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‘Service Contracts: Just Another Hair-Brained Scheme?’

An Analysis of the Decision in *Gorman v Terence Paul (Manchester) Limited* [2020]

2021

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Journal Article

Subject: Employee Status

Keywords: Employee; Mutuality of Obligation; Rent-a-Chair

Cases: *Gorman v Terence Paul (Manchester) Limited* [2020] 2410722/2019 (ET)

Introduction

'Ground-breaking;'[1] 'a landmark ruling of huge significance.'[2] These are just some of the terms used to describe the widely reported decision of Manchester Employment Tribunal in the recent case of *Gorman v Terence Paul (Manchester) Limited*.[3] In a judgement that has sent shockwaves through the legal community, Ms Meghan Gorman, a purportedly self-employed hairdresser operating under an Independent Contract for Services, was found, contrary to the express provisions of that agreement, to in fact be an employee.[4]

But how, I hear you cry? Well, setting aside the hyperbole for a moment, that is exactly what this article proposes to discover. To understand the Tribunal's decision, we must first examine its findings, before considering the application of the legal principles that underpin it in practice.

The Facts

The Respondent, Terence Paul (Manchester) Limited, operated a number of hairdressing salons in and around the Manchester area. The Claimant, Ms Gorman, began her career at the Respondent in or around 2013, initially as an apprentice hair stylist. Upon her qualification in October 2014, she entered into a so-called '*Independent Contract for Services*' with the Respondent.[5] In so doing however, the Claimant (unwittingly) agreed to number of contractual terms purporting to govern the relationship between her and the Respondent salon. These terms – which the Claimant did not properly understand[6] – sought to characterise her, not as an employee of the salon, but instead as a '*self-employed hair stylist*' (SEHS).[7]

1 'Self-Employed Hairdresser Held To Be Employee In Reality' (Aspire Business Partnership, 7 August 2020) <https://www.aspirepartnership.co.uk/News/3485/falsely-self-employed-hairdresser-wins-at-tribunal – Employment Status> accessed 17 September 2020.
2 'Hairdresser Meghan Gorman wins case over 'false self-employment" (BBC, 20 July 2020) <https://www.bbc.co.uk/news/uk-england-lancashire-53472037> accessed 17 September 2020.
3 [2020] 2410722/2019 (ET).
4 *Gorman* (n.3) [50].
5 ibid [6].
6 ibid [8].
7 ibid [9].

The Claimant continued to operate under this agreement (seemingly without issue) until the closure of the Respondent's salon in May 2019, whereupon she presented a number of claims to the Employment Tribunal, including; unfair dismissal, sex discrimination, as well as claims for notice pay, holiday pay, and a redundancy payment.[8] Critically, the statutory rights to which three of these claims relate (the right not to be unfairly dismissed,[9] the right to a minimum notice period,[10] and the right to a redundancy payment),[11] can only be vested in *employees*, and are predicated on that basis.[12] The rights to holiday pay, and to protection against discrimination, are of broader application, and can be claimed by *workers* as well as *employees*.[13][14]

Perhaps unsurprisingly against this backdrop, in its ET3 the Respondent contended that the Tribunal did not have jurisdiction to hear these claims, arguing that the Claimant was neither an '*employee*', nor a '*worker*' for the purposes of s.230(1) & s.230(3) Employment Rights Act 1996 (ERA 96).[15] [16] [17] Accordingly, the Tribunal convened a preliminary hearing to determine this issue.

The Law

It is assumed that most readers of this article will be familiar with the basic principles governing a contract of service, or, as it is more commonly referred to, a contract of employment. In short, there are three distinct requirements: mutuality of obligation between the parties, i.e. an obligation on the employer to provide, and on the employee to accept, some minimum amount of work (sometimes referred to as an "*irreductable minimum of obligation*"),[18] a sufficient degree of control, exercised by the employer over the employee; and the requirement for the employee to provide personal service.[19] In the absence of these factors, there can be no contract of employment. Only then, whereupon these minima are made out, can the Tribunal go on to consider the other terms of the contract, and whether they too indicate that a contract of employment has indeed been formed.

