THE INDUSTRIAL TRIBUNALS

CASE REF: 1121/19

CLAIMANT: **Tony Macklin**

RESPONDENT: **Northern Ireland Guardian Ad Litem Agency**

DECISION

The unanimous decision of the tribunal is that, at all relevant times, the claimant had been a self-employed contractor providing professional services to the respondent agency and not either an "employee" for the purposes of the Employment Rights Order 1996 or a "worker" for the purposes of the Working Time Regulations (Northern Ireland) 1996 and 2016. All claims are therefore dismissed.

CONSTITUTION OF TRIBUNAL

Vice President: **Mr N Kelly**

Members: **Mr Eddie Grant**
Mr Michael McKeown

APPEARANCES:

The claimant was represented by Mr Daniel Mullan, Barrister-at-Law, instructed by Shoosmiths Solicitors.

The respondent was represented by Mr Michael Potter, Barrister-at-Law, instructed by the Business Services Organisation.

BACKGROUND

1. The respondent is a special health and social services agency established by the Northern Ireland Guardian ad Litem Agency (Establishment and Constitution) Order (Northern Ireland) 1995.

2. In certain types of litigation involving children, the relevant court can indicate that a guardian ad litem (GAL) is required in relation to that litigation. A GAL is then selected by the respondent agency from a panel of GALs maintained by it. The court then appoints that GAL for the purposes of that litigation. The panel is established under Regulation 2 of the Guardians ad Litem (Panel) Regulations (Northern Ireland) 1995.

3. That panel includes those directly employed by the respondent agency under contracts of service and also those who are described as “self-employed” who are engaged on contracts for service.

4. The claimant had been appointed as a directly employed GAL in 1996.

5. In 2003, the claimant indicated to the respondent agency that he was considering transferring to self-employed status. That move offered financial benefits and increased career opportunities to the claimant.

6. In 2005, the claimant took advantage of a scheme operated by the respondent agency which allowed him to try out self-employed status for a period of one year before he committed to that status. It was in effect a career break allowing an employee to trial being a self-employed GAL.

7. After the conclusion of that year, the claimant decided to continue as a self-employed GAL. He worked as a self-employed GAL for some 14 years in total.

8. In the present proceedings, the claimant alleges that throughout that period he had been either:

   (i) an employee for the purposes of the Employment Rights (Northern Ireland) Order 1996 (the 1996 Order) or, alternatively,

   (ii) a worker for the purposes of the Working Time (Northern Ireland) Regulations 1996 and 2016 (the Working Time Regulations).

9. By way of remedy, if he had been at the relevant times an employee for the purposes of the 1996 Order, the claimant seeks the statutory penalty for failing to provide details of specified terms and conditions of service contrary to that Order and also compensation in respect of untaken holiday pay.

   If the claimant had been a worker under Regulation 2(b) rather than Regulation 2(a) of the Working Time Regulations, the claimant seeks compensation in respect of untaken holiday pay only.

10. The issue for the tribunal to determine is therefore whether in the period from 2005 to the lodgement of the current proceedings, the claimant had been an employee or a self-employed contractor or whether he had been in the intermediate category of worker.

Procedure

11. The claim had been case managed on 5 April 2019. Directions had been given in relation to the interlocutory procedure and in relation to the use of the witness statement procedure.

12. Witness statements were exchanged by the parties in advance of the hearing. Each witness, including the claimant, in turn swore or affirmed to tell the truth, adopted their witness statement as their entire evidence in chief and moved immediately into cross-examination and brief re-examination.

13. The claimant gave evidence on his own behalf. Mr Peter Reynolds the Chief Executive Officer of the respondent agency and Ms Heather Forster, a self-employed GAL, gave evidence on behalf of the respondent agency. Ms Forster was not cross-examined.

14. The hearing was listed for two days on 24 and 25 July 2019. Evidence was completed on the first day of that hearing. Oral and written submissions were provided on the second day of that hearing.

15. Given the inevitable complexities involved in fixing the exact amount of allegedly unpaid holiday pay over a lengthy period of irregular employment, the tribunal decided to proceed in relation to liability only at this hearing. The parties consented.

16. The tribunal considered the evidence and the submissions during the remainder of the second day ie 25 July 2017. It also held a panel meeting on 29 July 2019. This document is the tribunal's decision.

RELEVANT LAW

17. Article 3 of the 1996 Order provides:-

> *"3(1) In this Order, "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 Order "contract of employment" means a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing.*
>
> *(3) In this Order "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 an 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."*

18. Regulation 2 of the 1998 and 2016 Working Time Regulations provides:-

> *""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 an 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."

19. The distinction between an employee, a worker in the extended sense and a self-employed contractor, can be difficult to distinguish in some cases.

Standing back from the statutory definition as worded in the Working Time Regulations, the distinction between workers and non-workers for the purposes of EU law is the distinction between those who are employed and those who are self-employed. Those who fall within the former category can be 'employees' in the old fashioned sense as set out in paragraph (a) or workers in the more extended sense, as set out in paragraph (b). Many of the relevant characteristics which help to identify either employees or workers will be common to both.

20. In ***Cornwall County Council v Prater [2006] IRLR 362***, the Court of Appeal (GB) considered the case of a teacher who had been engaged, almost continuously, for a period of ten years as a home tutor to disadvantaged pupils. The issue in that particular case was whether the claimant had been continuously employed throughout the period of ten years. That issue is irrelevant to the present case. What is relevant is how the Court of Appeal (GB) regarded each of the individual contracts, which each might have been for periods as short as a few months.

The Court held that each such contract was a contract of employment. It stated:-

"43. - There was a mutuality of obligation in each engagement namely that the county council would pay Mrs Prater for the work which she, in turn, agreed to do by way of giving tuition to the pupil for whom the council wanted her to provide private tuition. That to my mind is sufficient 'mutuality of obligations' to render the contract a contract of employment if other appropriate indications of such an employment contract are present".

