berg's firm, Mr Maclauchlan's own business issues and the management problems associated with running law firms. Mr Maclauchlan had considerable experience in the financial management of law firms.

12. In 2014, Mr Maclauchlan was operating BL as a sole trader. He had previously run another incorporated business which continued trading until 2016.

13. On 27 October 2014, Mr Berg emailed Mr Maclauchlan [47]. His email recorded what the two men had previously agreed about how Mr Maclauchlan could assist with SRFS. I should state at this juncture, that at that time, SRFS was a limited liability partnership. It subsequently became a limited company. In his email, Mr Berg invited Mr Maclauchlan to come in and conduct a review with a view of undertaking a part-time finance director role. The arrangement would, initially, operate on an experimental basis but the underlying aim of the process was to get the firm working better with clearer financial guidance and an understanding of how it could amend its processes and functionality so that its partners could aim on concentrating on the direction of the business and making key decisions. Mr Berg invited Mr Maclauchlan to give him an estimate and a view of timescale and how he wanted to proceed. The email indicated that the partners agreed with this. The email was signed by Mr Berg acting as a partner of the LLP. The email was addressed to "Geoff" (i.e., Mr Maclauchlan).

14. Mr Maclauchlan responded to Mr Berg's email on 3 November 2014 [49]. He accepted the offer to review the firm's stress financial management and performance with a view to assuming a part-time finance director role. He suggested that the best way to proceed, in the short-term, was for him to carry out a review of the finance function, to include the financial and management accounts, staffing, procedures, and interface with fee-earning personnel. He then listed several items for review as follows:

a. Work in process (age and conversion rates).

b. Aged Debtors.

c. Unbilled Disbursements.

d. Aged Creditors.

e. Cash flow forecasts.

f. Availability of management reports for Members, Fee-Earners and Accounts personal.

g. Year-end and management accounts.

h. Bank facility arrangements.

i. IT systems including time-recording and data entry procedures.

15. Mr Maclauchlan indicated that this process would require conversations with Members, Practice Director, Accounts staff, and any other senior lawyers as deemed appropriate. He then went on to say that he would produce a report which would prioritise the areas most in need of further attention and set out a plan for addressing the issues identified. He anticipated that the exercise could be carried out in two or three days for which he would charge a fee of £800 plus VAT. Thereafter, he suggested a daily rate of £400 plus VAT for a period of up to 6 months during which they could both satisfy themselves that a part-time finance director is the right move for the business at that stage. He signed the email "Geoff".

16. On 4 November 2014, Mr Berg responded to Mr Maclauchlan's email signifying that the LLP agreed with his proposal [50]. The email was addressed to "Geoff" and signed by Mr Berg as a partner of the LLP.

17. In his evidence, Mr Berg agreed that the correspondence that I have just referred to was between the LLP and Mr Maclauchlan. He said that the review was the precursor to deciding whether it would be appropriate for Mr Maclauchlan to assume a part-time finance director role. At that time, it is clear that Mr Maclauchlan had not mentioned BL to Mr Berg and Mr Berg confirmed, under cross-examination, that he had not heard of BL when the emails passed between the two men. He accepted that Mr Maclauchlan was not holding himself out as working for BL and the arrangement was between the LLP and Mr Maclauchlan. Mr Maclauchlan was to carry out the work.

18. It is common ground between the parties that no formal agreement was ever drawn up to regulate the relationship.

19. In his witness statement, at paragraph 14, Mr Berg stated that he understood that Mr Maclauchlan had been retained as an independent

contractor. This was challenged under cross-examination. It was put to him that there was nothing in the emails that pointed to or referred to Mr Maclauchlan being engaged as an independent contractor. Mr Berg accepted that, but he qualified this by stating that the fact that the proposed fee was VAT inclusive suggested to him that Mr Maclauchlan was offering his services to the LLP as an independent contractor. However, he accepted that at the time when the arrangement was being formalised, there had been no discussion between himself and Mr Maclauchlan about his status although he believed that it was never intended to put Mr Maclauchlan onto the payroll and to tax his earnings under the PAYE scheme. On assessing this evidence, it is clear to me that the LLP was dealing with Mr Maclauchlan as an individual. There is nothing to indicate any discussion about his status as an independent contractor. The emails were addressed to Mr Maclauchlan in person. I accept that there was no evidence to suggest that it was intended that Mr Maclauchlan should go on the payroll and be employed and taxed as such.

