EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109144/2021

Hearing held by CVP on 1st October 2021
Deliberation Day 1st November 2021

Employment Judge I McFatridge

Mr I Coomber	**Claimant** **In Person**
East Scotland Scouts Regional Council	**Respondent** **Represented by:** **Ms McPhail - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant was not an employee of the respondent. The claimant's claims are dismissed.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unfairly dismissed by the respondent and that he was due a redundancy payment. The respondents submitted a response in which they denied the claim. It was their position that the claimant was not an employee but was a worker providing services to the respondent and as such he was not entitled to claim unfair dismissal nor to claim for a statutory redundancy

payment. A Preliminary Hearing was fixed in order to determine the preliminary issue of the claimant's employment status. At the hearing the claimant gave evidence on his own behalf. He had indicated he would be leading evidence from Mr. Kirk the centre's former activities manager but in the end he did not do so. Evidence was led on behalf of the respondent from John Robert Bruce who had been Interim Centre Manager between July 2018 and May 2019 and from John Mark Campbell, Centre Manager from May 2019 onwards. A joint bundle of productions was lodged. A paper copy and an electronic copy was lodged. The numbering below refers to the electronic copy which contained some documents additional to those in the paper copy. On the basis of the evidence and the productions I found the following matters relevant to the issue to be decided at the Preliminary Hearing to be proved or agreed.

Findings in Fact

2. The respondents operate a Scout Outdoor Centre at Bonaly where groups come to camp and stay in their residential facilities and carry out adventure activities. The groups include school parties, scout groups and groups from other voluntary organisations. Some users come for day visits. There is a partnership project with local schools as well as an arrangement with Edinburgh Council where the respondent runs away days for primary 7 children.

3. The claimant started volunteering at Bonaly in or about 2015 when he was 17 years old. Initially he was an unpaid volunteer. At that time the respondent operated a system whereby they had a Duty Manager on site at weekends when the Site Manager was unavailable. The claimant started working for the respondent as a Duty Manager on an occasional basis. This work later ceased around 2016 when the respondent decided to use unpaid volunteers to cover at weekends rather than a paid Duty Manager and they ceased to employ duty managers over the weekend At around the same time as the claimant started working occasionally as a Duty Manager the claimant also commenced working as a paid Instructor. As an Instructor the claimant

worked under Neil Kirk who was the Activities Manager. The work as an Instructor was casual.

4. Mr Kirk kept a register of instructors such as the claimant who might be available to work. If approached about a potential booking he would ask some of those with relevant skills if they were available. Usually, the claimant would be offered a bunch of dates in advance and asked if he was available. Once Mr Kirk had satisfied himself there was enough Instructors available he would get back to the school and confirm dates. He would design a programme and send it out to the Instructors. Generally the offer of work and its acceptance or refusal by the instructor would be communicated verbally but it would sometimes be done by email.

5. At no time was the claimant sent any statement of terms and conditions of employment nor was he given any written Contract of Employment.

6. In or about 2017 an Instructor Agreement (production number 5 page 30) was produced by the respondent with the intention that this be issued to the Instructors at Bonaly. The claimant never received this. The Agreement is headed up “Agreement of Terms and Conditions – Zero Hours”. It notes that “The Scout Council may offer you work from time to time as an Activity Instructor. If you accept any offer of work your duties will include instructing activities and maintenance and you will usually report to the Activities Manager” … It also contained a specific clause stating:

> “This is not an employment contract and does not confer any employment rights on you (other than those to which workers are entitled). In particular it does not create any obligation on the Scout Council to provide work to you and in entering into this contract you confirm your understanding that the Scout Council makes no promise or guarantee of a minimum level of work to you and you will work on a flexible as required basis. It is the intention of both you and the Scout Council that there be no mutuality of obligation between the

parties at any time when you are not performing work for the Scout Council."

7. In or about July 2018 Mr Bruce became Interim Centre Manager. One of the things he did was to update the Instructor Agreement. The new agreement was lodged (p34). The main reason for the update was to update the provisions relating to data protection. Mr Bruce gave copies of the new contract to Mr Kirk who was the Activities Manager with the instruction that Mr Kirk deliver a copy of this to all of the Instructors. Mr Bruce understood that Mr Kirk had done this. I accepted the claimant's evidence that he had not in fact seen a copy of this prior to the present proceedings. This Agreement contained similar clauses to the earlier Agreement confirming that it was not a Contract of Employment and there was no mutuality of obligation.

8. I find as a matter of fact that their was no written agreement between the parties relating to the claimant's engagement as an instructor.

