EMPLOYMENT TRIBUNALS

Claimant: Miss Y Rayani

Respondent: Abram Village Club

Heard at: Manchester **On:** 13 December 2021
15 December 2021

Before: Employment Judge Whittaker

REPRESENTATION:

Claimant: Mr Nkomo, Partner
Respondent: Mrs M Williams, Treasurer of Respondent

JUDGMENT

The judgment of the Tribunal is that the claimant was an employee of the respondent as at the date of her dismissal on 31 October 2020.

REASONS

Introduction

1. The claimant did not submit any documents for consideration by the Tribunal, and neither did she submit any witness statement. At the hearing today the claimant, through her partner, Mr Nkomo, told the Tribunal that the claimant simply intended to rely upon the content of the particulars which she had included in her claim form, despite the fact that these were extraordinarily brief and did not in any detail address the issue to be determined at the hearing today, namely whether the claimant was or was not an employee at the date of her dismissal.

2. The Respondent submitted a bundle of documents comprising some 56 pages and they also provided witness statements from Mr Ross and Mrs Williams who were officers of the respondent club. They also submitted a document which they described as the “position statement” of the respondent.

3. The single issue to be determined by the Tribunal today was whether or not the claimant was or was not an employee at the effective date of termination of her employment which took place as a result of the respondent hand delivering a letter to the claimant on 31 October 2020 advising her that the respondent "will no longer require the services you provide working the bar".

4. The claimant was offered the opportunity to meet with representatives of the respondent to discuss the matter, but it was very clear from the language of the letter dated 31 October 2020 that the decision had already been taken to dispense with the services of the claimant following a recent committee meeting. The content of the letter dated 31 October 2020 was very clear in that regard.

The Hearing

5. The hearing was due to start at 10.00am and the Tribunal was fully satisfied that all parties, including the claimant and her partner, Mr Nkomo, had been properly notified of the hearing and had been notified that it would start at 10.00am and that it would be held by video. The Tribunal was furthermore fully satisfied that full and proper joining instructions had been sent to the claimant through her partner, Mr Nkomo, to his email address.

6. Mr Ross and Mrs Williams joined the hearing promptly at approximately 9.50am but there was no sign whatsoever of the claimant or Mr Nkomo. This was still the case at 12.22pm. Repeated efforts were made by the Employment Tribunal to contact Mr Nkomo and indeed to enable the claimant and Mr Nkomo to join by video. It was clear from subsequent discussions that Mr Nkomo had not paid any proper or sufficient attention to the information and documentation which had been sent to him by the Tribunal and he appeared to have mistakenly told the claimant that in fact the hearing was due to take place on 30 December 2021 when no such information had been sent. Ultimately, however, through determined efforts by the Employment Tribunal administration and the Employment Tribunal Judge, the claimant and Mr Nkomo were able to participate in the hearing at 12.26pm when the claimant took the oath by affirmation.

Observations

7. Before the claimant joined the hearing today, the Employment Judge had well over four hours in which to consider the bundle of documents sent by the respondent and their witness statements, and at the same time to consider the claim form submitted by the claimant and the response form submitted by the respondent. From careful consideration of the documents and the witness statements of Mr Ross and Mrs Williams, it appeared very much to be the case that neither the claimant nor Mr Nkomo, nor Mrs Williams nor Mr Ross, had appreciated the complexities associated with whether or not the claimant would be properly classed as being self-employed or whether she would be classed as being an employee, or even alternatively whether she could be classed as a worker. Indeed, all four participants in the hearing today confirmed that they were entirely unaware of the possible official status of worker or what that meant, and how that status potentially reflected some of the characteristics of employment and some of the characteristics of self-employment.

8. It very much appeared that a decision had been made that the claimant would be told that she was self-employed, and that having been told she was self-employed

it therefore followed that the respondent did not attribute to the claimant any of the characteristics of employment such as a contract of employment, a statement of main terms and conditions of employment, any payslip, any particulars relating to sick pay or holiday, and arranged for the claimant to be paid in cash by authorising her to take her weekly earnings from the cash takings generated by the bar trade at the club premises of the respondent.

9. As a result of this lack of appreciation of the complexities associated with the potential status of the claimant (the lack of appreciation was shared jointly by all four participants today), it was often very difficult and indeed challenging for the Employment Judge to ensure that evidence which was given by the parties, particularly that given by the claimant and the purported evidence which Mr Nkomo repeatedly attempted to introduce, to ensure that the parties continued to provide evidence which was only relevant to the single issue to be determined by the Tribunal today, namely whether or not when the claimant was dismissed she was an employee which would then entitle her to bring a claim of unfair dismissal contrary to the relevant provisions of the Employment Rights Act 1996. The Tribunal wishes to emphasise that Mr Nkomo did not provide any witness statement despite the opportunity to do so in accordance with orders which had been made at a Preliminary Hearing in which he had equally participated.

10. On repeated occasions during the course of the hearing Mr Nkomo attempted to provide what could only have been described as evidence, and he was repeatedly reminded by the Employment Judge that he had not provided a witness statement, Mr Nkomo repeatedly asserted that he had not been able to provide a witness statement because essential documentation had not been provided by the respondent. This was not a justified perspective for Mr Nkomo to adopt. A great deal of the information which he attempted to provide to the Tribunal personally was evidence which he could and indeed should have included in a witness statement. His explanation that he did not provide a statement because of the alleged lack of certain documentation from the respondent simply did not make any sense and was unjustified.

Findings of Fact

11. The three witnesses, including the claimant, gave evidence by affirmation. They then answered questions put to them, either by Mr Nkomo on behalf of the claimant or Mrs Williams and Mr Ross on behalf of the respondent, and in particular answered a number of questions which were put by the Employment Judge. This questioning by the Employment Tribunal was essential because the witness statements, and in particular the very brief particulars supplied by the claimant in her claim form which she relied on as her witness statement, failed to address the manner in which the Tribunal was obliged to consider the employment status of the claimant. This was particularly the case so far as the claimant was concerned. Indeed, it would be fair to observe that the particulars supplied by the claimant in her claim form almost completely ignored the issue to be determined by the Employment Tribunal today. Without giving the claimant the opportunity to answer questions, particularly from the Tribunal, about important aspects of her engagement and time spent at the club working behind the bar, then it would have been impossible for the Tribunal to properly and fairly determine the issue which it was required to determine.

12. The claimant therefore, particularly through questions put to her by the Employment Judge, was allowed to provide significant evidence well beyond the

information which she included in her particulars of claim. The Tribunal was satisfied that this was because neither the claimant nor her representative (and partner), Mr Nkomo, had even begun to appreciate or address any of the particulars which any Employment Tribunal would need to have available to it in order to determine whether the claimant was or was not an employee as at the date of dismissal. So far as the claimant is concerned, those essential particulars and facts were completely missing.

13. The view of the Tribunal, therefore, was that it would be unreasonable to prevent the claimant in those circumstances from answering questions from the Tribunal in order to provide it with the information it needed to properly and fairly determine whether the claimant was or was not an employee.

14. Having considered the witness statements, having read the full bundle of documents and then having considered the additional information which was provided on oath both by the claimant and by Mrs Williams and Mr Ross when giving evidence and when answering questions, the Tribunal made the following findings of fact:

(a) At all relevant times the claimant worked to provide all relevant duties behind the bar at the club which was operated by the respondent. There was considerable confusion as to when the claimant began working there. The dates suggested included 2011, 2013 and 2014. This was never satisfactorily resolved because none of the parties had an accurate recollection and no documentation was provided or indeed appeared to have been maintained by the respondent to indicate when the claimant was recruited. In any event, that date was not at this stage of any importance because the Tribunal was focussed on deciding whether the claimant was an employee at the date of her dismissal. The claimant in her claim form described herself as the “bar manager” and that is an accurate summary of her responsibilities.

(b) When the claimant began work she was engaged by the respondent through Mr Nkomo, who is her partner and her representative. He confirmed to the Tribunal that when he engaged her to work as the bar manager at the club he did so on the basis that she would be “self-employed”. Mr Nkomo attempted to persuade the Tribunal that at the time that the claimant was engaged to be self-employed that in fact the club, through himself, appreciated the difference between being self-employed for tax purposes and self-employed for the purposes of employment law. However, Mr Nkomo, despite the liberal opportunities which were offered to him by the Tribunal, bearing in mind that he had not submitted a witness statement, was unable to provide any information or indeed any evidence at all to substantiate his suggestion that any consideration had been given at the time by the respondent or by Mr Nkomo to the description of the claimant’s status other than that of being self-employed.

(c) Initially the claimant worked seven days a week. She was responsible for maintaining records of the takings behind the bar, and these were all in cash. The claimant maintained records of the daily takings and at the end of the week, which was on a Saturday night, the claimant then took her wages in cash from the weekly takings which had been built up. The Tribunal was not provided with any records of the cash earnings of the claimant, but this was not disputed. In fact that arrangement continued

right up until the time that the claimant was dismissed. At all times she took a sum which reflected the hours which she had worked from the cash takings, and she reported that in her weekly financial summary which she provided to the respondent.

(d) The claimant was never provided with any contractual documentation at all. The Tribunal was not provided with any. Mr Nkomo openly accepted that when engaging the claimant that he had done so as a representative of the respondent on a self-employed basis. The claimant was never provided with any terms and conditions of employment and so throughout her employment she was never provided with any indications of entitlement to sick pay or holiday pay. The claimant did not seem in any way to be worried or concerned by this. She told the Tribunal that she simply accepted that as being the position. She did not at any time complain about it. She believed that she was receiving what she was entitled to. This was not because the claimant had a sophisticated understanding of what was meant by being described as being self-employed. It was simply that the claimant accepted what was offered and what she received from the respondent as being what she was entitled to. The claimant openly acknowledged to the Tribunal that she was extremely inexperienced in respect of what a person in her position might or might not be entitled to. She accepted her circumstances without any complaint and without raising any query at any time.

(e) Matters continued to run extremely smoothly. The claimant was told what hours and what date of the week to operate the bar. She arranged for deliveries. She organised the bar stock and she managed the bar cellar and all the administration and paperwork which was associated with her job as the bar manager.

(f) The claimant was never provided with any details of any disciplinary or grievance procedure. However, in June 2018 (page 50 in the bundle) the claimant was suspended as a result of allegations of financial discrepancies. The respondent therefore clearly believed that they were entitled to suspend the claimant in those circumstances whilst they carried out an investigation. That letter was sent to the claimant by one of their witnesses who appeared before the Tribunal, Mr Ron Harris, who at that time was the secretary. Following an investigation a further letter was sent to the claimant on 28 June (pages 51/52) in which Mr Harris informed the claimant that having investigated the matters the respondent was satisfied with the explanations and the claimant was reinstated so that she was able to return to work immediately on the following Friday.

(g) The Tribunal found an important paragraph on the final page of that letter sent by Mr Harris. The letter announced that the club was “aware that you have additional employment and have no objection to this. Please ensure that you inform us of any conflicts that might interfere with you carrying out your duties satisfactorily”. This was a reference to the fact that although the claimant had for some years been engaged to work seven days a week, that due to the troubled financial circumstances of the club it then only began to open on Friday, Saturday and Sunday evenings, which clearly was a significant drop in income for the claimant. The

claimant told the Tribunal today that in those circumstances she simply had to find alternative employment. She said that she found an alternative job first of all in 2018, and that reflects the comment in the letter to which the Tribunal has just referred. This alternative employment involved the claimant working in the care industry. She worked shift work. Clearly Monday to Thursday inclusive did not pose any issues. The company that the claimant worked for providing care services issued a rota to the claimant every month, and she therefore received significant advance notice of when she might be required to work on Fridays or Saturdays or Sundays which would conflict with the hours that she worked at the club. It was obviously this conflict which Mr Harris was referring at page 52 of the bundle when he referred to additional employment.

(h) The Tribunal was told that even in the early days of the claimant's employment the respondent had taken a generous attitude to the claimant asking to avoid working on certain nights. Prior to her obtaining alternative employment in 2018, the reasons why the claimant on occasions wanted to be excused from her responsibilities as a bar person were due to personal circumstances of the claimant including social activities that she wished to participate in. The Tribunal was told that whenever those requests were made by the claimant that there was never any occasion when the club did not agree to that request. The claimant had put forward a nephew of hers as a suitable alternative and that was accepted at all times as being fair and reasonable by the club. There was never any question that the replacement, the claimant's nephew, was anything other than perfectly competent and capable of standing in for the claimant.

(i) There was considerable interchange between the four people who appeared before the Tribunal today and other members of the committee and members of the club. The picture that was painted was that they were all in this together. There was no significant evidence of division. Clearly when people accepted positions such as treasurer or secretary then they accepted the responsibilities which went with that post, but that did not mean that they did not continue to be a member of the committee, and indeed a member of the club attending and enjoying the social atmosphere which was available at the club premises. The Tribunal accepted that this was reflected in the willingness to agree to the claimant not having to work every night that the bar was open, and it was reflected in both the tone and the content of the paragraph in the letter of Mr Harris at page 52 which has been referred to above.

(j) The claimant paid herself in cash from the cash takings. The working week of the respondent was Saturday to Saturday. The claimant added up all the takings up to and including Saturday night and then considered those on the Sunday. She carried out the necessary accountancy work and then the money which had been accumulated over the working week was paid into the bank on a Monday. The claimant at all times was paid in cash. No deductions were made or ever proposed by the respondent. The claimant never raised any query at any time about the manner in which she was paid or liability for tax and national insurance, or indeed any potential liability on the part of the respondent. She openly told the

Tribunal that she had not declared the monies which she had received to HMRC.

(k) Within the bundle the Tribunal was presented with a number of references which had been supplied by the respondent for the claimant. The majority of these had been provided in response to request for references to substantiate the searches being made by the claimant for alternative employment. There was no suggestion that those references had ever been made available to the claimant. In those references the claimant was described as being self-employed, but the Tribunal found that that did nothing more than reflect the wording on which she had been engaged at the outset, by her representative and partner, under the description of being "self-employed". That continued description in the references amounted to nothing more than a rather obvious self-serving statement. It reflected nothing more than the description which had been applied to the claimant from the outset by the respondent. It did not, in the view of the Tribunal, in any way reflect any continuing or detailed consideration by the respondent, or indeed by the claimant, of what might or might not be an accurate statement of her employment status.

(l) The respondent included within the bundle a number of letters which they had sent to the claimant over the years announcing that she was received a "salary increase". Again in normal circumstances the Tribunal would attribute importance to the use of the word "salary" which clearly would in normal circumstances reflect the status of employment. However, from the information which was given by all parties to the Tribunal today it was clear that nobody ever considered the potential importance of the use of the word "salary". To clearly illustrate the obvious confusion of the officers of the respondent, those letters also notified the claimant that she was receiving increases because of increases to the National Minimum Wage. Again there was no evidence whatsoever to suggest that any of the officers of the club had any time recognised the obvious discrepancy between describing the claimant as self-employed on the one hand, but on the other hand indicating that they felt bound to pay the claimant nothing less than the National Minimum Wage. This was simply a further and obvious indication of the confused and inadequate approach on the part of the respondent to what was genuinely and properly the status of the claimant whilst she was performing her responsibilities as a bar steward. Clearly if the claimant had been genuinely self-employed then the National Minimum Wage would have been irrelevant. These letters were issued to the claimant in 2018, 2019 and finally in July 2020. The last of those letters was sent to the claimant on 14 July 2020. That letter ended by indicating, once again, that the status of the claimant was "that of self-employed" and it indicated to the claimant that it was "your duty to declare your earnings to HMRC".

(m) The claimant openly acknowledged that she had never made any approach to HMRC. She told the Tribunal that she believed at all times that any responsibility for tax and national insurance had been paid by the club, but she produced absolutely no evidence whatsoever to substantiate that. She accepted that she had never made any query at any time of any

representative of the respondent to query whether that was the case. If indeed the claimant had ever thought of that, and the Tribunal seriously doubted whether she had, then there was no evidence whatsoever to substantiate other than what she had said to the Tribunal for the first time today. The claimant said nothing of that nature in her claim form and of course she had never submitted any additional witness statement. The Tribunal however was aware of the obvious discrepancies in that letter at page 54. Whilst at the same time it told the claimant that she was self-employed and that she should therefore declare her earnings to HMRC, they were at the same time telling the claimant that her "salary" was being increased and that it was being increased to comply with the National Minimum Wage. The obvious and significant discrepancies in that letter went entirely unnoticed and unrecognised by any representative or officer of the respondent. Indeed the obvious discrepancies were pointed out, for the first time, to Mrs Williams and to Mr Ross by the Employment Tribunal during this hearing.

(n) There came a time when the claimant's nephew was unable to stand in for the claimant and following the claimant finding alternative employment within the care system the claimant approached Mrs Williams' own son, Tom, to see if he would be interested in covering her bar duties when she was unable to do so because of the rota that had been issued to her by her other employer. He appears to have accepted the opportunity with enthusiasm, and clearly that enthusiasm and agreement was matched by his mother, Mrs Williams, who also appeared before the Tribunal today on behalf of the respondent. If at any time her son was unable to stand in for the claimant, then sometimes members of the committee would do it. The claimant pointed out that at all times, promptly upon receipt of her monthly rota, she approached Tom and if he was unable to do it then she approached the committee and alternative arrangements were made without any comment, any disagreement or indeed any discussion on the part of the respondent.

(o) The Tribunal questioned the claimant about other employment which she may have had before she started for the respondent which might/ought to have alerted her to the difference between the arrangements made regarding her work for the respondent, and the arrangements which might have been made by another employer when she was obviously engaged as an employee. The claimant said that she had worked at a cinema in Wigan for some ten years. The claimant was unable to remember, however, what documentation or information had been provided to her as it was some time ago. The claimant confirmed, however, that when she began working in the care industry, for Imagine, she was issued with a contract of employment and that she was issued with wage slips.

(p) The Tribunal asked the claimant why she did not recognise the obvious difference between what was issued to her when she joined the care industry and what she had and had not been issued with in connection with her work for the respondent. The claimant honestly and openly indicated that she had never for a moment paused to reflect on the

differences and had never given it any thought. She told the Tribunal that she was "not well informed about things like that".

(q) On the occasions when the claimant did not work then the person who worked in her place took their earnings, again in cash, from the takings on the night that they worked. If, for example, the claimant was unable to work on a Friday evening then the person who replaced her took their earnings, at the agreed rate, from the cash takings that Friday night and left a note for the claimant to confirm that that had occurred and to confirm the amount which had been taken.

(r) There was absolute disagreement between the claimant and Mrs Williams about the content of the document which appeared in the bundle at page 37. That was a letter dated April 2014 and was therefore a long time ago. Mrs Williams was adamant that this was a letter which she had written in her own handwriting at the request of the claimant. She said that the claimant had asked for this reference so that the claimant could pass it to her accountant. However, the claimant was equally adamant that she had never ever seen this letter and equally adamant that she did not have an accountant and had never had an accountant. The Tribunal noted that the letter was not addressed to any accountancy firm but only "to whom it may concern". That appeared very odd. If indeed it was to be written to an accountant, then it was somewhat surprising that the letter had not been directed by Mrs Williams as the treasurer directly to the accountants. After all, Mrs Williams accepted that all the other references which appeared in subsequent pages were also addressed "to whom it may concern" and they were, in contrast to the handwritten reference, sent direct to the recipient and not handed to the claimant for her to pass on. That of course would be the standard procedure in connection with any job related reference. The Tribunal was unable to determine the truth about the document at page 37. After all it was seven years ago. If it was a letter which was to be sent to an accountant then the Tribunal found it surprising that it had not been sent direct to the accountants and Mrs Williams was unable to provide the Tribunal with any details of who the accountants were. It was equally clear from the evidence given by Mrs Williams that at no stage had any member of the committee ever taken up the issue of reporting her earnings to HMRC with the claimant. There was no evidence to suggest they had ever asked for details of her accountants, or anyone had ever checked with the claimant that she was declaring her earnings to HMRC and that a genuine picture of self-employment was being painted to HMRC. The Tribunal did not consider that the letter at page 37 was of any particular importance and in view of the manner in which both Mrs Williams and the claimant gave evidence, they both proved equally persuasive and the Tribunal was therefore unable to resolve the differences between the claimant and Mrs Williams. The claimant remained adamant that she had never seen that letter and that the first time that she had seen it was when it was included in the bundle of documents for this hearing.

(s) There was some discussion between the claimant and the Tribunal about the issue relating to the three bottles of spirits which the claimant accepts

that she took home. However, bearing in mind that there will be a further hearing when all the issues relating to the circumstances of the claimant are explored by an alternative Tribunal, this Tribunal did not believe it appropriate to announce, or indeed to make, any findings of fact in connection with that. That remains the responsibility of the Tribunal at the final hearing.

(t) When questioned by the Tribunal Mrs Williams indicated that the approach of the club and the committee and its officers to the responsibilities relating to the bar were that there were indeed occasions when the claimant was either unable to work because of other work commitments or alternative sought to have a replacement to engage in social activities. Mrs Williams confirmed that the view of the club and its management was that the claimant was at all times able and allowed to find someone else. The Tribunal was told that the "main thing" was that the club was able to open on the nights they wanted the bar to be open for its members, and that at all times everybody knew the person who was standing in for the claimant.

(u) From 2018 when the claimant found alternative full-time employment in the care industry with Imagine, the relationship between the claimant and the club ran smoothly and effectively. Whenever the claimant's work with Imagine conflicted with a Friday, Saturday or Sunday night working behind the bar of the respondent then she was, without any objection or comment or difficulty or challenge, able to arrange for a replacement. The "main thing" being that the club was open and that at all times the replacement was somebody that the club knew very well. Indeed for the last three years prior to the termination of her position, that replacement was almost always Mrs Williams' own son.

The Law

15. Courts and Tribunals have regularly and repeatedly rejected the notion that there is one single factor that can determine employment status. Instead, the issue is approached by examining a range of relevant factors, and this is commonly known as the "multiple test". One of the earliest formulations of the test is to be found in **Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 1 All ER 433** in which Mr Justice MacKenna set out the following three questions:-

- Did the worker agree to provide his own work and skill in return for remuneration?

- Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?

- Were the other provisions of the contract consistent with its being a contract of service?

16. It is very well established that a Tribunal must not use a checklist approach in which the Tribunal runs through a list of factors and ticks off those pointing one way and those pointing the other way, and then totals up the ticks on each side to reach a decision. The decision making process is not a mechanical exercise of running

through items on a checklist in that way. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail. It is however important to recognise that not all details are of equal weight or importance in any given situation.

17. The Tribunal has, however, recognised that there is an irreducible minimum factors/elements which must be present in order to enable the Tribunal to conclude that the relationship was one of employment, one of master and servant. Those three elements as set out above are control, mutuality of obligation and personal performance. The Tribunal considered each of these. However it was the issue of personal performance which most troubled the Employment Tribunal.

18. In the early days, in 1999 and in 2001, there was disagreement between the relevant legal authorities about the issue of personal performance. In the Ready Mixed Concrete case it was stated that the employee must have agreed to provide his own work and skill. That court also noted that, "freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, although a limited or occasional power of delegation may not be". The Court of Appeal in one case indicated that where a claimant could choose at will whether to perform the contract himself or pay someone else to do it, and had chosen to pay others in the past, that was inconsistent with a contract of service. However, in a case involving Glasgow City Council in 2001 an instructor worked under a contract which said that if for any reason the person was unable to take a session then that person could arrange her own replacement from the council's list of approved instructors. The council would then pay that alternative instructor who was selected for that session directly. Key factors led the court in that case to conclude that the circumstances fell within the exception of "limited or occasional power of delegation" which had been mentioned in the Ready Mixed Concrete case. Key factors were considered to be that the power was only available when the claimant in that case was "unable" to attend rather than "unable or unwilling" in the earlier case. The fact that the claimant in that case would not be paid for sessions which she had delegated to others was also a factor pointing towards an employment relationship rather than a contract for services.

19. The Tribunal however considered that the most relevant case to the current circumstances involved in this case involving Ms Rayani was the case of **Weight Watchers (UK) Limited v Commissioners for Her Majesty's Revenue and Customs [2011] UKUT433**. The Tribunal noted and indeed reminded itself that this was a tax case and not an employment case, nevertheless the principles appeared to be obviously relevant. The above authorities to which the Tribunal has referred were considered in this case, even though it was a tax case. The Upper Tribunal in **Weight Watchers** made a distinction between two situations, namely:-

- One where the right to substitute is framed so as to enable the person promising to provide the work to fulfil that promise by arranging for another person to do it on his or her behalf; and

- The other where it allows the person in stated circumstances to find a substitute to contact directly with the employer to do the work instead.

20. According to the Tribunal, it was only the first of those alternatives which is fatal to the requirement that the person's obligation is one of personal service in that the substitute is actually performing that obligation. In this case where a leader found a substitute to take a particular meeting, the contract for that meeting was between the substitute and Weight Watchers Limited. In that case the Tribunal concluded that the claimant was an employee.

Judgment

21. It is not in dispute that the claimant had never been issued with any contract of employment or terms and conditions of employment. She had never been issued with a payslip. There had never been any indication at all that the respondent was willing to pay sick pay or holiday pay, and at no time had the claimant ever questioned or disagreed with this.

22. It was equally clear that the intention of the respondent at all times would be that the claimant would be classed as self-employed and indeed, as the Tribunal has remarked previously, the claimant was engaged on a self-employed basis by Mr Nkomo, her partner and current representative in these proceedings. The Tribunal however asked itself very carefully why the employers were focussed on self-employment at that time? Did they genuinely believe or turn their minds to the fact that the claimant was genuinely self-employed and, for example, whether or not she was running her own business with the risk of profit and reward? The only possible conclusion was that nobody ever gave any thought whatsoever to any such issue. The Tribunal's judgment is that the only reason why the claimant was continuously described as being self-employed was because the only person who was working for the respondent was the claimant. None of the committee members had any experience whatsoever of operating a PAYE system and indeed it was clear that they were unwilling to become involved in doing so. Mrs Williams was very clear about that.

23. In the view of the Tribunal it was abundantly clear that the purpose of describing the claimant as being self-employed was to avoid the complexities and inconvenience associated with a PAYE system. The limited understanding of all the parties involved, including indeed Mr Nkomo, the claimant's partner and representative, was that by describing the claimant as self-employed PAYE could be avoided.

24. It was equally obvious that there was nobody as a committee member or officer of the respondent who had ever appreciated any of the complexities associated with the alternative status of the claimant as an employee or indeed as a worker. There was no indication that anybody was aware of the obligations under section 1 of the Employment Rights Act 1996 to issue a statement of main terms and conditions of employment. They understood that sick pay and holiday pay was not appropriate for someone who was self-employed but nobody at any time, even for a moment, sat back to consider whether or not the claimant's status was genuinely that of someone who was self-employed or whether indeed the club ought to reflect on whether the status of the claimant should be accurately described as something else. That simply never ever occurred to the claimant, to Mr Nkomo or indeed to any officer or committee member of the club.

25. It was clear that the respondent exercised a reasonable degree of control over the claimant. After all, it was they who decided that the claimant's working week would

be reduced from seven days to only three days in 2018. This was not in any way negotiated or discussed with the claimant. It was discussed by the committee and they decided that the club would only open for three days and so on that basis, at a stroke, the claimant was told that she was only going to be allowed to work for three days and indeed be paid for three days. This indicates a considerable degree of autonomy and control by the club.

26. As the Tribunal has already indicated, the respondent felt able to exercise the right of suspension and indeed the possibility of disciplinary proceedings against the claimant and that was illustrated by the correspondence to which the Tribunal has referred above.

27. So far as the question of control of the claimant however is concerned, it must be recognised that this was control of a very light touch indeed. The responsibilities carried out by the claimant were very well known to everybody and they were not complicated. Committee members were able to stand in for the claimant quite willingly, and perfectly capably. It was not a complicated working system. Further, it was a well-established system. All parties agreed that there had never been any change to the choice of drinks which were available behind the bar. Business relationships with suppliers, therefore, were again very well established and very well known. Furthermore, if the club ran out of any particular drink, then they would simply pop to the shop next door to buy a replacement, something which clearly in normal licenced premises might be significantly frowned upon. There were no such difficulties for the respondent. There was therefore never any need for any detailed control or detailed supervision or detailed instructions to be given to the claimant. The operation ran smoothly and successfully to the satisfaction of everyone.

28. There was however agreement from the outset that the claimant could find a replacement in the years leading up to 2018 even if her reasons for wanting to find a replacement on occasions related to her social life or to her personal circumstances. It is clear that whenever the claimant had made a request that it had been easily and quickly accepted and there had never been any difficulty in finding a replacement who was well known to the committee and officers of the club. It was in all respects an entirely cordial agreement between the parties.

29. It had been suggested by the respondent in their response to the claim of the claimant that in fact it had been the claimant who had paid the wages of any replacement. That simply was not true. The replacement took their wages directly from the cash takings over the bar on the night that they worked and left a note for the claimant in order for her to accurately record that in her bookkeeping, with the knowledge and agreement of the respondent.

30. The Tribunal therefore could not find any reason to conclude that there was any contract between the claimant and any replacement. As with the case which has been quoted above, if there was any contract then it would be a contract which would be between the club and the replacement who fulfilled the duties of the claimant with the agreement and knowledge of the respondent club.

31. In contrast to the legal authorities to which the Tribunal has referred above, there were no legal contractual documents whatsoever. There was nothing whatsoever which at any time had been formulated to govern the right of the claimant to responsibilities as a bar person carried out by someone else. It was at best an

extraordinarily loose but equally extraordinarily cordial arrangement. There was nothing at any time to suggest that the claimant had a "RIGHT" to substitute, but it became clear over the years that whenever the claimant made a request that it was granted as long as the club was able to find a suitable replacement, and that had always been the case on every single occasion. The club would have had the right to refuse but it was a right which was never ever exercised. In the evidence which was presented to the Tribunal, it was never even contemplated that the respondent would object. Indeed quite the opposite. The evidence presented to the Tribunal was that on each occasion the club would be sympathetic and arrangements were made on every occasion for the claimant to take the time off even if a committee member had to stand in to fulfil the duties of the claimant. This reflected the unusual and yet extremely cordial nature of the relationship between all the people involved with the respondent club.

32. When the claimant found alternative employment in 2018 when her days were cut to just Friday, Saturday and Sunday, the roles were now very much reversed because this second job became the principal employment of the claimant. It was her principal source of income. When the rota of her new employer, Imagine, conflicted with her Friday, Saturday and Sunday evenings working behind the bar, the claimant really now required the agreement of the respondent because she could not in all honesty put at risk her principal employment by choosing to work behind the bar instead. There was no evidence put to the Tribunal that the respondent ever suggested to the claimant that she should go back to her new employer and ask to change the rota that had been notified to her. The claimant was never ever asked to do that. So although the reasons and the importance of the request to be allowed to work on a Friday, Saturday or Sunday were different than they had been before 2018, in the opinion of the Tribunal nothing really changed. This was reflected, as the Tribunal has indicated, in the very cordial nature of what Mr Ross said in the penultimate paragraph of his letter sent to the claimant on 28 June 2018 at page 51, but more importantly page 52. The respondent knew of this additional employment and indicated they had no objection to it, and they told the claimant that she should ensure that she inform the respondent of any conflicts that might interfere with her carrying out her duty satisfactorily. The only evidence presented to the Tribunal was that the claimant did exactly as was requested of her. Equally, on each and every occasion that she alerted them to this conflict a prompt and amicable solution was found between the respondent and the claimant. This was on every single occasion. There was no evidence that the club ever refused or that it ever objected or indeed that it ever complained. It had a well known and very acceptable replacement in the son of Mrs Williams, and indeed the Tribunal was told that there were always other committee members who would have stood in occasionally had that been necessary. Not surprisingly, bearing in mind the history of this matter, nothing whatsoever was put into writing.

33. The Tribunal therefore asked itself what picture was painted in connection with the requirement for the claimant to carry out personal service for the respondent? The only evidence available was that throughout the years that the claimant worked for the respondent that personal service was required but that equally there was at all times a full and frank agreement between the parties that a replacement could fill in for the claimant from time to time. In the opinion of the Tribunal, that was the only possible conclusion from the evidence presented to it, and it obviously became an unwritten term of the agreement between the parties. However, it was not surprising that it was

unwritten because in truth almost every aspect of the relationship between the respondent and the claimant remained unwritten, and even where it was in writing it was often extremely confusing, such as the letters relating to salary increase and references to the value of the relevant National Minimum Wage.

34. The Tribunal therefore asked itself how the arrangement between the respondent and the claimant actually operated and what was the nature of that agreement? The only conclusion the Tribunal could reach was that personal service was not required but that that was with the agreement of the respondent throughout. Furthermore, the only conclusion the Tribunal could reach was that the arrangement with regard to a substitute was that it fell into the second class of arrangements referred to in the Weight Watchers UK Limited case to which the Tribunal has referred above. In such circumstances it was an arrangement which "allowed the person in stated circumstances to find a substitute to contract directly with the employer to do the work instead". That was what happened here. "Stated circumstances" were never put into writing but they were well known and well recognised by everyone involved. Furthermore, the manner in which the replacement was paid was identical to the manner in which the claimant was paid, in other words they took the money from the takings of the respondent. It did not in any way involve the claimant paying the replacement from her own money, or indeed having anything to do with the payment of wages to the replacement. All that she was told was that the person had worked and how money they had taken out of the till in cash as wages to pay themselves with the knowledge and agreement of the respondent. That was obviously the case bearing in mind that after 2018 the person who most regularly filled in for the claimant was Mrs Williams' own son.

35. The Tribunal therefore considered what other circumstances were relevant in the decision making process. There appeared to be absolutely nothing which was consistent with the claimant being genuinely self-employed. She was not operating her own business with the possibility of risk and reward. The description of "self-employed" was something which simply related to the reluctance of the respondent to become involved in a PAYE system, and once that title had been attributed to the claimant then everything that followed represented that description of being self-employed. However, of course, that is not true because the claimant was described as earning a salary and she was paid in accordance with the National Minimum Wage. Both those issues, particularly the National Minimum Wage, would be utterly irrelevant to someone who is self-employed.

36. The Tribunal was satisfied that there was a degree of control exercised by the respondent and indeed they did that by suspending and potentially involving the claimant even in disciplinary proceedings. There was no need for detail or complicated instructions or supervision on a day-to-day, week-by-week or even month-by-month basis. It was a smoothly oiled process which ran without any real need for control or supervision. The respondent however at all times retained the right to dictate to the claimant what days and hours she worked, even if that significantly reduced her earnings from working seven days a week to working only three days a week, which the respondent imposed on the claimant in 2018. There was no discussion about that. The committee of the respondent met and imposed its decision on the claimant without negotiation or discussion.

37. The Tribunal equally considered the question of mutuality of obligation. The Tribunal found that this existed between the respondent and the claimant because the

claimant always accepted that it was her responsibility to work behind the bar and to carry out the duties of the bar steward, and she faithfully did that without any objection. Whenever she requested to be relieved from those duties for one night or more then at all times throughout her relationship with the respondent there was an agreement that the club would agree to that request. The Tribunal equally took into account that for the vast majority of the times when the claimant was obliged to work behind the bar that that is exactly what she did. The occasions when she did not do so were occasional. They caused no disruption or difficulty whatsoever for the respondent at any time. The Tribunal finds the respondent therefore fully understood and accepted that the claimant was obliged to carry out the work personally and therefore to provide personal services unless, with the agreement of the respondent, she was excused from doing so from time to time. That in essence became the only and obvious conclusion the Tribunal could reach. There was a mutuality of obligation between the parties and there was an obligation on the claimant to provide personal services, except that there was equally at all times an open and friendly agreement with the claimant that she would be excused when she had genuine reasons to work be elsewhere. This continued to be the case throughout the years that the claimant was engaged by the respondent until she was dismissed.

38. The conclusion of the Tribunal therefore was that standing back, looking at the full and bigger picture, that the picture painted was one of a contract of employment between the claimant and the respondent at all times. The description of the claimant being self-employed was not an accurate description of the status of the claimant at any time. It was a description which was initially applied by the claimant's own partner, Mr Nkomo, in order to entitle the respondent to avoid the responsibilities of a PAYE system. In other circumstances the Tribunal might be obliged to conclude that somewhat cynically the respondent had equally decided that by applying that description that they could avoid the obligations under the Employment Rights Act 1996, but it is perfectly obvious that those obligations remained entirely unknown to any of the four people who appeared before the Tribunal until they appeared before the Tribunal today. There was no such cynical approach whatsoever. All parties remained in complete ignorance of the significant factors which at all times ought to have been considered in order to fairly and accurately reflect the true status of the claimant from the moment that she started working for the respondent.

39. In the opinion of the Tribunal, had proper thought been given to those factors then the only conclusion from the outset would have been that to apply the label of self-employment to the claimant did not represent the true or proper picture, and that the only proper conclusion ought to have been that the claimant was employed as an employee from the moment that she started working for the respondent and that the respondent should therefore have complied with their obligations under section 1 of the Employment Rights Act 1996 and complied with all other obligations to which the claimant was entitled as an employee of the respondent.

40. On the basis that the claimant was therefore an employee of the respondent at the date of her dismissal, her claim for unfair dismissal will now proceed to a final hearing on a date to be determined by the Tribunal with the agreement of the parties at a second preliminary hearing which is to be held by telephone on Wednesday 16 December 2021.

Employment Judge Whittaker
Date: 8th July 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
21 July 2022

FOR THE TRIBUNAL OFFICE

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