EMPLOYMENT TRIBUNALS

Claimant: **Mrs P Hebden-Jacks**

Respondent: **Aura Leisure and Libraries Ltd**

Heard at: **Mold via CVP** **On: 5 February 2021**

Before: **Employment Judge C Sharp (sitting alone)**

Representation:
Claimant: Mr D Jacks (Claimant's husband)
Respondent: Mrs H Owens (Solicitor)

JUDGMENT

The Judgment of the Tribunal is as follows:-

The Claimant's claim for unfair dismissal is dismissed on the basis that she was not an employee of the Respondent on the alleged effective date of termination.

REASONS

Background

1. The Claimant, Mrs Penelope Hebden-Jacks, is an ice-skating coach who has coached a variety of individuals over approximately a 30-year career based at Deeside Ice Rink. Her work has included coaching celebrities for the Dancing on Ice programme on ITV, individuals with disabilities and members of the British Youth Ice-Skating Team. There is no dispute that the Claimant is a fully qualified ice coach who coached individuals to a national and international level, as well as to the standard required to perform ice-skating routines on TV. The dispute that I have to determine is whether she was an employee or worker of the Respondent or self-employed.

2. The Claimant's account, which is unchallenged, is that she has been based at the Deeside Ice Rink for over 30 years. The ice rink itself was originally operated by Flintshire County Council but at some point around 2017, it became operated by Aura Leisure and Libraries Ltd, a charitable not for profit organisation which operates entirely for the benefit of the local community.

3. On or around 3 or 5 June 2019 (the precise date is not a finding I need to make today but there is a conflict between the date of the letter and its date of delivery), the Claimant was given 4 weeks' notice and told that she would have to stop using Deeside Ice Rink on 3 July 2019. The Respondent's explanation is that there had been a number of issues concerning the Claimant's conduct; in particular, judges in the ice-skating community were refusing to attend ice-skating assessments if the Claimant was present, which the Respondent alleged was having a detrimental impact on its reputation. It is worth recording that the allegations surrounding the Claimant were not relevant to the purposes of today's hearing and I make no findings regarding this point at all.

4. The Claimant, after a period of ACAS early conciliation, issued a claim in the Employment Tribunal on 28 September 2019 alleging that she had been unfairly dismissed and stated that she had been an employee of the Respondent. It is relevant that within her claim form at section 8.2, she said she had been a full-time ice-skating coach at the ice rink on the basis of being a self-employed independent contractor; it was evident that she felt deeply aggrieved by the termination of her relationship with the ice rink.

5. In the Claimant's Schedule of Loss, she sought compensation for both the work she asserted at the hearing itself was undertaken as an employee (teaching the Learn to Skate/Skate UK course organised by British Ice-skating) but also for the lost income for her private work which she asserted today was undertaken on a self-employed basis and wholly separate to her alleged employment with the Respondent. Prior to today's hearing, in my view the Claimant had not differentiated between her private lessons and the Skate UK lessons or said that her position about status for each aspect of her work differed.

6. The Claimant also confirmed that she had moved her business to the Altringham and Widnes Ice Rinks and appeared to be seeking compensation for this, though as this related to her private work which she today said was done under self-employed basis, it is difficult to see how compensation for impact on trade could be lawfully awarded by an Employment Tribunal.

The proceedings within the hearing/oral evidence

7. Today's hearing has been listed to consider the issue of the Claimant's employment status. I was aware that the Claimant had previously made a number of applications to postpone today's hearing on the basis that childcare and her health prevented her from being able to take part in the proceedings. Those applications failed for the reasons stated by the Judges who dealt with them. I record that the Claimant at today's hearing was able to fully interact with the matters before me, spoke clearly and coherently, and was ably represented by her husband.

8. At the hearing, I heard oral evidence from the Claimant and from Mr Ian Foster, the Ice Rink Coordinator of Deeside Leisure Centre. An agreed hearing bundle was provided, including evidence such as the written commercial agreement between the parties, advertisements for ice-coaches from the Deeside rink and other skating entities, and the tax returns and accounts of the Claimant's business.