21. The Court of Appeal (GB) stated in ***Quashie v Stringfellows Restaurant Ltd [2013] IRLR 99***.

"10. - Typically an employment contract will be for a fixed or indefinite duration, and one of the obligations will be to keep the relationship in place until it is lawfully severed, usually by termination on notice. But there are some circumstances where a worker works intermittently for the employer, perhaps as and when work is available. There is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration, as a number of authorities have confirmed - ".

> *"12. - However whilst the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement, the fact that a worker works only casually or intermittently for an employer, may depending on the facts justify an inference that when he or she does work, it is to provide services as an independent contractor rather than as an employee."*
>
> *[Tribunal's emphasis]*

22. In ***Windle v Secretary of State for Justice [2017] 3 All ER 568***, the Court of Appeal (GB) considered the status of interpreters who worked for the Courts and Tribunals Service. The interpreters were engaged frequently but on a case-by-case basis. As part of its consideration of Section 83(2)(a) of the Equality Act 2010, it concluded:-

> *"(8) - The first – "a contract of employment" – means a contract of service."*

23. In looking at the related question of whether the interpreters had acquired the status of worker in the extended sense the Court of Appeal in ***Windle*** stated:-

> *"23. I do not accept that submission. I accept of course that the ultimate question must be the nature of the relationship during the period that the work is being done. [Tribunal's emphasis] But it does not follow that the absence of mutuality of obligation outside that period may not influence, or shed light on, the character of the relationship within it. It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or a lack of subordination in the relationship while at work which is incompatible with employee status, even in the extended sense".*

The claimant in the present case provided professional services to the individual courts which required the services of a GAL. Those services were provided on a case by case basis. The situation of the claimant in the present case is analogous to that of interpreters in the ***Windle*** case. The fact that the claimant only provides services on a case by case basis is an indicator pointing away from employee or worker status. The fact that the claimant was on the panel of GALs throughout the period does not significantly alter the essence of the relationship: the provision of a professional service to the courts, among others, on an intermittent basis.

24. The term "contract of employment" is not defined in the Working Time Regulations or in the Working Time Directive. However, (see ***Windle*** above), the terms "contract of employment" and "contract of service" are identical in meaning. The latter is the more archaic version of the former.

25. There is no easy definition of an "employee", a "contract of employment", a "contract of service", or "worker". The correct approach is to balance a range of factors and to reach a common sense decision on the basis of those factors.

26. An early definition appeared in ***Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2 QB 497:-***

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

27. One of the factors to be taken into account in deciding whether a contract is a contract of employment (or of service) is whether the individuals concerned ie either party to the contract, regarded the claimant's position as being that of a self-employed worker. In the present case, the claimant had accepted self-employed status for HMRC purposes. He had operated on that basis for some 14 years in respect of the respondent agency and other employers. That had been to his financial benefit and it had provided enhanced career opportunities. That is an indication of self-employed status, but no more than an indication. It is commonly recognised that in many areas of employment, that status is used for administrative convenience or for financial benefit to either or both parties to the contract and that it does not necessarily provide a definitive answer in relation to correct status. In ***Autoclenz Limited v Belcher [2011] IRLR 820***, the claimants had been categorised for some considerable time as self-employed workers and that status had been recognised by the HMRC. That had been to the financial advantage of the claimants and their employer. However the Court of Appeal and the Supreme Court both recognised that a tribunal should take an objective view in relation to status. Smith LJ stated that a person should not be estopped from contending that he was an employee "merely because he has been content to accept self-employed status for some years."

28. In ***FV Kunsten Informatie En Media v Staat Der Nederlanden [2015] All ER (EC) 387,*** the ECJ stated at paragraph 36, in relation to the extended meaning of 'worker':-

> *"It follows that the status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that person acts under the direction of his employer as regards, in particular, his freedom to choose the time place and content of his work -, does not share in the employer's commercial risks – and for the duration of that relationship, forms an integral part of that employer's undertaking -."*

In that case, a collective labour agreement had been reached for the pay and conditions of substitute members of orchestras. The substitutes fell into two categories; firstly substitutes who were engaged as direct employees and, secondly, substitutes who were regarded as self-employed. The issue was whether

the collective agreement had contravened anti-competition rules by including "undertakings", when it also applied to self-employed substitutes. The ECJ held that it did not do so. It described the self-employed substitutes as 'false self-employed'.

That said, a contract freely entered into by both parties and which provides for self-employment status cannot be lightly set aside: particularly where both parties enter into that contract with a full understanding of the implications of that contract, where the "employee" is not in a vulnerable position, and where the terms of the contract reflect the reality of the contractual relationship and in no way are artificial or a sham.

29. Another factor to be taken into account is that a contract of employment will generally require personal service on the part of the employee. In many cases, this has resolved to a discussion about whether or not and, if so, to what extent, the individual in question can provide a substitute to carry out work on his own behalf. In the ***Ready Mixed Concrete*** case (above) the individual concerned, a driver, was held to be an independent contractor. One of the critical features in that case had been that he had not been required to personally drive the relevant vehicle. He had been allowed to provide a substitute driver who could operate the vehicle on his behalf.

30. In ***Pimlico Plumbers Limited v Smith [2017] IRLR 323***, Etherton MR dealt with the issue of substitution in relation to the statutory definition of "worker" which had required "personal service". Although the case went further to the Supreme Court, nothing further was said at that level on this point:-

> *"- In the light of cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."*

31. However in the present case, there had been absolutely no possibility of substitution of any nature, with or without the permission of the respondent agency. The nature of the work and the appointment of a GAL in each case by an individual court meant that substitution was not a relevant issue.

32. Another factor to be considered when determining the employment status of an individual has been described as "mutuality of obligation" ie an obligation on the employer to provide work and an obligation on the employee to do that work.