9. Whilst he was working for the respondents as an instructor the claimant would generally be told when and where to set up by Mr Kirk, the Activities Manager. He would usually be working as part of a team. The claimant was not continually supervised while delivering each session. On occasions he would be instructing during periods when Mr. Kirk was absent from the site and there were no other managers around.

10. Generally speaking the vast majority of the equipment used by the claimant whilst instructing outdoor activities was provided by the respondent.

11. The claimant had been trained in ways of carrying out the activities which he instructed by the scouts. He considered that he was required to carry out his Instructor work in accordance with the way he had been trained. The respondent's position was that generally speaking instructors were required to follow their standard operating procedures. They wished to have a body of Instructors whom they had trained and who they could then call upon to act

as Instructors when required. The training included training in their standard operating procedures and risk assessments and Instructors would usually be required to carry out work in accordance with these. The training sessions would be held at the beginning of each year to inform the Activities Instructors of the standard operating procedures for the activities and the relevant risk assessments. If they had done so the respondents would seek their availability and place them on a bank to be offered work as and when available. The respondents kept a record of the Instructors' availability and qualifications to enable work to be offered to the most suitable Instructor. This record was maintained by the Facilities Manager. Examples of this were lodged (21 and 22). Once an Instructor had accepted work he would receive a sheet headed "Instructor Work Hours". Examples of these were lodged (pages 44-53). The heading for this shows for each month "This sheet gives you details of the groups and activities you have booked over the next month that you have agreed to work. The details will all show the hours required. These times include set up and take down times. If there are variances to these times please note this on your timesheet and give a reason why."

12. Whilst the respondent expected workers who had been trained by them such as the claimant to operate according to their own standard operating procedures there were other Instructors employed who carried out specialist instructing for which they had been trained by an outside training agency and were certified as Instructors in that field (eg archery). In that event those Instructors were required to operate according to their own training but were still required to comply with the respondent's risk assessments and policies. They would also be covered by the respondent's insurers although in many cases they would have their own insurance cover as freelance Instructors in their own particular subject.

13. Work would be offered to the claimant either by email to his personal email account or in person if he was already working at the Scout Centre. The claimant could choose to accept or decline any of the work offered to him by the respondent. There was no obligation whatsoever on the claimant to accept any of the work offered to him. There was no penalty imposed on the

claimant for declining any of the work offered by the respondent. The claimant did in fact decline work during his engagement. An example of this was provided at page 57. There was no obligation on the respondent to offer work to the claimant. The claimant acknowledged that he was on a "zero hours contract".

14. The claimant was also able to cancel shifts he had accepted with no penalties or repercussions. The hours worked by the claimant varied from month to month. The business operated by the respondent was seasonal in nature. Pages 44-53 above set out the claimant's engagements and show that some months he would be working for many days (eg page 50 July 2018) whereas in other months he may only have one engagement (eg page 48 April 2018.)

15. Towards the end of each month the respondent would compile a list of the hours worked by each of the workers into a spreadsheet and submit this to the payroll provider. The spreadsheet would include rolled up holiday pay which essentially was the amount of holiday pay which each worker had accrued for the days they had worked. This would be paid each month as part of the monthly payment. This contrasted with the position for employees who were paid holiday pay when they took annual leave in accordance with the usual practice. The claimant's monthly payment was subject to PAYE deductions for income tax and national insurance.

16. At some point in 2018 the casual workers were provided with a uniform displaying the respondent's name for use whilst working at the Centre.

17. On 1st April 2020 following the outbreak of the COVID 19 pandemic the respondent wrote to the claimant explaining that it was proposing to place him on furlough leave (page 38). It was done as soon as the respondent realised that the government intended that furlough leave could also be extended to zero hours workers. The letter stated:

> "Given you have a zero hours contract the calculation of your normal pay is defined as the higher of (a) your same month's earnings from

the previous tax year or (b) your average monthly earnings from the 2019/20 tax year".

18. The respondent used the same template letter for all staff in relation to furlough including workers and employees. On 26th August 2020 the claimant wrote to the respondent's Mr Bruce. The letter was lodged (page 81). In it he states "I have really appreciated the income support. It has been great to see Bonaly include us zero hours workers".

19. In or about August 2020 the respondents commenced a restructuring exercise. The Centre was loss making. The Regional Executive wished to change the business model so that the Centre would break even. Essentially they decided they needed to return to basic scouting and offer a camp site only and then rebuild from there. They could only rebuild what could be financially achievable. At that time the respondent's position was that they had 5 employees, 3 were full time and 2 were part time. This was in addition to the instructors who the respondent considered to be casual such as the claimant. They decided to replace these 5 employees with a Camp Warden and a redundancy process was gone through. At the end of the process and following consultation they decided in fact that they would have 2 Wardens. During the process Mr Kirk the Activities Instructor was one of those made redundant. The claimant was not subject to any formal redundancy process nor was he at any time told that his position was redundant.

20. On the other hand the claimant assumed that, given that the centre would be going back to basic scouting and providing a camp site only and given that the Activities Instructor had been made redundant the future need for Instructors was likely to be minimal. The respondent's position was that there would still be occasions when they would have a need for instructors and the claimant remained on their list of instructors who would be approached and offered the work if it became available.

21. In June 2021 the respondents received a booking from the Army Welfare Service who wished to send a group of young children to Bonaly on 5th and

6th July. The respondents emailed the claimant on 16th June asking him if he would be interested in this work (page 94). The claimant declined the work offered. The email exchange between the parties was lodged (p95-96). On 19 July 2021 Mr Campbell wrote to the claimant confirming that the claimant had declined the offer of work. He advised the claimant "You remain on our instructor list in the event any other casual work assignments come up in the future and thank you for offering to help and either coming up with other programmes or in running other days that may arise in the future."

22. The claimant spoke to the respondents regarding this.. On 20th July the respondents emailed the claimant advising *inter alia* that the course had had to be cancelled due to one of the children attending catching COVID and Mr Campbell having to self-isolate.(p96)

23. During the period from 2015 onwards the claimant also worked as Lighting/Pyrotechnician with a company called 21CC. He also carried out freelance work. He also worked for a company called Five Star Crew carrying out similar work to that for 21CC from April 2018 onwards. He also works as cover for a care company called Trio Care. He has also carried out work as an Instructor at other outdoor centres namely Auchengillen Outdoor Centre. He now advertises as a freelance Instructor.

Observations on the Evidence

24. I considered that both of the respondent's witnesses were giving truthful evidence to the best of their ability. It was clear that neither of them were able to give particularly detailed evidence about the precise way the claimant's engagement with the Centre had worked. As noted above the claimant had indicated that he was intending to call Mr Kirk as a witness. Mr Kirk was present online at the start of the Tribunal but by the time it came for him to give evidence he had gone offline. I adjourned the Hearing for a period of time in order to allow the claimant to contact Mr Kirk with a view to

establishing what the problem was. At the end of this period the claimant indicated that he could not contact Mr Kirk. I allowed a small subsequent adjournment and the claimant then advised that he had decided to proceed without Mr Kirk's evidence. He referred to a statement from Mr Kirk which had been lodged. (Page 157). I treated this statement with considerable caution since Mr Kirk did not make himself available to be cross examined. I did so particularly on the basis that I entirely accepted Mr Bruce's evidence that he had provided a copy of the 2018 Agreement for Mr Kirk to distribute to all Instructor staff including the claimant (page 34). The only potentially relevant paragraph in Mr. Kirk's statement is the last one which states that "Instructors were told what activities they were to deliver and the times at which they were to take place. Instructors were trained to deliver activities in specific ways and were subject to monitoring to ensure they did so. All work was organised by me either in person on the day or via email instructions on the rare occasions that I could not be present.". In general terms I accepted that this was how things had worked on a day to day basis during the periods the claimant was engaged by the respondent.

25. With regard to the claimant's evidence I was invited by the respondent to find the claimant neither credible nor reliable. I have to say I consider that the claimant was telling the truth as he saw it. I had some concerns regarding the reliability of his evidence since he could only see things from his point of view. It was clear that he himself considered that he had a status which was different from that of a freelance Instructor. I accepted his evidence that whilst he did carry out other work from time to time he saw himself mainly as an Instructor and would generally seek to accept work from the respondents when he could. That having been said he was also quite clear in his evidence that he had an absolute right to turn down work and that he would not be penalised for this. The respondent was not under any obligation to offer him work. At the end of the day I accepted the claimant's evidence to the effect that he had not received either of the written documents referred to by the respondents and in general I accepted that whilst he was working as an Instructor he required to work according to the respondent's standard operating procedures and that Mr Kirk would supervise him to the extent of

telling him what activities were to be delivered and the times they were to take place.

Discussion and Decision

26. Each party lodged written submissions and thereafter written comments on each other's submissions. I do not intend to rehearse them here. I shall refer to them where appropriate in the discussion below.

Issues

27. The sole matter which I required to determine was whether or not the claimant was an employee of the respondent. It was the claimant's position that he was an employee whilst it was the respondent's position that he was a worker as defined in section 230(3) of the Employment Rights Act 1996.

Statutory Background

28. The Employment Rights Act 1996 provides:

> "230 (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 phrase 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."

The principal case which provides guidance to Tribunals in relation to the question of employee status is that of ***Ready Mix Concrete v Minister of Pensions and National Insurance*** [1968] 2QB497515C. This essentially instructs the Tribunal to adopt a multi-factorial approach but also sets out the minimum requirements for a Contract of Employment. These are, as stated by the respondent, personal service, control in the performance of the services and other provisions that are consistent with a contract of service. In the case of ***Carmichael v National Power Plc*** [1999] 1WLR2042 the House of Lords held that mutuality of obligation was an irreducible minimum for employment such that without it the person was not an employee. All elements of the test must be present for employment status to be obtained. The recent case of ***Uber BV v Aslam*** [2021] UKSC5 confirmed that worker status is a question of statutory interpretation rather than contractual interpretation. Lord Leggatt urged Tribunals in applying the statutory language to apply a purposive interpretation bearing in mind the purpose of the legislation.

29. The case of ***Autoclenz v Belcher*** [2011] UKSC41 provides that in many cases the Tribunal is entitled to look behind the written contract between the parties and look at the overall factual matrix.

30. In this case I am invited by the respondents to find that the contractual terms were those set in the 2017 and 2018 Agreement. The difficulty with this is that I have accepted the claimant's evidence that he did not actually receive a copy of these. As noted above I entirely accepted Mr Bruce's evidence to the effect that he gave copies of the Agreement to Mr Kirk with instructions that

Mr Kirk was to give one to each Instructor. The claimant says that he did not receive this and I accept his evidence. On the other hand the existence of these Agreements clearly shows what the respondent's intention was in relation to the matter. I felt that in this case, given the claimant had not seen the written agreement's produced by the respondent, I required to rely entirely on the factual matrix showing how the engagement had operated in practice in order to deduce from that the terms of the contract between the parties and whether the contract was a contract of employment in terms of s 230(1).

31. What I found striking about the claimant's evidence was that his evidence about what happened in practice was entirely in keeping with the contractual position outlined by the respondents and as set out in the two written agreements. Most importantly it was clear to me that there was insufficient mutuality of obligation in this case for the contract to be a Contract of Employment. On the basis of the evidence the claimant was offered work as an Instructor from time to time. On the basis of the evidence and the claimant's own admission he was free to either accept this work or to turn it down. There was no obligation on the claimant to take any work nor was there any obligation on the respondent to offer him work.

32. I entirely accept that once the claimant had accepted the offer of work then he was subject to a degree of control by the respondent in the way he carried out that work. It is simply a matter of common sense that when one hires an Instructor to carry out potentially dangerous acts with young people then that Instructor requires to be subject to a degree of control. The respondents have standard operating procedures and risk assessments and the fact that Instructors have to comply with these does not mean that they are employees.

33. The claimant's evidence was to the effect that he considered that there was a further class of freelance Instructors who were given a bit more control over the way they carried out their instructing work. I accepted the respondent's evidence that for certain activities the Instructors would also be licensed by

an outside body and that they would require to work to the requirements of this outside body and, particularly where it was specialist and they had more knowledge than the Activities Manager it might well appear that they had more freedom in the way they carried out the activity. In my view this does not assist the claimant's case.

34. I appreciate that applying the Ready Mix Concrete test there are some matters which do point towards employment. These are mainly the fact that the claimant was paid under the PAYE system. He used the respondent's equipment under the supervision of their manager and was covered by the respondent's insurance. He had been issued with a uniform by the respondent and did not require to submit an invoice before being paid. All of these factors would assist the claimant. However I consider the key issue is the fact that the claimant could freely turn down work which he was offered.

35. The claimant also relied on the fact that work was regular during the busy season. As noted by the respondent the case of ***Clark v Oxfordshire Health Authority*** [1997] EWCA Civ 3035 makes it clear that abundance of work available and the fact that a claimant will generally accept the work offered does not indicate employment status.

36. The fact of the matter is that it was common ground that the agreement between the parties was that the claimant was entitled to turn down work offered even if as a matter of practice he found the work offered by the respondent to be congenial and would usually accept it. It is also clear the use by the claimant of the word "zero hours workers" in the email on page 81 and indeed by his own evidence that the respondents were not required to offer the claimant work. In my view this is the key factor and as a result the claimant cannot be an employee. My finding therefore is that the claimant was not an employee and cannot therefore claim unfair dismissal or the statutory right to a redundancy payment since in terms of the Employment Rights Act these rights are only available to employees. The claimant's claim is therefore dismissed.

Employment Judge: Ian McFatridge
Date of Judgment: 05 November 2021
Entered in register: 11 November 2021
and copied to parties