Case Number 1301951/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr D Hughes		**Aktrion Group Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
OPEN PRELIMINARY HEARING
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 21 November 2016
25 November 2016 (in Chambers)

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **In Person**
For Respondent: **Mr I Shahid (Solicitor)**

JUDGMENT

The judgment of the tribunal is that:

1 The claimant worked for the respondent as an independent contractor:-.

(a) He was not an "employee" or a "worker" as defined by Section 230(1) and (3) of the Employment Rights Act 1996.
(b) He was not "employed" within the meaning of Section 83(2) of the Equality Act 2010.
(c) He was not an "employee" for the purposes of Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.
(d) He was not an "employee" or "worker" within the meaning of Regulation 2 of the Working Time Regulations 1998.

2 Accordingly the claimant's claims for unfair dismissal; unlawful discrimination on the grounds of age and/or race; outstanding holiday pay; unpaid wages; and breach of contract; are dismissed for want of jurisdiction.

REASONS

Introduction

3 The claimant in this case is Mr David Llewellyn Baldwin Hughes; he was engaged by the respondent, Aktrion Group Limited, from 18 April 2016 until 16 June

2016 as a Resident Plant Quality Engineer. He was engaged to provide services to the respondent's client Hutchinson Poland (Hutchinson).

4 On 11 July 2016 the claimant presented his claim.. Within the claim form he claims to have been unfairly dismissed; and that there were outstanding sums due to him for unpaid wages; unpaid holiday pay; and breach of contract. In addition he claims that he suffered unlawful discrimination on the grounds of age and/or race.

5 All of the claims are denied; but in its response the respondent raised a preliminary issue. The respondent's case is that, at all material times, the claimant was a self-employed independent contractor; he was not an "employee" as would be required for his unfair dismissal claim and his breach of contract claim; he was not "employed" as would be required for his discrimination claim; and he was not a "worker" as would be required for his unpaid wages claim and his claim for unpaid holiday pay.

6 The matter was considered at a Closed Preliminary Hearing conducted by Employment Judge Rose QC on 5 September 2016: he directed that there should be an Open Preliminary Hearing, which is listed before me today, to determine the following preliminary issues:-

(a) Who is the correct respondent? Is it Aktrion Group Ltd or is it Aktrion Manufacturing Support Services Ltd (trade as Aktrion Automotive)?
(b) Whether the Employment Tribunal has jurisdiction to entertain the following claims having regard to the dispute as to the claimant':

    (i) Unfair dismissal contrary to s.103 of the Employment Rights Act 1996, was the claimant an 'employee' within the meaning of S.230 of the 1996 Act?
    (ii) Complaints of direct discrimination on the grounds of the protected characteristics of race and age; was the claimant 'employed' within the meaning of S.83(2) of the Equality Act 2010?
    (iii) A complaint of wrongful dismissal pursuant to the 1994 Extension of Jurisdiction Order; was the claimant an employee under Article 3?
    (iv) A complaint of outstanding holiday pay; was the claimant an employee or worker within the meaning of Regulation 2 of the WTR 1998?
    (v) A complaint of arrears of pay, was the claimant an employee within the meaning of s.230 of the 1996 Act?

(c) Whether the ET1 should be struck out on the grounds that the manner in which the proceedings have been conducted by the claimant has been

scandalous, unreasonable or vexatious pursuant to rule 37(1) of the 2013 Rules of Procedure.

(d) Whether, the claimant should be permitted to amend his claim form to include a complaint of victimisation contrary to s.27 of the Equality Act 2010.

7 At the commencement of today's hearing, I established that there was no issue between the parties as to the correct identity of the respondent; which is Aktrion Group Limited.

8 In the light of my findings on the issues set out at Paragraph 6(b) above, it is unnecessary for me to make any decision on the issues raised at Paragraphs 6(c) or (d).

The Evidence

9 I heard evidence from the claimant on his own account; and from Mr Shahid the in-house solicitor who represented the respondent at the hearing. In addition I was provided with a joint bundle of documents extending to some 250 pages; and an additional supplementary bundle from the claimant which was not sequentially paginated but included an additional 18 documents. I must observe that much of the documentation in each of the bundles was wholly irrelevant to the issues which I had to determine today.

10 I found Mr Shahid to be a wholly truthful and credible witness; the aspersions cast by the claimant as to his honesty and his professional conduct were without foundation. Having said this, Mr Shahid did not have personal knowledge of all of the relevant events. By contrast I found the claimant to be a wholly unreliable witness; seeking to mould the facts to his present purpose. Further the claimant was unwilling or unable to focus on the issues before the tribunal today; instead wishing to canvass much wider issues including serious safety concerns relating to Vauxhall motor cars. In particular I find that the version of the Consultancy Agreement presented to me by the claimant to be false; to be a doctored version of the original. The correct version of the Agreement is at page 60 the joint bundle.

The Facts

11 The appellant is a highly skilled Quality Inspection Engineer within the automotive industry; the respondent undertakes a variety of projects within the industry; Hutchinson is engaged in the manufacture of vehicle components used in Vauxhall motor vehicles. Hutchinson has manufacturing plants in Poland and the Czech Republic.