In the present case, the respondent agency was not obliged to offer any work to the claimant as a self-employed GAL. He agreed to be "available" for a certain number of hours per year. He did not guarantee to be available on days when he had been offered work or to undertake a minimum amount of work. However, he effectively could and did refuse work which had been offered to him by the respondent agency.

33. In ***Cotswold Developments Construction Limited v Williams [2006] IRLR 181***, the EAT stated that "employment" tends to need mutual obligations, whereas the extended "worker" definition tends to concentrate on the element of personal service by the individual and not on the obligation of the employer to provide work. It suggested a four step test;

"(i) was there one contract, or a succession of shorter ones?

(ii) If one contract, did the claimant agree to undertake some minimum (or at least, a reasonable) amount of work for the company in return for pay?

(iii) If so, was there such control as to make it a contract of employment?

(iv) If there was insufficient control (or some other factor negativing employment) was the claimant nevertheless obliged to do some minimum (or reasonable) amount of work personally, this qualifying him as a worker?"

34. Another test applied to determine the correct employment status for an individual is described as the "control test". In general, an employee does whatever his employer tells him to do.

35. In ***White v Troutbeck SA [2013] IRLR 949***, the Court of Appeal considered the case of claimants who were caretakers of a farming estate which had been owned by an off-shore company. The owners rarely visited the estate. However they expected it to be maintained and prepared for their occasional visits. The issue was whether the claimants had been employees. At first instance, the Employment Tribunal took the view that there had been an insufficient element of control in that case. The claimants had been left very much to themselves as to how they conducted their duties. The EAT overturned that decision. The EAT held that in modern circumstances, the relevant test had to recognise that many employees had substantial autonomy in how they performed their duties. At paragraph 45 the EAT stated "the question is not by whom day to day control was exercised but with whom and to what extent the ultimate right of control resided." That was upheld by the Court of Appeal (GB).

In the present case, GALs were required to provide independent professional services to the courts. This is not the type of case where "control" can have any real meaning or where it can be a relevant issue.

36. Another factor to be taken into account in determining the employment status of an individual is what is known as the "organisational test". In ***Stevenson Jordan and***

Harrison Limited v MacDonald and Evans [1952] 1 TLR 101, the Court of Appeal stated;

> *"Under the contract of "employment" a man is employed as part of the business, whereas under a contract for services his work, although done for the business, is not integrated into it but only accessory to it."*

The issue is therefore whether, and to what extent, the claimant had been integrated into the respondent's organisation. The decision to appoint a GAL in any case is a decision taken by the relevant court. If such a decision is made, a GAL is selected from the panel maintained by the respondent agency. The appointment of the GAL in relation to any particular case is a decision of the court. The claimant was a member of the panel. He took part in some but not all training provided by the respondent agency. His work was appraised by the respondent agency and he took part in professional development activities.

37. Another test is what is known as the "economic reality" test. That requires an assessment of the opportunities for profit and loss and the degree, if any, to which the worker was required to invest in the job by cash or time or by the provision of tools or equipment, together with the skill required for the work and the permanency of the relationship. In essence, the question is whether the claimant was a small business person, or a person operating a profession, rather than an employee or a worker.

38. The nature of the work undertaken by the claimant was such that little by the way of tools and equipment was necessary. The claimant was required to invest his time and skill as necessary in relation to the cases where he had been appointed as a GAL. In cases where he had been engaged as a GAL by the respondent agency he used a secure laptop and telephone. The provision of those items by the respondent agency was inevitable given the sensitive nature of the work and the requirement for absolute confidentiality.

39. All the above factors have to be taken into account in a balancing exercise to properly determine whether a contract is a contract of employment (or of service), rather than a contract of either a worker in the extended sense or that of a self-employed individual.

40. ***Hall (HM Inspector of Taxes) v Lorimer [1994] IRLR 171*** was, as the name suggests, an income tax case, where the Special Commissioner had determined that an individual had been self-employed rather than an employee. That individual had been a vision mixer for TV productions and had had 580 separate engagements over approximately 800 days. Each engagement had usually been extremely brief ie for a day or two. The longest had been for ten days. Mummery J heard an appeal from the Special Commissioner who had held that the individual had been self-employed for income tax purposes. He stated:-

> *"- This is not a mechanical exercise of running through items on a check-list to see whether they are present in, or absent from a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and making an informed considered qualitative appreciation of the whole. It is a matter of*

evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.

The process involved painting a picture in each individual case. As Vinelott J said in ***Walls v Sinnett [1986] 60 TC 150:***

"It is, in my judgement, quite impossible in a field where a very large number of factors have to be weighed, to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are common, what are different and what particular weight is given by another tribunal to common facts. The facts as a whole must be looked at, and what may be compelling in one case in the light of all the facts may not be compelling in the context of another case."

41. The definition of "worker" as it appears in Regulation 2 of the Working Time Regulations is in slightly wider terms than the definition of "employment" which appears elsewhere in anti-discrimination statutes. For example, the Sex Discrimination (NI) Order 1996 states at Article 2(2) that:

"'employment'" means employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly."

The Race Relations (NI) Order 1997 at Article 2(2) uses identical terms.

Like those other provisions, Regulation 2 first of all refers to standard contracts of service or of employment which relate to employees. Like those other provisions it then refers to engagement under "any other contract" to personally perform work or services for another party. Where it goes further is that it states that the other party to that contract should not be a person whose status is by virtue of that contract that of a client or customer of any profession or business undertaking carried on by the individual.

42. In essence, however, the definitions are the same. It has been the case for some time in EU litigation that the distinction between individuals who are workers as a result of a contract to personally perform services for another, and those who are not workers as a result of such a contract, is the distinction between those who are either employed or quasi-employed and those who are in effect self-employed and operating a business.

The Regulations use more words to make that clear but the same principle applies as elsewhere in the anti-discrimination statutes.