9. I consider this to be an appropriate juncture to make some observations about the evidence I have heard today. The Claimant had to be on several occasions reminded by me that her duty was to answer the question put to her and not simply to keep stating the same thing over and over or give the answer to a question that she wished she had been asked. Matters reached the point where in the interests of justice I warned the Claimant directly that as the decision maker, I was observing how she was responding to questions and I did not consider she was giving her evidence in a straightforward manner, even allowing for potential issues that can be caused by a virtual hearing. At points in my view, she was evasive. In contrast, Mr Foster appeared to be a witness who was doing his best to answer questions but did not always understand the questions as put by Mr Jacks. On a number of occasions, I had to intervene to clarify the question and ensure it was put forward in a manner that was understandable to the witness.

10. However, my perception of the credibility and reliability of the witnesses from whom I heard did not in the end affect the findings of fact that I have made below. This is because either the evidence of the Claimant herself or the surrounding contemporaneous documentation assisted me significantly in making those findings, so that even on the points where the parties were not in agreement, it was not necessary for me to prefer the evidence of Mr Foster over Mrs Hebden-Jacks, despite him being the more credible witness. I used the principles articulated in the cases of **Gestmin SGPS -v-Credit Suisse (UK) Ltd** [2013] EWHC 356 (factual findings are best based on inferences drawn from the documentary evidence and known probable facts, rather than a witness' memory which can be affected by many factors)

and **R (Dutta) v General Medical Council** [2020] EWHC 1974 (Admin) where Mr Justice Warby set out commentary by Mr Justice Stewart in the case of **Kimathi v Foreign and Commonwealth Office** [2018] EWHC 2066 (QB) on the *Gestmin* principle:

"*The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no useful purpose… .But its value lies largely….in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".*

The legal issues

11. At the outset of this hearing, I spent some time going through the legal issues with the parties and in particular ensuring that Mr Jacks, who is not legally qualified, understood the points that I needed to deal with within this decision. There were moments where I had to explain to him that points that he wished to raise were not relevant to the tests that I had to apply, and it was evident to me that there were some misunderstandings on his part as to the meaning of various parts of the commercial agreement which formed the basis of the agreement between the parties. I explained the meaning of those clauses to ensure that the Claimant's representative was able to put the case as best he could. One example was the meaning of the clause surrounding assignment of the benefit and burden of the contract and that did not directly relate to the possible right of substitution (or lack thereof) of someone to carry out the work of the Claimant. "*Assignment*" related to the contract itself; "*substitution*" related to who carried out the work.

12. The starting point is the Employment Rights Act 1996 which defines the meaning of the terms" *employee*" and "*worker*". I explained at the outset that while the Claimant was asserting that she was an employee, and the Respondent was asserting she was a self-employed independent contractor, I would consider all three potential statuses.

13. The definition of an employee comes from section 230(1) of the Employment Rights Act which defines the meaning of the word "*employee*" as "*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment."* In summary, the relevant things I should consider when deciding if someone is an employee is the control over that individual by the alleged employer, whether there is a mutuality of obligation as there is an irreducible minimum

that must exist for there to be an employment relationship (as confirmed in the case of ***Autoclenz Limited -v- Belcher*** **[2011] IRLR 823** in the Supreme Court) and personal performance.

14. The definition of "*worker*" is set out in section 230(3) which states a worker is *"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".* The case of ***Pimlico Plumbers Limited and Mullins -v- Smith*** **[2018] UKSC 29** confirmed a decision of the Court of Appeal where Lord Underhill made it clear that the essential question I would have to ask is whether the Respondent is a client or customer of the Claimant or is the Respondent the principal and the Claimant an integral part of the Respondent's operations and subordinate to the Respondent.

15. The importance of looking at the reality of what has happened was reiterated in the Supreme Court decision of ***Uber BV and others v Aslam and others*** [2021] UKSC 5, a decision handed down after the oral hearing of these proceedings, but upholding the previous decision of the Court of Appeal. The *Uber* case did not have a written agreement between the parties in existence, which is not the case here, but it comments on *Autoclenz*. The Supreme Court said that it was wrong in principle to treat written agreements as a starting point in deciding whether an individual is a worker. It reminded tribunals to consider the purpose of employment legislation, which is to give protection to vulnerable individuals who have little or no say over their pay and working conditions because they are in a subordinate and dependent position in relation to a person or organisation which exercises control over their work. The legislation prevents employers, frequently in a stronger bargaining position, from contracting out of these protections.

