RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr K Hussain**

Respondent: **AB Fine Art Foundry Ltd**

Heard at: **East London Hearing Centre**

On: **27th February 2020**

Before: **Employment Judge Reid**

Representation

Claimant: Mr Stephenson, Counsel

Respondent: Mr Ivinson, Solicitor

JUDGMENT (Reserved)

The judgment of the Tribunal is that the Claimant was an employee of the Respondent within s230(1) Employment Rights Act 1996.

Note: ***A telephone preliminary hearing was booked with the parties for 1st May 2020 at 10am because there was insufficient time for case management at the end of this hearing. See separate orders.***

The final hearing was also booked with the parties for 10th and 11th September 2020.

REASONS

Background and preliminary issue

1 The Claimant worked at the Respondent's foundry from 1st April 1994 to 21st June 2019 when the arrangement was terminated by the Respondent. The Claimant is an artist specialising in wax/ceramic shell/bronze work. The Respondent's business is the creation of such works for its customers, mostly fine art galleries.

2 The Claimant presented his claim on 18th September 2019 claiming unfair dismissal, unpaid holiday pay (dating back to 1994) and unpaid wages (a bonus not paid to him in June 2019). He said in that claim he was the Respondent's employee. The Respondent defended the claim on the basis that the Claimant was not its employee, but was self-employed meaning he could not bring the claims. I gave permission at the beginning of this hearing for the Claimant to amend his claim to include an argument in the alternative that he was a worker and gave oral reasons at the hearing.

3 The preliminary issue for this hearing was whether the Claimant was an employee within the definition in s230(1) Employment Rights Act 1996; if he was not an employee he could not bring the unfair dismissal claim.

4 The Claimant attended the hearing and gave oral evidence. His wife Mrs Hussain also gave evidence and there were two witness statements from past colleagues of the Claimant (Mr Hayes and Mr Borodale) who did not attend. Mr Hughes attended and gave evidence for the Respondent. There was a one file bundle to page 361. Both representatives provided written submissions and I also heard oral submissions. I reserved my decision due to lack of time.

Findings of fact

The general history of the relationship

5 The Claimant was engaged by the Respondent in April 1994 ostensibly on a self-employed basis which relationship was said by the Respondent to continue until he left in June 2019. The ending of the relationship after 25 years came about because of a disagreement between the Claimant and Mr Hughes over what was said to have been an inappropriate comment made to Mr Hughes' daughter Chloe by the Claimant. Mr Hughes told the Claimant to leave but gave him enough work to last him around 3 months so in effect giving him around 3 months' notice. The relationship between them was poor in the later years and at the end.

6 There were no documents evidencing the terms of the relationship between the Claimant and the Respondent either at the outset or during the course of it. The Claimant filled in tax returns as a self-employed person. I find he did not raise the argument with the Respondent that he was in fact an employee until he took advice for the purposes of this claim but the issue is whether he was an employee, not whether he thought he was an employee or whether he raised the status issue with the Respondent during the relationship. He had however mentioned holiday pay (JH para 7).

7 Both parties were presenting a particular picture to HMRC and I find that no particular credibility issues arise from this aspect which affect one party more than the other, because both were involved in presenting this picture and both benefitted from it.

The nature of the relationship

8 I find that the terms agreed orally between the Claimant and the Respondent (Mr Abercrombie and Mr Hughes at the interview in 1994) were as follows.

9 I find based on Mr Hughes' oral evidence that they agreed that the Claimant would work a minimum number of hours per week (then 35 but subsequently reduced to 32.5 so a minimum of 6.5 hours a day) at an agreed hourly rate (also referred to as flat hours). I also find that they discussed an overtime rate (C para 3). The Claimant was to work in the Respondent's foundry alongside the other staff. It was not disputed by the Respondent that it provided the vast majority of the equipment (including safety equipment), tools and materials the Claimant needed from which I find this was also the agreement from the outset. The agreement was that the Claimant would be paid weekly but that he would invoice the Respondent around monthly (though in practice the period varied – see below). The Claimant throughout the period received weekly payslips.

10 The Claimant was paid a discretionary bonus from time to time, as were the other staff (whether considered employed or not).

11 I that the parties did not discuss at this stage (or at any stage subsequently) whether or not the arrangement was such that the Claimant could send a substitute. There was never therefore an agreement that he could. The personal nature of the Claimant's work in reality would have made it virtually impossible for him to find another artist to do his highly skilled work for him, to a similar high standard. Whatever HMRC had been told in 2004 (page 279-280), it was not the case that the Claimant could send a stand-in. In that context I find any attendance by his sons on the limited occasions they came to work with him was for work experience.

12 Subsequent to this agreement in around 1996 the Respondent added price work (also referred to as piece work) to the Claimant's workload, which work was then sometimes identified separately on his payslip. This was in addition to the hourly paid work and was work done on a specific commission for a particular item. The Claimant had no say as to the amount of each type of work he did because it was dependent on the types of orders received by the Respondent. The price work could involve an element of risk for the Claimant if he misjudged the number of hours it would take and there was no other work for him to do – see findings below as regards the Laocoon sculpture. Mr Hughes would direct which type of work he wanted the Claimant to do at a given time (JH para 31). From 2010 onwards (page 82) more of the Claimant's pay was for flat hour work rather than for price work, although in 2012 and 2018 it was approximately evenly split. In 2015 and 2016 there was no price work at all. Both types of work continued until the end of the relationship. The highly specialist nature of the work was such that the Claimant had to do it himself.

13 I find that the way the Claimant was paid was not consistent with only being obliged to pay him on receipt of an invoice. This is because he submitted his invoices to the Respondent around every 3-4 weeks (the period varied, pages 93-162) but was paid weekly. The invoices were not clearly monthly but were on average issued by the Claimant every 2-4 weeks on a variable basis. The claimed legal nature of the invoice ie it being the trigger for a liability to pay was therefore absent and the Claimant was paid irrespective of the invoice for that period, which came later and merely confirmed what had already happened. This arrangement was indicative of an obligation to pay the Claimant but not based on the production of an invoice prior to payment. The way his pay was calculated was also consistent with an obligation to pay him irrespective of the subsequent invoice because the subsequent invoice merely matched up with what had already happened. The Claimant's weekly pay was calculated in arrears by adding

together the flat hours (and any overtime) he had worked in the previous week and Mr Hughes' estimate of how far the Claimant had got with a piece of price work so for example if Mr Hughes though the Claimant was 50% of the way through a price work item he would authorise a payment that week of 50% for that week. The price work payment was not therefore dependent on completion of the piece of work. I find that this payment arrangement was consistent with an obligation on the Respondent to offer the Claimant at least the minimum hours and for him to do those hours if it had them (which it usually did), even if occasionally he did less because he asked not to because eg leaving early/taking a day off – see findings of fact below. There was also a corresponding obligation on the Respondent to pay him for those hours, evident from the payment arrangements. As regards price work there was also an obligation to pay him in effect on account for the proportion of the work he had completed, before he completed the particular commission.

14 The Claimant was also paid what is called an RTB bonus which is an extra weekly payment made to those the Respondent treats as self-employed (JH para 15) for being up to date with invoicing. Given the invoicing done by the Claimant was not done weekly but in a slightly more random pattern I find such a payment somewhat illogical when the logical payment would be at the end eg of every month or every year when it is known that the invoicing is being done properly. The payment was not in practice consistent with self-employed status even if it purported to be.

15 The Claimant was able to use AB branded uniform if he chose to but as with all staff it was optional. The Claimant chose to do so due to the nature of the work but was not required to do so. However neither were any of the other staff (whether employed or self-employed) required to wear it. I therefore find that the wearing of the uniform does not add anything significant to the Claimant's argument on employment status. I also find that the fact he attended some Health and Safety training paid for by the Respondent (pages 358-361) not to have particular significance because the Respondent needed to have such knowledge in place amongst the staff generally and had to spread that over the site. The fact the Claimant was asked to do it was more to do with the spread of that knowledge than its relevance being that the Respondent asked him to do it and paid for him to do it as a sign of employment status. I find he overstated his role as being a Safety Manager or health and safety representative. However attending the courses did point towards his integration in the workforce.

16 From around 2002 the Claimant rented the flat above the foundry from A&A Properties, a company owned by Mr and Mrs Abercrombie so that he could avoid the travel between the Respondent and his home in Norfolk. The rent for the flat was slightly bizarrely deducted from his pay (see eg page 183) even though the entity to which he owed the rent was different to the Respondent. This deduction of the rent was more akin to the provision of staff accommodation for an employee than an independent arrangement with a landlord. It was not an arms-length tenancy arrangement but was inextricably linked to the arrangement with the Respondent.

17 From a few years into the arrangement (the Claimant says it was in the late 1990s) the Claimant was paid an extra weekly amount because he was a key-holder for the premises (see eg page 185, an extra £10 described as a bonus). Whilst this was said to point towards the flexibility he had to come and go (see below) I find that the holding of a key to the premises was more in line with being an employee than being self-employed because it is a position of trust and it would be unusual to give that responsibility to a non-

employee, even assuming the Respondent's premises insurance permitted a key to be held by a non-employee.

18 The Respondent' case was that the Claimant had flexibility in the hours he worked and could come and go as he wanted, taking into account he was also a key-holder. The Respondent's case was however inconsistent with the existence of fixed minimum hours, even if there was some flexibility about leaving early/arriving late. I find there was some flexibility in the Claimant's arrival and departure times particularly at the beginning and end of the week because his family was in Norfolk. The Respondent produced the schedules at pages 35-39 for the purposes of this claim. Whilst I find that the Claimant did sometimes do less than the required 6.5 hours a day (see eg a series of yellow Fridays in 2016/2016 page 36, total 24 days in that year), in the later years the overall number of these days reduced so that there are only 6 in 2016-2017, 8 in 2017-2018 and 6 in the part year 2018-2019. The Claimant's case was that he had to ask permission from Mr Hughes to work less the fixed daily hours. I however find that due to the length of the arrangement and the poor relationship between the Claimant and Mr Hughes and a consequent desire to have as little to do with the Claimant as possible (JH para 34), Mr Hughes let any deviations by the Claimant from the minimum hours on a particular day go, taking into account he valued the Claimant's skill and did not pay him for the hours missed. The Claimant did not want to talk to Mr Hughes any more than he had to (and vice versa) so kept it as a brief notification to Mr Hughes eg of a later arrival time. I therefore find that the Claimant was not seeking Mr Hughes' express formal consent to work fewer than the minimum hours in a particular day but the arrangement worked that provided the Claimant told Mr Hughes he would be late in or leave early Mr Hughes let it go. I find that the Claimant clearly felt under some sort of obligation to notify Mr Hughes orally in this way, amounting in practice to checking it was an agreed absence. Mr Hughes could have said he did not want the Claimant to operate in this way but chose not to, rather than it being the case that the Respondent had no power to say no because he was self-employed and free to come and go. That reduction in the number of days where the Claimant worked fewer than the minimum hours coincided to a degree with the increase in price work after summer 2017 (page 37-39 shown in blue) meaning that working the flat rate hours formed less of a significant part in the overall total workload. I therefore find that the nature of the relationship worked by way of the Claimant keeping the Respondent informed of his intended hours (if they were going to be different, which was not frequent), he was not expressly seeking permission on each occasion because the arrangement was such that Mr Hughes did not in practice have a problem with it, it not involving significant number of times per year and not paying the Claimant for the missed hours. Whilst this might point to there being an absence of an obligation on the Claimant to always have to stick to the minimum hours unless Mr Hughes specifically agreed otherwise, I find it was instead a pragmatic arrangement arising out of a long-standing arrangement where the Respondent valued the Claimant's work and the Claimant usually stuck to the minimum hours.

19 The Claimant was paid overtime throughout the period (page 82). This is more consistent with employment (or worker) status than self-employment.

20 The Claimant's case was that he had to ask permission for a day off, whether for holiday (albeit unpaid) or for anything else. I find that given the Respondent did not think it had to pay the Claimant if he was not at work (eg it did not think he should be paid holiday pay), this was again a pragmatic arrangement. Again I find that the arrangement was one

whereby the Claimant notified Mr Hughes of the days off he wanted and Mr Hughes accepted that notification, it not being a particular concern that the Claimant wanted some days off, given the long standing relationship and the fact that the Respondent was not paying holiday pay. If the Claimant was getting his work done the Respondent could be more flexible, including regarding his outside activities – see findings of fact below. I find that the arrangement also worked on a minimalist notification style basis rather than the Claimant seeking express permission each time he wanted a day off – this is evident from Mr Hughes' reaction to the Claimant emailing him in June 2019 (after he had been told to leave at the end of 3 months) to ask for a day off to attend his son's graduation (page 198). The way it had worked was not the Claimant seeking express permission on each occasion but telling Mr Hughes what his plans were and Mr Hughes raising no objection ie implicitly agreeing that the Claimant would take the days off. The Claimant telling Mr Hughes in advance when he would not be in was consistent with there being some obligation on his part to ask, even if in practice the asking was more of a telling and the agreement to it was a matter of not objecting, rather than giving specific express consent on each occasion.

21 The Claimant was a talented artist and a very long serving member of staff. The Respondent never had any concerns about his work and effectively let him get on with it. In that context the 'badges' of control which might be evident for an employee such as higher levels of direction and supervision and monitoring were not going to be present in that setting. The Claimant had some autonomy in the way he and Mr Hughes had to agree a price for piece work (JH para 14) but it was in line with his long experience and skills that in practice Mr Hughes would agree the price with him as the Claimant was the one who had the knowledge and skills to suggest a reliable estimate on which to base the price. The Claimant was ultimately advising the Respondent of what the price to the customer should be, and he would be paid in turn from what the customer paid the Respondent for the work. In this way the Respondent was not merely acting as a conduit for the commissioning of a piece work for the Claimant to do.

22 To a relatively small degree I find that there was an element of risk in the price set for price work. This is because the Claimant had to estimate the hours it would take and if it took him fewer hours, there was a risk that there might not be other hourly paid work in that week or day which Mr Hughes could allocate him instead so he did not lose out financially. The only example given by the Respondent was the Laocoon project (JH para 28) in late 2018/early 2019. I therefore find that this was the only occurrence of any significance of this type of problem. It was not part of a wider pattern over the period whereby the Respondent has shown that where it did not have any work for the Claimant to do it in effect laid him off on no pay. I was also not provided with particular evidence to support the assertion (or any examples of when it happened) that if the Claimant made a mistake he had to rectify it in his own time and would not be paid for that extra time. Mr Hughes said (JH para 32) that in practice the Claimant made few mistakes so the issue did not in fact arise to any meaningful extent and that if it arose when doing hourly paid work he could put it right during those hours. If it arose in price work then the Respondent said it would not pay him for the extra time to put it right but as he made few mistakes and he sometimes swapped between the two types of work I find that this was not a significant matter in practice.

23 The Claimant attended various events with other staff including trips to Russia, New York Dublin and Amsterdam (C para 15). I do not attribute particular significance to

this in the context that the Claimant was a very long term member of staff and spent nearly all his time working for the Respondent. He was given Arsenal tickets but I find based on the clarification he gave of his oral evidence that it was Mr Abercrombie who had the tickets in his personal capacity and it was he who let the Claimant take the tickets. I therefore do not attribute particular significance to this save to the extent that the trips showed the Claimant's integration within the workforce as he was being included.

24 When the arrangement was terminated, Mr Hughes gave the Claimant around 3 months' price work to tide him over so he was not left abruptly without an income. Given he and the Claimant had not got on well in later years and given the context of the departure (an inappropriate comment made to Mr Hughes' daughter Chloe), this was inconsistent with the claimed self-employed status. If truly self-employed Mr Hughes could have terminated the arrangement with immediate effect but didn't, more consistent with feeling under some sort of obligation to give the Claimant some sort of period of notice, albeit by way of price work.

The Claimant's activities outside of his work for the Respondent

25 The Respondent's case was that the Claimant was self-employed because he was marketing himself as an artist and doing some other work outside his work for the Respondent, thought the Respondent's case was not that that amounted to a significant amount of work or that he was very successful at it. Throughout the period in question the Claimant pursued his art outside of his work for the Respondent as set out below. The issue was whether that outside activity had the consequence that it meant the legal relationship with the Respondent was not employment. Doing other artistic work outside of his work for the Respondent did not of itself mean than he was self-employed, the issue was whether overall what he was doing meant that he was marketing himself as an artist as a self–employed business, including providing his services to the Respondent. The issue was not whether the Claimant was successful or not in his outside activity, the issue was whether the nature of the outside activity meant he was self-employed and the Respondent was just one of his customers, albeit the one he dedicated the vast majority of his time to.

26 I find that the Claimant's website was not up to date as regards his mobile number (page 272) and it had no email address, only a postal address. He was not therefore seeking commissions via the website which would usually be an important way of obtaining work. He paid a small fee for the website and there are links to articles about some of his work and exhibitions on page 273 from which I find that the principal object of the website was to showcase himself as an artist but not particularly to generate commissions, though I find based on his oral evidence that if one came his way from some aspect of his publication of his work that he would take it. This was the Claimant's principal online presence. In addition he had a cv on the artnet website (page 269) but when printed out in January 2020 it stopped at 2006. There were also articles about him on various websites about his exhibitions (pages 272) but these were not written by him.

27 The Claimant had a book/catalogue about his work published in 2005 (page 267) some 14 years before the relationship ended. I find based on the Claimant's oral evidence that the selling of his book on Amazon was not arranged by him and he did not know the seller. He accepted that it was a marketing tool to the extent that if someone saw that and contacted him about a commission he would take it but his website was not such that

enabled easy communication and ordering as only a postal address is given. He accepted in his oral evidence that the book/catalogue contained his cv but I find by 2019 that would have been very out of date and the book/catalogue would not have contained any details of his work or exhibitions after 2004.

28 I find based on his oral evidence that the Claimant rented a small studio in Suffolk from around 2014 paying about £10 per week rent. He used this for his outside work, going there around one weekend a month in the year leading up to his departure from the Respondent.

29 The Claimant took some specific days off to undertake his outside work during the normal working week. It was identified at the hearing that the Claimant had taken off 4 days off in 2000 (though two of these were over a weekend when he usually did not work) to help a friend Simon Callery (page 200). This was some 19 years before the Claimant left the Respondent. The other occasion referred to at the hearing was in the summer of 2012 when the Claimant assisted the estate of a late artist (Mr Flannigan) during the Respondent's summer shut down. The Claimant was not being paid holiday pay during this break and it is therefore not surprising that he took on the extra work or that the Respondent did not mind him doing that work in that situation. This amounted to two specific occasions for short periods over a 25 year period and I find that they do not show that the Claimant was free to do other work to any meaningful degree (by booking days off and working elsewhere for pay on those days) without the Respondent's agreement.

30 The Claimant also did some other work such as lecturing/workshops (JH para 26) but I find based on his oral evidence that this amounted to around five times over the 25 years of his service. I find he was paid for this work and that he booked days off to do this in the same was as he did for the Callery and Flannigan work set out above. No dates or periods this happened were identified thought the Claimant accepted he did some. In addition visits by students were arranged in 2000 and 20007 (page 230) but this was just a tour the Claimant did for the students and Mr Hughes also spoke to the students. I therefore find that the lecturing involved a limited number of days the Claimant might have to book off to do this. Again because the Claimant was not taking paid holiday to do this it was relatively easy for the Respondent to go along with it.

31 The Claimant also exhibited his work whether jointly or in later years in solo exhibitions (page 223-224). There were five joint exhibitions between 1997 and 2018 and five solo exhibitions between 2006 and 2017. This was less than one a year over the period from 1994 when he started at the Respondent, even though he had exhibited prior to joining the Respondent in 1990. The Claimant said that the only time he generated a sale was in 2007 at the Royal Academy and I find the absence of sales consistent with the absence of efforts by the Claimant to secure such sales by marketing his work in any commercial way, rather than it being the case his marketing was just not successful. I find he fitted in this work outside of his obligations to the Respondent and the Respondent allowed him to purchase materials (C para 16).

32 Taking the above findings of fact into account I find that the Claimant was not marketing his skills as an artist to any meaningful degree in the period after 1994 when he joined the Respondent. Whilst he accepted in his oral evidence that if a commission came his way he would take it, in practice he was not being commissioned, consistent with that lack of marketing effort. The Claimant is an artist and wants his work to be known about

and I find that this does not mean he is marketing himself as an artist with a view to obtaining commissions, when coupled with the absence of any real marketing effort. The Claimant called it a hobby and I find it goes beyond that because of the nature of his work and interest but it does not follow that what he was doing in reality was offering his services to anyone apart from the Respondent, on a commercial freelance basis. His outside work beyond what he did for the Respondent was tolerated by the Respondent because of his skill and because in practice he got his work done to a high standard. It was not something the Respondent tolerated because the Claimant had flexibility as a self-employed worker to come and go or do other work as he pleased. The Claimant operated the same minimalist notification style arrangement with Mr Hughes for this type of work as well as the eg leaving early/arriving late situations, consistent with some degree of obligation to ask for the time off.

Relevant law

33 An employee is defined in s230(1) Employment Rights Act 1996 as an individual who has entered into or works under (or, where the employed has ceased, worked under) a contract of employment. The definition of a worker in Regulation 2(1) of the Working Time Regulations includes both an employee and a worker under a worker contract.

34 Where a contract is based partly on oral agreements and conduct, the evidence of the parties as to what they understood the agreed terms to be is some evidence to show that these terms, in an objective sense, were agreed (*Carmichael v National Power [2000] IRLR 44*).

35 *Ready Mixed Concrete v Minister of Pensions [1968] 2QB 497* set out the conditions to show the existence of a contract of employment. These are firstly personal service for remuneration in consideration for his own work and skill for the employer, secondly an agreement (express or implied) to be subject to the employer's control and thirdly the other terms need to be considered as to whether they are consistent with the existence of a contract of employment. The 'irreducible minimum' requirements are mutuality of obligation, personal performance and control.

36 As regards the mutuality of obligation test, if there is an obligation to offer work when there is some, then it is not relevant that there are occasions when there is no work to offer and no payment (*Wilson v Circular Distributors [2006] IRLR 38*). Precision in the way hours are worked to show mutuality is not the correct approach but the history of the relationship should be considered to see if that showed that it had been agreed that there was an obligation to do at least some work and an corresponding obligation to pay for it (*Dakin v Brighton Marina Residential Management EAT 0382/120*).

37 As regards control the test is whether there is a contractual right to control and not necessarily a day to day control over work (*White v Troutbeck SA [2013] IRLR 949*). The EAT decided in *Wright v Aegis Defence Services EAT 0173/17* that the question does not depend upon the practical demonstration of control by drawing attention to particular instances when control has or has not been exercised, but rather on what is known of, or may be inferred from, the contract between the parties that is said to give rise to the employer's right to direct the individual in relevant respects. In this claim the nature of the Claimant's work was unusual and the way he worked and the control factor needed to be assessed in this context.

Reasons

Mutuality of obligation

38 Taking into account the above findings of fact and given the way the relationship operated in practice from the outset and throughout the 25 years, I find that there was mutuality of obligation between the Claimant and the Respondent because if the Respondent had work it was obliged to offer it to the Claimant and he was obliged to do it. This was evident from the way he was paid weekly (ie the invoices not being the trigger) and the fact he had to do minimum hourly paid hours and was paid overtime. Even if there was a distinction in relation to the way price work was allocated to the Claimant and he had to in effect agree the price with Mr Hughes (and thus what his share would be), there was still an obligation that the Claimant do hourly paid work if the Respondent had some. If the Claimant was given some leeway in his ability to do other activities by booking days off or leaving early/arriving late, this was minimal and did not detract from the obligation on him to overall do the minimum work he was allocated.

Personal service/right of substitution

39 Taking into account the above findings of fact, here was no right of substitution and the Claimant had to do the work himself. The element of personal service was therefore present.

Control

40 Taking into account the above findings of fact the Respondent had control over the Claimant, taking into account the very unusual and specialist nature of his work. What can be inferred from the nature of the contract between them was that the Respondent had control over the work allocated to the Claimant and the type of work it was (hourly paid or price work). The Respondent did not always keep the Claimant strictly to his minimum hours per day/week but gave him some leeway including a limited number of days off over the 25 years to undertake his other work during the working week but that limited leeway did not mean it did not have control over how the Claimant did his work, when he did his work, where he did it and the Respondent provided him with the means/equipment/materials to do it.

Other provisions consistent with employment contract

41 The treatment of the Claimant's tax status by HMRC as self-employed is not conclusive, particularly as it appears that HMRC did not have the material before them in 2004 that I have now and had been told that there was a right to send a substitute when I have found there was no such right. Tax treatment points away from employment status but is not conclusive particularly when set in that context and in the 15 years lapse of time since HMRC specifically looked at this issue.

42 The Claimant had (largely) fixed minimum hours for 25 years and was paid weekly for 25 years. He was integrated into the Respondent's business by virtue of that long service and the way he was allocated work. He was part of the team. He was provided with nearly all his tools and equipment and materials by the Respondent.

43 The Claimant had a flat above the Respondent's premises which he paid rent for by way of deduction from his pay. Although A&A Properties were a separate entity, Mr Abercrombie is a director of the Respondent and the arrangements over the rent deduction was consistent with a contract of employment, even if there was that anomaly over the two entities.

44 Although the Respondent paid no sickness and holiday pay because it thought it did not have to (which might, viewed objectively, be evidence of what the parties thought the terms were) this arrangement had been put in place in 1994, many years before there was the current awareness of situations where someone labelled as self-employed may in fact be at least a worker. Therefore even if the Claimant and Respondent thought that these did not have to be paid it was in that context.

45 Taken overall the other terms were consistent with a contract of employment. The length of the arrangement was also a factor consistent with a contract of employment.

The outside activities

46 Taking into account the above findings of fact, I find that the work the Claimant did as an artist outside his work for the Respondent was very minimal over a period of 25 years. The Claimant was not acting as a self-employed person marketing his work to a wider audience in any real sense, beyond some limited information about his work being available. He did nearly all his work solely for the Respondent and did not have any other customers or clients. The small amounts of other work he did do were extremely minimal when set in the context of such a long period and working almost exclusively for the Respondent. It was not the case that the Claimant was trying to get other customers or clients and was failing at that, he was not trying to do so in any meaningful way. His outside activities did therefore not affect the legal nature of his relationship with the Respondent as set out above.

Conclusion

47 The Claimant was an employee of the Respondent because he had a contract of employment with the Respondent from the outset. He is therefore able to bring his claim for unfair dismissal and for holiday pay and unpaid wages (bonus) in the capacity of employee.

Employment Judge Reid

3 March 2020