EMPLOYMENT TRIBUNALS

Claimant: Mr D Eite
Respondent: LB Specialist Cars Ltd

Heard at: Midlands (East) Region by Cloud Video Platform
On: 23 and 24 August 2021
Reserved to: 13 September 2021

Before: Employment Judge Blackwell (sitting alone)

Representation
Claimant: Mr S Proffitt of Counsel
Respondent: Ms J Duane of Counsel

RESERVED JUDGMENT

1. The Claim Form submitted to the Tribunal on 14 December 2020 should not be rejected pursuant to Rule 12 of the First Schedule of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

2. The Claimant was an employee within the meaning of Section 230(1) of the Employment Rights Act 1996 between 23 January 2017 until his dismissal on 31 August 2020.

3. The issue whether the Claimant's claim for holiday pay should be either struck out or a deposit ordered is stayed.

RESERVED REASONS

THE FIRST ISSUE

Whether the Claimant's claim in the above proceedings should be rejected by the Tribunal pursuant to Rule 12 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 (the Rules) and if so whether any defect has been rectified pursuant to Rule 13 of the Rules.

1. **Relevant statutory law**

Section 18A - The Employment Tribunals Act

"***18A Requirement to contact ACAS before instituting proceedings***

(1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.

This is subject to subsection (7).

(2) On receiving the prescribed information in the prescribed manner, ACAS shall send a copy of it to a conciliation officer.

(3) The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.

(4) If—

(a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or

(b) the prescribed period expires without a settlement having been reached,

the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant.

(5) The conciliation officer may continue to endeavour to promote a settlement after the expiry of the prescribed period.

(6) In subsections (3) to (5) "settlement" means a settlement that avoids proceedings being instituted.

(7) A person may institute relevant proceedings without complying with the requirement in subsection (1) in prescribed cases.

The cases that may be prescribed include (in particular)—

cases where the requirement is complied with by another person instituting relevant proceedings relating to the same matter;

cases where proceedings that are not relevant proceedings are instituted by means of the same form as proceedings that are;

cases where section 18B applies because ACAS has been contacted by a person against whom relevant proceedings are being instituted.

(8) A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without

a certificate under subsection (4).

(9) Where a conciliation officer acts under this section in a case where the prospective claimant has ceased to be employed by the employer and the proposed proceedings are proceedings under section 111 of the Employment Rights Act 1996, the conciliation officer may in particular—

(a) seek to promote the reinstatement or re-engagement of the prospective claimant by the employer, or by a successor of the employer or by an associated employer, on terms appearing to the conciliation officer to be equitable, or

(b) where the prospective claimant does not wish to be reinstated or re-engaged, or where reinstatement or re-engagement is not practicable, seek to promote agreement between them as to a sum by way of compensation to be paid by the employer to the prospective claimant.

(10) In subsections (1) to (7) "prescribed" means prescribed in employment tribunal procedure regulations.

(11) The Secretary of State may by employment tribunal procedure regulations make such further provision as appears to the Secretary of State to be necessary or expedient with respect to the conciliation process provided for by subsections (1) to (8).

(12) Employment tribunal procedure regulations may (in particular) make provision—

(a) authorising the Secretary of State to prescribe, or prescribe requirements in relation to, any form which is required by such regulations to be used for the purpose of providing information to ACAS under subsection (1) or issuing a certificate under subsection (4);

(b) requiring ACAS to give a person any necessary assistance to comply with the requirement in subsection (1);

(c) for the extension of the period prescribed for the purposes of subsection (3);

(d) treating the requirement in subsection (1) as complied with, for the purposes of any provision extending the time limit for instituting relevant proceedings, by a person who is relieved of that requirement by virtue of subsection (7)(a)."

2. Rules 10 and 12 – The Rules

*"**Rejection: form not used or failure to supply minimum information***

10.—(1) The Tribunal shall reject a claim if—

(a) it is not made on a prescribed form; or

(b) it does not contain all of the following information—

(i)each claimant's name;

(ii)each claimant's address;

(iii)each respondent's name;

(iv)each respondent's address.