16. There is no clear bright dividing line between the different statuses; I have to carry out a balancing exercise of the various relevant factors. Factors that are relevant are control, integration and the economic reality. As the case of ***Cotswolds Development Construction Limited -v- Williams*** [2006] IRLR 181 (EAT) reminds me, a focus on whether the worker actively markets their services to the world as an independent person or was recruited to be an integral part of the Respondent's operations usually tells me which side of the line this particular Claimant falls.

17. I am guided in other ways as to how I should approach the decision I have to make today. There is various observations from the Senior Courts that a

right of substitution is inconsistent with employee status if genuine and I should take into account the relative bargaining power of the parties when deciding the terms of any written agreement (in other words, what has been agreed). The true agreement may be gleaned from the circumstances that surround the situation and I should adopt a purposive interpretation of approach to the agreement (as reiterated in *Uber*). Terms in writing generally form the *prima facie* basis of the agreement (with the exception of terms about employment status) and I should not imply inconsistent terms with the written agreement if it is not a sham. I should also bear in mind that the true agreement may have changed over time through variations in the contract and Employment Tribunals are injuncted to be sensible and robust. Further commentary about this issue is set out in paragraphs 22 and 25 below, explaining my approach.

18. I must also bear in mind the three-limb test from ***Ready Mixed Concrete (South East) Ltd -v- Minister of Pensions and National Insurance*** [1968] 2 QB 497 where three limbs for a contract of employment to exist is set out, albeit in the rather outdated language of the master and servant relationship:

    (a) that the servant agrees in return for the wage to provide their own skill or work;
    (b) the servant agrees either expressly or implied terms to carry out their performance subject to the Respondent's control sufficient to make the Respondent a master;
    (c) that there are no contractual provisions inconsistent with a contract of service (with a reminder that a limited or occasional power of delegation or substitution does not mean there was no employment contract).

19. It is clear from an analysis of the law that I must look at the factors of mutuality of obligation, control, integration, personal performance, and economic reality. No single factor outweighs any of the others, so for example personal performance may be required but that does not mean there is an employment relationship in the same way as instructing a barrister personally does not make that barrister an employee of the client. I also remind myself the useful observation in the case of ***Hall (HM Inspector of Taxes) -v- Lorimer*** **[1994] IRLR 171** that I should not carry out a mechanical exercise of running through items in a checklist but rather *"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 making an informed, considered, qualitative appreciation of the whole…. Not all details are of equal weight or importance in any given situation."*

Submissions

20. I heard submissions from Mrs Owens on behalf of the Respondent and Mr Jacks on behalf of the Claimant. In my view, Mrs Owens' submissions were wholly in accordance with the legal framework outlined above and she drew my attention to a number of evidential matters which she said demonstrated the Claimant was self-employed, both under the terms of the agreement and in practice.

21. Mr Jacks understandably took the view it was better to go through the factors I had identified at the start of the hearing and tell me the Claimant's response to each of those. He argued that she was an employee of the Respondent for the approximately two and half hours a week she spent conducting the Learn to Skate programme on behalf of the Respondent (though he said at times it could be more time within the course of a week). Mr Jacks also asserted that the Claimant had never suggested that her private work was subject to employment status, despite the contrary being set out in both the ET1 and the Schedule of Loss. There was no dispute between the parties about the legal framework.

Findings of Fact

The written agreement

22. I accept that the Supreme Court in *Autoclenz* and *Uber* said that the starting point should not be the written agreement between the parties for the public policy reasons it outlined. While Lord Clarke in *Autoclenz* said that nothing within the judgment altered contractual principles for ordinary contracts , for employment contracts the tribunal should consider what was actually agreed between the parties "*either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded".* I consider that I must look at the contract entered into by the parties called the Ice Coaches Agreement between Flintshire County Council and the Claimant on 1 April 2013 (the commercial agreement) to establish if it is a sham agreement and for the assistance it can give about what was the actual agreement at the time the contract was agreed.

