RM

EMPLOYMENT TRIBUNALS

Claimant: **Mrs V Scott**

Respondents: **(1) Chigwell School**
(2) Mr H Ebden

Heard at: **East London Hearing Centre**

On: **31 January and 1 February 2019**

Before: **Employment Judge Moor**

Representation:

Claimant: Mr Islam-Choudhury, counsel
First Respondent: Ms K Fudakowski, counsel
Second Respondent: did not appear

PRELIMINARY HEARING JUDGMENT

1. In her work as a Visiting Music Teacher, the Claimant:

a. was not an employee of the First Respondent within the meaning of section 230(1) of the Employment Rights Act 1996;

b. was a worker within the meaning of section 230(3)(b) of the Employment Rights Act 1996; and

c. was an employee within the meaning of section 83 of the Equality Act 2010 ('an employee in the extended sense').

2. In her work with ensembles: the Claimant was neither an employee, nor a worker nor an employee in the extended sense of the First Respondent.

3. In her other ad hoc work (performances, chaperoning and all other work) the Claimant was neither an employee nor a worker nor an employee in the extended sense of the First Respondent.

REASONS

1. The Claimant, Mrs Scott, sings and teaches singing for a living. The First Respondent is an independent, secondary school ('the School').

2. At this preliminary hearing I must decide her legal status when she was working at the School. This will determine which, if any, of her claims can go to a full hearing.

Issues

3. The agreed issues for this Preliminary Hearing (44) are:

    3.1 Was Mrs Scott at all material times (being the period April 2014 – May 2018) an **employee** with the meaning of section 230(1) of the Employment Rights Act 1996 ('ERA')?

    3.2 Although not set out in the statute, in the issues, the parties agree that the answer to this question can be determined by consideration of the following factors 'constituting the irreducible minimum of a contract of service'.

        3.2.1 Did Mrs Scott undertake to provide services personally or did she have the right to provide a substitute and, if so, to what extent was this right limited or occasional?

        3.2.2 Did the School have a sufficient degree of control over Mrs Scott?

        3.2.3 Was there mutuality of obligations between them?

    3.3 Alternatively, was Mrs Scott a **worker**, within the meaning of section 230(3)(b) ERA?

        3.3.1 Did Mrs Scott undertake, under the '*Agreement to use the facilities of the School for the provision of music tuition'*, to personally perform work or services?

        3.3.2 Was the School a customer of Mrs Scott's business undertaking and/or client of the music teaching profession carried out by her?

        3.3.3 Was there mutuality of obligations between them?

    3.4 Was Mrs Scott an **employee**, within the meaning of section 83 of the Equality Act 2010 (EA)? Which the parties agree requires me to ask the same questions as under the **worker** issue.

4. At the outset of this hearing Counsel agreed that I may have to ask these questions in relation to the different sorts of work that Mrs Scott undertook: the work she did as a Visiting Music Teacher ('VMT'); the work she did with ensembles and other work (for example, her involvement in school performances and pupil chaperoning).

5. The Second Respondent, Head of Music at the School, attended the preliminary

hearing. At the outset I made sure that he understood he had a right to give evidence and make submissions. He chose not to do so. I encouraged him to keep this decision under review during the two days.

Findings of Fact

6. Having read the witness statements and heard the oral evidence of Mrs Scott and Mrs Jane Jackson, music department administrator, and having read the documents referred to in the evidence, I make the following findings of fact. (Numbers in brackets refer to the trial bundle, paragraphs to the relevant witnesses statement.)

7. Mrs Scott markets her services to the world at large as a freelance soprano and music teacher (*Linked in* profile, 197). During and after her performing career she has taught singing. She maintains entries in several online directories for singing teachers (199). For many years she has had a private practice of pupils externally from the School, including during the period when she also worked at the School (341). She was a peripatetic music teacher for the London Borough of Redbridge music service from November 2008 until March 2015, i.e. including much of the first year she worked as a VMT at the School.

8. Mrs Scott has 3 children, all of whom have been pupils at the School. They took instrumental music lessons. She was aware of the VMTs at the School who provided these lessons.

9. In 2014 Mrs Scott applied for the job of music teacher at the School. This advertisement indicated that for the right candidate ensemble work might also be available. Mrs Scott stated on the application form that she was not a qualified teacher. After meeting her at interview, Mr Punt, headmaster, wrote to Mrs Scott stating,

   '*whilst we cannot offer you the post as advertised, we would like to offer you an opportunity to come into school taking on a role within the visiting instrumental team. Howard Ebden is convinced that your musical and educational experience, your love for music and enthusiasm will have an appreciable and tangible effect on the musical life of the school and its pupils. The position, which will be for the [summer] term in the first instance, will take effect from 22 April 2014.'*

   He enclosed the '*peripatetic contract*'. Mrs Scott accepted and signed it.

The Written Agreement

10. The School engages a large group of VMTs under this standard, written contract 'the written agreement'.

11. It is described as an '*Agreement to use the Facilities of [the School] for the provision of music tuition.*' In it Mrs Scott is described as '*a self-employed contractor'*.

12. By Part C, it remains in force until termination by: either one full term's notice on either side; or, without notice, by the School if the VMT is in breach of the School's safeguarding duties, clause A12 or 13 (payment of the fee to the School), or is in

persistent breach of other provisions of Part A (293).

13. By Part A the VMT agrees to:

13.1 Appoint the Director of Music ('DoM') as her '*agent for the purposes of arranging for the use of the School facilities in connection with the musical tuition of pupils of the School*';

13.2 Arrange with the DoM at the beginning of each term to use the School's facilities '*at such days and times of the week as the contractor requires';*

13.3 *'Arrange with the DoM for any alternative days and times as may become necessary during the term giving the minimum of one week's notice of such alternative times.'*

13.4 *'Teach: (a) the pupils of the School on the School premises or elsewhere by prior written arrangement with the DoM… (b) private pupils (that is those who are not pupils of the School) only during such times as have been agreed with the DoM under the provision of clause B12…'* (Private pupils had to provide a liability disclaimer.)

13.5 Be responsible for the pupil's well being. And, if the pupil does not arrive for a lesson within five minutes of the starting time, then '*to ascertain the pupil's whereabouts and if not satisfied to follow the Absence Procedure as detailed in the Department Handbook.'*

13.6 *'Be aware of the contents of the Department handbook produced by the School's Music Department.*

13.7 *Any appointment of a suitably qualified deputy to teach in his/her place when necessary must adhere to the School's Safer Recruitment policy. Give reasonable notice to the DoM, and ensure that such a deputy is aware of his/her duties and responsibilities vis à vis the pupils and the School, and of his/her liability for CRB checks … The payment of such a deputy is the responsibility of the Contractor. (Cl A9)*

13.8 *Obtain payment for lessons direct from the parents/guardians of the pupils by termly invoice in advance, and for sundries supplied ... by termly invoice in arrears.*

13.9 *Be entirely responsible for his/her own financial arrangements including tax and National Insurance as a self-employed contractor.*

13.10 *Pay to the School at the end of each term a sum in respect of that term's provision of facilities under this Agreement … The rate will be reviewed annually and any increase will not exceed the then prevailing national inflation percentage rate.*

13.11 *Pay to the School in a similar manner [for private pupils].*

13.12 *Pay for the CRB [*now DBS*] check.'*

14. By Part B, the School agreed that it or the DOM will:

14.1 *…'will introduce new pupils to the Contractor when appropriate, and will at all times convey relevant information concerning pupils to the Contractor;*

14.2 *… will assist the Contractor in formulating a timetable … and provide relevant information relating to the availability of pupils for lessons during term time;*

14.3 *provide a suitable teaching place …'* and facilities for meeting parents. Telephones and computers at his/her request *'to assist the Contractor in the carrying out of his/her duties at the School.*

14.4 *Where the contractor uses the School equipment*/*musical instruments*, *in the course of instructing pupils, it will ensure that they are kept it in good working order at the School's expense.'*

14.5 will enter pupils for exams at the request of the VMT.

14.6 at the VMT's request, arrange for his/her invoices to be sent to parents through the School Office.

14.7 *Cl B8 'At the Contractor's request, the DoM will forward the Contractor's written progress reports on pupils to their parents through the School office.*

14.8 *In May of each year, the DoM will advise the Contractor of the recommended rates of fees for tuition for the subsequent academic year, and of the rate payable for use of facilities …'*

14.9 Provide public liability and personal injury insurance cover.

Music Department Handbook

15. The Music Department produced a Handbook (172ff). In the written agreement, Mrs Scott had agreed to '*be aware of [its] contents'*. Mrs Scott referred to it in only a limited way in her evidence to me, to suggest that the part of it relating to deputies was not operated in practice (para 15) – I set out my findings on that issue below.

16. The Handbook's purpose is to '*inform all members of the Music Department of administrative and policy matters … recommended practice, to act as an introduction to the workings of the department for new members and as a general reference…'*. I set out the relevant passages of the Handbook below.

17. It describes an aim of the Music Department to '*provide individual teaching on all instruments, singing … according to demand.* And '*to provide ensembles in which interested pupils can participate'*.

18. It informs VMTs that '*The School will generally do its best to provide a spread of pupils of various standards up to a number agreed in advance with each teacher (although numbers inevitably fluctuate and no guarantee can be given of total teaching hours). Teachers may teach on days of their own convenience, allowing for the requirements of the school timetable and providing teaching rooms are available. But days and timings cannot always be guaranteed to be continuous*

from year to year.'

19. The Handbook records that *'the School expects that [VMTs] will'*: attend regularly, punctually, smartly dressed and fit for work; that they will arrange their own timetables on the rota according to the Handbook; keep an attendance register; and write progress reports '*as required by the School (currently full written reports for all in February and July)'*.

20. Thus, on the basis of the reference to the written reports at Clause B8 as supported by this reference in the Handbook, I find that VMTs agreed with the School to write progress reports. I do not therefore accept Mrs Jackson's evidence that VMTs were simply 'asked' to do so. (Contrary to Mrs Scott's evidence, and despite Mr Ebden' apparent instructions on what was to be included, at 303.36, I find that in practice VMTs wrote the reports as they wished as Mrs Jackson described. There was no standard form, just a spread-sheet on which to input them.)

21. Mrs Jackson agreed the following were in the form of an instruction in the Handbook under the passage relating to the School's '*guidelines for timetabling*'.

    21.1 Lessons should be 30 minutes long.

    21.2 Pupils up to Year 11 '*should be given their music lessons on a rota basis to avoid them missing the same academic lesson each week.'*

    21.3 Sixth formers must not miss class under any circumstances.

22. The Handbook also sets out the Absence procedure referred to in the written agreement. This sets out firm rules for how to deal with a pupil's absence from class.

23. Mrs Jackson's evidence, which I accept, was that, while the following read as requirements in the handbook they were **not** followed in practice:

    23.1 to provide notice of the timetable for the following week (178);

    23.2 to only put a pupil up for an exam if they had the prospect of a good mark. In practice, it was up to the VMTs, in liaison with the parents, whether to enter a pupil into an exam and some were entered with the hope of only of a pass;

    23.3 there was an expectation that VMTs would attend the VMT parents evening (180) but no requirement to do so. VMTs had, in practice, organised meetings with parents at other times.

24. In relation to absences for more than one lesson the Handbook provides that the VMT '*should consider supplying a deputy, whom you will be responsible for organising and paying. As any deputy needs to be cleared by the DBS, the deputy needs to be agreed formally by the DoM and the Deputy Head (Staffing and Systems) in order that appropriate checks may be carried out in advance. In any event please give maximum notice to the school of any appointment of a deputy, as DBS checks can take up to three months'*. I set out below how the provision of deputies worked in practice.

Terms and Conditions for Parents

25. The School provided parents/guardians with written information and an application form for instrumental tuition. This begins, '*We offer tuition on the following instruments*' including '*singing*' (194.1).

26. The form must be returned to Mr Ebden. Parents/guardians signed it underneath this wording: *I have read the terms and conditions and wish my child to receive weekly instruction in accordance with the existing Conditions for Instrumental Lessons at Chigwell School*.' Their attention is drawn, in particular, to the requirement to give the VMT a term's notice to discontinue lessons.

27. The terms and conditions state as follows so far as is relevant:

    27.1 *'The [VMT] will use his/her best endeavours to schedule 30 lessons* per year. (cl 1)

    27.2 *No more than 10 lessons will be invoiced in respect of any one term except by prior agreement* [with the VMT]. *Where more than 10 lessons are actually taught in a term… the surplus lessons will be carried over and invoiced in the subsequent term(s).* (cl 2)

    27.3 *Payment of this invoice is due in advance*… A £10 surcharge was payable to the VMT after 21 days of late payment.

    27.4 *Notice to discontinue … must be in writing and received by the teacher (cc DoM) by the start of the term preceding … failing which a term's fees will be payable in lieu of notice.*

    27.5 *Parents and guardians will be notified in the Summer Term of the rate of tuition fees chargeable for lessons… the following September.*

    27.6 *All lessons will take place at [the School] …* Alternative arrangements can be agreed with the VMT '*with the approval of [the DoM]…*

    27.7 *The [VMT] may appoint a deputy teacher approved by [the School] to undertake the teaching of any or all of the lessons covered by this invoice.* (cl 10) (194.3)

VMT Rates, payment and invoicing

28. The rate for instrumental lessons at the School is described in the written agreement as the '*recommended'* rate (Cl B9).

29. As a matter of fact, after consultation with the VMTs (250.7, 329), the School set one rate that all VMTs were to charge. It heard proposals from them for an increase, asked them for information as to the rate set at other schools, and then decided upon and informed them of the increase. The School then also informed parents of the increase. As a matter of fact no VMT directly negotiated a different rate with parents/guardians. It is inconceivable that they could have done so, given that the School had advertised the rate to all parents. I find therefore that the rate was not a 'recommended' rate as the written contract provides. The true

agreement was that Mrs Scott agreed with the School that she would charge the rate set from time to time by the School, after consultation with her and the other VMTs. This is also true for the rate of late payment penalty.

30. Consistently with the written agreement, Mrs Scott invoiced parents/guardians directly for lessons. And they paid those invoices directly to her. (This was true for all VMTs).

31. Some VMTs, including Mrs Scott, chose to use an invoice template provided by the School under its letterhead (no address) and adding their personal address and bank details. Some did not. The use of this invoice was genuinely optional.

32. In 2018 the rate was £17.50 per lesson. In her private work Mrs Scott charged £16 per lesson. This would involve having to travel to different pupil's homes over the course of the day requiring additional time and travelling expenses. Thus, the School VMT rate was evidently a good one. Mrs Scott accepted this and that the VMT work could be lucrative. She was delighted to have been offered the work.

33. Consistent with the written agreement, the VMTs paid the school a fee of £5 per child per term. This rate was also set by the School, subject to the limit in the contract. As there were usually 10 lessons per term this meant 50p of the lesson rate was the School's fee. Mrs Scott accepted that this was a fee for the use of facilities and the opportunity to access the pupils.

34. Consistent with the written agreement, if parents did not pay her invoice it was Mrs Scott who lost out. The documentary evidence shows that she chased unpaid invoices, only asking for the School's help in this after her efforts had failed (309). While the School assisted in chasing unpaid bills, it warns parents/guardians that it is the VMT who can make a small claim in the county court (279). This risk was mitigated to some extent by the invoice being in advance of lessons, but there was evidence before me that Mrs Scott had actually lost out in some cases. She accepted this meant she took an economic risk.

Tax

35. Throughout her time at school, Mrs Scott described the VMT work on her annual tax return as self-employment. She claimed expenses against her VMT earnings and understood the tax advantages of doing so. She did not do so for her Redbridge contract, which she described on her tax return as employment. Contrary to the claim form, she did not receive 'take home pay' from the School.

Private (External) Pupils

36. Consistently with the written agreement, VMTs could arrange to teach private pupils (i.e. external pupils) at the School. I accept Mrs Jackson's evidence that this happened in practice, because it is supported by the documentary evidence (334). Mrs Scott said this was not an opportunity that she had 'used', which suggested to me that she understood she could choose to teach external pupils at the School had she wished.

37. An indemnity, for insurance purposes, had to be signed by the parents of external pupils (180)

Timetabling

38. Mrs Scott's set her own timetable as a VMT according to her availability. I accept Mrs Jackson's evidence that room scheduling came second and had never prevented a timetable being set according to a VMT's availability. Mrs Scott would then liaise with the parents/guardians and, if there were timetable clashes with lessons, they would alert her and she would adjust the timetable.

39. It is clear from the Handbook and practice that VMTs had to comply with the School's requirements that they did not timetable a lesson when a sixth former was in academic class and that they had to set a fortnightly rota so that younger pupils did not avoid the same class each week. I find, therefore, that these terms were additional terms of the agreement between the parties.

40. The emails Mrs Scott refers to in her written statement, do not support that there was an approval mechanism for timetabling as much as her simply informing the School/parents of her timetable:

    40.1 in an email the School asked Mrs Scott if she was planning to teach in the first week of a term. She then informed it of her intentions and did not seek their agreement (331.15);

    40.2 she informed the School she was not teaching in a particular week and what her plans were to make up the lessons (331). She did not seek approval;

    40.3 there are other documentary examples of a VMT changing a timetable and informing parents (e.g. 316, 304.5-6).

41. Nor do I accept Mrs Scott's contention that timetables were imposed by the School or changed by them without agreement. The documentary evidence does not support this. For example:

    41.1 a parent asked for a timetable change. Mr Ebden sought Mrs Scott's 'thoughts'. She then offered two alternative times (303.15);

    41.2 Mr Ebden asked Mrs Scott if it was possible to change certain days (303.17). This was a request not an imposition.

Obligations to provide work and/or do it when offered

42. Consistently with the written agreement, the surrounding documents and practice at the School, I find the following about whether there were obligations to offer/do work.

43. The VMT was free to choose how much time to make available. They were not obliged to offer a minimum number of lesson slots or teach a minimum number of pupils.

44. The School was not obliged to allocate any number of pupils or any pupil to the VMT. Parents could request a particular VMT and that request would be followed.

45. A VMT was not obliged to accept a pupil the School offered to her. Sometimes

VMTs passed pupils among themselves.

46. Once the pupil was timetabled to take lessons with the VMT, the VMT could cease to continue teaching that pupil even during term time. The arrangement could be ended at will. Plainly this did not happen a great deal, as it would not have been in the interests of the VMT to do so. But where, there was a poor 'fit' or the pupil showed no commitment to lessons the VMT was able to stop teaching. The VMT did not require the School's approval to do so. For example:

    46.1 on 30 November 2015, Mrs Scott wrote to a parent suggesting a pupil discontinue lessons due to lack of commitment (304.10). She did not seek notice pay. Nor would she teach the final lesson of the term; and

    46.2 on 21 November 2017, Mrs Scott sent Mr Ebden a draft email to a parent in which she suggested a pupil stopping lessons. This was for his information. He merely commented that the pupil was not seen in choir and that was a shame. She then informed Mr Ebden, after the fact, that she had spoken to the parent and sorted out a way ahead. I therefore do not accept her contention (paragraph 21) that she was required to consult before dropping students. This example shows the reverse.

Substitutes/Deputies.

47. One-off absences did not require a deputy, because they could be dealt with by moving a lesson: there were fewer planned lessons than weeks in the term.

48. For longer absences VMTs did use deputies and this was not unusual. I reject Mrs Scott's evidence to the contrary. The documentary evidence shows that VMTs organised deputies and I therefore accept Mrs Jackson's evidence that deputies were used. Some VMTs still had performing careers and the School understood that from time to time their performance commitments might get in the way of their teaching at the School. Doubtless it was part of the attraction to have VMTs who were professional performers. At the time of the hearing, one VMT had sent a deputy to cover his lessons while he performed with the ENO for a season.

49. The practice was that deputies charged parents directly for their time. The school did not pay them nor did the VMT for whom they were covering.

50. If a VMT needed to use a deputy, usually the VMT made the arrangements and informed the School. It required the deputy to be competent, have a valid DBS check and that he/she watched a 45-minute safeguarding video.

51. For ease, VMTs often chose other VMTs to deputise for them. But VMTs also chose external teachers for cover.

52. Even in Mrs Scott's case, she deputised for Ms Potterton for a temporary period. In April 2015, she sent an email chasing for Ms Potterton's pupils to be removed from her as it gave her too many students (303.58).

53. The requirements for a DBS were not so onerous as to make deputising impracticable as Mrs Scott suggests: sometimes there was sufficient time and sometimes the deputy already had DBS clearance. Nor did the deputy have to go

through the 'pre employment' checks she refers to—these were for employment as a music teacher, the role she did not obtain.

54. Therefore, in my judgment the written agreement as to deputies was not a sham and was not in form only.

55. While the written agreement did not require approval for the appointment of a deputy, it did require that the School be informed. The Handbook and parental Terms and Conditions state that prior approval by the School was required. Mrs Jackson's oral evidence was that, in practice, approval was not required. The documentary evidence points in both directions: it shows that some VMTs sought approval and others merely informed Mr Ebden of the arrangements they had made for cover:

    55.1 in one email a VMT forwarded to Mr Ebden a draft letter to parents to let them know he may have to use a deputy, saying '*please read and hopefully approve the letter'* (276);

    55.2 one VMT appointed another VMT as a substitute (277);

    55.3 in another, a VMT merely informs Mr Ebden '*just to let you know x will be teaching for me. I have told her the code for the door'* (278). This would suggest the deputy was not already a VMT;

    55.4 in another email the subject of which is '*tomorrow and next week'* a VMT asks Mr Ebden about the best approach: '*just to let you know unfortunately I won't be available for the next two weeks*'. He/she has a rehearsal for a production they are performing in. '*Will you be OK on your own or shall I see if x is around*?' (308) This suggests that Mr Ebden had a say on whether a deputy should be appointed.

56. Mrs Scott relies on the circumstances of her 'compassionate leave' to argue that deputies were organised by the School. I accept, however, that this was an exception to the usual practice. Mrs Scott's father was very unwell in Northern Ireland and she needed to go to assist her mother in his care. The School acknowledged that it was a difficult time for her and therefore, exceptionally, took on the burden of organising a deputy for the term she had informed them she would be away.

Other Matters

57. VMTs are identified as such on the School's website and documents, in a list distinguishing them from teaching staff.

58. Mrs Scott did not have access to all areas of the School.

59. Mrs Scott did not receive the benefits of employed teachers like sick pay, pensions and paid holidays (although she did receive a free lunch).

60. Mrs Scott had a school email address but used her personal address to communicate with parents. In December 2016 email distribution lists were changed so that VMTs no longer appeared on 'all staff' emails. Mistakenly,

Mrs Scott was retained on this distribution list.

61. I do not accept Mrs Jackson's evidence that in practice VMTs were not required to attend the AGM. This is inconsistent with the document at 326.15.

62. The VMTs had the freedom to teach however they chose and which exam board to use. The Handbook provided guidelines as to some tuition, for example, for aural tests, VMTs were informed as to which book and CD to use.

63. The School provided equipment, instruments, practice books and the use of a computer and printer. Some VMTs used the equipment and some used their own.

64. The School undertook more limited observation of instrumental lessons. Mrs Scott had been observed once. Instrumental lessons were not regulated by the independent school equivalent of Ofsted.

65. There was no disciplinary procedure. If a VMT performed badly this would show in parents avoiding the teacher and their practice at the school would decline or stop altogether.

66. Contrary to its arrangement with employed staff, the school did not pay sick pay, paid holidays or pension contributions.

67. Insurance was arranged by the School, except for external pupils.

External Business/Profession

68. As I have described above, it was known and expected that VMTs had a business or profession outside of their work at the School. That was part of their attraction.

69. In October 2017 the School informed Mrs Scott about a pupil wanting private lessons. The parent did not want them taught at the School to avoid a clash with academic lessons (331.1). She informed the School that she would not take the on, being '*at limit with private pupils currently'*.

Ensemble and Ad Hoc Work

70. The School ran various ensembles, music groups. It was an extra-curricular activity offered by the music department, which contributed to the musical life of the School.

71. In September 2014 Mr Ebden offered Mrs Scott the opportunity to coach the boys' choir ensemble. She did this until she left in 2018. In the last 2 years she also took the Musical Theatre group.

72. There was no obligation to offer this work or accept it once offered. A teacher could drop ensemble work at will, even during the middle of the term (290, 317.1). Likewise, the School could stop ensemble work (as exemplified the email from Mr Ebden at 290).

73. Ensemble times were arranged for Mrs Scott's availability: on Sept 2017 the School asked to move the choir time, but she did not accept this (329.4A) Instead of a change she informed the School '*I would rather not do choir this week*.' She

did not disclose this reply, and once disclosed, it undermined her written evidence at paragraph 25.

74. Mrs Scott personally invoiced the School for this work at an hourly rate, set by the School, of £32.32 (e.g. 204). She was not paid for ensembles missed through sickness. When she was sick Mrs Scott informed parents that the ensemble would not run (330).

75. When she was unable to take ensembles, her work would sometimes be covered by Mr Ebden or another teacher.

76. From time to time Mrs Scott did other paid work at the school, which can properly be described as ad hoc. For example, she was involved in the production of *Les Miserables* coaching in rehearsals and helping out (e.g. prompting) on the night. She also chaperoned pupils. She charged by the hour for this work. She had no expectation of any of it, nor an expectation that she would do it. Parents could equally be involved in this type of work voluntarily.

Label

77. I am satisfied, contrary to her evidence, that at the time she thought herself self-employed. She described herself as self-employed for tax purposes. She signed a contract to that effect. She described herself on her profiles as a self-employed singing teacher. It seemed to me that she was using 'employment' in her oral evidence not as a legal term but as something to describe more generally what she did. It can be easy, once a person understands the legal importance of the classification of their working status, for her to convince herself that she had thought all along she was an employee. This is probably what has occurred in Mrs Scott's case. By the end of her oral evidence on this point she said: *I'm a self-employed person but I'm contracted by the school to do a job of work*. *It's a bit complicated.'* Indeed, it is.

Submissions

78. Both counsel prepared helpful and full written submissions before the hearing, to which I refer but do not repeat.

79. For the First Respondent, Ms Fudakowski supplemented her concise, well-structured and persuasive written submissions orally. She contended that this was not a sham contract or one in form only. Nor was this a situation where there was any inequality in bargaining power. I should therefore find the terms of the written contract were the true agreement. She focussed in her oral submissions on whether Mrs Scott was a 'limb (b)' worker, it being more obvious, in her submission, that she was not an employee.

80. She argued there was no personal service here because of the contractual right to send a deputy. VMTs were responsible for that deputy's pay and discharged that responsibility by directing the parent to pay the deputy.

    80.1 Relying on the 5 examples in Pimlico Plumbers (para 84) she argued the only fetter on the right to send a substitute was that the School wished to be assured of their qualification for the work: their competence; knowledge

of safeguarding and that they were DBS checked. All of this fell squarely into the fourth example and was inconsistent with personal performance.

80.2 As to the fifth example, she argued that there was no contractual right of approval: there being no mention of it and no argument that the Handbook or parental terms and conditions were incorporated. Plus practice showed that VMTs sometimes simply told Mr Ebden of the substitute they had arranged.

81. She argued that Mrs Scott was independent of the School and in business on her own account. Mrs Scott marketed her services to the world at large and took the economic risk in the relationship. She had a high degree of independence. There was only 'light control'. She relied on Mrs Jackson's evidence that much of the guidance and direction in the Handbook was disregarded by VMTs who 'did their own thing'. As to the School setting the VMT rate and it being one rate, she argued this was not inconsistent with Mrs Scott being in business on her own account: it was akin to a tender, knowing the going rate, the rate was set with information from VMTs and was advantageous to them. Here VMTs entered into a contract with the school that gave them the facilities and access to the pupils, the opportunity to earn money. That was classically the role of an independent contractor.

82. She contrasted Mrs Scott's situation with that of the Claimant in Westwood (the hair restoration surgeon) who did not offer those services to the world at large but exclusively to customers of the clinic. It was also the clinic who paid him a percentage of their fee. Here Mrs Scott had a direct relationship with parents who paid her and were clients of her general business.

83. She argued that being part of the Schools' offer was insufficient to outweigh these other factors.

84. As to mutuality of obligation, all that existed here was a contract whereby for a fee the School provided facilities and access to pupils with no obligation on either side for the offer of or provision of work. That was a factor supporting that Mrs Scott was operating an independent business/profession.

85. She argued that I could analyse each strand of work differently and that the ensemble work did not require personal service, Mrs Scott had accepted the that she could appoint cover and as a matter of practice Mr Ebden or another teacher had done so. She argued that the ad hoc work did not have any mutuality of obligation as to amount to a contract of employment or a worker; and equally did not require personal service, other parents could be asked to step in and there were examples in the evidence of them doing so.

86. For Mrs Scott, Mr Islam-Choudhury, in his helpful oral submissions including answers to my questions, sought to persuade me to look beyond the words of the contract at the 'reality' of the situation.

87. He sought to argue that the post advertised was the post Mrs Scott was appointed to.

88. He contended that there was obviously personal service here: the fetters of

approval and requirements of safeguarding training and the slowness of DBS checks meant that the right to substitute was limited and therefore was not inconsistent with personal service. That was not surprising: the School did not want any jobbing singing teacher, it wanted Mrs Scott to teach its pupils.

89. He contended that VMTs were integrated into the business of the School. It referred to them in its music department handbook, and identified them to parents as an important part of its 'offer'. He agreed with my observation that the examples of Langstaff J in Cotswold Developments (cited at paragraph 34 in Winkelhof) and those of Lady Hale in Winkelhof, at paragraph 25, need not be mutually exclusive. Here Mrs Scott could *both* be in business on her own account, marketing her services to the world at large, and *also* a worker in her role as a VMT because *in that role* she was providing her services '*as part of a …business undertaking carried on by someone else*' (Winkelhof paragraph 25).

90. He argued the facts here were consistent with the School providing instrumental tuition to its pupils and using VMTs to carry out that work.

91. He argued that there was mutuality of obligation here even when Mrs Scott was not teaching. She had to provide a service of 30 lessons. And that in the case of a worker, while mutuality of obligation must exist, the 'pass mark' was lower, relying on Windle para 23, 24.

Law

Who is an employee?

92. Under section 230(1) and (2) ERA, the definition of **employee** is a person who works under a contract of employment (ss1), which is defined as a contract of service (ss2). The contract can be express (oral or in writing) or implied.

93. The statutory definition is, thus, somewhat circular. Much time has been taken by the courts in elucidating what a contract of employment looks like. It has not been possible to come up with a single test given the myriad ways one person can agree to work for another.[1]

94. The School's motto is *I shall find a way or make one*. The parties might be forgiven for thinking that this is what the law demands of Tribunals in determining employment status. But there are principles to apply and factors to weigh, which I set out below. In order to make it as readable for the parties as possible, I have placed case references in footnotes.

What are the terms of the contract?

95. One thing is clear from the statute: I must decide is what were the terms of the contract (the agreement) between the parties.

96. Under the law of contract, the starting point is that, where parties sign a written contract, then, if no additional verbal terms are alleged, those written terms are the whole of their agreement. It is not usually possible to imply additional terms

[1] Quashie v Stringfellow Restaurants Ltd [2013] IRLR 99 CA, para 6.

inconsistent with the writing. The only way this can be done is if the Tribunal finds that the written terms do not accurately reflect the true agreement.[2]

97. It has always been the case that written terms can incorporate others by reference if apt to do so. And the parties' practice may inform the interpretation of a written term, if it is ambiguous.

98. In the employment context, a party can seek to argue that a written term of contract does not represent the true agreement where it is a 'sham' *or* a matter of 'form'. For example, where a substitution clause is placed in a contract but no one seriously expects that a worker will seek to provide the substitute or where there is an express term denying any obligation on the worker to accept work but no one seriously expects the worker to reject any work offered. If so, that clause will not alter the true nature of the agreement between the parties.[3]

99. Where there is a dispute about whether the written terms really represent the true agreement, I can examine evidence of how the parties conducted themselves in practice and what their expectations of each other were in the context of the whole agreement. It may be open to me to draw an inference from this evidence that the parties' practice reflects their true obligations if it is inconsistent with the written terms.[4]

100. At times in his submissions, Mr Islam-Choudhury appeared to be saying I had to take a robust and realistic view of the nature of this work and the parties' practice and use that to decide what the terms of their agreement were. While it may be a subtle distinction, I do not consider the authorities allow me to go that far where there is a written contract. Usually the parties enter the contract before they actually do anything. It has been decided upon before they begin. The test is what the contract says. What the recent authorities provide is an opportunity to look at subsequent practice if the written agreement is claimed to be a sham or merely a matter of 'form' or otherwise not representing the real agreement.[5]

101. The reason employment cases have departed from the strictures of standard contract law to some extent is because the relative bargaining power of the parties can be unequal and employers can often dictate terms on standard, non-negotiable documents.[6] In such a situation, it is relevant but not conclusive that they have signed written terms and, after taking an approach (variously described as sensible, robust, realistic and worldly-wise[7]) I must determine what is the true agreement.[8]

Mutuality of Obligation

102. In order to create any contract there must be a minimum of mutual obligations. This simply means that there must be an obligation on each party to the other (like

[2] See the summary at Autoclenz Ltd v Belcher IRLR [2011] 820 SC para 20
[3] Lord Clarke in Autoclenz para 25-26, 29 approving Elias J in Kalwak, EAT.
[4] Lord Clarke in Autoclenz para 31 approving Smith LJ in Szilagyi, CA.
[5] As above at 5. I do not consider that Uber BV & ors v Aslam & ors A2/2017/3467 changes this position, although this issue may become a point on appeal given the dissenting judgment of Underhill LJ.
[6] Autoclenz para 35.
[7] An approach surely always taken by employment judges.
[8] Uber in CA.

the work/wage bargain). Once mutual obligations are identified, I must consider whether those entered into are consistent with a contract of employment.[9]

103. If the work consists of individual assignments, once a piece of work is offered and accepted, then mutual obligations may be owed for the duration of the assignment. A person might be employed for the assignment, even if it can be terminated at will. But it many cases, in order to establish a relevant period of continuous employment, the question will then become whether there is an overall contract existing between the individual assignments that can be designated an employment contract.[10] If there is no obligation to provide work and no obligation to accept it, this may prevent such an 'umbrella' contract from arising that may mean even if there is employment during the assignments there is no continuity of service.[11]

The Multi-Factorial Test

104. Once a contract has been identified, then various tests for its classification as a contract of employment have been proposed.[12] There is the 'control' test; the 'business integration' test; the 'economic reality' test and the 'multi-factorial' test.[13] It is this latter test that most Tribunals use to help determine whether the Claimant is an employee i.e. has a 'contract of service':

'A contract of service exists if these three conditions are fulfilled.

(i) The [employee] agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his [employer].

(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other [employer].

(iii) The other provisions of the contract are consistent with its being a contract of service.'[14]

The work/wage bargain

105. What if the purported employee is not paid by the purported employer? The employee does not need to be paid in wages but there is, in nearly all cases of employment, some remuneration coming from the purported employer. If not, that is a very strong indication against there being a contract of employment.

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[9] Quashie Elias LJ para 42 and 45. This, therefore, is part of Ready Mixed third limb, see below.
[10] This was explained in Cotswold Developments Construction Ltd v Williams [2006] IRLR 181. Carmichael v National Power [1999] ICR 1226 HL is a good example of why mutuality was the downfall of the casually engaged Claimants who were not able to establish this overall contract, because, between assignments, neither side owed any obligation to the other, either to provide work or to accept the offer of work.
[11] Carmichael p1230 G-H.
[12] Quashie para 6
[13] Ready Mixed Concrete (South East Ltd) v Minister of Pensions and National Insurance [1968] 2 QB 497 MacKenna J p515.
[14] Ready Mixed p516-17, MacKenna J, cited in Quashie.

> *It would be an unusual case where a contract of employment is found to exist when the worker takes the economic risk and is paid exclusively by third parties.*[15]

The matter might be different if the purported employer agreed to secure a payment by a third party.

Personal Service

106. It is necessary for the contract to require personal service by the individual. (This is true of an employee or a worker.)

107. Where there is a clause in the contract allowing the individual to send a substitute or deputy, then this can be inconsistent with a requirement of personal service.

108. A number of different types of substitution agreements have been considered in case law, culminating in the following Court of Appeal guidance:

108.1 an unfettered right to send a substitute is inconsistent with personal service;

108.2 if it is a conditional right to substitute then the nature and degree of those conditions is relevant, to what extent is it occasional or limited? For example:

108.2.1 a right to do so **only** when the individual cannot work, is consistent with personal performance;

108.2.2 a right limited **only by need to show** the substitute is **equally qualified** (whether or not that entails a procedure), is likely to be inconsistent with personal service;

108.2.3 a right to substitute **only with consent by another who has absolute and unqualified discretion to withhold** consent, will be consistent with personal performance.[16] (my emphasis)

Control

109. Control is a necessary but not always sufficient condition of employment. The higher the degree of control, the more consistent that is with employment, rather than someone being in business on their own account.

110. Where that control is put in place in order for the purported employer to comply

[15] Para 51 Quashie Elias LJ. A lap-dancer working at a club was paid in vouchers by the customers for whom she danced. They bought vouchers at the club. At the end of the night the club deducted commission and (potentially swingeing) fines from the value of the vouchers and paid the dancer the difference. It was possible after a hard night's work that she could end up with nothing. She bore the economic risk of the work. The Court of Appeal decided this was a powerful pointer against her contract with the club being one of employment. The dancer paid the club in order to be provided with the opportunity to earn money by dancing for clients. This consideration was not the kind that allowed the contract to be classified as one of employment.

[16] Pimlico Plumbers v Smith [2017] IRLR 323 CA Sir Terence Etherton MR, para 84.

with legislation, this does not make it any the less a feature of control.[17]

Other Factors

111. Other factors such as how integrated the worker is in the organisation and whether they provide their own equipment are relevant.

112. The label the parties apply to their relationship (or indeed HMRC) cannot fix its classification: individuals cannot contract out of statutory obligations. Yet older Court of Appeal authority states that where the matter is uncertain, the way in which the parties have chosen to categorise the relationship can be decisive.[18] It has never been clear to me how these two principles can be consistent with one another. Relying on observations in the Supreme Court, I am doubtful that an agreed label has much weight at all.[19]

Who is a worker?

113. Under section 230(3) a 'worker' is (a) an employee, or someone who has entered into or works under '*(b) any other* ***contract*** *… 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*. The shorthand for this second kind of worker is a '*limb (b)*' worker.

114. There is no single answer as to what is a limb (b) worker. It can be helpful to focus on: (1) whether a person markets their services to the world in general and, thus, has a client or customer; or (2) whether a self-employed worker is recruited to work as an integral part of the operations of another business.[20] But it seems to me that these two factors are not necessarily mutually exclusive given that a person can have different roles in the course of their working week. The degree of dependence might be a good marker[21] but this does not mean the same thing as 'subordination'. None of these questions are a replacement for the statutory wording, which requires an analysis of the contract and nature of the relationships created by it.[22]

115. There is good reason for the distinction between worker and other self-employed people. The law establishes that organisations have more obligations to workers than those in business on their own account. The more an organisation agrees with a self-employed person in a way that subjects her service to its control; and the more the organisation incorporates her within it; the more the self-employed person's self-determination is reduced by the terms of the contract. It follows, then, that in place of that self-determination, the organisation should take on some

[17] See for example, Uber, paras 91 and 96(1)(3)(6).
[18] Massey v Crown Life Insurance CA [1978] IRLR 31,32 per Lord Denning.
[19] Lord Neuberger in Secret Hotels 2 cited in Uber para 52.
[20] See Langstaff J in Cotswold Developments v Williams [2006] IRLR 181 para 53.
[21] James v Redcats (Brands) Ltd EAT [2007] IRLR 296 Elias J para 48.
[22] Bates Van Winkelhof v Clyde & Co LLP SC [2014] ICR 730, para 39. There, the Supreme Court approved the outcome in in Hospital Medical Group v Westwood [2013] ICR 415. Dr Westwood had three separate businesses, in one of which he was regarded as a worker. Judge Peter Clark in the EAT considered Dr Westwood to be a worker when providing the services of hair restoration surgeon to HMG because: he provided those services exclusively to HMG; he did not market that service to the world at large; and he was an integral part of its operations (para 38).

obligations towards her.

116. Mutuality of obligation may be capable of shedding light on the nature of the relationship. If services are supplied on an assignment-by-assignment basis, that may tend to show a degree of independence incompatible with worker status.[23]

Who is an Equality Act worker?

117. The parties agree that '*employee'* under section 83 EA in its extended sense, has the same meaning as a '*limb (b)*' worker under the ERA.

Other Cases Cited

118. I was not helped by Rogers v Craiglowan School UKEATS/0027/13/BI, Chatfield-Roberts v Philips [2018] UKEAT/0049/18/LA (employee cases), and Clarkson v Pensher Security Doors Ltd UKEAT/0107/09 (a worker case). These are all cases which turned on their own facts, different in material respects from those I have to consider, and which do not establish any new point of principle.

Application of facts and law to issues

VMT Work

119. I will first consider the work as a VMT.

Was there a contract to provide personal service?

120. The first question is whether there was a contract to provide personal service. As Ms Fudakowski pointed out, if there is no personal service then Mrs Scott is neither employee nor a worker.

121. This case is very near the dividing line.

122. The written agreement is not a sham or in form only: the true agreement was that Mrs Scott could provide a deputy. This right was used in practice by other VMTs engaged under the same contract. Mrs Scott herself had been a deputy. It was not unusual for a VMT to use a deputy when their absence required it.

123. This raises the question, then, whether the contractual right to send a deputy makes the agreement inconsistent with one to provide personal service.

124. First, the clause A9 of the written agreement limits the right to send a deputy '*when necessary*'. Thus, the agreed right to send a deputy was limited to those circumstances when it was necessary to do so, not just when the VMT felt like it. It might be argued that this conclusion is not supported by the terms and conditions agreed by parents: that the VMT could send a deputy for '*any or all*' of the lessons, but that was consistent with the fact that it was necessary to send a deputy sometimes for a long period, for example a performance season. I find, therefore, that the right to send a substitute was a limited one, and arguably therefore still consistent with personal performance.

[23] See Underhill LJ in Windle v SS for Justice [2016] ICR 721 CA, para 23.

125. Second, the fetter on who the deputy can be is limited only to their competence/qualification to teach: this includes the DBS check and safeguarding knowledge. According to the examples in Pimlico, if this were the *only* fetter, it would be inconsistent with personal service.

126. Third, although the written contract is silent on the requirement of approval by the School, the Handbook and terms and conditions for parents, state that approval was required. (It might be that the requirement of approval was incorporated by reference, but this was not argued before me and I make no finding upon it.) In any event, under the written agreement the School acted as agent for the VMT. In sending the terms and conditions to parents/guardians it was acting as agent for the VMT. Thus, for reasons of business efficacy, the agreement between the School and the VMT as to approval for substitutes would have to be the same as the agreement between the School/VMT and the parents/guardians. In my view therefore, there was an implied term in the contract between the parties that the right to send a substitute was subject to approval. While the documentary evidence does not entirely support that approval was requested in every circumstance, this does not undermine that it was a term of the contract that approval was required: the variations might indicate that the term was broken on occasion; or it may simply be that approval for that particular deputy had been given in the past. The fact that approval was not always sought is insufficient on its own to be inconsistent with my decision that the implied term existed.

127. The next question, according to the Pimlico examples, is the nature of this approval. In my judgment, the agreement was not that Mr Ebden had absolute unfettered discretion to approve (or not) a proposed deputy. His approval was limited to ensuring the competence, DBS checks and safeguarding training for the proposed substitute. This is because, in the Handbook, approval is required for those reasons. (Nor is there any evidence that Mr Ebden vetoed any particular deputy.) If those three matters were satisfied, I find that the School did not have an absolute and unqualified discretion to withhold consent.

128. This is therefore a limited right of approval and that, on its own, would be inconsistent with personal service.

129. The examples in Pimlico are not in the nature of the statute. They are guidelines. I have identified three limits on the right to send a substitute: that it is allowed only when necessary; that it is subject to limited approval and limited by competence. If the latter two were the only limits then the right to substitute might be inconsistent with personal service. But it is the first limit, that she could only send a deputy *when necessary*, that to me means the hallmark of this agreement was one whereby Mrs Scott contracted with the school to provide the service of teaching personally. This was a significant limit on her right to substitute for her own service.

130. I am supported in this conclusion by the fact that the individual VMTs are identified by name (and the academic letters behind those names) in the School's published information to parents. This would suggest that the School had selected particular individuals to teach instrumental lessons. (I have not taken into account the interview and pre-employment checks as, in my view, these were undertaken for the advertised role, which was not offered to Mrs Scott.)

Was there a Contract of Employment?

131. While the agreed issues suggest I should then ask only about control and mutuality of obligation, I will apply the multi-factorial test that includes also looking at whether the other terms of the contract are consistent with it being a contract of employment.

132. In my view, the main difficulty for Mrs Scott is that the terms of the contract as to remuneration were not consistent with it being one of employment. Mrs Scott took the economic risk in the agreement. She agreed with the School that she would teach pupils in exchange for their allocation to her and the use of the school facilities; but what the parties did not agree is that the School would pay her or secure that payment. Mrs Scott did not dispute on the facts that she took the financial risk of parents not paying and that she had lost out on occasion. That there was advance invoicing mitigated the risk, but not to nil. It was still very real. This was the effect of the terms of the written agreement she signed and also the practice.

133. This term as to payment by parents was not, therefore, artificial or a sham. Mrs Scott had a direct relationship with parents/guardians of the pupils she taught in ways other than invoicing them. My findings are that she liaised with them about timetables; discussed with them, before Mr Ebden, whether the pupil should continue lessons; and was prepared to teach the pupil privately when lessons at school were not convenient for the pupil. It was not only in relation to payment that they had contact. While the School set the rate that parents paid after consultation with VMTs, this did not turn the lesson fee into a fee paid by the School. The practice was that the School did not make up any losses suffered by VMTs when parents did not pay. It helped to chase fees when asked to do so but, even then, it reminded parents that it was the VMT who could bring a county court claim.

134. Benefits were exchanged between the School and Mrs Scott: the School received the benefit of teaching for its pupils; she received the benefit of teaching rooms, the opportunity for pupils to be allocated and the opportunity to teach at a better rate than in her private practice. As such there was contractual consideration. But this is insufficient to outweigh the lack of agreement as to a wage or other remuneration, which is a very strong indication against the contract being one of employment.[24]

135. I refer to the conclusions I reach below about the level of control by the School and a level of integration of Mrs Scott in it. There was undoubtedly some level of control and integration, and all other things being equal, they were consistent with employment.

136. The parties' agreement allowed Mrs Scott to teach pupils external to the School at its premises i.e. carry on her private practice at the School. While she chose not to 'use' this term, that does not suggest it was not genuine. Other VMTs did teach external pupils. This is also a factor that points away from the classification of the

[24] See the Ready-Mixed first factor and Quashie. Had I been the EJ in Quashie I might well have taken a different view as to the arrangements for payment on the facts of that case: the club paid the dancers directly and the fact that a dancer might not actually earned anything each night was mainly because of a system of penalties akin to the 'company shop' that indicated an high degree of control over her. Be that as it may, the principle applied and reaffirmed in Quashie in the Court of Appeal remains applicable.

contract as one of employment.

137. As to mutuality of obligations: the School had no obligation to allocate pupils to her and Mrs Scott had no obligation to take on pupils allocated. Thus, outside each teaching term in which pupils were allocated, there were no mutual obligations consistent with the written agreement being an umbrella contract of employment (see the Carmichael case).

138. In my judgment therefore the factors inconsistent with this contract being one of employment (she took the economic risk; no mutuality of obligation between pupils; she could carry on her private practice at the school) outweigh the factors pointing towards employment (some level of control, some level of integration, and a requirement of personal service).

139. I have not taken into account the differences in the employment contracts of other teaching staff and VMTs. Undoubtedly VMTs did not enjoy the benefits that other employed staff enjoyed (sick pay; holidays; pension contributions). It seems to me that is a neutral factor: it being perfectly possible for there to be two kinds of employees on different benefits within an organisation.

140. I therefore find that Mrs Scott was not an employee of the School in her capacity as a VMT.

Was Mrs Scott a worker (or employee in the extended sense)?

141. The question whether Mrs Scott, as VMT, was a worker is more difficult.

142. I have already found that the contract was for personal service.

143. Factors that would suggest she was not a limb b worker are that:

143.1 she marketed her services as a music teacher to the world at large and that she had a private practice in singing teaching externally from the School. This would suggest a degree of independence in carrying out that profession and that the School was merely another client of it;

143.2 the terms of the contract were such that she took the economic risk in the agreement would suggest a degree of independence, being in business on her own account;

143.3 under the contract she could choose when to work and when not to work; whether to accept a pupil; and when to stop teaching a particular pupil;

143.4 she had control over her work to the extent that she could teach any repertoire; use any exam board; decide upon whether to enter a pupil for an exam; decide when to meet parents; decide what to put in reports for parents;

143.5 she was not fully integrated into the school: she did not have access to all areas; she did not have the benefits of employed teachers (except for a free lunch); she was distinguished in the school list as a visiting music teacher rather than a member of the teaching staff.

144. The factors that tend to show the contract was one in which the School was not a client of a business that she ran:

144.1 the School held *itself* out as offering music tuition. The VMTs were identified in the music department information as providing part of the Department's 'offer'. They were included by name in lists of teaching staff, albeit separately. A realistic description of the arrangement was that the School offered parents the chance to receive tuition and engaged the VMTs to provide that offer;

144.2 it was a term of the agreement that Mrs Scott charged the advertised rate (set by the School for all VMTs). It was not open to her to negotiate her own rate with parents. Contrary to the written agreement this was not a 'recommended' rate;

144.3 under the contract, the school set a rate for late payment;

144.4 under the contract, the School allocated of pupils to Mrs Scott. It chose, for the most part, who those pupils were;

144.5 the contractual terms established some control over the way Mrs Scott operated: she was required to teach 30 minute lessons, according to a fortnightly rota and to avoid sixth formers missing academic lessons; she was required her to write progress reports; she had to comply with a strict absence and safeguarding procedure. That the latter was required by law is not relevant: it is still a feature of control.

144.6 the agreement included a requirement that she attend the AGM.

145. While, in practice, the School gave guidance to VMTs as to, for example, aural tests and parental reports, I consider this to be neutral, because I do not consider that Mrs Scott was contractually obliged to follow it.

146. I have applied these factors to the statutory test. In my judgment Mrs Scott wore two different hats: she was both a private singing teacher and, in her VMT work with the School, she was a worker.

146.1 The contract put limits on her independence when she was a VMT most importantly that she could not set her own fee and she had pupils allocated to her.

146.2 The contract established a level of control over her work with the school that reduced her independence: she could not choose lesson length and was limited in some ways as to the timetable she could arrange; she had to comply with strict absence and safeguarding procedures.

146.3 She was fairly well integrated into the School: listed as a member of staff; having an email address; using its equipment if she wished; she was insured by it.

146.4 The School offered to parents/guardians instrumental tuition as part of its music department: '*we offer*' (194.1). It provided that service, by using VMTs.

146.5 These four factors mean that Mrs Scott is more properly to be described as someone providing her services as part of the School's business, not independently from it. (I have in mind here, Winkelhof paragraph 25.)

146.6 The biggest factor against my conclusion is the lack of an agreement that the School pay a wage or remuneration. I do not consider that this is so strong a factor against her being a worker as employee. While it points to a level of independence, it is significantly lessened by her inability, within the terms of the contract, independently to negotiate the rate she could charge. The reality of the agreement was not that the School was acting as agent in this regard.

146.7 The other factor that might be said to be inconsistent with the status of worker is the lack of obligation to provide work and take work outside each pupil allocation. But here, bearing in mind that the 'pass mark is lower', the factors I have identified above pointing in the other direction are more weighty. The lack of mutual obligations between assignments points to self-employment but does not undermine that this is self-employment as a worker.

146.8 That Mrs Scott ran her own business/profession as a music teacher is a factor but not a weighty one. In my view the way she operated her business externally was different to the way she provided her services to the school. Not least she did not set her own rates. A person can market their services to the world at large, but still be for some of their working time a worker. The two concepts are not mutually exclusive. What matters here is my analysis of the contract Mrs Scott had with the School.

147. Overall, it seems to me that, an analysis of this contractual relationship is not that the School is, by virtue of the contract, a client or customer of Mrs Scott's business but that she is a worker of the School which provided, through its business using her services, the benefit of instrumental tuition to its pupils.

Ensemble work

148. I shall consider the same issues in relation to ensemble work. The contract to do this work was oral. It was not included in the written agreement above: Mrs Scott was not acting as a VMT while doing this work; nor was she charging parents/guardians directly for it.

Employee?

149. In my judgment, applying the multi-factorial test, Mrs Scott was not an employee in connection with this ensemble work:

149.1 while the school paid her directly, she invoiced the school suggesting that this was part of her profession as music teacher;

149.2 there was no mutuality of obligation between terms: she had no obligation to do the ensemble work if it was offered. This means there was umbrella contract of employment during the weeks she did not do this work.

149.3 once she agreed to do ensemble work, then there was a contract between the parties that for each weekly session, she was paid the rate set by the School. But given that she could obtain cover for a week and choose not to run the ensemble in a week when she was not available, it seems to me there was no mutual obligation that covered a term rather than a week. This is inconsistent with there being a contract of employment;

149.4 she was not subject to any direction or control that I have heard about so far as ensemble work was concerned. She organised the times of ensemble according to her availability. This suggests it was part of her business.

149.5 These factors outweigh that she was incorporated into the School while doing ensemble work and that it was only pupils of the School rather than anyone who could join the ensemble.

150. Was the status of the School that of client or customer of a profession (or business undertaking) carried out by Mrs Scott in connection with the ensemble work?

150.1 First, was the contract per week a contract to provide personal service. Probably: albeit that cover could be obtained. Cover was either Mr Ebden or from a teacher within the school. There is no evidence in this case that the agreement was that Mrs Scott could send anyone to do the work. Further the original advertisement identified that ensemble work would be offered to the right candidate. The School did not want just any teacher to do this work.

150.2 In this case, the factors in favour of her being a worker was that ensemble work was very much part of the School and music department 'offering', that only School pupils could take part, and that Mrs Scott was incorporated into the School business when she did this work. She took no economic risk here: it was hourly paid work.

150.3 Factors against this being a contract whereby she was a worker are that there was a minimum mutuality of obligation (she could effectively choose when and when not to do the work); that she invoiced the School as part of her business; that she marketed herself to the outside world as a music teacher. That there was little control as to how she did this work.

151. Overall, it seems to me the factors are finely balanced. Mrs Scott's activities were much less controlled than by the VMT contract. As an ensemble teacher she looked much more independent: doing the work according to her availability and invoicing by the hour. It seems to me that the contract between the parties was one whereby Mrs Scott agreed to provide her services to the School but that in this case it was the client of her profession/business of music teacher. I therefore find for this work she was not a limb (b) worker or an employee within the extended Equality Act meaning.

Other Ad Hoc work

152. In my judgment Mrs Scott was neither and employee nor a worker when she

performed the hourly ad hoc work of being involved in performances and chaperoning.

153. My reasoning is similar to ensemble work but the factors are more weighted against employment or worker status.

154. The limited mutuality of obligation that existed here it was inconsistent with a contract of employment because there was no obligation to offer or do the work. The work was ad hoc, as and when, and paid hourly.

155. Although I see some force in the School's argument that the contract here was not one of personal service: I disagree, in that chaperoning and performance involvement required personal attributes.

156. For the same reasons as for ensemble work, however, it seems to me the balance of factors was that Mrs Scott was not a limb (b) worker (or employee in the extended Equality Act sense) when doing this work: there was little or no control and, while the Claimant was integrated, the work was a series of ad hoc jobs that she invoiced through her external business. It seems to me that the School is properly to be regarded as client or customer of her external business/profession of music teacher in relation to this ad hoc work.

Full Hearing

157. I discussed with the parties Case Management Orders at the end of the hearing, and set those out in a separate order. It is to be hoped the parties will be able to agree which issues remain to be determined at a full hearing as a result of my decision.

Employment Judge Moor

Dated: 19 February 2019