



# EMPLOYMENT TRIBUNALS

**Claimant:** ALICE WALSH

**Respondent:** WHY WOULDN'T YOU LTD

**Heard at:** Watford Tribunal (by video link via CVP)

**On:** 4 September 2024

**Before:** Employment Judge Bloch KC

**Appearances:**

For the claimant: In person

For the respondent: Joshua Cainer, of counsel

## RESERVED JUDGMENT FOLLOWING PRELIMINARY HEARING

### JUDGMENT

Between 15 July 2020 to 30 January 2024 (and in particular between 31 January 2022 and 30 January 2024):

- (1) The Claimant was not a Limb (a) employee/worker (Employment Rights Act 1996 (“**ERA**”) s.230(3)(b)) or Limb (b) worker (ERA s.230(3)(b)) of the Respondent under a global or umbrella contract;
- (2) The Claimant was a Limb (a) employee/worker and a Limb (b) worker of the Respondent during each time she performed an assignment (a piece of typing work) for the Respondent.

# REASONS

1. The claimant, Ms Alice Walshe, (“**C**”), claims: (1) constructive unfair dismissal under ss.94, 95(1)(c) and 98 of the ERA and (2) various pay claims – although in her ET1C ticked the boxes for “*holiday pay*”, “*arrears of pay*” and “*other payments*”, she did not particularise the legal and factual basis for these claims.
2. C was engaged by the Respondent (“**R**”) as a typist, (under the title of self-employed audio typist) as part of a pool of home-based typists, whose work involved typing up dictation from various companies and individuals, R’s clients. The work was in the surveying industry. She was engaged by R on two occasions, April 2012 to April 2015 and 15 July 2020 to 30 January 2024. It is the latter period which is relevant. R’s Grounds of Resistance deny that she has the requisite employment/worker status to bring her claims. On 15 July 2024 EJ Warren listed this Preliminary Hearing to determine C’s employment status.
3. C’s (unparticularised) pay claims seem either to be: (1) a contractual claim under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 – which applies only to Limb (a) workers; (2) an unauthorised deductions from wages claims under the ERA – which applies to Limb (a) or (b) workers (ss.13(1) and 23(1) ERA); and/or (3) a holiday pay claim under the Working Time Regulations 1998 (“WTR 1998”) – which also applies to Limb (a) or (b) workers (reg 2(1) WTR 1998).

Each of these claims will require employment/worker status to be considered.

4. At the outset of the hearing R proposed two further issues about continuity of employment. However, I decided that it was inappropriate to add these issues given that:
  - (a) they were outside the scope of the preliminary hearing issue as ordered by EJ Warren;
  - (b) C was unrepresented and could not have anticipated or be expected to be ready to deal with these further issues;
  - (c) time was very short to cover the existing issues having regard to the number of witnesses, the very substantial size of the bundle and the wide array of legal authorities relied on. In the event, the matter was only concluded within the one allotted day by providing for the parties to serve their submissions in writing. (Given the decision by *the Supreme Court in Commissioner for HMR&C v Professional Game Match Officials Limited* [2024] UKSC 29 (“**SC**”) handed down on 16 September 2024, the parties submitted further written submission by the parties on the effect of that decision on the issues in this preliminary hearing).
5. R sought to formulate the issues as follow: in the two years prior to C’s resignation, between 31 January 2022 and 30 January 2024:

- (a) did C work under a global contract of employment as a Limb (a) worker for that period?
- (b) if not, did C work under a contract of employment as a Limb (a) worker during when completing each individual item of piece work for this period?
- (c) if not, did C work under a global Limb (b) worker contract for that period?
- (d) if not, did C work under a Limb (b) worker contract when completing each individual item of work for this period?

This seemed broadly accurate but I have, however, dealt with the issues in a different order.

### Facts

6. By R's email to C dated 8 July 2020 R set out its Terms of Working which governed their working relationship:

1. You will be home-based working an agreed minimum number of hours/days.

2. You will be working for WWY on a self-employed basis, paid at a rate of £0.40 per minute of dictation for CWS work and £0.50 per minute of dictation for all other client work, £4 for each copy and paste case completed. This should equate to approximately £10-£11 per hour, based upon the average speed of our current typists. Payment is made in arrears on the 28th of the month by BACS transfer to your account, upon receipt of your invoice. A monthly charge of £25 is charged to you to cover our ongoing software license fees in relation to the systems we provide to you, ongoing training, support and auditing. You must show this on your invoice each month as a deduction.

3. You will need a compatible headset and foot pedal, you can either purchase your own (please be careful if purchasing online that you do not purchase a foreign version) or I can arrange for this to be ordered from our own supplier and sent direct to your home address should you wish. The cost of this is £130 + VAT and will be invoiced to you upon completion of your first full month with WWY.

**Please note:** Access to the our Winscribe transcription system will be provided by us however this system is only for work given to you by WWY (you cannot use this for any other typing for other typing companies), and the hardware that is compatible (i.e. foot pedal) for use with this system may not be compatible with other transcription software should you choose to use it for alternative typing companies.

4. You will need reliable broadband connection which will need to be wired up directly to your PC/Laptop from the router (NOT WORKING WI-FI), ideally fibre to maximize the efficiency of your link to our server environment, Internet Explorer, a fully licensed operating system with full Outlook email system (if you could let me know which operating system you have that would be useful), anti-virus (not Freeware, i.e. not McAfee) and we also require you to confirm that you have at least 1MB (ideally 2MB) of memory available on your PC.

5. We will give you access to our secure server environment which has two-factor authentication for security purposes.

**Documentation** To comply with our clients' requirements all typists are subject to Level 3 security checks, which includes a DBS check (if you choose to no longer provide a typing service to WWY within 6 months then you will be required to cover the cost of the DBS check which will be deducted from your final invoice).

### Training and equipment

7. C was trained by R on both occasions of her time working for R and was set up on the various systems required by R's IT department. As indicated by the Terms of Working C was advised by R that a headset and foot pedal would be required to undertake the job and it was agreed for this to be sent by R to C and invoiced by R to C. As indicated by the Terms of Working this equipment might not be compatible with other transcription software used by other typing companies. Further, each time C raised her invoice, she had (as referred to above) to make the monthly £25 deduction to cover R's annual service charges.

### Audit/vetting

8. C had regular ad hoc audit checks and received training undertaken by the R (as indicated by clause 2 of the Terms of Working). R would send to C emails or messages on R's "Slack" message system advising of any errors made in the reports C had typed and pointing out where she needed to alter/do anything differently going forward. As indicated in the Terms of Working, C was required to have a vetting check carried out in respect of which R was to cover the cost, provided that C had provided her services to R for at least 6 months.

### Rota: C's evidence

9. R operated a rota. R suggested to C the set hours to work Monday to Friday. Each day C would log on at her scheduled start time and log off at her finish time (although she often stayed on longer than her finish time if it was busy, if she had not finished the job she was on or R had allocated C more jobs close to C's finish time). R would allocate jobs to the typists who had confirmed previously that they expected to be available, allocating the oldest jobs first and moving in time order from when the jobs had been received. When jobs came in R would offer it to an available typist by adding it to their queue. C was expected to log on at her rota start time and not to log off until her finish time otherwise R would check up where she was. She was also told that she should inform the R if she needed to log off sooner than her finish time. I accepted this evidence as to the operation of the rota.
10. C further maintained that if she wanted to change her hours of working then she would need to get permission from R for this. If she wanted to take any time off, had an appointment or any other reason why she couldn't work then she would have to inform R of this each time. Again, if she was ever running a bit late for whatever reason or had to leave earlier than her scheduled finish time then she would have to inform R of this too. C was also asked to check the rota first before booking any time off to make sure there were enough typists to cover. R often sent out group messages as well as individual text messages to C asking for extra help. R would message C on a regular basis asking if she was able to start earlier than her rota hours and/or stay on longer and sometimes R would message C on a weekend and Bank Holidays to ask if she could do more. There were also times where R would ask if C would correct some work she had done in the week in her own time without any increase in pay rate offered. C agreed most of the time

as she felt she had no choice but to do extra work. She also felt that if she said no and was not compliant, R might withhold work from her which made her feel harassed and under extreme pressure. According to C, R pressured her a great deal when work was busy to get the work done as quickly as possible. She was often sent messages asking “how much longer do you have left to do” and “you seem to be taking much more time to complete this job”. R would also often add more work to her pile without C asking or agreeing to it. C felt under pressure if she was not working to the speed and standards to suit R.