20. On 27 November 2014, Mr Maclauchlan submitted his invoice for the work that he had completed [130]. The invoice number was TBL 426 and was for £800 plus VAT. The total VAT inclusive amount was £960. The invoice was issued to the LLP in BL's name. It was for the provision of accountancy services-Financial Management review. The VAT reference number was 813772526. In his evidence, Mr Maclauchlan explained that whilst this was the first invoice to be issued to the LLP, he did not want to give the impression that BL had not done work elsewhere.

21. Mr Berg was happy with the financial review and more work was passed to Mr Maclauchlan. This was confirmed in an email addressed to "Geoff" from Mr Berg on 23 December 2014 [51]. Mr Berg thought that Mr Maclauchlan's involvement as finance director would be invaluable. Mr Maclauchlan responded by email on 24 December 2014 signing himself off as "Geoff".

22. More invoices were issued. The next invoice issued to the LLP was on 19 December 2014 under reference TBL 431. This was for £2000 plus VAT. The total invoice was £2400 for five days work. This invoice was also issued by BL. I have discussed other subsequent invoices below.

23. In his oral evidence, Mr Berg was asked about the role that Mr Maclauchlan played in the LLP and subsequently in SRFS. The overall picture that one forms from what he said is that Mr Maclauchlan became increasingly integrated into the operation of the LLP and subsequently in SRFS. The following are examples:

    a. The LLP had a banking and overdraft facility with the Yorkshire Bank. Their relationship manager, Mr Steve Wilson, emailed Mr Berg and his partner, Mr Andrew Swan, on 16 January 2015 in respect of the annual review meeting. Mr Berg forwarded that email to Mr Maclauchlan on the same day stating that it would be a good

opportunity to meet with Mr Wilson and wanted to know whether he could attend the review meeting [52]. Mr Maclauchlan attended that meeting and was introduced to Mr Wilson as the finance director representing the interests of the LLP.

b. In an email dated 21 January 2015, Mr Berg sent an email to all of the fee earners indicating that he and Mr Maclauchlan were coming round to see them to seek their views on the fees that they anticipated billing before the end of the financial year [53]. In his oral evidence, Mr Berg confirmed that he and Mr Maclauchlan went round the office during which they spoke to every fee-earner to get a sense of what they would be billing at the end of the financial year.

c. Mr Maclauchlan was issued with an SRFS dedicated email address. He was also provided with an alternative SRFS private email address which was used by the partners and senior management to discuss confidential and sensitive matters.

d. Mr Maclauchlan was given a set of keys to the SRFS premises which gave him access to all areas. In November 2015, he was also given unrestricted access to SRFS IT systems. He had remote access to the SRFS server. This was because he did not always work in the office.

e. Mr Maclauchlan had his own dedicated office in SRFS' premises. He did not share that office with anyone else other than the LLP's Members (i.e., partners) or its directors when the business was transferred to SRFS. He used the office to review confidential and sensitive financial information relating to the LLP or SRFS as the case may be. He also did work for another client, Closegate, whilst in that office. Mr Berg did not appear to have a problem with that, and he did not think it appropriate to enquire into his business dealings. He knew about the relationship with Closegate because of the business lunches that he had with Mr Maclauchlan before 2014.

f. As time went by, the amount of time that Mr Maclauchlan spent working at SRFS increased. For example, on 16 March 2016 Mr Berg emailed Mr Maclauchlan to confirm a conversation that both men had where it was agreed that the LLP wanted him to increase his time commitment up to 10 days per month. The agreed fee was £4000 plus VAT. This was to be for a trial period of 4 months after which both sides could reassess where they wanted to go. Mr Berg stated that the LLP was reliant on Mr Maclauchlan in his capacity as finance director and he asked him to be very candid with them if he felt his increased fees were putting too much pressure on the LLP's cash flow [64]. The email was addressed to "Geoff".

g. On 26 April 2016, Mr Maclauchlan emailed Mr Berg asking for his earlier message to be corrected to 8 days per month and for

authorisation that is monthly payment could be increased to £4800 for 4 months. He also asked for a formal agreement and whether it would be acceptable for Mr Maclauchlan to have SRFS business cards. Mr Berg replied to that email to correct the error and confirmed that his time commitment was to be increased to 8 days per month. He also agreed to the increase payment being made to him and confirmed that there should be a contract of services between them. He agreed that business cards would be a good idea and steps would be taken to arrange that [65]. In his oral evidence, Mr Berg confirmed that no formal agreement was produced or entered into. Business cards were produced at their cost and were issued to Mr Maclauchlan which were no different to those given to other members of the LLP or subsequently in SRFS. He accepted that anyone looking at Mr Maclauchlan's business card would believe that he was the finance director of the LLP.

h. On 3 May 2016, Kingsmere was incorporated. Mr Berg confirmed in his evidence that as a consequence of that, no agreement was drawn up and the underlying arrangement between Mr Maclauchlan and the firm did not change. The only thing that changed was that invoices were issued to the firm in the name of Kingsmere. Nothing was discussed about that fact. The Tribunal was taken to a letter written by Mr Maclauchlan to HMRC on 16 June 2016 [129B] which is only relevant insofar as it provides some insight into Mr Maclauchlan's own understanding of his relationship with SRFS. He refers to them as a new client and that, with effect from 1 April 2016, his finance director services were being supplied through Kingsmere. He explained that BL had effectively ceased trading at the end of March 2016.

i. On 17 February 2017, Mr Maclauchlan put a further business proposal to Mr Berg. In essence, he proposed taking of responsibility for the following areas in addition to Finance and Accounts:

    i. HR, including non-legal recruitment and payroll.

    ii. IT.

    iii. Facilities management.

    iv. General administration (e.g., insurances, archiving arrangements et cetera).

    He was not proposing to do all of the work himself and would look to outsource individual areas such as payroll and HR. The current arrangement was for him to be paid for 8 days per month, but he was averaging 11.25 days per month which he characterised as him "gifting" the firm approximately £24,000. He proposed increasing his monthly commitment to 12 days but recognised there

could be risks to the firm's levels of profitability and suggested a new arrangement which he characterised as "cash-neutral" under which he would be paid for 10 days with the proviso that he would have a profit-sharing arrangement. He signed the proposal "Geoff". This was accepted by Mr Berg [66]. In his oral evidence, Mr Berg confirmed that he was happy with that suggestion and that Mr Maclauchlan's role expanded to run the administrative side of the practice.

j. The Tribunal was taken to a document called "Short Richardson & Forth Ltd Business Structure" [129]. This showed the organisation of the business. The section headed "Finance Department" describes Mr Maclauchlan as the head of that department with three people reporting to him. In his oral evidence, Mr Berg was not particularly clear on what the purpose of that document was. He thought it might have been drafted as part of the 2020 project for regenerating the firm, but he also accepted that it might have been incorporated into the office manual. He accepted that it could have been for the benefit of the workforce at large as well as the senior managers of the firm. He confirmed that the individuals named in the document in the Finance Department were direct reports to Mr Maclauchlan.

k. Mr Maclauchlan, and the senior managers of SRFS had their own dedicated email account for the purposes of discussing confidential matters. An example was provided [75]. This email channel was used for matters that were considered not to be of general circulation. Another example of that confidential channel concerned an email relating to a proposed acquisition of another firm [79].

l. More invoices were issued by BL but not sequentially. When Mr Maclauchlan was cross-examined about it, he explained that BL was doing work for another client called Closegate. This explained the missing numbers in the invoice sequence. Mr Berg did not question the invoices submitted by BL or to ask what lay behind BL.

m. The first invoice to be issued by Kingsmere was on 31 May 2016 [146]. This was for £8000 plus VAT. The total bill was £9600. The VAT registration number was different to BL. The invoice related to the provision of finance director work for April & May 2016 for 16 days work at £500 per day. Other examples of Kingsmere invoices were produced to the Tribunal which were similarly out of sequence and for the same reason is that given for the BL invoices.

n. Mr Maclauchlan said that out of the 133 invoices issued by BL or Kingsmere, 54 were issued to the LLP or SRFS. He did other work for Closegate.

