EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr G Jones	AND	West Penrith Community Bus Association

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 29 August 2019

EMPLOYMENT JUDGE N J Roper

Representation
For the Claimant: In person
For the Respondent: Mrs Hambleton, Solicitor

JUDGMENT

The judgment of the tribunal is that the claimant was an employee of the respondent at all material times and that this tribunal therefore has jurisdiction to hear his unfair dismissal claim.

REASONS

1. This is the judgment following a preliminary hearing to determine the employment status of the claimant. In this case the claimant Mr Geoff Jones has brought a claim alleging unfair dismissal. The claim is denied by the respondent. This tribunal's jurisdiction to hear this claim turns on the claimant's employment status.
2. I have heard from the claimant, and I have heard from Mr Chris Angove and Mrs Edita Jenkin on behalf of the respondent. I was also asked to consider statements from Mrs Melanie Smith and Mr Peter Beech on behalf of the claimant, but I can only attach limited weight to this because they were not here to be questioned on this evidence
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent is the West Penwith Community Bus Association, which is an unincorporated association and a not for profit organisation. It runs a bus service for local people in West Cornwall. The claimant originally worked as a volunteer driver for a number

of years, but became a paid driver between 2012 and 2013. He then took a break and resumed as a paid driver from May 2015. He was dismissed for reasons of conduct on 8 March 2019.

5. The claimant asserts that once he ceased being a volunteer driver, he was always an employee of the respondent as a paid driver. The claimant asserts that he signed a contract of employment but the respondent says that it is now unable to find that. I have seen an email dated 19 December 2012 between the respondent's then administrator Mrs Melanie Smith in which she reminds the claimant to sign and return his employment contract. The claimant says that he did exactly that, and I accept his evidence. The claimant asserts that this contract of employment was in place from 2012, and remained in place when he rejoined the respondent as a paid driver from May 2015.
6. The respondent had three paid drivers, and added a fourth driver during 2017. The system was that the respondent would prepare a schedule or a rota of the drivers' shifts for a week, to ensure that all of the routes which the respondent was contracted to cover had a driver in place. Different drivers preferred to work on different days and to cover different shifts. If a driver was unable to cover his normal shift, for instance because of holiday or medical appointments, then another driver would be asked to cover it. On other occasions drivers would agree to swap shifts between themselves, before notifying the administration office.
7. The claimant is a keen golfer and preferred to play golf on Tuesdays and Friday mornings, but also did other driving shifts. In 2017 when the fourth driver joined the respondent, he says that the driving duties for the three original employees were reduced to accommodate the fourth driver. From that time he tended to work two shifts a week, being Mondays and Wednesdays. There was a dispute as to whether the claimant was ever prepared to work on a Thursday, but that seems to predate the reduction in driving shifts in 2017. I accept the claimant's evidence that from this time there was a regular pattern of him working Mondays and Wednesdays and avoiding Tuesdays and if possible Fridays.
8. I have heard from Mrs Jenkin who has the difficult task of preparing the rotas and ensuring that all routes are covered. It was accepted practice that the drivers would email in advance to request holidays or any change of shift. To that extent each driver including the claimant was able to request a change from the normal working pattern. However, once the rota was produced, usually on a Friday, to cover the next week starting on the Monday, the drivers were expected to cover the shifts which they had been allocated. They were also required to drive the routes as specified by the respondent, and were under the respondent's direct control in this regard.
9. The respondent concedes that the other three drivers have signed contracts of employment in place and it is unsure why the third does not. All of its drivers were treated as employees for tax purposes, and were all paid on a PAYE bases with employee National Insurance contributions deducted. The claimant and the other drivers were entitled to annual holiday, but had to seek authority from the respondent to take it. When they did, they were paid statutory holiday pay. The claimant and the other drivers were also entitled to statutory sick pay if they were absent on certified sickness leave.
10. The claimant was never in business on his own account. He never owned any of the buses nor was he required to make or pay for any arrangements relating to the insurance or maintenance of the buses he was driving. Apart from covering each other if they were unable to carry out a shift, or if they wished to swap shifts amongst themselves, none of the respondent's drivers (including the claimant) were entitled to send a substitute driver, and nor did any of them do so.
11. When the claimant was dismissed he was treated as if he was an employee in that he was subject to the normal disciplinary procedure which the respondent would apply to its employees. When the claimant issued these proceedings, the respondent entered a notice of appearance agreeing that the dates of employment relied upon by the claimant were correct. It has only recently sought to challenge the claimant's employment status as these proceedings have progressed.
12. Having established the above facts, I now apply the law.
13. Employees and workers are defined in section 230 of the Employment Rights Act 1996 ("the Act"). An employee is an individual who has entered into or works under (or, where

the employment has ceased, worked under) a contract of employment. A contract of employment is defined as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing. Under section 230(3) of the Act a 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. (A worker who satisfies this test in sub-paragraph (b) is sometimes referred to as a "limb (b) worker").

14. Under section 94(1) of the Act the right not to be unfairly dismissed is limited to employees.
15. I have considered the following cases: Autoclenz Ltd v Belcher and Others [2010] IRLR 70 CA and [2011] UKSC 41; Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497; Pimlico Plumbers Ltd & anor v Smith [2017] EWCA Civ 51; Nethermere (St Neots) Limited v Gardiner [1984] ICR 612; Express and Echo Publications Ltd v Tanton [1999] IRLR 367.
16. As confirmed in paragraphs 18 and 19 of Lord Clarke's judgment in Autoclenz in the Supreme Court: "18 : As Smith LJ explained in the Court of Appeal of paragraph 11, the classic description of a contract of employment (or a contract of service as it used to be called) is found in the judgement of McKenna J in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515C : "a contract of service exists if these three conditions are fulfilled: (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. (iii) The other provisions of the contract are consistent with its being a contract of service … Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be". 19: Three further propositions are not I think contentious: i) As Stephenson LJ put it in Nethermere St Neots Ltd v Gardiner [1984] ICR 612, 623 "There must … be an irreducible minimum of obligation on each side to create a contract of service". ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: Express and Echo Publications Ltd v Tanton ("Tanton") [1999] ICR 693 per Peter Gibson LJ at p 699G. iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg Tanton at page 697G."
17. The Supreme Court has upheld the Court of Appeal in the Autoclenz decision, and the approach to be adopted where there is a dispute (as in this case) as to an individual's status. In short, the four questions to be asked are: first, what are the terms of the contract between the individual and the other party? Secondly, is the individual contractually obliged to carry out work or perform services himself (that is to say personally)? Thirdly, if the individual is required to carry out work or perform services himself, is this work done for the other party in the capacity of client or customer? And fourthly if the individual is required to carry out work or perform services himself, and does not do so for the other party in the capacity of client or customer, is the claimant a "limb (b) worker" or an employee?
18. I adopt and apply this test in that order. First, as to the terms of the contract, these are set out in the findings of fact above. The contractual terms or factors which point to employment status are as follows: the claimant had a signed contract of employment in place; he was treated as an employee for the purposes of tax, National Insurance, holiday pay, and statutory sick pay; it was never understood that he was in business on his own account; he was not authorised to send a substitute in his place to cover an agreed shift, and nor did he ever do so; the respondent initially agreed in these proceedings that his length of service as an employee was correct; when driving the claimant was under the direct control of the respondent as to how to complete the shift; when he was dismissed the claimant was subjected to the normal disciplinary process which would have applied to the other

employees; and although the claimant was able to notify availability in advance, and whether he would be able to carry out his normal pattern of shifts, once the rota was agreed he was required to attend to complete his driving duties.

19. The respondent seeks to argue that there was insufficient mutuality of obligation and/or insufficient control for the relationship to amount to a contract of employment. This argument is based on the assertion that the claimant was able to refuse to drive a shift if he did not wish to do so, whether this was for personal or other reasons. That is true to an extent in that the claimant as well as the other drivers were able to notify the administration office if they did not wish to carry out a normal shift, and were able to agree a swap with another driver. They also would book holiday and medical appointments in advance. However, in my judgment that is merely a convenient process in place which enabled this small employer to ensure that all of its routes were covered by its four drivers. Once the weekly schedule or rota had been agreed, then the claimant as well as the other drivers were required to carry out those driving duties. Is also clear that a pattern of normal shifts emerged, more latterly with the claimant working Mondays and Wednesdays but not on Tuesdays and Fridays. It was simply not the case that on any given day the claimant could just refuse to turn up for work, or alternatively send a substitute, if he felt like doing so. I accept the claimant's evidence that he and the other drivers knew that once the rota was agreed they were required to attend and to drive in accordance with that rota.
20. As to the second limb of the Autoclenz test, I therefore find that the claimant was contractually obliged to carry out services personally. There was an "irreducible minimum" of employment status.
21. In conclusion therefore, I find that the claimant was an employee of the respondent at all material times and that this Tribunal therefore has jurisdiction to hear his unfair dismissal claim. Further case management directions will follow.
22. For the purposes of rule 30(6) of the Employment Tribunals Rules of Procedure, the issues which the tribunal identified as being relevant to the claim are at paragraph 1; all of these issues were determined; the findings of fact relevant to these issues are at paragraphs 4 to 11; a concise statement of the applicable law is at paragraphs 13 to 17; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 18 to 21; and no compensation was awarded.

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Employment Judge N J Roper
Dated 29 August 2019

Judgment sent to Parties on