12 The role of Resident Plant Quality Engineer is a regulatory requirement. The engineer is required to stand outside the normal production management and to review quality and safety. In layman's language it is an internal audit of the safety

and quality of the manufacturing process. Hutchinson approached the respondent with a request to provide them with a Resident Plant Quality Engineer; who would be independent of their own management structures; to carry out safety and quality inspections and report to senior managers. Accordingly, the respondent recruited the claimant.

13 Of necessity, the claimant had to be independent of Hutchinson; and I find that he acted wholly independent of the respondent as well. Nobody within the respondent's organisation had the necessary knowledge; skills; or experience; to in anyway oversee the claimant's work.

14 The Consultancy Agreement signed by the claimant and the respondent clearly provides for the claimant to be a self-employed consultant. His contractual obligation was to provide 40 hours per week of services to Hutchinson; he was to invoice the respondent for this; the claimant was not required to provide those services in person; not only was he permitted by the contract to send another engineer of his choosing; he was required to do so where necessary to ensure that all services were provided. His obligation was to ensure that 40 hours per week were provided to the requisite professional standard. The claimant was paid gross and was responsible for his own tax and national insurance contributions; indeed, although the agreement was between the claimant in person and the respondent, the payments due to the claimant were paid to a limited company under his control. He scheduled his own work in accordance with Hutchinson's needs.

15 As I have already indicated, I reject the claimant's version of the contract; it plainly makes no sense. But it is nevertheless very informative: the claimant acknowledges that the contract provides for him to be self employed as a consultant providing services to Hutchinson. The variations to the contract which he contends for, and which I reject, do not detract from this; but instead, are variations which provide that, on the happening of certain events, the claimant will then be treated as an employee of the respondent from the outset; that he will be entitled in those events to employee rights; and to payment in full of one year's salary. I am not at all satisfied that even if this were the genuine version of the contract it could be enforceable as such. To provide for a contract to be self-employed but for the arrangement to be varied on a backdated basis to one of employment upon the happening of certain events (such as the early termination of the arrangement) strikes me as being wholly void for uncertainty. The claimant describes the clause as a penalty clause. I do not have to decide this point because I reject this version of the contract.

16 I therefore proceed on the basis that the version of the contract provided by the respondent is the correct one and it clearly and expressly states that he is a self-employed contractor.

17 For the relatively short duration of the contract, the claimant provided the quality and safety inspection services to Hutchinson as expected. However, sometime around 19 May 2016 a dispute arose between the claimant and Hutchinson; it is unnecessary for me to consider the circumstances of that dispute; Hutchinson therefore terminated the arrangement with the respondent; and, in accordance with the Consultancy Agreement, on 24 May 2016, the respondent gave notice to terminate the Consultancy Agreement with the claimant; termination was accepted by the claimant in an email dated 30 May 2016. Essentially, the claimant's case is that the penalty clause referred to above was then engaged; and at that moment he became an employee (backdated); I have already indicated that I reject this.

The Law

18 **The Employment Rights Act 1996 (ERA)**

Section 230: Employees, workers etc

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

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

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

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

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

19 **The Working Time Regulations 1998 (WTR)**

Regulation 2: Interpretation

"Worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under)

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

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

20 **The Equality Act 2010 (EqA)**

Section 83: Interpretation and exceptions

(1) This section applies for the purposes of this Part.

(2) "Employment" means—

(a) Employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

21 **Decided Cases**

21.1 There is voluminous case law which seeks to encapsulate the essence of a contract of employment and to distinguish it from other forms of working relationship. A variety of tests have been proposed to identify a contract of employment but none has won universal approval. In ***Ready Mixed Concrete (South East) Limited -v- Minister of Pensions and National Insurance*** **[1968] 2QB 497 (HC)**, McKenna J summarised the essential elements of the contract of employment as follows:-

(a) 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 hid master.
(b) 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.
(c) The other provisions of the contract are consistent with its being a contract of service.

21.2 In 1968, when the ***Ready Mixed Concrete*** case was decided, considerable emphasis was placed on the element of control which the employer might exercise over the employee in the discharge of the latter's duties. But it has long been recognised that control cannot be a determinate factor. For example there are real

limitations over the degree of control which a hospital trust can exercise over the activities of a brain surgeon who may be pre-eminent in his field of expertise - but rarely in such cases there is there any doubt that the trust does employ the surgeon.

21.3 In ***White -v- Troutbeck SA*** **[2013] IRLR 949 (CA)**, the Court of Appeal, approved the judgement of the EAT during which it was stated that:-

> "*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*"

21.4 In ***Autoclenz Limited -v- Belcher & Others*** **[2011] IRLR 820 (SC)**, the Supreme Court established the following principles to be considered by the tribunal in determining the true nature of the relationship:-

(a) It is important to be aware that employers may place substitution clauses, or clauses denying any obligation to accept or provide work, in employment contracts as a matter of form, even where such terms do not reflect the real employment relationship.

(b) A finding that a contract is in part a sham does not require a finding that both parties intended it to paint a false picture as to the true nature of their respective obligations. The question in every case is what is the true agreement between the parties?

(c) Where there is a dispute as to the genuineness of a written term in an employment contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. All the relevant evidence must be examined, including: the written term itself, read in the context of the whole agreement; how the parties conduct themselves in practice; and their expectations of each other.

(d) Evidence of how the parties conduct themselves in practice may be so persuasive that an inference can be drawn that the practice reflects the true obligations of the parties, although the mere fact that the parties conduct themselves in a particular way does not of itself mean that the conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that the right is never exercised in practice does not mean that it is not a genuine right.

(f) The relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed. The circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. Organisations which offer work or require services to be provided by individuals are frequently in a position to dictate the written terms which the other party has to accept. In practice, in employment cases, it may be more common for a court or tribunal to have to investigate allegations that the written contract

does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so.

21.5 In recent cases, a factor which has proved decisive in determining employment status is *mutuality of obligation* - is there an obligation on the worker to do work? Is there an obligation on the employer to provide work and to pay for it?

21.6 In the very recent case of ***Quashie -v- Stringfellow Restaurants Ltd.*** **[2013] IRLR 99 (CA)**, the Court of Appeal considered the case of a dancer who worked at a London nightclub. The claimant was found not to be an employee; despite the fact that some mutuality of obligation existed between the claimant and the nightclub owner. The claimant was required to turn up on time; be of the correct appearance; and to perform the duties of dancing for and with clients at the nightclub. The crucial omission in her case was that there was no obligation on the nightclub owner to pay the claimant anything at all - she was paid by fees charged to clients for "*private dances*". Those fees were actually paid not by cash but by vouchers, purchased from and later redeemable by the nightclub. These were then deposited with the nightclub and from which the nightclub made deductions for a house fee; commission; and for services such as hairdressing and make-up which were provided to the dancers. The claimant was then paid the balance - on some nights she may receive nothing at all or even be in deficit. The Court held that, absent an obligation by the nightclub to pay the dancer anything at all, the dancer could not be regarded as an employee of the nightclub.

21.7 The cases of ***O'Kelly & Others -v- Trusthouse Forte Plc*** **[1983] IRLR 369 (CA)** and ***Carmichael & Another -v- National Power Plc*** **[2000] IRLR 43 (HL)** were true examples of what have been referred to as casual workers working on an "*as required'* basis. In ***Carmichael*** the claimants were Tour Guides employed to provide guided tours of Blythe A and B power stations. They were employed for many years on the basis that when the respondent, National Power, required Guides because they have visitors either booked or expected, they would be invited to work and if they chose to work they came in and provided guided tours. But if they chose not to then that was the respondent's problem to find another Guide who could fulfil the duty, there was no obligation upon them to work at all; and they had no expectation of work during periods when no guides were required. The position was similar in the case of ***O'Kelly***: Mr O'Kelly was one of a number of Wine Waiters used by a hotel when they had large functions and needed to supplement their normal waiting staff. Mr O'Kelly would receive a telephone call to ask if he wished to work for a particular function and he could choose to do so or decline. In each of these cases, because there was no obligation to work; and no obligation to offer any work, the claimants were found not to be working under contracts of employment.

21.8 I have considered the recent tribunal decision in ***Aslam & Others –v- Uber B.V. & Others*** **2202550/2015** and the recent Court of Appeal judgment in

Pimlico Plumbers & Another –v- Smith **[2017] EWCA Civ 51 (CA)**. These are undoubtedly important cases in the exploration of the boundary between employee/worker and worker/independent contractor. But my judgement is that neither of these cases adds to or changes the substantive law on the subject. They are both fact specific; and are expositions of the existing law.

Discussion & Conclusions

22 I am satisfied that the claimant in this case is neither an employee nor a worker. The respondent as putative employer exercised no control over the claimant or how he performed his duties. He was required to ensure that services defined in the Service Agreement were delivered to Hutchinson for an agreed price; but he was not required to do any work personally; he was permitted to send a substitute; and indeed, was specifically required to do so where necessary. The choice of substitute was entirely a matter for him; it was not qualified in any way by the contract.

23 I am satisfied therefore that on an interpretation of the contract itself and an examination of the reality of the relationship between the parties the conclusion is the same; the claimant was an independent contractor providing services to Hutchinson.

24 This conclusion is unaffected by my finding that the version of the contract relied upon by the claimant is a fiction. I would reach the same conclusion even on the basis of his contract. That contract itself provided that the claimant was an independent contractor but contained what the claimant describes as “penalty clauses” changing his status upon the happening of certain events. In my judgement such a clause would be wholly void for uncertainty.

25 Having found that the claimant was an independent contractor; he was not an employee; he was not a worker; it follows that the tribunal has no jurisdiction to consider any of his claims; all of which are therefore dismissed. The claims having been dismissed on this basis, it is unnecessary to consider the respondent’s application to strike the claims out as having no reasonable prospect of success; further it must follow that the tribunal would be wanting in jurisdiction to consider a victimisation claim under the Equality Act 2010. Accordingly the application to amend the claim is also dismissed.

Employment Judge Gaskell
13 February 2017
Judgment sent to Parties on
13 February 2017