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EMPLOYMENT TRIBUNALS

Claimant ***Respondents***

Mr W Murdoch **AND** Italia Conti Academy of the Theatre Arts Ltd

Heard at: London Central **On**: 7 & 8 September 2017

Before: Employment Judge Segal (Sitting alone)

Representation
For the Claimant: Mr M Laing, Consultant
For the Respondent: Ms G Crew, of Counsel

JUDGMENT

1 The Claimant was not an employee of the Respondent as defined by Section 230(1) of the Employment Rights Act 1996.

2 The Claimant was a worker of the Respondent as defined by Section 230(3) of the Employment Rights Act 1996.

REASONS

Representation

1. The Claimant was represented by Mr Laing, an Employment Consultant. The Respondent was represented by Ms Crew, of Counsel. I thank them both for their assistance, especially in their closing submissions.

Evidence

2. There was a substantial agreed bundle, a few documents within which proved relevant (though the bundle was ordered to be prepared on the basis of a final hearing not just the Preliminary Hearing). I

heard oral evidence from the Claimant; and on his behalf from Susan Jolley, an ex-employee who also has a related claim. For the Respondent I heard evidence from Samantha Newton, Principal of the Respondent; and from Ann Sheward, the Principal of the Respondent until 2016. The witnesses were, other than where I have identified below, in my view trying to give helpful and honest evidence.

Issues

3. This Preliminary Hearing was listed on 22 June at a Preliminary Hearing and Case Management Hearing by the Regional Judge. I quote from paragraph 2 of the order she made.

> "It was agreed that there was a preliminary issue in relation to William Murdoch as to whether he was an employee as defined by Section 230 of the Employment Rights Act 1996. (There was no issue that the Claimant was a worker as defined by Section 230(3) of the Employment Rights Act)."

4. At this hearing the Respondent wishes to withdraw what it accepts amounted to a concession under Section 230(3) - something that it had indicated it would wish to do in a letter of 16 August to the Tribunal which dealt very largely with matters of disclosure. I am bound to say that I am doubtful that the Respondent should be permitted to withdraw that concession and no explanation either in the letter or today has been offered as to why it was first made and why the Respondent now wishes it to be withdrawn. However, no prejudice was alleged on behalf of the Claimant were the concession withdrawn, so I do address the matter substantively below.

Facts

5. The Respondent is a Performing and Theatre Arts School in London. It is a substantial enterprise with a turnover of some £2.5 to £3 million per annum. The Claimant is a Fellow Member of the Association of Accounting Technicians, he is not a Chartered Accountant. He has a long history of employment in that field, but in 2006 was working as a self employed sole trader. He later formed a limited company with himself as the sole director: W&DM Accountancy Ltd, I will refer to that as 'W&DM'. In 2006 the Claimant began working for one or two days a week for the Respondent. He also by that stage had begun working and continued to work on Saturdays for a separate but connected organisation based in Guildford that I shall refer to simply as "Guildford".

6. It is not disputed that at that time he worked for both organisations in a self employed capacity dealing with book keeping

and financial matters. His work was valued by the Respondent. At no time was a written contract of any sort entered into between the Claimant and the Respondent. Over the coming years an employed accountant of the Respondent left; and then in 2011 its financial director or at least the person working in that capacity, Sheila Jackson, also left. By that time, the Claimant in his words had become "sucked in" to what amounted by 2015 to a full-time role in terms of hours worked, so much so that even when the Claimant's health suggested otherwise, he found himself unable to cut back to three or even four days per week.

7. From 2011 to 2016, as the Respondent recognised, the Claimant together with Susan Jolley were in effect the 'finance department' of the Respondent. Susan Jolley also worked in a Human Resources capacity. There is no dispute about the range of work that the Claimant did, nor that it had been performed previously largely by employed staff. The overall direction of the Respondent until 2016 was in the hands of its Principal, Ann Sheward, to whom the Claimant reported in that sense. By reference to the duration of his engagement by the Respondent, the integration of his work within the Respondent's business, the full- time nature of his job, I find as a fact that the Claimant was – in those senses – fully integrated into the Respondent's business.

8. The Claimant continued to work for Guildford on Saturdays and had (increasingly few) other ex-student clients in a small way. In latter years between 80% and 90% of the Claimant's income came from the Respondent via W&DM. The Respondent always treated the Claimant as self employed.

9. The Claimant was not entitled to sick pay or holiday pay. The Claimant told me in evidence that he had chosen not to invoice the Respondent for holidays. The Claimant was entitled to manage his hours and his holidays as he saw fit, though he did so with due and proper regard for the increasing and difficult workload he had also to manage. He was not subject to the Respondent's disciplinary and grievance procedures. In all of those respects, the Claimant was not integrated into the Respondent's business.

10. The Claimant invoiced the Respondent on the basis of a daily rate by 2014 at least £365 and then from May 2016 £395. In each case, that rate was determined by the Claimant without discussion or prior agreement of the Respondent, on the basis of what the Claimant had been advised was appropriate and himself felt was appropriate. I have no reason to doubt that it was an appropriate rate.

11. By 2014 at least the Claimant wanted to be employed in some role such as Vice Principal Business Manager. Ms Sheward, in difficult personal and professional circumstances at that time, did not agree to such a change and, in her mind, was principally responding to the Claimant's request for a change of title rather than employment status. Susan Jolley recalls a conversation at that time with Ms Sheward in which Ms Sheward reflected on the Claimant's request and amongst other things referred to the additional costs that would be involved in making the Claimant an employee. Ms Sheward denies such a conversation. It is not of much or any direct relevance but I find that it is more likely that Ms Sheward has mis-remembered or prefers not to remember that conversation than that Ms Jolley has fabricated it.

12. The Claimant's financial affairs were conducted through W&DM. In 2013 to 2016, the company accounts show income of about £80,000 (of which as I said some 80% to 90% was income from the Respondent) and expenses of some £50,000 plus, leaving a taxable income of some £20,000 to £30,000. The Claimant was not either prior to or at the hearing particularly forthcoming about the detail of those expenses; and when they were explored his evidence was not entirely convincing. In short, Mr Laing and indeed Mr Murdoch himself correctly conceded that the Claimant had achieved significant financial benefits in terms of a reduced tax burden by his self employed and incorporated status including in respect of his income from the Respondent.

13. In 2014, the Claimant managed to secure for the Respondent a very large payment relating to interest rate hedging product mis-selling by HSBC. He sought and got the agreement of Ms Sheward in advance that he would get a commission if he secured that large sum of money (he was perhaps not entirely clear at the outset to Ms Sheward what the potential source of the money would be; but I do not suggest there was any self-interested concealment). When the money was confirmed, he asked for and then was subsequently paid a total of £35,000 of commission by the Respondent. As he put it, his view was that the Respondent should not 'have its cake and eat it'; that is to say, the Respondent should not be able to treat him as self employed when he felt he ought to be employed and yet not pay him on the basis of a self employed person entitled to commission for extraordinary services rendered.

14. The work that the Claimant did to obtain this rebate – or ex gratia payment technically – was as he agreed 'part and parcel of my daily work' for the Respondent. The Claimant accepted in answer to myself that he could not 'square' an entitlement to that payment with employed status. The relationship between the parties terminated in

early November 2016 in circumstances that for present purposes I need not explore at all.

The Law

15. Section 230 of the Employment Rights Act insofar as material reads as follows:

> 'Subsection (1) in this act 'employee' means an individual who has entered into or works under … a contract of employment …
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> Subsection (3) In this act 'worker' … means an individual who has entered into or works under …
>
> (a) a contract of employment; or
>
> (b) any other contract whether expressed or implied and (if it is expressed) 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.'

16. I was referred to several cases in what Ms Crew rightly characterises as a vexed area of law. I cite now from three of them.

17. In **Hall v Lorimer** 1994 ICR 218, the Court of Appeal dealt with the case of a freelance vision mixer doing work for various production companies, who had initially been assessed for income tax under Schedule E, but had successfully appealed that assessment and by the time the Court of Appeal dealt with the case had been reassessed under Schedule D. The Court of Appeal reviewed much of the previous case law approving in particular the judgment of Mr Justice Cooke in **Market Investigations Ltd v Minister of Social Security** [1969] 2QB 173 at 184-185:

'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 of services. If the answer is no, then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled at the considerations which are relevant and determining that question …'

18. They noted that the Privy Council in the **Lee Ting Sang** case [1992] AC 374, had approved that judgment saying 'the matter had never been better put'. The Court of Appeal also expressly approved what has become the well-known analysis of, as he was then, Mr Justice Mummery in the same case. They quote as follows:

> 'In order to decide whether a person carried on business on his own account, it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in or absent from a given situation. The objection of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole … The facts as a whole must be looked at, and what may be compelling in one case in the light of all the facts may not be compelling in the context of another case.'

19. They noted that in the case they were considering, the production company controlled the time, the place and the duration of each programme and that the tax payer did not provide his own equipment, hired no staff to assist him and ran no financial risk apart from that of bad financial debt. He had no responsibility for investing in or management of the work of the programme making and no opportunity to profit from the way he carried out his assignments. They referred to treatment by the Claimant in that case of his accounts and tax affairs. They noted that his expenses included travel expenses of some significance and others which were all considered to be deductable but only if he were assessed under Schedule D. The Court of Appeal per Nolan LJ noted 'they would seem to me quite different in nature and scale from those likely to be incurred by an employee'. In the same judgment however Lord Justice Nolan said this in reference to the judgment of Mr Justice Cooke I referred to earlier.

> '… His test does not mention the duration of the particular engagement or the number of people by whom the individual is engaged … In the present case … the most outstanding feature to my mind is that the tax payer customarily worked for 20 or more production companies and that the vast majority of his assignments, as appears from the annexure to the stated case lasted only for a single day (218D-E).'

20. In **Catamaran Cruises Ltd v Williams** [1994] IRLR 386, one issue was whether Mr Williams was an employee of the company even though in more recent years he had provided his services to them through a limited company. The EAT determined that there is no rule

of law that the importation of a limited company prevents the continuation of a contract of employment if the true relationship is employer employee. It cannot be changed by putting a different label on it; whether or not the contract in question is one of service is a question of fact. The formation of a company may be strong evidence of a change of status but that fact has to be evaluated in the context of all the other facts. At paragraphs 14 and following they addressed themselves to the particular facts of that case. They noted: 'Having pointed out that it was conceded on behalf of the appellants [the company] but for the existence of Unicorn [Mr Williams' company] it could not be argued that Mr Williams was an independent contractor and that his evidence showed all the facts necessary for a finding that he was an employee were present. The Tribunal held:

> '1 Unicorn could provide the services of Mr Williams for the work provided and no one else …
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> 2 Unicorn was Mr Williams under another name.
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> 3 His hours were similar to others who were the appellant's employees and paid on the same basis except that he was paid gross and the money was expressed to be paid as a fee for his services.
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> 4 Mr Williams was under the same conditions of service and the same disciplinary procedures as employees, the only difference being that Unicorn was paid a fee for his services.
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> 5 We might add that we were told during the hearing of the appeal and it was not challenged that Mr Williams was offered sick pay and holiday pay after Unicorn was formed … It is clear from the findings of fact that save for the gross payments made to Mr Williams and described as a fee, there was no factual change whatsoever in the terms of Mr Williams employment. It was in our view right for the Tribunal in these circumstances to find that Mr Williams worked for the appellant under a contract of services.'

21. The last case is that of **Pimlico Plumbers Ltd v Smith** [2017] EWCA Civ 51 [2017] ICR 657. This was a case in which Mr Smith had claimed both as an employee and a worker. The Employment Tribunal had found him to be a worker but not an employee. Both parties appealed those findings to the Employment Appeal Tribunal; both appeals were dismissed. The company appealed again to the Court of Appeal in relation to the finding that Mr Smith was a worker. Mr Smith did not appeal or at least was not given permission to appeal on the basis that he was an employee. At paragraphs 42 and following these

facts are noted as having either been agreed or found by the Employment Tribunal

> 'Mr Smith worked solely for the company … He could make a decision about when to go home on a working day. He decided his own working hours. Mr Smith agreed that the company had no obligation to provide him with work on any particular day and if there was not enough work, the company would not have to provide him with work and he would not be paid. [In respect of a job] he could decide the number of days it would take and whether to use another engineer to help him … He was registered with the construction industry scheme. He engaged an accountant to prepare income and expenditure accounts throughout the period of his relationship with the company. He filed tax returns on the basis that he was self employed, he was registered for that and presented monthly invoices to the company for that. Mr Smith's income and expenditure accounts demonstrate that he had to cover substantial costs of materials himself. In the last full year he worked for the company, he paid £5,2887 of materials, he also provided his own protective clothing. He paid his wife £4,680 per year for minimal secretarial duties and also claimed a sum of £520 per year to reflect the use of a room in his home as his office. He also set off sums for accountancy charges, insurance, telephone and internet tools and equipment hire and motor vehicle expenses against receipts of £130,753 Mr Smith set off expenses totalling £82,454.'

22. On those facts the Court of Appeal had no difficulty in dismissing the company's appeal and upholding the finding that Mr Smith was a worker for the purposes of Section 230(3).

Submissions

23. Ms Crew for the Respondent noted the irreducible minimum criteria for employment status as being (1) personal service, (2) mutuality of obligation, and (3) a level of control. She accepted that the first two criteria were met. As to control, she accepted that as far as the actual performance of the Claimant's work was concerned any lack of control was not an absolute bar to employment status; but she prayed in aid of non-employment status that there was little such control and no control in respect of certain other matters. In that last regard she referred me to the Claimant's ability to control his hours, the lack of entitlement to sick pay and holiday pay, the Claimant's ability to determine when he took holidays, the Claimant not being subject to a grievance procedure, the Claimant not being appraised (though it was accepted that other staff were not appraised also).

Whether it is correct to characterise those issues as issues of control perhaps does not matter, they are certainly issues that are relevant to the determination of employment status.

24. However, Ms Crew fairly accepted that the most important submission she wished to make was that there were certain features quite inconsistent with employment status. Of those she pointed first to the way the Claimant dealt with his financial affairs and the way he took advantage for tax liability purposes of his self employed and incorporated status. I have dealt with the factual detail of that above. Secondly, she pointed to the fact that he had sought and been paid the commission payment that I have referred to above. Thirdly, she pointed to the fact that he in his own view chose whether to claim for holiday pay and fourthly she pointed to the fact that he chose what his daily invoice rate should be and when to increase it.

25. As to his status as a worker, Ms Crew said she relied on the same points and also referred to the **Pimlico** case and in particular in that context she reminded me of the commission payment that he had received.

26. For the Claimant Mr Laing unsurprisingly focused from the other end of the telescope. He said rightly that there was considerable evidence both documentary and in the witness statements, of the Claimant performing effectively a full-time role integrated into the business of the Respondent and reporting to the director and Principal, Ms Sheward. Yes, he accepted, he was a professional and therefore he was not micro-managed but that was neither here or there. In terms of being in business on his own account, he said that it was not fair to portray the Claimant's work for the Respondent simply as part of a multi-client business. He contrasted the situation at Guildford where the Claimant was not integrated into the business and did not have his own office etc.

27. He accepted fairly that the Claimant's choice of what level of fee to invoice and when to increase it was a factor pointing in the other direction; as was the fact that the Claimant benefitted significantly in terms of his tax liabilities from his self employed and incorporated status. Finally, he accepted that the seeking and receipt of the commission payment also pointed against employment status. But in conclusion said that the level to which he had been integrated for so long and on such a full-time basis within the Respondent's business should outweigh those other factors.

Discussion

Employment Status

28. It has not been entirely obvious to me during this hearing whether the Claimant was an employee within the meaning of Section 230(1). The Claimant was, Mr Laing submitted, at one extreme in terms of the duration of his engagement with the Respondent, its full-time nature and the integration of his work into the business into the 'finance department', as it was colloquially referred to, of that business.

29. However, the Claimant did not have an entitlement to holiday or sick pay; he chose when to take his own holidays and had at least a measure of control over his own hours.

30. At the other extreme, the Claimant's financial arrangements in terms of his tax advantages, the determination of his own fees and his asserted entitlement to and receipt of the substantial commission payment point very much to self employed status.

31. In the end as enjoined by the Court of Appeal in **Hall v Lorimar** having tried at least to paint the picture from the bottom up, I have to form an overall impression and in that regard agree with the Respondent that taken as a whole there are simply too many and too obvious inconsistent features in the relationship to permit a finding of employment.

Worker Status

32. Save for those inconsistent features that I have mentioned – significant and determinative though they have been in relation to employment status – I would have found the Claimant to have been an employee. As the passages from the **Pimlico** case I have referred to make clear, such features of themselves do not negate worker status if the other features point towards it, as they certainly do here.

33. The **Pimlico** case is in my view, on its facts, a fortiori for the Respondent company to this case. I therefore do not hesitate in finding that the Claimant was a worker for the purpose of Section 230(3) and therefore may pursue his claim in relation to alleged underpayment of holiday pay.

Case Management

34. All outstanding matters of Case Management were agreed. I note the following:

(1) The Respondent undertook to provide responses to outstanding requests for Further Particulars of the ET3 to the Claimant within 14 days of today.

(2) The parties agreed that it would be preferable as things stand at present for the Full Merits Hearing in November to be liability only. I acceded to that, subject to the requirement of the parties to give ongoing reconsideration to that, and if it seemed appropriate when further evidence was obtained to be in a position to deal with remedy at the end of the Full Merits Hearing if appropriate, they should come prepared to do that.

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Employment Judge Segal
2 October 2017