(2) The form shall be returned to the claimant with a notice of rejection explaining why it has been rejected. The notice shall contain information about how to apply for a reconsideration of the rejection.

Rejection: substantive defects

12.—(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—

(a) one which the Tribunal has no jurisdiction to consider; or

(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process.

(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a) or (b) of paragraph (1).

(3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection."

Introduction

3. 12(1)(da) and 2(ZA) were added to Rule 12 by The Employment Tribunals (Constitution and Rules of Procedure) Early Conciliation: Exemptions and Rules of Procedure (Amendment) Regulations 2020 no doubt following a series of decisions in

the Employment Appeal Tribunal, for example Mr Justice Kerr in the case of ***The Commissioners for HM Revenue & Customs v Serra Garau [2017] ICR 1121*** said at paragraph 1 of his Judgment:

> *"1. Parliament has enacted mandatory "early conciliation" provisions to steer parties in employment relationships towards resolving their differences without litigation. These provisions may do much good, but they also give the parties something else to litigate about. This is at least the fifth case of this kind we have had in the last couple of years. The appeal arises from a dispute about dispute settlement"*

4. **Agreed chronology**

31 August 2020	The Claimant's employment terminated.
29 September 2020	Early conciliation commenced.
26 October 2020	Early conciliation certificate R199100/20/75.
12 November 2020	Second conciliation commenced.
26 November 2020	Second certificate issued R218256/20/40.
14 December 2020	ET1 issued and acknowledged by the Tribunal using second certificate R218 256/20/40

5. **Ms J Duane's submissions for the Respondent**

"7. R avers that C has issued proceedings under an invalid early conciliation certificate number, namely R218256/20/40, **[P2]**, thus requiring the claim form to be rejected in accordance with either Rule 10 or Rule 12 of the ET Rules. In *Commissioners for HM Revenue and Customs v Serra Garau [UKEAT/0348/16],* the EAT held that where a certificate is issued under section 18A(4) , there cannot thereafter be a second valid early conciliation certificate regarding "that matter".1

1 see per Kerr J at para 21 in *Revenue and Customs Comrs v Serra Garau [2017] ICR 1121*

8. R contends under Rule 12(1)(c) the claim has been presented on a claim form that did not contain an early conciliation number as the second certificate is not effective. R avers that where a claim form has been submitted without an early conciliation number, the Tribunal must reject that claim under Rule 12 and may not allow the claim form to be amended to include the correct number. In E.ON Her Honour Judge Eady held (Para 54):

"*54. The consequence of a failure to include the correct early conciliation number is made clear under rules 10 and 12 : the claim in question shall be rejected and the form returned to the would-be claimant. That being*

so, when it became apparent to the employment judge that the claimant's claim forms were of a kind described by rule 12(1)(c) , he was mandated by rule 12(2) to reject the claims and return the forms to the claimant. Having complied with that obligation, there would no longer have been any claim before the tribunal that could have been amended by exercise of the employment judge's case management powers under rule 29 , although it would have been open to the claimant to re-submit a rectified claim form, now including the correct number from the first certificate. Had the claimant adopted this course, the employment judge would have been required to treat the claim as thus validly presented on the date that the defect was rectified: rule 13(4) of the Rules. The claim would have been lodged out of time but it would then have been for the tribunal to determine whether it had not been reasonably practicable to present the claim in time. In this regard, the tribunal might have seen it as relevant that the claimant had not been given a notice of rejection and advised of the means by which he might apply for a reconsideration at an earlier stage (and see the discussion of the interplay between errors under rules 10 and 12 and the "reasonable practicability" test in Adams v British Telecommunications plc [2017] ICR 382 and North East London NHS Foundation Trust v Zhou 5 July 2018), although no doubt the employer would have countered this suggestion by pointing out that it had raised the issue some time before the preliminary hearing and the claimant (who was legally represented throughout) had taken no steps to rectify the error earlier. In any event, the tribunal did not adopt this course but, instead, purported to allow an amendment to a claim that it ought to have rejected and returned to the claimant. I understand the employment judge's desire to adopt this course but I consider that, by doing so, he erred in law."