11. Day to day control: While C accepted that she was free to accept or decline any jobs allocated to C throughout the day, she said that this was not always the case. R exercised control over the work done by C. Given that R needed to meet the typing needs of its clients it was necessary for R to deploy the resources available to it via the typing pool, requesting C to work early when demand required, allocating work to C and directing the order in which it should be done - and re-arranging such allocation where needed, as well as checking up when C had not completed a piece of work or skipped it in the queue.

R's evidence re rota refusal of work/time off

12. According to R, C was in full control of her availability, i.e. if and when she wanted to accept typing jobs. She changed her availability regularly. For example, when arranging appointments or for various personal matters including: if she had overslept/was having a lie in; picking up a car; taking pets to the vets; house viewings, when she was waiting on completion and moving dates for buying a house; during spells of illness etc. She was not required to give a reason. Sometimes she did, sometimes she did not. This was no problem and R would always thank her for letting me know. Jobs were simply allocated to typists according to availability/preference in order suit the needs of the clients. The work fluctuated and there were times when there were less typing jobs available to offer. Each day was different.
13. There was no obligation to offer C any minimum number of typing jobs and as such she had no guarantee of work. There were often times when no work was available and she was informed about this.
14. C preferred shorter jobs, for example, she would often ask if there were any mortgage valuations available to type.
15. Lucy Burton-Lloyd (Managing Director) and Amanda Yoxall (Typing Services Supervisor), both of whom gave evidence, explained R's working arrangements and expectations of typists, in particular the operation of the “rota system”:
  - (a) First, work was not guaranteed by R. Following C's request to be re-engaged, Ms Burton-Lloyd emphasised that “*I cannot guarantee work volumes*” and C replied “*I'm prepared for every eventuality with regards to work not always being guaranteed*” This was repeated in the part of the email which preceded the Terms of Working: “*As always, volumes aren't guaranteed and there will be the inevitable lulls but at the moment*”

*we are struggling most days to keep on top of things*". There was therefore no obligation for R to provide C with work.

- (b) Secondly, C referred to set "working hours" according to a rota which determined when she would have to log on and log off work. However, this in practice, operated to indicate each typist's "*periods of expected availability*" and was "*used as a tool to estimate sufficient availability from the pool of typists to deliver client requirements*". C was not guaranteed work during these hours and under the Terms of Working would only be paid for each piece of typing work allocated, accepted and completed. When C logged on she would often ask if there were typing jobs available. There was no obligation for R to pay C for time spent logged on waiting, but not working. As to this, C accepted that the amount of work available fluctuated depending on the time of year or other factors like clients coming and going, particularly at Christmas. C also accepted ultimately, that under her working arrangements with R: work was not guaranteed; R had no obligation to provide her with any work; and R had no obligation to pay her for time waiting for jobs to become available, only for jobs done.
- (c) Thirdly, C had no obligation to stick to her rota times, to work in these periods or to accept typing jobs and she could refuse jobs offered. C was free to change them as she wished and did so many times. Although C suggested that she needed to "*get permission for this*" she either informed R of the desired changes or accepted suggestions by R intended to benefit her. There was a high degree of flexibility within the typist pool – if C rejected a job then it was reallocated to an alternative typist in the pool at that time and at the weekends typists were free to pick from an "*open screen*" which listed all available jobs. Ms Yoxall was also willing to allow C to swap certain kinds of work for other kinds of work, R submitting that this occurred sometimes midway through typing up a dictation. Sometimes work was juggled in this way between typists either because R was too busy or because lower work levels needed to be fairly allocated.
- (d) C also regularly refused work, or refused any more work than had already been allocated, or chose some types of work over others. In cross-examination C said "*There were times I did say that I had a prior arrangement, but as I was always having the impression of being self-employed, that is what I felt I could say because what else could I say?. I was self-employed so thought that was the right thing to do to take time off whenever I wanted*".
- (e) Ms Burton-Lloyd explained that because C preferred short mortgage valuations to boost her earning potential, R would often put work of that kind in her queue on R's Winscribe transcription system. She said that C had the opportunity to reject them and have them removed from her queue. There were many of examples where C did just that. For those reasons, the Tribunal should find that, even on C's own evidence, C had substantial freedom to refuse or choose work – the pressure she

described appeared, from her evidence, to be largely self-imposed, not a matter of obligation to R.

- (f) Fourthly, C said that if she wanted to take any time off, ran late or had to leave early she would have to inform R about this. She also said that typists were asked to check the rota before booking any time off to ensure there were enough typists. As to this R maintained that there was no obligation to do so and no permission was required – they were merely matters of courtesy to assist R in planning allocation and completion of work. C regularly informed R that she wanted to clock off early, had overslept, wanted a day off, needed to attend hospital or vet appointments, or needed to view properties. There was no obligation to work if she did not wish to.
- (g) A number of ‘SOS’ emails were sent to typists to let them know R was struggling to cover all typing jobs because of the number of typists on leave. In some, Ms Burton-Lloyd noted: “*So many of you have made yourselves unavailable (and I fully appreciate that as you are self-employed you are entirely at liberty to do so) ...*” and “*whilst I appreciate that you are all self-employed and can take time off as you choose.*” Any requests to look at the rota and see who else was on leave before booking, or to inform R of non-working periods, were entirely matters of courtesy. Any requests to help out at busy times or when R was under resourced were just requests. If R could withhold permission for leave or force typists to work, no ‘SOS’ emails would have been needed.

#### Conclusion on the rota system and other facts

- 16. I concluded :
  - (a) in line with R’s submissions, that there was no contractual obligation on the part of R to provide C with work and there was no obligation on the part of C to accept work offered to her; any obligations felt by her in this regard were subjective, driven by her own need to earn money; further, she exercised a fair degree of independence as to when to take breaks/holidays – and there was no evidence of any occasion on which C was penalised by R (eg by withholding work) for not doing sufficient work or taking a break from work as she did on several occasions;
  - (b) in line with C’s case, that there was a fairly high degree of control exercised by R in regard to:
    - (i) what work C was offered to do from day to day and the turn - around time;
    - (ii) the manner in which it was to be done (by training and being set up on R’s transcription system and her being in communication with R’s IT department) and being required (generally) to do work in the order of jobs coming in - or as otherwise directed by R to C;
    - (iii) supervision over the work through audit and correction of C’s work and comments on the speed and accuracy of her work.
- 17. I accepted the C’s evidence as setting out the atmosphere under which C worked and the degree of involvement of R in regard to C’s work and setting

of her workload. That said, I do not find that C was any contractual obligation on her part in regard to taking time off. It was sensible for C to inform R of her intentions regarding work – not only as a matter of courtesy but because if C did not do so it would undermine R’s ability to ensure that there were sufficient typists available to perform the expected workload.

18. It was not suggested that with any regularity C would (eg to suit her own convenience) swap certain kinds of work for other kinds of work midway through typing up a dictation. It is far more likely – and consistent with the evidence - that any such occasional interruption of a piece of typing work was (as indicated at paragraph 61 of R’s Closing Submissions) because R was too busy or because lower work levels needed to be fairly allocated. Unsurprisingly, insofar as that occurred sometimes, that was because of the needs of the business not because of any whim or change of heart or mood on the part of C. It would have been inefficient for such interruption by C to occur otherwise than in exceptional cases and it is most unlikely that R would have tolerated C instigating swapping of incomplete work without justification.
19. C had the financial responsibility in respect of the equipment she used and the headset and foot pedal in accordance with the Terms of Working. On the other hand while the terms afforded choice in regard to the type of equipment I accepted C’s evidence that in reality the choice was exercised by R so that R exercised control in this regard. C’s evidence (not challenged by R) was that R deployed an IT department who would be in contact (at R’s direction) regularly to install the various systems needed to undertake the work on C’s computer and be available to solve any IT issues that occurred at any time. It also had a contact number that C should ring if there were any IT problems. Further, R installed anti-virus software on C’s computer as required by it.
20. The rates of pay were set by R. By letter dated 1 June 2015 HMRC expressed some concern to R in this regard stating that it is usually the case that the self-employed individual set their own rate of pay and not the company – and that R might wish to review this point. However, R did not make any changes in this regard. Periodically R involved C and the other typists in the decision-making process for setting their rates of pay. For example, in July 2020 typists were asked to confirm whether a suggested revised rate of pay “*meets the acceptable pay scale that enables you to continue offering your services to WWY*” and C confirmed her acceptance. Similarly, in response to typists refusing to complete the work of a particular client, R was able to increase its rates for work done for that client. There were other occasions when R raised typing rates unprompted or C requested rate increases which were rejected by R. It is, however, noteworthy that in all these instances the initiative was invariably that of R.
21. C did not have a company email address or telephone and was not required to attend any company meetings or deal with R’s own clients. Whilst she had access to R’s ‘Slack’ messaging system and Winscribe system, she agreed to pay a monthly charge of £25 for access to software licences and business support (as set out above).