23. It is worth pointing out that the Respondent took over the business of the ice rink from the council, and there was no provision preventing the benefit and the burden of the contract from being assigned to Aura from the council. Both parties proceeded on the basis that the assignment happened.

24. Prior to the hearing the Claimant had asserted that *Autoclenz* was engaged and there was a sham agreement situation. However, in the course of her oral evidence before me, the Claimant accepted that the 2013 contract was

a true agreement and reflected the position of what had been agreed between the parties, both on the date that it was signed and on an ongoing basis, except for the provisions that stated that she was self-employed and not an employee. Unsurprisingly, the Respondent's evidence through Mr Foster agreed with this, though it was clear that there were some parts of the agreement that never operated, for example the annual review between the managing officer and the ice coaches.

25. There is no basis on which I could make a finding that this agreement was a sham agreement and it did not reflect what had been agreed between the parties at the time it was entered into given the evidence of both parties; many of the principles of *Autoclenz* are not engaged. However, bearing in mind the legal authorities, even when the conduct of the parties and other evidence shows that the written terms were understood and agreed to be a record of the parties' rights and obligations towards each other, which is the position of the parties in this case, any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded. In other words, the provision that the Claimant was self-employed will be ignored and I must look at the reality on the ground before making such a finding.

26. I thought it would be useful if I analysed what the agreement said before going on to look at the facts on the ground as it represented the agreed position as conceded by the Claimant (with the exception of her status). The agreement is described as a commercial agreement by both parties, as accepted by the Claimant in the course of her oral evidence. Having read the complete agreement, it is abundantly clear that this is a commercial agreement and not a contract for service in the classic form.

27. The agreement covers both the Learn to Skate lessons offered by the council, which have to be booked at reception, and the private lessons offered by ice coaches which have to be booked directly between the client and the coach. The Claimant's contention that there is a split between the work she carried out for the Learn to Skate programme and her private lessons is not supported at all by this agreement - the agreement expressly covers both aspects of this work. There is within the services offered by the ice coach under the agreement a provision that ice coaches should be available to carry out Learn to Skate lessons but I will return to this point later in the Judgment about the difference between availability and obligation. The agreement throughout refers to "*the ice coach".* The term "*you*", which was a feature of the *Pimlico Plumbers* case, is not mentioned. The agreement was in my view a document drafted to cover a number of contractors who are ice coaches, as opposed to an employee, as shown by the analysis of the document below.

28. Section 3(a) says that the ice coaches must devote sufficient time and attention to performing their services satisfactorily and confirms that they are perfectly free to work elsewhere (I interpret this as a requirement to provide work of satisfactory quality and a "free to compete" provision). This is not a term consistent with employment status.

29. Section 3(d) says that the reasonable directions of the managing officer must be followed. The evidence before me made it clear that there was no basis on which the managing officer could direct the content of the lessons or indeed the times by a specific coach. The managing officer was Mr Foster who was not qualified as an ice coach and has insufficient expertise in ice skating to dictate the content of lessons. Both parties agree that the contents of the Learn to Skate programme is as set out in the hearing bundle and imposed by the governing body, British Ice-Skating. The private lessons were entirely a matter between the coach and her pupil subject to the coach ensuring that the coaching meets that pupil's requirements as the parties accepted. In terms of the times of lessons, the evidence I heard was that the private lessons were set at a time agreed between the coach and the pupil, and in relation to the Learn to Skate, a timetable was created after booking of lessons with reception by pupils. The Learn to Skate lesson bookings were then passed onto to the head coach through Mr Foster, and in a process I will outline later various ice coaches ended up teaching those lessons. The evidence of Mr Foster was that the "*reasonable direction*" provision of section 3(d) is to deal with matters such as health and safety and potentially appropriate direction as to how the ice coaches should behave as on occasions there had been complaints and difficulties about their conduct. This was not challenged by the Claimant's representative during cross-examination. This provision does not itself assist to establish a particular status as even self-employed contractors can be reasonably expected to follow health and safety policies and conduct themselves appropriately.

