EMPLOYMENT TRIBUNALS

Claimant: Mr M Robinson

Respondents: The Management Committee of Bolton Metro Swimming Stars & Others

HELD AT: Manchester **ON:** 9-11 April 2019

BEFORE: Employment Judge Warren

REPRESENTATION:

Claimant: Mr Quickfall, Counsel
Respondents: Mr J Jenkins, Counsel

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The claimant was a worker. The claim of unfair dismissal is thus dismissed as he was not a qualifying employee.

2. The case is now listed for a final hearing on the remaining issues.

REASONS

1. Reasons were given orally at the Hearing, and written Reasons have been requested by the claimant.

Background and Law

2. This is a preliminary hearing to decide the question of employment status for the claimant, ahead of a listed hearing for claims of unfair dismissal, breach of contract and a wages claim.

3. The respondent denies that the claimant meets the description of an employee under section 230 (1) Employment Rights Act 1996, which defines an employee as 'some who works under a contract of employment' and further asserts that he was not a worker either.

4. There have been a substantial number of cases in which the higher courts have attempted to unravel the general into the specific on this issue. In particular I have been referred to the following cases by the parties:-

- *James v Redcats Brands Ltd [2007 IRLR 296* – a power to send a substitute only where a worker is unable to do the work is still consistent with personal performance.

- *Autoclenz Ltd v Belcher [2011] UKSC 41* – The Tribunal should be concerned not just with the wording of the contract but with the reality of the arrangements between the parties.

- *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2QB 497* – 'control refers to controlling the manner in which the work was carried out.

- *Pimlico Plumbers Ltd & another v Smith [2018] UKSC 29* sets out the approach to be taken in looking at the issue of personal service:- an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally.

- *Secretary of State for Justice v Windle and Ararda [2016] EWCA Civ 459* – mutuality of obligation was necessary for both workers and employees.

- *Cotswold Developments Construction Limited v Williams [2006] IRLR 181* asks whether the purported worker actively markets his services to the world in general, or whether he is recruited by the principal to work as an integral part of the principal's operations.

- *Hashwani v Jivraj [2011] UKSC 40* – there is a distinction between someone performing services for and under the direction of another person in return for remuneration, and those who are independent providers of a service not in a relationship of subordination with the person receiving the service.

- *White v Troutbeck SA [2013] IRLR 286 EAT* The question is where the ultimate right of control resides.

- *Stevenson Jordan and Harrison Ltd v MacDonald and Evans [1952] 1 TLR 101 CA.* Is the work part of the business or done for the business but not integrated?

- *Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173* – is the person who has engaged himself to perform these services performing them a a person in business on his own account – the economic reality.

- *Hall (Inspector of Taxes) v Lorimer [1994] IRLR 171 CA* The object of the exercise is to paint a picture from the accumulation of detail.

5. What is clear is that the questions to be answered in any case are fact specific to that case and involve the application of, by now, very well defined legal principles.

The Evidence

6. I heard from the claimant in regard to his own case, and from Mr Wightman-Love (Vice chair), Mr M Batty (Chair), Mr Carter (Treasurer) and Mr Harrop (ex secretary) in their own regard as respondents, and also on behalf of the management committee of Bolton Metro Swimming Stars Club (the Club). I found all of the respondent witnesses to be generally doing their best to assist the Tribunal. The claimant answered the respondent's questions hesitantly, and often failed to answer the question asked. When reminded of what was required he did answer, but some of his answers were not credible for example he tried to suggest he believed he was an employee before he signed the last contract, so why sign it when it was explicitly a contract which stated he was self employed? Further, at around the same time he referred to himself as a contractor in correspondence with the club, directly contradicting his own evidence.

7. Where evidence differed, it seemed to me generally to be a matter of different interpretations of the same circumstances. The respondent witnesses were unable to give a full picture of the time of the claimant's engagement with the Club as their tenures did not cover the entire period, and in the case of Mr Batty and Mr Wightman – Love were relatively short. The Treasurer's reluctance to answer questions outside of his time as Treasurer but based on club documents did not reflect well on him and did not assist the Tribunal.

8. There was an agreed bundle of documents extending to in excess of 400 pages. Page references herein refer to that bundle.

9. I have applied the evidential test, the balance of probabilities.

The Facts

10. The named respondents are, or have been, part of a committee of volunteers which organises the Club, a not for profit organisation with no legal status, which provides coaching to swimmers at different levels. They utilise local swimming pools at times offered to them.

11. The claimant's first engagement with the respondents was in October 2014 when he worked as an assistant Coach. His first contract specified that he was engaged on a self employed basis. I heard very little evidence about that contract, and his working conditions then. What is clear however is that he was recruited because of his skills, knowledge and experience having coached to Olympic and Commonwealth standards.

12. A year later, in July 2015 the claimant became Head Coach and signed a further contract (p 63 A - L). This recognised an increased administrative and

supervisory role for the claimant and specified that he should provide 18 hours of poolside coaching and 6 hours of other duties, supervision, evaluation of swimmers and other coaches, training and development, and administrative duties. He was expected to provide this service for 48 weeks a year, for a fee of £22,000 per annum paid over 12 equal instalments, on submission of an invoice, up to 30 days in arrears. He was to attend up to 26 days of swimming events, and would be paid his expenses for those events by the Club. There was no mention of him being paid any other expenses e.g. to attend work generally, or for his telephone bill.

13. There is a clear ability to substitute specified within the agreement, provided that the substitute meets certain specified qualifications. Everyone agreed that the claimant could only substitute for the 18 hours of poolside coaching.

14. A year later the claimant was presented with a third contract. This was in similar terms to the previous contract, but included additional duties. The claimant was asked to sign it and he asked for time to consider it – he took 2 months. He consulted his representative body. He then signed it without demur.

15. This again cited him as self employed in unequivocal terms and set out specifics of how he was to undertake his administrative duties (p.150). In this his paid administration time was reduced to 5 hours a week and his poolside time increased to 19 hours. He was given clear responsibilities for reporting to the Club committee. (p143) lists matters which suggest he was to be self employed – including an express declaration to that effect.

16. Over the previous few months there had been issues with the claimant's performance in relation to the administrative side of his work. He had been to a meeting with the then chairman of the Club, following which he emailed describing himself as a contractor and said:- 'to terminate my contract will be a breach of contract'.

17. The new contract addressed those issues, and required a more detailed level of answerability to the Club including monthly written reports and specific ways of communicating with the parents of swimmers.

18. I turn now to how the contract operated in reality.

19. The claimant received a fee each month based on an invoice he supplied. At one time the Club received a grant from which he could be paid in part. He was asked to submit his invoices to reflect this, and he did so.

20. The claimant prevaricated over the time table issues and did himself no favours in his evidence. The Club provided the pool times (which were simply a compilation of dates and times that they were able to agree with various pools based on availability). Beyond that the claimant decided who swam and when, and who coached which team/group, although this evidence was not given willingly by him.

21. He did report what was happening to the committee, and I saw no example of his specific plans being rejected, although there were occasions when the Club made suggestions, and discussed the timetables and plans.

22. Some of the Club committee were parents of swimmers and clearly had an interest in the timetables, swimming plans, camps and competitions. They all had an interest in retaining swimmers because that is how the club was generally funded.

23. Although the contractual right to substitute a coach required the claimant to advise the club in advance of the reason (it could be any reason – it was an unqualified right), and he gave evidence that he did so, there was no evidence of this happening in the minutes of the meetings, and it was clear from Mr Wightman Love, that even as a committee member there were occasions when his daughter had been coached by an alternative coach, without him being aware in advance.

24. The claimant gave evidence that he could not have worked for an alternative club at the same time as a squad coach because he would have a conflict and the club could lose swimmers who would follow him if the fees were cheaper. I noted that the evidence of Mr Harrop was that there had been a rumour floating that he was working for the NHS at the same time. If that was the case I noted that none of the minutes suggested any concern on the part of the club that he may be working elsewhere, and there was no exclusivity clause in his contract. To be clear, there was no evidence that the claimant had in fact worked elsewhere during this contract, but the Club appeared unconcerned at the concept in any event.

25. The claimant would attend the committee meetings, on his own admission for a short period of time as he was usually coaching at the same time, and would report to the Club at those meetings.

26. I make no findings in relation to the step testing – the claimant arranged it and drew the required fee from the parents. The Club played no part in it, but it was clearly a step taken for the benefit of the swimmers, and the claimant is unlikely on the evidence to have made a penny from it. For clarity – these are a series of tests to establish the fitness of the swimmer, and require external input.

27. The appellant carried out most of the administrative duties at times and places to suit himself. I saw no evidence that he had claimed incurred expenses for this part of his job.

28. The evidence of Mr Batty is that the claimant devised the timetable, chose the competitions to be entered, chose his own coaching sessions and selected the swimmers in each group. The Club retained control of safeguarding issues, and ensured that the claimant was complying with the terms of his contract.

29. Both parties provided comprehensive written submissions to which they spoke. I confirm that I have taken account of all of the submissions and the case law provided and cited, in reaching my conclusions.

Conclusions

30. Was the claimant a worker, an employee or self employed? To find him to be worker I would have to be satisfied that the respondent was not a client or customer of the claimant's business, that he provided personal service and that there was mutuality of obligation.

Client/customer

31. Was he engaged as an integral part of the operations? It is not totally clear. He was engaged because of who he was and his background. He could have provided coaching elsewhere but he may have chosen not to work elsewhere. His contract was for a substantial part of the week and a reasonable sum of money, that could be his choice. Many contracts offer sums of money which enable the client to achieve exclusivity merely by specifying the expected working hours.

32. Was he providing services under the direction of another in return for remuneration? There was no direction other than when he failed to comply with the terms of his contract, at which point he was offered a different contract with more specific terms of engagement. He was not placed under a disciplinary procedure and given a time by which he should improve (as one would expect of an employee). He was told the contract would end and he would be offered another.

33. Personal service, an unfettered right to provide a substitute? For 2/3rds of his contract he had such a right, and there is evidence that he did so. He simply had to tell the Club the reason (the Club had no specified discretion to refuse him the right to do so). Even when he did not do so, (which reflected the pointlessness of requiring him to tell the Club in the first place) as long as his coaching sessions were appropriately covered the Club had no interest other than in ensuring safeguarding and that the quality of coaching were maintained. Contrary to the claimant's belief, in reality he did not need the Club's permission, and there was evidence that he did not always seek it. The claimant's right to substitute was inconsistent with an undertaking to do the work personally. That said because he was engaged for his particular reputation and experience, he was expected to provide some coaching personally.

34. For the balance of his contract there is no issue. He had no right to substitute for his 5 hours of administration and supervision and training and this is consistent with personal service.

35. It is agreed in this case that there is mutuality of agreement – required both for an employee and a worker.

Is the claimant an employee? Who has control?

36. Applying the principles set out in *Ready Mix Concrete* (cited above). Is it a contract for service rather than a contract of services?

37. The claimant is required on the facts I have found to provide his own skill and work in relation to the management elements of his role, but not always in relation to his coaching element, which is the majority of his contracted work.

38. Is he subject to 'sufficient' control. It is not argued that the respondent should not have any control – the issue is whether it is sufficient. The claimant was given a very detailed description of what was required of him – how, when and what he should do. That could be seen as control – or as the club ensuring that the Head Coach met the terms of his contract by being specific about their requirements of him.

39. The claimant agreed those terms after consulting his governing body, and reflecting on them. The control was all about ensuring the terms of the contract were met – for instance, it was for the claimant to set out a swim plan, and for the committee to ensure that there was a swim plan. For the claimant to ensure that every session had a coach, and for the committee to ensure that was the case.

40. The parameters under which the claimant worked did involve the committee advising him of the available pool times and whereabouts, but it was for the claimant to ensure those times were utilised to best effect for the club and swimmers.

41. I disagree with the claimant's assertion that he was a member of the Club committee – if he had been he would inevitably be found to be an integral part of the business. He did not have a vote, was not always named in the minutes as present, and on his own evidence would nip in, deal with his report, and leave to continue coaching.

42. I note further than most of the claimant's insurance other than that for ASA events (competitions), was paid for by himself. The provision of equipment issue assists neither side as so little was needed for the coaching, although he appeared to be expected to use his own phone at his own cost for his administrative work, and any office costs appear to have been met by him, as there is no evidence of any claim in the bundle or witness statements.

43. Looking at the principles set out in *Hall v Lorimer* (cited above) and considering his work activity, I look for the main purpose of the contract and find that the majority of the claimant's time was expected to be spent poolside, coaching, without any control by the committee other than ensuring he complied with the terms of his contract and provided cover if he was unavailable.

44. I turn to the remuneration. This was specified in the contract as a lump sum, paid gross, in 12 instalments, but for 48 weeks work. For the other 4 weeks of the year the claimant was not being paid by the respondent.

45. Two of those weeks were taken at the end of the season – a date specified by the claimant, and 2 weeks with the agreement of the committee. This was not paid holiday.

46. The claimant had no entitlement to any other benefits.

47. He argues that he received paternity pay as he took time off from his responsibilities when his child was born. It was noted that his poolside sessions were all covered by substitutes. The reality is that whilst he was away because of the birth of his child he did not comply with his Head coach responsibilities, of 5 hours within one week. Such a short period cannot be indicative of the status of a contract which in similar terms had existed for around 3 years.

48. I have found that the club did not restrict him working for others. He may have chosen not to, I simply do not know, but I do know that when rumours spread that he was working for the NHS the club appeared indifferent to the news.

49. The claimant paid his own tax, national insurance and business liability insurance.

50. As in any commercial contract there was a right for both parties to end the contract, without reason at 28 days' notice, and with reason on behalf of the respondents at 14 days' notice.

51. The claimant was provided with 2 club kits. The claimant described this as a uniform. It was a kit in the colours worn by the swimmers and identified him and them at competitions. There was no requirement on him to wear it either on a day to day basis or at competitions, although if the swimmers were wearing theirs, it might be expected that he would want to be identified as their coach.

52. The claimant did have an element of control over his terms and conditions. In reality I accept that had he rejected the new contract, as was his right, the club would likely have sought a new head coach on similar terms which may be the reality of being self employed or a worker and having no direct employment rights.

53. I stand back and look overall at the situation to weigh up my findings. I have considered whether the work undertaken away from poolside, is sufficient to say the claimant was an employee because for instance for that part of the work that there was some control and no opportunity to substitute. However overall, that was only a few hours a week. The majority of his work was poolside, and for that it was clear that there he was subject to limited control, and had a right to substitute with very little restriction.

54. I conclude therefore that the claimant as not an employee.

55. However I do find that the picture which emerges of the way in which the parties interacted does not suggest a self employed contractor either. The claimant's involvement in the club was closer than that – there was some mutuality of obligation, and a level of loyalty between the Club and the claimant. He was after all Head Coach, and there to ensure that the swimmers achieved as much as possible. That was, as well, the whole purpose of the Club. If he failed to deliver the expected results, the Club would lose members to other clubs, and potentially would not remain viable. Because he was key to the success or failure of the Club, he was under an obligation to perform at least some of the coaching personally. The Club was not his client, but in effect he was part of the team, which involved the support of parents, the commitment of the swimmers, and the committee.

56. I therefore conclude that he was a worker. That being the case he does not qualify to bring a claim of unfair dismissal, and that claim is dismissed.

57. The claimant indicated that he may withdraw the claim for an unlawful deduction from wages unrelated to holiday pay, but that was a slight error he believed in the respondent's calculation.

58. There remains a claim for breach of contract

59. Following completion of the Judgement the claimant made an application to amend the claim to include a claim of holiday pay, out of time. He argued that he

was unaware that he was a worker until such time as I had adjudicated upon his status.

60. The following Case Management Orders were therefore made with the consent of both parties :-

(1) On or before 11 May 2019 the claimant is to prepare an application to amend the claim to introduce an allegation of unpaid holiday pay.

(2) On or before 25 May 2019 the respondent may prepare and serve a draft response.

61. The claimant's application (unless agreed in advance by the respondent) will be decided at the Final Hearing of this case on 26 June 2019 at Manchester. The case has been listed for one day.

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Employment Judge Warren

Date 12 June 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON
21 June 2019

FOR THE TRIBUNAL OFFICE