EMPLOYMENT TRIBUNALS

Claimant: Mr Alex Kitchener

Respondent: Cranleigh School

Heard at: Watford Employment Tribunal (remote) **On:** 05.10.2022

Before: Judge L Mensah remotely

Representation

Claimant: Mr D Patel (Counsel)
Respondent: Ms C Lord (Counsel)

JUDGMENT

1. The Tribunal orders are;

a) The Claimant's claim to be employed by the Respondent is not been made out and is dismissed.

b) The Claimant alternative claim to be a worker for the Respondent is not made out and is dismissed.

c) The Claimant is not entitled to bring a claim for unfair dismissal and this claim is dismissed.

d) The Claimant is not entitled to notice pay and his claim is dismissed

e) The Claimant is not entitled to holiday pay and his claim is dismissed.

Directions

f) As the Claimant's issues before me stand as dismissed, the whole claim appears dismissed, but as I did not have a detailed discussion with the parties as to the other issues, and in an abundance of caution, I give the Claimant and his representatives until close of the 23.11.2022, to write in (copying in the Respondent) and set out in full any basis upon which his existing claim/s could proceed on the above findings.

g) If no reason is given, or if it is agreed all claims fall to be dismissed, the whole claim stands as dismissed.

h) If any reason is given by the Claimant's representatives, the Respondent has until the 07.11.2022 to respond and then the matter should then be placed before myself, or another Judge, to consider whether the matter should be listed for a further case management hearing or proceed to a final hearing.

References

2. Herein any reference to ERA is to the Employment Rights Act 1996 and WTR is the Working Time Regulations 1998. For ease of reference when I refer to the Respondent or the Claimant, I also mean their legal advisors.

Issues for the Tribunal overall,

3. I had a brief discussion with the Representatives about the issues in the case. It was agreed I was only considering the first issue and dependent upon the outcome, the case may require a further case management hearing. I have addressed this matter at the end of this judgment. As regards the overall issues they appear more generally to be:

1. Whether the Claimant is an employee within the definition of section 230 of the ERA?
2. If the Claimant is an employee. Whether he was unfairly dismissed under Section 98 ERA? The Respondent pleads Some Other Substantial Reason in the alternative?
3. If the Claimant was procedurally unfairly dismissed, whether there should be a reduction as per Polkey v AE Dayton Services Limited [1987] ICR 142?
4. If the Claimant is an employee, whether he was entitled to notice pay under section 98 ERA?
5. If the Claimant is an employee, whether the Respondent failed to pay him holiday pay Section 13 ERA 1996 as an unauthorised deduction, or Regulation 30 WTR?
6. Whether the any award should be uplifted or reduced due to any failure to follow ACAS code?
7. Whether there should be any reduction contributory conduct?

Issues before Tribunal today:

4. Whether the Claimant is an employee within the definition of section 230 of the ERA act 1996?

The Law

5. I have summarised the law, taking into account the various case law referred to by the parties in their written submissions. As necessary I have mentioned some of those cases herein. The failure to mention a specific case does not mean I have not read and taken into account the submission or the case. The parties can see from the summary of the law, I have read both submissions with care. As is often the position in such cases, parties seek to quote from a myriad of cases on the selected factors to demonstrate their position. However, in determining whether an individual is an employee or not, the case often falls to be determine on a question of fact and not law. The statutory provision relevant to this issue can be found in Section 230 of the ERA 1996

"Employees, workers etc.

(1)In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2)In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3)In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a)a contract of employment, or

(b)any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly."

6. The Claimant rightly asserts the "multiple test" established in Ready Mixed Concrete (South East) limited V Ministry of Pensions and National Insurance [1968] 1 ALL ER 433 applies. As the Respondent rightly point out, the worker/employee distinction is a question of degree, applying the same test as in Byrne Bros (Formwork) limited v Baird [2002] IRLR 96. I agreed with the parties the following factors (a non-exhaustive list and set out in no particular order) and all relevant circumstances should be taken into account:

The Contractual provisions and whether or not those provisions do represent the true relationship between the parties.

7. See, Consistent group Limited v Kalwak [2007] IRLR 560.

57. The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work, in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He said this 'Of

course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham it will want to say so.'

"58. In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.

"59. ... Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance ..."

8. The Claimant's lawyers emphasis, as underlined below, this has expanded through the recent Supreme Court case of Uber BV and ors Aslam and ors [2021] ICR 657, SC where the Supreme court confirmed,

> "76….*it can immediately be seen that <u>it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point</u> in determining whether an individual falls within the definition of a "worker". To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it*".
>
> "85….*The Autoclenz case shows that, in determining whether an individual is an employee or other worker for the purpose of the legislation, the approach endorsed in the Carmichael case is appropriate even where there is a formal written agreement (and even if the agreement contains a clause stating that the document is intended to record the entire agreement of the parties). This does not mean that the terms of any written agreement should be ignored. <u>The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other. But there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it. Furthermore, as discussed, any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded</u>*." (my emphasis)

The degree of control exercised by the employer.

9. The Claimant relied upon what is said in White and another v Troutbeck SA (EAT) [2013] IRLR 286 which went before the Court of Appeal [2013] EWCA Civ 1171. In effect the Employment Tribunal had limited its assessment to the absence of day to day control, as opposed to the wider picture of control as part of the totality of the factors in the case. The Respondent refers to the comments of Elias LJ in Stringfellows Restaurants Limited v Quashie [2013] ILRL 99,

> *"14. Control is not the only issue. Even where the work-wage relationship is established and there is substantial control, there may be other features of the relationship which will entitle a tribunal to conclude that there is no contract of employment in place even during an individual engagement."*

The Respondent refer again to Johnson v Transopco UK Limited [2022] EAT 6 where they point out the EAT held at paragraph 83,

> *"The terms on which independent sub-contractors do work may often be wholly determined by the client. Any business has an interest in protecting its brand, and the adverse effects which a poor customer experience delivered by a provider may have on it."*

The presence or absence of mutuality of obligation to provide or do work.