9. R contends that this is not a matter about which the Tribunal has discretion and that the claim form containing, effectively, "no certificate number" by C must be rejected. In order to rectify this defect C would need to submit a rectified claim form, including a valid early conciliation number from the first certificate, which would only be validly presented on the date that the defect was rectified.

10. R contends that the claim would be out of time and, taking into account that C has been represented throughout these proceedings, it was reasonably practicable for C to have presented the claim in time. C's failure to do so, does not obviate the clear principles of the Rules. Moreover C's suggestion that the early conciliation certificates are and/or have been linked are erroneous, as evidenced within the bundle, **[P28B, 29B].**

11. R contends that if the claim were to now be amended this would be lodged outside the relevant time limit and for which the tribunal has not granted an extension of time, and could not have done so in circumstances in which C (i) was represented by solicitors, (ii) had lodged an initial claim within the primary time limit and merely needed to cite the first certificate number (in existence before the expiry of the time

limit) on any of the subsequent claim for it to be validly instituted, and (iii) had failed to provide a good reason for the failure to do so.

12. Whilst C may seek to rely on the ET Amendment Regulations 2020, which amend the ET Rules to give an employment judge the discretion to accept a claim form where the conciliation number quoted by C is not the same as that on the conciliation certificate due to C's error, it is R's submission that the Amendment Regulations 2020 make no changes to rules 12(1)(c), 12(1)(d) or 12(2) of the ET Rules. Therefore, taking into account that the claim form has been submitted with "no early conciliation number" it remains the case that the claim form **must** be rejected.

6. In summary, Ms Duane relies on the following paragraphs of Mr Justice Kerr's Judgment in the ***Serra Garau*** case as follows:

"18. I come to my reasoning and conclusions. I am in no doubt whatever that the Respondent's submissions are to be preferred. Only one mandatory process in enacted by the statutory provisions. The effect of the provision is to prevent the bringing of a claim without first obtaining an early conciliation certificate. Once that has been done, the prohibition against bringing a claim enacted by section 18A(8) of the **Employment Tribunals Act** is lifted.

19. The quid pro quo for the prohibition against issuing a claim until a certificate is obtained, is that the limitation regime is modified so that the certification process does not prejudice the claimant. That is how section 207B of the **Employment Rights Act** and its counterpart section 140B of the **Equality Act** operate.

20. I agree with Mr Northall that the scheme of the legislation is that only one certificate is required for "proceedings relating to any matter" (in section 18A(1)). A second certificate is unnecessary and does not impact on the prohibition against bringing a claim that has already been lifted.

21. It follows, in my judgment, that a second certificate is not a "certificate" falling within section 18A(4). The certificate referred to in section 18A(4) is the one that a prospective claimant must obtain by complying with the notification requirements and the Rules of procedure scheduled to the **2014 Regulations**."

7. Ms Duane's submission is that therefore the Claim Form should be rejected pursuant to Rule 12(1)(c) in that it does not contain "an early conciliation number".

8. She further submits that therefore Rule 12(1)(da) and 2ZA are therefore not engaged.

9. **Mr Proffitt's submissions for the Claimant**

"5. Accordingly, Rule 12(2ZA) provides that should the tribunal find any error in relation to C's ACAS EC Certificate recorded in the ET1 the tribunal is not mandated to reject the claim. The tribunal must now consider whether it is in the interests of justice to do so. Importantly, the authorities regarding rejection

of a claim due to an invalid ACAS EC Certificate were decided before that change existed, and the tribunal must be alive to that substantial shift towards the application of justice on discretionary bases.

6. In *Revenue and Customers Commissioners v Serra Garau 2017 ICR* 1121 it was noted that there is no legislative provision for a claimant to seek a second EC Certificate in relation to the "same matter". So, where multiple EC Certificates are issued by ACAS in relation to the "same matter", it is only the first which is relevant for the purposes of compliance with s18A Employment Tribunals Act 1996 ("ETA").

7. In *Akhigbe v St Edwards Home Ltd and ors 2019 ICR D6, EAT* it was held that determining what amounts to the "same matter" requires an analysis of the factual matrix between the respective disputes. Where the connection between the first and second certificates is simply the same parties, such as where a whistleblowing claim is followed by a claim for unpaid wages based on different events, this will not be the "same matter".

