# EMPLOYMENT TRIBUNALS

**Claimants:** **Ms A Dolphin and six others**

**Respondents:** **Rhythmix (in Liquidation) Ltd (R1)**
**The Secretary of State for Business, Energy and Industrial Strategy (R2)**

**Heard at:** **Considered on the papers** **On: 10/3/2021**

**Before:** **Employment Judge Wright**

**Representation:**
**Claimant:** **Written representations**

**Respondents:** **R1 – no representation**
**R2 – written representations**

# JUDGMENT

It is the Judgment of the Tribunal that the claimants were employees of R1.

# REASONS

1. Seven claimants brought claims against R1 for (amongst other things) holiday pay, notice pay and redundancy pay. At a preliminary hearing on 29/6/2020 it was agreed the Tribunal could consider the claims of four lead

claimants on the papers. R2 was joined to the proceedings as statutory guarantor.

2. At the preliminary hearing the claimants said R2's response had not been served upon them. In the claimants' written submissions dated 17/9/2020 they said they had still not received R2's response.

3. Witness statements, a bundle and other documents were provided and considered. The claimants were all music tutors and some had an additional role.

4. R1 is a music, social welfare and education charity and is registered with the Charity Commission of England and Wales. It was incorporated on 12/1/2007 and is a private limited company by guarantee.

5. It is the claimants' case they were made redundant on 12/7/2019 when R1 told them not to attend work. This followed a period when the claimants were aware R1 was struggling financially and there had been delays in paying their invoices.

6. The claimants were told on 9/8/2019 R1 was having to pursue insolvency proceedings and it entered into a Creditors Voluntary Liquidation on 11/9/2019.

7. The claimants were told and they considered themselves to be self-employed. They submitted invoices, however, they said the invoices were in reality a form of time-sheet so that the respondent could calculate their pay.

8. Apart from the submission of an invoice, the claimants say that in all other respects, they were in reality employees of R1.

9. The claimants had different start dates and had CRB checks, insurance and signed up to R1's Code of Practice and Aims and Objectives. There were other policies which they had to follow, such as a disciplinary policy and whistleblowing policy.

10. The claimants were directed where they were to perform services for R1. They had to provide feedback to R1 in the form of an evaluation and in a certain format.

11. They would agree in advance the sessions they would perform for R1 and were personally obliged to perform the work. If for some unforeseen reason they could not deliver a particular session, R1 would source an alternative tutor to replace the particular claimant.

12. The claimants had to perform the work in a certain way and to R1's standards.

13. The claimants were paid an hourly rate set by R1.

14. Projects were offered to the claimants for each term and they accepted them. There was an expectation that work would be offered and be accepted.

15. The claimants' performance would be assessed by a director of R1 and feedback would be provided. Targets were set which the claimants were expected to meet.

16. The claimants were expected to undertake CPD on a regular basis and the cost was met by R1. The claimants were also invited to team development meetings.

17. R1 provided the equipment, such as iPads and instruments for use during the sessions.

18. The claimants were listed on R1's website, their details were included in promotional materials and they engaged in workplace social functions (leaving drinks and suchlike).

The Law

19. The claimants' straight-forward and primary claim is that they were employees of R1 in accordance with s. 230(1) of the Employment Rights Act 1996 (ERA):

> **s. 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.
>
> (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly.

20. The claimants set out the relevant authorities:

The starting point for a determination of employment status was historically set out by McKenna J in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, [1968] 1 All ER 433,*** where he said as follows:

*"'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service …'."*

The parties' intentions are a relevant factor in assessing employment status (***Calder v H Kitson Vickers Ltd [1988] ICR 232, CA***). However, regardless of the labels applied to the working relationship by the parties, the Tribunal will consider the "reality" of the relationship in order to made a proper determination (***Protectacoat Firthglow Ltd v Szilagyi 2009 ICR 835, CA; Autoclenz Ltd v Belcher and ors2011 ICR 1157, SC***). Therefore, the mere label applied or intention of the parties at the outset of the relationship is not determinative.

21. Since the claimants' written submissions, the Supreme Court has handed down its Judgement in Uber BV v Aslam [2021] UKSC 5. The Supreme Court held that Uber drivers were workers for the purposes of the national minimum wage and working time legislation.

22. In Uber the Supreme Court said the correct starting point is the statutory provision (in this case s. 230 ERA), irrespective of what had been contractually agreed. Employers and in this case R1 dictated the terms under which the claimants worked. R1 set the rate of pay. Someone who is genuinely self-employed sets the rate at which they are prepared to work, not the other way around.

Conclusions and concerns

23. The claimants were in reality employees of R1.

24. It is a concern that as they were not paid via PAYE, they have underpaid contributions to the National Insurance Fund, which they now seek payment from. It would also appear they have not paid the correct amount of income tax. This is a matter for HMRC.

25. It is also a concern that R1, a Registered Charity was able to operate for a number of years treating its staff as self-employed. The staff have not therefore had the benefit of, for example, pension contributions. Furthermore, R1 has not accounted correctly in respect of the staff to HMRC.

26. The claims will now be listed for a one-day remedy hearing, unless the parties can reach agreement.

Employment Judge Wright

26 March 2021