22. There was no evidence of C marketing her services generally. To the contrary, to the knowledge of R, C provided all her services to C.
23. C signed annual declarations confirming she had complied with self-employment rules and regulations governed by HMRC and confirmed annually that she submitted tax returns .

### **The law**

24. **S.230(3) ERA 1996** and **reg 2(1) WTR 1998** adopt the same definition of “*worker*” as follows:

“(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.”

25. Limb (b) worker contracts must contain two elements: (1) C must have entered into a contract whereby she undertook to perform work or services for R; (2) C must have agreed personally to perform some work or services for R. However, C is not a Limb (b) worker if: (3) she carried on a “*profession or business undertaking*” on her own account so as to be “self-employed”; and (4) R was also a “*client or customer*” of C by virtue of the contract (at [41]; **Sejpal v Rodericks Dental Ltd** [2022] IRLR 752 at [10]-[11] and [35]).
26. Cases on personal performance have been applied interchangeably to both Limb (a) and (b) workers, although tribunals should not lose sight of the different overarching legal tests for each status.
27. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 2 QB 497 at 515C-D, MacKenna J set out the following test:

*“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.”*

28. **PGMO (SC)** the issue was whether the contracts formed each time a referee accepted an offer of a match appointment were contracts of employment. The issues were further confined to questions of mutuality of obligation and control (there was no challenge to the decision below that the overarching contracts were not contracts of employment).
29. I shall quote at some length from this judgment especially given its authoritative treatment regarding the issues of mutuality and control – in particular in the context of separate assignments where there is no umbrella contract. This will help obviate more copious reference to the many others cases cited by the parties (many of which are referred to in the citations from **PGMO (SC)**). Also, I will below summarise the key propositions from **PGMO (SC)** relevant to the present issues.
30. In **PGMO (SC)** Lord Richards (with whom the other Supreme judges agreed) stated in regard to **Ready Mix Concrete** :

[30] *“First, there has been a tendency in some judgments, and still more in the submissions made in some cases, to focus unduly on the issues of mutuality of obligation and control and to treat all other terms of the contract and the surrounding circumstances of the parties’ relationship as of less significance, or even as being relevant only if they negative the existence of an employment relationship. However, not only did MacKenna J himself make clear that mutuality of obligation and control were necessary, but not necessarily sufficient, conditions of a contract of employment, but there are decisions of high authority which emphasise the need to address “the cumulative effect of the totality of the provisions [of the contract] and all the circumstances of the relationship created by it” and to view “in the round, the relationship between the parties recorded in the agreement in the setting of the surrounding circumstances”:* [White v Troutbeck SA \[2013\] EWCA Civ 1171, \[2013\] IRLR 949](#) , per Sir John Mummery at paras 38 and 41, and see also [O’Kelly v Trusthouse Forte plc \[1984\] QB 90](#) , [Lee Ting Sang v Chung Chi-Keung \[1990\] 2 AC 374 \(PC\)](#) , [Hall v Lorimer \[1992\] 1 WLR 939 \(Mummery J\)](#) and [\[1994\] 1 WLR 209 \(CA\)](#) “.

[32] *“Secondly while as a pre-condition to a finding of employment there must be, under the contract, a sufficient degree of control by the putative employer over the putative employee, the extent of that control in any particular case remains a relevant factor in the overall determination of whether there exists an employment relationship. It is not the case that once the pre-conditions of mutuality of obligation and control are satisfied, they drop out of the picture as relevant factors in the overall assessment of whether a contract of employment exists: see Commissioners for [Atholl House](#) at para 76. “*

[39] *The second condition, control, is expressed in the most flexible (if now outdated) terms: control “in a sufficient degree to make that other master”. It requires the court to test control by reference to the conditions then prevailing as regards work and employment. While MacKenna J went on to instance matters that must be considered in this context (“the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done”), he quoted with approval what was said in the judgment of Dixon CJ and three other justices of the High Court of Australia in [Zuijs v Wirth Brothers Pty Ltd \(1955\) 93 CLR 561 \(Zuijs\)](#) at p 571:*

*“What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters.”*

[40] *It is an essential element of a contract of employment that the employee provides his or her personal service for payment by the employer. This requirement has been variously described, for example as "the wage-work bargain": see [Cotswold Developments Construction Ltd v Williams \[2006\] IRLR 181, para 48 \(EAT, Langstaff J\)](#) . This perhaps more clearly pinpoints its focus than the usual but bland term "mutuality of obligation", which could be applied to all bilateral contracts of any description. However, in this case, as in many others, it has been adopted as the label for the first pre- requisite of any contract of employment and, with some reluctance, I shall also use it.*

[41] *"This requirement of payment for personal service cannot, however, itself establish that the contract in question is a contract of employment. It is likewise an essential element of contracts for services whereby independent contractors agree to provide their personal services for payment, and of the broader statutory categories of "worker" under, for example, [regulation 2\(1\) of the Working Time Regulations 1998 \(SI 1998/1833\)](#) and of "employment" under the [Equality Act 2010 \(section 83\(2\)\(a\)\)](#) . Beyond simply establishing the existence of a contract, it has been said to locate the contract in "the employment field": see [James v Greenwich London Borough Council \[2007\] ICR 577, paras 16-16 per Elias J.](#)"*

[49] *"None of these authorities establishes that, where there is a single engagement (such as officiating at a particular match), there must be mutual obligations in existence before the engagement commences, for example before the referee arrives at the ground on the day of the match. On the contrary, there are authorities that establish the contrary. In [Clark v Oxfordshire Health Authority](#) , immediately following the passage quoted above, Sir Christopher Slade said, "I can find no such mutuality subsisting during the periods when the applicant was not occupied in a 'single engagement'" ."*

[50] *"The point is made in clear and direct terms in a number of authorities that a contract of employment may exist covering only the period while the employee carries out work for which he or she is paid."*

[53] *"The position as regards single engagements and overriding contracts was summarised in [Atholl House](#) at para 74:*

*"It is now established that, while a single engagement can give rise to a contract of employment if work which has in fact been offered is in fact done for payment, an overarching or umbrella contract lacks the mutuality of obligation required to be a contract of employment if the putative employer is under no obligation to offer work ..."*

[54] *"The single engagement was addressed by Lord Leggatt in [Uber](#)<sup>1</sup> at para 91: "Equally, it is well established and not disputed by Uber that the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working: see eg [McMeechan v Secretary of State for Employment \[1997\] ICR 549](#) ; [Cornwall County Council v Prater \[2006\] ICR 731](#) . As Elias J (President) said in [James v Redcats \(Brands\) Ltd \[2007\] ICR 1006, para 84](#) :*

*'Many casual or seasonal workers, such as waiters or fruit pickers or casual building labourers, will periodically work for the same employer but often neither party has any obligations to the other in the gaps or intervals*

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<sup>1</sup> *Uber BV v Aslam* [2021] IRLR 407bates

*between engagements. There is no reason in logic or justice why the lack of worker status in the gaps should have any bearing on the status when working. There may be no overarching or umbrella contract, and therefore no employment status in the gaps, but that does not preclude such a status during the period of work.'*

*I agree, subject only to the qualification that, where an individual only works intermittently or on a casual basis for another person, that may, depending on the facts, tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with worker status: see [Windle v Secretary of State for Justice \[2016\] ICR 721, para 23](#) ."*

[55] *"In the light of these authorities, it is clearly established that there may be sufficient mutuality of obligation to satisfy one of the essential requisites of a contract of employment, even if the obligations subsist only during the period while the putative employee is working for the putative employer. The example of casual workers given by Elias J in the passage from his judgment in [James v Redcats \(Brands\) Ltd \[2007\] ICR 1006, para 84](#) is enough to show that this is a commonplace occurrence. Indeed, the FTT in the present case said, and this was not challenged by PGMOL, that "[I]t is possible for a contract of employment to exist only when work is being performed, such that a casual worker may have a series of contracts of employment" (para 15). With regards to the referees in the present case, there would be sufficient mutuality of obligation in the period from their arrival at the ground on Saturday to the submission of their match report on the following Monday. It would not be necessary to show that they were under contractual obligations before their arrival at the ground. "*

[56] *"Nonetheless, it is the case that a referee and PGMOL were under mutual contractual obligations from the time early in the week that the referee accepted the offer of a match on the Saturday of that week. PGMOL did not challenge the FTT's finding that "individual match appointments each gave rise to a contract, constituted by the offer of the appointment made by PGMOL, and its acceptance by the referee, through the MOAS system" (para 159). Despite the creation of a contract in this way, PGMOL submitted that no mutual obligations existed because both the referee and PGMOL were free to cancel the engagement, without penalty, at any time before the referee arrived at the ground. But, it does not follow from the right of either party to cancel the engagement without penalty that, while the contract remained in being, the parties were not under mutual obligations to each other. On the contrary, those mutual obligations existed from the time of acceptance of the match, unless the engagement was terminated."*