10. The mutuality of obligation can be simply described as;

    (a) The obligation on the employer to provide work.
    (b) The obligation on the employee to do the work.

11. As per Ready Mixed Concrete (South East) limited V Ministry of Pensions and National Insurance [1968] 1 ALL ER 433 and the Respondent's submissions, the absence of an irreducible minimum of obligation is fatal to establishing employee status, albeit not necessarily worker status, see Nursing and Midwifery Council v Somerville [2022] EWCA Civ 229. However, the existence of such an obligation does not create any prima facie presumption of a contract of service. All relevant factors need to be examined, see Kickabout Productions Limited v Revenue and Customs Commissioners [2002] EWCA Civ 502.

The duty to provide personal service

12. See Macfarlane v Glasgow City Council [2001] IRLR 7 where the tribunal noted a distinction between a fettered right of substitution, which might give

rise to an employment relationship. The respondent refer to R(IWIG) v CAC [2021] EWCA Civ 952, which held that the genuine unfettered right to substitution which was occasionally (albeit rarely) exercised was fatal to Deliveroo riders' assertion of worker status for the purposes of trade union recognition. They further rely upon Johnson v Transopco UK Limited [2022] EAT 6, as the EAT held and Employment Tribunal is entitled to consider the activities of the Claimant when he was not working for the Respondent.

13. The Claimant also argues in the alternative that the "pass mark is lower" for determining worker status and relies upon Windle and Anor v Secretary of State for Justice [2016] ICR 721.

The provision of tools, equipment, instruments etc?

14. Neither party refer to any specific case on this factor but both rely upon facts in this case which fall under this heading.

The arrangements for tax and national insurance?

15. It is agreed the Claimant paid his own tax and national insurance. I return to this in my findings. The Claimant argues the fact he was registered is not conclusive and relies upon Enfield Technical Services Limited v Payne; BF Components Limited v Grace [2008] ICR 1423, Court of Appeal.

The opportunity to work for other employers?

16. The parties both agree the Claimant did provide his services as a Music teacher to a number of other educational establishments on a self-employed basis. I again return to this in my findings.

Other contractual provisions such as holiday pay, notice, fees, expenses and for sick pay,

17. The Claimant accepts this is a relevant factor but argues, as per Forest Mere Lodges Limited EAT 0246/06 that an employer shouldn't not be able to avoid statutory protections by other breaches. In Clark v Oxfordshire health Authority [1998] IRLR 125 where no entitlement to sick pay, the Tribunal said this was a factor said to be merely one indicator in the overall assessment.

The degree of financial risk and responsibility for investment and management

18. I refer to this in my findings. The respondent argue Quashie, see herein. Which says it would be an unusual case where the employment contract is found to exist when the worker takes all the economic risks and is paid

exclusively by third parties. The Claimant argues his circumstances are distinguishable.

Whether the relationship of being self-employed is genuine one or whether there is an attempt to avoid modern protective legislation

19. This in reality feeds into whether the contractual arrangement is a true reflection of the arrangement. The Claimant accepts the stated intention of the parties is relevant but argue it is the substance of the intention, rather than the form, that is important.

The degree of integration into Respondent's business.

20. This is again a fact sensitive factor and the Claimant refers to Stevenson Jordan and Harrison Limited v MacDonald and Evans [21952] 1 TLR 101 before the Court of appeal and Hospital Medical Group Limited v Westwood [2013] ICR 415 before the Court of Appeal to confirm this is a relevant factor. The Claimant argues the identification of the client as the pupil, and the parent as being responsible for payment of the Claimant's fees is not conclusive,

41. The above analysis on the meaning of client is supported by comments made by the EAT in *Community Based Care Health Limited v Narayan* EAT 0162/18, in the analogous scenario of a GP working for an out-of-hours service, that:

"...I would not think of a provider of NHS services as, normally, the client of a doctor performing the work constituting provision of those services. It is an odd use of language to call the service provider the doctor's client; the doctor's primary client is the patient whom he or she advises and treats. The organisation administering the provision may be more akin to an employing organisation, but the question is one of fact in each case, made by painting a picture from an accumulation of detail." (para 41)

21. In the alternative is it argued the Claimant is a worker. In other words he is in a contract where he undertakes to perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of client or customer of any profession or business undertaking carried on by the individual.

Evidence

22. I heard evidence from the Claimant and Mr Richard Saxel, Director of Music at the Respondent school since September 2019 and received written submissions and authorities from both parties. I am grateful for the professional approach taken to the case. I have also considered as relevant, the documents the parties made reference to during the evidence.

Findings

23. The Claimant is a music teacher. The Respondent is a co-educational independent day and boarding school based in Surrey. It is a charity and Mr Saxal described it as "*providing education in accordance with the principles of the Church of England for boys and girls*." The Claimant says he was told about a teaching role at the said school through a Guitar teacher when attending a "gig." The Claimant is a Musician who is hired for work, and a self-employed Music teacher in various schools

24. He therefore decided to apply for the role. He admits he signed an agreement on the 24 April 2009, which is referred to as "the Agreement" with the School. The parties agree no other written agreement exists between them, but for guidance in a handbook I refer to in detail below. The agreement describes the Claimant as self-employed and contains details as to the contractual arrangement as between the parties. Mr Richard Saxel told me the school had a Music department but could not cover every instrument and so this is part of the reason why Visiting Music Teachers or VMT's were introduced.

25. Mr Richard Saxel says the reason the contract represents the true relationship and its background is,

8. VMTs may market their services at the School using the notice board in the Music School, speak to me about whether one or more pupils want private tuition and may be engaged by parents on self-employed terms and conditions if they do. The only intention on the part of the School is to permit its more musically interested pupils, to have access to additional individual VMT teaching if they wish. This is an additional marketplace for VMTs to advertise and deliver their services. It is only permissible if the engagement is on a self-employed basis, with no obligation on the School. Being self-employed and responding to specific pupil demand enables VMTs to fit their private teaching practices around their own professional schedules, which may include performing as soloists and in professional orchestras. The terms of their agreement with the School give them permission to attend the site with the absolute discretion to send a deputy in their place when required.

26. The VMT handbook 2020 also provides some further details described as guidance, for example.

- **Employment** - You are not employed by the school but are self-employed using the schools' facilities by agreement. As such your contract is with the parents of the students you teach and ilt is recommended that you supply them with a written contract. The school can provide a template if desired. Invoices should be sent directly to parents at the start of each term.
- **Room Hire** – A charge of £1 per pupil per term is made each term. This will be invoiced by the Accounts Department.

- **Notice** – A full half-term's written notice is required from parents for lessons to cease. This communication may be either to the teacher or HoI. If you receive notice from a student you must check with your HoI as to whether the school is aware. Lessons should be timetabled as normal during notice periods although there is no expectation that you will chase

27. At the hearing, the Claimant was asked about the circumstances in which he came to sign the agreement. He told me in terms that he had no choice but to sign it, he couldn't recall reading it in detail (despite it being two pages in length) but he says he had to sign it if he wanted the work and he was aware other unnamed individuals had taken it "*to solicitors and their unions but it was compulsory to sign it*." So the Claimant is effectively saying he didn't necessarily pay this document appropriate attention, but signed it because it was the only way to secure the work. The agreement was for the Claimant to teach pupils at the school as a Visiting Music teacher, referred commonly by the parties as a VMT. The agreement is three pages in length albeit the third page contains only the signatures of the Claimant and Head Master at the time. The terms of the agreement in particular state,

3. ***Self-Employed Status:*** You are self-employed, in business on your own account, which for the purposes of this Agreement, means:

   3.1. You are registered as self employed with HM Revenue and Customs and are responsible for your own income tax and national insurance contributions;

   3.2. You are not subject to an express or implied contract of employment with the School; and

   3.3. You are not entitled to be paid by the School in relation to your fee, pension or any holiday under the Working Time Regulations, statutory maternity pay, statutory sick pay, statutory adoption pay, statutory paternity pay or parental leave or to receive any other benefits of employees of the School.

28. The Claimant accepts at all material times he was registered as a self-employed person with HMRC, completed and filed tax returns as a self-employed person and paid his own tax and national insurance. The agreement states,

14. ***Income Tax & National Insurance:*** You shall indemnify the School in the event of a claim for income tax or national insurance being brought against the School in respect of any payment for services provided by you to parents at the School.

29. In fact he told me he had always worked as a self-employed person and had never been in employment as a Music teacher though PAYE. I return to this below. I found the Claimant's evidence that he did not read the agreement and understand the terms difficult to accept. Firstly, he is an experience self-employed Music teacher and teaching at multiple schools and would know the industry. I find it hard to believe he would not have understood the nature of

the agreement. Further, as he gave his evidence it was clear to me that in fact he had not only read the agreement but had been working to its terms in both form and content, guided by the VMT handbook. I reject this aspect of his evidence. I find it goes to undermine his reliability.

30. The Claimant also accepts he did not receive any of the usual benefits identified in 3.3 throughout his time with the School. He accepted that at no point did he ever challenge why he was not in receipt of holiday or sickness pay or why he would have been free to take holidays without limitation. At the hearing, he was taken to his tax return for 2020/2021 and confirmed he also sought financial support of £11,224, through the government's self-employment scheme grant during the pandemic. Taken through his income for that year he confirmed the work he did at the school made up about 23% of his income for that year. It is clear he understood what it meant to be self-employed and he told me he made decisions as to whether to claim his expenses such as the £1 fee is paid per pupil to the school. The fact he said he didn't claim it because he didn't feel it was worth it is not important in my view.

31. During the hearing he told me he worked as a self-employed Music teacher at five other schools whilst working at the Respondent school. He told me he would advertise his services on a website, studios or anywhere he could. He does not suggest the work he does for the other schools is employment disguised as self-employment. At various stages of his evidence he drew comparison with the way the other schools operated and in particular when it came to substitution. I return to that below.

32. The Claimant agreed that the parents were responsible for agreeing with the Claimant directly to offer such lessons and for paying him directly for the lessons. He agreed in return he would provide the lessons. He was taken to the VMT contract,

Contracts (see Teaching Agreements)
The school does not have a contractual agreement with VMTs as they have self-employed status. The school recommends that a contract exists directly between a VMT and parents. A suggested example is in VMTIF.

33. He accepted the school were not responsible for the fees and he had had to take legal proceedings against some parents to recover his fees. This means he had asserted and relied upon the contractual agreement he had created with the parents for the payment of his fees. He also admitted even when the child was on a scholarship the parent was still directly responsible for the payment but the school would reimburse the parent out of the scholarship fund. He was taken to the VMT handbook of September 2020,

- **Employment** - You are not employed by the school but are self-employed using the schools' facilities by agreement. As such your contract is with the parents of the students you teach and ilt is recommended that you supply them with a written contract. The school can provide a template if desired. Invoices should be sent directly to parents at the start of each term.

34. The Claimant accepted he was informed the contract for the music lesson would be between the parents and the VMT's and there was no evidence the school ever held any contracts with the parents for these lessons and Mr Saxel denied the school ever got involved in sending out contracts but did provide the VMT's with templates if they did not have their own. The Claimant accepted, as per the agreement, he invoiced parents directly and I gather from his evidence he didn't use the template either.

13. ***Invoicing:*** You shall address all invoices for lessons to parents. The School is under no legal obligation to assist in the collection of unpaid invoices, which are your responsibility.

35. There was some evidence occasionally the school would try to assist in contacting parents to pay fees but I accept that this was not because it was part of some contractual agreement with the parents. I accept the school was trying to help because it had good contact with parents. In fact this is exactly what they say in the handbook,

- **Non-payment** – Should a parent fail to settle an invoice it is expected that you will send at least one reminder and follow this up with a phone call. If payment is still not forthcoming contact your HoI and they will be happy to contact the parent on your behalf. You have no obligation to continue to teach lessons while an invoice is unpaid. Should a default persist the school is unable to make a payment in lieu and standard legal procedures should be considered. In practice this is an extremely rare event.

36. The fact the contract for payment of the Claimant's fees for his work was directly with the parents, is in my view entirely contrary to their being an employment relationship with the Respondent. If the Respondent was not paying the Claimant in return for his work then one has to ask whether the basic formula for a working relationship did exist. He agreed the school did not cover any of the costs of these private music lessons. This is not akin to a doctor working in a public service. This is a private service where the parent of a child contracts for music lessons and pays the Music teacher.

37. However, the Claimant did argue there were restrictions on the lesson times and costs and guidelines had to be adhered to. I return to this below. He

agreed he would pay the school a fee of £1.00 per pupil per term for use the schools premises and access to the pupils as per the handbook,

8. ***Room Hire:*** Subject to availability, the School will make a suitable room available to you for a fee of £1 per pupil per term, which will be invoiced termly in arrears. You should notify the Director of Music before the first week of term of your available timings for your room requirements and any equipment that should be made available.

38. He agreed a list of pupils would be provided and he would be free to agree with parents on this list to offer music lessons. He was also free to advertise his services on the school notice board, albeit, he couldn't not remember if he had ever done that. The Claimant agreed he would get this list and ultimately it was up to him to decide if he wanted to teach all the pupils on the list or not. There was no requirement on him to take on a pupil as per an email at page 132 of the bundle

6. ***Hours:*** The School is under no obligation to provide pupils for instruction. You may teach as many pupils at the School as there is demand for services, subject to there being suitable rooms available

39. Further,

6. Pupil numbers: Please can you let me know what your ideal pupil numbers are in order for me to allocate new pupils. As we look to the next academic year it's really useful to have an idea of where to place new pupils.

40. The Claimant agreed he would therefore decide how much work he would take on. He was asked if this clause accurately reflected the agreement,

12. ***No Restrictions:*** The School has imposed no restrictions on where or for how much time you may work at other locations or in business on your own account and you do in fact do so.

41. He replied "*Yes as self-employed they wouldn't even challenge that. It would be quite weird. Why put clause, it seems strange, you can choose to work where you want*." I took this as the Claimant accepted he was free to work where he wanted and for who he wanted. He was in charge of how much time he gave to teaching at the school and how many pupils he took on. What he found strange was the existence of this clause because it was in his eyes, trite, that he had this right.

42. Whether the clause was stating the obvious or not, it is significant he was absolutely free to control the extent of the work he did at the school or for any other organisation. Further, the Claimant told me if he is working as a musician on "gigs" and would find band rehearsals clashed with lessons, he would turn down taking on pupils at the school and could reduce his own commitment to offer music lessons. This is a significant element of control the

Claimant had over his work and indicative of the Claimant being his "*own boss*[1]"

43. A term in the agreement requires the Claimant to comply in the securing of an enhanced Criminal Records Bureau certificate. The Claimant agreed this was necessary as part of safeguarding the pupils in the school and in particular in his role, as he would have direct and unsupervised access to the pupils in the school during the lessons. I accept this is the case and as a requirement for safeguarding is not indicative of the employment status of the Claimant either way.

44. The same section also requires the Claimant to provide the school with two satisfactory references. Mr Saxal makes the point that the school seeks to maintain standards of teaching. This is supported in my view by the very clear statement at the start of the VMT handbook which states,

> Safeguarding is at the heart of everything we do at Cranleigh and needs to be at the forefront of your teaching and general conduct. This is both for the safety of the students and for your own protection. You will have been through our rigorous safer recruitment procedures before starting here. You will also have received safeguarding training and it is a requirement of your continued work here that you undertake training annually and/or as otherwise required. The school's public safeguarding policy is available here www.cranleigh.org/welcome/people/safeguarding and you should familiarise yourself with it. Posters with details of the safeguarding team are displayed in both departments and around the schools.

45. The Claimant did not appear to gainsay this when it came to his own work for the school. It seems to be logical that whatever the employment relationship, any business would seek to secure the services of individuals who meet the business need and did not undermine its reputation. Further, as an educational establishment it seems inherent the School would require those teaching the pupils had the necessary skills to teach.

46. The Claimant agreed the process on the day of teaching. He would arrive at the school and locate a free room he could hold his lesson, would bring his own recording "stuff" and "anything else he needed" The agreement and handbook state,

> 9. ***School Equipment:*** You will provide and use your own equipment. However, the School recognises that in some instances it will not be practicable for you to do so (i.e. for instruction on the piano, drums and other large instruments). Where you use School equipment or musical instruments in the course of instructing pupils, you must ensure that it is kept in good working order. You must inform the School immediately of any fault

[1] Withers v Flackwell Health Football Supporters' Club [1981] IRLR 307

There is a stock of instruments at both schools available for beginners to hire. Hire fees are charged directly to parents through their school bill at the end of each term. Parents are to be encouraged to buy their own instrument when they are confident that tuition will continue for the long term.

47. He agreed he could use school equipment if he needed larger instruments but told me effectively he would use his own equipment. Further it was not challenged that pupils would pay hire charges for use of school equipment during the lessons, directly to the school. This was above and beyond the school fees and effectively an extra.

48. The Claimant complained that the school controlled the lessons. He was asked if he accepted what was said in the handbook,

Music Lessons: The content of any music lesson is a matter for you and your replacement and is not subject to direction by the School.

49. He told me he did accept the content was a matter for him but that he would be asked at times to assist pupils going GCSE or A-level and accepted this was when pupils were struggling he would help in this way as it was in the pupils best interest and in his words "*everyone's' interest, the kid, the school and me*…"

50. This in my view is an admission he was effectively in control of the content of the lessons and the assistance he sometimes gave was simply good business sense.

51. The Claimant was taken to an email,

Hi [redacted]
Thanks for the clarification on this...I guess it's fine to have a private arrangement, but he shouldn't be missing school lessons if that is the case. If they are external lessons, they should be out of school time ideally. Alternatively, you could bring his lessons into school - it's the same price, probably better on safeguarding protocols, and ensures he doesn't miss the same lessons each week.
All the best
Rich

52. This was a scenario where the Claimant was teaching a siblings and pupil privately outside the school. The Claimant told me he thought he had been teaching the pupil in the school system. It was put to him this showed the school did not have an issue with him teaching pupils privately outside the school. The Claimant did not deny this. The ability of the Claimant to be able to teach pupils completely outside the School system without any suggestion of penalty is also in my view an indicator of a lack of control by the school in the Claimant's business.

53. A clause in the agreement deals with substitution. This was addressed by both parties as a significant feature of the witness evidence and written submissions. The agreement says as follows,

> 4. ***Substitution:*** You may provide a replacement at your absolute discretion. Any replacement must have received satisfactory clearance in accordance with Clause 2. The School recommends that you provide the School with a list of substitutes you may wish to use so that the School can obtain satisfactory clearance in advance. This list can be updated by you at any time. You are solely responsible for the payment of any replacement's fee and CRB clearance costs.

54. In terms of what the Claimant could do, the Claimant accepts he had this stated right to substitute, but he argues it was effectively fettered by the conditions the School required for substitution. Mr Saxel says,

> 17. An example of how this arrangement works in practice can be found at pages 442 to 447. This VMT went on to use the deputy identified in the documents once they had completed the required safeguarding checks. I am also aware of a bass guitar teacher at the School, Jacob Purcell, who during the Michaelmas term 2019 made use of three deputies, Chris Maxfield, Bob Falloon and Sam Green, all VMTs who taught at the School, when he took half a term off teaching to work on a cruise. Mr Purcell informed the School of this arrangement verbally.
>
> 18. In reality, many VMTs recognise the personal brand and relationship benefits of continuity of teaching, wishing to ensure pupils and parents continue to engage their services, and wanting to keep and preserve the income for themselves. Substitutes are therefore rarely used in their teaching practice where possible. Where a VMT is unable to meet a particular teaching commitment, there are generally sufficient weeks in the term to enable a VMT to "skip" a week of teaching where they have a performing commitment without needing to send a substitute to cover their lesson. However, providing a substitute is a genuine contractual and practical reality and where it is requested, the right is recognised by the School. Where VMTs send deputies to teach their lessons, they communicate this arrangement to parents. VMTs would normally arrange their timetables with pupils, and then provide this to the substitute. The VMT would then invoice the parent for the full term's lessons, and pay the substitute for the lesson(s) covered. The School has no right to approve the quality of any substitute, this is a matter for the VMT.

55. The Claimant explained in his witness statement at paragraphs 8 through to 12 the difficulties he faced with substitution. Firstly, he points to the need for the substitutes to go through the same satisfactory criminal records checks and provide the same satisfactory references. The Respondent also suggest he may wish to provide a list of those he would wish to use as substitutes in advance so these requirements can be complied with.

56. In oral evidence, the Claimant actually did not seek to suggest the requirements were unreasonable when dealing with pupils, but that the Respondent had an added layer beyond other schools where he worked as a self-employed teacher. Firstly, he says at other schools the provision of a valid general enhanced CRB check certificate is sufficient but the Respondent

would not accept such a document and would only accept a certificate they were involved in obtaining. It is clear the provision of enhanced clearance when working with children is a safeguarding issue.

57. Mr Richard Saxel was asked about this added layer and told me he would not apologise for the higher standards of safeguarding the school held. I found this explanation entirely credible and I do not consider this added layer, or the requirement is itself an indicator the contractual right to substitute is not a true representation of the relationship between the parties. The Claimant was required to undergo the same checks as any substitute. This was no more than a safeguarding issue and an important one for a boarding school. I note the agreement highlights such matters,

16. ***Notifying Offences:*** You and any replacement are required immediately to notify the School if you are charged or convicted of any criminal offence including road traffic offences. You are also required to notify the School of any criminal offence committed by a replacement of which you become aware, whom has previously been subject to a Criminal Records Bureau check by the School.

17. ***Child Protection:*** You are obliged to to report any concerns you may have about a child's welfare to the School's Designated Person for Child Protection.

58. The above adequately amplifies some of the safeguarding concerns the school had in mind and why they felt it was best practice to secure their own CRB checks.

59. As regards the references, this did not appear in the actual evidence as a real bar to substitution, even though it was suggested the provision of references was a fetter to substitution. Mr Saxel explained in oral evidence the school would want the substitute to have an equal ability/qualification to deliver the same service. There was no evidence this was ever a bar in reality or that the school did ever refuse to accept a suggested substitute because of a reference.

60. The Claimant says he never sought to use a substitute, but Mr Saxel told me that most VMT's would not want to use a substitute if they were for example taken ill, as they had the ability to re-arrange the sessions to another week and so would rather do this than lose the income. Further he explained that VMT's would also at times "double up" which meant they would teach two pupils at the same time when they had had to cancel a session for whatever reason. The Claimant says himself,

11. On a couple of occasions, I rearranged lessons if I had conflicting appointments, which was usual practice. But lessons were always made up. I quite frequently doubled up students' lessons when they had exams or had missed lessons for whatever reason.

61. This supports Mr Saxel's evidence as to why substitutes were used infrequently and also why the Claimant did not seek to use substitutes. I accept that the reality of the situation is substitutes' were really needed because the Claimant and other VMT's had such flexibility in the way they managed the lessons they could accommodate changes without losing the work.

62. Despite this evidence the Claimant does however complain that the VMT handbook contains provisions which did fetter this contractual right. The Claimant says,

"10. In section "Expectations & Professionalism" of the VMT Handbook, there is a sub paragraph titled, 'Absence' [516]. This advises that if I was absent due to illness, then I must contact Cranleigh at the earliest opportunity. This shows that I was not entitled to send in a substitute, when I was absent."

63. This is the VMT handbook for September 2020. This wasn't specifically put to Mr Saxel and I could not see why the need to notify the School if the VMT was absent did show the substitution clause was a sham. There was no suggestion the notification in some way prevented the Claimant from also providing a substitute. It seems to be entirely logical in any school setting that if a lesson is cancelled the school, and perhaps more so in a Boarding school context, would need to know so they could dealt with what the pupil was going to do if the lesson was not going ahead. As Mr Saxel told me, they could not have children wandering around the school premises.

64. The Claimant was taken to two examples in the bundle where evidence showed other VMT's seeking to substitute. He told me he wasn't aware of this and had used substitutes in other schools but not at the Respondent school because of the need for school CRB checks. In my view his evidence orally is that once he knew the school wanted to carry out their own CRB he did not seek to explore substitution further.

65. However, he did argue the school required substitutes to "sit through further checks" It was also suggested to Mr Saxel in cross-examination that any substitute would have to complete training at the school. Mr Saxel confirmed there were some local training requirements specific to being able to work at the school but told me these were the kind of training sessions that could be completed within a very short time frame and would not fetter the use of a substitution, even if short notice. It must in my view be a realistic requirement that anyone working at a school has some sort of induction training to enable access to the individual school and use of the school premises. The Claimant

did not refer to any evidence that indicated such training was prohibitive or a fetter. He was however asked if he was in fact referring to the following,

3 **Additional checks**: if you wish to provide a Substitute to undertake the Services on a regular basis i.e. once a week or more on an ongoing basis or four times or more in a 30 day period; the School may require further suitability checks to be completed on the Substitute in order for the School to comply with its statutory or regulatory obligations from time to time.

66. It was put to the Claimant that as a matter of law if a substitute became a regular teacher this was classified as a "restricted activity." He told me he had no knowledge about this and the point was not taken further. The Claimant has not adduced evidence that such additional checks were not a legal requirement as stated. It was not suggested to Mr Saxel this was not the case either.

67. What was suggested to Mr Saxel was the use of substitutes was so restrictive it meant only other Respondent VMT's or previous Respondent VMT's would be able to act as substitutes. Mr Saxel replied "*As regard stringency it exists as a boarding school and community and we have responsibility to act on behalf of parents for children in our care. The second part is not tested, Most VMT's did use another VMT but it happened very rarely in practice as they didn't want to lose income*."

68. I find the detail of the restrictions support the Respondent's case that they are genuine safeguarding conditions and the only reason the Claimant and others have not sought to bring in substitutes is because they have such flexibility in the way they teach they can accommodate a cancelled lesson in the term without losing the income; as opposed to it being a sham clause.

69. Mr Saxel was asked about why the language of some of the others clauses made no reference to a substitute,

10. ***Pupil Welfare:*** You are responsible for the well being of pupils during a lesson.

11. ***Progress Reports:*** You shall report progress to parents.

13. ***Invoicing:*** You shall address all invoices for lessons to parents. The School is under no legal obligation to assist in the collection of unpaid invoices, which are your responsibility.

15. ***Conduct on School Premises:*** You shall comply with the code of conduct for self-employed teachers at schedule 1.

70. Much was made of the use if the word "You" as opposed to mentioning the Claimant or a substitute. Mr Saxel accepted this was the case. Whilst I can see the distinction drawn by Counsel, I have to say I did not agree with the restricted way it was interpreted. It is just as open to interpretation to suggest whoever was in the position of a VMT, whether substitute or not, would be the

"You" in these categories. Therefore, whilst not specific I do not accept it is a glimpse of an alternative reality.

71. The Claimant admitted he didn't know if he was included as a VMT in staff emails but said he would sometimes get an email he described as a "round robin." He accepted he was identified as a VMT and separate from staff in the Music department handbook. He accepted he had restricted access to the Respondent's IT systems.

72. It appears the Claimant's reference to control of his lesson was more with regard to the timetabling. It was common between the parties the school asked that lessons did not take pupils out of the same weekly lessons and so once the Claimant had decided how many pupils he would want to take on for the term the school would seek to place these lessons into a timetable the parents and pupils could access. It has been exhibited at page 178,

5. Click on 'Build Your Timetable' – where you can enter Day, Time and Lesson Missed (as you did in Google)
6. If you're not teaching, you need to choose 'Not Teaching' from ALL THREE dropdowns to complete the row. This will be updated in the next week or so to include only 1 click.

73. It is common there was timetabling system at the school and the Claimant told me he could put into the timetable when he was teaching students, parents would also request certain slots so their child didn't miss academic lessons. He told me "*Sometimes IT wouldn't work but down to me to timetable as best I could for students requirements*."

74. The Claimant complained he had to try and make his lesson fit into the timetable. When challenged further he was asked if he agreed the actual timing of the lessons was agreed between him and the parent. The claimant replied "*Yes if there would try an organise around their timetable so didn't repeat on same academic lessons on their end.*" I don't accept the need to fit into the pupil's school timetable has anything to do with the Respondent seeking to control the Claimant's lessons. The music lessons were secondary to the main teaching curriculum and the school was doing no more than diary management for the pupils. The Claimant as much as admitted this in oral evidence when he said "*It was their system as timetable so complicated for each student so had to have some control otherwise no one would know where the students were.*"

75. Mr Saxel was asked about some of the requirements in the handbooks. He was taken to the lesson rates guidance. It states as relevant,

I have had a number of questions regarding the new lesson rate. Below is a table outlining the various lesson lengths, cost and number of lessons to charge for each term. Please note that both the Senior & Prep Schools have the same lesson rate and lesson protocols now.

	Standard Lesson (30 mins.)	**Extended Lesson** (45 mins.)	**Double Lesson** (60 mins.)
Michaelmas (12 lessons)	£240.00	£360.00	£480.00
Lent (9 lessons)	£180.00	£270.00	£360.00
Summer (6 lessons)	£120.00	£180.00	£240.00

- **Fees** – Lesson fees are reviewed every year and will be communicated to you by RJS. Lessons are of 30, 45, or 60 minutes duration. It is recommended that students beyond Grade 5 should have 45min lessons with 60min for students at or above Grade 8, but this must always be negotiated directly with the parents. For award holders the length of lesson paid for by the school will be communicated to you by your HoI but parents are free to top this up at their discretion and expense.

76. Mr Saxel was referred to his witness statement,

40. Under the VMT Agreement (page 36-39), VMTs were not bound by any particular lesson rates. However indicative rates were provided to VMTs and parents by the School and VMTs charged for their lessons according to these rates. This was in part to enable the School to budget for those pupils on Music Awards (whom the School funds by pre-crediting parents for the cost of music lessons).

77. It was put to Mr Saxel that the above was inconsistent with the VMT's being self-employed. It was suggested the way these documents expressed the rates did not indicate the VMT's had freedom to set their own rates. Mr Saxel told me the VMT's were free to charge whatever they wanted to conceded the way the documents expressed this was not reflective of that position. He explained that music award holders had budgets and so the rates had to fit in those budgets but otherwise the rates were not fixed. He agreed the school stipulated the length of the lessons but argued these were all frameworks that most VMT's adhered to in practice but were free to amend. Her pointed out the length of the lessons was impacted by the fact they were subsidiary to the main academic courses and shouldn't interfere with it.

78. The Claimant did not adduce anything to counter this evidence but it was argued on his behalf that the school was effectively seeking to control the VMT's in a way inconsistent with being self-employed. There is some merit in this aspect of the evidence because the school is indicating what fees should be charged without making it clear these are not binding and indicative. This is borne out by the fact Mr Saxel had to give the evidence he did and it was not apparent from the wording.

79. There is no evidence either way as to whether anyone has ever tried to charge anything other than the rates mentioned. I suspect the reality is the VMT's all charged the rates set out above because it appeared that is what the school required. Mr Saxel also told me the length of the lessons was also relevant to the age of the child. This was not taken further. I formed the view the length of the lessons may well have been a mixture of trying to fit the lessons around the main curriculum and age but it was a school led process, rather than the VMT's themselves.

80. Mr Saxel was asked about the dress code for VMT's and staff at the school,

> - **Dress cod**e – All staff at Cranleigh, including VMTs, in both the Prep and Senior schools are expected to dress in a professional manner. For men, shirt and tie is a minimum with an equivalent standard expected of women. Please do not arrive for teaching in casual, un-ironed or otherwise unsuitable clothes as it reflects badly on the professionalism of the whole department.

81. There was some dispute as to whether the Claimant always wore a tie or dressed more casually than staff. The Claimant says he had a tie kept in a locker at the school and would wear the tie for all lessons. Mr Saxel says he was aware the Claimant didn't always wear his tie when at the school and it was a running joke at the school with other staff. Mr Saxel says the Claimant was encouraged to wear a tie but had the Claimant been a staff member he would have ultimately faced the disciplinary process because pupils had to wear a uniform and demands were high on them and staff were a model for pupils. The Claimant accepts it was never suggested to him that he would face any formal process regarding his dress.

82. My reading of the evidence is the Claimant is likely to have accepted the need to wear a tie and did wear a tie when teaching, but clearly did not wear a tie when attending at the school, as he confirmed the tie was kept on the school premises. I therefore accept Mr Saxel's evidence that other staff had seen the Claimant without a tie and sought to encourage him to wear a tie. The Claimant was asked not to use his first name with pupils. It was said to be a way to maintain the appropriate teacher-pupil relationship as part of a package of safeguarding. The Claimant's response was "*Up to them. I was called into office and asked not to sign as Alex and sign as Mr Kitchener*." Effectively, the Claimant felt it was over zealous on the part of the school, as he did the dress code "*No, the Respondent is the only school, another school says first name only to break down barriers and not maths teacher but Guitar teacher.*"

83. Mr Saxel was asked about the need for VMT's to attend meetings and participate in parent evenings. Mr Saxel told me this might have happened before 2010 but not since. The Claimant did not suggest otherwise, albeit both

confirmed VMT's were invited to some of the music events and Mr Saxel told me this was because it was recognised the VMT's contributed to them through the lessons. The Claimant told me the only training he would have to attend was the annual safeguarding and that he was not regularly required to attend any other meetings and this had been the position for the past 15 years in the preparatory school.

84. Mr Saxel was asked about the need for VMT's to prepare reports for the school, in his witness statement he says.

> 32. The writing of reports is a necessary part of being a teacher and VMTs were responsible for reporting to their clients. They determined what was included in the reports. The School gave guidelines on the style and content of reports because our parents expect a level of professionalism. Reports were initially issued via the School but in June 2021, a decision was taken for reports to be issued directly to parents by the VMTs (page 431).

85. When questioned about this Mr Saxel told me this was standard practice for Teachers, whether VMT or Academics, to report in writing on progress and rejected the suggestion such reporting could have been dealt with orally. Mr Saxel also confirmed in 2019 the condition to provide such reports were reduced from every term to bi-annually and it was part of this practice that targets and goals would be set. The Claimant did not refer me to any evidence that this was not standard practice in the industry. I am not an expert and have no knowledge of the same.

86. Mr Saxel told me the reports were sent through the Head of instrument at the school, checked for grammar and sent back for re-writing if necessary. He told me the school wanted a clear picture of the progress of what the pupils were doing and in his evidence also indicated they wanted standards to be maintained. Further, he accepted the VMT's would have to keep records of pupil attendance together with brief teaching notes but argued this is because the school had a duty of care to know where students were and what was happening to them. I take note this is perhaps a more heightened position because the school is a boarding school and so the school is de-facto taking on the day to day caring role of pupils at the school.

87. There was some evidence regarding the arrangements in place during the first Covid lockdown. The Respondent did not allow the Claimant and other VMT to access the pupils whilst the school was closed and until the School had organised a platform for online teaching it was satisfied met their safeguarding concerns. The Claimant told me he was unhappy with this as other schools had left it to the self-employed VMT's to organise the online lessons and had been able to continue his work via Zoom or Skype. It appears the Respondent communicated with parents in the following terms,

You may well be wondering what will happen to your children's musical studies in these unprecedented times. It is my intention to facilitate online music lessons for the period of time that we are away from school, and I have drawn up a comprehensive set of guidelines for our Visiting Music Teachers, who will be in touch with you directly.

88. The Covid protocol forbid lessons to be carried out in the pupils bedrooms unless their parents were present. After the school was able to re-open the VMT's were asked allocated a single room to use for the day. Mr Saxel explained the school could not offer Covid cleaning facilities every time there was a change, so the person allocated the room was given the responsibility to keep it in clean order for their own use and then the room was cleaned at the end of the day. Mr Saxel was referred to a note dated March 2020 at page 210,

Prep school pupils in Forms 1-5 may have lessons by any video calling platform that you choose: Skype, WhatsApp, FaceTime, Zoom etc – **BUT ONLY THROUGH PARENTS' DEVICES, AND WITH A PARENT PRESENT IN THE ROOM**. The initial contact must be made from the Visiting Music Teacher to the parent's device.

89. Mr Saxel explained forms 1-5 were taught on their parent's devices but forms 6 at prep level and form 5 at Senior level the pupils had been given school i-pads and form 6 knew how to use Google meet.

90. I accept the real motivate for these measures was not to seek to control the VMT's but to safeguard the pupils within the resources of the school. The Claimant may have had a different experience in other schools but I accept Mr Saxel's explanations as they are plausible, credible and justified. This ties in with the way the school has approached many of the matters raised above and is consistent. It is clear the school takes a more stringent approach to safeguarding than others the Claimant has worked for.

Conclusions

91. Drawing together all the evidence and my findings as set out above, I find the Claimant was at all times a self-employed Music Teacher. I prefer as set out the explanations given by the Respondent. I find the Claimant was not employed as claimed within the meaning of Section 230(1) of the Employment Rights Act 1996. I find on the balance of probabilities the agreement was a true representation of the contractual relationship between the parties. Whilst the school exercised some control over elements of the work done at the school premises I accept the reasons for these controls were for safeguarding, and practical reasons such as trying to fit the lessons into a pupil's' timetable in a way that worked for all.

92. In fact, I am satisfied they assisted the VMT's in being able to offer their services within a demanding academic environment and whilst motivated to

maintain high standards of care for the students. There was no obligation on the Claimant to provide work. He was free to choose to offer his services to as many pupils as he wanted or to none at all. He could and did work elsewhere as a VMT on a self-employed basis and he could dip in and out of work as he chose. He could vary his work and cancel lessons if he had clashes. No mutuality of obligation existed.

93. I am satisfied the barriers to a substitute were genuine safeguarding concerns and the business need of the school to secure qualified teachers. The Respondent was under no duty to provide work and in fact did not provide work, but simply provided a list of pupils in the school to the VMT's, who could then negotiate lessons directly with parents to suit the parent's wishes and the child's needs. The Respondent was not part of the contractual agreement between the parent and the VMT.

94. The Claimant did use his own equipment, organised his own tax and national insurance and took the financial risks in the way he organised his business. He was his own boss. He was not entitled to, and did not expect, the kind of benefits associated with employment and in fact had little integration into the school beyond offering the lessons through their system, dressing in a professional manner and use of his surname as opposed to his first. These are part of a package of measures designed to give the school a professional and streamlined appearance. I find the control, risk and important features of running his business rested in the hands of the Claimant. I find the relationship is as a genuine self-employed Music teacher.

95. As a result of my findings, I find the Claimant has also failed to establish he is a worker under Section 230 (3) of the ERA 1996 (or for that matter Section 296 of the Trade Union and Labour Relations and Consolidation Act 1992). The Claimant had not agreed to provide services personally to the Respondent. The agreement with the Respondent is not the provision of his services, but the way he should conduct himself when he is on the school premises when providing personal services to pupils of the school. The actual provision of his services as a Music teacher is to the pupils/parents and the Respondent is not a party to that contract.

96. As a result of my findings, the Claimants claims for Unfair dismissal, notice pay and holiday pay are dismissed.

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Employment Judge **Mensah**
Date 07.11.2022
Sent to Parties on – 10/11/2022
For Tribunal Office – N Gotecha