EMPLOYMENT TRIBUNALS

Claimant: Mr N Watson

Respondent: St Francesca Cabrini School

Heard at: Croydon by cloud video platform

On: 27 April 2022

Before: Employment Judge Nash

Representation
Claimant: Mr Ohringer of counsel
Respondent: Mr Amunwa of counsel

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Following ACAS Early Conciliation from 2 December 2020 to 13 January 2021, the claimant presented his claim to the Tribunal on 8 February 2021.

2. At this hearing the tribunal heard from the claimant on his own behalf who swore to his witness statement. On behalf of the respondent, it heard from the Head Teacher, Ms Lawton-Quinn, who swore to her witness statement. The tribunal had sight of an agreed bundle to 252 pages.

The Claims

3. It was agreed that the claimant brought the following claims: -

   i. Unfair dismissal under section 98 Employment Rights Act;
   ii. Unauthorised deduction of wages under s13 Employment Rights Act;
   iii. Annual Leave under regulation 14 Working Time Regulations;
   iv. Breach of contract in respect of notice pay;
   v. Redundancy pay; and
   vi. Failure to provide a written statement of terms and conditions pursuant to section 1 Employment Rights Act.

The Issues

4. The only issue for today's preliminary hearing was the employment status of the claimant and – accordingly – the jurisdiction of the tribunal in respect of each claim. Was he an employee, a worker or self-employed?

The Facts

5. The respondent is a local authority funded school.

6. The claimant started work for the respondent from 19 January 1998 as a music teacher, working twelve hours a week.

7. He applied by completing an application form. There was no job description. The respondent described the role as a "position". The claimant taught a demonstration lesson and was offered the role.

8. He worked Monday, Wednesday and Friday, 1.15-3.35pm being seven hours per week. The claimant had no recollection of his employment status being mentioned. There was no written contract of employment. He believes that he was told to fill in a timesheet and put in invoices to arrange payment. He said that he did not wish to be difficult, so he complied.

9. There was no suggestion that the timesheets before the tribunal were inconsistent with the patterns of work relied on by the claimant. He only worked, and was paid, during term time.

10. During his working arrangement with the respondent, he worked at or with at least one other school at any time.

11. At first the claimant taught whole classes under the National Curriculum. The respondent said that the claimant was able to do as he pleased in class, but the tribunal accepted the claimant's evidence that he had to follow the Schools' Practice Guidance on a National Curriculum subject. The claimant did not provide any musical instruments or equipment of his own. During lessons a teacher was present at all times partly to keep control. At this period the claimant was not involved in choir practice.

12. The claimant had a cycling accident; his recollection was that he had not taken any time off work. The respondent said that it thought that he had taken time off and was not paid. The tribunal saw no documentary evidence on this. As only the claimant was able to give direct evidence of what happened, the Tribunal preferred the claimant's evidence.

13. In 2013 there was a significant change to the claimant's work. In April 2013 he took over the duties of another teacher – mainly hymn and choir practice – and was asked to provide 1:1 piano lessons for various pupils. The claimant had a limited ability to refuse a particular pupil, for example on the grounds that the pupil was being taught outside of school. However, the Tribunal found that the respondent had very considerable influence over who the claimant taught piano. In addition, the claimant stopped giving whole class lessons. He believed this was because music was dropped from the National Curriculum.

14. From April 2013 to January 2018 the claimant's working pattern was all day Wednesday, all day Friday plus Thursday afternoon, a total of 13.66 hours per week. The claimant's evidence was that the respondent chose these hours to fit in with its timetable. It was not in dispute that the claimant was regularly asked to do more hours and that he was paid for these on an hourly basis. The claimant's evidence was that he felt some requirement to accept extra hours to keep the respondent happy and maintain his position.

15. The claimant led choir practice and the setting up of the projector for hymn practice. He and the Head auditioned and graded pupils for the choir. The final decision on choir members was up to the respondent but there was rarely, in practice, any disagreement.

16. In January 2018 the claimant's hours changed again to full-time Wednesday and Thursday, plus Friday mornings - being 14.66 hours per week.

17. In October 2019 the claimant's hours changed for the last time. He went down to working all day Wednesday and Thursday - being 11.33 hours per week.

18. The claimant's evidence, which was not substantially disputed, was that days off - for instance for medical appointments - were agreed in advance with the respondent and if, say a medical appointment overran, he would contact the respondent. There was no dispute that the claimant was paid if, for instance, snow or a flood closed the school or if he was late because a medical appointment overran. The respondent said that this was a matter of goodwill.

19. According to the Head's witness statement, the claimant could change his days and hours as he requested. However, the respondent provided very little detail or evidence about this, and, in the view of the tribunal, it was little more than a bare assertion. The claimant said that his hours were fitted around the school timetable and the school's needs.

20. The claimant's timesheets before the tribunal recorded broadly fixed hours, together with overtime. The tribunal had sight of some notes from December 2019 which the tribunal found referred to a discussion between the Head and the claimant about his working arrangements. It was said that this indicated that there was flexibility, for example, it said, (the claimant) will let (the respondent) know'. However, the tribunal found the document too brief and vague to be of material assistance.

21. The claimant's evidence was that if, for instance a sports day, meant he could not work on his usual day, he was still paid. There was no substantive challenge to this.

22. Although there was a conflict of evidence about how much the claimant attended inset days, it was not in dispute that he attended at least part of some inset days.

23. The claimant had a staff fob and photo pass allowing him access to the premises. He was able to log into the school's intranet. Although, by March

2020 he was waiting on a new password and had no access. The school website described him as a specialist teacher.

24. The claimant's evidence which was not substantively challenged was that he participated in activities such as fund raising and the Christmas dinner.

25. The respondent's practice was to take responsibility for and pay for DBS checking of all those working on its premises. The respondent made no distinction as to employment status. It would not rely on a worker or employee's individual DBS check.

26. On 21 March 2019 the respondent wrote to staff including the claimant stating that all individuals must be paid through the payroll and tax deducted at source. The only exceptions were if someone was a registered company or an individual registered as a sole trader. They would need to be paid into a business account or provide evidence from HMRC that HMRC treated them as a sole trader. The respondent asked the claimant for this evidence and on 29 March 2019 the claimant replied, "I can confirm my status as a sole trader, and I have pleasure in providing my self-assessment reference.'

27. There was a meeting on 13 March 2019 between the claimant and the Head. According to the respondent's notes (which were not provided to the claimant at the time), he said that he needed to have a period of time off because of his children, and he suggested taking June off and then stopping, i.e., retiring. He said he did not have an occupational pension. He said that he had been freelance for many periods of his life.

28. The claimant's account was that they discussed his taking time off in June. In the event, it was later agreed that he would take September off. He was not paid whilst off in September 2019.

29. When the claimant was absent in September 2019, the respondent did not arrange a substitute because, it said, there was little work for the claimant at this time and so no need. However, the respondent did not suggest that the claimant had not worked his normal pattern in the previous September.

30. The claimant returned to work in October 2019 on his previous hours, although he thought that he no longer worked Fridays.

31. On 19 March 2020 the school went into Covid lockdown. The school premises stayed open for a couple of weeks for key-worker children. After a few weeks, the children transferred, and the school premises closed down. Teachers provided lessons virtually.

32. The respondent was not entitled to access the CJRS furlough scheme and staff were paid from its budget which remained unchanged.

33. The claimant was locked out of the respondent's intranet at this time due to a password problem. He chased the respondent and telephoned about what was happening. He did not send emails. The claimant's evidence was that he understood that the school was closed as no one contacted him.

34. On 16 June 2020 the school premises reopened for a limited number of children with restrictions including “bubbles”, social distancing, and no assemblies, singing or hymns. The school shut down for the summer holidays. It opened again for Autumn term in September 2020 with restrictions, such as no singing, still in place.

35. The claimant emailed the respondent on 30 August 2020 ‘Since I have heard nothing from the school for over five months and with the children returning this week, I am naturally keen to know what your plans are for me this term.’

36. The Head emailed the claimant explaining that communications had been on the school email to which he should have access. However, she would be in touch personally as to plans. The claimant replied that day, 3 September explaining that he had been locked out of the school email and asked as to the future arrangements. The respondent stated, “I will be in touch with you personally to discuss plans for the term. Currently the guidance states that no assemblies or group singing should take place.”

37. On 24 September the Head provided a further up-date by email that under the current guidance, they were not in a position to offer assemblies or singing practice but that this would be reviewed after half-term.

38. By an email dated 28 September the claimant wrote to the respondent stating, ‘we have a longstanding agreement that I shall provide music services for the school on two days per week. This I have done until 23 March. Despite making myself readily available for work, you have not contacted me requesting my return and there has been no suggestion of a payment to retain my services.’

39. The respondent replied by means of a letter which stated that there was a lot that the school could not do currently, including singing and music. There was also a background of falling school roles. He was thanked for his previous support. The Head referred to this as difficult times and she could not see a light on the horizon; the Government was keeping the risk assessments under review.

40. The claimant considered that this letter in effect dismissed him. The respondent disagrees. It was agreed that this was not a matter to be determined at this hearing. It was not in dispute that the claimant’s work for the respondent ended in September 2020.

The Law

41. The definition of employee for these purposes are found at section 230(1) of the Employment Rights Act 1996 as an individual who has entered into or works under a contract of employment. Sub-section (2) provides that a contract of employment means a contract of service whether expressed or implied and if it is express, either oral or in writing There is no other definition of contract of service in statute.

42. Definition of a “worker” for the purposes of rights under the Working Time Regulations 1998 is set down in regulation 2(1). It includes any individual who works under a contract of employment or a contract (whether oral,

written, express or implied) 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 a client or customer of any professional business undertaking carried on by the individual.

43. This definition is virtually identical to that found in section 230(3)(b) of the Employment Rights Act for the purposes of various other employment rights including the right not to suffer any deduction from wages. Workers covered by these provisions are often referred to as "limb (b) workers".

Submissions

44. Both parties provided the Tribunal with written submissions and made brief oral submissions including speaking to the other party's submissions.

Applying the Law to the Facts.

45. For the tribunal to have jurisdiction in a claim for unfair dismissal, redundancy payment and breach of contract, the claimant needs to be an employee. However, for a claim for unauthorised deductions from wages and under the Working Time Regulations, he needs only to be a limb (b) worker.

46. The tribunal, accordingly, first considered whether the claimant was an employee, which would be determinative of jurisdiction over all the complaints.

47. The respondent agreed that there was a contract between it and the claimant, as per the respondent's submissions. The issue was, was this a contract of service?

48. In the absence of a written contract, the legal relationships between the parties may be inferred from their conduct in its factual and legal context, (see the Supreme in *Uber BV v Aslam [2021] ICR 657* at § 45 per Lord Leggatt JSC). The Tribunal reminded itself that it should take care not to confuse the conduct of the parties with their intention and what the parties understood to be the bargain reached. Nevertheless, conduct may be relevant evidence as to the parties' understanding.

49. Firstly, the Tribunal considered whether there was what is usually referred to as mutuality of obligation, that is, was there an irreducible minimum of an obligation to provide and accept work, (see *Nethermere (St Neots) Ltd v Gardiner and anor 1984 ICR 612, CA*, and *Carmichael and anor v National Power plc 1999 ICR 1226, HL*). The tribunal asked if there was a bare minimum of a reasonable amount of work that the claimant agreed to provide and felt obliged to provide, and that the respondent felt obliged to offer?

50. For the Tribunal the most important factor was that the claimant had fixed hours. The respondent's case was that he did not. However, the Head's evidence was that that, in effect, it went without saying that - subject to any specific arrangement - he would return every term to teach. During the first part of his work for the respondent - when he was teaching whole classes music under the National Curriculum - the claimant's lessons were time-tabled by the respondent. Over the course of his work, his pattern of hours

changed a number of times, but after each change, the hours were fixed until there was a further change.

51. The tribunal had sight of about fifteen timesheets dated variously from 2015 through to January 2020. The respondent did not say that these were in way atypical or did not represent the claimant's usual working arrangements. Whilst these time sheets recorded that the claimant did work extra hours over his minimum, they reflected a regular pattern of work on regular and fixed hours.

52. The only exception was the one document from December relating to specific weeks which suggested that the claimant had some flexibility as to days and hours. The claimant's explanation was that at the end of term in December, there was some flexibility. The Tribunal accepted that evidence because the end of the December term is an atypical time of the year in schools, when regular patterns and timetables are often disturbed.

53. The claimant's invoices before the tribunal recorded the number of hours worked in a pay period but not what the hours were. Therefore, it was not possible to draw conclusions as to the extent, if any, to which the claimant worked different minimum hours.

54. The respondent contended that there could not be mutuality of obligation because the claimant had taken time off in September 2019 during term time by agreement.

55. The Tribunal accepted the claimant's evidence that he could not simply fail to turn up for work, even if he gave warning. He had worked for the respondent for about two decades and there was, leading up to the time off in September 2019, discussions about time off and the possibility of retirement. The Tribunal found that this was consistent with, in the normal course of events, the claimant being expected and expecting to attend work regularly and reliably on a fixed pattern. Taking September off in 2019 was an unusual occurrence and the parties came to a specific arrangement about this.

56. The Tribunal considered whether there were any factors pointing against a mutuality of obligation. For the Tribunal the most important factor was that the claimant did not work from the beginning of the Covid lockdown in March 2020 until termination five or six months later.

57. The respondent's case was that during this period the claimant did not act in a way consistent with being an employee who thought he had mutuality of obligation and was entitled to be paid.

58. The difficulty for the Tribunal was how much should a claimant's conduct during the highly unusual and indeed unprecedented circumstances of Covid and Lockdown, affect the Tribunal's understanding of what the parties understood their obligations to be. As the respondent acknowledged, the early months of Covid – March to August 2020 – was a time of a good deal confusion, and events moved fast and frequently.

59. The tribunal could not take into account the respondent's approach under the CJRS because, as a school, it was not able or expected to take advantage of the furlough scheme. The respondent did not furlough anyone. The claimant's situation was simple. He did not come into work, and he was not paid.

60. The Tribunal weighed these factors in the balance and overall determined that the factors pointing to mutuality of obligation outweighed the factors pointing against. Taking into account the other factors which pointed strongly to mutuality of obligation, the parties' conduct in the unprecedented circumstances of Lockdown in 2020 were insufficient to overcome the finding that there was mutuality of obligation. The tribunal was bolstered in this decision by the respondent's failure to contact the claimant and the claimant's attempts to contact the respondent.

61. The Tribunal then applied what is known as the multiple test of employment status, as set out in in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD* and confirmed by the Supreme Court in *Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC*.

> Firstly, did the worker agree to provide their work and skills in return for renumeration? Was there a requirement for personal performance as opposed to a right of substitution?
>
> Secondly, did the worker agree to be subject to a sufficient amount of control, either expressly or impliedly, for the relationship to be one of an employer and employee?
>
> Thirdly, were the other provisions of the contract consistent with its being a contract of service?

62. The Tribunal considered if the claimant had provided personal service or if there was a right of substitution. It was agreed that this had never arisen in practice. The question for the Tribunal was, what was the intention of or the bargain between the parties as to personal performance? The difficulty for the respondent, in the view of the Tribunal, was that it was hard to see how a right of substitution might have worked in practice. The respondent wanted, for understandable reasons, to have, all staff (to use a neutral term) on the same DBS check. This was the case even if, as for the claimant, they had already obtained a DBS check elsewhere.

63. There was no discussion of getting a substitute in when the claimant was away in September 2019. Further, the Head had replied to a Tribunal question frankly stating that the claimant could not simply send anyone in as a substitute if he did not want to come to work; she would need to meet them and get a "feel" for them. In view of the Tribunal, this was a sensible and plausible answer.

64. The Tribunal accordingly found that there was a requirement as to personal performance.

65. The Tribunal went on to consider control. It found that the claimant had

agreed to be subject to a sufficient degree of control for the following reasons.

66. Many employees, such as the claimant, apply a skill or expertise that is not susceptible to direction by anyone else in the organisation. Therefore, the significance of control is that the employer can direct what the employee does, not how he does it (see *Catholic Child Welfare Society and ors v Various Claimants and Institute of the Brothers of the Christian Schools and ors 2013 IRLR 219, SC*).

67. The Tribunal had little hesitation finding that the claimant was under the respondent's control in the first years when he taught according to the National Curriculum. The claimant always had a qualified teacher in the room for behaviour management. The tribunal considered if the changes in his role over time indicated that control had changed materially. The changes reflected the respondent's needs, the change in the National Curriculum, the availability of other staff, and the requirements of the Church year. After the claimant no longer worked according to the National Curriculum, the respondent exercised sufficient control to be consistent with employment status. The claimant enjoyed a good degree of independence, for instance as to who received piano lessons or was in the choir, applying his music expertise. However, the respondent retained overall control, for instance, over piano lessons or the choir. Accordingly, the Tribunal found that the respondent had sufficient control.

68. The Tribunal went on to consider whether there were any other factors consistent or inconsistent with employment status.

69. It was consistent with employment status that the school provided equipment. It was consistent with employment status that the claimant did not hire or fire staff.

70. The Tribunal considered whether the claimant bore a financial risk. Was he, to some extent, in business on his own account? The Tribunal found that he was not for the following reasons. The claimant could increase his income by taking on extra hours over his minimum hours. The Tribunal thought it was a nice question as to how much autonomy the claimant actually had to refuse extra hours, after all it was in the interests of both parties if the respondent offered extra hours and the claimant accepted. It appears to have hardened into some form of an expectation between the parties. However, even if the claimant had had an entirely free choice whether to do extra hours, the fact that a person is free to refuse or choose to work extra hours - overtime – is not inconsistent with employment status and does not indicate that the worker is in business on his own account. Overtime is a common feature of employment contracts.

71. Further, the claimant did not bear a financial risk when the school closed for planned sports days, or unplanned emergencies. He was paid even if the respondent could not and did not offer him work. He was also paid if he was late back from a medical appointment.

72. A factor inconsistent with employment status was that the claimant did not receive or expect holiday pay.

73. Another factor against employment status was his tax arrangements. In the view of the Tribunal, this was a somewhat weightier factor on these facts than is sometimes the case. The claimant was asked if he was a sole trader and he replied that he was. He actively presented himself as a sole trader. This was to an extent offset by the claimant having been told he was self-employed by the respondent at the beginning, without any input into the decision and having been treated as self employed for nearly two decades. Nevertheless, this was therefore a factor more consistent with his being self-employed.

74. The Tribunal did not attach a great deal of weight to the claimant's reference to "free-lance" in 2019 this as this was not a note that the claimant saw at the time, and it was very unclear what the claimant actually meant by this.

75. The Tribunal considered if the claimant was subject to disciplinary and other policies. On a balance of probabilities, it appears that some applied to him, for instance safeguarding, but others did not.

76. The Tribunal went on to consider whether the claimant was integrated into the respondent's functions. The claimant was teaching children which was the core function of the respondent's organisation. He started teaching the National Curriculum and he then started teaching them music and he was also directly involved in the provision of school worship at a Roman Catholic school.

77. The Tribunal reminded *Uber BV v Aslam* in which the Supreme Court held that worker -rather than employee - status was a question of statutory interpretation. The correct approach is to consider the purpose of the legislation -which is to give protection to vulnerable individuals who are in a subordinate and dependent position in relation to a person or organisation which exercises control over their work. In the view of the tribunal, if that is true of worker status, it can also be true of employee status.

78. Finally, the Tribunal reminded itself of the guidance from the Court of Appeal in *Hall (Inspector of Taxes) v Lorimer 1994 ICR 218, CA,* that the overall effect as to whether someone is an employee or contractor can only be appreciated from standing back from the detailed picture which has been painted by viewing it from a distance and making an informed considered and appreciative decision as a whole. It is a matter of the evaluation of the overall effect of the detail. Not all details are of equal weight or importance in any given situation.

79. The Tribunal had found that there were some material factors against the claimant being an employee. His specific statement, albeit in reply to the respondent, that he was a sole trader. More weightily, he and the respondent had behaved in a manner that was not necessarily consistent with either thinking that there was mutuality of obligation during Lockdown. The claimant was not paid during this period, and he did not complain.

80. Nevertheless, in the view of the Tribunal, these factors were outweighed by the other significant factors which strongly pointed toward employee status. In respect of mutuality of obligation during Lockdown, this was an unprecedented situation and was insufficient to outweigh the parties'

approach to mutuality for the earlier nearly two decades.

81. In an informed, considered and qualitive appreciation, the overall effect of standing back was that the claimant was an employee of the respondent.

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Employment Judge Nash
Date: 24 May 2022

Sent to the parties on
Date: 23 June 2022

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