[59] *"In my judgment, the right to terminate is irrelevant at the first stage of determining whether there exists the mutuality of obligation required for a contract of employment. Where there exist the necessary mutual obligations under the contract, as was the case with each engagement to officiate at a match, and the contract remains in place, it satisfies the condition of mutuality. Mr Peacock's submission that it did not greatly matter whether this point came in at the first or third stage overlooks that, if it did come in at the first stage and was held to be decisive on the facts of the particular case, the contract in question could not be one of employment. By contrast, if it is a relevant factor at the third stage, it is just one of many factors that may be relevant to determining the nature of the contract."*

[60] *"I do, however, accept that the nature and extent of the mutual obligations are relevant to determining whether the contract is one of employment. In [Windle v Secretary of State for Justice \[2016\] EWCA Civ 459, \[2016\] ICR 721](#) , a case concerning the extended meaning of "employment" in the [Equality Act 2010](#) , the*

Court of Appeal rejected a submission that the absence of mutuality of obligation between engagements added nothing to the enquiry as to whether the claimant was an employee in the extended sense of being engaged under "a contract to do work personally". Underhill LJ, with whom Jackson and Lindblom LJJ agreed, said at paras 23 and 24 in a passage with which I agree:

"23. .... I accept of course that the ultimate question must be the nature of the relationship during the period that the work is being done. 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 lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense. Of course it will not always do so, nor did the employment tribunal so suggest. Its relevance will depend on the particular facts of the case; but to exclude consideration of it in limineruns counter to the repeated message of the authorities that it is necessary to consider all the circumstances.

24. ... The factors relevant in assessing whether a claimant is employed under a contract of service are not essentially different from those relevant in assessing whether he or she is an employee in the extended sense, though (if I may borrow the language of my own judgment in [Byrne Bros \(Formwork\) Ltd v Baird \[2002\] ICR 667, para 17 \(5\)](#)), in considering the latter question the boundary is pushed further in the putative employee's favour – or, to put it another way, the pass mark is lower." "

### Control

- [61] "There can be no doubt that a sufficient element of control by the employer over the employee is essential to the existence of a contract of employment, but it is a test that can prove difficult to apply. In most situations, of course, there is no difficulty. The degree of control over the work to be undertaken by the employee, where and when it is to be undertaken and, in many cases, the way the work is to be done leaves no room for doubt that the level of control is consistent with employment. But, in a minority of cases, where the nature of the services provided by the putative employee leaves little room for intervention by the putative employer, the question of control may be difficult to answer."
- [62] "This was recognised by MacKenna J in [RMC](#). In his summary of the three conditions for the existence of an employment contract, he expressed the requirement of control in these terms: "[The employee] 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 [the employer]" (emphasis added) (p 515D). The emphasised words, which are echoed in later authorities, allow for a wide range of circumstances and leave the question of control to be answered by an assessment of the facts of each case. In [Montgomery v Johnson Underwood Ltd \[2001\] EWCA Civ 318, \[2001\] ICR 819 \("Montgomery"\)](#) at para 19, Buckley J (with whom Brooke and Longmore LJJ agreed) referred to "some sufficient framework" of control. The relevant passage is quoted below".
- [63] "MacKenna J expanded on the question of control at p 515F:  
"Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient



*degree to make one party the master and the other his servant. The right need not be unrestricted.*

*What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters.'— Zuijs v Wirth Brothers Proprietary, Ltd(1955) 93 CLR 561, 571.'"*

[64] *"In that passage MacKenna J listed factors which would generally characterise a contract of employment at the time of his judgment in 1967, and to a great extent they remain applicable today. Developments in the patterns of work have, however, increased the cases in which some or all of those factors will be absent but where nonetheless it is appropriate to find the necessary degree of control. The existence of such cases was recognised by MacKenna J, as his repetition that the right must exist "in a sufficient degree" to create the relationship of employer and employee, as well as the quotation from the decision of the High Court of Australia in Zuijs , shows. Zuijs has been an influential authority in this country and the statement that what matters is "lawful authority to command so far as there is scope for it...if only in incidental or collateral matters" has been frequently quoted, for good reason. "*

[65] *" This question was discussed in [Montgomery](#) in which Buckley J said at para 19 that, as to control, MacKenna J:*

*"had well in mind that the early legal concept of control as including control over how the work should be done was relevant but not essential. Society has provided many examples, from masters of vessels and surgeons to research scientists and technology experts, where such direct control is absent. In many cases the employer or controlling management may have no more than a very general idea of how the work is done and no inclination directly to interfere with it. However, some sufficient framework of control must surely exist. A contractual relationship concerning work to be carried out in which the one party has no control over the other could not sensibly be called a contract of employment.'"*

[67] *"The reference in the passage from [Montgomery](#) contains reference to those in occupations where, by the nature of the work, a putative employer can have little or no control over the execution of the work. Buckley J gave the examples of masters of vessels, surgeons, research scientists and technology experts. Zuijs concerned an acrobat working for an itinerant circus and it was in that context that the majority made the statement quoted by MacKenna J in [RMC](#) . The principal judgment was given by Dixon CJ and three other members of the Court. It is worth quoting the entirety of the relevant part of that judgment (at p 571):*

*"The duties to be performed may depend so much on special skill or knowledge or they may be so clearly identified or the necessity of the employee acting on his own responsibility may be so evident, that little room for direction or command in detail may exist. But that is not the point. What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters. Even if Mr Phillip Wirth could not interfere in the actual technique of the acrobatics and in the character of the act, no reason appears why the appellant should not be subject to his directions in all other respects.'"*

- [68] *“This passage makes clear that, on the one hand, the requirement for control extends only so far as there is scope for it and, on the other hand, that there must be some control, if only in incidental or collateral matters.”*
- [71] *“ In approaching this question, it is sometimes said that what matters is not whether in practice the employer could intervene, but whether as a matter of theoretical rights the employer would be contractually entitled to do so. When applied to the performance of highly skilled tasks, this, in my view, involves detaching contractual rights from any practical reality. It is almost invariably the case that an employer's right of intervention is implied not express, and it is difficult to see a basis for implying a right that either cannot or will not ever be exercised. In this context, reference is frequently made to [White v Troutbeck SA \[2013\] IRLR 286 at paras 40-42 \(EAT\)](#) (affirmed on appeal: [\[2013\] EWCA Civ 1171, \[2013\] IRLR 949 \(CA\)](#) ). The EAT said at para 40 that “the key question is whether there is, to a sufficient degree, a contractual right of control over the worker. The key question is not whether in practice the worker has day-to-day control of his own work”. On the facts of that case, there was no difficulty in applying a test based on a legal right of general control over the claimants' work. They were employed as caretakers and managers of a farm. The owner of the farm lived abroad and only occasionally visited the farm. In practice, there was little or no control over the couple's work at the farm, but it was clear that the owner enjoyed a contractual right to exercise a high degree of control and there was nothing in the nature of their work which presented any difficulty in doing so. But, it is wrong to deduce from this decision that control must involve so wide a right of intervention.”*
- [72] *“While I entirely agree with the well-established proposition that control must be based on the terms of the contract in question, it does not follow that an employer must have a contractual right to intervene in every aspect of the performance by the employee of his or her duties.”*
- [73] *“It is of central importance in the present appeal that we are considering separate contracts for each match. What needs to be shown is a sufficient framework of control as regards each contract taken separately. In this respect, this case differs from many of those involving people who exercise a high degree of skill and independent judgment while carrying out their work. The present case is therefore not analogous on its facts to *Zuijs* which involved a “weekly hiring for an indefinite period to do a defined task on the premises of the other party as an integral portion of a spectacle under his general management and control” (p 569).”*
- [74] *“ Lord Leggatt addressed issues of control in his judgment in [Uber](#) , with which the other members of this Court agreed. Although the appeal concerned the question whether Uber drivers were “workers” for the purposes of various statutory provisions, Lord Leggatt dealt with control as it applied to employees as well as to workers. The term “worker” is defined by [section 230\(3\) of the Employment Rights Act 1996](#) to include not only an individual who works under a contract of employment but also an individual under any other contract “whereby the individual undertakes to do or perform personally any work or services for another party to the contract” unless the other party is a client or customer of any profession or business carried on by the individual.”*
- [76] *“The significance of this part of the judgment in [Uber](#) [lies] .....in demonstrating that sufficient control consistent with an employment relationship may take many forms and is not confined to the right to give direct instructions to the individuals concerned.”*

