EMPLOYMENT TRIBUNALS

Claimant: Mr I Sagna

Respondent: Drumroots Ltd

HELD AT: Manchester **ON:** 21 May 2019 and 4 June 2019 (in chambers)

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: Dr A Greenhill, lay representative
Respondent: Mr D Jones, counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was not an employee of the respondent within the definition in s.83(2) of the Equality Act 2010 either throughout the relevant period of 2006 to June 2018, or during the course of any particular assignment within that period.

2. The tribunal, therefore, does not have jurisdiction to consider the claims of race discrimination and these are dismissed.

REASONS

Issues

1. The claimant claims race discrimination.

2. This was a preliminary hearing listed to consider whether the claimant was, at all material times, in employment with the respondent within the meaning of section 83 (2) of the Equality Act 2010 (EQA).

3. I identified at the start of the hearing, and informed the parties, that I would be considering whether there was a "umbrella" employment relationship covering the whole period during which the claimant worked with the respondent and, if not, alternatively, whether the claimant was an employee during the course of particular assignments.

This hearing

4. The claimant is originally from Senegal. His first language is Wolof but, as an interpreter in that language could not be obtained for this hearing, he requested an interpreter in the French language, which he also speaks. He gave his evidence in French, through an interpreter, and the interpreter interpreted the proceedings for the claimant. The claimant had prepared a witness statement in English. There was no translation of the statement in Wolof or French. The claimant informed me that the statement had been prepared by him telling his representative about relevant matters and her recording these in English. The claimant told me that, although he speaks and understands spoken English, he does not read and write English much. He told me that his representative read the witness statement to him in English and he understood this.

5. I heard evidence from the claimant and, for the respondent, from Mr J Riley, director, and from Ms A Preece, former director/secretary.

Facts

6. The respondent is a company limited by guarantee, incorporated on 17 January 2006. The objects for which it was established include using music as a medium to inspire, educate, heal and entertain through performances and facilitating workshops and to support and encourage the growth of the cooperative movement, promote cooperative principles, enterprises and activities and to encourage equality and democratic control over the workplace.

7. The Articles of Association of the respondent company define "employees" in those articles as meaning "anyone working 20 hours a week or more for the company or involved all or part of the core activities: performers, workshop facilitators, instrument skinning & supply service." The Articles provide that only employees may be members of the co-op.

8. There were six original members of the respondent company. These did not include the claimant. Four of the original members became directors on incorporation of the company. One became secretary. The sixth member became secretary at a later date. One of the founding directors and members of the company, James Brown, died in 2007. There have been some changes in officers over the years. There are no officers who are not also members.

9. James Riley is the only salaried employee of the company.

10. The original directors of the company included some of the members of an African drumming band, Tanante.

11. The claimant, who is originally from Senegal, is a talented West African dancer, drummer and storyteller.

12. The claimant met James Brown and James Riley in 2005 at a drumming workshop in Manchester.

13. The claimant says that he participated in founding meetings of the respondent. I accept that he was involved in discussions about the respondent's proposed activities around the time the company was being established. However, he was never a director of the respondent company and was not a member of the respondent in the company law sense. The minutes of AGMs which I have been shown make it clear that the claimant was not attending those meetings.

14. I accept the claimant's evidence that he was assured by James Brown that he was a valued part of the respondent and that he would always be part of the cooperative and his contributions would contribute to the long-term success of the cooperative. The close relationship between the claimant, James Brown and the respondent is evidenced by the inclusion of the claimant's photograph, together with photos of others, with the description "Drum Roots and Tanante" in the service sheet for the celebration of the life of James Brown.

15. However, on the basis of the claimant's oral evidence, I find that he was told by James Brown that he was not going to be the same as those who became members of the company in the legal sense; he would become self-employed as a professional artist and invoice the company for work done.

16. In the period between 2006 and June 2018, the claimant worked periodically with the respondent, predominantly providing African dancing workshops and performances at schools but also performing in concerts and other events with drummers from the respondent. Typically, a performance or workshop would last for anything between one hour to a full day. The respondent gave the claimant first refusal of dancing opportunities due to the quality of his work and the friendly relationship between them. I find that the claimant was the dancer who performed most often with the respondent in the period between 2006 and June 2018. However, the claimant accepts that he was free to refuse work offered and did so, on occasion, when he was not available. The respondent had alternative dancers it could call on. The claimant accepted that there were occasions when the respondent replaced the claimant with another dancer if he was not available.

17. Mr Riley gave evidence that, on an occasion in July 2014, the respondent allowed the claimant to send his cousin in his place when he could not attend a performance. The claimant said that he performed with his cousin, rather than his cousin performing in his place; he had given the respondent his cousin's details when they asked him if he knew anyone else who could perform since they needed more than one dancer. I have no documentary evidence that assists me to determine whether the claimant's cousin appeared instead of or as well as the claimant. Given the passage of time, it may well be that Mr Riley has forgotten the circumstances in which the claimant's cousin came to perform with the respondent. The burden of

proof is on the respondent to establish facts on which they rely. The respondent has not satisfied me that, on this occasion, the claimant substituted another dancer for him.

18. When the claimant's mother died, he did not perform in a drumming concert which had been arranged. The concert went ahead without him. I heard no evidence that another dancer was found to perform at that concert.

19. The claimant was not paid if work was cancelled.

20. I find that, when there was a possibility of work, the respondent would ask the claimant whether he was available on the particular date, telling him what the work would be and what amount the client would pay. The claimant was free to accept or refuse the work. The possibility of work for the claimant sometimes arose because, when the respondent was being booked for a drumming workshop, they would ask the client whether they would like a dancer for an additional payment. In most cases, the respondent would pay the claimant the full amount which the client had agreed for a dancer. Sometimes, on bigger jobs, where there was a lot of organisation, an administration fee was taken by the respondent but the claimant got paid the amount he had agreed he would work for.

21. The claimant gave evidence that sometimes, as a promotion, the respondent and the claimant would perform at an event without charge. The claimant was not paid for these events. Mr Riley only recalls one event they performed at without a fee, which was a charity event. It is not necessary for me to find on how many occasions the claimant performed with the respondent without payment of a fee. At most, I find this was occasional and I find that the claimant was free to agree or refuse to perform at these events.

22. The claimant would sometimes be told by the respondent to perform in West African costume. Sometimes, the claimant already knew that he would be bringing his costume. The claimant supplied his own traditional costume and any props that might be required. Within the bounds of what the client had requested, the claimant decided how to perform the work.

23. The claimant was told when and where he was to perform.

24. The claimant was not informed by the respondent that there were any particular standards of behaviour which he was required to observe. The claimant did not see Mr Riley as his boss.

25. In addition to the work he did for the respondent, the claimant did work for other clients. For example, the claimant performed for Her Majesty the Queen at the opening ceremony of a hospital in Manchester and at the London 2012 Olympics, as part of a group formed for that purpose. The respondent was not involved in arranging either of those engagements. I accept the claimant's evidence that he did more work for the respondent than any other client.

26. The claimant was registered as self-employed with HMRC. He invoiced the respondent for work he did for them. Initially, his wife prepared invoices for him. When the claimant was no longer with his wife, James Riley prepared invoices for

the claimant for a long time, not only for work the claimant did for the respondent but also for work the claimant did for other people. The claimant told Mr Riley how much he was charging when Mr Riley was preparing an invoice for work for a client other than the respondent. As previously noted, the claimant does not read and write much in English. I find that Mr Riley prepared invoices for the claimant to assist him, because the claimant found it difficult to do this himself. This was not the respondent dictating terms or adjusting invoices; the invoices were prepared for the amounts for which the claimant had agreed to do the work.

27. The claimant did not give evidence in his witness statement about how much work he did for the respondent. His representative, based, she said, on entries in his diaries, put it to Mr Riley that the claimant performed at 520 events for the respondent in the period 2006 to 2018. Mr Riley had not seen the entries in the claimant's diary so was unable to comment on that. He gave evidence that he had counted between 14 and 30 events each year at which the claimant performed by arrangement with the respondent. He said this was 2 to 3 in a year, initially, with a peak of 30 in a year. On the evidence before me, I am unable to make a finding as to exactly how many events the claimant worked at for the respondent. However, even on the figures put by the claimant's representative, this averaged at less than one per week.

28. Some, but not all, of the claimant's bank statements for the relevant period were included in the hearing bundle. For most of the months for which a statement was provided, the claimant received only one payment from the respondent. In some months, the claimant received more than one payment. The lowest total payment for a month for which a statement was provided was £75 and the highest was £450.

29. On the basis of the claimant's witness statement, the claimant's earnings from any source never exceeded £6000 in any tax year in the relevant period. HMRC tax calculations included in the bundle indicate that the claimant's profit from self-employment in the tax year 2009/2010 was £1,652 and in 2010/2011 was £4,765. Correspondence about tax credits awards show that, for the tax year 2012/2013, the claimant estimated his income from self-employment to be £3536 and for the tax year 2015/2016, the claimant's income from self-employment was £2080 and that the claimant had no other income in these tax years.

30. The claimant's tax returns were done for him by a friend.

31. In addition to workshops and performances, the claimant ran a weekly dance class at Union Chapel in Fallowfield, with which the respondent provided assistance. The claimant received the payments of £5 per class from the adult students and from this paid the rent for the premises. The respondent assisted the claimant by promoting the classes, together with its own drumming class, and providing, free of charge, drumming accompaniment.

32. The claimant's image was often used on publicity material for the respondent until after the claimant alleged, in the summer of 2018, that his intellectual property rights may have been breached by the use of his personal image. The claimant was often described in publicity material as a guest performer.

33. The claimant's photo and a description of him appeared on the respondent's website until 2017 in a section entitled "Drumroots Members". He was described as having become a Tanante band member and that he "worked alongside Drumroots." The description also states: "We have performed and taught together in many concert venues, festivals and education establishments across the UK, with Sens developing a special bond and working relationship with Tanante". Mr Riley was unable to explain why the claimant was the only non-member listed on the website, but said it was something that one of the directors had suggested as a good idea.

Submissions

34. Mr Jones, for the respondent, had prepared a written skeleton argument in advance of the hearing, pursuant to a case management order. Unfortunately, the skeleton argument predominantly addressed the issue of whether the claimant was an employee as defined in the Employment Rights Act 1996, rather than whether the claimant was an employee as defined in the Equality Act 2010. Mr Jones, who was instructed at a late stage, informed me that he had not been provided with a copy of the pleadings at the time he prepared the skeleton argument. This skeleton argument was, therefore, of limited assistance.

35. Dr Greenhill also prepared a written skeleton argument.

36. Both representatives made brief oral submissions to enable the submissions to be made within the one day which had been allocated for the hearing.

37. Mr Jones referred to the decision of the Supreme Court in *Pimlico Plumbers Ltd v Smith [2018] UKSC 29* and to the decision of the Court of Appeal in *Secretary of State for Justice v Windle and Arada [2016] EWCA Civ 459* as containing the relevant legal principles to apply, without, no doubt due to lack of time, taking me to any specific passages in these decisions.

38. In summary, Mr Jones submitted that the claimant was not an employee within the sense in the Equality Act 2010. He referred to lack of control by the respondent over what the claimant did. The claimant was free to refuse work and did so. The claimant was registered as self-employed and was responsible for his own tax. The relationship lacked the necessary obligations of personal service, mutuality of obligation and control in relation to the overall relationship and each individual assignment.

39. Dr Greenhill, for the claimant, submitted, in summary, that the claimant met the test for a "worker" in the *Pimlico Plumbers* case, so was an employee for the Equality Act 2010. She referred to the definition of "employees" in the respondent's Articles of Association, submitting that the claimant came within that definition since he was involved in the core activities of the company, as defined. She referred to the claimant being publicly named as a member of the respondent company. She submitted that there was an umbrella contract. She said work was carried out regularly. The claimant was under an obligation to work for the respondent because of his specialist skills and knowledge. The claimant worked personally for the respondent. The respondent found substitutes if necessary. The respondent had control over the way workshops were run. The respondent controlled the attire the claimant could wear. The respondent had control of payments and services.

The Law

40. "Employment" for the purposes of the Equality Act 2010 (EQA) is defined in section 83(2)(a) as follows: "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work."

41. The definition of "worker" in s.230(3) Employment Rights Act 1996 has been equated by the Supreme Court with that of "employment" in s.83(2)(a) EQA: *Bates van Winkelhof v Clyde & Co LLP [2014] UKSC32.* Case law about worker status is, therefore, relevant to the test for employment in the EQA.

42. In cases where there is no contract of employment or apprenticeship, to be an employee in the EQA sense (which is referred to in many of the authorities as employment in the extended sense), a person must, in accordance with the words of s.83(2)(a) EQA, be employed under "a contract personally to do work."

43. The equation of the s.83(2)(a) EQA test with that of a "worker" as defined in s.230(3)(b) ERA, however, imports a further element in deciding whether the claimant was an EQA employee: was the respondent's status by virtue of the contract for the particular assignment that of a client or customer of a profession or business undertaking carried on by the claimant? If it was, then the claimant was not a worker in the ERA sense or, because of the equation of the two tests, an employee in the EQA sense.

44. Lord Clark in *Hashwani v Jivraj [2011] UKSC 40,* identified, at paragraph 34, the question in determining whether an arbitrator was a worker as being:

> "…whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services. Those are broad questions which depend upon the circumstances of the particular case. They depend upon a detailed consideration of the relationship between the parties…The answer will depend upon an analysis of the substance of the matter having regard to all the circumstances of the case."

45. Lady Hale, in *Percy v Board of National Mission of the Church of Scotland [2005] UKHL 73,* observed, in a case where a former minister of the Church of Scotland was found to be a worker so entitled to present a claim of unlawful sex discrimination: "[t]he fact that the worker has very considerable freedom and independence in how she performs the duties of her office does not take her outside the definition."

46. In *Bates van Winkelhof v Clyde & Co LLP [2014] UKSC32,* Lady Hale warned against treating the presence or absence of "subordination" as the infallible touchstone for distinguishing between the two kinds of self-employed worker under section 230(3) ERA ((1) 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; and (2) self-employed people who provide their services

as part of a profession or business undertaking carried on by someone else): paragraph 39.

47. The Court of Appeal in *Windle v Secretary of State for Justice [2016] ICR 721,* restored a decision of the employment tribunal that professional interpreters who worked for Her Majesty's Courts and Tribunals Service (HMCTS) on a case by case basis (as well as working for other institutions) were not employees within the meaning of EQA and, therefore, could not bring complaints of race discrimination against the Secretary of State.

48. Underhill LJ, giving the decision of the Court, rejected a submission on behalf of the claimants that the absence of mutuality of obligation between engagements can add nothing to the enquiry as to whether the claimant was acting "under direction" or in a "subordinate" position, *while at work*. He wrote, at paragraph 23:

> "I do not accept that submission. 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."

49. He wrote further, in paragraph 24:

> "…The factors relevant in assessing whether a claimant is employed under a contract of service are not essentially different from those relevant in assessing whether he or she is an employee in the extended sense, though (if I may borrow the language of my own judgment in *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667: see para. 17 (5), at p. 678H), in considering the latter question the boundary is pushed further in the putative employee's favour – or, to put it another way, the passmark is lower….."

50. The Supreme Court in *Pimlico Plumbers* held that the tribunal legitimately found that there was an umbrella contract between Mr Smith and Pimlico. The Supreme Court in *Pimlico* therefore found it unnecessary to consider the relevance to worker status of a finding that contractual obligations subsisted only during assignments (paragraph 41). They referred to *Windle v Secretary of State for Justice [2016] ICR 721* as the leading authority in that respect, writing that Underhill LJ suggested at paragraph 23 "that a person's lack of contractual obligation between assignments might indicate a lack of subordination consistent with the other party being no more than his client or customer." Lord Wilson commented that the submissions made on behalf of Mr Smith in *Pimlico* that, on the contrary, it might indicate a greater degree of subordination to that other party must await appraisal on another occasion.

Conclusions

51. As Mr Jones noted in his oral submissions, it was common ground between the parties that there was a longstanding relationship between the claimant and the respondent.

52. Where the parties were at odds was as to the legal categorisation of that relationship. The respondent considered the claimant a talented and valued associate but one who was not an employee as defined in the Equality Act 2010 (which equates, under current case law, with the test for a "worker" under the Employment Rights Act 1996). The claimant has come to the view that he was an employee in that sense, perhaps following publicity about "gig economy" cases, where claimants were held to be workers, some details of which were included in the hearing bundle of documents and referred to in the skeleton argument prepared by the claimant's representative.

53. The fact that the claimant, when doing work for the respondent, was engaged in some of the core activities of the respondent, as set out in their Articles of Association, and, therefore, would fall within the definition of "employees" for the purpose of the Articles of Association does not answer the question as to whether the claimant was an "employee" within the definition in s.83(2) EQA. To answer that question, I must apply the legal test, as interpreted in authorities which bind me, to the facts I have found.

54. As I explained to the parties at the start of the hearing, this involves me considering whether there was a "umbrella" employment relationship, in the EQA sense, covering the whole period during which the claimant worked with the respondent and, if not, alternatively, whether the claimant was an employee, in the EQA sense, during the course of particular assignments.

55. I conclude that there was no "umbrella" contract in this case. There were no contractual obligations at all between the parties between assignments. In particular, there was no obligation on the claimant to accept work or on the respondent to offer work. The claimant could, and did, refuse work. Although, in practice, the respondent gave the claimant first refusal of work, I conclude there was no contractual obligation on them to do so. They offered the claimant the work because the claimant was very good at what he did and because of their longstanding friendly relationship. I conclude that the claimant was not an employee within the EQA definition between assignments.

56. Next, I must consider whether the claimant was an employee of the respondent in the EQA sense during the course of an assignment.

57. Once the claimant had agreed to do a piece of work for the respondent, I conclude there was a contractual agreement that he would do that work, himself, for the fee agreed. The claimant was not free to send anyone he chose to do the work in his place; the respondent contracted with him because of his particular skills and expertise. If the claimant, for whatever reason, became unable to do the job, the respondent would, if possible, find someone else from their contacts to do the work. When the claimant's mother died, the drumming concert went ahead without the claimant; the claimant did not find a substitute and I heard no evidence that the

respondent found anyone else to perform in the claimant's place on that occasion. The respondent did not satisfy me, on the evidence, that the claimant had substituted his cousin for himself on one occasion; the claimant said he had performed alongside his cousin. I conclude that the necessary obligation of personal performance existed during the course of each assignment.

58. Because of the equation of the s.83(2)(a) EQA test with that of a "worker" as defined in s.230(3)(b) ERA, I must consider a further question to decide whether the claimant was an EQA employee: was the respondent's status by virtue of the contract for the particular assignment that of a client or customer of a profession or business undertaking carried on by the claimant? If it was, then the claimant was not a worker in the ERA sense or, because of the equation of the two tests, an employee in the EQA sense.

59. I must consider all relevant circumstances in answering this question.

Factors which may suggest the respondent was a client or customer of a profession or business undertaking carried on by the claimant

60. These include the following.

61. The claimant was a professional performer who carried out work for the respondent and other clients. He also ran a weekly dance class in his own right, for which he received payment directly by the students, although he was assisted with the class by the respondent.

62. There was no mutuality of obligation between the claimant and the respondent between assignments. In accordance with the Court of Appeal judgment in *Windle,* this 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.

63. The assignments for the respondent were only occasional and not regular. On the evidence before me, I could not make any definite finding on the number of assignments carried out each year by the claimant. The respondent put this at 14-30 per annum. Even on the higher figures put by the claimant's representative, this averaged at less than one per week. The very low income from any source indicated on the claimant's tax calculations and tax credit statements and the selected bank statements suggest that the claimant's payments from the respondent (which were not his only income) were very low. This very low income from the respondent is further confirmation that the claimant's assignments for the respondent were only occasional, rather than regular.

64. I consider that the limited number of engagements the claimant had with the respondent and the range of other work he did which was not for the respondent could point towards the respondent being a client or customer of a business undertaking carried on by the claimant, rather than towards him being an employee of the respondent in the extended sense.

65. There were no rules imposed by the respondent on the claimant as to his conduct.

66. The claimant was treated as self-employed by HMRC and invoiced the respondent for his services. I recognise that this is in no way determinative as to whether the claimant is an employee within the extended sense, but it is a factor which may be taken into account.

67. The claimant generally had freedom to wear what he considered appropriate and to use such props as he considered appropriate, although the respondent would sometimes tell him to wear traditional West African dress. The claimant provided costumes and props himself. This was a different situation to the requirement on Mr Smith to wear a branded Pimlico uniform.

68. Within the bounds of what had been requested by the client, the claimant decided how to perform the work.

69. I note, however, from the comments of Lady Hale, in *Percy v Board of National Mission of the Church of Scotland [2005] UKHL 73,* that the fact that a worker has very considerable freedom and independence in how they perform their duties may not take them outside the definition of employment in the extended sense.

Factors which may point towards the claimant being an employee in the extended sense during assignments

70. These include the following.

71. The claimant did more work for the respondent than any other client.

72. Although there was no contractual relationship between assignments and no mutuality of obligation between assignments, there was an ongoing close relationship, evidenced by the use of the claimant's image in promotional material for the respondent and the inclusion of the claimant in the "members" section of the respondent's website until 2017.

73. There was an element of control over what the claimant did. He was told when and where he was to do the work. The respondent sometimes told him to bring his West African costume.

Overall conclusion as to whether the respondent was a client or customer of a profession or business undertaking carried on by the claimant

74. On balance, I conclude that there are more factors that point towards the respondent being a client or customer of the claimant's business as a professional performer than away from this. Although there was a level of control, this was very low: it amounted to no more than would be expected for any performer booked by a client: where and when to attend and, sometimes, what costume to wear. The fact that the claimant did more work for the respondent than any other client and the close relationship between the claimant and the respondent do not outweigh the occasional nature of the work for the respondent and the lack of mutuality of obligation between assignments, pointing towards independence of the claimant as a performer in business on his own account.

75. I conclude that the claimant was not an employee of the respondent during the course of any assignment.

Summary of conclusions

76. I have concluded that the claimant was not an employee within the EQA definition either throughout the relevant period (there being no umbrella contract) or during the course of individual assignments (because the respondent was a client of the claimant's profession as a performer).

77. Because I have concluded that the claimant was not an employee within the EQA definition, the tribunal does not have jurisdiction to consider his complaints of race discrimination and these are dismissed. This brings these tribunal proceedings to an end.

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Employment Judge Slater

Date: 4 June 2019

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

10 June 2019

FOR THE TRIBUNAL OFFICE