43. In the ECJ decision in ***Lawrie-Blum v Land Baden-Wurttemberg [1987] ICR 483***, Advocate General Lenz stated in his opinion that the term "worker" covered any employed person who was not self-employed. The Court stated at paragraph 17 of its judgment;

"That concept (ie of "worker") must be defined with objective criteria which distinguish the employment relationship by reference to the rights and duties

of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."

44. In ***Kurz v Land Baden-Wurttemberg [2002] EC 1-10691***, the Court stated at paragraph 32 that;

> *"32. - In order to be treated as a worker, the person must pursue an activity which is genuine and effective, to the exclusion of activities on such a small scale as to be regarded as purely marginal or ancillary. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the directions of another person in return for which he receives remuneration. By contrast, neither the sui generis nature of the employment relationship under national law, nor the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of the remuneration can have any consequence in regard to whether or not the person is a worker for the purpose of Community law."*

45. It is therefore clear that where an EU based provision, albeit in domestic legislation, falls for interpretation, the meaning of the term "worker" has a particular definition in Community law. In paragraph 66 of ***Allonby v Accrington and Rossendale College [2004] ICR 1328***, the ECJ stated;

> *"Accordingly, the term "worker" used in Article 141(1) EC cannot be defined by reference to the legislation of the member states but has a Community meaning. Moreover, it cannot be interpreted restrictively."*

46. The Court went on to state;

> *"67. For the purposes that provision, he must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration -."*

The ECJ in ***Allonby*** went on to state;

> "*71. The form of classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of Article 141(1) EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article."*

The ECJ was clearly recognising that the classification of an individual, for the purposes of income tax and other regimes within domestic states, may well not reflect the reality of the employment relationship for the purposes of EU law. In the present case, the claimant was described as self-employed for income tax and national insurance purposes.

47. In ***Percy v Board of National Mission of the Church of Scotland [2006] 2 AC 28***, the House of Lords considered a sex discrimination claim under the

Sex Discrimination Act 1995 which had been brought by a woman who had been a minister in that Church. The House of Lords determined that she had been employed within the meaning of that Act. Lord Hoffmann dissented on the basis that the claimant had been the holder of an office. However he stated at paragraph 66 that if the arrangement had been contractual rather than by virtue of a particular office, it would plainly have been a contract of service. Lord Hoffmann stated at paragraph 73 that the term "worker" is a term of art in Community law which was defined by the ECJ in ***Lawrie-Blum***. Baroness Hale stated at paragraph 141:-

> *"The distinction is between those who worked for themselves and those who worked for others, regardless of the nature of the contract under which they are employed".*

48. At paragraph 145 of ***Percy***, Baroness Hale quoted Sir Robert Carswell in ***Perceval-Price v Department of Economic Development [2000] IRLR 380.***

> *"All Judges, at whatever level, share certain common characteristics. They all must enjoy independence of decision without direction from any source, which the respondent quite rightly defended as an essential part of the work. They all need some organisation of their sittings, whether it be prescribed by the President of the Industrial Tribunals or the Court Service, or more loosely arranged in a collegiate fashion between the judges of a particular court. They are all expected to work during defined times and periods, whether they be rigidly laid down or managed by the Judges themselves with a greater degree of flexibility. They are not free agents to work as and when they choose, as are self-employed persons. Their office accordingly partakes of some of the characteristics of employment –."*

At paragraph 146, Baroness Hale stated:-

> *"I have quoted those words at length because they illustrate how the essential distinction is, as Harvey says, between the employed and the self-employed. The fact that the worker has very considerable freedom and independence in how she performs the duties of her office does not take her outside the definition. Judges are servants of the law, in the sense that the law governs all that they do and decide, just as clergy are servants of God, in the sense that God's word, as interpreted in the doctrines of their faith, governs all that they practise preach and teach. That does not mean that they cannot be "workers", or in the "employment" of those who decide how their ministry should be put to the service of the Church."*

49. In ***Suhail v Herts Urgent Care (UKEAT/0416/11RN)*** the EAT concluded that the employment tribunal had been entitled to conclude that the claimant had been operating a business on his own account. He had been self-employed rather than either an employee or a worker.

50. The claimant had been a registered general practitioner and had worked as an out-of-hours GP. The respondent had provided those services to the local Primary Care Trust. It had approximately 250 registered GPs on its panel; including the claimant. It used a mixture of "self-employed" and directly employed GPs. The claimant had been engaged as a "self-employed" GP.

51. The claimant had entered into a clear written contract which provided that he had been self-employed. There was no obligation on the respondent to offer work and no obligation on the claimant to accept work. The claimant was responsible for his own income tax and national insurance. He was to provide his own standard medical bag and was provided with consumables.

There was a limited right of substitution. The claimant could arrange for work to be covered by another GP on the respondent's panel.

The claimant had been free to work for others and had done so.

52. The EAT concluded that:-

> *"The finding by the Employment Tribunal that the respondent was in business on his own account is fatal to the suggestion that he was either an employee or a worker. This finding seems to me to be crucial and conclusive. The claimant was clearly marketing his services to whichever provider of medical services might wish to provide him with work."*

53. The EAT recognised that certain factors in this case had pointed towards worker or employee status. Other factors had pointed towards self-employed status. The EAT had considered all these factors and in particular had concluded that the contract for service had been clear and that it had meant what it said.

Relevant Findings of Fact

54. The claimant is a qualified social worker with approximately 32 years' experience. He joined the respondent agency as a directly employed GAL in 1996.

55. Under the Guardian Ad Litem (Panel) Regulations (Northern Ireland) 1996, the respondent agency maintains a panel of directly employed and "self-employed" GALs. Only members of that panel may be appointed by a court as a GAL under either Article 60 of the Children's (Northern Ireland) Order 1995 or Article 66 of the Adoption (Northern Ireland) Order 1987.