8. In *Drake International Systems Ltd and ors v Blue Arrow Ltd 2016 ICR 445, EAT* it was confirmed that there is no requirement for a claimant who seeks to add further claims to existing proceedings to go through the ACAS EC procedure again.

Submissions – ACAS EC / Rejection

9. R's argument in relation to the ACAS point appears to be based on a misapprehension. In its ET3 **[16]** R states in relation to the EC Certificate number provided that it is:

> *"…shocked and unaware of any early conciliation taking place in relation to this certificate, is unaware of what it was for and therefore had no opportunity to respond to any claim relating to this and have not been part of any conciliation process for this."*

10. R's shock, lack of awareness of, and lack of opportunity to respond to, the subsequent EC Certificate is irrelevant to its validity. There is no duty on any claimant to give permission to ACAS to disclose the existence of the process to a respondent, and it does not affect whether the certificate and/or claim is validly presented; R therefore appears to pursue invalidity on fundamentally mistaken grounds.

11. In any event, as can be seen from a comparison of the ACAS Notification Data forms, and as described by C in his supplemental statement, the two certificates are not in respect of the "same matter" within the meaning of *Akhigbe*. The first EC Certificate (R199100/20/75) expressly refers to a claim of unpaid wages and holiday pay **[28B-28C]** only. The second EC Certificate (R218526/20/40) refers to unfair dismissal **[29A-29B]**, and arose following C obtaining advice that he may have a claim regarding TUPE **([C SP1 w/s paras 36-43]**). Those claims are factually different, pursued on entirely different legal grounds, and capable of being mutually exclusive. Indeed, the TUPE claim

could not possibly have been brought about by the same factual matrix, as at the time of the first EC Certificate C had no idea what it meant.

12. Importantly, it is self-evident that the relevant "conciliation opportunity" envisaged by Kerr J in *Akighbe* (para 51) which may help settle a dispute would necessarily be new and on entirely different bases; a respondent facing a wages claim is dealing with entirely different risk to a respondent facing an unfair dismissal and TUPE claim.

13. As it happened, once becoming aware of grounds for his unfair dismissal and TUPE claim, C sought to ensure he complied with the ACAS EC Certificate requirements by gaining another certificate, and by using that certificate when filing his ET1 **[C SP1 w/s para 42]**. Pursuant to *Drake*, there was no requirement for C to have obtained a subsequent certificate to introduce those additional claims, but doing so is a clear effort to exercise compliance with the Rules. It cannot possibly be in the interests of justice to penalise a claimant for following those steps before filing a claim. The result is that C had a right to pursue the entirety of the claims, whether he had submitted a limited first claim and immediately applied to amend, or included the unfair dismissal and TUPE claim the first time around.

14. Accordingly, even if the tribunal finds that C should have used the first EC certificate and has therefore technically erred by inputting the later EC certificate on his ET1, C invites the tribunal to waive the error and accept the claim under Rule 12(2ZA). The obvious purpose of the amendment to the Rules was precisely to avoid the unintended consequence of barring access to justice by claimants who sought to comply and made a clerical or technical error when completing the ET1 claim form; it could not be in the interests of justice to reject a claim in circumstances where the rule change was made specifically to avoid that miscarriage of justice."

10. In oral submissions, Mr Proffitt argued that the wording of 12(1)(da) encompasses any form of error, including for example the inclusion of a random number, the inclusion of the Claimant's birthday or the Claimant's National Insurance number.

11. I am not persuaded by Mr Proffitt's references to the case of ***Akhigbe v St Edwards Home Ltd [2019] ICR D6*** in that that case is clearly distinguishable in that there were two claim forms dealing with different matters which both used the same ECC number, which was valid.

12. Counsel could find no authority on that point since the amendment to the Rules.

13. Therefore the question is whether or not the inclusion of the certificate number which is not a valid certificate falling within s18A(4) is caught by 12(1)(da). In my view it is by reading 12(1)(da) literally. The early conciliation number on the Claim Form is not the same as the early conciliation number on the early conciliation certificate, ie the only valid certificate being R199100/20/75.

