Case Numbers: 2300271/2021
2300665/2021
2301949/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Chaudhuri**

Respondents: **R & S Records Ltd (R1)**
Mr R Vandepapelier (R2)

Heard at: **London South via CVP On: 10/3/2022 and 11/3/2022**

Before: **Employment Judge Wright**

Representation:

Claimant: **Mr E McDonald – counsel**

Respondent: **Mr J Samson – counsel**

PRELIMINARY HEARING JUDGMENT

It is the Judgment of the Tribunal that the claimant does not come within the jurisdiction of the Equality Act 2010 (EQA) as he was not 'in employment' with R1 as per s.83(2) EQA. The claims are therefore dismissed.

RESERVED REASONS

1. The claimant presented his first claim on 21/1/2021, a second claim on 16/2/2021 and a third claim on 1/6/2021. He claims discrimination contrary to the EQA based upon the protected characteristics of race or sex. The pleadings were lengthy, running to 34-pages.

2. The respondents resist the claims.

3. A preliminary hearing had been conducted before Employment Judge Keogh on 14/12/2021. She had listed the preliminary hearing over two days, to determine (page 132):

> 'The claimant's applications to amend claim numbers 2300665/2021 and 2300271/2021;
>
> Whether the claimant is in 'employment' for the purpose of s. 83(2) EQA.'

4. The respondent had made a strike out application and wanted that point to be determined first. There was a discussion about the correct course to proceed and it was decided that it was logical to take the employment status point first.

5. The parties had a completely unrealistic expectation in terms of what reading the Tribunal could do in the time allocated. There was a 814-page bundle and 81-pages of witness statements. After dealing with preliminary matters and hearing from the parties, the reading took the remainder of the first day. References in this Judgment to the bundle are to the electronic page number.

6. An issue then arose as a result of the location of R2; eventually, it was confirmed he was in Belgium and the intention was that he would give his evidence from that location, via video link. The parties attention was drawn to the position as set out in Agbabiaka (evidence from abroad; Nare guidance) [2021] UKUT 286 (IAC). After some discussion and delay, the respondents decided not to call R2 to give evidence. The only evidence which was challenged in cross-examination was therefore that of the claimant.

Findings of fact

7. The claimant's claim is that he was in employment of R1 for the purposes of his claims under the EQA. His evidence is that at all relevant times, he was employed by R1 under a contract to personally do work. He claims

that he provided A&R[1] and general services to assist in the day-to-day running of R1 the record label, owned by R2 and his partner, founded in 1983/4.

8. The claimant's 'bio' states that he is a DJ, hosting radio shows, did A&R work (citing R1), has released records with named artists, had a residency on NTS Radio, is a member of a collective which hosts underground raves, is a co-founder of a hip-hop party and DJ collective and has established himself as 'one of the most pivotal figures in the London music landscape and one of its most trusted DJs in skills and selection' (page 536).

9. The claimant and R2 met at a record store event in January 2019 and R2 said he recalled that the claimant had told him he was a DJ and freelance music consultant and a fan of electronic music. The meeting must have gone relatively well as they exchanged details. R2 followed up this encounter via an email on 21/1/2019 (page 202). R2 said he was looking for:

> '… some R&S scouts, to tip me, send me music etc, all kinds of music
>
> No limits
>
> If you know some people let me know
>
> …'

10. The claimant replied (page 201):

> 'The R&S scouts thing sounds really cool. How does it work financially?'

11. The claimant went onto say that he will be on honeymoon for two months and was planning to take some time off. The Tribunal notes, this statement is not indicative of someone entering into an employment relationship.

12. R2 responded (page 200):

> '… good to hear you are going on Holliday

[1] Artists and repertoire (A&R) is the division of a record label or music publishing company that is responsible for talent scouting and overseeing the artistic development of recording artists and songwriters.

> So yes when you have time, let's talk about A&R -For R&S Records / Apollo Records.

13. In response, the claimant queried how it worked:

> '…usually, 'financially / payment wise?
>
> And what work are you expecting – just scouting and sending you music? Or actually a bit more official with R&S / Apollo email and reaching out to artists, etc?'

14. The claimant's questions suggested that he was new to an A&R scouting role and that he did not know how the role or the payment usually operated.

15. Time passed and on 24/5/2019 R2 emailed the claimant and said (page 213):

> '…, the deal with Dan was 700 Euro per month as freelance a&r .
>
> Sending music, discuss it etc – dealing with acts et'

The claimant replied:

> 'Yes, Let's do it.
>
> Let me know next steps.'

16. On 29/5/2019 the claimant emailed R2 (page 216):

> 'Just wanted to let you know that I've been receiving all the demos that you have been sending but wanted to manage expectations.
>
> With the amount being paid and the level of work - I think it would make more sense for me to do one listening session a week and sum all my feedback in one place and email, perhaps 2 - depending on how the week is going.
>
> Obviously if something needs more urgent attention then let me know but it's probably not too efficient of my time to give you feedback in drips and drabs on a daily basis (although feel free to send them whenever you want).

> Let me know if this works for you and if you have a particular day you'd like to receive all the feedback - am thinking Fridays would be best for me and feels like a good day to dedicate to listening.'