56. Individual courts appoint a named GAL for the purposes of the relevant litigation. Only the individual court can change any such appointment. Therefore while the respondent Agency selects and nominates an individual from the panel, the ultimate appointment is a matter for the court.

57. Under Regulation 11, the agency is required to identify training needs and to make reasonable provision for the training of those on its panel. Given the nature of the work, that does not appear to the tribunal to be an indication of employment rather than self-employment. The need to identify and maintain training would be equally applicable to those engaged as self-employed contractors as it would be to those engaged as direct employees, or as workers. It was the nature of the work that required the provision of training; not the contractual relationship between the claimant and the respondent agency.

58. Similarly, the nature of the work required a high degree of confidentiality. In the case of "self-employed" GALs, and those directly employed GALs who worked from

home, typing arrangements and arrangements for the storage and transmission of documents had to be notified to and agreed by the respondent agency. There had to be provision for the secure storage of documents. Long-term storage of documents at home was strongly discouraged by the respondent agency. Short-term storage arrangements had to be specifically agreed with the agency.

The tribunal concludes that this had been inevitable given the nature of the work undertaken by the GALs. The high degree of confidentiality and the need to secure that confidentiality was not an indicator, in these circumstances, of the status of employee or worker as opposed to self-employed status.

59. The respondent agency maintains a guidance document in relation to those Regulations. It makes it plain that the agency needs to maintain a panel of GALs which is sufficiently large to cope with sudden increases in work, while at the same time not being so large that work is spread too thinly amongst members of the panel, thus discouraging membership. The guidance document also makes it plain that the panel would include both directly employed staff and self-employed staff.

60. The respondent agency also maintains a self-employed procedures manual. That manual makes it plain that it is the responsibility of self-employed GALs to record details of their work and to invoice for that work. Mileage claims are also paid from home for self-employed GALs and not from the place of work which was the situation for those employees not working from home.

61. The Agency provided a secure laptop and telephone to the individual self-employed GAL including the claimant. However the agency did not pay for calls and it was the responsibility of the self-employed GAL to provide and to maintain their own broadband connection.

62. The claimant and other self-employed GALs were registered as self-employed for HMRC purposes and were responsible for their own income tax and national insurance. The claimant employed his own tax accountant who dealt with his work for the respondent agency and also his work for other bodies. It was a requirement of the respondent agency that, on appointment as a self-employed GAL, the claimant had to notify details of that accountant to the agency.

The guidance also stressed the independence required from both directly employed and self-employed GALs.

63. In the period from 2005 until the lodgement of the current proceedings, the claimant did significant work for others on a self-employed basis when he also worked as a "self-employed" GAL for the respondent agency. He provided services for the Western Trust, Queen's University Belfast and for Dr Barnardo's in the Republic. In 2016, 2017 and 2018 he had provided services for others in the Republic. In doing so, he had earned gross sums in respect of those three years of €42,832.00, €55,618.00 and €33,395.00 respectively. These sums were significant and indicated significant work had been done for others.

64. The claimant did not seek the permission of the respondent agency before engaging in these activities on a self-employed basis for the Western Trust, Queen's University Belfast and for Barnardo's and others in the Republic of Ireland. That appears to the tribunal to have been entirely consistent with self-employed

status. A directly engaged employee would not have had such significant freedom to contract with others. The claimant had been required to ensure that his work for others did not conflict with or interfere with his work for the respondent agency. The other bodies for whom he provided services would no doubt have sought similar assurance. That is not an indicator of employee or worker status.

65. The internal guidance of the agency makes it plain that there had been a hierarchy of case allocation. Cases were allocated first to directly employed GALs and secondly to "self-employed" GALs as appropriate. It was only if sufficient work had gone to the directly employed GALs that work could or would have been offered to self-employed GALs such as the claimant.

66. The procedures also made it plain that, in relation to self-employed GALs, work would be allocated to the most efficient individuals. Value for money was a crucial issue. That appears to the tribunal to be more consistent with self-employed status.

67. It is not in dispute that the original appointment of the claimant in 1996 had been an appointment as directly engaged employee. He had access to a sick pay scheme, to a pension scheme, to a grievance procedure and to all the aspects of an employment relationship which are consistent with that of an employee.

68. It is clear that the claimant had not been pressurised or in any way forced to move from directly employed status to "self-employed" status in 2005. It is also clear that the claimant had chosen, entirely of his own volition, to avail of a self-employed career break scheme which had allowed him to work on a self-employed basis for a full year before he made his mind up and had committed to "self-employed" status.

69. When it was put to the claimant in cross-examination that he had chosen to become a self-employed GAL, he confirmed that that had been his own decision; no one else's. He also confirmed that he could have reverted back to directly employed status after the conclusion of the 12 month self-employed career break scheme. He had had the benefit of a year's trial which had enabled him to assess the advantages and disadvantages of self-employed status before he had finally made that decision to become self-employed.

70. The claimant signed a clear and explicit contract for service on 14 February 2005. It was headed; "self-employed guardians ad litem – terms and conditions".

71. The fees payable for self-employed GALs were set out in detail and those fees were at a higher rate than the equivalent salary paid to directly employed GALs. It stated specifically:-

> *"It is the responsibility of guardians ad litem, as self-employed individuals, to make provisions for insurance, sickness, holidays, pensions and tax according to their personal circumstances."*

72. It stated in relation to training that:-

> *"Guardians must attend induction training and will be expected to attend training organised by the Agency. Payment will be at travel and waiting time rates for hours of attendance. Training carried out by self-employed*

guardians ad litem on behalf of the Agency and for participation in Agency working/task groups will be paid at the base rate."

73. The contract for service stated that case claims should be made on a monthly basis.

74. The contract for service stated that a self-employed GAL should be available for a minimum of 650 hours per year ie an average of 14 hours per week, not that he would accept or work for 650 hours per year. However it made it plain that self-employed guardians ad litem could accept or decline any work offered by the Agency. No explanation or permission would be required.

