EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L Freeman	**v**	**David Lloyd Leisure Limited**

RECORD OF AN OPEN PRELIMINARY HEARING

Heard at: Watford **On**: 25 November 2019

Before: Employment Judge Alliott (sitting alone)

Appearances

For the Claimant: In person.
For the Respondent: Ms L Hatch, Counsel

JUDGMENT

1. The claimant was not an employee of the respondent within the meaning of section 230(1), Employment Rights Act 1996 and consequently the Employment Tribunal does not have jurisdiction to hear his unfair dismissal claim.

2. The claimant's claim is struck out as it has no reasonable prospects of success.

REASONS

1. This open preliminary hearing was directed by Employment Judge Manley to determine the following issue:

> "Whether the claimant was an employee of the respondent, so as to give the Employment Tribunal jurisdiction to hear his unfair dismissal claim"

The Evidence

2. I heard oral evidence from the claimant and Mr Samuel Phillips, General Manager of the Heston David Lloyd Club at the material time. Obviously enough I had witness statements from both individuals. In addition, I had a bundle running to 165 pages from the respondent and two bundles from the claimant.

The Law

3. By a claim form presented on 23 April 2019, the claimant claims for unfair dismissal. For the purposes of the Employment Rights Act 1996, in order to bring such a claim, the claimant has to be an employee.

4. Section 230 of the Employment Rights Act 1996 provides as follows:

> "230 – Employees, workers etc
> (1) In this act "employee", means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
> (2) In this act "contract of employment" means a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing"

5. I take the following propositions from the IDS Employment Law Handbook, Contracts of Employment.

(i) At 2.22, where the parties' intentions have to be gathered not only from documents but also from oral exchanges and conduct, the terms of the contract are a question of fact."

(ii) At 2.24 'Tests of employment status' "It is now accepted that no single factor will be determinative of employee status and a number of factors must be looked at – the so-called 'multiple' or 'mixed' test, which is considered at length under 'multiple test' below."

(iii) At 2.28 – "Multiple test" – "As we have seen, the courts have rejected the notion that there is one single factor that can be determinative of employment status. Instead, the issue is approached by examining a range of relevant factors – this is commonly known as the 'multiple test'. One of the earliest formulations of the test is to be found in Ready-mixed Concrete (South East) Limited v Minister of Pensions and National Insurance, 1968 1 ALL ER433, QBD, in which Mr Justice MacKenna set out the following three questions:

- Did the worker agree to provide his or her own work and skill in return for remuneration?
- Did the worker agree expressly or impliedly to be subject a sufficient degree of control for the relationship to be one of master and servant?
- Were the other provisions of the contract consistent with it being a contract of service?

However, in Hall (Inspector of Taxes) v Lorimer, 1994, ICR218, CA, the Court of Appeal cautioned against using a check list approach in which the court runs through a list of factors and ticks off those pointing one way and

> those pointing the other, and then totals up the ticks on each side to reach a decision. In so doing, it upheld the decision of Mr Justice Mummery in the High Court … who stated that "this is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative, appreciation of the whole. It is a matter of evaluation of the overall effect of the detail ….. not all details are of equal weight or importance in any given situation".

6. Nevertheless, there are elements that form part of an irreducible minimum to determine the issue.

7. Of relevance to this case are control, mutuality of obligation, casual and irregular work, personal performance, financial considerations, the intention of the parties and miscellaneous factors such as the ability to do other work and integration within the organisation workforce.

8. Lastly, in the context of this case, from 2.46:

> " Payment in kind does not necessarily preclude a contract of employment."

The facts

9. The claimant was a long-standing member of the David Lloyd Club at Heston. He joined the club in 1998 as a paying member.

10. The claimant is a professional photographer. He is self-employed working at weddings, parties and other social occasions.

11. At the respondent's premises, there is a board where certain individuals working at David Lloyd have their photographs posted for identification purposes. Managers, trainers and coaches, some employees and some engaged as self-employed service providers, have their photos on the board. Obviously enough, someone had to take photographs of these individuals when they first joined the club, or if an updated photograph was needed, for example, in the event that someone changed their hairstyle.

12. In addition, there would be functions held at the club such as the summer party, Diwali and Halloween. The claimant told me that there might be two private functions at the club per year as well.

13. In 2003 the claimant photographed the wedding of a tennis-pro. The tennis-pro suggested that the claimant could take photographs for the club. In 2003 the claimant came to an arrangement with the then manager that, on a 'quid-pro-quo' basis, he would take pictures required as and when for the club and in return he would have use of the club facilities and the adjacent golf club for free.

14. As well as paying members, the respondent had a membership status of 'complimentary membership'. This 'complimentary membership' would be granted annually. The 'complimentary membership' form that I have seen gives examples of why individuals may be granted complimentary membership, namely elite sports person or tv personality. A further example given to me was BMW staff being granted 'complimentary membership' in exchange for the provision of a car for the clubs' use. In 2003, in accordance with this arrangement, the claimant became a 'complimentary member'.

15. In 2010 a new General Manager known as "Lorraine", arrived at the Heston Club. The claimant told me that she had a friend who she wanted to do the photographs and consequently the claimant stopped taking photographs for the club. Between 2010 and November 2012, the claimant reverted to being a paying member. I understand that at the time there was no suggestion by the claimant that he was an employee and indeed no complaint at him ceasing to be the person to be taking photographs for the club.

16. In October or November 2012, the claimant was asked if he would like to do it again (in the context of taking photographs for the club) and the claimant said yes. He received a refund on his annual subscription and became a 'complimentary member' as from 1 November 2012.

17. The claimant told me that he went to the club three to four times per week or indeed sometimes five times a week to socialise and play tennis. It is quite clear to me that the claimant was an enthusiastic member of the club and was there on a very regular basis.

18. On 16 December 2018, the claimant attended at the club in order to photograph a tennis competition. He arrived late and the foyer of the club was somewhat crowded. Whilst passing through the foyer, the claimant made a comment to a customer, or in the hearing of a customer. I need not go into the rights and wrongs of this incident but it later led to the claimant being interviewed by "Anna" the subscriptions lady and one other manager.

19. As a result of the interview, the claimant's membership was suspended on 16 December 2018. Later his membership was terminated under the membership rules on 11 January 2019.

20. I now turn to consider the various factors that I need to assess in coming to the conclusion I have come to.

Intention of the parties

21. I find that at no point was it the intention of either the claimant or the respondent that the claimant would be employed under a contract of employment.

22. I find that neither party regarded the claimant as an employee and that this was simply an arrangement whereby the claimant got complimentary

membership of the club on a 'quid-pro-quo' basis for taking pictures on an ad-hoc basis, as and when pictures were required. The claimant is clearly a skilfull photographer and enjoyed his involvement.

Integration

23. Given that the respondent did not regard the claimant as an employee, so he was provided with none of the trappings an employee or even a self-employed provider of services. The claimant was not provided with a uniform. He did not have a company e-mail address. His picture was not posted on the employee board. He did not have an employee or staff membership card. There was no written contract between him and the respondent other than the annually signed complimentary membership form. He had no line manager. He was paid no payment or wages and so obviously there was no deduction of tax or National Insurance. He is not a member of the respondent's pension scheme.

24. The claimant was clearly a familiar individual in the club who was around a lot, often taking photographs. Against this, I have been shown an e-mail from February 2018 wherein Mr Phillips referred to the claimant as "our photographer". However, having assessed all the evidence, I have come to the conclusion that the claimant cannot be said to have been integrated into the respondent's organisation. For the majority of the time was at the club, the claimant was there as a member and not undertaking any form of services.

Control

25. The claimant supplied all his own photography equipment. The claimant told me that the photographing of trainers etc came about as follows. He told me that every time he came into the club, he did so with a backpack in which he had his camera. He told me that he would go in to the gym or wherever and speak to the relevant manager asking "anything to do". If the manager said something on the lines of "I've got a new guy starting", then the claimant would say ""I'll get it".

26. I have been provided with an example of an e-mail exchange setting up the claimant to do some photographs. This is from November 2017. An e-mail is sent to the claimant stating:

> "Hi Laurie,
> When would you be free to do a photo for Sam? We haven't seen you around, hope all is well".

27. On 16 November 2017, Mr Sam Phillips sent a follow-up e-mail to the claimant as follows:

> "Hi Laurie
> Great to meet you yesterday in club. Would it be ok to move my photo to next week, Wednesday or Thursday? Whatever works for you. Sorry for the inconvenience ……."

28. In my judgment those e-mails speak volumes and demonstrate that the claimant was being treated more like a volunteer than an employee who could be directed to attend at a certain hour in order to take photographs.

29. The same impression comes from an e-mail exchange relating to the claimant's holidays. For example, on 24 February 2017, the claimant wrote an e-mail stating:

> "Yo Mary ….. just to say I'm away until March 6 … Regards Laurie"

30. With the response:

> "Enjoy your holiday"

31. The claimant accepted that he did not have to ask anyone if he wanted to go away on holiday.

32. It is clear to me that the claimant had no set hours and came and went as he saw fit. As recited, he would see managers in his own time and make appointments if any staff were required to be photographed. The claimant has shown me an e-mail where he was instructed not to take photographs in the pool area by Mr Phillips following a complaint from another member. I find that this was not indicative of control of an employee but management of another member. How the claimant went about photographing individuals was entirely down to the claimant.

33. As regards the photographing of functions the claimant told me that he would ask whoever was organising the function "do you want me to come and take photographs" and he told me that the managers always said "yes". Again, that is a far cry from the claimant being directed to work for the respondent.

34. Accordingly, I find that there was insufficient control of the claimant to constitute him as an employee.

Mutuality of obligation

35. There was an expectation that the claimant would take photographs of staff and certain functions as and when required. Obviously enough, both parties regarded that requirement as ongoing. However, I find there was no obligation on the respondent to provide photographic work for the claimant. It was all on an 'ad-hoc' basis.

36. Accordingly, I find that there was no mutuality of obligation sufficient to find a contract of employment.

Personal performance

37. It was the expectation of both parties that it would be the claimant himself who took the photographs. As such I find that it was an agreement for

personal performance. That said, it could hardly be otherwise given that the claimant could only access the club as a member. Whether or not he could send another in his place to take photographs was never put to the test but I suspect that if he had asked it would have been allowed.

Financial considerations

38. The claimant was not in receipt of regular payments and his reward for taking photographs was the 'complimentary membership'. This is said to have been worth £1,200 per annum. Nevertheless, in my judgment, this was not sufficient to constitute a contract of employment.

Miscellaneous matters

39. The claimant freely acknowledged that he could work as a photographer on his own account in his own time whenever he felt like it. Some contacts for paying work were made as a result of his photography at the club.

40. Having run through the various factors that I am required to do in order to assess whether or not the claimant was an employee, I met metaphorically stand back and look at the situation as a whole. I have concluded that the nature of the relationship between the claimant and the respondent was not one of a contract of service and consequently I find that the claimant was not an employee for the purposes of section 230(1) of the Employment Rights Act 1996. As such, this Employment Tribunal does not have jurisdiction to hear his unfair dismissal claim and it must be struck out as having no reasonable prospect of success.

Costs

41. At the conclusion of this hearing, Ms Hatch, on behalf of the respondent, made an application for costs, under rule 76 of the Employment Tribunal's (Constitution & Rules of Procedure) Regulations 2013, on the basis that the claimant has acted unreasonably in bringing these proceedings.

42. I take as my starting point that the expectation in Employment Tribunals is that the losing party will not have to pay costs of the successful party.

43. In this case, I do not consider that the claimant can be said to have acted unreasonably in the bringing of these proceedings. The mere fact that he has not prevailed does not mean that his actions have been unreasonable. It is well established in law that what the parties call their relationship is not determinative of the actual legal relationship between them. The evaluation of whether or not someone has been employed under a contract of service is one that is multi-faceted and involves an analysis of the factual situation. Whilst I have found against the claimant on most of the individual factors, on one view the underlying relationship was of the claimant being provided with a benefit in kind and performing services for the respondent. Consequently, I do not consider that he has acted unreasonably in bringing these proceedings and I decline to make a costs order.

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Employment Judge Alliott

Date: 2/12/19

Sent to the parties on: .....

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For the Tribunal Office