14. This therefore brings me to a consideration of (2ZA). In that regard, Ms Duane's submission is that it would be in the interests of justice to reject the claim, principally

because the Claimant was at the relevant time being advised by solicitors, although his evidence was to the effect that in relation to the starting of the second ECC process, he acted on his own.

15. Mr Proffitt submits that it is clear that the Claimant made an error, ie using the second certificate number and not the first one and that further it would not be in the interests of justice to reject the claim because the obvious purpose of the amendment to the Rules was to avoid the unintended consequence of barring access to justice by claimants who sought to comply. I note in this case the effect has been that there were two attempts at early conciliation. I agree with Mr Proffitt that it would be a miscarriage of justice if I did not exercise my judicial discretion in not rejecting the claim. To reject the claim would also give the Respondent a windfall limitation argument.

16. It follows therefore that I do not need to go on to apply Rule 13.

THE SECOND ISSUE

Employment status

17. **Relevant statutory law**

Section 230(1) and (3) - Employment Rights Act 1996

> *"**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."

18. As to case law, there is a plethora of relevant authority but I begin with the three tests set out in the case of ***RMC (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497*** which held that the key test for the existence of a contract of service were:

> *"(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."*

Findings of fact

19. Mr Eite returned to the UK at the end of 2015 after having lived and worked overseas for 15 years. On his return, he used his skills in painting, decorating and tiling working for people he knew and local builders. He also had a relationship with his nephew carrying out the same wort of work.

20. His trade, however, was working with fibreglass, carbon fibre, mould making, pattern making and finishing.

21. As a consequence, I accept that he cold called the Respondent (LB) who coincidentally were looking for such skills at that time. It was common ground that the discussion led to a trial period and that the relationship should be one where Mr Eite was self-employed.

22. I accept Ms White's evidence that the fundamental reason which applied to all of those working for LB was that at that point in 2017, the Directors did not have long-term confidence in the viability of LB and thus it would be inappropriate to offer contracts of employment. LB's business was the production of kit cars. The moulding and production of body parts was therefore an integral part of the business.

23. The one month trial period was completed satisfactorily and thereafter, until he signed a contract of employment commencing on 2 September 2019, Mr Eite submitted simple invoices which LB paid and they were based on hours worked.

24. Throughout the period up until September 2019, Mr Eite was not paid for holidays (though he did take holidays) and he did not receive any sick pay. He made no contribution towards pension and the accounts of his business show him as self-employed. He further claimed expenses throughout the period up to September 2019.

25. Fortunately, LB's business flourished and there was sufficient work for Mr Eite. He generally worked around 38 hours per week, save for a period early in 2017 when Mr Eite was engaged in renovating his property.

26. As from October 2018, Mr Eite asked to work his hours over Monday to Thursday and it is clear that that is what then occurred.

27. I accept that Mr Eite had the benefit of a number of significant increases in the hourly rate that he was paid, ie in May 2017, November 2017, September 2018 and again when he accepted a contract of employment in September 2019. Ms White characterises the pay increases as ultimatar. She says that there was no negotiation. I accept that there was no negotiation but it seems to me that it was more than likely that Ms White was satisfied with Mr Eite's work and that notwithstanding the pay increases, LB would remain profitable.

28. I accept that Mr Eite was permitted to use his mobile 'phone in a way that would not have been open to an employee. I further accept that Mr Eite was not subjected to LB's disciplinary procedure. I further accept that Mr Eite had more latitude in determining his start and finishing times.

29. I also accept that Mr Eite determined how to carry out the moulding and finishing work that he was given to do. However, it was always within a timetable dictated by LB so that a project could be finished within the time agreed with customers.

30. I accept Ms White's evidence that early in 2018, she approached Mr Eite with a view to Mr Eite becoming an employee. I also accept her evidence that Mr Eite rejected the offer on the basis that he was better off being self-employed. Mr Eite's evidence on the point, as was often the case, was vague and I prefer the evidence of Ms White who was throughout candid and straightforward.