30. Section 3(e) talks about conduct and ice coaches following the policies of the council. It would be fair to describe this as a rather vague term. The Claimant had nothing to say on this point while Mr Foster said "*well it refers to matters such as fire regulations and health and safety."* I did not consider that this provision assisted any allegation of employment status.

31. Section 3(f) says that the Claimant cannot delegate her duties or obligations otherwise and as expressly permitted. This demonstrates there was no or an extremely limited right of substitution, other than the provisions which talk about giving notice that an ice coach was not going to attend class. This could support a finding of employment status or personal service from a contractor.

32. Paragraph 6(c) sets out a review mechanism. The evidence from Mr Foster is that this never happened and there was no contradictory evidence from the Claimant in this regard. It would appear to be an irrelevant term.

33. Section 7 deals with the operations of the ice rink and says that the ice coach will report to the managing officer and comply with all reasonable instructions. Again there was very little from the Claimant on this point while Mr Foster talked about it relating to the rink itself and not the actual work of the Respondent, the operator of a leisure centre.

34. Section 10 is a fairly standard default provision which says if the ice coach fails to provide the services for any reason other than ill health or circumstances outside their control the contract can be terminated. The drafting is more consistent with self-employed status.

35. Section 11 is a termination provision which is striking in that it allows for the possibility of an ice coach being a firm rather than an individual. An employee cannot be a limited company.

36. Section 25 says that the ice coach is self-employed and the Schedule sets out the services that are to be provided by both the ice coach and the council. The services to be provided by the ice coach are to be available to teach the Learn to Skate lessons and teach private lessons (dealt with by the ice coach themselves). If the ice coach is unable to attend the Learn to Skate classes, they must give 7 days' notice unless they are taken suddenly ill, and that they should encourage Learn to Skate pupils to stay within the programme. This last point was described by Mr Foster as being a provision that simply stops coaches trying to "*poach*" Learn to Skate pupils into becoming private pupils from which the coach would generate more income. Having read the provision, I do consider that to be a reasonable and natural interpretation of that provision, though equally the Claimant's argument that keeping people within the Learn to Skate programme would increase the income of the Respondent is valid. The ability to simply stop teaching Learn to Skate lessons if notice is given is not consistent with employee status – an employee cannot choose to just stop doing their work due to their servant position.

37. The services that have to be provided by the Respondent under the agreement is that it will allow the ice coach to have access to the rink in return for rink rent. In addition, it must provide a music system, an ice coaches room, keys and give appropriate notice about the unavailability of the rink. This is not the type of offering one would expect to see in an employment contract, while it is wholly consistent with self-employed status and a service being offered by the Respondent to the Claimant's business.

38. When I step back and consider the terms of this agreement, it is wholly inconsistent with employee status. Any natural interpretation of this agreement is that the Learn to Skate lessons are being provided with the Respondent being the client or customer of the ice coach. Furthermore, there is no obligation on the Respondent to offer work to the ice coach. The fact that the ice coach has to make themselves available to teach Learn to Skate lessons does not mean that the Respondent must offer that work – the agreement does not require the Respondent to offer the coach Learn to Skate lessons; it says the coach should be available to teach if asked.

39. Mr Foster's evidence was that the Respondent could choose to stop offering the Learn to Skate programme. Contrary to the submissions of Mr Jacks, he was forced to concede when I put the question to him that there was no evidence before me that the Learn to Skate programme was so essential to the Respondent's operation that it could not continue without it.

40. My interpretation of the agreement between the parties is that the ice coach is a self-employed independent contractor and it covers all aspects of her business that is being operated at the Deeside Leisure Centre, including the Learn to Skate lessons. There has been no suggestion by the Claimant that she was forced to agree to the contract due to her subordinate position; in her oral evidence she said it was an accurate reflection of the agreement between the parties, except for the point that she was self-employed (which was then defined by her as covering the Learn to Skate lessons only).

