EMPLOYMENT TRIBUNALS

Claimant: Mr V Shini

Respondent: David Lloyd Leisure Limited (1)
Jodie De Giorgio-Miller (2)
Linda Jones (3)
Marie Eracli (4)

Heard at: Watford **On:** 29 & 30 September 2021

Before: Employment Judge Maxwell

Appearances
For the claimant: Mr Galbraith-Marten QC, Counsel
For the respondent: Mr Perry, Counsel

RESERVED JUDGMENT

1. The Claimant was not an employee or worker within section 230(3) of the Employment Rights Act 1996.

2. The Claimant was not an employee within section 83 of the Equality Act 2010.

3. The Claimant's claims are dismissed for lack of jurisdiction.

REASONS

1. By a claim form presented on 23 March 2020, the Claimant brings complaints of:

   1.1 unfair dismissal;

   1.2 automatic unfair dismissal for making a protected disclosure;

   1.3 protected disclosure detriment;

   1.4 harassment related to race, religion or belief;

   1.5 direct discrimination because of race, religion or belief.

1.6 victimisation.

1.7 breach of contract (notice pay).

2. At a preliminary hearing for case management on 11 January 2021, the judge directed a preliminary hearing to determine employment status. Unfortunately, by reason of poor health, the judge was unable to prepare an order in these terms. The parties cooperated to agree a note of this decision.

Issues

3. The issue before the employment tribunal at this preliminary hearing is employment status and more especially, whether at material times the Claimant was:

3.1 an employee of the First Respondent as defined in s. 230(3)(a) of the **Employment Rights Act 1996** ("ERA");

3.2 a worker as defined in ERA s. 230(3)(b);

3.3 an employee as defined in s. 83 of the **Equality Act 2010** ("EqA");

Evidence

4. An agreed bundle of documents was prepared, running to 558 pages.

5. Witness statements were provided and oral evidence heard from:

5.1 Vahid Shini, the Claimant;

5.2 Marie Eracli, the Fourth Respondent, who is a tennis coach and Junior Tennis Professional at the First Respondent club;

5.3 Linda Jones, the Third Respondent, who is a tennis coach at the First Respondent club.

Facts

Background

6. The Claimant is a tennis coach. From 2009 until the termination of their relationship in 2019, he worked at the First Respondent's club in Finchley.

7. The agreement between the Claimant and First Respondent included that he would provide 8-10 hours of tennis coaching per week for members of the Club, in group lessons. The Claimant was not paid for the 8-10 hours, rather in exchange for covering these group lessons he was given the opportunity to market himself and to be marketed by the Club to its members, as a private tennis coach. When giving private lessons at the Club the Claimant would not be charged for using its facilities. He would be paid directly by the member having the lesson. The Claimant would keep all of the fees charged in this way, he did not pay a percentage to the First Respondent. The Claimant could give private lessons to individuals or very small groups of up to 3.

8. The Claimant was one of a pool of such coaches (circa 12-15 at any one time) working in this way, with his name and profile appearing on the Club notice board and wearing the First Respondent's branded clothing when on site. He would have appeared to members as the First Respondent's coach and part of the Club. As well as use of the Club, the Claimant received a discount on purchases and was invited to staff events.

9. Ms Jones has been a coach at the Club since 2001. Between 2016 and 2017, she was also the Adults Racquets Manager ("ARM"). Similarly, Ms Eracli has been a coach since 2007. In August 2019, she also became the Junior Tennis Professional ("JTP"), organising the Club's offering to young players. Ms Jones and Ms Eracli say they are direct employees of the First Respondent in their management roles (ARM, JTP) and self-employed when working as tennis coaches giving private lessons.

Group Lessons

10. Although there were terms provided for payment with respect to group lessons taught above the mandatory 8-10 hours, in practice this happened rarely or not at all, as the coaches would cover for one another, or see there excess hours in one week set against reduced or nil hours in another

11. The First Respondent determined the format and content of the group lessons. This would, however, be a standard offering, based upon age and / or ability, of the sort any qualified and experienced tennis coach would be familiar with.

12. The First Respondent supplied all of the equipment necessary for the group lessons, including balls and rackets, cones and ladders (for training drills). The Claimant used his own racket.