31. Again, with candour, Ms White accepted in cross-examination that her offer was made to formalise a situation which already existed.

32. At 337 to 339 we see the contract of employment signed between the parties of 12 September 2019. From that date, Mr Eite was an employee, was paid under the PAYE regime, made pension contributions and was treated thereafter as an employee with the consequence for example that his use of his mobile 'phone at work was restricted.

33. Mr Eite was provided with everything he needed to perform his role, including tools and other equipment and did so exclusively on LB's premises.

Conclusions

34. The burden of proof to establish the status of employment is with Mr Eite. Firstly, did Mr Eite agree to provide his own work and skill in return for remuneration? Ms Duane submits that during the material period, ie up until September 2019, Mr Eite was not required to carry out the services personally and had an unqualified right to appoint his substitute, limited only by requirement to show that the substitute was as qualified as Mr Eite. As Ms White accepted, the question of substitution never arose and was never discussed. It is clear from Ms White's evidence that prior to Mr Eite joining the Company, subcontractors had been used where necessary and it seems to me that if Mr Eite had either left or reduced his capacity to produce the finished product, subcontractors would have been used to fill the shortfall.

35. Given the question of substitution was never discussed between the parties, it seems to me that it is clear that Mr Eite was required to carry out his work personally and that reflects the reality of the period between January 2017 until September 2019.

Control

36. As indicated above, I accept that Mr Eite had more leeway than would normally be expected in a relationship of employer and employee. It seems to me that that however reflects the fact that Mr Eite's work was of value to LB and was at the time the best option open to LB.

37. Again, as reflected in the findings of fact, although Mr Eite determined how he would carry out the work that he was given and in what order, nonetheless that was to a timetable dictated by LB. I therefore conclude that there was a sufficient degree of control over Mr Eite to justify a conclusion that he was an employee.

The Contract

38. Finally, is the question of whether the oral contract between the parties which subsisted between January 2017 and September 2019 is consistent with a contract of employment. On the face of it they are not, given in particular the way in which Mr Eite was paid by way of invoice and that both parties regarded Mr Eite as being self-employed, at least until 2018. I was referred to the decision of the Court of Appeal in the case of ***Young & Woods Ltd v West [1980] IRLR*** beginning at page 201, the tribunal's tasks is to look at the reality of the relationship. The headnote states:

> "… *it is the duty of an Industrial Tribunal, once a person goes to it and says, "Though I was self-employed, nevertheless I am an employee entitled to enforce my statutory rights", to see whether the label of self-employed is a true description or a false description by looking beneath it to the reality of the facts, and it must be its duty to decide on all the evidence whether the true legal relationship accords with the label or is contradicted by it.*"

39. The headnote goes on:

> "*Nor could it be held as contended on behalf of the appellants that though a party cannot alter the true relationship, if the parties genuinely and expressly intend to establish a person as self-employed, then he cannot make an unfair dismissal claim as an employee. In such circumstances, the parties can resile from the position which they have deliberately and openly chosen to take up. To reach any other conclusion would be to presuppose some kind of estoppel against invoking the statute which would in effect permit the parties to contract out of the act and to deprive a person who works as an employee within the definition of the act under a contract of service of the benefits which the statute confers upon him.*"

40. That approach has followed in cases such as ***Autoclenz*** and most recently in the Supreme Court decision in the ***Uber*** case. See in particular paragraphs 71 – 78 of that decision.

41. It seems to me therefore that the only provision of the oral contract between the parties that is inconsistent with that of a contract of employment is the label that the parties put upon the relationship, ie calling Mr Eite self-employed.

42. I therefore conclude that Mr Eite was from January 2017 to his dismissal on 31 August 2020 an employee. It therefore follows that Mr Eite was also a worker within the meaning of subsection (3) of section 230.

THE THIRD ISSUE

43. The parties have agreed that I should not determine this issue, subject to orders being made which follow as a separate document.

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Employment Judge Blackwell

Date: 22 September 2021

JUDGMENT SENT TO THE PARTIES ON

23 September 2021

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FOR THE TRIBUNAL OFFICE

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