THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**

BETWEEN:

Mr S Nahajski **Claimant**

AND

The Eikon Charity **Respondent**

ON: **21 March 2019**

Appearances:

For the Claimant: **In person**

For the Respondent: **Mr D Mold (Counsel)**

WRITTEN REASONS PRODUCED PURSUANT TO A REQUEST BY THE RESPONDENT

1. By a claim form presented on 4 September 2018 the Claimant brought various claims, including a claim of unfair dismissal and breach of contract as regards notice pay. Those claims depended on his being able to establish that he was an employee. He also brought various monetary claims that depended on him being able to establish that he was a worker.

2. I heard evidence from the Claimant himself and from Christopher Hickford, the Respondent's CEO, from Jean Pullen, HR Recruitment and Facilities Manager, Paul Wilkinson, Head of Service and Deputy CEO and Kevin Young, Finance Trustee. There was a bundle of documents comprising 455 pages and the Claimant added a number of documents on the morning of the hearing. Any references to page numbers in these reasons are references to page numbers in that bundle.

The relevant law

3. To bring a claim of unfair dismissal the individual must be an employee. To bring certain other claims, such as for wages or holiday pay an individual need only be a worker.

4. An “employee” is defined as:

> "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment" (section 230(1), Employment Rights Act 1996 (ERA 1996)).

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" (section 230(2), ERA 1996).

5. The basic requirements of a contract of employment were set out in the case of Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance [1968] 2 WLR 775. These requirements are that:

(i) 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;
(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 master; and
(iii) the other provisions of the contract are consistent with its being a contract of service.

6. A “worker” is defined as an individual who has entered into or works under (or, where the employment has ceased, worked under) either of the following:

(i) A contract of employment;

(ii) 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.

(Section 230(3), ERA 1996.)

Case law has established that to establish that an individual is a worker there must be personal service, meaning both that:

(i) the status of the "employer" under the contract was not that of a

customer of a business undertaking carried on by the individual; and

(ii) the individual would in general be required to provide their services personally with only a limited right to substitute someone else to do the work.

For there to be a contractual arrangement at all there must also be some reciprocal obligations – an obligation to pay for work that has been undertaken would be the bare minimum required.

7. The statutory definitions of "employee" and "worker" are therefore complex and somewhat difficult to pin down. They have therefore been frequently the subject of decisions of employment tribunals and the higher courts. But despite the existence of numerous authorities the question of the employment status of an individual remains primarily one of fact.

8. I was also referred to a number of cases on the status of volunteers to which I refer as necessary in these reasons.

Findings of fact

9. In this case I make the following findings of fact based on the evidence I have heard and the documents I have reviewed.

10. In or around 2006 the Claimant founded the Windle Valley Youth Project. He was a trustee of the project but also carried out an executive function. He was in effect its CEO. However he received no wage for his work and nor, as a Trustee, would he have been entitled to one. When the organisation merged with the Respondent in June 2016, the Claimant was described on the merger document as a Trustee and he was not included in the list of transferring employees. I heard no evidence that suggested that the Claimant was despite all of these counter-indications an employee of WVYP. I find as a fact that he was a volunteer of that project, that his role as Trustee precluded him from receiving remuneration and that any work that he did for the project was carried out in a voluntary capacity without expectation of reward. He described himself in an email to Mr Hickford on 9 December 2015 as a Volunteer CEO (page 32b).

11. When WVYP merged with the Respondent it was necessary to find a role for the Claimant and to make good use of his evident skills, industry, commitment and hard work. He did not want a role that precluded him from active involvement in the work of the charity and so did not become a Trustee. At pages 30 to 31were a set of notes dating from September 2015, when the merger was under discussion. These notes alluded to the Claimant's future role and suggest that he join the merged charity as a pro bono Head of Innovation and Development with hours to suit him.

12. That is in effect what happened. The Claimant joined the new board in a role in which he received no remuneration for the work he did despite his seniority, level of responsibility and the evident contribution his work made to the

success and development of the charity. That was his wish however – he voluntarily relinquished any salary for his role. At page 32b there was a role description drafted by him some three months before the merger. It described an interesting and responsible role. It stated, as regards remuneration "Same expenses arrangements as currently". There was no mention of salary, or, crucially, a contract.

13. Once the role came into effect the Claimant worked during school term times only. He was repaid his expenses and received a monthly mobile phone allowance, regardless of whether he was working or not. There was at one point a discussion about whether the fact that he had never claimed a salary could be prayed in aid of a financial difficulty at the Respondent by means of a donation equivalent to the salary he had not sought, but that discussion was not pursued owing to the potential complexities involved. The Claimant described himself as a volunteer to the outside world (page 102 is an example).

14. The Claimant's work was controlled by the Respondent in so far as he reported to the CEO, Mr Hickman, and was ultimately answerable to the Board. His work was critically important to the Respondent's financial health and it is not surprising that it was considered necessary to put a reporting structure in place or to set objectives for him to meet. He was also clearly integrated into the organisation – he appeared on the structure chart and was responsible for managing and appraising staff. The Respondent's Annual Plan envisaged a clear role for the Claimant (page 407). Page 65a provides evidence that a system of regular reporting to Mr Hickman was put in place. The degree to which the Claimant was integrated into the organisation is also described in detail in the Claimant's unchallenged evidence at paragraphs 32-39 of his witness statement.

Conclusions

15. The critical question in this case is whether there was a contract between the Claimant and the Respondent as required by either subsection (1) or (3) of s 230 ERA or whether this was a voluntary arrangement involving no contract between the parties. If the latter the Claimant was neither an employee nor a worker and his claims must fail.

16. The Claimant admits that there was no written contract. But can a contract be gleaned from the all the facts of the arrangement? As a matter of law a contract must have certain features – there must be an offer, acceptance of that offer, an intention to create a legal relationship and consideration, meaning something of value passing from each party to the contract to the other. The key ingredient of a contract as distinct from a voluntary arrangement is this last element - consideration. If that is lacking there can be no contract and neither employee or worker status can be established. If there is a contract, but insufficient control or mutuality of obligation to create an employment contract, there may be a worker contract.

17. In my judgment there was nothing in this arrangement that amounted to

consideration. There was no pay for the work done and the Claimant received not an expenses allowance, but a reimbursement of expenses. I have considered the Claimant's submission that he received a flat rate allowance for mobile phone costs even in months that he was not working, but he did not submit that he received reimbursement for mobile phone costs that he was not incurring. He did use his mobile phone for work and the £10 a month was a contribution towards a genuinely incurred cost. The Claimant also refers to the experience and training he received, but the authorities to which I was referred have clearly established that where a volunteer seeks to establish that there was consideration for the work they do it is not sufficient to point to training and experience. Training is not tantamount to remuneration (*Melhuish v Redbridge Citizens Advice Bureau [2005] IRLR 419*).

18. It follows from this conclusion that the Claimant's claim falls at the first hurdle. This does not mean that work he did was not significant, responsible or important. It simply means that the facts show that he agreed not be paid for it and nothing else that amounts to consideration was given to him in exchange for doing it. Hence there was no contract between the parties.

19. Related to this conclusion is my conclusion that there was no mutuality of obligation between the parties. The Claimant felt a strong sense of duty and commitment to the Respondent and felt that he had assumed responsibilities that he could not simply walk away from. But the critical point was that the Respondent could not require him to carry out those responsibilities – he did them because he wanted to not because he had entered into a contractual obligation to do so. The Respondent would have had no recourse against him in contract if he had simply walked away. The corollary of that is that the Claimant cannot now enforce employment rights against the Respondent. It is true that other elements that would be characteristic of an employment relationship are present in this case – notably the Claimants integration into the line management structure and the extent to which his work was directed by the Respondent. But those factors cannot overcome the lack of consideration and mutuality of obligation that are fatal to the existence of either an employment or worker contract.

20. For completeness I will add that even if the arrangement with the Respondent had amounted to employment, the Claimant would not in my judgment have had sufficient service with the Respondent to bring an unfair dismissal claim. He was manifestly not transferred to the Respondent as an employee under TUPE and at its highest his case can only be that his employment commenced at the point of the transfer, which I find on the facts to have been 30 June 2016. The email from Mr Hickford to the effect that the Claimant was part of the Respondent's senior management team prior to that was not, I find, a true representation of the situation as at that date. Time would therefore have run from 30 June 2016 and not earlier, giving the Claimant insufficient service to bring a claim of unfair dismissal.

21. For all these reasons the Claimant has been unable to establish the requisite status to bring claims before the employment tribunal, either as an employee or as a worker. The tribunal does not therefore have jurisdiction to determine

them and they must therefore be dismissed.

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Employment Judge Morton
Date: 5 July 2019