8 ibid [1].
9 Employment Rights Act 1996, s.94(1).
10 ERA 96, s.86.
11 ibid, s.135(1).
12 *Tolley's Employment Law Service*, para E.5001 (Issue 152, November 2020).
13 Equality Act 2010, s.41.
14 Working Time Regulations 1988, s.13(1).
15 ERA 1996, s.230.
16 *Gorman* (n.3) [2].
17 Note: broadly similar definitions of a 'worker' are provided for at s.83(2)(a) Equality Act 2010 and s.2(1) Working Time Regulations 1988.
18 *Nethermere (St Neots) Ltd v Taverna and Gardner* [1984] IRLR 240 (CA) [22].
19 *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 (QB) 515.

The Autoclenz Principle

In this case, the written terms of contract were seemingly clear: the Claimant was under no obligation to attend work, could choose her own working hours, was responsible for her own accounting and tax affairs, retained any profit earned by her during her time at the salon, and could, at her absolute discretion, provide a substitute to attend work in her place.[20] How then, notwithstanding these seemingly unsurmountable hurdles, was she found to be an employee? The answer lies, as it so often does, with a decision of the Supreme Court.

In another landmark decision of its day, the case of *Autoclenz Ltd v Belcher and others*[21] provided some much needed clarity on a line of conflicting EAT and Court of Appeal authorities concerning the relative weight to be attached to the contractual terms established from conduct of the parties (a question of fact),[22] vis-à-vis those to be established from the written terms of agreement (a question of law),[23] in assessing the nature of any given contractual / employment relationship. The facts of the case are not important. The legal principle it establishes however, most certainly is. In short, recognising the often considerable imbalance in the relative bargaining power between the parties in an employment relationship (as opposed to a commercial one),[24] the court acknowledged that, whilst ordinarily an unimpeachable record of the terms on which a contract is entered into, in this context, the written terms of agreement would often not accurately reflect what was, in fact, agreed between the parties in practice.[25] As such, the court ruled that the focus of the Tribunal's inquiry should be on determining the precise terms of agreement between the parties, which would '*often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part*.'[26]

This assessment necessarily involves a detailed examination, not only of the written agreement entered into – here the *Independent Contract for Services* – but also of the conduct of the parties in practice pursuant to that agreement.[27] As with the irreductable minima, the weight to be attached to each will vary depending on the precise circumstances of the case.[28] Essentially, the Tribunal is required to ask itself a simple question: do the written terms of agreement accurately reflect the

20 *Gorman* (n.3) [9].
21 [2011] UKSC 41, [2011] IRLR 820.
22 *Carmichael v National Power plc* [1999] UKHL 34, [2000] IRLR 43 [29].
23 *Davies v Presbyterian Church of Wales* [1986] IRLR 194 (HL) 196.
24 Autoclenz (n.21) [34] – [35].
25 ibid [32].
26 ibid [35].
27 *Autoclenz* (n.21) [30] – [35].
28 *O'Kelly & others v Trusthouse Forte plc* [1983] IRLR 369 (CA) 382.

nature of the *whole agreement* between the parties in practice?[29] Here the Tribunal found that it did not; its terms representing only a partial record of the agreement between the parties, not one that was reflective of the *whole agreement* in practice.[30] Specifically, the Tribunal made the following findings:

Mutuality of Obligation

There was mutuality of obligation between the parties.[31] This finding is based on an amalgamation of both the written terms of agreement, and also the conduct of the parties in practice. The written contract stipulated that the Claimant: '*shall during periods spent at the Salon, attend to the requirements of any clients who may require [her] hairdressing services*.'[32] This term accurately reflected the agreement between the parties. The terms purporting to allow the Claimant the freedom to attend whenever, and upon whomever, she desired however, did not.[33] In practice, the Tribunal found that the Respondent required the Claimant to attend the salon during their operational hours of business, whereupon she was required, in accordance with the above clause, to provide her hairdressing services to specific clients, as directed to her by the Respondent. In return, the Respondent was obliged to pay her for the work done.[34]

Control

These factors were also highly relevant to the Tribunal's consideration of the degree of control exercised by the Respondent, where again an amalgamation of terms prevailed.[35] The written contract required the Claimant to conform to certain standards of dress, and to adopt the Respondent's pricing structure, both in terms of the personal hairdressing services she provided, and also for any ancillary products sold. So too was the position in practice.[36] Of themselves, these features are not inconsistent with a contract for the provision of services.[37] However, the Respondent also controlled the Claimant's working hours, her movements during those hours, her holiday entitlement, the clients she was permitted to service, and the insurance she worked under,[38] none