13. The Claimant would be expected to assess and review the ability of players in the group lessons.

Private Lessons

14. In terms of his private work, the Claimant said in his oral evidence that 95% of this comprised bookings made directly into his diary by the First Respondent's reception or sales staff. The Claimant was challenged on this, it being suggested to him that in all likelihood most of his private work would be repeat business (i.e. members would have a series of lessons with him, rather than just one) and this would be arranged direct. The Claimant was reluctant to accept this proposition. After some questions from the Tribunal, the Claimant said he was referring to how first contact was made between him and a new private client. He accepted, thereafter, arrangements would be made direct between him and the lesson recipient. Ms Jones said the method by which new private bookings would be made was, generally, that a message would be sent to the coach with the contact details for the prospective new client and then it would be left to them to make contact and reach an agreement direct. Ms Jones agreed a member might make a booking direct using the Club's app but in her experience this happened very infrequently. I accept Ms Jones' account of this, which was clear and specific. The Claimant would, typically, have been sent the contact details of

prospective clients and it was then up to him to make convenient arrangements. Any direct bookings into his diary would have been made by the members and I find this happened infrequently.

15. Some banding of the rates charged for private lessons occurred. Such rates were not set by the First Respondent. The coaches would have become aware of the rates being charged by others in the pool and this led in some instances to the same rate adopted by more than one coach. The Claimant's assertion that the rate was set by the First Respondent was contradicted by his evidence that: one coach charged more because he was level 4 qualified and more popular; another charged less because he was less popular; and he did not know the rate charged by a third.

16. When teaching private lessons, the Claimant had his own basket and balls.

17. The Claimant says his private lessons were subject to unannounced observations. Whilst ad hoc, informal feedback may have been provided if a manager or colleague happened to see something they thought worthy of comment, I do not find there was any formal appraisal process or regular pattern of lesson observation.

Coaches' Meetings

18. The First Respondent held monthly meetings with all the coaches, including the ARM and JTP. Although the Claimant and other coaches were usually present at these meetings, attendance was not a compulsory requirement. When they did attend, this was counted toward discharging their 8-10 hours.

19. On a small number of occasions, where for example and important health and safety matter needed to be addressed, then attendance by the coaches at a meeting would be required.

20. These meetings would also be used to explain upcoming events. The coaches would be urged to encourage members to take up the Club's services, to participate in its programmes and help the First Respondent hit its budgetary targets.

21. Emails were sent out afterwards with respect to what had been discussed.

Work Outside the Club

22. The Claimant obtained the vast majority of his private work from the Club, although he was not bound to do so. If he had more or better opportunities elsewhere, he was at liberty to pursue these. Whilst the 8-10 hours of group lessons took place at popular times of day (e.g. weekdays after school or work) they did not represent the only times when tennis coaches may be in demand and providing lessons. The Claimant says he taught a couple of "high net worth" individuals at their homes, in their own courts. Ms Jones and Ms Eracli both undertook private coaching outside of the Club. Some of the coaches also undertook coaching overseas, in particular in Portugal and the USA.

23. It is understandable, given his obligation to cover group lessons, that the Claimant would seek to maximise the benefit gained from his association with the Club but this was a matter for him.

Written Terms

24. The Claimant signed written terms in 2011, which provided that it was an agreement for the "supply of services" and included:

> **2.1 The Supplier must provide a minimum of 8 to l0 hours a week of group tennis term courses / classes at times, to be arranged and agreed with the Clubs Sports Manager. The Club will decide the format and content of these courses. The Supplier will arrange all individual coaching direct with the members concerned. The Supplier will be responsible for agreeing a fee with the member and collecting payment, and maintaining his or her own diary.**
>
> **2.2 The Supplier must hold a minimum LTA Club Coach Qualification (NVQ Level 2) or an equivalent qualification approved by the LTA and hold a current LTA coaches license in order to undertake any coaching within David Lloyd Leisure. Level 1 and Level 2 Coaching Assistants may not coach alone under any circumstances, but may assist a licensed coach on court ln lessons or tennis activities. Level 1 and Level 2 Coaching Assistants must be registered with the LTA.**
>
> **2.3 The Supplier must ensure that their profile is placed on the appropriate Club notice board, and it must include a photo, contact details, price rates, and qualifications. These details together with your availability for coaching must be provided to the Club's receptionists and on line if required.**
>
> **[…]**
>
> **2.11 The Supplier further warrants to the Club that they will:**
>
> **a) take out and maintain throughout the term of this Agreement, adequate Insurance in respect of Public Liability Insurance coverage to a minimum value of £2 million with an Insurance office of repute to protect themselves against any liabilities arising out of this Agreement and shall produce, at the request of the Club, a copy of the Insurance policy or policies and relevant renewal receipts for Inspection by the Club;**
>
> **b) where appropriate take out and maintain throughout the term of this Agreement, adequate Employer's Liability Insurance coverage (minimum £2 million cover) with an Insurance office of repute to protect themselves against any liabilities arising out of this Agreement In respect of all and any Suppliers they utilize to carry out the Services and shall produce, at the request of the Club, a copy of the Insurance policy or policies and relevant renewal receipts for Inspection by the Club.**

2.12 If the Supplier has agreed to undertake the Services and is unable to do so due to circumstances beyond his or her control or does not wish to attend in person for any reason, the Supplier must provide a suitable qualified and experienced alternative person as he or she may from time to time deem appropriate to provide the coaching he or she has agreed to undertake as set out in clause 2.2. The alternative person must:

- be suitably qualified as set out In clause 2.2

- be suitably experienced

- hold an equivalent policy of Insurance to that held by the Supplier

- wear an acceptable standard of attire as described in this Agreement

- demonstrate a professional attitude

- have the appropriate CRB check as required

The Supplier must notify the Club if this power to delegate Is exercised and provide details of the name of the delegate together with evidence of the their REP membership, qualifications, public and employers insurances and CRB check If appropriate as listed above. Should the Supplier delegate the Services, the Club will continue to pay the Supplier In accordance with the provisions set out in this agreement and the Supplier Is responsible for paying the alternative person that they have delegated to perform the Services. Should the Supplier be unable to undertake the Services for whatever reason and are unable to provide a replacement, the Club reserves the right to choose it's own temporary replacement Supplier, and should this replacement cost more than the Supplier, the Club reserves the right to charge the Supplier for this additional cost;

2.13 The Supplier will notify the Club at least two weeks prior to any planned absence in order that the Club can satisfy itself of the criteria for the alternative person set out in clause 2,12 or to find its own temporary replacement Supplier.

2.14 Where the Supplier is unable to notify the Club as set out In clause

2.12, the Club reserves the right to choose It's own temporary replacement Supplier, and should this replacement cost more than the Supplier, the Club reserves the right to charge the Supplier for this additional cost. The Supplier Is responsible for contacting members to rearrange any appointments.

[…]

Substitution

25. During this hearing, cross-examination and the parties' submissions were heavily concentrated on the question of substitution.

26. If the Claimant was unable to teach the group lessons or wished not to do, then he was required to arrange cover (save for certain times of year, such as over Christmas, when there was no scheduled group lessons). Whilst the ARM and JTP may become involved, such as by sending messages to the pool of coaches encouraging volunteers, the obligation to find a replacement rested with the individual coach wishing not to teach their group lesson.

27. In his witness statement, the Claimant says more than once that he "understood" cover had to be arranged from within the pool of coaches who had contracted with the First Respondent. In his oral evidence at the hearing, he said he was repeatedly "told" during the monthly coaching meetings that he was not allowed to use an external coach to provide cover.

28. The documentary evidence and in particular the WhatsApp messages passing between the coaches do not reflect the First Respondent saying that external cover could not be used. Mr Perry suggested the absence of any such reference was likely to be a deliberate measure by the First Respondent's managers (i.e. they would deliver the message orally to coaches that cover had to be internal but be careful not to put that in writing, as that would tend to expose the contractual provisions on substitution as sham). I did not find this argument persuasive. The far more plausible explanation for a prohibition on external cover not being referred to in messages, is that it was not discussed orally either. The Claimant's evidence on this point was not satisfactory. There was no reason given in evidence for the use of external cover to have been discussed at the coaches' meetings. Had the Claimant or his colleagues sought to employ external cover and been rebuffed by the First Respondent, then there would have been reason for mangers to have informed the coaches about this. There was, however, no evidence, of any such failed attempts to employ outside coaches or that this was a bone of contention and if it had been, then it would have been expected to appear somewhere in the messages or other correspondence. What I am satisfied the Claimant and his colleagues were told repeatedly, is that if they wished not to attend their group lessons then they had to find cover and notify the First Respondent of the arrangements they had made for this.

29. The coaches were permitted to send substitutes to cover their group lessons and did so. There was, of course, an obvious financial advantage in conducting these lessons themselves whenever possible and so generally cover would only be sought when the coach was unwell or wished to take leave. Almost always, the person providing this cover was another coach from the First Respondent's pool. There were a number of reasons for the substitutes being found in this way:

    29.1 as a starting point, in order to maximise the financial benefit from this arrangement with the First Respondent, the Claimant and his colleagues would have an obvious incentive to conduct the group lessons themselves, since they would not incur a cost in so doing;

    29.2 when coaches did seek cover, whether because they were unable or did not wish to teach a group lesson, the pool would be the easiest way for them to find a replacement, since the coaches knew one another, were in

regular contact (in person and via WhatsApp) and were encouraged by the ARM and JTP to provide cover for their peers;

29.3 coaches could avoid the need to actually pay their cover (the going rate was £40 per hour) by providing reciprocal cover for that person on another occasion;

29.4 the requirement that the person providing cover be suitably qualified and the like would very easily be demonstrated to the First Respondent's satisfaction in this way;

29.5 the First Respondent would benefit from its group lessons being provided by someone known and who would be dressed in its branded clothing.

30. The Claimant has referred to examples of outside coaches being caught giving private lessons and being stopped from so doing. On these occasions, external tennis coaches had joined the Club as members, then hired courts and used these for the purpose of giving their own private lessons. These were not coaches who had entered into any arrangement or agreement with the First Respondent to use its facilities in this way. They were individuals seeking to misuse an ordinary membership to conduct their private business at the Club. That the First Respondent did not allow such use of Club membership is unremarkable, given it would tend to undermine the arrangement it had in place with the Claimant and his colleagues to provide group lessons in exchange for the right to use its facilities in this way. Notably, the existing coaches including the Claimant took objection to such misuse, which is unsurprising given they had to provide regular group lessons in order to gain this opportunity. This is not a comparable situation and does not tend to support a conclusion that the Claimant and his colleagues were not allowed to use external coaches to cover their group lesson commitments.

31. The Claimant says the reality of the agreement between the coaches and the First Respondent is that they were only allowed to obtain cover from within the First Respondent's pool and that to the extent the written terms would appear to allow for the use of a suitably qualified external coach, they are a sham. In response to evidence from the Respondents suggesting a named external coach (who had formerly been a tennis coach at the Club) provided cover in May 2019, the Claimant said this amounted to the First Respondent's rules being broken for financial gain. Ms Eracli and Ms Jones also referred to an earlier period of cover provided by another external coach and I accept their evidence on this.

32. The Claimant and Ms Jones both gave oral evidence about conversations they had the night before giving evidence at the Tribunal, with potentially relevant witnesses to the earlier period of cover. Whilst I am not bound by the hearsay rule, vague, indirect evidence of this sort, provided at the last moment, was not helpful.

33. I am satisfied the agreement between the parties here did allow for the use of external cover. I have reached this conclusion because:

33.1 external coaches were actually used, albeit very infrequently;

33.2 the reason for the rarity of this practice was not any prohibition but rather that it was far more convenient and commercially attractive for all concerned to utilise the internal pool whenever possible;

33.3 the Claimant's argument that the First Respondent had a rule, which it broke for the financial benefit of coaches is unconvincing;

33.4 a far simpler explanation when external coaches were used is that internal cover could not be found and it was within the rules to get someone from outside;

33.5 whilst the Claimant may believe he could not use an external coach for cover, I do not accept this was because he was repeatedly told this;

33.6 there was no occasion when the Claimant or anyone else sought to rely upon external cover and this was refused;

33.7 no reason was given in evidence for the subject of external coaches to be repeatedly discussed at the coaches meetings and I have found it was not;

33.8 had the use of external coaches been a bone of contention between the Claimant and his colleagues on the one hand and the Respondents on the other, this would have been reflected in the documentary evidence and it is not;

33.9 encouraging colleagues to volunteer to cover for one another and focusing on this pool did not prevent the Claimant or his colleagues from going elsewhere it they wished to.

Law

Statutory Provisions

34. So far as material, section 230 of the **Employment Rights Act 1996** ("ERA") provides:

> **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.**
>
> **[…]**

35. The definitions at section 83 of the **Equality Act 2010** ("EqA") include:

> **(2) "Employment" means—**
>
> **(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;**

36. Notwithstanding some difference in the statutory language, it is now settled that "a contract personally do work" under EqA section 83(2)(a) has the same meaning as in ERA section 230(3)(b); see **Bates van Winkelhof v Clyde and Co LLP [2016] ICR 721 SC**.

Employee

37. As to whether a claimant is an 'employee' within section 230(1) of **the Employment Rights Act 1996** ("ERA") for the purposes of bringing an unfair dismissal claim, no single test is determinative, various factors must be considered; see **Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2 WLR 775 HC**, per Mackenna J:

> **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. […]**
>
> **As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be […]**
>
> **As to (ii). 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 be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.**

38. The approach set out above has been followed in a number of cases and was endorsed by the Supreme Court in **Autoclenz v Belcher [2011] ICR 934 SC**, Lord Clarke referring to it as the "classic description of a contract of employment" and then adding:

> **19 Three further propositions are not I think contentious: (i) As Stephenson LJ put it in Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612, 623, "There must . . . be an irreducible minimum of obligation on each side to create a contract of service." (ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: Express & Echo Publications Ltd v Tanton [1999] ICR 693, 699G, per Peter Gibson LJ. (iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg the Tanton case […]**

39. This approach to establishing an employment contact can be summarised as requiring, as a minimum:

    39.1 control by the employer over the employee;

    39.2 mutuality of obligation, for the employer to provide work, for the employee to accept and perform work;

    39.3 an obligation on the employee to provide personal service.

40. In addition to control, mutuality and personal service, the Tribunal should look at whether other factors in the case are consistent with an employment relationship and these may include:

    40.1 the terms of any written contract, subject to a determination of whether this reflects the true agreement between the parties - see **Autoclenz**;

    40.2 whether and to what extent the claimant is integrated into the respondent's business on the one hand, or appears to be in business on their own account on the other;

    40.3 whether and to what extent the claimant bears a financial risk;

    40.4 the relative bargaining power of the parties.

<u>Worker</u>

41. As to whether a claimant is a 'worker' within ERA section 230(3)(b) or falls within the extended definition of 'employment' within EqA section 83(2)(a), a consistent approach is now adopted. Three elements are necessary under 230(3)(b) are:

    41.1 a contract (express or implied);

    41.2 under which the individual has agreed to personally perform any work or service;

41.3 the work or service is for the benefit of another, who is not a client or customer of the individual's profession or business undertaking.

42. Whilst any written terms will always be a relevant consideration, the Tribunal will need to consider whether these reflect the true agreement between the parties; see **Autoclenz**, per Lord Clarke:

> **34. The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para 92 as follows:**
>
> > **"I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so."**

43. Unlike employment, worker status is an entirely statutory construct, the interpretation of which should give effect to the legislative purpose, namely to protect vulnerable individuals in a subordinate position, with little or no say in their pay and working conditions; see **Uber BV and others v Aslam and others [2021] ICR 657 SC**:

> **87. In determining whether an individual is a "worker", there can, as Baroness Hale DPSC said in the Bates van Winkelhof case [2014] ICR 730, para 39 , "be no substitute for applying the words of the statute to the facts of the individual case." At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who is employed under a "worker's contract".**
>
> **88. This approach is also consistent with the case law of the CJEU which, as noted at para 72 above, treats the essential feature of a contract between an employer and a worker as the existence of a hierarchical relationship. In a recent judgment the Grand Chamber of the CJEU has emphasised that, in determining whether such a relationship exists, it is necessary to take account of the objective**

> **situation of the individual concerned and all the circumstances of his or her work. The wording of the contractual documents, while relevant, is not conclusive. It is also necessary to have regard to how relevant obligations are performed in practice: see AFMB Ltd v Raad van bestuur van de Sociale verzekeringsbank (Case C-610/18) [2020] ICR 1432, paras 60–61.**

44. Personal service is, however, as much a requirement for worker status as for being an employee under a contract. Importantly, a limited right of substitution is not inconsistent with a worker's personal service obligation; see **Pimlico Plumbers Ltd v Smith [2018] UKSC 29**. The point was addressed more fully by Etherton MR when the same case was in the Court of Appeal; **Pimlico Plumbers Ltd v Smith [2017] IRLR 323**:

> **84. […] I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.**

45. Consistent with Etherton MR's forth point, a right of substitution may still be considered unfettered for these purposes even where there is a requirement to give notice that a substitute will be sent or that the person be suitably qualified; see **UK Mail v Creasey [2012] 9 UKEAT/0195/12/ZT**, per HHJ McMullen QC:

> **24. The critical point is that there is no fetter on Mr Creasey's right to invoke the alternative provider in the agreement and have the work done by the Personnel. That there are conditions on who that person is – that is, skill, qualifications and passing the tests the Respondent is recorded as having in paragraph 28 of the Judgment – does not mean that Mr Creasey's right to send him or her along is fettered. Unlike the majority of the authorities to which I have been referred, there is no requirement that the Claimant be unable to perform his duties or that he is sick; the simple issue is one of choice for him. That as a matter of fact for 10 or 15 years he did himself do the work does not change the nature of the right he has to send someone else. That others did choose to do so, the 7 or so of the group of 56, does not affect that either; it simply illustrates that some people took advantage of their right to provide a substitute and most did not. The starting point, therefore, is the contract itself; the contract**

> **provides an unfettered right, as I construe it, to send someone else, provided that they have the qualifications.**

46. Conversely, where the right to send a substitute was limited to persons selected by and known to the putative employer, or the right could be exercised only in cases of unavailability due to illness and the like, this would be the sort of limited right which would not exclude employee or worker status; see **MacFarlane v Glasgow City Council [2001] IRLR 7**, per Lindsay P:

> **11. The Tanton case is in our judgment distinguishable from that at hand for at least the following cumulative reasons. Firstly, the Appellants in our case could not simply choose not to attend or not to work in person. Only if an Appellant was unable to attend could she arrange for another to take her class. Secondly, she could not provide anyone who was suitable as a replacement for her but only someone from the Council's own register. To that extent the Council could veto a replacement and also could ensure that such persons as were named on the register were persons in whom the Council could repose trust and confidence. Thirdly, the Council itself sometimes organised the replacement (without, it seems, protest from the Appellant concerned that it had no right to do so). Fourthly, the Council did not pay the Appellants for time served by a substitute but instead paid the substitute direct. There is no finding as to what the substitutes were paid nor that they were paid the same as the Appellants nor that the Appellants had any say in what the substitutes were paid. These four grounds in our view provide ample reasons for the Tanton case to be distinguished but unfortunately only the last of the four was considered by the Tribunal in our case.**

47. Substitution and worker status were recently considered by the Court of Appeal (an appeal from the the High Court on a judicial review application with respect to a CAC decision on trade union recognition) in **Independent Workers Union of Great Britain v Central Arbitration Committee (Roofoods Ltd t/a Deliveroo) [2018] IRLR 84**:

> **77. I believe that that was a conclusion to which the CAC was entitled to come. The particular feature on which it relied was its finding that riders are, genuinely, not under an obligation to provide their services personally and have a virtually unlimited right of substitution. That is on any view a material factor in the decision whether they are in an employment relationship with Deliveroo. Paragraph 13 of ILO R198 refers to the fact that the work 'must be carried out personally by the worker' as an indicator of an employment relationship (see para [57] above); and it follows at least that the absence of such an obligation must be a contra-indicator of worker status (as it was treated in Yodel). However, in my view the CAC was entitled to regard it as decisive. I do not think that the position taken in English law that an obligation of personal service is (subject to the limited qualifications acknowledged in Pimlico Plumbers) an indispensable feature of the relationship of employer and worker is a parochial peculiarity. On the contrary, it seems to me to be a central feature of such a relationship as ordinarily understood, and I see no reason why its importance should be any the less in the context of art 11.**
>
> **78. Lord Hendy relied on the Panel's finding that riders only rarely take advantage of the right of substitution. However, I do not believe that the**

> **question of how often in practice the putative worker does the work himself or herself as opposed to having it done by someone else can be relevant as such, though it may be relevant to the question of whether the right is genuine. We are, necessarily, concerned with legal relationships, and any test other than what the parties' (genuine) rights and obligations are would be unacceptably uncertain. It cannot be the case that whether riders working on identical terms fall to be treated as workers depends on how often they choose to take advantage of their right to do the work through substitutes. I note that in Yodel the CJEU did not suggest that any analysis was required of how frequently B used a substitute.**

48. Whilst a consideration of whether the claimant is in business on their own account is expressly required under ERA section 230(3)(b), this is also necessary in connection with the extended definition of employment at EqA section 82(2)(a); see **Bates van Winkelhof**. Factors relevant to whether the claimant is in business or an independent professional may include:

    48.1 the degree of control, duration of the engagement and exclusivity - see **Byrne Brothers (Formwork) Ltd v Baird [2002] ICR 667 EAT**;

    48.2 subordination - see **Jivraj v Hashwani [2011] ICR 1004 SC**.

    48.3 Integration - see **Cotswold Developments Construction Ltd v Williams [2006] IRLR 181 EAT**:

> **53. It is clear that the statute recognises that there will be workers who are not employees, but who do undertake to do work personally for another in circumstances in which that "other" is neither a client nor customer of theirs — and thus that the definition of who is a "client" or "customer" cannot depend upon the fact that the contract is being made with someone who provides personal services but not as an employee. The distinction is not that between employee and independent contractor. The paradigm case falling within the proviso to 2(b) is that of a person working within one of the established professions: solicitor and client, barrister and client, accountant, architect etc. The paradigm case of a customer and someone working in a business undertaking of his own will perhaps be that of the customer of a shop and the shopowner, or of the customer of a tradesman such as a domestic plumber, cabinet maker or portrait painter who commercially markets services as such. Thus viewed, it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls. […]**

<u>Overlap</u>

49. There is a considerable overlap in the matters relevant to whether a claimant is an employee on the one hand or worker on the other. One notable difference is the requirement for mutuality of obligation. Whereas this must be present in an employment contract, an individual may be a worker notwithstanding the absence of mutuality. Importantly, however, even in a worker case, the absence of mutuality between assignments may shed light on the true nature of the

relationship within an assignment, i.e. point toward independence and a lack of subordination; see **Windle v Secretary of State for Justice [2016] IRLR 628 CA**. Underhill LJ in Windle also observed that the factors relevant to employee or worker status are not essentially different, although the 'passmark is lower' for worker.

Analysis

50. Both Mr Perry and Mr Galbraith-Marten QC produced written skeleton arguments, which they amplified and expanded upon orally. I was given a bundle of authorities which they both referred to. The main focus of their argument was on the substitution issue and this is reflected in the authorities they cited. They did also address other relevant considerations, albeit to a lesser extent.

51. There was little or no difference between the parties with respect to the relevant legal framework. The real dispute concerned the findings of fact I should make and then application of the law.

Private Lessons

52. I am satisfied the Claimant could not have been either an employee or worker of the First Respondent when carrying out his private lessons. There was no contract at all between the Claimant and the First Respondent for the provision of private lessons and so the question of its categorisation does not arise. For the sake of completeness, however, an application of the relevant tests clearly leads to the same conclusion:

    52.1 there was no mutuality of obligation:

        52.1.1 the First Respondent did not agree to provide work in the form or private lessons and the Claimant did not agree to perform such work;

        52.1.2 the Claimant entered into individual agreements with the particular clients who wanted to receive his private tuition;

        52.1.3 the Claimant was paid direct by the customer for his services.

    52.2 the First Respondent did not have control over the Claimant when he was providing private lessons:

        52.2.1 it was a matter for the Claimant to decide, whether or when he taught privately, what the content of lessons comprised, how long they lasted and what he charged for giving them;

        52.2.2 that the Claimant was prevented from offering large group lessons privately would seem aimed at maintaining a boundary between his business and that of the First Respondent, rather than control by an employer of an employee;

        52.2.3 that the First Respondent put potential new customers his way from time to time, does not amount to the Claimant being controlled;

52.2.4 nor does the fact of a colleague passing comment on one of the Claimant's private lessons evidence control.

52.3 There was no obligation to provide personal service:

52.3.1 there was no obligation owed by the Claimant to the First Respondent to provide any service at all with respect to private lessons.

53. Quite plainly, with respect to his private lessons, the Claimant was in busines on his own account, taking the risk and, to the extent his popularity were increasing, standing to benefit from more work and being able to charge higher rates. Nor was his business conducted exclusively at the First Respondent's premises.

54. The more difficult question is whether the Claimant was an employee or worker when he was providing the group lessons, which I address below.

Group Lessons

Substitution

55. Given the focus in the way this case was argued, I will begin by addressing substitution. Both Mr Perry and Mr Galbraith-Marten QC agreed that if the Claimant had an unfettered right to send a substitute then he could not be an employee or worker for the purposes of his claims. Mr Perry invited me to prefer the Claimant's evidence, arguing the right to send a substitute was not merely limited but heavily circumscribed, in that he was only entitled to explore the possibility of obtaining cover from within the First Respondent's pool of coaches. Mr Galbraith-Marten contended the Claimant was free to send in his place any suitably qualified coach, subject to notifying the First Respondent of that person and their qualifications.

56. It follows from the findings I have set out above, I am satisfied the Claimant could use and external coach to provide cover, subject to the notice provisions. This is something that was provided for in his written terms and I find these did reflect the true agreement between the parties. This right to utilise a coach from outside the First Respondent's pool had in fact been exercised previously by the Claimant's colleagues. That such use had been made only very infrequently is immaterial, if the entitlement was a genuine one, which I am satisfied it was. The approach almost always adopted in practice of looking within the First Respondent's pool of coaches did not suggest a discrepancy between the written terms and the true agreement, rather and as set out above more fully, it was a matter of convenience and advantage to both parties.

57. Whilst Mr Perry's submissions on substitution were predicated on a finding of fact that the Claimant was not entitled to use an external coach, I have nonetheless gone on to consider whether the right to send a substitute in the form I have found it was unfettered, in the sense discussed in the case law.

58. Clause 2.12 sets out the various requirements a substitute must satisfy, with respect to qualification, attire, CRB and insurance. These particulars reflect the Claimant's own obligations under the agreement, the matters he would himself provide in the event he chose (as he usually did) to provide personal

performance. These are not fetters, they are a requirement that the substitute provide that which the Claimant was obliged to.

59. Clause 2.12 also required the Claimant to notify the First Respondent of his intention to send a substitute and provide evidence of their qualifications, insurance and the like. The requirement to inform the First Respondent of his intentions was scarcely a fetter. As to the evidence of their registration, insurance and similar, again these are matters the Claimant was obliged to hold when performing personally and it is difficult to characterise this being expected of his substitute as a fetter.

60. The Claimant's evidence was to the effect that he would only send a substitute when he was unable to attend, such as illness, and that took holidays in the periods when coaching was not taking place. This was a matter of choice for him. There was evidence of colleagues deciding to send someone in their stead for reasons of personal preference, such as to allow them to go and watch the ATP finals. That the Claimant wished to profit from his arrangement with the First Respondent by providing personally performance whenever he could is entirely understandable but it does not detract from the reality of their agreement allowing him to do otherwise.

61. When the Claimant did send a substitute it was for him to arrange and pay for this. The Claimant pointed to evidence of the JTP and ARM involving themselves in facilitating substitution, such as by urging colleagues to put themselves forward. Support or encouragement of this sort being provided did not, however, detract from it being the Claimant's responsibility to find a replacement. And, of course, he would have to pay the replacement himself or come to some other arrangement with them such as mutual swaps.

62. This was not then a case such as **MacFarlane** where a replacement might be sent only where the worker was unable to work themself, had to come from the employer's list and would be paid direct.

63. My conclusion, therefore, is that the requirement for personal service is not made out because the Claimant had an unfettered right (as above) to send a substitute instead. The arrangement between the Claimant and the First Respondent did not, therefore, amount of a contract of employment. Nor was he a worker within ERA section 230(3)(b) or in employment for EqA section 83(2)(a).

64. Whilst my conclusion on substitution is determinative of the Tribunal's jurisdiction, I will, briefly, address the other matters canvassed in argument.

<u>Mutuality of Obligation</u>

65. There was mutuality of obligation. The First Respondent agreed to provide the Claimant with work, namely the group tennis lessons. The Claimant agreed to accept and perform that work. Had the other factors necessary for an employment relationship been present, then I would have been satisfied there was mutuality of obligation, such as was consistent with the Claimant being an employee within ERA section 230(3)(a).

Control

66. The First Respondent exercised a high degree of control over the Claimant with respect to the Group lessons, determining their time, content, membership and the like. The Claimant was required to wear the Respondent's branded clothing, to use its premises and equipment. He was liable to sanction in the event of default on his obligations or a failure to maintain standards, ultimately this being in the termination of the agreement. Had the other factors necessary for an employment relationship been present, then I would have been satisfied there was sufficient control for the Claimant to have been an employee within ERA section 230(3)(a).

Other Factors

67. The Claimant was deeply integrated into the First Respondent's business. As referred to above, he was required to wear the Club's uniform. He was advertised as the First Respondent's tennis coach, with his photograph and a profile being provided to members as part of the Club's offering. The group lessons were a very significant part of the membership benefits. Meetings of the coaches took place and a collective approach followed on many issues. He was encouraged to promote the Club's programmes and to assist in the achievement of financial targets. The Claimant took no personal risk with respect to the group lessons. He used the Club's facilities and equipment. As far as his contracted hours were concerned, the Claimant could not be said to be in business on his own account. Rather, he was facilitating and carrying out the Respondent's business. All of these factors are consistent with an employment relationship.

68. The one factor which could, arguably, point the other way is the contractual consideration provided by the Respondent. The Claimant was not paid a salary, hourly rate or fee. Rather, in exchange for carrying out his weekly hours, he was afforded the benefit of running his own business from the Club at other times. Whilst this was a most unorthodox arrangement, given the opportunity to earn in this way was the reward the Claimant received for providing his fixed hours of work every week, I would not have found this was inconsistent with the nature of the relationship as being one of employment.

Conclusion

69. The Claimant was not obliged to provide personal service. He was not an employee or worker of the First Respondent, within ERA section 230(3) or EqA section 83(2)(a). The Tribunal does not have jurisdiction to hear the Claimant's claims.

Date 18 October 2021

Sent to the parties on:

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For the Tribunal Office:

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