Appeal No. UKEATS/0027/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 19 July 2013

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MR GORDON H C ROGERS — APPELLANT

CRAIGCLOWAN SCHOOL — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR R MORTON (Solicitor) Maclay Murray & Spens LLP Quartermile One 15 Lauriston Place Edinburgh EH3 9EP
For the Respondent	MR D GORRY (Solicitor) Law at Work Limited Kintyre House 205 West George Street Glasgow G2 2LW

SUMMARY

CONTRACT OF EMPLOYMENT

The Claimant sought a declaration that he was an employee of the Respondent, and sought a declaration of his terms and conditions of employment. He also claimed there had been an unlawful deduction from wages under section 13 of the **Employment Rights Act 1996** and in respect of holiday pay. The Respondent argued that the Claimant was not an employee but rather was a self-employed contractor and that there had been no unlawful deductions from wages. They argued that the ET had not erred in law in so finding. Held that the ET had made no error in law. The appeal is dismissed.

THE HONOURABLE LADY STACEY

Introduction

1. The Respondent is a charity which runs a preparatory school. The Claimant teaches pupils of the Respondent to play the bagpipes. He has done so since 1996**.** The Claimant works for Perth and Kinross Council and has done so since 1992 where he is a permanent part-time instrumental instructor. He is an employee of the Council. Throughout the whole period of his relationship with the Respondent the Claimant has taught at various other schools under his contract with the council.

The Judgment of the Employment Tribunal

2. Following a hearing in November 2012 and February 2013 the ET found that the headmaster of the school, then a Mr Beale, approached the Claimant in September 1996 and asked if he would be interested in taking on bagpipe teaching at the school. The Claimant and Mr Beale met and discussed matters. The ET found that "the claimant understood that his appointment would be on the same basis as his appointment with Perth and Kinross Council and that he would be an employee." The ET set out in paragraph 3 a letter written by Mr Beale, following the agreement between him and the Claimant in the following terms:

> **"I am delighted to confirm the appointment as Piping Teacher at Craigclowan.**
>
> **The bare bones of our appointment process is that:**
>
> **1. One term's notice is to be given on either side.**
>
> **2. The appointment is initially for one year with confirmation within that time.**
>
> **3. Payment will be according to Craigclowan's own scale based on IAPS recommended rates for musicians. Currently the rate we pay is £15 an hour and these payments are spread over 12 months to ensure there is some financial income during holidays!**
>
> **If there are any queries about any of this please do not hesitate to let me know. The term dates, fixed as far ahead as they have been, are as follows**
>
> **…**
>
> **There is a staff/governors lunch on Monday 2nd September at1230 and you would be very welcome to come. This will be followed by a staff meeting at 2 o'clock.**
>
> **I look forward to seeing you at the beginning of the new term."**

3. The Claimant began by working one day per week. The arrangement was that parents who wished their child to be taught to play the chanter or bagpipes would advise the school and an arrangement would be made for the child to be taught one-to-one by the Claimant. There was a school band, run by the Claimant. The school invoiced the parents for the cost of music lessons on a termly basis along with the school fees. At the beginning of each school year the Bursar made an estimate of the hours which the Claimant was likely to be teaching during term time. The Bursar then estimated the amount of payment which would be due over the whole year on the basis of the hourly rate. That sum was paid over 12 months in equal instalments. In or around August or September each year a calculation was performed and if the Claimant had been overpaid the sum involved was deducted from the coming year's money and if underpaid the school would pay the balance to him. A similar arrangement obtained for other visiting music teachers.

4. By 1998 the demand for the Claimant's services was such that a waiting list was building up and he spoke to the director of music, Mr Olafsson who in turn spoke to Mr Beale. It was agreed that the Claimant would come in two days per week, which arrangement has persisted to date.

5. The ET found that the Respondent did not specify the syllabus to be taught by the Claimant or by any other visiting music teacher. The Claimant was free to choose which accrediting body pupils should study for. He wrote a substantial amount of the material used by him in teaching. The school did not allow visiting music teachers to take pupils during the first or last weeks of term. Throughout the period in which the Claimant taught at the school he did not refuse to take any child on. On notification by the head teacher or the head of music that a particular child wished to take lessons, the Claimant has usually auditioned the child.

Arrangements were then made for the child to be allowed out of ordinary classes in order to attend for his music lesson. When he first started the Claimant supplied materials necessary for his teaching himself and then sent a bill to the Respondent for reimbursement. He changed that practice in the two years before the Tribunal as he found the delay between his laying out the money and being reimbursed too long. Instead, the current practice is that the Claimant tells the pupil what is required and his parents are expected to obtain it.

6. Between 1996 and 2006 the school bursar was Mrs Beale, the wife of the headmaster. Her system for payment was that each visiting music teacher, including the Claimant, gave her a chit every week showing the number of lessons taught. In 2007 a new Bursar, Ms Robinson changed the system, requiring the Claimant and other visiting music teachers to complete a timesheet giving the names and times of each lesson given. The system of paying throughout the year continued but at some stage changed so that it was paid over 10 months rather than 12. The Claimant was always paid net of tax and national insurance.

7. In 2002 the Respondents produced a school handbook. This showed the Claimant and other visiting music teachers as members of staff. The handbook gives instructions on child protection issues which the Claimant considered applied to him. On one occasion a situation arose with another visiting teacher, not the Claimant, in which allegations of inappropriate behaviour were made. The head teacher decided to proceed on the basis of the school's staff disciplinary process. Other members of staff were required to attend training on special days, were required to take part in annual appraisals, and were required to supervise school activities in the evening. The Claimant and other visiting music teachers were not required to attend the training days, not to take part in appraisals, nor to attend parent's evenings; nor to supervise school activities in the evening.

8. Members of staff who are qualified members of the General Teaching Council (GTC) are members of the Scottish Teachers Superannuation Scheme administered by the Scottish Public Pensions Authority. This scheme is only open to individuals who are members of the GTC. The Claimant is not a member. No pension payments have been made on his behalf by the Respondents to any pension scheme. The Claimant is a member of the local government pension scheme in respect of his employment with Perth and Kinross Council.

9. The Claimant has never had paid holidays. He had one week's holiday during term time, on one occasion. He taught double classes the following week. The Claimant had had two periods of ill-health during his relationship with the Respondent. On the first occasion he made no claim for sick pay and did not receive any sick pay. On the second occasion he submitted a claim for statutory sick pay, in September 2010, and the Respondent indicated that they did not accept that he was entitled to sick pay but they did make a payment, similar to the amount of sick pay had he been eligible, on a without prejudice basis. The ET found that the Claimant provided a substitute to teach his classes while he was unwell on the first occasion. On the second occasion he did not provide a substitute and the Respondent brought in another teacher.

10. On 31 August 2009 the headteacher, no longer Mr Beale but a new teacher, wrote to the Claimant and the other visiting music teachers stating that he had been aware for some time that the employment arrangements had not been as clear as they might be. He said that there were two possibilities, being that the visiting music teachers became employees of the school or that they are self-employed teachers. He sought views on the subject. The Claimant took advice from his union and in 15 September 2009 wrote to the school indicating that he had always considered himself to be an employee. He asked the school to provide a written statement of employment particulars under sections 1 and 2 of the Employment Rights Act. The reply from

the Respondents was to the effect that they were trying to establish his status and were in discussions with HR consultants and with HMRC. Another music teacher had raised the question of being subject to deductions for tax and national insurance with the Respondent. Correspondence with HMRC took place in connection with that teacher in 2009. The Respondent received a response from HMRC to the effect that the individual teacher was self-employed.

11. The ET decided that the Claimant was a self-employed contractor rather than an employee of the Respondent or a worker providing services to them. It took the view that the letter from the then headmaster quoted above was "entirely ambiguous and did not take matters forward". The Employment Judge stated that he looked at the realities of the situation since 1996. He accepted the Claimant's contention that if he could show that he had been an employee in 1996 then he would still be an employee as there was no evidence that at any point he had agreed to a change in his status. He then looked at the evidence and found that the preponderance of factors came down on the side of self-employment. He did not find the issue of the Claimant's tax status to be particularly helpful one way or the other. He stated that so far as mutuality of obligation was concerned, he accepted the Respondent's argument which was based on the clear fact that the Claimant was not obliged to take on any pupil and that he was only paid for the hours that he worked. Therefore if the school had fewer pupils wanting to be taught than the amount of time available the Claimant would lose income. The Tribunal therefore found, on the basis of the way the relationship had worked that the Respondents were not obliged to offer work to the Claimant nor was he obliged to accept it. Turning to the question of control, the ET accepted the Respondent's argument that all of the matters which the Claimant contended showed that the Respondent exercise control over him were no more than would be expected if the Claimant was a self-employed contractor. The ET noted that another teacher had one occasion been subjected to the Respondent's Disciplinary Procedures.

The ET found that the fact that the Claimant provided his own materials, chose what to teach, and how to teach it, all indicated self-employment and contra-indicated employment. The ET found that the Claimant had a right to substitute another teacher if he was unavailable. The ET also relied on the fact that once the Claimant had declined to pay for materials and invoice the school there was no question of the school paying. The Claimant told the pupils what was needed and they obtained the goods themselves. From all of these factors the ET found that the Claimant was a self-employed contractor.

The Claimant's Submissions

12. Mr Morton for the Claimant explained that the parties were agreed as to the law and the legal principles which the ET should have had in mind when making its decision. He indicated he would argue that that the ET failed to apply the multifactorial approach necessary in making its decision. He took his second ground of appeal first. He argued that while the Employment Tribunal was obliged to make findings about credibility and reliability, the Tribunal heard in this case gone too far. He referred to paragraph 32 of the decision in which the following is stated: –

> **"I considered that all witnesses were attempting to assist the Tribunal by giving truthful evidence as they saw it. I found the claimant's evidence to be more calculated than that of the respondents' witnesses in that the claimant clearly had an agenda to show himself as being an employee and he tended to slant the answers to questions with a view to bolstering up this position. I did not find that he give any evidence which was deliberately untruthful but I felt that I required to bear in mind when considering his evidence that this is a matter where he has been in dispute with his employers for the last 2 or 3 years and he clearly has a definite end in view. I found the respondents to be much more balanced in their approach and in general preferred their evidence."**

Mr Morton sought to argue that the paragraph showed that the ET had acted perversely. He argued that the ET had approached the Claimant's evidence about the original meeting between the Claimant and the headmaster in an unfair way. The ET had found that if the Claimant was an employee in 1996 then he remained an employee throughout his period of time with the Respondent. He noted that the ET had found that the Claimant thought that he was an

employee. He argued that it was perverse of the ET to regard the Claimant as having an agenda and that if that had led the ET to prefer other evidence then they had erred in law by acting perversely. While Mr Morton did appreciate that the views of the parties could not be decisive, he argued that if the Claimant was acting in good faith and was truthful when he said that he thought that he was an employee then that would go some way to establishing his status as an employee. He argued that at the beginning of the relationship that there would be few other matters to consider in order to determine status. The ET should not have regarded the Claimant's position as someone putting forward an agenda. Mr Morton stated that all litigants must have a position and therefore could be said to have an agenda. He appreciated that successful appeals on perversity are likely to be few and far between. He made reference to the well-known case of **Yeboah v Crofton** [2002] IRLR 634 and in particular to paragraph 92. Nevertheless he argued that the approach by the ET was flawed and that an error in law had been made. He argued that the Claimant had not been told that the ET was concerned about his having an agenda and therefore had no opportunity to explain his position. There had been no evidence at the ET from Mr Beale or from his wife as they are no longer employed with the Respondent. Therefore the Tribunal only had evidence from the Claimant about the early stages of the relationship.

13. Mr Morton sought to argue, still under the second ground of appeal which relates to perversity, that the ET had found that various matters were dealt with in the letter of appointment namely notice, duration, remuneration which were all necessary parts of a written statement of terms and conditions of employment under the **Employment Rights Act 1996**. He therefore argued that it was perverse of the ET to find that the Claimant was self-employed.

14. Turning to his other grounds of appeal, Mr Morton sought to argue that the letter of appointment should have been given more weight. He appreciated that the question of weight

was generally one for the Tribunal at first instance and that it is not a ground of appeal that the weight given by the first instance tribunal is said to be insufficient. Nevertheless he argued that the case of **Autoclenz v Belcher and others** [2011] UK SC 41 was authority for the proposition that an appeal tribunal required to look at the reality of the situation. Thus the appeal tribunal could substitute its own view of the weight to be put on matters for that of the tribunal at first instance. Were that not so, Mr Morton argued, no appeal of this sort could succeed. He therefore argued that the rationale of the case of **Autoclenz** was that the appellate tribunal could look at the whole case again if persuaded that the tribunal at first instance had reached the wrong conclusion. He argued that the ET had placed too much weight on the fact that the Claimant taught his own syllabus. He pointed out that specialist music provision is different from for example mathematics where there is a fixed syllabus. He argued that the ET had paid insufficient notice to the evidence given by the Director of Music, Mr Olafsson, but he did not specify what evidence had been ignored. The ET had paid too much attention to the circumstances of other visiting teachers, when it was only the situation of the Claimant which was relevant.

15. Mr Morton referred to the case of **Ready Mix Concrete (South East) Ltd v Minister of Pensions & National Insurance** [1978] 1 All ER 433. He said that the test for whether a person was an employee or self-employed was set out at page 515. He made reference to the well-known dictum as follows: –

> **"A contract of service exists if these 3 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."**

16. Mr Morton's submission was that the Claimant satisfied parts (i) and (ii). He argued that the third part was also satisfied, by reference to the evidence about the use of school procedures

on child protection being applied to another visiting teacher, the weekly returns of children taught being supplied by the Claimant to the Bursar, the evidence about the syllabus, once properly understood as it applied to specialist subject teachers, and the arrangements for substitution, which showed that on one of two occasions the Respondent had arranged a substitute

17. The motion for the Claimant was that the appeal should be allowed and that I should substitute my own decision for that of the ET. Mr Morton argued that sufficient facts had been found to enable me to decide that case. If I were prepared to allow the appeal but was not prepared to substitute my own decision I should then remit to a differently constituted tribunal.

The Submissions for the Respondent

18. Mr Gorry submitted that the Employment Tribunal had made no error of law. He confirmed that the parties were agreed that the correct approach was to apply a multifactorial test as set out in the cases of **Ready Mixed Concrete** and **Autoclenz**. He argued that the Employment Tribunal had done so. He referred to page 46 of the **Autoclenz** case and to paragraphs 18 and 19. He argued that the test which should be applied by the ET was set out firstly in the three-part test in the **Ready Mixed Concrete** case and supplemented by the three further propositions namely that there must be: –

1. an irreducible minimum of obligation on each side to create a contract of service
2. if a genuine right of substitution exists, this negates an obligation to perform personally and is inconsistent with employee status.
3. if the contractual right, as for example a right to substitute exists, it does not matter that it is not used.

Mr Gorry argued that so far as mutuality of obligation is concerned, the Respondent was not obliged to offer work and the Claimant was not obliged to accept it. There was not a sufficient degree of control by the Respondent of the Claimant to indicate our relationship of employment. The ET had clearly found that the Claimant had the right to provide a substitute. That had actually happened on one occasion. He therefore argued that these were indicators which were inconsistent with the relationship of employment between Claimant and Respondent.

19. Mr Gorry submitted that the Claimant had not identified any error of law. He made reference to the case of **Hellyer Bros v McLeod and others** [1987] ICR 526 at page 538 from where he quoted the well-known part of Lord Radcliffe's speech in the case of **Edwards v Bairstow** [1956] AC 14 to the following effect: –

> **"I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been an error in point of law."**

He argued that the Claimant had not identified any error in law. There was nothing in the judgment of the ET which was obviously bad law. The judge had directed himself correctly and had come to a decision to which he was entitled to come. The findings which he made were patently open to him to make. Much of the evidence was uncontested and the weight given to individual parts of evidence were for the tribunal at first instance. While much of the content of the letter of appointment were necessary parts of an employee's statement under the **Employment Rights Act 1996**, they were also matters which applied to a contract for services. There was nothing in them to indicate employment to the exclusion of all else. Therefore the

Employment Tribunal was entitled to find as it did at paragraph 38 that the letter did not take the matter much further forward. Mr Gorry argued that even if the letter did indicate that the relationship was that of the employer and employee it was only one factor. All factors had to be taken into account. The Claimant may have assumed that his situation would be similar to that of his situation with the local authority but that was not conclusive. It had been argued by Mr Morton that the ET had concentrated too much on the other teachers and not enough on the Claimant. Mr Gorry argued that that was incorrect as there were many common points between the other teachers and the Claimant and the ET was entitled to note that; the decision had not been made on the basis of the contracts of people other than the Claimant.

20. Mr Gorry argued that the test for an appeal on perversity had not been met. It was in order for the ET to note that the Claimant had been in dispute for some time with the Respondent prior to the hearing before the Tribunal. The Respondent in contrast thought that it was a grey area and that is why the ET found that the approach of the Respondent was more balanced. Thus he argued that the comment by the ET did not show that it had acted perversely. In any event, as the majority of the evidence was not in dispute there was no connection between the ET's view that the Claimant had an agenda and any allegation of perversity in the findings of fact made by the ET.

21. As regards disposal Mr Gorry argued that there were not sufficient undisputed facts for me to substitute my own view were I minded to allow the appeal. Most of the case had turned on oral evidence. It should therefore be remitted, were I to allow the appeal, to a freshly constituted tribunal.

Discussion and Decision

22. I came to the view that the Claimant had not identified any error of law on the part of the ET. The evidence laid before the ET was not in dispute in any material way, and the issue was the interpretation of that evidence as required by the cases of **Ready Mixed Concrete** and **Autoclenz**. It was therefore for the ET to consider whether or not the test set down in the cases was met. The weight that the ET put on individual parts of evidence was a matter for it. In a careful and reasoned judgment, the ET explained why it came to the view that there was a lack of mutuality of obligation, a lack of control, and a right of substitution. All of those are indicators of self-employment rather than employment. There is nothing perverse in the decision of the ET.

23. The ET was, in my view, entitled to note that the Claimant had been in dispute for some time with the Respondent about his status and to bear that in mind while considering the Claimant's evidence. I should emphasise that the ET did not find the Claimant to be in any way incredible, that is, it did not find that the Claimant was telling lies. The ET simply took the view that the Claimant put a slant on any evidence that he gave as he believed that he was an employee. While it is obvious to any tribunal that the parties, as opposed to other witnesses, to some extent have an agenda, it does not amount to perversity for the tribunal to note the situation. In my view the ground of appeal concerning perversity is misconceived insofar as it relates to the methodology used by the ET. In so far as it is argued that the decision was perverse in the sense that the ET reached a decision which was not open to it on the facts found, I disagree. There was evidence before the ET from which it was entitled to make the findings in fact listed in the judgment. From those findings, the ET was entitled to conclude that the relationship between Respondent and Claimant was not that of employment, and to find that the relationship was properly categorised as that of a self-employed contractor.

24. Had I been inclined to allow the appeal I would have taken the view that as most if not all of the evidence was not in dispute the matter could be decided by me as a matter of law.

25. I have not found any error of law in decision of the ET. The appeal is dismissed.