29 For a recent exposition of these principles in the context of workers on zero hour contracts, see the decisions of the Court of Appeal in *Uber v Aslam and Others* [2018] EWCA Civ 2748, [2019] IRLR 257 (although note: this decision is currently subject to an appeal in the Supreme Court), and the Supreme Court in *Pilmlico Plumbers Ltd v Smith* [2018] UKSC 29, [2018] IRLR 872.
30 *Gorman* (n.3) [36].
31 ibid [38].
32 ibid [9].
33 ibid [40].
34 ibid [39].
35 ibid [43].
36 ibid [18] – [19].
37 ibid [9], [12].
38 ibid [15], [40], [47], [49].

of which were adequately reflected by the terms of the written agreement outlined, and all of which denoted a significant degree of control.

Personal Service

As to the requirement for personal service, the Tribunal found the written agreement to be inherently contradictory. On the one hand it appeared to afford the Claimant the (seemingly unfettered)[39] discretion to: '*use a suitably qualified and experienced substitute or delegate to perform the hairdressing services*'[40] whilst also providing that the Claimant '*shall not be entitled to any payment from [the respondent] in respect of any period where [she] does not perform services at the Salon regardless of the reason for the non-performance of services*.'[41] The Tribunal found the latter clause more accurately reflected the agreement between the parties, and although the issue never in fact arose in practice,[42] in the event that it had, the Claimant would not have been entitled to provide a substitute of her choosing, whilst still retaining payment for her services in the manner envisaged by the case law.[43][44]

Other Terms

Having established these factors, the Tribunal then had a significant degree of flexibility in determining whether the other provisions of the contract were consistent with its being a contract of service.[45] Aside from the Claimant's responsibility for her own accounting and taxation requirements (about which she had no choice)[46] they too indicated that she was an employee – notably in respect of the various restrictive covenants to which the Claimant was subject; a feature more commonly indicative of a contract of employment, than one of services.[47]

Thus, the Tribunal concluded, the Claimant was an employee of the Respondent (and consequently also a worker), and was, therefore, entitled to pursue her claims as presented.[48]

39 *MacFarlane v Glasgow City Council* [2000] UKEAT 23, [2001] IRLR 7 [13] – [14].
40 *Gorman* (n.3) [9].
41 ibid [10].
42 Which, of itself, does not necessarily indicate that a right of substitution did not exist: see *Express and Echo Publications Ltd v Tanton* [1999] IRLR 367 (CA) [25].
43 *Gorman* (n.3) [21].
44 *Autoclenz* (n.21) [19].
45 *Ready Mixed* (n.18) 515.
46 *Gorman* (n.3) [50].
47 ibid [13], [49].
48 ibid [50].

Analysis

At first blush, the decision in *Gorman* is a straightforward one. It correctly engages and applies the *Autoclenz* principle, concluding that through a combination of oral and written terms, the coveted prize of employee status was indeed made out.[49] Conspicuous by its absence within the Tribunal's reasoning however, is a factor crucial to the establishment of a contract of employment in law: the wage-work bargain.

The rent-a-chair model of business is utilised by bookmakers, dentists, hairdressers and beauticians across the country. It is predicated on the basis of the facilitation of services. Specifically, an individual, here a hairdresser, contracts with a business for use of their space / facilities in which they (the contractor) can then provide their services to clients. The relationship between the parties is therefore commercial in nature, and not dissimilar to the manner in which one might rent, say, a warehouse from which to conduct a distribution business. There are obligations; one party must provide the space / facilities, and one must pay for it – here via a not insignificant share of fees charged by the stylist.[50] There may even be a significant degree of control exercised as to how the space / facilities are utilised and the service offered, here demonstrated by the Respondent's requirements for the Claimant to utilise its own product ranges, conform to its dress code, and agree to abide by its pricing structures, codes of practice, and insurance arrangements.[51] What there is not in these circumstances however, is a prima facie obligation on the part of a company to provide work, nor on the contractor to accept and be paid for it – absent which, there can be no mutuality of obligation, and, therefore, no valid contract of employment.[52]

How then, in these circumstances, is the putative employer obligated to pay the putative employee anything at all? Through a careful examination of the rationale in *Gorman*, this analysis seeks to answer that question, before also reflecting on the extent of any wider implications of the decision, both in respect of businesses operating similar so-called 'rent-a-chair' models in practice, and for the definition of self-employment under domestic employment law more generally.

Employee

In order to understand and critically analyse the extent to which the Tribunal's reasoning does indeed engage with, and respond to, this question, it is necessary first to understand the complex legal framework, and historic jurisprudence upon which its findings are based. A useful starting

49 ibid.
50 ibid [11].
51 ibid [9], [12].
52 *Tolley's Employment and Personnel Procedures Manual*, para T.6004 (December 2015).

point in conducting such an analysis can be found in s.230 of the Employment Rights Act 1996 which defines an employee as:

> *'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.'*[53]

A contract of employment is similarly defined as: '*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing*.'[54] Rather unhelpfully, a '*contract of service*' is not further defined.[55] Thus, through these deliberately opaque definitions, the statute allows us to understand only that an employee works under a contract of service, but offers little assistance in defining that concept further.[56]

The Tests

To those familiar with this complex area of litigation, the imprecise definitions of these concepts is certainly nothing new. Indeed, in the case of *Stevenson v MacDonald*, Denning LJ (as he then was) commented that: '*It is almost impossible to give a precise definition*', before further ruminating that: '*It is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies*.'[57] Befitting of that difficulty is the fact that, perhaps unsurprisingly, various tests for determining employee status have been posited over the years, none of which have been met with universal approval.[58]

They include, in no particular order: '*the control test*.' Originating from the decision of Bramwell LJ in Yemens v Noakes, and commonly understood to mean the degree to which '*a person [is] subject to the command of his master as to the manner in which he shall do his work*';[59] '*the business integration test*', first proffered by Denning LJ in *Stevenson* which focusses on whether or not the work done by the putative employee is integral to the business, or merely ancillary to it;[60] and the '*business of your own account*' test, first postulated by the High Court in *Market Investigations Ltd v Ministry of Social Security*,[61] and subsequently approved by the Court of Appeal[62] and the Privy Council.[63]

53 ERA 96, s.230(1).
54 ibid, s.230(3).
55 *Halsbury's Laws* (4th edn, 2014) vol 39, para 149.
56 Mark Butler, 'What's your employment status?' (2014) 19 ELN 86.
57 [1952] 1 TLR 101 (CA) 104.
58 Nigel Baker, 'Legal Status of Employees' (2004) 27 CSR 25, 198.
59 [1880] 6 QBD 530 (CA) 532 – 533.
60 *Stevenson* (n.57) 111.
61 [1969] 2 QB 173 (QB) 185.
62 *Young & Woods Ltd v West* [1980] IRLR 201 (CA) [27]; O'Kelly (n.28) [21].
63 *Lee v (1) Chung and (2) Shun Shing Construction Engineering Co Ltd* [1990] IRLR 236 (PC) [6].

The approach that is most commonly cited as representing the most instructive and clearly enunciated, if not slightly antiquated version of the law however (although interestingly not the formulation favoured by the Tribunal in this case), can be found in the judgement of Mackenna J in the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*, in which it was held:

> *'a contract of employment exists if these conditions are fulfilled:*
> *i. The servant agrees that, in consideration of wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.*
> *ii. He agrees, express 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.'*[64]

A subsequent litany of case law has operated to distil the *Ready Mixed* formula into three distinct requirements: mutuality of obligation, control, and personal service. Whilst successive Court of Appeal authorities have established that the weight to be attached to each of these principles will vary in any given case, they must each nonetheless be present, as without them, no contract of employment can subsist.[65]

Of these alternative tests cited above, it can safely be said that, for the purposes of s.230 ERA 96, the control test has been subsumed into the second limb of the multi-factorial test in *Ready Mixed*. However, although no longer determinative in its own right, as observed in the case of *Chadwick v Pioneer Private Telephone Co Ltd*: '*A contract of service implies an obligation to serve, and it comprises some degree of control by the master*.'[66] This remains as true today as it did in 1941, and provides a useful reminder of why successive cases have continually emphasised the centrality of control as one of the key hallmarks of a contract of employment, and why it can often still prove to be the decisive factor in its own right.[67]

Arguably of even greater significance than control however, is the defining feature of any employment relationship – the concept of the wage-work bargain. Put simply, an employment contract requires that an employee be under an obligation to provide his labour, and that an

64 *Ready Mixed* (n.18) 515.
65 *Nethermere* (n.19) [60]; *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318, [2001] IRLR 269 [19]; *Tanton* (n.42) [31].
66 [1941] 1 All ER 522 (MWA) 523.
67 *Motorola Ltd v (1) Davidson and (2) Melville Craig Group Ltd* [2001] UKEAT 46/00, [2001] IRLR 4 [16].

employer be under an obligation to pay him for it.[68] Where these mutual obligations do not exist, the contract cannot be one of employment.[69]

Here, the obligation on Ms Gorman to provide her labour is well-defined. Indeed, it is prescribed under the written agreement, and found so to be by the Tribunal.[70] The obligation is established beyond mere opportunity to provide her work in the *Tanton* sense,[71] largely thanks to the Tribunal's findings in line with *Autoclenz* as to the requirement for her to attend work at particular times – expressly contrary to the provisions of the written agreement.[72] In short, the Respondent dictated when the Claimant was required to attend at their premises, during which time she was required to provide her hairdressing services.

The obligations on the Respondent however, are altogether less certain. Whilst the nature of the agreement clearly discloses some form of obligation, namely the requirement to provide the Claimant with use of a chair, washbasin, surrounding fittings, hot water, consumable stock and other services[73] – factors which properly formed the Respondent's consideration for the purposes of the service agreement – whether or not there is sufficient obligation to form a contract of employment, that is to say whether there is an obligation to provide the Claimant with remuneration for her services, is much less clearly defined. This raises an interesting question: if the Claimant's only consideration is the performance of her work, and the Respondent's only obligation is to provide the space / facilities necessary to enable the Claimant to provide her services to clients, how can it be said that they are obliged to pay her anything at all?

Quashie

This difficulty is graphically illustrated by the case of *Stringfellow Restaurants Ltd v Quashie*, in which Ms Quashie, a lap dancer (rather coyly described by the Respondent as a table-side dancer), sought to pursue a claim of unfair dismissal, following her dismissal for suspected involvement with drug misuse at the Respondent's premises.[74] In concluding that Ms Quashie was not an employee, the Court of Appeal highlighted the important distinction between obligations of the kind necessary to form a contract (of a commercial nature) more generally on the one hand, and those necessary to form a contract of employment on the other.[75] Specifically, it held that:

68 *Harvey on Industrial Relations and Employment Law*, para AI.24 (Issue 285, December 2020).
69 *Nethermere* (n.19) [60].
70 *Gorman* (n.3) [9], [38].
71 That is to say, a term that has the effect so as to enable, but not require a person to work, and enable, but not require, the person for whom he works to provide that work – see *Tanton* (n.42) [25].
72 *Gorman* (n.3) [15].
73 ibid [11].
74 [2012] EWCA Civ 1735, [2013] IRLR 99 [1].
75 Quashie (n.74) [42] – [44].

> *'The critical question was as to the nature of those contractual obligations. Were they such as to render it a contract of employment? To use the language of MacKenna J, were the provisions of the contract consistent with it being a contract of service? The most important finding in that regard was the Tribunal's inference from the evidence that the employer was under no obligation to pay the dancer anything at all. The principal evidence for that was that she negotiated her own fees with the clients, took the risk that on any particular night she would be out of pocket and received back from the employer only monies received from clients after deductions."*[76]

Indeed, although not impossible,[77] Elias LJ concluded that it would: '*be an unusual case where a contract of service is found to exist when the worker takes the economic risk and is paid exclusively by third parties*.'[78] Central to the Respondent's obligations to pay the Claimant then,[79] are two distinct considerations: the degree of economic risk assumed by the putative employee, and the nature of the payment arrangement with the third party client.

Despite the seemingly obvious parallels with the circumstances of this case, the Tribunal in *Gorman* concluded that it was not bound to follow the ratio of *Quashie*, commenting that it regarded it as merely providing guidance on, as opposed to substitution for, the statutory provisions of s.230 ERA 96.[80] In order to understand why the Tribunal did not consider itself bound by *Quashie* (the reasoning is not set out in terms within the judgement), and how it purported to distinguish it from the facts of *Gorman*, it is necessary to examine its findings in some detail.

Firstly, whilst *Quashie* undoubtedly does provide some degree of analogy in terms of the general manner in which labour is contracted, and perhaps more pertinently, in terms of the method by which such contracts are remunerated, that analogy does not extend to the level of economic risk assumed by the parties. In *Quashie*, the Claimant was obliged to pay to the Respondent a nightly 'house fee' of £65 for every shift she worked. This fee operated regardless of whether or not she in fact provided her services to any clients on any given shift.[81] There was always then, an appreciable risk for Ms Quashie that, absent any clients, she would make a loss on any given shift. Conversely, Ms Gorman was under no such obligation; any such fees owing to the Respondent stemming directly from the monies earnt in the performance of her professional services – in the form of a

76 ibid [45].
77 See for example the comments of Cozens-Hardy MR in *Penn v Spiers and Pond Ltd* [1908] 1 KB 766 (CA), where it was observed that 'there are many classes of employee whose remuneration is derived largely from strangers', hotel porters and waiters providing two such obvious examples.
78 *Quashie* (n.74) [51].
79 Therefore, also necessary to the establishment of the mutuality necessary to found a contract of employment.
80 *Gorman* (n.3) [34].
81 *Quashie* (n.74) [19].

67% levy on her gross fees.[82] If she did not perform any work, neither she nor the Respondent would be remunerated. Crucially, this arrangement operated so as to shield the Claimant against the risk of incurring a loss in the manner demonstrated in *Quashie*.

Thus, whereas it can clearly be said that in Ms Quashie's case she bore the economic risk in the relationship – a feature more readily attributable to contracts for service,[83] and one to which Elias LJ attached significant weight in his findings[84] – the same cannot be said of *Gorman*, where, as per the Tribunal's findings, the Respondent bore the risk of profit and loss.[85] Indeed, there are other divergences too; chief among them the fact that Ms Quashie negotiated her own fees, whereas the Claimant did not.[86] Accordingly, thanks largely to the manner in which the Respondent chose to arrange its business dealings with Ms Gorman, it cannot be said that the circumstances in *Quashie* provide a complete analogy on this issue.

However, whilst the significance of these distinctions cannot be understated, they do little to displace the other consideration that precluded the Respondent from having the necessary obligation to pay the Claimant's wages in *Quashie* – the fact that she was paid exclusively by third parties. On this issue, Ms Gorman's case does align with *Quashie*, and appears to place her in some considerable difficulty.

Cheng

This issue was examined in detail by the Privy Council in the case of *Cheng Yuen v Royal Hong Kong Golf Club*.[87] Mr Cheng was a golf caddie whom, subject to agreeing to abide by certain rules as to his standard of dress, was permitted entry to the Respondent's premises in order to offer his caddying services to individual golfers. In exchange for such services he was paid a fee, the level of which was decided centrally by the club. These fees were paid to him by the club, who then recouped them from individual golfers.

In its decision, the Privy Council determined that:

> *'the only reasonable view of the facts is that the arrangements between the club and the claimant went no further than to amount to a licence by the club to permit the claimant*

82 *Gorman* (n.3) [11].
83 Jeremias Prassl, 'Employee Shareholder 'Status': Dismantling the Contract of Employment' (2013) 42 ILJ 307, 332.
84 *Quashie* (n.74) [51].
85 *Gorman* (n.3) [45].
86 ibid [11].
87 [1997] UKPC 40, [1998] ICR 131.

> *to offer himself as a caddie for individual golfers on certain terms dictated by the administrative convenience of the club and its members.*
>
> …
>
> *He did not receive any of the sickness, pension or other benefits enjoyed by employees of the Club nor indeed any pay over and above that resulting from particular rounds of golf for which the golfer was debited by the Club even if as a matter of machinery the Club handed the fee to the Claimant.*'[88]

Their Lordships went on to conclude that there could not be a contract of employment in these circumstances, i.e. where Mr Cheng was paid exclusively by third parties, for want of mutuality of obligation – specifically the requirement for the club to pay him a wage.[89] The ratio in this case, cited with approval by Elias LJ in *Quashie*,[90] seems to provide that in circumstances where a Respondent is effectively acting only to facilitate an agreement between the would-be employee and a third party by providing an environment in which they can do business, a contract of employment cannot exist. This is so even where the Respondent collects and pays the necessary fees to the would-be employee. In this regard, their function is merely that of a conduit, with obligations only to pass on monies generated between the contractor and the third party, not itself to make payment directly.

Clearly, there are significant parallels here with the circumstances in *Gorman*, and with the rent-a-chair business model more generally. On the terms of the written agreement, the Claimant contracted with individual clients for the provision of her hairdressing services, much as Mr Cheng did with individual golfers. She was required to wear a uniform, conform to certain standards of dress, with her fees being set by, and paid through, the salon in its capacity as conduit. Importantly, Mr Cheng was also seemingly permitted entry to the club and allowed to offer his services to individual golfers free of any charge, which, although the decision itself is silent on the matter, tends to indicate in line with *Quashie* that, as in Ms Gorman's case, the economic risk was assumed by the Respondent. It is, therefore, a more complete analogy. As such, whilst Ms Gorman was clearly required to perform work in accordance with the conditions of her contract as the Tribunal found it to be, assuming *Cheng* to be correct, there is seemingly no corresponding obligation on the Respondent (as opposed to the third party clients) to pay her for it.

Thomas Wood, Counsel for the Respondent in *Gorman*, argues persuasively in his article that the Tribunal simply did not engage with this issue in its judgement, operating as it does at the heart of

88 *Cheng* (n.87) [20].
89 ibid [21].
90 *Quashie* (n.74) [49].

the rent-a-chair business model.[91] He makes a valid point. Nowhere in the Tribunal's judgement do they explicitly deal with this question. How then, notwithstanding the facts in *Cheng*, did the Tribunal seek to distinguish Ms Gorman's case; and more particularly, how did it find that the Respondent was indeed obliged to pay the Claimant a wage, and mutuality made out?

The answer to this conundrum lies in the precise manner in which the Respondent conducted its business. Indeed, as Elias LJ remarked in *Quashie*; '*Each case turns on the particular arrangements under which the contract is made and performed.*'[92] This fact specificity is particularly true of mutuality of obligation,[93] the fluidity and malleability of which in practice, allowed the Tribunal to effectively resolve this issue, and to distinguish *Cheng*. To do so, the Tribunal needed only to ask itself one, reassuringly straightforward question: *With whom does the client contract?*

Thankfully, the answer to this question is equally straightforward. On the evidence, the Tribunal found that the Respondent clearly regarded the clients as belonging to (and therefore also contracting with) the salon, as opposed to the individual stylist.[94] This is aptly demonstrated in the Tribunal's lengthy findings as to the measures taken by the Respondent to restrict the Claimant's (and presumably others) access to its client database, notably even following the Claimant's dismissal;[95] by its strict control over the clients to whom the Claimant was permitted to provide her services;[96] and by the restrictive covenants in place, specifically designed to retain those clients.[97] Having made that finding, the Tribunal was then bound to conclude that the nature of the contractual arrangement – certainly as the Respondent understood it to be – was that of a typical contract of employment, i.e. one in which a client contracts with the Respondent for the provision of hairdressing services, who then, in turn, employs the Claimant to provide those services to said client. In those circumstances, they were, of course, obliged to pay the Claimant a wage.

Contrast this with the situation in either *Quashie* or indeed *Cheng*, where it cannot properly or sensibly be said that individual golfers and/or attendees at the nightclub would reasonably have understood that when engaging the services of either Ms Quashie or Mr Cheng, they were, in fact, entering into an agreement with the Respondent business, with the caddie / dancer acting as its employee.

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91 Thomas Wood, 'Mutuality of obligation, and why Gorman v. Terence Paul (Manchester) Ltd. doesn't actually change a thing' (*St John's Buildings*, September 2020) < https://stjohnsbuildings.com/wp-content/uploads/Tom-Wood-Mutuality-of-obligation-Gorman-v.-Terence-Paul.pdf> accessed 19 October 2020.
92 *Quashie* (n.74) [47].
93 Janet Barlow, 'A poor fit' (2015) 165 NLJ 8.
94 *Gorman* (n.3) [16], [48].
95 ibid [47].
96 ibid [17].
97 ibid [22], [48].

Nor would the Respondents in those cases have had any control over the clients with whom the Claimants contracted. In *Gorman*, the Respondent could freely exert that degree of control over the Claimant, and frequently did so.[98] The clients belonged to them, and they could utilise the labour they employed in the service of those clients howsoever they wished. The same cannot be said of *Cheng* and *Quashie*. Evidently then, this finding is central, not only to establishing mutuality of obligation, but is also a central plank of the Tribunal's reasoning in its assessment of control, again serving to illustrate the centrality of this finding to the facts of this case.[99]

Although not directly relevant to the s.230 authorities, further support for this proposition can also be derived from applying the facts of these cases to the various alternative tests set out above: For example, in applying the '*business integration test*' favoured by Denning LJ, can it really be said that Mr Cheng was integrated into the Respondent's golf club to the same or similar degree as was the Claimant to the salon? The club could carry on its operations without the use of Mr Cheng's (or indeed any other caddies) services. Thus, although undoubtedly an important auxiliary feature of the Respondent's business structure, his services were clearly ancillary to its operations. Conversely, Ms Gorman's services were central to the operation of the Respondent's salon, their revenue depending exclusively on the provision of her labour in a way that it did not in either *Quashie*, or *Cheng*.

The "*business of her own account*" test produces similar results. On the Tribunal's findings, it is difficult to envisage how, in the absence of the Claimant herself contracting with the third party clients, she could be said to have been conducting business of her own account. She worked on the Respondent's clients, at the Respondent's behest, and was, therefore, clearly carrying out their business. Contrast this with either Ms Quashie, or Mr Cheng, whom, regardless of the other factors in their cases, were evidently carrying out their own business affairs – albeit using the Respondent's premises as a convenient location from which to do so – and not that of their would-be employers, who, in terms, supplied entirely separable hospitality and leisure-based services respectively.

Conclusion

In conclusion then, although not explicitly set out in terms within its judgement, when analysed through the prism of mutuality of obligation, the Tribunal's logic in determining this issue is clear. It is predicated, correctly in my view, on the nature of the contractual relationship between the parties, and distinguishes both *Quashie* and *Cheng* on that basis. That said, to borrow a phrase from a recent governmental faux pas, I do however agree with Mr Wood in a *specific and limited way*. As set out above, the irreductable minimum here was established in line with the *Autoclenz* principles, i.e. on

98 *Gorman* (n.3) [39], [41].
99 ibid [43].

basis of both the written terms of agreement, but also, crucially, the conduct of the parties.[100] Had the party's actions in practice not diverged so drastically from the terms of the written agreement as set out – most notably in respect of the manner in which the Respondent sought to assert ownership over its clientele, as well as its continued willingness to bear the totality of the economic risk between the parties[101] [102] – regardless of the other provisions of the contract, mutuality of obligation could not have been made out. Accordingly, whilst perhaps a cautionary tale of the pitfalls of poor industrial practice, absent similar such divergence in the future, it is unlikely that the decision in *Gorman* will be precedential in nature.

Reflection

Striking at the heart of the contemporary discourse on employee status, this case provides a cutting critique (pun very much intended) of the law on this complex issue, and serves as a useful reminder of the dangers of so-called '*Independent Contractor Agreements*' for both practitioners and employers alike. Specifically, it highlights the critical importance of ensuring, not only that such agreements are drafted in clear terms and adequately reflect the intentions and understanding of the parties, but also in ensuring that their terms are adhered to in practice. As the Respondent here discovered to its peril, the consequences of failing to do so can be expensive, and well publicised.

100 Alan Bogg 'Sham Self-Employment in the Supreme Court' (2012) 41 ILJ 328, 333.
101 But also in respect of the Claimant's working hours, the degree of control to which she was subjected during those hours, and the blanket unwillingness to allow for the provision of a substitution.
102 *Gorman* (n.3) [7].

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