17. The Tribunal finds this is indicative of the claimant managing R2's expectations, rather than him being beholden to R2 or R2 having control over him and how he operated.

18. On 1/7/2019 there was an email exchange between the claimant and R2's partner regarding invoicing (page 220). On 1/8/2019 the claimant produced his first invoice (numbered AC126). The 'project / work' was described as 'R&S A&R scouting' and the description of the work in the body of the invoice was described as 'R&S A&R scouting – 1/7/2019 to 1/9/2019'[2] and was for €700.

19. There is nothing to indicate that the description of the work for which the claimant was invoicing, was anything other than his own description of the work he was doing at the time. Despite what he now says, at the time, he considered himself to be an A&R scout for R1.

20. There was an event in Mumbai on 17/10/2019 at which both the claimant and R2 performed (page 246). The claimant is described as 'the current A&R' for R2. R2 is described as 'The Boss, A&R and Factotum of the all-mighty Techno label [R1] and needs little introduction'.

21. The relationship continued and the claimant continued to invoice R1. The Tribunal was taken to the leads or tips the claimant produced for R1 during the period June 2019 to June 2020. Although the claimant referred to 'signing' acts for R1, he accepted that he did not do so and did not have authority to do so. The leads or tips he passed onto R2 resulted in two commercial projects, two EPs and one personal project (a charity endeavour which R2 was against from the outset and which he eventually deleted it from R1's catalogue). One other project went elsewhere to a third party.

22. R2 never asked the claimant to account for his time or sought any justification in respect of what the claimant was doing, in return for the €700 per month which the claimant was invoicing.

[2] No point was taken by either party of the date-range in this invoice. The next invoice (numbered AC129) and dated 2/9/2019 stated that it covered the period 1/8/2019 to 1/9/2019. Although nothing turns on this, it is assumed there was a typographical error on the date on invoice AC126 that neither party noticed nor took issue with.

23. On 28/11/2019 the claimant emailed a proposal to R2, which resulted in a meeting in Belgium between him and R2. The claimant said (page 276):

> 'What I roughly propose is the following:
>
> - I continue to fulfil my current duties as A&R for R&S. Still submit ideas for music signings and still feedback on any ideas for the already agreed payment.
>
> - We create a new sub-label which will be a 50/50 joint venture and joint ownership between myself and R&S, of which I will maintain creative control for direction and music
>
> - I take on the label manager duties for the 50% stake of the new sub-label
>
> - To ensure that the best music is still prioritised for the main labels, R&S will get first refusal on any music brought by myself
>
> - If R&S does not want the music, I am free to release on the sub-label
>
> It would be good to sit down and discuss the mechanics of it all - distribution, branding, etc.
>
> I spoke to [Mr Whittaker[3]] and he and I are both available to come to Belgium on 3rd December, as discussed on the call. Will that suit 2? How do we go about arranging travel and accommodation?'

24. Clearly, the claimant was pitching a new contractual arrangement. He was seeking to extend his remit and to further ingratiate himself with R1. The Tribunal finds that this was a commercial proposal. The claimant was not saying that he wanted to move away from an *employment-type* relationship into something more commercial. He was seeking to align himself more clearly as a business partner of the R1. The Tribunal finds that his motivation for this was that he found he had benefitted from his link to R1 as A&R scout and that he could foresee a further commercial and financial benefit to himself going forward, if he became a formal business partner of R1.

[3] Described as R1's freelance label manager.

25. Around this time, the claimant emailed R1 with his November invoice (page 281). He said that he had added an expense of £60 to the invoice, which Mr Whittaker had said on the night was okay. The expense was transport costs which the claimant covered (page 282/509). The claimant went onto say, that: 'If not – I will be happy to swallow the costs myself.' The Tribunal finds that an employee or someone in a relationship of employment, would firstly expect to be reimbursed for any additional expense incurred during the course of their employment, to R1. Secondly, they would not offer to meet the cost themselves, particularly when the expense had been authorised by another representative of R1.

26. On 23/3/2020 the UK Government announced the first lockdown due to Covid-19 and people were ordered to stay at home. Obviously, this changed beyond recognition, the claimant's operation. There would no longer be any live-gigs for him to attend to source leads or tips for R1. It would also impact upon his other activities, such as live-DJ events.

27. In an email chain starting on 20/5/2020 the claimant recommended a new act from Manchester to R2 (page 376). This was what R2 had wanted from the claimant. He wanted someone in touch with the music scene in the UK to source and refer potential new acts to him. R2's response was dismissive ('this is crap man') and he said that he needed to think about a sub-label that would keep R1's reputation 'super clean'. The claimant responded and tried again to convince R2 that he would regret letting this artist go. Mr Whittaker also contributed to the email chain saying 'agreed' (as in he agreed with the claimant and that R2 would regret not signing this artist). R2 would not change his position. There followed some discussion about the claimant's charity project and R2 seemed to be saying (as far as can be understood) that the charity project had only been successful as it was produced in his record label, i.e. R1. It was clear to the Tribunal that R2 was autocratic in respect of 'his' record label (R1), he ran R1 in a way he saw fit and that he would not do anything which he perceived, would damage that label.

28. The claimant responded (page 374):

> 'Of course, the R&S name and charity element helped and Im not denying that.
>
> R&S has a 40 year legacy and even though we argue - Im very proud to A&R for a label with such a history and incredibly proud to be working for you and [your partner]...'

The email and the comments are contemporaneous (it was sent 12 minutes later) and it is noted that the claimant describes his role as 'to A&R for'; not 'working for'. Even if loose language is used in quasi-employment relationships[4], the claimant did not state he had the status he now claims he had at the time.

29. That prompted R2 to suggest a new sub-label and the claimant responded by saying (page 373):

> 'Like I said – Im not happy with the deal…
>
> I either way a 50/50 split or increased pay.
>
> I think Ive proved Im worth it.'

30. If the claimant was in a subordinate relationship to R2, the Tribunal finds the claimant would not negotiate in such a way. He would be more conciliatory. That is particularly the case when, the claimant said on many occasions, he had to massage R2's ego and he used that as an explanation as to why he described his role on the invoices in the way he did and on other occasions when his description of himself, appeared to contradict his status as he now wished to present it.

31. The timing of these exchanges is relevant the Tribunal finds. If the claimant's other 'live' work had completely ceased due to the lockdown, he could not survive on €700 per month and entering into a commercial profit-sharing partnership with R2, would improve his financial position.

32. R2 responded in his usual forceful manner, but in short he said words to the effect of; he did not care about money, but he did care about the integrity of the music R1 produced. R2 also played 'hardball' with the 'deal' the claimant was attempting to negotiate. The Tribunal finds that an individual 'in employment' and in the circumstances of various lockdowns in different countries would not be negotiating for a partnership and split of the profits. They may well have attempted to argue for an increased rate of pay or have suggested taking on more duties in return for an increased rate. The claimant was attempting to negotiate a partnership deal with R2. The fact he was unsuccessful was not due, the Tribunal finds, him having a weak negotiating position. It was to do with the fact that he was not in

[4] Mr Whittaker referred to the claimant as 'employed' by R1 (page 303); he said 'So maybe you should trust [the claimant] who isn't in a crisis and is in exactly the right place to find young artists in the UK (the reason you employed him)'. The Tribunal finds that Mr Whittaker's description is of no assistance in reaching a conclusion on the s.83(2) EQA point. The language used is every day language and not the legal definition in the legislation.

as strong a position as R2. R2 was in that position as the integrity of R1 was fundamental to him and he was prepared to walk away from any deal/proposal, if in his view it was not right for R1. That was despite the fact that the claimant may well have been correct (Mr Whittaker certainly thought so) that the artists he proposed R1 sign, would have been commercially and financially successful.

33. In April/May 2020 there was an email exchange between R2's partner and the claimant, regarding the invoices being in Euros and the payment being made in Sterling. The parties resolved this amicably. This was against a backdrop of PAYE and employment status being highlighted at the time from when the Coronavirus Job Retention Scheme (CJTS) was introduced by the UK Chancellor; when employment status on a specified date was crucial in order to be able to claim under the CJRS. There was also a scheme for Self-Employment Income Support Scheme (SEISS) published on 26/3/2020.

34. R2 was based in Belgium and he would not necessarily have had a reason to establish what the position was in the UK, because as far as he was concerned, he did not have any employees in the UK.

35. The claimant has not said what, if any, assistance he sought from the UK Government at the time. It is of note, that the extremely peculiar circumstances of the CJRS and the SEISS certainly brought to the fore, the question of employment status and the different forms of help available dependent upon an individual's status. It certainly did not prompt the claimant to raise any questions when his invoices were being discussed. The reason for this, the Tribunal finds, is that the claimant accepted he was not in employment at the time.

36. The claimant and R2 continued to renegotiate the arrangement. On 3/7/2020 the claimant proposed that he would agree to one of three options (page 422). The 'current deal' was described as:

> '- A&R scout
> - I bring you ideas and offer feedback on ideas
> - £700 per month.'

37. The Tribunal finds that summary reflects the position as understood by the parties at the time. The claimant was an A&R scout, he fed-back leads and tips to R2, all in return for a retainer of €700 per month (not Sterling).

38. In the second option, the claimant said: ‘As I said before – I am a freelancer and do various works for lots of different projects and personal work as well.’

39. Again, the Tribunal finds that this statement was an accurate description of the position, as the claimant understood it at that time, not as he now seeks to claim he was ‘in employment’.

40. The parties reached an agreement during an email exchange on 3/7/2020 (page 444):

> ‘From: [R2]
> Date: Fri, Jul 3, 2020 at 10:03 PM
> Subject: Re: Compromise
> To: [the claimant]
> Cc: [Mr Whittaker], [R2’s partner]
>
> That what i was talking About non stop
>
> Op vr 3 jul. 2020 om 22:08 schreef [the claimant]
>
> Excellent! :)
>
> CCing in [Mr Whittaker] so he's aware.
>
> On Fri, 3 Jul 2020, 20:27 [R2] wrote:
>
> Brilliant!
>
> Op vr 3 jul. 2020 om 21:25 schreef [the claimant]
>
> l will be able to accept this deal for a 1 year period.
>
> • R&S 'XXXXX' Series
> • Six EP's
> - 1 album
> • Label to be a series on R&S like RV Trax - not a new sub label - not to use the R&S original logo on main branding
> • Small print on artwork - logo and 'distributed by R&S Records'
>
> £1000 per month + 20% net profit on all 7 releases.

> On Fri, 3 Jul 2020, 18:55 [R2] wrote:
>
> You got. 20% on Net Profit for the album
>
> So that would cover it all... if the album is successful - and there U are. 10000 % sure it will be
>
> Voila
>
> xx [R2]'

41. The Tribunal finds this was a partnership with the claimant agreeing to use the reputation of R1 to pursue what he saw as a potentially profitable commercial business venture.

42. The claimant's next invoice (AC169) was dated 5/8/2020 and it referred to the 'project / work' as being 'R&S A&R scouting (July 2020)' and the 'description of work' as 'R&S A&R scouting – 1/7/2020 – 2/8/2020'. Albeit the invoice was now for £1,000, not €700.

43. On the 29/9/2020 there was a message exchange during which R2 informed the claimant he was letting him go (page 656). There had clearly been a disagreement between them. R2 was complementary about the claimant (you are a superstar A&R, I wish you all the success in the world), but it seemed that their different view for the future direction led to a fundamental difference of opinion and to a parting of the ways.

44. On the 30/9/2020 following a telephone call, the claimant emailed R2 saying that he had only been paid two invoices of £1,000 and that R1 owed him £10,000 (page 502). He attached an invoice for the outstanding sum. The basis of the claim to be entitled to £10,000 is not clear. The agreement was that the claimant would be entitled to a retainer of £1,000 per month in return for him providing his services to R1.

45. More seriously however, the claimant threatened publish his already written open letter online and to send it to his press and artist contacts (page 502). In the absence of a response from R2, the claimant repeated his threat the same evening. R2 replied saying that it was a legal matter to be discussed amongst lawyers. The claimant responded that he disagreed and that unless the money was in his account that evening, he would publish his letter (page 501). R2 referred to the claimant's actions as blackmail and said that he would not respond to that.

46. The claimant did not publish his letter as he had threatened on the 30/9/2020 or on the 1/10/2020. He did however release details of his allegations to the media, which were reported on 16/10/2020 (pages 728-735).

47. The claimant presented his first claim to the Tribunal on 21/1/2021. What he did then was to release the details of his first claim form (2300271/2021) to the press. It was reported by the BBC, the Guardian (and by other outlets it seems, including the industry magazine Resident Advisor) on the 10/2/20201 (page 736). It is not clear whether or not the media outlets were aware the claim form was *sub judice*. The fact of the claim and the particulars of the claim were not yet a matter of record and this hearing was the first occasion where the matters were discussed in public. There is therefore a concern that the media outlets have committed contempt of court.

48. The Tribunal also notes that the claimant has been legally represented throughout these proceedings and at least since 21/1/2021 (or it is reasonable to conclude from a date prior to the presentation of the claim form). Whilst the claimant may have acted without legal advice when he released details of his potential claim to the press on 16/10/2020, it appears that the details of these proceedings (or at least the first claim) were released to the press in February 2021 when he was legally represented.

49. The respondents are invited to draw this Judgment to the attention of the relevant media outlets and for them to provide an explanation as to why the details of the claim were published and if necessary to provide a retraction.

50. The Tribunal has considered the matters put to the claimant about his tax returns and other invoices. The Tribunal agrees that it is strange and of concern that the Tribunal was only provided with the claimant's amended self-assessment tax return for the year ending 5/4/2020 submitted as an amendment on 23/1/2022 (page 537). It showed the claimant's gross income of £42,256 and allowable business expenses of £20,209 and a net profit of £22,047. The Tribunal accepts that in the same tax year, the invoices submitted to R1 accounted for €5,600 or approximately £5,000. Taking the numbering from the claimant's invoices, there were 33 invoices which were submitted (it is assumed) to other entities to which the claimant provided his services. The Tribunal finds that the claimant was in business on his own account and was marketing his services as a DJ (and related activities) as, per his own description, as a freelance DJ or A&E.

51. The claimant was not accountable to R1. He did as much or as little work for R1 as he saw fit and in fact, he did very little. R2 did not take issue with that, as he would be entitled to do if the claimant owed any obligation to him. Even with the varied contract, the claimant did not produce a great deal more referrals for R1 and again, R2 did not take issue with that, but then decided to terminate the contract.

52. The claimant used R1's email address, as did Mr Whittaker. The Tribunal does not find that this factor added anything to the debate. It finds that giving the claimant and Mr Whittaker an '@rsrecords' email address was more about giving a professional impression to artists etc, with whom the claimant and Mr Whittaker were dealing, than anything else. The Tribunal also finds that people were more likely to provide personal information (such as their bank details) to an email address which appeared to give a legitimate link to R1, than to either the claimant's or Mr Whittaker's personal email address.

53. The Tribunal does not find that the claimant was subservient to the respondents; that he did not get the contractual outcome he attempted to negotiate did not mean that he was subservient. The fact was that the claimant never managed to secure the deal he wanted. Although he claimed to be in a 'take it or leave it' position to R2, the fact was R2 called the claimant's 'bluff' with the result that the claimant was in a weak negotiating position. The main reason for this, the Tribunal finds, is that R2 was in a much stronger position. R2 was genuinely in a 'take it or leave it' position. R2 was not prepared to compromise the integrity of R1 and was authentically prepared to forgo profit, to maintain the reputation of R1. To put it bluntly, he did not care what the claimant thought or what the claimant said would be profitable (and clearly the claimant went into partnership with R1 in order to benefit from the profits made and so was taking a financial risk). R2 was not prepared to budge and was an authoritarian in respect of his (frankly expressed) views.

54. For the same reasons (R2's intransigence) the claimant was not able to negotiate a favourable deal for himself, although he tried. The fact that he was in a poor negotiating position, did not mean that he was not in business on his own account; he was. It is not accepted the claimant was 'posturing' when he made the statements which he did or that he had to flatter R2's ego. Although R2 was certainly strident in his views, he accepted what the claimant had to say and 'called him out' in respect of his (the claimant's) position. The claimant could have gone to work elsewhere or pursued more profitable business opportunities (the Tribunal was told that he could earn £3,000 for a single DJ gig. Clearly, based

upon his tax return he did work to the value of £42,256 of gross profit activities. The Tribunal has already found that for whatever reason (some element of which was possibly the effect of the lockdown on the live music scene) it suited the claimant to be linked to R1 and to refer to himself as an A&R man for R1 (the Tribunal finds that R2 was known as *the* A&R man for R1). For example, when introducing the claimant to an artist, R2 described the claimant as 'our assistant A&R' on 31/5/2019 (page 218) and this was never queried by the claimant or challenged.

55. Due to the nature of the work the claimant was engaged to carry out, the Tribunal finds he was not integrated into R1 and he was not under the control of R2. The was no direction from R2 as to how the engagement was performed and it was erratic and irregular. The evidence demonstrated the claimant was free to choose how and where to do the work, or not to do it at all. The claimant was not in need of protection, was not vulnerable and was not being exploited. He was offered a commercial contract, at a rate of pay offered by R2 which was accepted by him. All R2 wanted the claimant to do was to 'to send him music', that was the only instruction (page 201). How the claimant went about that was entirely up to him. There was no obligation on him to perform the task personally and he could delegate it or sub-contract. There was no direction or stipulation from R2 as to how the claimant was to send him music.

The Law

56. Section 39 of the Equality Act 2010 (EQA) provides:

…
(2) An employer (A) must not discriminate against an employee of A's (B) —

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

57. The relevant part of section 83 (2) EQA provides:

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

58. Section 83(2)(a) EQA 2010 says 'Employment' means 'employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.' The Explanatory Note to the EQA says 'this Act covers discrimination both in the employment and related fields and in relation to goods, facilities, services, transport and certain public services'. The Equality and Human Rights Commission Statutory Code of Practice: Employment, repeats this when citing the 'Purpose of the Equality Act 2010'. In 'Scope of the Code' it states 'Part 5 is based on the principle that people with the protected characteristics set out in the Act should not be discriminated against in employment, when seeking employment, or when engaged in occupations or activities related to work.' (page 18). The code is not binding on Tribunals but is highly influential.

59. In his written submissions, Mr Samson directed the Tribunal to the recent EAT Judgment of HHJ Auerbach in Johnson v Transopco UK Ltd [2022] EAT 6 at paragraphs 30-39:

> '30. It is convenient at this point to have an initial look at the authorities. For our purposes, a useful route in is found in the judgment of Underhill LJ (Jackson and Lindblom LJJ concurring), in Secretary of State for Justice v Windle [2016] ICR 721. That case concerned claims brought under the Equality Act 2010, but, as the following passage explains, the extended definition of "employee" in section 83 of the 2010 Act has been interpreted as being subject, impliedly, to the same "client or customer" exception as expressly appears in the definition of "worker" with which we are concerned. The authorities on the two concepts therefore provide a single body of guidance.
>
> 31. At [8] to [14] Underhill LJ summarised the legal background as follows:
>
> > "8. Section 83 (2) (a) identifies three kinds of contract. The first – "a contract of employment" – means a contract of service. The Claimants accept that they were not employed under such a contract. It is their case that they were employed under the third kind of contract listed, namely "a contract personally to do work". The best explanation of what that phrase refers to appears in Bates van Winkelhof v Clyde & Co. [2014] UKSC 32, [2014] 1 WLR 2047. In that case the Supreme Court was concerned with whether the claimant was a "worker" within the meaning of section 230 (3) of the

Employment Rights Act 1996, but Lady Hale, who delivered the majority judgment, reviewed the field more widely. Limb (b) of section 230 (3) refers to employment under

"… any other contract … 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".

Lady Hale pointed out, at para. 25 (p. 2055 B-C), that that formulation distinguished between two kinds of self-employed people:

"One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in Hashwani v Jivraj (London Court of International Arbitration intervening) [2011] 1 WLR 1872 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else. The general medical practitioner in Hospital Medical Group Ltd v Westwood [2012] EWCA Civ 1005; [2013] ICR 415, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a 'worker' within the meaning of section 230(3)(b) of the 1996 Act."

She then, at paras. 31-32, went on to observe that the same distinction was recognised for the purpose of discrimination law, even though section 83 (2) (a) of the 2010 Act does not contain anything equivalent to the elaborate words of exception in the second half of section 230 (3) (b). She said:

"31. As already seen, employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but do not fall within the

second class. Discrimination law, on the other hand, while it includes a contract 'personally to do work' within its definition of employment (see, now, Equality Act 2010, s 83(2)) does not include an express exception for those in business on their account who work for their clients or customers. But a similar qualification has been introduced by a different route.

32. In Allonby v Accrington and Rossendale College (Case C-256/01) [2004] ICR 1328: [2004] ECR–I873 the European Court of Justice was concerned with whether a college lecturer who was ostensibly self-employed could nevertheless be a 'worker' for the purpose of an equal pay claim. The Court held at para. 67, following Lawrie-Blum v Land Baden-Wurttemberg (Case C-66/85) [1987] ICR 483; [1986] ECR 2121: that 'there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration'. However, such people were to be distinguished from 'independent providers of services who are not in a relationship of subordination with the person who receives the services' (para 68). The concept of subordination was there introduced in order to distinguish the intermediate category from people who were dealing with clients or customers on their own account. It was used for the same purpose in the discrimination case of Jivraj v Hashwani. [2011] 1 WLR 1872 "

9. As Lady Hale there acknowledged, the qualification on the apparently broad scope of the phrase "a contract personally to do work" had in fact already been recognised in the decision of the Supreme Court in Hashwani v Jivraj [2011] UKSC 40, [2011] 1 WLR 1872, although the discussion is less explicit. In that case the issue was whether an arbitrator was an employee for the purpose of the Employment Equality (Religion or Belief) Regulations 2003, which had an identical definition. Lord Clarke, with whose judgment the other members of the Supreme Court agreed, emphasised that it was not enough that the putative employee should be a party to a contract personally to do work: he or she must be "employed under" such a contract (see para. 36, at p. 1887 B-C).

10. It has become common to refer to persons employed under contracts falling within the terms of section 230 (3) (b) of the 1996 Act as "limb (b) workers". Because, inconveniently, the 2010 Act uses different language, it is inapt to refer to employees of the third kind listed under section 83 (2) (a) by the same label. I will refer to them as "employees in the extended sense".

11. As to how the distinction is to be made between the two kinds of self-employment – that is, between employees in the extended sense and the "truly self-employed", as it is sometimes put – in Hashwani Lord Clarke said, at para. 34 (p. 1886 E-G):

"... The essential questions ... are ... those identified in paras 67 and 68 of Allonby [2004] ICR 1328, namely whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services. Those are broad questions which depend upon the circumstances of the particular case. They depend upon a detailed consideration of the relationship between the parties ... . The answer will depend upon an analysis of the substance of the matter having regard to all the circumstances of the case."

12. It will be seen that both Lady Hale in Bates van Winkelhof and Lord Clarke in Hashwani refer to the decision of the ECJ in Allonby v Accrington & Rossendale College (Case C-256/01) [2004] ICR 1328. This concerned an equal pay claim by part-time lecturers at a further education college, who had initially been employed by the college but had been made redundant and required to offer their services through an agency. One of the issues was whether the claimants were "workers" within the meaning of article 141 of the EU Treaty. At paras. 64-72 (pp. 1359-60) the Court said this:

"64. The term 'worker' within the meaning of article 141(1) EC is not expressly defined in the EC Treaty. It is therefore necessary, in order to determine its meaning, to apply the generally recognised principles of interpretation, having regard to its context and to the objectives of the Treaty.

65. According to article 2 EC, the Community is to have as its task to promote, among other things, equality between men and women. Article 141(1) EC constitutes a specific expression of the principle of equality for men and women, which forms part of the fundamental principles protected by the Community legal order: see, to that effect, Deutsche Post AG v Sievers (Cases C-270 and 271/97) [2000] ECR I-929, 952, para 57. As the court held in Defrenne v Sabena (Case 43/75) [1976] ICR 547, 566, para 12, the principle of equal pay forms part of the foundations of the Community.

66. Accordingly, the term "worker" used in article 141(1) EC cannot be defined by reference to the legislation of the member states but has a Community meaning. Moreover, it cannot be interpreted restrictively.

67. For the purposes of that provision, there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration: see, in relation to free movement of workers, in particular Lawrie-Blum v Land Baden-Württemberg (Case 66/85) [1987] ICR 483, 488, para 17, and Martínez Sala, para 32.

68. Pursuant to the first paragraph of article 141(2) EC, for the purpose of that article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. It is clear from that definition that the authors of the Treaty did not intend that the term 'worker', within the meaning of article 141(1) EC, should include independent providers of services who are not in a relationship of subordination with the person who receives the services (see also, in the context of free movement of workers, Meeusen v

Hoofddirectie van de Informatie Beheer Groep (Case C-337/97) [1999] ECR I-3289, 3311, para 15).

69. The question whether such a relationship exists must be answered in each particular case having regard to all the factors and circumstances by which the relationship between the parties is characterised.

70. Provided that a person is a worker within the meaning of article 141(1) EC, the nature of his legal relationship with the other party to the employment relationship is of no consequence in regard to the application of that article: see, in the context of free movement of workers, Bettray v Staatssecretaris van Justitie (Case 344/87) [1989] ECR 1621, 1645, para 16, and Raulin v Minister van Onderwijs en Wetenschappen (Case C-357/89) [1992] ECR I-1027, 1059, para 10."

13. Both Lord Clarke in Hashwani and the ECJ in Allonby refer to a "relationship of subordination". In Bates van Winkelhof Lady Hale warned against treating the presence or absence of "subordination" as the infallible touchstone for distinguishing between the two kinds of self-employed worker under section 230 (3): see para. 39 (pp. 2058-9). That term was, however, used by the ET in this case (loyally applying Hashwani) and neither party criticises it for doing so. I will occasionally use it myself, though bearing in mind Lady Hale's caveat.

14. One other part of the legal background which it is necessary to refer to is the concept of mutuality of obligation. The position is most lucidly stated by Elias LJ in Quashie v Stringfellows Restaurant Ltd [2012] EWCA Civ 1735, [2013] IRLR 99, at paras. 10-12 (pp. 102-3), as follows:

"10. An issue that arises in this case is the significance of mutuality of obligation in the employment contract. Every bilateral contract requires mutual obligations; they constitute the consideration from each party necessary to create the contract. Typically an employment contract will be for a fixed or indefinite duration, and one of the obligations will be to

keep the relationship in place until it is lawfully severed, usually by termination on notice. But there are some circumstances where a worker works intermittently for the employer, perhaps as and when work is available. There is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration, as a number of authorities have confirmed: see the decisions of the Court of Appeal in Meechan v Secretary of State for Employment [1997] IRLR 353 and Cornwall County Council v Prater [2006] IRLR 362.

11. Where the employee working on discrete separate engagements needs to establish a particular period of continuous employment in order to be entitled to certain rights, it will usually be necessary to show that the contract of employment continues between engagements. (Exceptionally the employee can establish continuity even during periods when no contract of employment is in place by relying on certain statutory rules found in section 212 of the Employment Rights Act.)

12. In order for the contract to remain in force, it is necessary to show that there is at least what has been termed "an irreducible minimum of obligation", either express or implied, which continue during the breaks in work engagements: see the judgment of Stephenson LJ in Nethermere (St Neots) v Gardiner [1984] ICR 612, 623, approved by Lord Irvine of Lairg in Carmichael v National Power plc [1999] ICR 1226, 1230. Where this occurs, these contracts are often referred to as "global" or "umbrella" contracts because they are overarching contracts punctuated by periods of work. However, whilst the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement, *the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee* [emphasis supplied]. This was the way in which the employment tribunal analysed the employment status of

> casual wine waiters in O'Kelly v Trusthouse Forte plc [1983] ICR 728, and the Court of Appeal held that it was a cogent analysis, consistent with the evidence, which the Employment Appeal Tribunal had been wrong to reverse." … "

32. Windle concerned professional interpreters who worked for HMCTS, case by case. HMCTS had no obligation to offer them assignments, nor they to accept them. The tribunal held that they were not employees, in the Equality Act 2010 extended sense. It found that "the absence of mutuality of obligation between assignments points away from employee status under section 83(2) for the times when these claimants were engaged on assignments." The EAT overturned the tribunal's decision, but the Court of Appeal restored it. At [22] to [24] Underhill LJ said:

> "22. The principal submission of Mr Humphreys in seeking to uphold the decision of the EAT was that in determining whether a claimant is an employee in the extended sense the essential question is to what extent he or she is acting "under direction", or is in a "subordinate" position, while at work. As he put it in his skeleton argument:
>
> "This will require an enquiry, founded on the contract, into the scope of that direction and the extent of any limitation on the putative employee's independence in that context. The absence of mutuality of obligation between engagement can add nothing to that enquiry … . "
>
> 23. I do not accept that submission. I accept of course that the ultimate question must be the nature of the relationship during the period that the work is being done. But it does not follow that the absence of mutuality of obligation outside that period may not influence, or shed light on, the character of the relationship within it. It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense. Of course it will not always do

> so, nor did the ET so suggest. Its relevance will depend on the particular facts of the case; but to exclude consideration of it *in limine* runs counter to the repeated message of the authorities that it is necessary to consider all the circumstances.
>
> 24.That would be my view even without any reference to Quashie. But I do not in fact think that what Elias LJ said in the passage which I have italicised can properly be disregarded on the basis that the issue in that case was whether the claimant was employed under a contract of service. The underlying point is the same. The factors relevant in assessing whether a claimant is employed under a contract of service are not essentially different from those relevant in assessing whether he or she is an employee in the extended sense, though (if I may borrow the language of my own judgment in Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667: see para. 17 (5), at p. 678H), in considering the latter question the boundary is pushed further in the putative employee's favour – or, to put it another way, the passmark is lower. I would add for completeness that I do not think that Judge Clark's point that continuity of employment is not an issue in Equality Act cases (see para. 19 above) affects the analysis. The question is whether the claimant is an employee at all; and it was that which was the issue in Quashie."

33. A number of authorities have grappled with the more general question of how a tribunal might go about testing and determining, in the given case, whether the "client or customer" exception applies. On this issue, we can start with Byrne Bros (cited in the foregoing passage in Windle). In Byrne Bros, in the course of making a series of numbered points about this exception within [17], the EAT (Mr Recorder Underhill QC, as he then was, and members) said the following:

> "(4) It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b). That can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees *stricto sensu* - workers, that is, who are

viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.

(5) Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.

(6) What we are concerned with is the rights and obligations of the parties under the contract - not, as such, with what happened in practice. But what happened in practice may shed light on the contractual position: see Carmichael (above), esp. per Lord Hoffmann at pp 1234-5."

34. In Cotswold Developments Construction Limited v Williams [2006] IRLR 181 the EAT (Langstaff J and members) said the following at [53]:

> “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 shop owner, 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. It is not necessary for this decision to examine more closely the individual cases which may fall much closer to the dividing line, and the principles upon which those cases should be determined, because in the present case the Tribunal determined that Cotswold was not in the position of a client or customer of any profession or business undertaking carried on by the Claimant reason of "the nature of the Claimant's relationship with the Respondent" (paragraph 7.3). They did not elaborate further. However, it seems to us that they were entitled to draw that conclusion, in particular because no finding of fact suggests that the Claimant operated as an independent tradesman, and much of it is suggestive if not determinative of the fact that Cotswold recruited him to work for it.”

35. In James v Redcats (Brands) Limited [2007] ICR 1006 the EAT (Elias P), after citing the guidance in Byrne Bros and in Williams,

observed of the latter's reference to marketing to the world in general (at [50]): "I would agree that this will often assist in providing the answer, but the difficult cases are where, as in this case, the putative worker does not in fact market his services at all, nor act for any other customer even although Mrs James is not barred by her contract from so doing. In some cases the business is effectively created by the contract."

36. In Autoclenz Limited v Belcher [2011] ICR 1157 (SC) Lord Clarke JSC (for the Court), citing the judgment of Aikens LJ in the Court of Appeal, said, of cases in the work field:

> "34. The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para 92 as follows:
>
> > '92. 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. ...'
>
> 35. So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."

37. In The Hospital Medical Group Limited v Westwood [2013] ICR 415 Maurice Kay LJ (Longmore and Toulson LJJ concurring) observed at [18]:

> "The striking thing about the judgments in Cotswold and Redcats is that neither propounds a test of universal application. Langstaff J's "integration" test was considered by him to be demonstrative "in most cases" and Elias J said that the "dominant purpose" test "may help" tribunals "in some cases" (paragraph 68). In my judgment, both were wise to eschew a more prescriptive approach which would gloss the words of the statute."

38. He added at [20] that there was "no single key with which to unlock the words of the statute in every case". In Bates van Winkelhof v Clyde & Co LLP [2014] ICR 730, which concerned a partner in a firm of solicitors, Lady Hale said at [39], after reviewing these authorities:

> "I agree with Maurice Kay LJ that there is 'not a single key to unlock the words of the statute in every case'. There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of 'subordination' to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves. As Elias J recognised in Redcats, a small business may be genuinely an independent business but be completely dependent upon and subordinate to the demands of a key customer (the position of those small factories making goods exclusively for the 'St Michael' brand in the past comes to mind). Equally, as Maurice Kay LJ recognised in Westwood, one may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into the other party's operation as to fall within the definition. As the case of the controlling shareholder in a company who is also employed as chief executive shows, one can effectively be one's own boss and still be a 'worker'.

> While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker."

> 39. In Uber BV v Aslam [2021] ICR 657 Lord Leggatt (the other Justices concurring) said, at [71], that the general purpose of the legislation in question is "to protect vulnerable workers" from being paid too little, required to work excessive hours or subjected to other forms of unfair treatment, such as for whistleblowing. He cited with approval the description of the purpose in Byrne Bros, referring to those who are in a "subordinate and dependent position." Further on he observed, at [75]: "The correlative of the subordination and/or dependency of employees and workers in a similar position to employees is control exercised by the employer over their working conditions and remuneration.'

Conclusions

60. The Tribunal concludes the claimant was not in employment under a contract to personally do work. He was an independent freelancer and an entrepreneur. Once he had met R2 he saw an opportunity to align himself with R1, to benefit his own reputation as a DJ (and all of the other activities he pursued).

61. None of the contractual documentation pointed to an employment relationship; it pointed to the opposite, that the claimant was in business on his own account.

62. None of the contemporaneous documents (emails and text messages) evidence that the claimant was in an employment relationship; again they pointed to the opposite.

63. For those reasons, the claimant was not in employment for the purposes of s. 83(2) EQA with the result that he does not come within the scope of the EQA and his claims are dismissed.

Employment Judge Wright

06 April 2022