Case Nos: 3304800/2018 to 3304801/2018
and
3304819/2018 to 3304820/2018

EMPLOYMENT TRIBUNALS

Claimants:		**Respondent:**
(1) Mr T Sturt	**v**	Rushmoor Borough Council
(2) Mr S Lacey		

PRELIMINARY HEARING

Heard at: Reading **On:** 1 March 2019

Before: Employment Judge Chudleigh (sitting alone)

Appearances
For the Claimant: In person
For the Respondent: Mr E Kemp of Counsel

JUDGMENT having been sent to the parties on **22 March 2019** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In claims presented on 17 and 19 March 2018, the Claimants made complaints of unfair dismissal, wrongful dismissal, the failure to make a redundancy payment, the failure to pay accrued holiday pay, and an unlawful deduction of wages. The matter was set down for a preliminary hearing to determine the Claimants' employment status.

2. The Claimants both gave evidence. On behalf of the Respondent, I heard from Estelle Rigby who is employed by the Respondent as a principal HR Officer and Kelly Chambers who is employed by the Respondent as Bereavement Service Manager. I made the following findings relating to the material facts.

3. Mr Sturt worked for the Respondent as a crematorium organist between 1 October 2005 and 1 January 2018. Mr Lacey worked for the Council as a crematorium organist between 4 September 1981 and 1 January 2018. Each Claimant worked set days every week. During the period when Mr

Sturt was employed, he worked Monday, Tuesday and Wednesday and Mr Lacey worked Thursday and Friday. They played the organ during the cremation services. The number of services that took place each day varied but could amount to as many as seven. If a family attended with their own organist, the Claimants would still be paid and they would be expected to assist the family's organist with operating the organ and other matters.

4. Each Friday, the cremation services for the following week were planned and the Claimants were told how many sessions they would be doing the next week.

5. The Claimants did not always work each of their regular shifts. They were entitled to indicate that they were unable to work those shifts. They always gave the Respondent reasonable notice of absence. The Claimants' absences generally occurred on the days they were not scheduled to work, but there were occasions when the Claimants did other work on their regular days.

6. On the days when the Claimants did not work for the Respondent and were not on holiday, they undertook other work for different organisations or people. They both played the organ at their churches during weddings and funerals and Mr Lacey advertised himself in the Yellow Pages as being a piano tuner. Mr Sturt advertised himself on his Linked In page as an independent music professional. Both were piano teachers at Eggars' School in Alton and Mr Lacey occasionally played the piano to accompany a music student during an exam.

7. If either Claimant was unable to work, they never sent a substitute and did not swap shifts between themselves. The process was that they would notify the Respondent who would then nominate a substitute. The substitute was often the other Claimant, but two other regular organists were called upon by the Respondent to play the organ during services.

8. I was shown a document which had been compiled for the purposes of the hearing which was extracted from the crematorium's diary. It ran from July 2014 until December 2017 and illustrated the days when the Claimants were not available and the organist who covered them. For the calendar year 2015, there were 20 days when Mr Sturt was not available and 17 days when Mr Lacey was not available. A proportion of those days were holiday, but not all.

9. It was common ground between the parties that the Claimants were required to perform services personally and were not entitled to send a substitute.

10. The claims were never given a formal contract of employment. On 6 October 2016, following a letter that the Respondent received from HMRC,

the Claimants were put on what the Respondent called the "casual register". From that point forward, deductions were made from pay for tax and national insurance. Both Claimants were invited to participate in the Respondent's pension scheme and they elected to do so. Accordingly, deductions were made from their pay for the purposes of pension.

11. The Claimants were paid £22 in respect of each crematorium service they attended. They submitted monthly invoices to the Bereavement Services Manager who in turn advised the Respondent how much the Claimants should be paid. Up until this time, the Claimants had worked on what was ostensibly a self-employed basis, submitting their own tax returns.

12. In November 2016, the Respondent drafted letters which it meant to send to the Claimants detailing the terms on which they were to be engaged as casual workers. The letters were not received by the Claimants. The letters made clear that the Claimants were entitled to choose whether to accept engagements which were offered to them. The draft letters also said that the Respondent was not obliged to offer the Claimants work and that they were not obliged to accept work.

13. When the Claimants attended work, they played the Respondent's organ and were required to play the music that was chosen by the families of the deceased.

14. Both Claimants were very respectful of their perceived obligations towards the Respondent. They both considered that their work with the Respondent was their primary job and they provided reliable service over the years.

Submissions of the parties

15. Mr Kemp, on behalf of the Respondent, put in written submissions which he supplemented orally. His submission was that the Claimants did not have employee status because the irreducible minimum of mutuality of obligation was absent. Both Claimants had the freedom to decline services. He also submitted that there was insufficient contractual control for an employment relationship because the Claimants were not required to give contractual notice, were not subject to the Respondent's disciplinary and grievance procedures, they had no access to e-learning modules and were not required to sign up to the Respondent's standards of behaviour. In addition, they did not receive sick pay.

16. Mr Kemp submitted that the Claimants were not workers because they were independent contractors and were not integrated into the Respondent's business. He relied on the case of Cotswolds Development Construction Limited v Williams [2006] IRLR 181 at paragraph 53 and on Pimlico Plumbers Limited v Smith [2018] ICR 1511 which he said endorsed the decision in Cotswolds Development at paragraph 44. The

Claimants actively marketed their services as independent persons and were not integral parts of the Respondent's organisation.

17. The Claimants took issue with Mr Kemp's submissions. They pointed out that their work was regular and clearly defined and that on the days that they were engaged, they were at work all day.

The law

18. "Employee" is defined in s. 230(1) ERA "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment". S.230(2) provides that a *"contract of employment"* means "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

19. "Worker" is defined in s. 230(3) ERA as follows:

"In this Act "worker" (except in the phrases "shop worker" and "betting 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 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;

and any reference to a worker's contract shall be construed accordingly."

20. Insofar as employee status was concerned, I had regard to the case of Ready Mixed Concrete v Minister of Pensions and National Insurance [1968] 2 QB 497 in which McKenna J stated:

> *"A contract of service exists if these three conditions are fulfilled-*
>
> *(1) The servant agrees that in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master;*
>
> *(2) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master;*
>
> *(3) The other provisions of the contract are consistent with its being a contract of service."*

21. Mutuality of obligation is as a necessary element of a contract of employment - Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612, CA, and Carmichael and another v National Power plc [1999] ICR 1226, HL.

22. This generally means that there must be an obligation on the employer to provide work, and a corresponding obligation on the employee to accept and undertake the work offered.

23. There is guidance on the dividing lines between employee and worker status and worker and independent contractor status in Cotswolds Development Construction Limited v Williams at paragraphs 61 and 53 respectively.

24. Para 53 provides:

> "*It is clear that the statute recognises that there will be workers who are not employees, but who do undertake to do work personally for another in circumstances in which that "other" is neither a client nor customer of theirs — and thus that the definition of who is a "client" or "customer" cannot depend upon the fact that the contract is being made with someone who provides personal services but not as an employee. The distinction is not that between employee and independent contractor. The paradigm case falling within the proviso to 2(b) is that of a person working within one of the established professions: solicitor and client, barrister and client, accountant, architect etc. The paradigm case of a customer and someone working in a business undertaking of his own will perhaps be that of the customer of a shop and the shopowner, or of the customer of a tradesman such as a domestic plumber, cabinet maker or portrait painter who commercially markets services as such. Thus viewed, it seems plain that a focus upon 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*"

25. In Pimlico Plumbers Limited v Smith, the Supreme Court gave further guidance on this issue in paras 35-49.

Conclusions

26. It was common ground between the parties that the Claimants were required to provide personal service. Mr Kemp's argument against worker status was that the Claimants were in business on their own accounts and were not integrated into the Respondent organisation. I did not accept that submission.

27. The work that the Claimants did for the Respondent were their main jobs. They did do other work, both played the organ in their respective churches on Sundays, both worked as piano teachers. In addition, Mr Lacey undertook work tuning pianos. However, that work was usually done outside and around their main jobs with the Respondent.

28. There were occasions when the Claimants took time off work with the Respondent in order to undertake other work, but those times were few and far between. Moreover, the Claimants were integrated into the Respondent organisation, they had regular days when they played the organ and did so over a long period of time. They were not independent tradesmen and the Respondent was not a client or a customer. They worked for the Respondent regularly and were integrated into the Respondent's business.

29. In the present case, the Claimants provided their own work and skill in return for remuneration. Furthermore, they were subjected to a reasonable degree of control by the Respondent. They adhered to the Respondent's timetable, played the music they were directed to play by the Respondent, and played the Respondent's organ. Those matters pointed to there being a contract of employment.

30. Furthermore, there was no right of substitution. If the Claimants were unable to work their shifts, they were required to notify the Respondent of that fact and the Respondent organised the substitute organist.

31. The difficult issue for the Claimants in this case was the question of mutuality of obligation. The authorities suggest that mutuality of obligation is an irreducible minimum necessary to create a contract of service.

32. In practice, the Claimants worked very regularly for the Respondent on set days per week. However, they were entitled to turn down work and periodically did so, to take holiday but also to undertake work elsewhere.

33. The Respondent never indicated to them at any time during the period when they worked as crematorium organists that they would not be allowed to take time off to undertake work elsewhere. I find as a fact that the Claimants had the right not to undertake shifts offered and equally, the Respondent was not obliged to offer the Claimants work. Although as a matter of habit, the Claimants regularly worked the same days each week, that was only because it was convenient, and not because of any legal obligation. In the circumstances, my finding was that in the absence of mutuality obligation, the Claimants were not employees even though there were many aspects of the relationship which did point towards employee status.

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Employment Judge Chudleigh

Date: 13 May 2019

Reasons sent to the parties on

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For the Tribunal office

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