75. This was a clearly different situation from that of directly employed GALs. A directly employed GAL could only turn down work if permitted by the management for a good reason eg overloading. No permission or explanation was required in the case of self-employed GALs. The requirement for a minimum availability is not unusual in contracts of this type. It does not appear to the tribunal to indicate the status of employee or worker. When it was put to the claimant in cross-examination that there was a difference between the position of a directly employed employee and the position of a self-employed GAL, the claimant confirmed that was correct; he could turn down work in any circumstances.

76. Importantly, when it was put to the claimant in cross-examination, in clear terms, that the contract for service had accurately reflected his working relationship with the respondent agency, he confirmed that it had done so. He further confirmed that it had reflected his relationship with the respondent agency throughout the relevant period up to the present date. He confirmed that the contract had not been a sham or an arrangement with an ulterior motive.

77. The claimant was further asked in cross-examination whether he was alleging that the document had been "put together" to misrepresent the working relationship. He confirmed that he was not making that allegation.

78. The claimant also confirmed that he had not contracted to be available on certain days or at certain times or in relation only to certain categories of work.

79. When it was put in cross-examination to the claimant that the change from employee status to self-employed status had been entirely his choice and that he had entered into the self-employed arrangement with his "eyes wide open" he confirmed:-

"Yes it was a choice I made".

80. It is clear that the claimant had been, until lately, content with his arrangement with the respondent agency under the contract for service. In an appraisal minute in 2007 which had been countersigned by the claimant, the minute stated:-

"This appraisal confirmed Tony as an experienced and professional practitioner who is open to acknowledging the need for developing its practice. The move to self-employed, has opened up many new areas of work and training opportunities."

81. There was no documentary evidence or other evidence relating to any complaints by the claimant throughout his period of "self-employed" status before 2017 relating to that status. The matters that were raised by the claimant before 2017 appear to relate to work allocation and the implications of "Agenda for Change".

The claimant maintained in evidence that he had raised such complaints before 2017 and that he had argued at that time that he had been an employee. The tribunal does not accept that evidence. If those complaints had been raised, those complaints would have been raised, or at least referred to, in written form and documentation would have been produced to this tribunal. Furthermore if that had been the case, the matter would have been pursued through the claimant's union or at the very least pursued in the course of the job appraisals. In the absence of any such documentation, the tribunal can only conclude, on the balance of probabilities, that no such complaints were made by the claimant before 2017.

82. The claimant at no point disputed his "self-employed" status with HMRC or sought to amend that status. He did not try to raise a grievance with the respondent before 2017.

83. The respondent agency had provided a secure laptop and a secure telephone. The claimant paid for calls and provided broadband access. He had been required to use that particular laptop and that particular telephone for work conducted on behalf of the agency. The claimant had also been required to use the email address provided by the respondent agency. He had also been advised to use a secure database provided by the respondent agency. The claimant had also been provided with a business card which, laterally at least, had indicated that he was self-employed but provided the name of the agency. Mr Reynolds indicated that this had been a form of identification. It had been particularly useful when the claimant was visiting private homes in sensitive circumstances. The claimant had also been required to use the headed notepaper provided by the respondent agency. All the claimant's correspondence had to be sent to the respondent agency's Headquarters.

84. All of the above issues appear to the tribunal to be entirely driven by the particular nature of the work undertaken by GALs, whether directly employed or "self-employed". In that particular context, secure communications, a secure database, secure correspondence, secure storage, secure post facilities etc were all entirely consistent with either self-employed status or employed status. It indicated neither the one nor the other. The requirement to use headed notepaper, rather than personal notepaper or blank paper purchased from Tesco is hardly surprising. The highly confidential and sensitive nature of the work, rather than the relationship between the claimant and the agency, made those measures necessary.

85. If the claimant had required a solicitor in the course of his work he had been required to use the panel provided by the agency. That panel was drawn from the wider children's panel conducted by the Law Society. It was restricted to those who were assessed by the agency as having sufficient experience and expertise. Again it does not appear to the tribunal to be of any significance in relation to the employment status of the claimant. The respondent agency in conducting its statutory functions would have been obliged to ensure that proper legal services were available to either directly employed GALs or self-employed GALs. The

requirement to use only solicitors on the panel reflected the specialised area of law and had nothing to do with the contractual relationship between the claimant and the agency.

86. There clearly had been no right of substitution in the particular circumstances of this case. However that is unremarkable and does not indicate in itself employed status. An appointment as a GAL was an appointment made by an individual court and could only be varied or terminated by that court. Substitution was not a possibility given the nature of the work. In these circumstances, the absence of a right of substitution is not a relevant factor.

87. The claimant argued that directly employed GALs had also been able to undertake other duties. Mr Reynolds stated, and the tribunal accepts that a number of directly employed GALs did perform other duties but, with one exception, not as social workers. He gave as an example those who provided art therapy services or cognitive behavioural therapy courses. They did not act as either social workers or as guardians ad litem. There was one exception to that rule but Mr Reynolds stated that was very much the exception to the rule.

DECISION

88. The cases which require an employment tribunal to determine whether a claimant, during a relevant period, came within one of the three categories of employee, worker or self-employed are relatively common. The selection of the appropriate category in any individual case requires the tribunal to balance all the relevant factors and then to stand back and make a reasoned assessment of the whole picture. It would be rare for all the relevant factors in any one case to point consistently in the same direction. It also has to be remembered that the relevance of each of those different factors will also differ from case to case. What may be a relevant factor in relation to a retail worker may not be a relevant factor, or may not be as relevant a factor, in relation to a skilled professional such as an accountant, doctor or a specialised social worker.

Ultimately the tribunal has to reach an objective decision after considering all the relevant factors which arise in the particular circumstances of the case, while recognising that what may have been a relevant factor in another decided case may not be as relevant in the present case.

89. The circumstances of the present case are, in the collective experience of this tribunal, relatively unique. The claimant had originally been an employee who had been engaged on a clear contract of service. He had not been pressurised, or even encouraged, to change that contract to a contract for service. He accepted, in cross-examination, that the decision to change to a contract for service had been entirely his own decision; no one else's.

Directly employed and self-employed GALs both provided independent professional services to the courts when appointed in respect of individual cases. There had been no "drive" on the part of the agency, as suggested by the claimant, to enhance independence by appointing self-employed GALs. That assertion had been made by the claimant in his witness statement but there is absolutely no evidence to support that assertion. Furthermore, that assertion does not make any sense. The

distinction between directly employed GALs and self-employed GALs had nothing to do with professional independence. Both acted independently in their professional capacities when providing services to the courts. The use of self-employed GALs did not enhance that independence. It assisted the respondent agency in maintaining flexibility and it allowed the respondent agency to ensure that sufficient GALs were available for appointment, even where there had been an upsurge in work.

90. However, this is not simply a case where the claimant had chosen, entirely of his own volition, to switch from directly employed status to self-employed status. He had also been allowed a 12 month career break to trial self-employed status. He had availed of that opportunity and had thereafter decided to remain as a self-employed GAL. He accepted that he could have decided to remain as a directly employed GAL either before entering into the 12 month career break or immediately after that 12 month career break. He could have applied in any recruitment competition for employment as a directly employed GAL over 14 years. He did not do so. The claimant had known precisely what he was doing in changing to self-employed status. This had not been a change which he had misunderstood or in respect of which he had been misled by the agency. It was not a change which had been forced upon him. He knew what he had been doing and he did it because he had perceived financial and career advantages. He had not been a vulnerable or disadvantaged employee. He had not been in an unequal bargaining position. He had been an experienced social worker with ready access to advice. He had not been in a disadvantaged or subordinate position in relation to his decision to change his status.

91. The claimant alleged in evidence that he had complained about his status to the respondent agency and that he had argued at a relatively early stage that he had in reality been an employee or a worker. There is no evidence whatsoever to support that assertion. Any issues raised by the claimant, before 2017, related to work allocation or the implications of Agenda for Change. It is simply inconceivable that, if as the claimant now alleges, he had actively complained about his status and had actively alleged that he had been in reality an employee or a worker, that that had not been evidenced in some way in written complaints, either directly from him or through his professional trade union.

92. The circumstances, in the present case, cannot be compared to a situation, such as that in ***Autoclenz***, where relatively disadvantaged and vulnerable workers had been presented with a fait accompli, and where the contractual arrangements had been a sham, designed to conceal employee or worker status and to enhance financial advantages, primarily for the employer. Where a written contract does not properly represent the intention of the parties, it is permissible for a court or tribunal to construe that contract properly by way of rectification. That is not the situation in the present case. The contract for service, signed by the claimant, had been in very clear terms. It had succeeded a 12 month career break in which the claimant had had a full opportunity to trial self-employed status. Furthermore, he had been considering self-employed status for some time and had presumably researched and assessed the advantages and disadvantages of such an arrangement before he had even started his career break. The contract for service had been entered into by the claimant entirely as a matter of his own choice.

93. Crucially, the claimant accepted in cross-examination that the agreement had accurately represented his relationship with the respondent agency throughout the period from 2005 up to the present day. That concession is fatal to his argument that he had been, throughout that period, either an employee or a worker and that he had not been a self-employed contractor as set out in the written agreement which he had freely entered into and which he had operated without complaint from 2005 up to approximately 2017. Throughout that period, the claimant had agreed with HMRC that he had been self-employed. He had benefited from the financial advantages consequent on that status, and he had worked for other parties to a significant extent. He had entered into that contract for service in full knowledge of its implications. He had taken full advantage of the tax implications and other advantages of that status without complaint from 2005 to 2017. He continued to do so thereafter, even after he had complained in 2017 that he was not really self-employed. He knew what he had been doing and he cannot, now, expect the tribunal to rewrite history and to change the decision which he made as a matter of informed personal choice in 2005.

94. As indicated above, the claimant's concession that the contract for service had accurately reflected his relationship with the respondent agency is fatal to his claims. Even if that had not been the case, it is plain that the claimant had, throughout the period from 2005, been operating a business or a profession on his own account and that he had been marketing his services to others in the same way as the claimant had in ***Souhail*** (above).

95. As with most, if not all, cases of this type, certain factors pointed towards self-employment, while others pointed towards employee or worker status. Some factors were less relevant than they would have been in relation to other areas of employment. If the concession had not been made and if the tribunal had been looking beyond the plain words of the contract for service, the tribunal would have had to determine the relevance of the various factors, to assess these factors in relation to the facts of the case and to reach an objective decision on the overall picture.

96. Certain factors pointed towards self-employed status:-

    (i) The clear terms of the contract for service had referred to self-employed status.

    (ii) That contract for service had been signed by the claimant after a lengthy period of consideration and after a 12 months trial.

    (iii) The claimant had access to advice from his trade union. He had known exactly what he had been doing and he had made an informed choice.

    (iv) The claimant had been free to accept or to refuse work offered by the respondent agency and had done so.

    The requirement for a minimum of 650 hours "availability" had been a measure to avoid any panel member being inactive. There was no evidence that the requirement had ever been policed or enforced.

(v) Directly employed GALs had been allocated work first. It was only after they had been given work that allocation of work to self-employed GALs had even been considered and then only on a value for money basis.

(vi) The claimant had provided significant professional services to other bodies and had not sought, or required, the permission of the respondent agency to do so.

(vii) The claimant had not been part of the pension scheme provided for employees. He had been expected to make his own pension arrangements.

(viii) The claimant had to record work and invoice the respondent agency for that work.

(ix) The claimant had not been eligible for contractual sick pay or holiday pay.

(x) The claimant had been responsible for his own tax and national insurance as a self-employed person. He had employed an accountant and had been required to tell the agency who his accountant was.

(xi) The claimant had invoiced for work actually done rather than receiving a wage.

(xii) The claimant had been required to provide his own broadband connection and to pay for telephone calls.

(xiii) The claimant had claimed travelling expenses, without restriction, for his home address.

(xiv) The claimant had effectively complete control of how he performed his professional duties as a GAL for the courts who had appointed him. The operation of the panel, training and professional development had been minimal and had been required by the nature of the professional duties required, rather than by the contractual relationship between the claimant and the respondent agency.

(xv) The claimant had only been engaged to provide professional services on a case by case basis. That pointed away from the status of employee or worker.

97. Certain factors pointed towards the status of either employee or worker or were argued as doing so:-

(i) There had been no scope for substitution and personal service had clearly been required of the claimant. The claimant, was appointed as a GAL, could not provided a substitution GAL or sub-delegated work.

As indicated above, a factor, such as substitution, which is relevant in one case: eg ***Ready Mixed Concrete (South East) Limited*** (above) may not be relevant in a different set of circumstances.

In the present case, the appointment of a GAL was made by the individual court. The respondent agency nominated or allocated a GAL for that role. Only the individual court could terminate that appointment once made. The nature of the professional services required, in assessing and reporting on the needs of a vulnerable child, as directed by a court, was such that substitution or sub delegation was simply not an issue. That was because of the nature of the professional services required and because of the court appointment. It had nothing to do with the contractual relationship between a self-employed GAL and the respondent agency.

The tribunal therefore concludes that the issue of substitution is not relevant to the present case.

(ii) The claimant submits that he had been obligated to provide services for 650 hours per annum and that this had represented a mutuality of obligation. That submission is incorrect. The requirement was to be available for a minimum of 650 hours per annum. Those hours may or may not have coincided with an offer of work (which the respondent agency had not in any event been required to make). The tribunal accepts that the reason for that requirement had simply been to avoid appointing or retaining inactive members of the panel who would have required training and support. There was no evidence that the requirement had ever been policed or enforced. The reality was that there had been no effective mutuality of obligation to an extent that would have been consistent with the status of employee or worker.

(iii) The claimant argued that he had been under the control of the respondent agency. As indicated in ***White v Troutbeck SA*** (above) the issue is where and to what extent ultimate control resided.

The claimant and other self-employed GALs provided independent professional services to the individual courts which had appointed them. Control, in any real sense, rested with them or with the courts who had the power to terminate the appointments. It did not rest, in any real sense, with the respondent agency.

Training had been provided by the agency as a statutory duty, but at a lesser level than that provided to employees. There had been professional appraisal. However, given the nature of the work, that is hardly surprising. It would have been necessary for employees, workers and for the self-employed. The agency could hardly have allocated work in this area without checking on how that work was performed. The same point can be made in relation to the complaints procedure.

The tribunal concludes therefore that the level of control ultimately exercised by the respondent agency over how the work was done was minimal and, on the circumstances of this case, not consistent with the status of employee or worker.

(iv) The claimant had been provided with a secure laptop and telephone. He had to use a secure database. Post had to be delivered to the address of the

agency rather than to his home address. There were restrictions on the storage of documentation at his home address.

The providing of equipment can be an indicator of the status of employee or worker. However, in the present case, the confidentiality and sensitivity of the professional services provided for the courts required the provision of a secure laptop and a secure telephone. It also necessitated the use of a secure database, the restriction on post and the storage of documents. None of these matters had been required because of the contractual relationship between the claimant and the respondent agency.

The tribunal concludes therefore that these matters do not indicate the status of worker or employee and that they are equally consistent with the status of self-employed contractor.

(v) The claimant argues that he had been integrated into the organisation of the agency. That is to ignore the reality of the situation. The claimant had originally been an employee and had chosen to alter that position to a self-employed contractor. The use of self-employed contractors on the panel was intended to increase flexibility on the part of the respondent agency to deal with peaks and troughs in workload. Work was allocated first to employees and only then to self-employed GALs, and then only on a value for money basis. Some training was provided. Some appraisal was conducted. There was a complaints procedure. However, all those matters were a reflection of the nature of the work and of the obligation of the agency to ensure that competent GALs were made available to the courts.

The reality was that self-employed GALs were at best 'semi-detached' and not fully integrated into the organisation. They were not part of the sick pay, holiday pay or pension schemes. They were not guaranteed work. They were not obliged to accept work.

The tribunal therefore concludes that the organisation test was not satisfied.

(vi) The claimant argued that the 'economic reality' meant that he had been either a worker or an employee.

The tribunal concludes that the reality was that the claimant had been operating a business, providing professional services for the respondent agency and for others. Minimal equipment had been provided to the claimant and then only because if the confidential and sensitive nature of the work. The claimant provided significant services for a range of other clients and did not seek the permission of the respondent agency to do so.

98. The tribunal concludes that it cannot look behind, or seek to rewrite, a plainly worded contract for service which had not been a sham and which had not been drawn up by the respondent with an ulterior motive. The claimant was an experienced professional with ready access to advice. He had made an informed choice. He had not been coerced, pressurised, or otherwise taken advantage of by the respondent agency. He had changed his status in 2005 "with his eyes wide open".

99. If the tribunal is wrong to determine the matter in that way, the tribunal would in any event had concluded that the relevant factors in this case, assessed as a whole, are indicative of a self-employed professional operating a business rather than an employee or a worker.

100. All claims are therefore dismissed.

Vice President:

Date and place of hearing: **23 and 24 July 2019, Belfast.**

Date decision recorded in register and issued to parties: