



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101138/2020 (V)

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Held via Cloud Video Platform on 7 & 8 September 2020

Employment Judge M Sangster

10 **Mrs M Mitchell**

**Claimant
Represented by
Ms McGinley
Advocate**

15 **Carnegie Swimming Club**

**First Respondent
Represented by
Ms Ross
Solicitor**

20 **Ms B Hay**

**Second Respondent
Represented by
Ms Ross
Solicitor**

25 **Ms A Molloy**

**Third Respondent
Represented by
Ms Ross
Solicitor**

30 **Ms E Thow**

**Fourth Respondent
Represented by
Ms Ross
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant was not an employee of the First Respondent in terms of s.230(1) of the Employment Rights Act 1996. Her complaint of unfair dismissal is accordingly dismissed.

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REASONS**Introduction**

1. This was a final hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing.
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2. The claimant presented a complaint of unfair dismissal. The respondents denied that the claimant was an employee of the First Respondent indicating, as a result, that the Tribunal did not have jurisdiction to consider the claim of unfair dismissal.
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3. At a case management preliminary hearing held before Employment Judge I McPherson on 28 May 2020, case management orders were issued directing that a preliminary hearing on employment status be held and that details for the Second Respondent, Third Respondent and Fourth Respondent be provided, so that they could be added as respondents. They were formally added, in accordance with Rule 34 of the Employment Tribunals Rules of Procedure, by consent, at the outset of the hearing.
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4. The claimant gave evidence on her own behalf and called Alison Lister, Club President of the First Respondent from March 2016 to March 2019.
- 20 5. The respondents led evidence from Andra Laird, Club President of the First Respondent from 2012 to 2014, Alison Molloy, Third Respondent and Treasurer of the First Respondent from April 2015 to date and Elaine Thow, Fourth Respondent and Club Secretary of the First Respondent from March 2017 to date.
- 25 6. Evidence in chief was taken by reference to witness statements, which had been exchanged in advance and were taken as read.
7. A joint set of productions was lodged, extending to 93 pages.
8. The case management orders issued at the case management preliminary hearing held before Employment Judge I McPherson on 28 May 2020

confirmed that submissions would not be given orally at the conclusion of the preliminary hearing. Instead, parties would exchange written submissions within 7 days after the conclusion of the preliminary hearing, and 7 days thereafter they would each provide a written reply to the other party's written submissions, with copies being provided to the Tribunal.

Issues to be Determined

9. Was the claimant employed by the First Respondent?

Findings in Fact

10. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
11. The First Respondent is a swimming club with charitable status. It has a Management Committee and an Executive which consists of the President, Vice President, Treasurer and Club Secretary.
12. The First Respondent has a mix of volunteer and paid swimming coaches. It is a requirement imposed by Scottish Swimming that volunteers and paid swimming coaches require to be PVG checked, registered with the Scottish Amateur Swimming Association (SASA) and have a UK Coaching Certificate (UKCC).
13. The claimant initially provided coaching services for the First Respondent on a voluntary basis. She received no payment for her services, but was reimbursed for any expenses incurred.
14. The claimant moved from being a volunteer to providing services on a paid basis in October 2013. There was no written contract governing the relationship.
15. In November 2013 the First Respondent's Management Committee agreed that contracts should be issued to all coaches. Draft contracts were drawn up at the start of 2014, but these were not finalised or presented to the coaches.

This was possibly due to the resignations of the President (Andra Laird) and Treasurer (Alan Mitchell, the claimant's husband and a Chartered Accountant), with effect from April 2014.

- 5 16. Whilst he had resigned in April 2014, the newly appointed Treasurer didn't work out, so Alan Mitchell stepped back in to cover the role until April 2015, when Alison Molloy became Treasurer. Alan Mitchell conducted a handover of work to Alison Molloy at that time. Whilst payment to coaches was discussed, there was no indication in that handover that any contracts were
10 in place with any of the coaches.
17. From October 2013 onwards, the claimant submitted invoices for her services on a monthly basis to the First Respondent's Treasurer. She completed a tax return annually and paid her own tax and national insurance. She did not
15 receive payslips or P60s from the First Respondent.
18. The claimant was initially paid £300 per month. This gradually increased to the point when, latterly, she was receiving £1,600 per month. Aside from negotiated increases to the claimant's monthly fee, the amount for coaching
20 services did not vary.
19. The claimant became Head Coach with the First Respondent in September 2015. She was responsible for coaching the Performance and Junior Performance squads. This responsibility took up approximately 16 hours per
25 week in the form of the structured training at the poolside. The claimant's remaining responsibilities took approximately 4 further hours per week. These included liaising with the other coaches, the timetabling of coaching sessions and identification of available pool time and allocation of coaches to squads.
- 30 20. The First Respondent had no input into the delivery of the coaching services by the claimant. The claimant simply required to keep the First Respondent informed of key issues/activities. She generally attended the First Respondent's AGM, to present her annual report.

21. The days and times on which the claimant delivered coaching sessions were dictated by availability at the various swimming pools used by the First Respondent. As Head Coach, the claimant would also attend galas and competitions which the swimmers attended, often at weekends.
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22. In addition to the fee for coaching services, the claimant claimed for additional hours (if she worked in excess of her core hours) at a rate of £11 per hour, as well as expenses for travel to competitions and occasionally accommodation.
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23. The claimant also claimed reimbursement of the cost of some small items she purchased to carry out her role, namely a stopwatch, parachute and drag chute.
24. The First Respondent preferred that its coaches and swimmers wore kit with the First Respondent's logo on it. It did not insist on this, however. The First Respondent provided the claimant with branded kit for this purpose.
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25. The claimant was not subject to any form of performance review or appraisal.
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26. The claimant arranged for substitutes to cover her poolside coaching sessions if she wished to take a holiday, was sick or wished some personal time. She did not require to inform the First Respondent if she wished to take a holiday, if she was sick or she was otherwise not providing the services, provided a substitute was arranged to cover.
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27. The claimant did not inform or consult with the First Respondent about the use of substitutes and the First Respondent did not require that she did so. She simply arranged for someone else to cover her coaching sessions whenever she wished. Where the claimant arranged for someone to cover her classes, this could be a coach who was, in any event, scheduled to be coaching at the same session as her, in which case they would not receive additional payment. Alternatively, if the coach was not scheduled to be working, it was possible that they would claim for additional hours in the invoice they submitted to the First Respondent, albeit they did not specifically
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state that this was to provide cover for the claimant in the invoices they submitted.

5 28. The claimant also arranged for her daughter, and another coach the First Respondent had no relationship with, to cover her classes. She also arranged for a coach used by the First Respondent for land based training, but not swimming coaching, to deliver land based training sessions instead of poolside coaching, at times when poolside coaching would normally be undertaken. The First Respondent did not pay any of these individuals. The claimant however continued to claim her full monthly fee.

10 29. The claimant carried out paid coaching for Scottish Swimming whilst engaged by the First Respondent. She did not carry out regular coaching for any other swimming clubs, albeit there was nothing preventing her from doing so.

15 30. On 28 September 2016, the Claimant wrote to Alison Molloy as Treasurer stating *'We did not get round to discussing my increase in monthly fees at our last catch up. Is there an opportunity to discuss this soon?'*.

20 31. Alison Molloy responded the following day stating:

'I'm away on holiday from 5th Oct back 21st so not going to be able to catch up before then. So as not to slow things down too much would it be possible for you and Alison to meet beforehand. What we need to ensure is

25 - *Agreed payment is supported by a contract that clearly states hours etc. The contract needs to be clear that self employed position and we do not cover holiday pay, if substitutes are required things like that. If the wording is not clear then the club could be seen as being an employer and we fall into NI payments, pension payments which we cannot do.*

30 - *to achieve that if as a start we can state hours (if any change from now) inc gala attendance, salary and in principle what happens when you are not there for whatever reason. This can then be built into the contract.'*

32. The claimant did not dispute that she was self-employed, or the other provisions of the email.

5 33. In or around 2018, a new coach began working with the First Respondent and the Management Committee discussed the potential of putting in place contracts with its coaches. The President at that time, Alison Lister, prepared draft contracts and took legal advice on the terms of these. By the time she stepped down from her position in March 2019 however, the contracts had not yet been issued.

10 34. The First Respondent contributed to the cost of a training course which the claimant attended in 2019, namely Scottish Swimming Aquatic Developers Programme.

15 35. Elaine Thow and Becky Hay (Vice President) met with the claimant in August 2019. During the course of that meeting Elaine Thow stated that, in accordance with the claimant's contract, she was not an employee. The claimant stated that she did not have a contract. The draft which had been prepared by Alison Lister earlier that year was provided to her. She was asked
20 to consider it and sign it, or revert with any queries. The contract was dated 1 June 2018 and stated that it had effect from 4 September 2017. The draft contract included the following provisions:

25 a. The claimant was not employed by the First Respondent, rather she was self-employed for the duration of the Agreement;

b. The claimant would be available for not less than 32 working hours each calendar month;

30 c. The claimant would keep the First Respondent informed of progress on the coaching services and comply with reasonable requests for information from the First Respondent, but the claimant's method of working was entirely her own and she was not subject to the control of the First Respondent;

- d. The claimant had a right to use a substitute for the provision of the services, provided the substitute was approved by the First Respondent;
- 5 e. The First Respondent would pay a fixed monthly fee of £1,600 for the provision of coaching services for the Performance and Junior Performance squads including one gala per month, with additional payments for the provision of additional services;
- 10 f. The fees would be paid each month subject to delivery by the claimant of an invoice detailing the services provided that month and the fees due;
- g. The claimant was responsible for all tax and national insurance contributions in respect of payments made to the claimant by the First
15 Respondent; and
- h. Nothing in the contract rendered the claimant an employee of the First Respondent and the claimant agreed that she was a self-employed contractor and not an employee.
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36. The claimant did not either sign and return the contract or raise any concerns about the First Respondent's understanding of her employment status following that meeting, or following receipt of the draft contract.
- 25 37. Following the meeting in August 2019, the claimant did however ask Andra Laird for a role profile which might apply to her position. Mrs Laird provided a generic role descriptor for a Head Coach role.
- 30 38. The claimant's role as Head Coach for the First Respondent ceased on 12 November 2019.

Relevant Law

39. Section 94(1) Employment Rights Act 1996 (**ERA**) states that '*An employee has the right not to be unfairly dismissed by his employer.*' Unless the claimant
5 is either admitted to be, or can be found in law to be, 'an employee' at the point of termination of her employment, the complaint of unfair dismissal cannot proceed.
40. Section 230(1) ERA defines 'employee' as '*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*' Section 230(2) provides that a contract of employment means '*a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing.*'
- 15 41. The starting point in considering the question of the relationship between the parties will be the terms of any written agreement between them. In ***Autoclenz v Belcher and others*** [2011] UKSC 41 the Supreme Court considered the terms of a written document and whether that was conclusive evidence of the parties' relationship, and held that if there was or might be a
20 sham arrangement a Tribunal should examine the working relationship between the parties, how that operated, and what was the reality of the situation.
42. The issue of the status of a person as employee, worker or neither of those
25 terms has been the subject of much case law. The essential test for employment status was set out in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*** [1968] All ER 433, which referred to the need for an irreducible minimum of personal service, control and other factors consistent with a contract of service.
- 30 43. In determining whether an employee has employee status it is not a mechanical exercise of running through items on a checklist. In ***Hall (Inspector of Taxes) v Lorimer*** 1994 ICR 218, CA, the Court of Appeal

upheld the decision of Mr Justice Mummery in the High Court (reported at 1992 ICR 739), who had said:

5 *'this is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of*
10 *evaluation of the overall effect of the detail... Not all details are of equal weight or importance in any given situation.'*

Submissions

44. In accordance with the case management orders, the parties lodged detailed written submissions by 15 September 2020, and thereafter a written reply to
15 the other party's submission, by 22 September 2020.
45. Both parties commented on the evidence presented to the Tribunal and the credibility of the witnesses, inviting the Tribunal to find that their witnesses were more credible where a dispute arose.
46. Both parties' submissions were structured the multiple test set out in **Ready**
20 **Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance**. The parties each addressed whether there was a written contract between the parties (the respondent's position was that there was a written contract between the parties, the claimant's position was that there was not). Each party then provided detailed submissions on whether there was a
25 requirement for personal service, whether the First Respondent exercised a sufficient degree of control over the claimant for there to be an employment relationship and whether there were any other factors which pointed to an employment relationship.
47. The following cases were also referred to by the parties:
- 30 a. **Stringfellow Restaurant Ltd v Nadine Quashie** [2012] EWCA Civ 1735;

- b. *Autoclenz Ltd v Belcher and Others* [2011] ICR 1157, SC;
- c. *Catholic Child Welfare Society and others v Various Claimants and Institute of the Brothers of the Christian Schools and others* [2013] IRLR 219;
- 5 d. *Ministry of Defence HQ Defence Dental Service v Kettle* UKEAT/0308/06; and
- e. *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51.

Discussion & Decision

- 10 48. Determination of a person's status is a question of fact for the Tribunal, to be ascertained by examining the particular circumstances of each case. The Tribunal reached the following conclusions.

Contract of Employment

- 15 49. The Tribunal found that there was no written agreement between the parties. The First Respondent had considered this in both 2014 and 2018, but no written agreement was presented to, or reached with, the claimant at those times.
- 20 50. The Tribunal noted that Andra Laird stated that a contract was presented to, and signed by, the claimant in 2014. That evidence was not accepted by the Tribunal. Andra Laird stated in cross examination that she never saw a signed contract and didn't know for sure whether it had been signed – she just assumed that it had been and that it had been passed to the claimant's
- 25 husband, Alan Mitchell. No other witnesses had seen a signed contract between the claimant and the First Respondent and the claimant denied that this was ever presented to her. No signed contract was presented in evidence. There was no mention of any contracts in the handover of work from Alan Mitchell to Alison Molloy in 2015. Alison Lister, the President from March 2016
- 30 to March 2019, was clear that there was no contract in place between the First Respondent and the claimant. In addition, the terms of the email dated 29

September 2016, from Alison Molloy (the Treasurer at that time) to the claimant clearly suggested that no contract was currently in place between the parties.

- 5 51. In the absence of any written agreement, the Tribunal must consider the reality of the arrangements between the parties based on the evidence that it heard. The Tribunal did so by considering the following factors.

Personal service

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52. In ***Pimlico Plumbers Ltd v Smith*** [2017] EQCA Civ 51, the claimant had a limited ability to offer a substitute in practice because he could only send another Pimlico operative (essentially, swapping assignments). The Court of Appeal in that case reviewed the previous authorities in relation to personal service and found that a conditional right to provide a substitute may or may not be inconsistent with personal performance, depending on the precise contractual terms and the degree to which the right was limited or occasional. By way of example, and subject to any exceptional facts, the Court of Appeal stated that a right to substitute, limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that
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- entails a particular procedure, is inconsistent with personal performance.

53. When the case was considered by the Supreme Court (***Pimlico Plumbers Ltd and Mullins v Smith*** [2018] UKSC29), the Supreme Court framed the relevant question as '*Was Mr Smith's right to substitute another Pimlico operative inconsistent with an obligation of personal performance?*'. In answering that question the Supreme Court stated that consideration should be given to whether the dominant feature of the contract remained personal performance.
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54. The claimant was not required to deliver the coaching services personally. She could arrange for a substitute to cover her shift without informing or consulting the First Respondent. The only requirement was that any substitute

was PVG checked and was registered with UKCC and SASA. These requirements were set down by Scottish Swimming, not the respondent.

55. Therefore, while the claimant did not have an entirely unfettered right to send
5 a substitute, the limits dictated by the regulatory body (not by the respondent) related to basic qualifications only. In accordance with the findings in ***Pimlico Plumbers***, the Tribunal finds that these arrangements were inconsistent with personal performance. Personal performance was not the dominant feature.

10 **Control**

56. In ***Ready Mixed Concrete***, MacKenna J stated that '*control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall
15 be done.*' All of these factors need to be considered together to determine whether one party has control to a sufficient degree for there to be an employment relationship. Following ***Ready Mixed Concrete***, the Court of Appeal in ***Montgomery v Johnson Underwood Ltd*** [2001] EWCA Civ 318 agreed that the requirement for a sufficient degree of control by the employer
20 forms part of the irreducible minimum, without which there can be no employment contract.

57. The claimant was able to carry out her work as she thought best. She had full control over the coaching programmes and how this was delivered. She
25 merely required to inform the First Respondent of her activities.

58. The coaching did require to be conducted at particular times, and in particular locations, but that was simply as a result of the availability of swimming pools.

59. There was no evidence that the claimant was subjected to the First Respondent's day-to-day direction or rules and policies, for example in relation to standards at work or in relation to sickness absence and pay or annual leave.

60. In all the circumstances, the Tribunal found that the claimant was not subject to a level of control by the respondent consistent with there being a contract of employment.

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Other Factors

61. The Tribunal found that there was a degree of mutuality of obligation. The parties agreed that the claimant would provide the services and that these would be provided for a certain number of hours per week. There was no question of the claimant refusing such work, albeit it was clear that she did not require to do so personally.

62. The claimant was never paid through PAYE on the First Respondent's payroll. Rather, she submitted invoices to the First Respondent and accounted to HMRC in her own tax returns. She received no employee benefits. This was not consistent with an employment relationship.

63. The claimant's ability to undertake other paid roles was not restricted in any way. This was not consistent with an employment relationship.

64. There were however some factors which would ordinarily point to an employment relationship, such as:

25 a. Some items required to undertake the role were purchased by the claimant and the cost of these were reimbursed by the First Respondent. These were however incidental, rather than regular or of significant cost.

30 b. A one off contribution of £500 to the cost of a training course undertaken by the claimant was reimbursed by the First Respondent.

c. The claimant was also reimbursed for travel and accommodation costs. This had however also been the case when she was a volunteer.

d. The claimant was provided with the First Respondent's kit. She was not however required to wear this by the First Respondent.

5 65. As expressed by Mummery J in Hall, it is necessary to '*stand back from the detailed picture which has been painted by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole.*' This guidance and the comment that, '*this is not a mechanical exercise of running through items in a checklist to see whether they are present in, or absent from*
10 *a given situation*' were of particular assistance in the present case, where there were some factors pointing towards an employment relationship, and others, particularly the important requirements of personal service and control, were not. Adopting the approach, expressed by Mummery J, the Tribunal concluded that the reality of the relationship between the parties was
15 that the claimant was not an employee of the First Respondent, as defined in s.230 (1) of the 1996 Act.

66. Accordingly, the Tribunal does not have jurisdiction to consider the complaint of unfair dismissal and that claim is dismissed.

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Employment Judge: Mel Sangster
Date of Judgment: 20 October 2020
Entered in register: 04 November 2020
and copied to parties

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I confirm that this is my Judgment in the case of Mitchell v Carnegie Swimming Club and that I have signed the Judgment by electronic signature.

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