[77] *“ It is HMRC's case that the terms on which the National Group referees are engaged for each match contain a sufficient framework of control exercisable by PGMOL to satisfy the element of control necessary for a contract of employment, even though PGMOL cannot control their work by actually intervening during a match. Put in broad terms, their case is that referees were subject to contractual obligations as to their conduct and performance during each individual engagement which were sufficient to constitute control, particularly when coupled with PGMOL's powers, in effect, to penalise referees for breaches by denying them opportunities to officiate at future matches and by reducing, on account of their performance during the season, their right to share in the "performance or merit payment pot", the size of which is fixed before the start of the season.”*

[88] *“In my view, the Court of Appeal was correct to say that the combination of contractual obligations imposed on referees as to their conduct generally during an engagement from the time that a match was accepted to the submission of the match report, and as to their conduct during a match, was capable of giving PGMOL a framework of control sufficient for the purposes of meeting the control test for employment purposes. Unlike the Court of Appeal, I consider that the existence of effective sanctions which it was open to PGMOL to impose after the end of an engagement are of some significance because, on the facts of this case, the right to impose those sanctions played a significant part in enabling PGMOL to exercise control over the referees in the performance of their duties, on and off the pitch. I am not downplaying the significance of the fact that the referees' obligations were contractual and enforceable as such, but I think the UT was right in this case to attach some significance to those sanctions.”*

[91] *“In my view, the position as regards both mutuality of obligation and control is clear. On both issues, I consider that this Court is able, on the basis of the FTT's findings of fact and the extensive submissions made by both parties, to conclude for itself that the irreducible minimum of mutuality of obligation and control necessary for a contract of employment between the National Group referees and PGMOL is satisfied in this case in relation to the individual match contracts.”*

31. I shall seek to summarise what I regard as the key relevant propositions to be derived from **PGMO (SC)**:

(1) General

32. Mutuality of obligation and control are necessary, but not necessarily sufficient, conditions of a contract of employment.
33. The tribunal must address "the cumulative effect of the totality of the provisions [of the contract] and all the circumstances of the relationship created by it" and view "in the round, the relationship between the parties recorded in the agreement in the setting of the surrounding circumstances".
34. The court must consider the nature of the mutual obligations and the degree of control exercisable by the putative employer.
35. The factors relevant in assessing whether a claimant is employed under a contract of service are not essentially different from those relevant in assessing whether he or she is an employee in the extended sense, ie a



Limb (b) worker though (see [Byrne Bros \(Formwork\) Ltd v Baird \[2002\] ICR 667, para 17](#) (5)), in considering the latter question the boundary is pushed further in the putative employee's favour – or, to put it another way, the pass mark is lower.

## (2) Mutuality of obligation

36. It is an essential element of a contract of employment that the employee provides his or her personal service for payment by the employer.
37. An overarching or umbrella contract lacks the mutuality of obligation required to be a contract of employment if the putative employer is under no obligation to offer work.
38. A contract of employment may exist covering only the period while the employee carries out work for which he or she is paid. There may be sufficient mutuality of obligation to satisfy one of the essential requisites of a contract of employment, even if the obligations subsist only during the period while the putative employee is working for the putative employer.
39. A single engagement can give rise to a contract of employment if work which has in fact been offered is in fact done for payment.
40. Lack of worker status in the gaps should not have any bearing on the status when working however, where an individual only works intermittently or on a casual basis for another person, that may, depending on the facts, tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with worker status ie the absence of mutuality of obligation outside that period may influence, or shed light on, the character of the relationship within it. It may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense.
41. It does not follow from the right of either party to cancel the engagement without penalty that, while the contract remained in being, the parties were not under mutual obligations to each other.

## (3) Control

42. The extent of control in any particular case remains a relevant factor in the overall determination of whether there exists an employment relationship. It is not the case that once the pre-conditions of mutuality of obligation and control are satisfied, they drop out of the picture as relevant factors in the overall assessment of whether a contract of employment exists.
43. Whilst there must be considered "the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done"), control is expressed

in the most flexible terms: control "in a sufficient degree to make that other master" – or some "sufficient framework" of control.

44. It requires the court to test control by reference to the conditions then prevailing as regards work and employment.
45. On the one hand, the requirement for control extends only so far as there is scope for it and, on the other hand, that there must be some control, if only in incidental or collateral matters.
46. "What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters." - *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 (Zuijs) at p 571;
47. While control must be based on the terms of the contract in question, it does not follow that an employer must have a contractual right to intervene in every aspect of the performance by the employee of his or her duties. Sufficient control consistent with an employment relationship may take many forms and is not confined to the right to give direct instructions to the individuals concerned.
48. Further guidance is to be found in the following cases relied on by R:
49. Interpretation of contract: R referred in its submissions to the **Uber** case in which Lord Leggatt (at [84]-[85]) approved of the approach in **Carmichael v National Power Plc [1999] 1 WLR 2042** that it was open to the tribunal to examine all of the relevant evidence, including oral and written exchanges and ongoing conduct, to determine the parties' true intentions about their contractual relationship. Lord Leggatt stated:

[83] *If, as I conclude, the way in which the relevant relationships are characterised in the written agreements is not the appropriate starting point in applying the statutory definition of a "worker", how is the definition to be applied?*

[84] *In the Autoclenz case it was said (at para 35) that "the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part." More assistance is provided by the decision of the House of Lords in Carmichael v National Power plc [1999] 1 WLR 2042. That case concerned tour guides engaged to act "on a casual as required basis". The guides later claimed to be employees and therefore entitled by statute to a written statement of their terms of employment. Their case was that an exchange of correspondence between the parties in March 1989 constituted a contract, which was to be classified as a contract of employment. The industrial tribunal rejected this case and found that, when not working as guides, the claimants were not in any contractual relationship with the respondent. The tribunal made this finding on the basis of: (a) the language of the correspondence; (b) the way in which the relationship had operated; and (c) evidence of the parties as to their understanding of it. The House of Lords held that this was the correct approach. Lord Irvine of Lairg LC said at p 2047C that:*

*“... it would only be appropriate to determine the issue in these cases solely by reference to the documents in March 1989, if it appeared from their own terms and/or from what the parties said or did then, or subsequently, that they intended them to constitute an exclusive memorial of their relationship. The industrial tribunal must be taken to have decided that they were not so intended but constituted one, albeit important, relevant source of material from which they were entitled to infer the parties’ true intention ...”*

[85] *In the Carmichael case there was no formal written agreement. The Autoclenz case shows that, in determining whether an individual is an employee or other worker for the purpose of the legislation, the approach endorsed in the Carmichael case is appropriate even where there is a formal written agreement (and even if the agreement contains a clause stating that the document is intended to record the entire agreement of the parties). This does not mean that the terms of any written agreement should be ignored. The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties’ rights and obligations towards each other. But there is no legal presumption that a contractual document contains the whole of the parties’ agreement and no absolute rule that terms set out in a contractual document represent the parties’ true agreement just because an individual has signed it. Furthermore, as discussed, any terms which purport to classify the parties’ legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker’s contract are of no effect and must be disregarded*

50. Personal service/performance – substitution: At the Court of Appeal stage of [Pimlico Plumbers Ltd v Smith \[2017\] EWCA Civ 51, \[2017\] IRLR 323](#), Sir Terence Etherton MR (at [84]) tried to rationalise the cases by adopting a test based on the “*nature and degree of any fetter on a right of substitution*”:

*“84. ... 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.”*

51. At the Supreme Court stage of [Pimlico Plumbers \[2018\] UKSC 29, \[2018\] IRLR 872](#) Lord Wilson emphasised (at [32]) that: “... *The sole test is, of course,*

*the obligation of personal performance; any other so-called sole test would be an inappropriate usurpation of the sole test. But there are cases, of which the present case is one, in which it is helpful to assess the significance of Mr Smith's right to substitute another Pimlico operative by reference to whether the dominant feature of the contract remained personal performance on his part".*

52. Whilst Sir Terence Etherton MR's judgment remains helpful guidance, in [\*\*Stuart Delivery Ltd v Augustine \[2021\] EWCA Civ 1514, \[2022\] IRLR 56\*\*](#) Lewis LJ noted (at [34], [40] and [55]) that he had been seeking to summarise the principles to be drawn from existing case law, rather than establishing a rigid classification or strict rules. Rather than trying to shoehorn the facts of a particular case within the examples he gave, Lewis LJ held that "*It is more appropriate to focus on the real issue, that is whether the nature and degree of any fetter on the right or ability to appoint a substitute to determine whether that was inconsistent with any obligation of personal performance*".

#### (4) Other factors

53. In [\*\*HM Revenue & Customs Atholl House Productions Ltd \[2022\] IRLR 698\*\*](#) Sir David Richards emphasised (at [122]-[123]) applying the multi-factorial approach included considering whether, objectively, the parties intended to create an employment relationship and whether the person providing services is carrying on a business on their own account:

*.. 124. If the person providing the services is known to carry on a business, profession or vocation on their own account as a self-employed person, it would in my judgment be myopic to ignore it, when considering whether or not the parties intended to create a relationship of employment. In many of the cases, it has been taken into account for that purpose. The weight to be attached to it is a matter for the decision-making court or tribunal. If the contract provides, as did Ms Adams' contracts with the BBC, that she was a freelance contributor, the relevance of this fact arises directly from the contract's express terms."*

54. In [\*\*HMRC v Kickabout Productions Ltd \[2022\] 4 All ER 500\*\*](#) Sir David Richards summarised (at [104]) that "*The court's task at that stage is to examine all relevant factors, both consistent and inconsistent with employment, and determine, as a matter of overall assessment, whether an employment relationship exists*". He also clarified that the existence of the necessary preconditions of mutuality of obligation and control does not create a *prima facie* presumption that a contract of employment exists (**Atholl House Productions Ltd** at [113]); **Kickabout Productions Ltd** at [104]).
55. In [\*\*Market Investigations Ltd v Minister of Social Security \[1968\] 2 QB 173\*\*](#) Cooke J held (at 184G-185B) that, "*... the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "Yes", then the contract is a contract for services. If the answer is "No", then the contract is a contract of service*". He suggested a non-exhaustive list of relevant factors, including: "*whether the man performing the services provides his own equipment, whether he hires his own*

helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task". These comments were approved in Lee Ting Sang v Chung Chi-Keung [1990] IRLR 236, per Lord Griffiths at [6].

### **Limb (b) Worker status**

56. Limb (b) worker contracts must contain two elements: (1) C must have entered into a contract whereby she undertook to perform work or services for R; (2) C must have agreed to personally perform some work or services for R. However, C is not a Limb (b) worker if: (3) she carried on a "*profession or business undertaking*" on her own account so as to be 'self-employed'; and (4) R was also a "*client or customer*" of C by virtue of the contract (**Uber** at [41]; **Sejpal** [2022] IRLR 752 at [10]-[11] and [35]).
57. Cases on personal performance have been applied interchangeably to both Limb (a) and (b) workers, although tribunals should not lose sight of the different overarching legal tests for each status.
58. **Byrne** – paragraphs 17(4)-(5) provides further helpful guidance:

*(4) It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b). That can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees stricto sensu — workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of [Part II of the Employment Rights Act 1996](#) or the [National Minimum Wage Act 1998](#), to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.*

*(5) Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services — but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.*

*(6) What we are concerned with is the rights and obligations of the parties under the contract — not, as such, with what happened in practice. But what happened in practice may shed light on the contractual position: see Carmichael (above), esp. per Lord Hoffmann at pp 1234–5.*

59. It is not necessary for someone to be a Limb (b) worker during each individual engagement worked ([NMC v Somerville \[2022\] EWCA Civ 229, \[2022\] IRLR 447](#) at [41]-[48]; *Sejpal* at [23]-[26], [44]-[46]).
60. However, mutuality of obligation does remain relevant for determining whether there is an umbrella worker contract (*Somerville* at [46]; *Sejpal* at [24], [44]-[46]). Furthermore, in [Windle v Secretary of State for Justice \[2016\] EWCA Civ 459, \[2016\] IRLR 628](#) Underhill LJ held (at [23]): “*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 lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense ... Its relevance will depend on the particular facts of the case*” (approved in *Uber* at [91]).

#### Limb (b): client or customer exception

61. If the Tribunal finds there was a contract whereby C undertook to do work personally, then she will be a Limb (b) worker unless: (1) she carried on a “*profession or business undertaking*” on her own account so as to be ‘self-employed’; and (2) R was also a “*client or customer*” of C (*Sejpal* at [35]). The case law has identified three helpful indicia which help apply the legislation.
- (1) Subordination and dependency: In [Byrne Bros \(Formwork\) Ltd v Baird \[2002\] IRLR 96](#) (see above) Mr Recorder Underhill QC (at [17(4)]) made similar observations to Lord Leggatt in *Uber* (quoted above) that the legislation’s purpose is to extend protection to workers who are, substantively and economically, in the same subordinate and dependent position as employees:
- (2) Integration: In [Cotswold Developments Construction Ltd v Williams \[2006\] IRLR 181](#) Langstaff J (at [53]) suggested: “... a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work ... as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls”.
- (3) Dominant purpose/feature test: In [James v Redcats \(Brands\) Ltd \[2007\] IRLR 296](#) Elias J noted at [53] that courts previously asked “*whether the “dominant purpose” of the contract is the provision of personal services or whether that is an ancillary or incidental feature. It is only if it is the dominant purpose that the definition [of worker] is engaged*”, and (at [59]),



*“the dominant purpose test is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependent work relationships, or is it in essence a contract between two independent business undertakings? ... Its purpose is to distinguish between the concept of worker and the independent contractor who is in business on his own account, even if only in a small way”* but preferred (at [65]-[67]) the following formulation: *“An alternative way of putting it may be to say that the courts are seeking to discover whether the obligation for personal service is the dominant feature of the contractual arrangement or not”*. The latter test was preferred in **Pimlico Plumbers** at [32] and **Manning v Crips Investment Management Limited [2023] IRLR 729** at [39]-[40].

62. Primacy of the statute: In **Bates van Winkelhof**<sup>2</sup> Lady Hale (at [33]-[36]) acknowledged that the various indicia could be helpful, but emphasised (at [37]-[39]) that they were not essential requirements, they were not always relevant in every case and: *“There can be no substitute for applying the words of the statute to the facts of the individual case”*. In **Uber** Lord Leggatt (at [87]) agreed, adding:

*“[87] ... At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a “worker” who is employed under a “worker’s contract”.*”

63. In **Sejpal** HHJ Tayler (at [7]) noted: *“... Concepts such as ‘mutuality of obligation’, ‘irreducible minimum’, ‘umbrella contracts’, ‘substitution’, ‘predominant purpose’, ‘subordination’, ‘control’, and ‘integration’ are tools that can sometimes help in applying the statutory test, but are not themselves tests”* and that *“the statutory test must be applied, according to its purpose”*. He also agreed (at [33]) that *“The concepts of integration, control and/or subordination may assist”* in determining whether the client or customer exception applied.

## **R's key submissions**

### **A. Global contract**

64. R contended that none of the essential criteria were satisfied for a global contract of employment or worker contract. The Tribunal should therefore find that there were no global or individual contracts of employment.

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<sup>2</sup> **Bates van Winkelhof v Clyde & Co LLP** [2014] UKSC 32

## **B. Individual assignments**

65. Mutuality of obligations: As far as individual contracts of employment for each typing job are concerned, whilst there was mutuality of obligations for the duration of each job and some degree of control by R and personal service, that must be viewed against the background of a lack of mutuality of obligations in between each job and the consequential freedom C had over work undertaken and the flexibility of work allocation by R amongst typists. That combined with the nature of what the parties envisaged the nature of their agreement to be and the fact that C assumed financial risk for her work by investing in her own equipment shows that C was performing her services as a person in business on his own account, not as an employee. (R accepted that mutuality of obligations was irrelevant for the duration of each individual typing job done and paid for. Elsewhere in its submissions R accepted that in any event there was mutuality of obligations for the duration of each individual piece of work or typing job done and paid for (I observe that the second formulation is more in line with the approach in **PGMO (SC)**).
66. If the Tribunal found that there was no global Limb (b) worker contract, then this acted as an indication that C provided services as an independent contractor, not a Limb (b) worker, even during each typing job. This was in line with **Windle**.
67. Personal performance: Whilst R accepted that there was some degree of personal performance for the duration of each typing job done and paid for, the flexibility of allocation and reallocation of work within the typist pool and the fact that this amounted to a limited right of substitution means that personal service was not the dominant purpose or feature of the contract. There was a limited right of substitution so long as that right was within the typing pool. That was another reason that there could be a global contract of employment. R relied on the case of **Town and Country Glasgow Limited v Munro** [2019] WL 05394051 (EAT Scotland) R submitted that although the facts were different and the right of substitution was “slightly more expansive”, there was a similar system of work allocated to available receptionists in a pre-approved pool (see [4]-[9]). Lord Summers there considered (at [16]) that the “swappable” work deprived a contract of personal service and there was no Limb (b) worker contract. His analysis was equally applicable to Limb (a) workers.
68. R submitted that C was freely able to provide her services to other businesses without any detriment to her position with R. For example, on 8 December 2023 Ms Burton-Lloyd messaged C: *“is everything ok? notice that you take a long time to pick up jobs when they are on for you... im just wondering if you are doing work for someone else in between? if you are I just need to know”* When C replied, *“Hi no I’ve not been well and that’s why its taking me a bit longer for jobs I’m pacing myself”*, Ms Burton-Lloyd said, *“aah ok, you should have said then we know, hope you are ok just let us know if you are struggling”*



*at least then we know to manage the workflow accordingly*". Whilst R requested being updated of this, this was only a requested courtesy to enable it to plan allocation and completion of work. (In my judgment, however, read in context, this communication was more in the nature of a complaint or exercise of pressure for C to work more regularly than a courteous enquiry.) R further submitted that other typists worked for both R and other businesses with no problems. R acknowledged that C's ability to work for two different entities did not necessarily preclude an employment relationship. However, this facility still remains a relevant indication of the nature of her relationship with R being one where she assumed financial risk and responsibility for providing her services, especially when viewed against the lack of mutuality of obligation in between each item of piece work undertaken and the consequential limits on control and personal service set out above.

69. Control: Whilst R accepted there was some degree of control for the duration of each typing job done in relation to the manner and turnaround time in which they were completed, this has to be viewed in the wider context of the freedom and control C had over her work undertaken.
70. Price setting: R submitted that although C placed significant emphasis on this point, it is only one of a list of relevant factors listed in ***Lee Ting Sang v Chung Chi-Keung***; case law since makes clear that this is only one factor in the holistic assessment of the nature of the working relationship. Similarly, to the extent that this issue was partly triggered by HMRC's letter referred to above, HMRC was already satisfied that typists were self-employed and suggested, separately, that who set the rates was only a factor which R "*may therefore wish to review*". Moreover, the idea of who "*sets*" rates of pay is somewhat "*reductive*"; remuneration is a bilateral agreement that depends on negotiation.
71. Other relevant factors to the overall assessment: R submitted that although the requirements of control, personal performance and mutuality of obligation were satisfied to some degree for each individual typing job, there were four key points to be considered as part of the overall assessment of the contract:
  - (1) Financial responsibility for equipment: By agreeing to the Terms of Working, C assumed the financial responsibility of either supplying her own equipment or paying R to supply it for her;
  - (2) C did not have a company email address or telephone and was not required to attend any company meetings or deal with R's own clients. Whilst she had access to R's Slack messaging system and Winscribe system, she agreed to pay a monthly charge of £25 for access to software licences and business support under Clauses 2 and 3;
  - (3) Under the Terms of Working the general position was that R only covered the cost of a DBS check if C worked for more than 6 months;

- (4) Limb (b) worker: client/customer exception: R contended that C carried on a “*profession or business undertaking*” on her own account and R was a “*client or customer*” of C:
- (i) Subordination and dependency: It was acknowledged that C only carried out typist work for R, to the best of R knowledge. However, C was not subordinate or dependent. She was free to work for other businesses, as were other typists. She also accepted the financial risk as to whether or not she wished to do any work for R and, indeed, as to whether any work would be available at all;
  - (ii) Integration: For the same reasons, C was free to market her services as an independent person to the world in general. R was her client or customer and she could have used the same equipment she had purchased to perform other work for other people. The flexibility of work allocation meant that C was not an integral part of R’s operations;
  - (iii) Agreement between the parties and tax arrangements: C agreed to Clause 2 of the Terms of Working: “*You will be working for WWY on a self-employed basis ...*” C also signed annual declarations confirming she complied with self-employment rules and regulations governed by HMRC and confirmed annually that she submitted tax returns. Indeed, despite bringing this claim, C’s LinkedIn account still described her role as a “*self-employed audio typist*”. Relatedly, HMRC made enquiries in 2015 and appear to have been satisfied at the time that typists engaged by R were self-employed. Although R accepted that the relevant tax arrangements and the Terms of Working were not conclusive (see, e.g., ***White v Troutbeck SA*** at [36] and the approach adopted in ***Uber*** at [84]-[85]), these were both indicators, judged objectively, as to what the parties agreed and contribute to a picture of self-employment, not Limb (a) or Limb (b) status;
  - (iv) (as above) if the Tribunal found that there was no global contract of employment, then this acted as an indication that C provided services as an independent contractor, not an employee, even during each individual typing job.

### **C’s key evidence/ submissions**

72. Apart C’s various points referred to above in these Reasons, C emphasised the following points:
- (a) supervision/audit checks;
  - (b) the operation of the rota as showing the control exercised by R over C;

- (c) the numerous emails/communications showing the day to day control exercised by R over C's working. There was often a level of checking up on C;
- (d) that:
  - (i) R provided all the training themselves required to undertake the job;
  - (ii) R provided equipment needed to undertake the job i.e. foot pedal and headset;
  - (iii) R's IT department would be in contact (at direction) regularly to install the various systems needed to undertake the work on C's computer and be available to solve any IT issues that occurred at any time and had a contact number that C should ring if there were any IT problems;
  - (iv) R installed an anti-virus software on my computer as per one of the its requirements (which C had to pay for);
- (e) C further emphasised that:
  - (i) it was R who created annual declarations which typists in C's position were all to sign each year to state they were self-employed and took care of our own tax/NI contributions. This indicated a level of control by R;
  - (ii) the deduction a £25 service fee from anything C had earned (set out in the Respondent's Terms of Working, to cover the businesses' licence fees) was not an option; C had no a say in it.

## **Discussion**

### **(1) Global contract?**

73. In my judgment, for the reasons submitted by R, there was no mutuality of obligation during the periods during which C was not actually providing her services to R – no obligation on the part of R to provide work to C and no obligation by C to accept work offered by R. In particular:
- (a) C was (as she made plain several times in evidence) fully aware that she was not obliged to carry out work when requested – she regarded this as a significant freedom which she exercised from time to time;

- (b) I accepted R's submission that C's conduct in informing R when she was intending to take holidays/time off when she wished was not matter of (contractual) compulsion;
- (c) Given that mutuality of obligation (the wage-work bargain) is a pre-condition for the existence of an umbrella/global employee or worker contract, I conclude that no such contract existed between C and R during the relevant period.

**(2) Individual assignments**

- 74. The more difficult question is whether there existed individual contracts of employment during which C worked on each assignment (or piece of typing work).
- 75. I apply the multi-factorial approach (approved again recently by the Supreme Court in the **PGMO SC** case), giving appropriate weight in particular to the following:
  - (a) that there was no global contract (as I have found) – which may be relevant to whether C was an employee or worker when working on such assignments;
  - (b) whether C was during such assignments providing her personal services; here, the issue of “substitution of service” is potentially significant – and in particular the existence of the pool of typists of which C was a member;
  - (c) the issue of the degree of control by R over C in the provision of her services to R;
  - (d) other relevant factors bearing on the overall question of whether the contractual relationship was consistent with a contract of employment or a contract for the provision of services.
- 76. In relation to whether C was a limb (b) worker (under ERA S230(3)(b) I must further consider whether C was working under a contract with R whereby R's status was by virtue of that contract a “*client or customer*” of a “*profession or business undertaking*” carried on by C.
- 77. Turning to the individual factors:

**A. Limb (a) employee/worker assignments**

(i) Personal service (each assignment)

- 78. R rightly accepted that there was at least an element of personal service involved in the typing services provided by C to R during each assignment. R, however placed considerable reliance on the existence of the pool of typists and sought to equate the deployment or substitution of another pool member for C where she was not available, as equivalent to a right of substitution.
- 79. This seems to me to ignore the crucial point that C had no “right” to substitute someone else for herself. R simply had available to it another source of supply

for typing services within the pool of workers whom it had pre-selected to provide such services to it. In my judgment the case of **Town and Country Glasgow Limited v Mr. S Monro** relied on by R in this regard falls to be distinguished from the present case in various respects. In that case:

- (a) someone who was unknown to the “employer” would have been an acceptable substitute if the person was reasonably competent – (para 9);
- (b) the employer permitted the claimant to organize cover if she was unable to work. The employer did not therefore reserve to itself the task of identifying the substitute (para 9);
- (c) The respondent’s exercise over the choice of the substitute was weak – (para 10);
- (d) The work could be performed by someone who has not been identified by a process of advertising and review (para 15).

Further it was not a case in which the position in regard to separate assignments was under consideration.

- 80. I should add that the reference by Lord Summers in that case to Sir Terrence Etherton’s “principles” (para 6) appears (on its face) to be inconsistent with the overriding principle of applying the wording of the statute rather than raising factors to the status of principles: Applying the dictum of Lewis LJ in ***Stuart Delivery*** “*I must focus on the real issue, that is whether the nature and degree of any fetter on the right or ability to appoint a substitute to determine whether that was inconsistent with any obligation of personal performance*”. Following this approach I do not regard the availability to C of other typists in the pool to do work when C was not available as equivalent to a right of C to substitute such typists for herself. In any event, in my judgment the limits on such substitution to members of R’s pre-approved pool typists is not inconsistent with an obligation of personal performance on C’s part.
- 81. I conclude that the dominant feature of the relationship between C and R was the provision by C of her personal services to R.
- 82. Control (each assignment)

*Exclusive working:* To the knowledge of R, C worked exclusively for R; that said, it seems clear that C was not contractually bound to work exclusively for R; while R’s email referred to above seemed to express disapproval of such a possibility and therefore thereby indicating a degree pressure on C to provide all of her services to R, I remind myself of the words of Lord Leggatt In ***Uber*** (at [84]-[85]) in which he approved of the approach in **Carmichael v National Power Plc [1999] 1 WLR 2042** that it was open to the tribunal to examine all of the relevant evidence, including oral and written exchanges and ongoing conduct, to determine the parties’ true intentions about their contractual relationship. That said, it is difficult to conclude that the fact of exclusive working proves a contractual obligation to do so. However that fact is (in my judgment) relevant to the issue of whether C was working under a contract with R whereby

R's status was by virtue of that contract a "*client or customer*" of a "*profession or business undertaking*" carried on by C (see below);

83. The following factors point towards C being subordinate to and/or subject to R's control in regard to each assignment undertaken by C:
- (a) *Price*: I regard it as significant that the price of C's services was (and any increases) were set by R; it is unsurprising that this point troubled HMRC when considering the arrangements between C and R; R's submission that the fees reflected the market price (which might or might not be the case) misses the point of who it was who took the initiative in setting the price; usually, as indicated by HMRC, an independent business undertaking will set the price of its services to its customers, even if this is subject to market forces, and even if there may (at least some times) be some pushback or negotiation by the client;
  - (b) *Rota and day to day control*:
    - (i) R (generally) determined which work was allocated to C. There was a high degree of daily control exercised by R over C's carrying out of the work eg which work should be carried out by R and when – and when it should be swapped with the work of others in the pool – as well as the turn-around time. The element of control was accepted by R in submissions – at least in part. That was the broad position albeit that some flexibility existed whereby sometimes work would be re-allocated to others in the pool. This may have been at the bidding of C or R but was in my judgment much more likely to be that of R, given R's need to spread out the work appropriately in the interest of speed and business efficiency. That said, R seems to have accommodated C's preference for typing certain kinds of documents. However, even in that case any such flexibility in favour of C would have to be with R's agreement. In my judgment, viewed in the round, C was working within the R's business framework and control (rather than that R was a customer or client of C);
    - (ii) C's work was controlled or supervised by R by virtue of training and audit;
    - (iii) The typing work was of a straightforward nature and although obviously it required accuracy (as well as speed) left little or no discretion on the part of C what to do or how to do it;
    - (iv) Looking at matters in the round, in my judgment the issues of control and freedom of C to withhold services are more significant in relation to the question of the existence or otherwise of a global contract than in regard to the assignment by assignment working. In regard to the latter it seems to me clear (as I have said) that when undertaking an assignment C was providing her services through and subject to R's system of working and subject to its control. C's termination of work in the middle of doing it was more likely to have occurred through R wanting to re-organise work depending on

availability of typists rather than that C would for her own convenience interrupt a piece of work once she had started it. The electronic communications between them seem to support this conclusion. It is difficult to imagine that R would with any regularity have tolerated arbitrary chopping and changing by C of work which she had already started. The length of the relationship belies such possibility. If it did ever happen in this way (about which there was no clear evidence) it would in my judgment have been very much the exception than the rule.

- (c) *Training/Equipment*: R provided the training required for C to undertake the work, specified the equipment needed to undertake the job including R's Internet system and installed anti-virus software on C's computer (as prescribed by R) as well as providing the back-up of R's IT department.
- (iii) Other factors (each assignment)

84. These are principally:

- (a) That that there was no mutuality of obligation between jobs (as I have found). While C's right to terminate each assignment was irrelevant at first stage (ie whether there was mutuality for the purposes of a global or umbrella contract) it has relevance in regard to her independence in regard to undertaking individual assignments. R rightly relied on the approach of the Supreme Court in **PGMO SC** [59-60] as to the significance of the nature and extent of the mutual obligations. However, it is difficult to see how lack of mutuality of obligations in between each job and the consequential freedom C had over work she agreed to undertake (and the flexibility of work allocation by R amongst typists) can outweigh the others factors which (as I have found) firmly point to the existence of a subordinate relationship when the assignments were actually being carried out. Lack of mutuality of obligation between assignments is insufficient in my judgment to displace the weight of factors pointing to C's subordinate status when providing her personal services during individual assignments;
- (b) The form of the contract and the monthly invoicing by C of her fees as well as that C was not (formally) part of R's employed workforce eg using their email address. However, in my judgment these are more points of form than substance and when balanced against the fact that C was providing her personal services within R's system and under its control, are not sufficient to displace the weight of factors pointing to C's subordinate status;
- (c) That C paid for the cost of her equipment - which she owned and could (at least theoretically) have used in other employment or work; this provision of "own tools" is often indicative of independent status. However in my judgment the degree of financial risk assumed by C was relatively modest both as to the cost of the equipment and the monthly fee and therefore does not have substantial weight; C did not in any real sense assume a "degree of responsibility for investment and management" and an opportunity of profiting from sound management

in the performance of the task within the meaning of **Market Investigations** (at 184G-185B); nor do I accept (as submitted by R) that C's ability to turn down work is to be seen as an assumption of financial risk on her part;

- (d) In looking at the question of whether the terms of the contract are consistent with a contract of employment or otherwise, the points of exclusivity of working and price setting (referred to above) might equally be considered at this stage (as well as indications of control) as indicating the existence of a contract of employment but exactly at what stage these points are considered makes no difference to the outcome.

### **Conclusion: individual employee assignments**

- 85. In all these respects in regard to each assignment there existed in my judgment a sufficient framework of control over C's work (comprising personal services) to regard R as C's employer; this framework of control provided and maintained a degree of subordination of C to R indicative of employee status. They outweigh "other factors" referred to above.
- 86. Standing back and looking at matters in the round, in my judgment C was R's employee when performing each typing assignment for R

### **B. Limb (b) (individual worker assignments)**

- 87. Bearing in mind that the "passmark is lower" in regard to Limb (b) than for Limb (a) (**Byrne**), the points made in regard to my conclusion that C was a Limb (a) employee/worker of R in relation to each assignment when undertaken by C, apply all the more in relation to the issue of Limb (b) status:
  - (a) As indicated above, there was mutuality of obligation in relation to each assignment carried out and paid for either (or, alternatively, mutuality of obligation was not required in regard to each assignment);
  - (b) In my judgment C was not working under a contract with R whereby R's status was by virtue of that contract a "*client or customer*" of a "*profession or business undertaking*" carried on by C. C was not in business on her own account:
    - (i) there was no evidence of a business being conducted by C beyond the provision of personal services by C to R. There was for instance no evidence of C marketing a business;
    - (ii) that (to R's knowledge) C provided the entirety of her services tends to indicate that C was not in business on her own account and that R was not a customer or client of C. If, as stated by Sir David Richard in **Athol** [124] it would be "myopic to ignore" that a person providing services was known to be carrying on a profession or



vocation for their own account it would (it seems to me) be myopic to ignore that C was t (to R's knowledge) providing services to no-one but R;

- (iii) the framework of control by R within which C provided her personal services (and was subordinated) was indicative of C being a worker of R rather than that R were customers of C;
- (iv) the contrary factors referred to above were neither individually nor cumulatively substantial enough to displace the accumulation and weight of factors indicating C's worker status.

### **Overall conclusion**

88. I accordingly concluded that at the relevant time ie between 15 July 2020 to 30 January 2024 (and in particular between 31 January 2022 and 30 January 2024):

- (a) C was not a Limb (a) employee/worker or Limb (b) worker of R under a global or umbrella contract;
- (b) C was an Limb (a) employee/worker and a Limb (b) worker of R during each time she performed an assignment (ie individual item of typing) for R.

**EMPLOYMENT JUDGE BLOCH KC**

**DATE SIGNED:** 11 November 2024

Sent to the parties on:

22/11/2024

For the Tribunal Office: