Case Number: 2201625/2018

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants	**and**	**Respondents**
Ms A Braine & others		**The National Gallery**

JUDGMENT ON PRELIMINARY HEARING

HELD AT: London Central **ON: 26 November to 6 December 2018; 18 December 2018**

BEFORE: Employment Judge A M Snelson (sitting alone)

On hearing Mr C Milsom, counsel, on behalf of the Claimants and Mr M Pilgerstorfer, counsel, on behalf of the Respondents, the Tribunal adjudges that:

(1) When working for the Respondents on individual assignments the lead Claimants (named in the accompanying Reasons) were employed as 'workers'.
(2) Between assignments, the lead Claimants were not 'employed' by the Respondents, either under contracts of employment or as 'workers'.
(3) The right to pursue claims under the Trade Union & Labour Relations (Consolidation) Act 1992 ('the 1992 Act'), s188 is confined to persons employed under contracts of employment and does not extend to 'workers'.
(4) Accordingly, the lead Claimants' complaints under the Employment Rights Act 1996, s94 (unfair dismissal) and the 1992 Act, s188 are dismissed.

REASONS

Introduction

1 The Respondents are the charitable organisation through which the National Gallery ('the Gallery') is run.

2 The Claimants, who number 27, are experts in art and/or the history of art. They worked for the Respondents as 'educators' (the Respondents favour the label

'freelancers', but that conveys nothing of their function), many of them over lengthy periods of time, until a reorganisation implemented in late 2017 and, in some instances, thereafter. Their core role was to deliver talks, lectures and workshops at the Gallery and (pursuant to 'outreach' programmes and the like) elsewhere. The significance of the reorganisation is that it marked the end of the association between some of the Claimants and the Respondents and those who remained worked thenceforth under fresh terms. The dispute with which I am concerned is about the employment status of the Claimants prior to the reorganisation.

3 By their collective claim form presented on 9 March 2018, all Claimants pursue claims for holiday pay and complain of unfair dismissal, age discrimination and failure to consult on redundancy. Some also complain of sex discrimination and one alleges victimisation on grounds of trade union membership and/or activities.

4 In their response form, the Respondents resist all claims. Their central defence is that the rights invoked by the Claimants did not attach to them because at all material times they were neither employees nor 'workers', but independent contractors in business on their own account.

5 Case management hearings were held on 14 September and 10 October 2018, the latter by telephone. The upshot was that, very largely by agreement, the Tribunal directed the listing of a public preliminary hearing to determine two matters: first, whether selected Claimants had the necessary legal status to bring the claims advanced; and second, a pure point of law concerning the reach of the redundancy consultation provisions. I will shortly return to the agreed issues and set them out in full.

6 Six lead Claimants were chosen, three by each side, and the remaining claims were stayed. The Claimants nominated Ms Kirsty Allen, Ms Aliki Braine and Ms Jo Lewis; the Respondents Dr Richard Stemp, Mr James Heard and Mr Ben Street. The effect of the Employment Tribunals Rules of Procedure 2013, r36 is that a decision on a lead case is binding on the parties to the related claims unless, within 28 days of promulgation, an application is made for an order that it should not have that effect on those parties (or so many as join in the application).

7 The preliminary hearing came before me on 26 November 2018, with ten days allowed. The Claimants were represented by Mr Christopher Milsom and the Respondents by Mr Marcus Pilgerstorfer, both counsel. I am very grateful to both for their considerable assistance.

8 Before the hearing started the issues for my decision had been formulated by agreement in these terms:

> **(1) What is the status of each lead C?**
>
> **(a) Is each lead C an "employee" during the period in which s/he was working within the meaning of s230(1) ERA[1]?**

[1] Employment Rights Act 1998 ('the 1998 Act')

(b) Is each lead C an "employee" within the meaning of s83(2) EqA[2], read – if necessary – in light of the Framework Directive 2000/78 and/or Recast Directive 2006/54?

(c) Is each lead C a "worker" within the meaning of s230(3) ERA / Reg 2(1) WTR[3] read – if necessary – in light of the Collective Redundancies Directive 98/59 and/or Working Time Directive 2003/88?

(d) Is each C none of the above?

(2) S188 TULCRA[4] (if relevant given the answer to Q1)

Can a claim under s188 TULRCA extend (contrary to the terms of the statute) beyond "employees" to "workers"?

(a) Cs contend that the Collective Redundancies Directive 98/59 requires such a result as a matter of EU law (relying, inter alia, on Balkaya v Kiesel Abbruch- und Recycling Technik GmbH [2015] ICR 1110 and that TULCRA can be read so as to achieve that result.

(b) R denies this is correct as a matter of law.

9 On day three of the hearing I was told of a disagreement between the parties as to whether the question of continuity of employment (on the premise that there was any employment) should (or could) be determined. Eventually, to their credit, counsel agreed that the point could be addressed, Mr Milsom having conceded that the (alleged) employment of all lead Claimants had featured gaps which, subject to the relevant provisions of the 1996 Act, broke continuity. The provisions relied upon were s212(3)(b) and (c). Accordingly, it was agreed that the Tribunal would address the further question whether, in the case of any lead Claimant, continuity of employment (if there was any employment) was preserved by either provision.

10 The evidence, which was immensely detailed, was completed on day nine (6 December). I then adjourned at counsel's request to allow them time to prepare their closing arguments. Written and oral submissions were presented on 18 December, and I then reserved judgment. Early in the New Year I thought it right to give the parties the chance, if desired, to add brief observations on the judgments in the *Uber* and *Pytel* litigation handed down shortly after our hearing. Brief submissions from both sides were delivered on the due date, 25 January.

11 It is important to emphasise that my findings are confined to the lead Claimants' cases and references below to the Claimants must be read as applying to the lead Claimants only unless otherwise stated or a contrary intention is obvious from the context.

Employment Status – Principles

12 The Employment Rights Act 1996, s230 includes:

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

[2] Equality Act 2010 ('the 2010 Act')
[3] Working Time Regulations 1998
[4] Trade Union & Labour Relations (Consolidation) Act 1992 ('the 1992 Act')

> **(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.**
>
> **(3) In this Act, "worker" … 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 do all perform personally any work or services for another party to the contract whose status is not by virtue of the contract 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.**

13 Much more straightforwardly, the 2010 Act by s83(2)(a) defines employment as meaning "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work".

14 It has been authoritatively held that there is no distinction between the 'worker' under the 1996 Act and the individual working under a "contract personally to do work" under the 2010 Act (see *Pimlico Plumbers Ltd v Smith* [2018] IRLR 872 SC *per* Lord Wilson, para 14).

15 An essential characteristic of any contract of employment or 'worker' contract is mutuality of obligation. This may be expressed as an obligation on the employer to provide work and a corresponding obligation on the employee or worker to accept and perform it. In *Carmichael v National Power Plc* [1999] ICR 1226 HL it was held that the contract governing relations between Mrs Carmichael and the Respondents was not a contract of employment because of the absence of mutuality of obligation between assignments. She was engaged as a guide on a "casual as required" basis and was entirely free to accept or reject any offer of an assignment which was forthcoming. The contract set out the terms on which she would work but imposed no obligation on her to work at all. Allowing that it was entirely possible that when working her status was that of an employee, the House of Lords was clear that during the gaps there was no employment contract.

16 In *Byrne Brothers (Formwork) Ltd v Baird & others* [2002] ICR 667 the EAT addressed the definition of a 'worker' contract under the 1996 Act, s230(3)(b). Giving judgment, Mr Recorder Underhill QC, as he then was, commented (at para 17):

> **(1) We focus on the terms "[carrying on a] business undertaking" and "customer" rather than "[carrying on a] profession" or "client". Plainly the Applicants do not carry on a "profession" in the ordinary sense of the word; nor are Byrne Brothers their "clients".**
>
> **(2) "[Carrying on a] business undertaking" is plainly capable of having a very wide meaning. In one sense every "self-employed" person carries on a business. But the term cannot be intended to have so wide a meaning here, because if it did the exception would wholly swallow up the substantive provision and limb (b) would be no wider than limb (a). The intention behind the regulation is plainly to create an intermediate class of protected worker,**

who is on the one hand not an employee but on the other hand cannot in some narrower sense be regarded as carrying on a business. …

(3) The remaining wording of limb (b) gives no real help on what are the criteria for carrying on a business undertaking in the sense intended by the Regulations – given that they cannot be the same as the criteria for distinguishing employment from self-employment. Possibly the term "customer" gives some slight indication of an arm's-length commercial relationship – see below – but it is not clear whether it was deliberately chosen as a key word in the definition or simply as a neutral term to denote the other party to a contract with a business undertaking.

(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.

17 In *Clyde & Co LLP v Bates van Winkelhof* [2014] ICR 730 SC, Lady Hale discussed the concept of a 'worker'. Her judgment includes these passages:

24. First, the natural and ordinary meaning of "employed by" is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.

25. Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in *Hashwani v Jivraj (London Court of International Arbitration intervening)* [2011] UKSC 40, [2011] 1 WLR 1872 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business

undertaking carried on by some-one else. The general medical practitioner in *Hospital Medical Group Ltd v Westwood* [2012] EWCA Civ 1005; [2013] ICR 415, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a "worker" within the meaning of section 230(3)(b) of the 1996 Act. Had Parliament wished to include this "worker" class of self-employed people within the meaning of section 4(4), it could have done so expressly but it did not.

…

31. As already seen, employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self- employed but do not fall within the second class. Discrimination law, on the other hand, while it includes a contract "personally to do work" within its definition of employment (see, now, Equality Act 2010, s 83(2)) does not include an express exception for those in business on their account who work for their clients or customers. But a similar qualification has been introduced by a different route.

…

34. In *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, Langstaff J suggested, at para 53, that

> **". . . a focus on 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 for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls".**

35. In *James v Redcats (Brands) Ltd* [2007] ICR 1006, Elias J agreed that this would "often assist in providing the answer" but the difficult cases were those where the putative worker did not market her services at all (para 50). He also accepted, at para 48, that

> **". . . in a general sense the degree of dependence is in large part what one is seeking to identify – if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached – but that must be assessed by a careful analysis of the contract itself. The fact that the individual may be in a subordinate position, both economically and substantively, is of itself of little assistance in defining the relevant boundary because a small business operation may be as economically dependent on the other contracting party, as is the self-employed worker, particularly if it is a key or the only customer."**

36. After looking at how the distinction had been introduced into the sex discrimination legislation, which contained a similarly wide definition of worker but without the reference to clients and customers, by reference to a "dominant purpose" test in *Mirror Group Newspapers Ltd v Gunning* [1986] ICR 145, he concluded, at para 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 on business in his own account, even if only in a small way."**

> **37. The issue came before the Court of Appeal in *Hospital Medical Group Ltd v Westwood* [2012] EWCA Civ 1005, [2013] ICR 415, a case which was understandably not referred to in the Court of Appeal in this case; it was argued shortly before the hearing in this case, but judgment was delivered a few days afterwards. The Hospital Medical Group argued that Dr Westwood was in business on his own account as a doctor, in which he had three customers, the NHS for his services as a general practitioner, the Albany Clinic for whom he did transgender work, and the Hospital Medical Group for whom he performed hair restoration surgery. The Court of Appeal considered that these were three separate businesses, quite unrelated to one another, and that he was a class (b) worker in relation to the Hospital Medical Group.**
>
> **38. Maurice Kay LJ pointed out (at para 18) that neither the *Cotswold* "integration" test nor the *Redcats* "dominant purpose" test purported to lay down a test of general application. In his view they were wise "not to lay down a more prescriptive approach which would gloss the words of the statute". Judge Peter Clark in the EAT had taken the view that Dr Westwood was a limb (b) worker because he had agreed to provide his services as a hair restoration surgeon exclusively to HMG, he did not offer that service to the world in general, and he was recruited by HMG to work as an integral part of its operations. That was the right approach. The fact that Dr Westwood was in business on his own account was not conclusive because the definition also required that the other party to the contract was not his client or customer and HMG was neither. Maurice Kay LJ concluded, at para 19, by declining the suggestion that the Court might give some guidance as to a more uniform approach …**
>
> **39. I agree with Maurice Kay LJ that there is "not a single key to unlock the words of the statute in every case". There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of "subordination" to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves. …**

18 Mr Milsom cited *Autoclenz Ltd v Belcher* [2011] ICR 1157 SC in support of the proposition that the Tribunal must have regard to the true relationship between the parties. If the written terms do not reflect the reality, they must be disregarded.

19 In *Secretary of State for Justice v Windle & another* [2017] ICR 83 CA, the Court of appeal was concerned with whether the absence of an umbrella contract was a factor relevant to the assessment of the putative employee's status when working. Underhill LJ commented (para 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 ET so suggest. Its relevance will depend on the particular facts of the case; but to exclude consideration of it *in limine* runs counter to the repeated message of the authorities that it is necessary to consider all the circumstances.**

20 But in the *Pimlico Plumbers* case, the same judge, having referred to his own remarks in *Windle*, para 23, added this (para 145):

> **But it is not only legal obligations that may shed light of that kind. If the position were that in practice the putative employee/worker was regularly offered and regularly accepted work from the same employer, so that he or she worked pretty well continuously, that might weigh in favour of a conclusion that while working he or she had (at least) worker status, even if the contract clearly (and genuinely) provided that there was no legal obligation either way in between the periods of work.**

Oral Evidence and Documents

21 I heard oral evidence from the six lead Claimants and their supporting witness, Ms Lee Riley, formerly employed by the Respondents as Business Development Manager, and, on behalf of the Respondents, Ms RoseMarie Loft, Head of HR, Mrs Natasha Halford, Head of Gallery-Hosted Events, and Dr Susan Foister, Deputy Director and Director of Public Programmes and Partnerships. All gave evidence by means of witness statements.

22 In addition to the testimony of witnesses I read the documents to which I was referred in the nine-volume bundle of documents, to which certain additions were made in the course of the hearing.

23 I also had the benefit of the comprehensive closing submissions on both sides and the concise further submissions on the *Uber* and *Pytel* judgments.

The Facts

24. As I have said, I was presented with a mass of evidence – more, perhaps, than was necessary given that the central facts were largely undisputed and the disagreements between witnesses were chiefly matters of nuance, perception and terminology. At all events, I have had regard to everything put before me, but it is not my function to recite an exhaustive narrative or to resolve every evidential conflict. It should not be thought that any matter explored in evidence but not mentioned in my narrative has been overlooked. The facts which I think it necessary to record, either agreed or proved on a balance of probabilities, are the following.

Programmes offered by the Respondents

25. The lead Claimants were very largely involved in work for the Respondents' Education Department. It ran a range of programmes and activities including the Schools Programme (gallery tours and workshops for primary and secondary school children), the Family Programme (tours and workshops for families and young people), the Adult Programme (everything from public guided tours to theatre lectures and courses to life drawing classes), 'Access' (programmes for people with sensory impairments and/or learning disabilities) and 'Outreach' (off-site workshops for people with various special needs).

26. Some Claimants did occasional work for other parts of the National Gallery organisation, such as the Development Office or the Events Department. As I explain below, such work tended to take the form of 'one-off' commissions and it

was common ground before me that educators when engaged in such activities were operating as self-employed contractors in business on their own account.

27. Unless expressly stated to the contrary, the findings which follow relate to work in Education Department programmes.

Engagement, induction and training

28. The lead Claimants started working for the Respondents on diverse dates, none of which can be identified with precision. Taking them in the order in which they gave evidence, the year, or approximate year, of commencement in each case was: Ms Allen: 2000; Ms Braine: 2001; Mr Heard: 1971 (or perhaps 1973); Dr Stemp: 1994; Mr Street: 2006; Ms Lewis: 2002.

29. Prospective educators were required to undergo what was described as "training" before they could be appointed members of the "team". A letter to Ms Allen of October 2000 explained that the training consisted of observing at least 10 Gallery talks and attending a "debrief" thereafter and, in addition, familiarising herself with at least 20 pictures from the collection so as to be able to speak confidently about them. Following the observations and the "debrief" she was required to deliver two tours under observation, after which her appointment to the team was confirmed.

30. The purpose of the training was to ensure that appointees fully understood the standards, requirements and "house style" of the Gallery. Ms Allen gave unchallenged evidence, which I accept, that she was told of particular educators whom she should observe and that they had been selected as best representing the teaching style of the institution.

31. While undergoing training, educators were described as "probationers". They were entitled to some of the facilities and benefits enjoyed by established educators, but not others. For example, they were required to obtain daily visitor passes whereas established educators received permanent passes. The probation periods typically lasted about six months. Those found to have performed satisfactorily were notified that they had been added to the "freelance team" on a "more permanent basis".

32. Observation and assessment did not end on confirmation of the appointment: they were enduring features of life as an educator. I will return to this subject below.

Written terms

33. Before 2002 appointees to the Respondents' panel of educators received letters of engagement. These stressed that membership of the panel did not guarantee a regular supply work and that educators were at liberty to turn down any offer of work which they received.

34. The first standard form agreement between educators and the Respondents came into existence in early 2002. The lead Claimants already appointed by then signed it without complaint.

35. In 2005 the Respondents produced a slightly revised form of agreement. It was signed by all six lead Claimants. The only material innovation was the stipulation that payment of fees would be made through the payroll and that the Gallery would deduct income tax and national insurance contributions. The 2002 version had provided for the possibility of payments being made gross against invoices, subject to proof of the "self-employed status" of the relevant educator.

36. Since the 2005 agreement remained in force throughout the period relevant for the purposes of these proceedings, we can confine our narrative to its terms. So far as material, they were as follows (underlining added):

> **Term of Agreement**
> **You agree to undertake the Services set out in the attached schedule as required from 1 February 2002 (sic) until further notice. However the NG does not guarantee a minimum number of hours work and you are under no obligation to accept offers of work which are made to you.**
>
> **Fees**
> **In consideration for the Services the NG will pay you a firm fee in accordance with the attached Schedules.**
>
> **Payment will be made through the payroll by credit transfer… The NG will deduct Income Tax and National Insurance from each payment.**
>
> **…**
>
> **Expenses**
> **All actual expenses as may be reasonably incurred by you in respect of the Services must be approved in advance by the Director of Education. Approved expenses will be reimbursed on receipt of valid invoices submitted by you, supported by receipts.**
>
> **Performance of services**
> **You warrant that your existing commitments afford you and will continue to afford you sufficient time to enable you to provide the Services in a competent, timely and efficient manner. You shall provide the Services with reasonable care and skill to the best of your ability and in a professional and workmanlike manner in willing co-operation with the NG and its staff.**
>
> **You will be responsible for your own arrangements in respect of any resources you require to perform the Services (including secretarial/administrative support, computer hardware and software, and all related elements of day-to-day working arrangements) other than as set out in this Agreement. You will have access to the NG's library in normal opening hours for preparation of the Services.**
>
> **You hereby indemnify the NG in respect of any and all actions, proceedings, claims, demands, losses and damages and expenses … on account of any damage to property, or breach of copyright or similar rights, arising from any act for which you are responsible.**
>
> **You will be responsible for your own insurance arrangements …**
>
> **You will comply with the NG's requirements in force at any time in respect of Health and Safety, Security and Fire Precautions. …**

No contract of employment or pension entitlements
Nothing in this Agreement shall create or constitute a contract of employment between the NG and you, and you are not entitled to any pension or other benefits from the NG. It is agreed, as between the NG and you, that you are self-employed and/or an independent contractor and you are not an employee of the NG.

Confidentiality
You shall treat all information and knowledge arising out of the Services as being confidential.

You agree that all communication with the press and media, in respect of this engagement and the NG generally, will be handled by the NG and you will not publicise this engagement nor make any statement or have any communication with the press and media about any matter relating to the NG.

Copyright
Copyright, and any similar rights, for all texts, documents, photographs of NG paintings or property, or other information written, prepared or taken by you belongs to the NG ...

No Assignment
You shall not assign, transfer, sub-contract or in any other manner make over to any third party the benefit or burden of this Agreement without the prior consent in writing of the NG.

Termination of contract
The NG shall have the right to terminate this Agreement at any time on giving written notice of 14 days.

You shall have the right to terminate this Agreement at any time on giving written notice of 14 days.

37. There were four schedules to the 2005 agreement as follows:

SCHEDULE 1

Services to be undertaken for schools, teachers' courses and guided tours

1. **Respond to requests to undertake tours for school [groups] or for guided tours in a timely fashion; ensure that dates and times are noted and adhered to.**
2. **Arrive for talks punctually and ensure that tours are of the requisite length.**
3. **Where late arrival or cancellation is inevitable, ensure that the appropriate persons in the Education Department have been informed as far in advance as possible.**
4. **For school groups, where possible, accommodate late arrivals and adjust the talk given accordingly.**
5. **For guided tours, ensure that the information desks are given details of the rooms you will visit.**
6. **Ensure that the talk is given to the highest standards possible and that the information presented is up-to-date and reflects current NG thinking.**
7. **For school talks and talks for teachers, ensure that knowledge of the requirements of the National Curriculum is current.**
8. **The fee for these Services is £37.67 per hour.**

SCHEDULE 2

Lunchtime lectures

1. **Ensure that the date and title of the lecture has been agreed between yourself and the member of National Gallery Education responsible for the lunchtime lecture programme in good time, and that the topic is not subsequently changed without the express approval of the Director of Education.**
2. **Ensure that you arrive punctually for the lecture, and that where slides are used, these are of an appropriate quality. …**
3. **Ensure that the content of the lecture reflects current NG scholarship.**
4. **Conclude the lecture by the agreed time.**
5. **The fee for a lunchtime lecture with slides is £100. The fee for a Gallery talk is £60.**

SCHEDULE 3

Short courses

1. **Agree topic and details of course with the appropriate member of National Gallery Education.**
2. **Provide course outlines and reading lists, as requested, by the agreed time.**
3. **Arrive punctually for all sessions of the course.**
4. **Ensure that the content of the course reflects an awareness of current NG scholarship.**
5. **Claim by invoice at the conclusion of the course.**
6. **The rate of pay is £150 per one-and-a-half hour session.**
7. **Where courses are repeated, a fee for the repeat course will be agreed between the lecturer and the appropriate member of National Gallery Education and approved by the Director of Education.**

SCHEDULE 4

Workshops and sessions off-site

1. **Agreed dates and details with appropriate member of National Gallery Education.**
2. **Provide all details of sessions to be given as requested.**
3. **Where materials need to be ordered, ensure that details are provided as far in advance as possible.**
4. **Arrive punctually for all sessions.**
5. **Respect rules and conditions of work in off-site workplaces.**
6. **Claim by invoice at the conclusion of the session.**
7. **The rate of pay is £150 per day or £200 for whole-day sessions off-site. Details of pay for shorter sessions to be negotiated in advance with appropriate member of National Gallery Education and approved by the Director of Education.**

38. Later draft agreements were prepared by the Respondents but never distributed to the educators. In those circumstances no reliance is placed upon them.

Booking work

39. As Ms Allen explained in her evidence, there was no single system for allocation of work and, because each programme was individually administered, a number of different procedures evolved. In summary, however, the exercise was carried out by the responsible administrator either matching educators' availability

supplied in advance by means of a pro-forma grid or contacting them directly by telephone or email to slot them into gaps in the calendar.

40. Ms Riley gave evidence of the system from the perspective of the administrator. Her witness statement included this passage, which I accept as accurate:

> **13. My experience of the allocation of work was that it was allocated generally based on expertise and experience. Often there was either a team of Educators allocated to a particular type of work (for example those with appropriate teaching experience were allocated to the Schools team …) Or there were individuals who had specific expertise (for example Richard Stemp is an expert on the Renaissance and would be approached to give certain talks and courses in that area). Many of the Educators had run certain courses or programmes for decades because of their knowledge of that particular area of the collection.**
>
> **14. As explained above, when allocating the guided tours, there was a team of Educators who were allocated to that work … There was a schedule of guided tours which took place throughout the week at set [times]. Either I or one of my colleagues would send out the schedule usually two months at a time. We would ask the Educators to let us know when they would be available. The schedule would then be completed and they would be told via an email and/or a letter when they had been booked in … They were not allowed to choose their own specific days, they had to give several choices and we then allocated the work.**
>
> **15. For other programmes such as the lunchtime lectures or family and adult workshops, the appropriate National Gallery employee would decide what areas of the collection they would like to focus [on]. This might be influenced by a current exhibition or if there were certain anniversaries etc. They would then approach the preferred Educator to deliver this programme, which would likely be based on expertise.**

41. Educators were not penalised for declining work. Some may have sensed that if they were seen to be unavailable too often there might be a risk of being overlooked for work opportunities in the future. That is the sort of doubt that naturally arises in the mind of anyone anxious to preserve a valued source of work, but I do not recall any witness claiming to have declared himself or herself available out of a sense of obligation or otherwise against his or her will and I strongly doubt whether it ever happened. The simple fact is that the educators enjoyed the work on offer and relied on the income derived from it. Accordingly, they made themselves available for so much of it as suited their personal and professional appetites and commitments. Similarly, the Gallery never acknowledged any obligation to provide work to educators. It did not go beyond offering assurances that it would offer as much work as it could and that it would seek to distribute assignments equitably.

Cancellations (by either side)

42. It was open to educators and the Gallery to cancel assignments at any stage and for any reason. It is also true, as witnesses on the Claimants' side stressed, that the Gallery discouraged cancellations by educators because they were liable to cause administrative difficulties. I accept that many educators would be loath to cancel in the absence of a compelling reason, not only because to do

so would be likely to create a problem for the organisation, but also for fear of making themselves unpopular with the individual(s) on whom they depended for future assignments. In the circumstances, I am satisfied that it is fair to say the cancellations by educators happened quite rarely.

43. Cancellations of educators' bookings by the Gallery occurred from time to time, usually precipitated by the relevant group or school cancelling a visit. Under their cancellations policy (the terms of which were amended from time to time), educators would receive their fee in full if the cancellation was sufficiently close to the booked date. Otherwise, they bore the loss in full (if unable to secure a fresh booking at the Gallery or elsewhere).

Working patterns

44. Among the educators there is a wide range of experience of work at the Gallery. Some were very frequent attenders – at least during term-times – for many years; some attended for only a few sessions annually. The lead Claimants were certainly among the busiest educators during the years for which figures are available.

45. No lead Claimant worked to a rigid pattern, although in some cases a set routine may have become established at least in relation to part of the duties undertaken. For example, Ms Allen appears to have been booked more or less constantly from about 2005 to 2015 on the Outreach 'Take Art' programme, delivering two hospital sessions per term, except for when she was away from work on maternity grounds, when Ms Braine took her place. But overall there was no set pattern. Ms Allen explained without challenge that as a member of the schools team she delivered 300 tours in 2001, 249 in 2002 and 236 in 2003. Ms Braine told me that she worked a weekly *average* of 4-5 days up to 2008 and, owing to child care responsibilities, an *average* of 2-3 days thereafter. I am sure that that is about right. No doubt the experience of others was similar. As one would expect, numbers and routines varied from educator to educator and fluctuated over time, influenced by personal and family obligations, other professional commitments (in the Gallery and elsewhere) and a host of other factors. No witness suggested that there was a set quota of annual, termly, monthly or weekly allocations of sessions of any particular kind.[5] It was common ground that, over most of the time up to the reorganisation, there was plenty of work to go round and a very strong expectation of repeat bookings for those who sought them. There was, however, no *guarantee* of any repeat booking, as Ms Riley in evidence and Mr Milsom in argument appeared in the end to accept. And of course the lead Claimants also accepted that the Respondents were bound (morally at least) to distribute what work was available in an equitable manner. That inevitably meant that there would be occasions when individuals would be disappointed to find themselves allocated less work and/or less convenient and/or attractive assignments than they had hoped for.

46. Two of the lead Claimants, Ms Allen and Mr Heard, each worked for the Respondents for a single period of about three years under what are agreed to

[5] The suggestion would have been a surprising one since the continuation of the work performed by the educators ultimately depended on the availability of public funds to pay for it.

have been conventional contracts of employment, before returning to their 'freelancer' roles. At these times they worked to regular routines.

Pay and expenses

47. As we have noted, the educators were paid standard fees for each assignment. The rate of pay, depending on the nature of the assignment, was set by the Gallery. The figures in the Schedules to the 2005 Agreement were the subject of unilateral revisions from time to time. Only in the rare circumstances envisaged in Schedule 3, para 7 and Schedule 4, para 7 was provision made for the parties to negotiate a fee.

48. Fees were authorised for payment against pay claim forms submitted by the educators. Payments were made through the payroll and subject to deductions for income tax and national insurance contributions. I will return shortly to this aspect.

49. It was not open to educators to retain any tips received through their work for the Respondents. Any gratuity was to be surrendered to the Gallery.

50. Expenses were paid to educators in accordance with the 2002 and 2005 Agreements, against receipts. Where educators were required to travel, the Gallery made the necessary bookings, including hotel reservations, and met the costs in full. In this regard, educators were treated in exactly the same way as salaried employees. And, like them, they were entitled to 'overnight fees', a form of subsistence allowance.

51. In 1999 Mr Heard received two letters from Ms Shirley Dunn, Deputy Head of HR, acknowledging that he was a 'worker' and entitled to holiday pay. A memo sent to him by another responsible officer of the Respondents in the same year was to similar effect. It seems that the other educators did not receive similar communications. I do not feel able to make a finding as to whether in fact the Gallery honoured its stated intention to enhance its pay rates for educators to incorporate a holiday pay element and, if it did, whether the enhancement was maintained and, if so, for how long. On any remedies hearing the Tribunal will expect much better evidence than was placed before me.

52. Educators (unlike the Gallery's salaried staff) were not entitled to sick pay. If an educator was unfit and so had to cancel an assignment, he or she was not paid. There was no formal sickness absence reporting procedure for educators, but the Respondents issued some informal guidance on the subject.

Income tax and national insurance contributions

53. The educators were paid their fees gross until 2004. This reflected the shared understanding of the parties (before and after that date) that, for income tak purposes, the educators were 'self-employed'. In 1999 the Inland Revenue issued an adjudication to the effect that they were employees properly so-called and income tax and national insurance arrangements needed to be altered to give effect to that state of affairs. The ruling did not satisfy the parties and both sides considered that it was wrong. The Respondents nonetheless felt compelled to

implement it and did so, in 2004. (The remarkable delay is unimportant for present purposes.)

Other entitlements and benefits

54. Non-pecuniary benefits enjoyed by educators included the following:

(a) unrestricted security access (following completion of the probation period);
(b) use of the library;
(c) use of the "freelancers' room";
(d) use of computer equipment and photocopier;
(e) use of certain materials;
(f) use of the staff canteen;
(g) access to staff discounts;
(h) invitations to staff lectures and similar events;
(i) invitations to private views;
(j) invitations to the Gallery's Christmas party.

Right of substitution? Swapping?

55. The Respondents devoted great energy to attempting to challenge the Claimants' evidence that they were required to provide their services personally and were not free to appoint substitutes. I regret that wasted effort. The Respondents' case did not go beyond mere assertion. I am entirely satisfied that there was no right of substitution and no practice of appointing substitutes.

56. Nor did educators have, or assert, a right to swap assignments with one another. Again, the Respondents' case begins and ends with mere assertion. To state the obvious, an isolated offer or attempt by an educator to help the Gallery to find a replacement for him on a booking which he had cancelled lent simply no support to the theory of a right to swap (or substitute).

Control, appraisal and assessment

57. I have set out above the 2005 Agreement and schedules thereto. Of particular significance here are the repeated stipulations that the educators' work must conform to current Gallery thinking and scholarship.

58. The reference to "thinking" was not limited to matters aesthetic or philosophical. It extended also to house style and all aspects of presentation, teaching practice and the like. Three examples will suffice.

(a) Ms Allen at an early stage was told in no uncertain terms that using a small canvas as a visual aid was contrary to the Gallery's style and not allowed.
(b) On another occasion, the Head of Education noticed that she was carrying cue cards and informed her that speaking from notes was not acceptable.
(c) A communication sent to educators drew attention to the fact that use of capital letters in a particular context was out of keeping with the house style.

59. The Respondents went to considerable lengths to instil in the educators an awareness of the Gallery's requirements, practices and standards, often through the medium of detailed written "guidelines" or "guidance".

60. Educators were required not only to be aware of relevant rules and policies (such as those governing health and safety or child protection), but also to enforce them as the responsible representatives of the Gallery.

61. The Respondents provided training courses and events for educators on a wide range of topics. These included:

(a) SEN;
(b) dementia;
(c) child protection;
(d) autism;
(e) communication skills.

62. Educators were also required or at least strongly encouraged to attend meetings arranged by the Gallery. These included:

(a) "freelancers' meetings";
(b) "school teams meetings";
(c) 9 a.m. talks.

63. Assessment (or "evaluation") was a feature of the educators' professional lives throughout their time at the Gallery. They were observed by senior staff members and received detailed feedback and advice. This practice did not, as was suggested on behalf of the Respondents, end with the departure of Ms Ali Mawle, Head of Education from 2008 to 2012. The system did become rather less formalised and rigorous after about 2014.

64. Educators were not subject to any formal disciplinary procedure. Ms Braine was, however, put through an analogous process on one occasion, which culminated in a warning.

Integration

65. In many different ways, the educators were to a substantial extent integrated into the Respondents' organisation. This integration was manifested in a number of facts and matters already recorded under other headings, in particular:

(a) most of the non-pecuniary benefits and entitlements which they enjoyed;
(b) the extension to them of requirements to adhere to Gallery house style and approved presentational practices;
(c) the extension to them of in-house training and education;
(d) the fact that they were required or strongly encouraged to attend certain meetings;
(e) the obligation on them to enforce relevant policies as representatives of the Gallery;

(f) the assessment regime applied to them.

66. The following further points are significant in this context:

(a) educators were asked to provide training, cover and ad hoc assistance to the Education Department;
(b) they were routinely apprised of changes and developments within the Education Department;
(c) they were invited to participate in consultations and discussions on projects and development proposals;
(d) they were provided with pigeon holes and expected to check their contents.

Holding out - the 'face of the Gallery'?

67. Educators were in numerous ways held out as belonging to, and authorised to speak for, the Gallery. In particular:

(a) they were listed in the Gallery's Staff Directory;
(b) they were described in promotional material as "Gallery experts";
(c) they were on occasions required to wear National Gallery T-shirts, on the stated ground that they were representing the Gallery;
(d) they were explicitly appointed as the Gallery's representatives on certain programmes and/or on certain external bodies.

Comparison with (admitted) contract of employment terms

68. The Respondents were eager to point out the obvious differences between the terms under which the educators worked and those applicable to salaried staff. Typically, as one would expect, the terms under which the latter worked included provision for:

(a) set hours;
(b) fixed monthly salaries;
(c) flexible additional benefits;
(d) paid annual leave;
(e) sickness absence procedures and entitlement to sick pay;
(f) notice rights, depending on duration of service;
(g) pension benefits;
(h) applicability of disciplinary and grievance procedures.

The Claimants' relationships with other galleries and institutions

69. The lead Claimants readily accepted that at relevant times they had worked for other galleries and institutions as independent contractors in business on their own account. But they showed convincingly through their evidence that those relationships did not feature anything like the degree of control and integration which characterised their dealings with the Gallery.

70. Certain lead Claimants also admitted and averred that, in some of their work at the Gallery (for example 'one-off' services for the Events Department, such as

delivering a talk at a private party), they had been properly classified as independent contractors. These were seen and understood on all sides as arm's length business transactions and qualitatively quite different from the Education Department work. Fees were paid against invoices, addressed either to the client direct or to the Gallery. In either case, payment would be made gross and the educator was at liberty to treat it as self-employed income and set expenses against it.

71. On occasions, persons agreed to be salaried employees of the Gallery also carried out private work for the Events Department, for which they received an appropriate fee. It appears that, for the purposes of this work, arrangements between the Gallery and the employees concerned in respect of bookings, remuneration, payment and so forth were indistinguishable from those applicable to educators' Events Department activities.

Analysis and Conclusions

Disclosure, credibility and related arguments

72. Counsel devoted enormous energy to trading points on disclosure. Mr Milsom contended that an adverse inference should be drawn from the Respondents' late production of certain documents although he stopped short of putting to any witness a dishonest intention to suppress disclosure of relevant material. Mr Pilgerstorfer replied that in many respects the Claimant's approach to disclosure had been selective and self-serving. I was not greatly assisted by this controversy. The issues I was asked to decide did not depend on the credibility of the parties. The very substantial bundle before me consisted largely of documents which illustrated self-evident and/or uncontroversial facts and I am unable to conceive of circumstances in which additional material from either side could have affected my decision.

73. Nor do I attach great weight to arguments on both sides about contradictory positions adopted by the opposing parties. By way of example, Mr Milsom naturally sought to exploit the fact (noted above) that at one point the Respondents had acknowledged in writing that educators were 'workers' and entitled to holiday pay. And Mr Pilgerstorfer, equally understandably, did not hesitate to remind some of the Claimants in cross-examination of earlier times when they had strenuously maintained that they were properly classified as independent contractors. It was all grist to the forensic mill and I do not dismiss these points as irrelevant, but in the end the status questions depended on my findings on the (mainly undisputed) facts and the legal analysis to be applied thereto.

74. Nor am I swayed by the arguments about 'presentational' changes by the Gallery from around 2013 onwards. There seems to have been a policy afoot from around that time aimed at avoiding language which might be seen as characterising the educators as employees or workers. It would have been surprising if the organisation had not woken up to the obvious fact that the legal status of some people working for it was at least ambiguous. But an apparent attempt to dispel the ambiguity helps me very little in my task. The same goes for the fierce dispute about the true purpose behind the 2017 reorganisation. It would

be surprising if *one* aim had not been to resolve the uncertainty over the educators' status, but again, I derive very little assistance from this line of inquiry. My analysis must be informed by the facts, not the perceptions (or suspected perceptions) of the parties. Accordingly, I have recorded no primary findings on these aspects.

The income tax and national insurance controversy

75. The 1999 adjudication has also been the subject of forceful and scholarly debate before me. I decline to engage with it for two reasons. First, the question determined by the Inland Revenue was not the same as the question before me. The point at issue was whether, for the purposes of tax law, the educators were properly classified in 1999 as "self-employed" or "employed". My function is to decide a different status issue, which does not pose a binary choice and offers three possible answers, on the basis of evidence covering a period of nearly 20 years following the 1999 ruling. It is not my function to review the earlier assessment but to reach my own decision on the different questions and the different evidence presented to me.

Status – umbrella contract?

76. I am quite satisfied that, contrary to Mr Milsom's ambitious submission, there was no overarching employer/employee or employer/worker contract. Not surprisingly, the argument was not foreshadowed in the claim form, in which (grounds of claim, para 15) it was pleaded that the Claimants had the status of employees "for the periods in which they were working". Very simply, there was no obligation between assignments to offer or accept work and that was fatal to the Claimants' case. As in *Carmichael* (cited above), the main purpose and effect of the 2002 and 2005 agreements were to set out a framework to govern the relationship between the parties during individual assignments. The fact that some obligations survived the end of each assignment does not point to a continuing employee or worker contract because those obligations (relating, in particular, to confidentiality, intellectual property and termination) did not carry with them the requisite obligation to offer or accept work. On the contrary, they formed part of a set of terms in which such an obligation was explicitly denied.

77. Mr Milsom's submission seemed to rest very largely on three factors: the longevity of the working relationships, the perceived regularity of working patterns and the alleged acceptance by the Respondents of an obligation to offer work. As to the first, it seems to me that the long duration of a working relationship does not by itself support an argument about the status of the individual under consideration. There is no reason in principle why the success of a work relationship and its preservation over an extended period should be seen as justifying the conclusion (to which, subject to what is said in the next paragraph below, the argument leads) that the legal obligations of the parties somehow changed over time. Mr Milsom understandably did not advance that case in terms, no doubt because of the difficulty of answering the obvious questions which they invited: When, and how, did passage of time wreak a fundamental change in the legal ties between the parties? A 'bank' nurse may work at the same hospital year in, year out without there being any basis for suggesting any change in his or her relationship with the relevant Trust (*cf Clark v Oxfordshire HA* [1998] IRLR 125

CA). On the face of it, there would be no basis for inferring an umbrella contract of service (or for services) regardless of how long the relationship lasted. The duration of the triangular relationship between worker, agency and end user over a period of years in *James v London Borough of Greenwich* [2008] IRLR 302 CA did not warrant the inference of a contract of employment between the Claimant and the end user. The *Carmichael* case is a further illustration of the same point.

78. Mr Pilgerstorfer says that the reasoning in the last paragraph misses the point because the Claimants agree that there was no change in their status. If that it right their position becomes unsustainable for a different reason: it means that their case has to be that each was an employee from his or her first assignment onwards. That makes the arguments based on 'longevity' and 'regularity' (see below) irrelevant and requires the Tribunal to hold that the 2002 and 2005 Agreements drastically misrepresented the true relationships between the parties from the dates when they came into force onwards. As I will explain below, I see no reason to make that assessment as at May 2018, let alone 2002 or 2005. Ms Lewis and Mr Street, recruited in 2002 and 2006 respectively, worked only under those Agreements. What possible basis could there be for saying that from day one they were under a duty to accept work offered to them despite their signing terms which said the very opposite? And the arguments on behalf of the other lead Claimants would be almost equally hopeless in the absence of any evidence suggesting that arrangements before February 2002 were incompatible with the terms of the 2002 and 2005 Agreements. Alive, no doubt, to the danger of stirring these demons into wakefulness, Mr Milsom glided serenely around them.

79. As to the 'regularity' of working arrangements, the findings of fact above speak for themselves. It is true that assignments on some programmes were allocated on a (more or less) regular schedule over certain periods (I have mentioned the example of Ms Allen's involvement in the Take Art programme). But this represents the high water mark of the Claimants' case on 'regularity'. I remind myself that it was no part of any named Claimant's case to say that he or she was 'employed' on certain Education Department programmes but not on others. Rightly so. No witness told me that his or her *overall* work pattern at the Gallery in any particular year or quarter or month was repeated in any subsequent year or quarter or month. As in everyday parlance, 'regularly' is often misused in the Claimants' witness statements to mean 'frequently'. Stepping back and reviewing the evidence in the round, I find that it is not accurate to say that any of the lead Claimants undertook 'regular' work (seen as a whole). Their schedules fluctuated, depending on the availability which they offered, the amount of work to be performed and the number of candidates for that work.

80. I should add that even if the evidence had established a greater degree of regularity of assignments than I have found, that of itself would not have inclined me significantly towards the umbrella contract theory. Why should any (more or less) regular pattern of working be seen as signalling even a *perceived* obligation (let alone a true legal obligation) on the part of the Respondents to offer work on a particular programme to educator X, at the expense of educators Y and Z? There is no basis for inferring any such perception. That would lead to an untenable notion of the Respondents believing that they owed different obligations to different educators. Not surprisingly, no such case was advanced. And if Y and Z were not

candidates for the work, why should the unsurprising fact that X receives regular repeat bookings be seen as substantiating a duty or perceived duty to offer him or her the work when the simple explanation is that he or she is the only, and therefore obvious, choice? In my view the Respondents' selection of particular educators for particular assignments was the product of circumstances and nothing to do with perceived (let alone real) legal obligation. In some cases, the nature of the work narrowed the field. For example, it was common ground that some programmes required continuity throughout a school term or year. So, an educator allocated the first assignment could expect to be re-booked regularly throughout the relevant period. Other factors more generally in play included the amount of work for distribution, the number of educators available, the special skills and experience required and offered and, I have no doubt, the relationship between the individual educator and the administrator responsible for allocations.

81. The frequency (as opposed to regularity) of repeat bookings lends no more support to Mr Milsom's submission than the longevity of the relationships. The two points go hand in hand.

82. The third factor relied upon by Mr Milsom must be rejected on the facts. As I have found, the Respondents did not acknowledge a duty to offer work. A promise to offer as much work as possible was plainly not such an acknowledgement. Nor, self-evidently, was the assurance that assignments would be fairly distributed between those interested in receiving them.

83. Mr Milsom also relied on the evidence of Ms Lofts that the Gallery would remove from the list of team members those who had not worked for a specified period or had "regularly" refused offers of assignments. I do not accept that this supports the argument that the written terms do not reflect the reality. It does not imply an obligation to accept any particular offer of work. The practice referred to (I do not recall being told of a single example) is best seen as a pragmatic way of confining the team to those genuinely willing and able to benefit from membership of it. It was not suggested that removal from the list precluded any educator from asking to be restored to it.[6]

84. Self-evidently, Mr Milsom could not rest the umbrella contract theory on the 2002 and/or 2005 terms, which excluded any such contract. Rather, he contended that an umbrella contract must be inferred from the parties' conduct, which demonstrated that the express terms were at variance with the reality. This submission, modelled on *Autoclenz*, is unfounded. In my judgment no inconsistency is shown between the parties' conduct and the express terms and there is no need (necessity being the criterion) to infer any contract, let alone one which is contradicted by the express terms. The lead Claimants enjoyed times of plenty over an extended period and came to rely on work at the Gallery being available indefinitely on the terms to which they had become accustomed. That was natural and not at all unreasonble, but there is no legal ground for treating

[6] Of course, a careful lawyer advising the Gallery would recommend removing any 'dormant' educator from the list after first terminating the individual's (framework) agreement in accordance with its terms, on two weeks' notice. But the Respondents' (apparent) failure to do so does not help the Claimants on the umbrella contract issue. If anything, it reinforces the Respondents' case that neither side acknowledged any relevant mutual obligations between assignments.

their expectations as though they were entitlements. The success and duration of the dealings between the parties are explained not by creative legal analysis but by the mutual benefits derived from them.

Status – individual assignments

85. Mr Pilgerstorfer submits first and foremost (submissions, para 218) that, even when an assignment had been offered and accepted, there was no mutuality of obligation and therefore no employment contract (employee or worker). He rests this argument on the right (on either side) to cancel the booking. With respect to Mr Pilgerstorfer, I cannot agree. The existence (or not) of mutual obligations determines whether there is a contract at all. Plainly there was a contract here and, equally plainly, there was mutuality of obligation: on the one side to do the work and on the other to pay for it. The fact that the parties had a right to cancel did not militate against there being (subject to exercise of that right) mutuality of obligations.

86. What was the legal nature of the contract to which any individual assignment gave rise? I start with the question of personal service. Here my factual findings speak for themselves. Despite Mr Pilgerstorfer's efforts to the contrary, I have found that there was no right or practice of substitution and no right or practice of swapping assignments between educators. It is perfectly plain that the assignments were agreements for personal services.

87. Mr Milsom submitted first that on each assignment the Claimants worked under contracts of employment. He relied (*inter alia)* upon the way in which educators were recruited; the 'probation period'; the degree of supervision and applied to them; the fact that fees were not negotiated but fixed by the Gallery (save in the very rare circumstances envisaged in Schedule 3 para 7 and Schedule 4 para 7 to the 2005 Agreement); the income tax and national insurance arrangements; the educators' entitlement to use the Respondents' resources; the degree to which the educators were integrated into the organisation; and "indicators as to the Respondents' perception as to status", including their written acknowledgement that holiday pay was payable.

88. I cannot accept Mr Milsom's primary submission. In my findings of fact above I have listed some of the fundamental differences between the terms on which the Claimants worked and those which governed the relationships between the Gallery and its salaried staff. In particular, the latter were paid fixed monthly salaries set within collectively agreed banding scales, worked set hours, with provision for overtime, were entitled to annual paid leave, were subject to sickness absence procedures and entitled to sick pay, were eligible to join pension arrangements and were subject to line management arrangements and formal disciplinary and grievance procedures. In addition, to state the obvious, it was not open to employees to decline to perform work assigned to them. In my judgment these differences demonstrate very clearly the intention of the parties that their relationship should be qualitatively distinct from that of employer and employee. The clear purpose was to enter into a liaison not involving the burdens of employment proper but rather affording both sides levels of flexibility which that form of relationship makes impossible – for the Respondents to pay only for the

educator services required from time to time, and for the educators to work, subject to demand, as and when suited them.

89. I readily accept that some of the points relied on by Mr Milsom argue persuasively against the Respondents' case (to which I will shortly turn) that the Claimants were independent contractors in business on their own account. But they do little to advance the positive case that they were employees. The recruitment arrangements were, in my view, consistent with the Claimants having 'worker' status. The same goes for the supervision and control exerted by the Respondents. Given the nature of the work in question, the skill and expertise which it demanded of educators and the importance of ensuring that what they presented to the public was of the highest quality, it is not surprising that the Gallery were very careful in their recruitment arrangements and kept a close eye on the performance of the educators whom they had engaged. But I see nothing in all of this that excludes, or even leans against, 'worker' status. The fact that rates of pay were set by the Respondents argues against the educators being in business on their own account but helps very little on the question whether they were employees or 'workers'. The fact that the Claimants were paid through the payroll and tax and national insurance contributions were deducted at source was the result of the intervention of HMRC and did not reflect any choice by the parties themselves. Moreover, for HMRC's purposes the issue was a binary one: whether the educators were 'employed' or 'self-employed', whereas I am faced with a question to which there are three possible answers. The Respondents' acknowledgement of the educators' right to holiday pay, and the internal correspondence relating to the reorganisation, for what little they are worth, lean if anything towards 'worker' rather than employee status. And the points on integration also seem to me to offer (more or less) equal support to the 'worker' and employee analyses.

90. In summary, Mr Milsom's points in support of his primary argument make no headway against the powerful factors the other way. Accordingly, I am very clear that, when working on individual assignments, the educators were not employed under contracts of employment.

91. Turning to the Respondents' primary contention, that the educators contracted with the Gallery as independent contractors in business on their own account, I regard Mr Pilgerstorfer's arguments as unsustainable. There are many features of the relationships between the parties which, in my view, demonstrate clearly that the lead Claimants did not enter into what can sensibly be classified as an arm's length commercial arrangement between businesses. Many of those factors have been mentioned already. They include those relied upon by Mr Milsom in support of his primary submission, in particular the recruitment arrangements; the supervision and control exercised over the educators; the extent to which they were integrated into the Gallery's operations and held out as representatives of it; the fact that the Claimants were supplied with materials, facilities and support in numerous other ways; the pay arrangements including the fact that pay was set per session by the Respondents with no reference whatsoever to the educators; the fact that educators were not allowed to retain tips; the provision for educators to recover expenses; and the Gallery's retention of intellectual property rights in the Claimants' work. The terms are eloquent of the

inequality in bargaining power between the parties, a further factor which argues against the Claimants having had the status of independent contractors in business on their own account. Stepping back, I consider it plain and obvious that it is unreal to describe the dealings between the parties as transactions in which the Gallery stood as the "client or customer of any business undertaking" carried on by any of the lead Claimants. Rather, those dealings are characterised by dependant work relationships (*Redcats, Gunning*) in which the lead Claimants provided their services as part of a business or enterprise operated by the Respondents (*Bates van Winkelhof*). In short, the Claimants worked 'for' the Gallery as members of *its* team of educators.

92. This is not to say that every art historian or art expert delivering talks or workshops at the Gallery or elsewhere holds the status of a 'worker'. On the contrary, the lead Claimants themselves accepted, rightly, that some of their work (within the Gallery and elsewhere) fell on the other side of the line. But that merely makes the point that the exercise entrusted to me is fact-sensitive. The fact that the Claimants performed some work as independent contractors on their own account does not militate against the conclusion which I have reached.

93. For all of these reasons I have concluded that the educators cannot satisfactorily be classified as employees or as independent contractors in business on their own account. Fortunately, the law does not compel me to make a choice between two outcomes which seem to me equally, and profoundly, inapposite. I am satisfied that the Claimants are properly identified as belonging to the intermediate category of 'workers' and accordingly entitled to the limited protections which Parliament has seen fit to extend to individuals providing services pursuant to relationships of the sort under consideration here.

94. In reaching these conclusions I have addressed my mind to the facts of each of the lead Claimants' cases. Mr Milsom pointed out that while his primary submission was that all Claimants enjoyed the same status (as employees) it would be open to the Tribunal to find otherwise and to differentiate between them. I have considered each lead case separately and I am satisfied that each lead Claimant was, on each assignment, employed under a 'worker' contract.

The TULCRA point

95. The 1992 Act, s188(1) imposes a duty of consultation on an employer contemplating dismissing as redundant 20 or more "employees" at one establishment within a period of 90 days or less. Many other subsections of s188 refer to "employees". The claim is brought under s189(1)(d) which gives the Tribunal jurisdiction to consider claims by "affected employees" or "any employees who have been dismissed as redundant".

96. By s295(1) it is provided (so far as material) that an "employee" is someone working under a contract of service or apprenticeship. The next section defines a "worker" in terms very similar to the 1996 Act, s230(3)(b).

97. Mr Milsom placed reliance on the Collective Redundancies Directive 98/59 ('the Directive'), Art 2, the EU Charter, Art 27 and the European Convention on

Human Rights, Art 11, which proclaim workers' rights in respect of consultation on collective redundancies and the more general right of freedom of assembly and association. He also drew attention to Community authorities which stress the wide scope of the concept of 'worker' under the Directive and generally. On the 'interpretive obligation' (the *Marleasing* principle)[7], he cited the well-known domestic authorities collected by Underhill LJ in *Blackwood v Birmingham and Solihull Mental Health NHS Foundation Trust* [2016] ICR 903 CA, para 48 *et seq*. He submitted that interpreting "employees" as extending to "workers" would "go with the grain" of the legislation (*Ghaidan v Godin-Mendoza* [2004] 2 AC 557 HL) or, in the alternative, that the Tribunal was in any event compelled to disapply the restriction as contrary to fundamental principles of EU law and/or the EU Charter.

98. Mr Pilgerstorfer's main submissions (he set them out in a much fuller form and in a different order) were that: (a) the Directive does not apply to contracts of limited duration or for specific tasks, and accordingly no *Marleasing* obligation could even theoretically arise; and (b) in any event, it is not open to the Tribunal to adopt the interpretation contended for by the Claimants because it would conflict with a fundamental feature of the 1992 Act.

99. My conclusion that there was no overarching or umbrella contract of employment or worker contract has already been explained. The first question which arises is whether the Directive applies to the individual assignments undertaken by the lead Claimants. By Art 1(2)(a) it specifically excludes from its scope:

> **collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry of the completion of such contracts.**

100. The Court of Justice has held in *Rabal Canas v Nexea Geston Documental SA & another* [2015] 3 CMLR 34 that the Art 1(2)(a) exclusion is not limited to "collective redundancies" and extends to "individual terminations of contracts" (judgment, paras 60-67).

101. I can see no answer to Mr Pilgerstorfer's first argument. The individual assignments were contracts for limited periods of time and for specific tasks. In my judgment there is no arguable foundation for the complaint that the 1992 Act denies the lead Claimants any protection or entitlement which is mandated by the Directive.

102. There being no overarching contract and no arguable basis for contending that the individual assignments came within the scope of the Directive, the temptation to leave the matter there is not easily resisted, but that would not do justice to the efforts of counsel. I will, however, deal with what remains very briefly. I agree with Mr Pilgerstorfer that, if the Directive was applicable, it would not be open to the Tribunal to read the 1992 Act, s188 as applying to 'workers'. I agree with him that it is plain and obvious that Parliament has made a clear and deliberate choice to extend the protection of the section to employees properly so called but not to 'workers' (see his submissions, paras 282-4, which list numerous

[7] *Marleasing v La Comercial internacional de Alimentacion SA* 1 CMLR 305

examples of other provisions of the Act which carefully differentiate between employees and 'workers', sometimes including the latter within an extended definition of 'employment' and sometimes not).

103. Mr Milsom says that, even if Parliament has so decided, the Tribunal is compelled to disapply the restriction. I disagree. The *Marleasing* obligation requires the domestic court to interpret domestic legislation in a manner consistent with the relevant Directive, *so far as possible*. It is concerned with *interpretation*; it neither requires nor permits the court to usurp the function of the legislature. As Sir Colin Rimer put it in *Lock v British Gas Trading Ltd (No 2)* [2017] ICR 1 CA (para 109):

> **… it does not automatically and necessarily follow that a conforming interpretation of implementing domestic legislation will be possible in every case. It is, I consider, still necessary to apply an objective assessment as to whether a legislative choice has been made that is directly at odds with the requirements of the Directive.**

I agree with Mr Pilgestorfer that Mr Milsom's submission invites me to cross the line between interpretation and legislation. If the question arose at all, which it does not, I would decline to take the impermissible course proposed.

Continuity of employment

104. Since I have found that the Claimants were not employed under contracts of employment, the question of continuity of employment does not arise. I will, however, address it briefly since counsel asked me to do so and there is a real possibility of this litigation going further.

105. I have noted that Mr Milsom signalled an intention to pursue submissions under the 1996 Act, s212(3)(b) and (c). The material parts read:

> **(3) Subject to … any week … during the whole or part of which an employee is –**
>
> **(a) …**
> **(b) absent from work on account of a temporary cessation of work, or**
> **(c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose …**
>
> **counts in computing the employees period employment.**

106. The sub-para (b) ground was not pleaded and, if it was pursued at all, barely pursued. The statutory language is straightforward. The employee must establish that his absence from work was brought about by a temporary cessation of work. In *Byrne v City of Birmingham DC* 1987] IRLR 191 CA Purchas LJ explained the effect of the legislation in these terms (para 13):

> **The expression 'cessation of work' must denote that some 'quantum of work' had for the time being ceased to exist, and, therefore, was no longer available to the employer to give to the employee.**

The Claimants led no evidence of any cessation of the Gallery's work or of any absence attributable to such a cessation. In short, no evidence was given capable

of sustaining an argument under sub-para (b). In so far as one was pursued, I dismiss it.

107. Turning to the sub-para (c), it can be seen that continuity under this provision may be extended where the parties, by arrangement or custom, regard the employment as continuing. In *Curr v Marks & Spencer* [2003] IRLR 74 CA, Peter Gibson LJ observed (para 30):

> **… the ex-employee … must, by arrangement (which can, but need not, be a contract) or custom, be regarded by both the employer and the employee as continuing in the employment of the employer for any purpose … But there must be a mutual recognition by the arrangement that the ex-employee, though absent from work, nevertheless continues in the employment of the employer. Without there being a meeting of minds by the arrangement that both parties regard the ex-employee as continuing in that employment for some purpose, s213(3)(c) will not be satisfied.**

In my judgment any argument under sub-para (c) is obviously untenable here given that the parties do not now agree, and have never agreed, that any lead Claimant was at any time employed by the Respondents under a contract of employment (save for Ms Allen and Mr Heard during the brief periods when they were admittedly employed under service agreements). Absent such agreement, the possibility of an arrangement or custom involving mutual recognition of the continuation of employment during a period of absence cannot arise. In any event, and for the avoidance of any doubt, no evidence even theoretically capable of sustaining an argument under sub-para (c) was put before me.

108. For these reasons, had I found that the lead Claimants were employed under contracts of employment during each assignment, I would nonetheless have dismissed their claims for unfair dismissal on the ground that they were unable to establish the period of two years' continuous service required to qualify for the right not to be unfairly dismissed.

Outcome and Further Conduct

109. For the reasons stated, the unfair dismissal and s188 claims must be dismissed.

110. I will allow the parties 28 days from the date of promulgation to discuss the way forward. If the Tribunal has not received any communication by then, a telephone preliminary hearing will be set up to decide on the next steps.

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EMPLOYMENT JUDGE SNELSON
27 February 2019

Judgment entered in the Register and copies sent to the parties on 27 Feb. 19

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