24. The relationship between Mr Maclauchlan and SRFS ultimately broke down. SRFS terminated the relationship setting out its reasons for doing so in a letter addressed to Kingsmere dated 19 March 2019 [98].

25. On 27 March 2019, Mrs Lisa Berg wrote on behalf of SRFS to Kingsmere requesting that he returned his keys to the premises [104].

26. Mr Maclauchlan instructed a firm of solicitors, Tyr Law, to represent his interests. They wrote a letter before action to SRFS on 19 May 2019 on behalf of their client Kingsmere. It is a long letter. For present purposes I note that they were claiming on behalf of their client £84,194.80 in respect of unpaid invoices. In his oral evidence, Mr Maclauchlan told me that he had reviewed and approved the draft letter before action before it was sent to SRFS. He also told me that proceedings had been issued in the civil court for recovery of the debt and that the action was running in the name of Kingsmere.

27. The Tribunal was referred to what appears to be extracts from Mr Maclauchlan' LinkedIn profile [129 a]. One of these is for BL and the other is for Kingsmere. In respect of the Kingsmere profile, Mr Maclauchlan was asked about his consultancy arrangement with Emmersons Solicitors Limited. This was recorded to state that it started in March 2019. Mr Maclauchlan confirmed that when he was put on notice of termination by SRFS, he had looked for business elsewhere and had secured the retainer with Emmersons.

28. Mr Maclauchlan told me that he took holiday throughout his relationship with SRFS. His wife would suggest time which they wanted to take off and he would then check with the Finance Department that he was not going away at the same time as his colleagues and he would then tell Mr Berg what he wanted to do. I have no reason to doubt this.

29. I now turn to the applicable law. The status of worker does not exist in the common law. It is a creation of statute, reflecting the policy that some basic employment rights should not be confined to those working under a contract of employment. These rights include protection from unlawful deduction from wages, equal treatment for part-time workers, protection from unlawful detriment on whistleblowing and trade union grounds, minimum periods of daily and weekly rest, limits on the working week, entitlement to the national minimum wage and paid annual leave.

30. Regulation 2 (1) WTR states that "worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under):

    a. A contract of employment (limb (a)); or

    b. Any other contract, whether express or implied and (if 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 (limb (b)).

31. The definition is identical to that contained in section 230 ERA. It includes, but is not restricted to, individuals employed under a contract of employment. The second limb (limb (b)) of the definition potentially covers a wide range of individuals who provide personal services under a contract, including many casual and freelance workers. However, it does not extend to self-employed people who are genuinely pursuing a business activity on their own account. To fall within limb (b) the individual must show:

    a. The existence of a contract.

    b. That he or she undertakes to personally perform the work or services for another party; and

    c. That the other party is not a client or customer of a professional business undertaking carried out by the individual.

32. In **Bates van Winkelhof v Clyde and Co-LLP and anor (Public Concern at Work Intervening) 2014 ICR 730, SC** the Supreme Court, in the course of holding that members of a limited liability partnership could be "workers" within the meaning of section 230 ERA, insisted that primacy must be given to the words of national statutes insofar as they do not apply a definition narrower than that required by European law. In this regard, UK law does not necessarily import an ingredient of "subordination" into the concept of worker as the European caselaw perhaps implies, and in that sense, UK law may admit of a wider definition that could embrace, for example, a person who is in business on their own account so long as his or her services are not provided in the capacity of a customer or client.

33. In **Bates**, Lady Hale agreed with Lord Justice Maurice Kay in **Hospital Medical Group Ltd v Westwood 2013 ICR 415, CA** that there is not a single key to unlock the words of the statute in every case". Distilling the statutory definition into its constituent elements, the following factors are necessary for an individual to fall within the definition of "worker":

    a. There must be a contract, whether express or implied and, if express, whether written or oral.

    b. That contract must provide for the individual to carry out personal services; and

    c. those services must be for the benefit of another party to the contract who must not be a client or customer of the individual's profession or business undertaking.

34. Although it is not mentioned in the statutory definition, the weight of authority also suggests that some degree of mutuality of obligation is also a requirement for limb (b) workers' status to arise. However, there is disagreement over whether this is a freestanding requirement or merely an aspect of one or more of the three elements of the statutory definition listed above.

35. For an individual to lay claim to "worker" status whether under the limb (a) or (b) of the statutory definition, he or she must first show that there is an express or implied contract with the "employer". If the contract is express, it can be written or oral. The conditions for the formation of a contract must be met. One of the requirements for the formation of a contract is that the parties must intend their agreement to create legal relations.

36. To fall within limb (b), an individual must undertake "to do or perform personally any work or services for another party to the contract". This is an obligation of personal performance. Determining whether a contract includes an obligation of personal performance as a matter of construction, and it is not necessarily dependent on what happens in practice. In **Redrow Homes (Yorkshire) Ltd v Wright 2004 ICR 1126 CA** the Court of Appeal observed that it does not necessarily follow from the fact that work is done personally that there is an undertaking that it be done personally.

37. A line of caselaw on the "contract personally to do work" test under Equality Act 2010, section 83, has focused on the question of whether the dominant purpose of the contract is the provision of personal services. In **James v Redcats (Brands) Ltd 2007 ICR 1006, EAT** Mr Justice Elias, President of the EAT, held that it was appropriate to use the dominant purpose test in the context of limb (b) worker status as it attempts to identify whether a contract should be located in the field of dependent work relationships whether it is in essence a contract between two independent business undertakings. However, he noted that focusing on the dominant purpose test has its difficulties because it is not always clear what the dominant purpose of the contract is. He considered that the problem lay in the word "purpose", which can mean both immediate and longer-term objectives. He said:

> *If I employ bus drivers who are employees, it may still be said that my purpose is to run an efficient bus service rather than personally to employ the drivers.*

Accordingly, he suggested that an alternative way of phrasing the test may be to ask whether the dominant feature of the contractual arrangement is the obligation personally to perform work, in which case, the contract would sit in the employment field and the individual concerned will be either a worker or an employee. If, however, the dominant feature is a particular outcome or objective and the obligation to provide personal

services is an incidental or secondary consideration it will lie in the business field.

38. In **Pimlico Plumbers Ltd and anor v Smith 2018 ICR 1511, SC**, the Supreme Court held that it was helpful to assess the significance of Mr Smith's right of substitution by reference to whether the dominant feature of the contract remained personal performance on his part (applying **James v Redcats**)**,** although it stressed that this did not supplant the statutory test. Shortly thereafter, an employment tribunal, applying the dominant feature test, found that self-employed couriers for the parcel delivery service Hermes also were limb (b) workers (**Leyland and ors v Hermes Parcelnet Ltd ET case No 180 0575/17**).

39. The last clause of limb (b) of the statutory definition makes it clear that if a person renders services or performs work on the basis that the person to or for whom he or she does so is a customer or client of his or her business or profession, he or she is not a "worker". In **Byrne Brothers (Formwork) Ltd v Baird and ors 2002 ICR 667, EAT** the EAT gave guidance on what it termed this "clumsily worded exception" it held that the intention was clearly to create an intermediate class of protected worker made up of individuals who were not employees but equally could not be regarded as carrying on a business. According to the EAT:

> *the essence of the intended distinction [created by the exception] must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves.*

40. The EAT explained that drawing this distinction in any particular case will involve all or most of the same considerations as when distinguishing between a contract of employment in the contract for services but with the boundary pushed further in the individual's favour. The basic effect of limb (b) is to "lower the pass mark", so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless reach that necessary to qualify for protection as workers. Factors to consider could include the degree of control exercised by the "employer", the exclusivity of the engagement and its typical duration, the method of payment, what equipment the "worker" supplied, and the level of risk undertaken. Factors such as the individual having business accounts prepared and submitted to HM Revenue and Customs, being free to work for others, being paid at a rate that includes an overheads allowance and not being paid when not working, can all be relied on to support the view that he or she is running a business and that the person for whom the work is performed is a customer of that business.

41. While the focus of Tribunal is often on the question of whether the purported worker is in business on his or own account, it should not be forgotten that the legislation poses a more nuanced test. The status of the

other party to the contract must be that of "client or customer" if the exclusion is to apply. In **Hospital Medical Group** HMG recruited W to work as a hair restoration surgeon at its Birmingham clinic on terms which required him to use HMG's equipment and which prevented him from offering the same service to anyone else. He was not, however, required to carry out the work and nor was HMG required to provide him with any. W continued to work in his own surgery and also undertook work for another private clinic, advising on transgender issues. When W worked for HMG, he was paid a percentage of the fee received from the patient. His written contract stipulated that he was a self-employed independent contractor and contained many terms consistent with that status, including obligations on W to submit monthly invoices, take out his own professional indemnity insurance and pays and expenses, tax, and national insurance. In August 2010, HMG summarily terminated the contract with W who brought a claim against the company alleging, amongst other things, unlawful deduction from wages and failure to pay holiday pay, claims that dependent upon his being either an employee or a worker. The employment tribunal rejected W's argument that he was HMG's employee went on to hold that he was a worker on the basis that he was engaged to perform work personally for HMG, which, in effect, introduced its clients to him. Furthermore, HMG was not "a client or customer of any profession or business undertaking" carried on by W. The EAT upheld the Tribunal's decision.

42. On further appeal by HMG, the Court of Appeal observed that the Tribunal had clearly found that W was in business on his own account when he contracted with HMG. The crucial finding, however, was that HMG was not W's "client or customer". It was not just another purchaser of W's medical skills. W had contracted specifically and exclusively with it to carry out the relevant services and had done so separately from his surgery and his work with the other clinic. Furthermore, W was clearly an integral part of HMG's operations, even though he was in business on his own account. For example, he was referred to as "one of our surgeons" in the company's marketing material. In reaching this conclusion, the Court of Appeal rejected HMG's submission that a party must be a customer or client if it contracts with an individual who is in business on his or her own account. Such an interpretation would effectively exclude all people in business on their own account from being workers. If Parliament had intended that result, it would have said so.

43. The Court of Appeal rejected the idea that there is a single touchstone to unlock the words of the statute in every case but accepted that the "integration test" set down by Mr Justice Langstaff in **Cotswold Developments Construction Ltd v Williams 2006 IRLR 181, EAT,** will often be relevant in determining whether a person is a worker or in business dealing with a customer or client. According to this test, it is possible (in most cases) to determine whether a person is providing services to a customer or client by focusing on whether that individual actively markets his or her services as an independent person to the world

in general (and thus has clients and customers) or whether he or she is recruited to work for the principal as an integral part of its organisation.

44. The case of **Community Based Care Health Ltd v Narayan EAT 0162/18** involved a GP out-of-our services to the NHS. An Employment Judge ruled that the GP was a worker despite the fact that she was paid through a limited company. The judge considered, among other things, that the GP worked regular shifts for around 12 years, was required to work personally and did not have an unfettered right to send a substitute. The judge also found that the GP worked regular shifts for one provider over many years. This was distinguished from another decision of the EAT in **Suhail v Barking Havering and Redbridge University Hospitals NHS Trust and anor EAT 0536/13** which also involved a GP providing out-of-hours services to an NHS Trust. In that case, however, he had actively marketed himself to whichever locum agency offered the most attractive sessional work and there was no obligation to provide work to him nor on the GP to accept assignments when they were offered. He was free to work for any other organisation.

45. In **Bates**, Lady Hale rejected the argument, which had received obiter support in the Court of Appeal, that "worker" status implies that one party be subordinate to the other. She noted that there can be no substitute for applying the words of the statute to the facts. She acknowledged that this would not always be easy to do but could not accept that the addition of some mystery ingredient of "subordination" would help. In her view, there is no "magic test" other than the words of the statute themselves. As Elias P recognised in **James v Redcats** a small business may genuinely be an independent business but be completely dependent on, and subordinate to, the demands of a key customer. 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, with 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. Lady Hale commented:

> *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".*

She considered that 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.

46. Applying the law to the facts, I find as follows:

    a. There is no doubt that a contract existed between the parties. It was not reduced to writing but it did not need to be in writing. The essential elements of the contract were constituted by the email exchange between Mr Maclauchlan and Mr Berg on 27 October 2014 and 3 November 2014. In return for providing the financial review, the LLP agreed to pay a fee. This is clear evidence of an

intention to create mutually binding legal relations. The email exchange reflected discussions that had previously taken place. The fundamentals of the arrangement (performing the finance director role) remained essentially the same throughout the duration of the relationship.

b. Who were the parties to that contract? It has been suggested that initially, this was BL. However, I do not think that can be the case. BL had no separate legal personality to Mr Maclauchlan – it was his trading name for his business which he provided on a sole trader basis. On his own admission, Mr Berg had no prior knowledge of BL. Furthermore, at the time when the two men exchanged emails, Mr Berg addressed his response to "Geoff" i.e., Mr Maclauchlan. This is clear evidence that he believed that he was dealing with Mr Maclauchlan on behalf of the LLP. I remind myself, that in construing this, I have to look at the point at which there was offer and acceptance not what happened thereafter. The language of the email exchange points to Mr Maclauchlan contracting in his own right personally to provide services to the LLP. There is no evidence at the time that he was acting through an intermediary. The fact that invoices for those services were initially issued by BL and subsequently Kingsmere does not detract from that conclusion. Furthermore, in his evidence, Mr Berg accepted that the arrangement fundamentally stayed the same throughout the relationship.

c. Mr Maclauchlan personally undertook to provide his services to the LLP and its successor SRFS. It is clear that the LLP and SRFS wanted Mr Maclauchlan for his skill and expertise and that is what they were paying him for. There is one qualification to that; as the relationship progressed, Mr Maclauchlan told Mr Berg that some of his additional duties would be outsourced (e.g., HR). However, this did not fundamentally alter the essential personal nature of the relationship. I do not think that this created a comprehensive right to offer a substitute. In any event Mr Maclauchlan would still be responsible for managing the external contractors as part of his finance director role.

d. Mr Maclauchlan was in business. He provided his services to two clients: Closegate and SRFS. At first blush it could be said that this is fatal to his claim to be a worker because he falls at the last hurdle in meeting the limb (b) test and this is what Mr Flood submitted. He said that this amounted to a professional client-based relationship test pushing Mr Maclauchlan away from being a "worker" to being genuinely self-employed. That is a superficially attractive argument but I do not think that the facts support that conclusion for the following reasons:

i. Mr Maclauchlan had not been contracted to complete a particular project. He assumed the role of the finance director.

ii. He became heavily integrated in SRFS and to all intents and purposes he was so integrated into that organisation that an outside observer would be unable to distinguish him from other employees of that business for the following reasons: he attended partners and board meetings. He went to meetings with the bank and was held out as the finance director representing the financial interests of the business. He had firm specific email addresses. He had a business card which presented him to the outside world as the finance director. He had his own office space. He was given keys to the building and unrestricted access to the IT system. He was described in the business organisation chart as head of the finance department with three employees who reported to him.

e. The fact that Mr Maclauchlan initially traded as BL and then incorporated Kingsmere through which he ran his business affairs does not, in my view, militate against a finding of his "worker" status. Many people run businesses through corporate intermediaries primarily because it confers certain tax advantages but also affords them a degree of protection through limited liability. To suggest that trading through an intermediary automatically creates a business/client relationship would effectively exclude all people in business on their own account from being workers. As stated in **Hospital Medical Group** if Parliament had intended that result, it would have said so.

f. In the final analysis, SRFS contracted with Mr Maclauchlan to provide his personal services. They wanted him to assist them in the running of their practice and had chosen him because of his experience and skill of working with law firms.

g. Whilst Mr Maclauchlan is a professional person with a high degree of autonomy as to how the work is performed, and how he markets his skills to the world in general although he had more than one string to his bow, the facts in this case are that he was so closely integrated into SRFS' operation as to fall within the definition of a worker.

47. For all of these reasons, I find that Mr Maclauchlan was a worker, and, consequently, the Tribunal has jurisdiction to hear his claim.

Employment Judge Green

Date 15 January 2021