41. However what about matters on the ground? I considered it appropriate to go through each of the factors and set out my findings of fact on that basis.

Control

42. The evidence of both the Claimant and Mr Foster and within the bundle is that there was little or no control over the Claimant by the Respondent. The content of the Learn to Skate lessons were set by the Governing Body and both parties accept that the Respondent had no involvement at all in relation to the private lessons. The Claimant alleges that she was forced to attend meetings, but this is not supported either by her own account or the evidence of Mr Foster. Mr Foster's evidence, which was not challenged, was that there were no technical meetings, though he did arrange unpaid meetings once or twice a year to enable the ice coaches to have an opportunity to raise any issues. He added that there was on one occasion a meeting where the ice coaches had to be trained on how to conduct themselves and about good practice within their businesses.

43. There is no evidence of any disciplinary policy applying to the ice coaches. Mr Foster had no knowledge of such a step being taken and the Claimant outlined little of relevance within her statement on this point. There is no

evidence that the ice coaches, despite the allegations of the Claimant, were forced to turn up at the rink at particular times. What the evidence supports is that when the Learn to Skate timetable was created, the head coach enquired which ice coach would like to make themselves available to teach those lessons, and that there was no sanction for the several occasions when the Claimant and other ice coaches decided not to teach the Learn to Skate classes, either for whole blocks or part blocks, because their time was taken up with other matters, such as attending competitions. The unchallenged evidence was that recently one ice coach had not taught Learn to Skate classes for a 12-month period without sanction. The Claimant has provided no evidence that she was forced to attend meetings of such a nature that is consistent with employment status.

Integration

44. There was no evidence before me of any integration of the Claimant, and not to the extent that she was an integral part of the Respondent's operations. The requirement that staff, contractors and members of the public have to sign in, swipe or clock in when on the premises was no evidence of anything other than a need to know who was in the building for the purposes of fire regulations as outlined by Mr Foster.

45. The issue with the jacket raised by the Claimant did not support her case. The jacket was one provided by the council (with its logo, not the Respondent's) who had ceased to operate the rink years ago in 2017. The oral evidence of the Claimant was that she hardly ever wore it and that there was no sanction when she did, despite her position that when it was first introduced the management did want her to wear it. There was no challenge to Mr Foster's evidence that the jackets had been provided at the request of the ice coaches and he had not seen them worn for a long time.

46. I have already outlined my finding that the coaches could volunteer to cover Learn to Skate classes once the timetable was constructed but this is not evidence of integration into the Respondent's operations as the evidence indicated the coaches volunteered and the Respondent was a client of the ice coaches for these purposes. There was a dispute between the parties as to whether the Claimant was entitled to free gym usage, but there was no evidence at all that employees were entitled to free gym use when the Claimant left the ice rink; the evidence of Mr Foster was that this had not happened since 2014.

47. The evidence before me about the status of ice coaches in other ice rinks appears to support Mr Foster's proposition that it is not uncommon within the ice-skating industry for ice coaches to be self-employed. The fact that the Claimant found one ice skating club in Ayr that was prepared potentially to employ an ice coach (and the advertisement is not clear as it used the

term "*employed*" and "*self-employed*") does not mean that the Respondent had to treat her as employed. I have to look at what happened in Deeside, not Ayr.

48. The use of an ice coaches' room, which formed part of the commercial agreement, does not evidence integration any more than the use of a robing room by barristers in court indicates that the barrister an employee. While the Leisure Centre had an ice rink, there is no evidence before me that the ice coaches did anything other than what they chose to do for the purposes of their own business. On an operational level they do not appear to have any deep involvement with the Respondent's operations – the Respondent was able to close the rink when it chose (and give the ice-coaches a discount on the rink rent).

Personal performance

49. The parties agreed that it was the Claimant who was expected to provide the services under the agreement. As I have already indicated, the fact that personal performance is required is not conclusive evidence that there is an employment relationship. The commercial agreement was a contract for services, not service.

Mutuality of obligation

50. I have already found that the agreement itself does not require the Respondent to provide work to the Claimant. Mr Foster's evidence was that the Respondent would want the Learn to Skate programme to be staffed by ice coaches if offered, but nothing prevented it from ceasing to offer the programme. His evidence was that individual ice coaches were free to accept or reject the offer of work as they saw fit. The Claimant's representative's response during submissions when I asked him what evidence was before me that the Respondent was required to offer work to the Claimant was that the ice coach is required to offer availability and the Learn to Skate programme was pivotal to the Respondent. However, being required to be available on the part of an individual does not mean that there is a requirement to offer work as I have previously explained. There is no evidence before me that the Learn to Skate programme is pivotal as Mr Jacks accepted himself. Indeed, the Claimant in her evidence talked about having moved her role to the Altringham and Widnes Ice Rinks, and said that they were structured differently and did not appear to offer the Learn to Skate programme. There is no evidence before me on which I could find there is a mutuality of obligation between the parties.

Economic reality

51. In this case, there was considerable evidence that the economic reality was that the Claimant was on business on her own account and took the risk accordingly. The Claimant paid, as the evidence in the bundle shows, rink rent every month to the Respondent. She received the benefit of a discount when there was a difficulty in opening the rink. The Claimant generated claims for payment on the Learn to Skate lessons (through claim forms) and was paid for those lessons she delivered. The evidence from both parties was that the Claimant was free to stop delivering these lessons, even mid-way through a lesson block.

52. It is worth noting that the amount claimed for Learn to Skate lessons each week according to the evidence in the bundle were not large. Quite often, the Claimant was claiming sums in the region of £28 a day or £57 a day when I look at the 2017 sheets and similar if slightly increased sums over time. The amount she earned from the Learn to Skate program compared to her private lessons, according to the evidence before me from both parties, was not as significant.

53. The Claimant prepared accounts on a self-employed basis and in her tax returns to HMRC stated that she was not generating any income from any employment. In fairness to the Claimant, her answer to this was that she had been told she was self-employed. However, the claimant also said she contacted HMRC and she continued to file returns stating that she was self-employed. The Claimant was able to move her business elsewhere, according to her own evidence. In my judgment, the economic reality demonstrated that the Claimant was operating her own business, dealing with both Learn to Skate and private lessons. The Claimant was free to move her business and operate as she wished (within the bounds of acceptable everyday conduct) with little or no control over her by the Respondent; she was not in a subordinate and dependent position, unlike the Claimants in *Autoclenz*.

Conclusion

54. Going through the answers to the legal questions my conclusion is this - that the analysis factors of control, mutuality of obligation, integration and economic reality all show that the Claimant was self-employed, including when she was teaching the Learn to Skate lessons. This is confirmed both by the reality on the ground and the terms of the legal agreement between the parties, which is not a sham. The Claimant was required to give personal service but this in itself is not sufficient to establish a contract of employment exists.

55. If I apply the factors of the *Ready Mixed Concrete* limbs I am not persuaded that the Claimant agreed in return to provide her own skills and work to receive a wage, nor I am not persuaded that she was subject to the Respondent's control to any level close to making the Respondent her master. The contractual provisions are inconsistent with a contract for service. The focus on whether the Claimant independently markets her services to the world as shown by her website, the information poster and practice, which she herself accepts includes a large element of self-employment through the private lessons, demonstrates that the Claimant was an independent person who marketed her services as an ice coach to the world; she was not an integral part of the Respondent's operations, but instead it was her client or customer.

56. It is evident from the Claimant's witness statement and oral evidence, as well as the ET1, that she is angry about the termination of her relationship with the Deeside Leisure Centre. She is also unhappy with the way that the law is structured. She feels exploited. While I have empathy with the Claimant for feeling that way given the evidence about how the relationship was ended, and bore in mind the principles underpinning employment legislation, this is not a basis in which I could lawfully find she is an employee given the facts of her case. Only employees can bring an unfair dismissal claim and as I have found that the Claimant is not an employee, I find that her claim for unfair dismissal must be dismissed as the Employment Rights Act requires that only employees can bring such claims.

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Employment Judge C Sharp
Dated: 19 February 2021

JUDGMENT SENT TO THE PARTIES ON 22 February 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS