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## EMPLOYMENT TRIBUNALS

*Claimant*

*Respondent*

Mr N Smith  
Mr D Hart

AND

Islington Centre for English

**HELD AT:** London Central

**ON:** 9 March 2020

**BEFORE:** Employment Adkin

***Representation:***

**For Claimants:** In person  
**For Respondent:** Mr S Hoyle, Consultant

## JUDGMENT

Judgment is given for the Claimant for unpaid holiday pay in the sums of £246 for Mr Smith and £1,079 for Mr Hart.

## REASONS

1. By claims presented on 19 April 2019 the Claimants bring claims for unpaid holiday pay arising from their engagement as English Teachers by the Respondent. It was agreed between the parties that the claims would either stand or fall on whether or not their engagement by the Respondent amounted to worker status within the meaning of Regulation 2 of the Working Time Regulations 1998.

Evidence

2. I have the benefit of hearing oral evidence and reading a witness statement from Mr Smith. Mr Smith was cross examined by Mr Hoyle. Mr Hart was asked fewer questions on the basis that his case is substantially similar to Mr Smith's. I also heard evidence from the owner of the Respondent Mr T Shoben.

3. Mr Shoben did not have a written witness statement but gave oral evidence in brief to rebut certain points that appear to be in dispute following the Claimant's evidence. Mr Shoben was briefly cross examined by the two Claimants.

The Law

4. The definition of a worker given within regulation 2 of the Working Time Regulation 1998 reads as follows:

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 who status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried out by the individual; and
- (c) any reference to a worker's contract shall be construed accordingly.

5. The test for a worker it has been confirmed in the case law is a multifactorial test, there are certain crucial elements. First the individual must be under an obligation personally to do the work. Mutuality of obligation and ability of the alleged worker to substitute another are relevant considerations.

Second the person for whom the work is done must not be a client or customer of a business being run by the individual.

6. As to the ability of a worker to substitute it appears that a limited right of substitution does not preclude the conclusion that a person is a worker (Pimlico Plumbers Limited v Smith [2018] UK SC 29; 2018 ICR 1551).

7. On the other side of the line a genuine and absolute right to substitute would indicate that the individual is not a worker (Independent Workers' Union of Great Britain (IWGB) v RooFoods Limited (t/a Deliveroo) [2018] IRLR 84).

8. In a series of appellant cases the Court have shown a willingness to look behind the express wording of a written contract. That principle which was confirmed in the case of Autoclenz v Belcher [2009] EWCA Civ 1046, [2010] IRLR 70 has been followed in recent authorities such as Uber B.V. & Ors v Aslam & Ors [2019] ICR 845 and Addison Lee Limited v Gascoigne UK EAT/0289/17.

9. It can be said, generally that there is a distinction between those who are genuinely running their own business and those who although not employed are providing services as part of another business.

#### Findings of Fact

10. On 4 December 2017 Mr Hart commenced working for the Respondent.

11. On 11 January 2018 Mr Hart moved from part time hours to full time hours.

12. On 8 October 2018 Mr Smith commenced working for the Respondent.

13. On 31 October 2018 Mr Smith had the following exchange with Amanda, an employee of the Respondent:

*“Mr Smith: Hey Amanda. You wouldn’t happen to know what date the school closes for Christmas? Trying to decide if it’s worth going back to one or a few weeks over the New Year.*

*Amanda: Yes I do Niall... Last day is Friday 21<sup>st</sup> December then we open again on Monday 7th January. Student numbers will be low both before and after this period so there are no guarantees that your class in the morning will be open so if you want to go earlier or come back later (if it’s cheaper) than keep that in mind! I wouldn’t want you to payloads more money if there are no hours!!*

*Amanda: On saying that quite a few of the cont[r]act teachers are taking the week before and/or of so I may well need you desperately!!!”*

14. On 11 November 2018 Mr Hart and Mr Smith (together with another Claimant Mr Owen) requested written contracts setting out their terms and holiday pay from the Respondent.

15. In January 2019 the Claimants report that their hours were significantly reduced. They accept that the hours in January would typically be somewhat reduced in any event. Mr Hart engagement by the Respondent came to an end in February 2019.

16. Mr Smith’s contract ended on 19 February 2019.

17. 11 December 2018 I accept the Claimants case that when they tried to raise these matters Mr Shoben told them that they were trying it on and breaching a gentlemen’s agreement which Mr Smith interpreted as being the piece of paper that he was forced to sign in respect of the self-employed contractor status.

#### Documentation

18. Both Claimants assert and I accept that they were never given a full contract of terms and conditions that governed that the work that they produced. Mr Smith did sign a document, page 64 which says this:

I understand that my working hours at the Islington Centre for English are irregular and I am responsible for my own capital tax and national insurance contributions, I am self-employed.

I am also aware that I will be required to undergo a CRB check, references and previous employment on my CV will be checked and I am suitable to work with students under the age of 18.

19. The Respondent's case is that both Claimants were offered terms and conditions similar to those which appear at pages 59-63 of the agreed bundle (in the name of Mr Owen) which is a statement of terms and conditions which provided for sick pay and a holiday allowance, neither Claimant signed up for to this. The Respondent maintains that Mr Hart declined the opportunity to sign up with this contract without actually seeing the wording of it. Mr Smith also maintains that he has never seen this contract of employment, I accept that neither of the Claimants ever saw this document or an equivalent.

20. The Claimants point to the fact that they were treated as other members of the staff. They have pointed out photographs of them in fancy dress or standing with other staff members in group poses. They were treated as part of the team of teachers. They maintain that they had little autonomy in the sense that they had to teach classes at a time and location of the Respondent's choosing. These were times that were set by the Director of Studies and where on the Islington Centre for English premises.

21. The Claimants point to the fact that certain teaching groups were regarded as belonging to them. For example, on 13 November the Director of Studies sent a WhatsApp message to Mr Smith saying

*“I had to put half of your class with Richard and some with Steve’s FCE as four teachers were off so ask Richard what he did”. [underlining added]*

22. Similarly, on 19 November the Director of Studies asks if Mr Smith could cover

*“Daniel’s [Mr Hart’s] intermediate [class]”.*

23. There was a similar message on 14 December 2018. The significance of this is that there were classes that were regarded as belonging to the Claimants.

24. The Claimant were addressed as staff by Mr Shoben in his memorandum to the staff and directed them in a memo that they should not agree to any request by a student to offer additional lessons. The Claimants make the point that Mr Shoben was exercising a degree of control over the Claimants as they were not able to contract separately with students.

25. As to substitution the Claimants point out that they could not sub-contract the work to another teacher. If they could not attend work they had to contact the Director of Studies who would find a substitute teacher. This is evidenced by a WhatsApp message from the Director of Studies dated 29 January 2019 which says, “it is not your responsibility to contact the students”. The Claimants point out that they were expected to attend teacher meetings, but by a memo dated 6 December this was made optional when the Claimants requested to be paid for the 15-minute meeting.

26. As to supervision there was a quality control element carried out by the Respondent. The Claimants were subject to observations. Although in the case of Mr Smith there was not an observation while he was working there.

27. The Director of Studies directed the Claimants as to which resources to use. They were also directed to include a “tech-slot” in which they would promote the Respondent’s Facebook page, YouTube channel and app.

28. Mr Shoben's evidence was that although individual students could commence or end at any point, studies were arranged administratively into "books". Books were three months in duration. He said that it would at the end of a book that the Respondent would re-consider the classes being taught and the allocation of teachers to those classes. I accept this evidence. I find that the corollary of this is that was an expectation that the Claimants would continue teaching their allocated classes during this three month period.

### Submissions

29. In summary the Claimants say that this is a classic *Autoclenz* situation i.e. the one page document does not reflect the reality of the situation and that they were workers.

30. As to bargaining power the Claimants say that all teachers were paid according to the pay scale and there was no scope for negotiation. I accept that there was a pay scale and this was not realistically open to the Claimants individually to renegotiate with the Respondent, it was take it or leave it.

### Respondent's Submissions

31. The Respondent submits that I should take account of the fact that Mr Owen who had previously been a Co-Claimant with Mr Smith and Mr Hart is what Mr Hoyle describes as a militant trade unionist and that he was only dragging the other two Claimants into this matter to help him bolster his own case in order that he could pay a hefty tax pay. Mr Hoyle says that they have been swept up in the momentum of Mr Owen's campaign.

32. I find that the motivation of a third party in bringing a claim and his alleged 'militant' status is irrelevant to the determination of the worker status of Mr Smith and Mr Hart.

### Conclusions

33. I find that the Claimants were workers within the meaning of Regulation 2 of the Working Time Regulations 1998.

34. I rely on the fact that they were realistically unable to substitute and had to provide *personal service* based on my findings of fact.

35. As to *bargaining power* it is said by the Respondent that the Claimants were not forced to sign the document, that “no one held a gun to their head” and that they were free not to take the offer. I accept the Claimants’ case on this point which is simply that this was a precondition of undertaking work for the Respondent and they needed the money. I consider that the Claimants at the point of entering into work for the Respondent had little by way of bargaining power. There was a set of rates and they had little choice but to accept the rates that were being offered and the terms that were being offered.

36. As to *mutuality of obligation* I accept the Claimants evidence that they did have regular classes. The Respondent referred to particularly classes as belonging to particular teachers including the Claimants and there was an expectation that the Claimants would continue to teach “their” classes at the same time each week. The Claimants expected that they would continue to teach these classes and the Respondent expected the Claimants to teach them.

37. It is clear from Mr Smith’s WhatsApp exchange with Amanda on 31 October 2018 that he could not guarantee his hours going into the New Year. I consider however that Mr Shoben’s evidence about three monthly “books” of studies and my findings on this point indicate that during the currency of these books there was a mutuality of obligation. It is quite clear that Mr Smith was anxious to only take his holiday to Taiwan at a time that would fit in with the school closure weeks over the Christmas period. There was an obligation here for him to remain able to teach his classes during the term time.

38. Looking at the matter in the round I consider that the reality of the situation was that the working arrangements for both Claimant does



correspond to the definition set out at regulation 2 of the Working Time Regulations. There was no full written contract. I find that the “self employed” declaration signed by Mr Smith did not reflect the reality of the situation. Both Claimant were workers.

### Quantum

39. The Claimants have provided detail behind the calculation of their claims. This has not been seriously challenged by the Respondent or in fact challenged at all either in terms of the evidence on which it is based or the calculations. I accept the calculations as they are put forward.

### Claimants Counterclaim for Notice

40. The Respondent seeks to counterclaim for notice pay on the basis that they say that the Claimants did not honour their contractual obligations in this respect. The Respondent has two difficulties in this respect, first there is no written contract which might evidence what the notice arrangements were said to be.

41. Secondly, and perhaps more fundamentally the Respondent has not counterclaimed as part of its response. I do not consider it would be appropriate to add a counterclaim by way of amendment at this stage when the Claimants have not had the opportunity to put in a response and in any event the Respondent has not produced an amended response containing details of this counterclaim.

Employment Judge Adkin

Dated: 14<sup>th</sup> March 2020

Reasons sent to the parties on:

17/3/2020

For the Tribunal Office