EMPLOYMENT TRIBUNALS

Claimants:		**Respondent:**
Mr P Martin (1) Mrs E Martin (2)	**v**	Achieve Lifestyle

Heard at: Reading **On:** 16 January 2023

Before: Employment Judge Anstis (sitting alone)

Appearances
For the Claimants: Mr P Starcevic (counsel)
For the Respondent: Mr S Hoyle

RESERVED JUDGMENT

The claimants were employees of the respondent when actually working and for the duration of any "Assignments".

REASONS

INTRODUCTION

1. The claimants are a married couple. The respondent operates two leisure centres in Runnymede, one of which has a swimming pool. The respondent offers swimming lessons at that centre. Both claimants were swimming teachers who worked for the respondent. They bring various claims (described elsewhere) arising out of the final months of their work for the respondent and the ending of their work with the respondent.

2. Some of those claims depend on them being employees of the respondent. The respondent does not accept that they were its employees, but it does accept that they were "workers" and employees in the extended sense that applies for the purposes of discrimination law. The respondent also agrees that the claimants were not self-employed. Mr Hoyle rejected my suggestion that people in the claimant's position fell within binary categories of self-employment or employment, arguing that the so-called "limb (b)" worker was a status in its own right, and that that was the status held by the claimants.

3. At a hearing on 24 August 2022 EJ M Bloom directed this preliminary hearing "*to determine the claimant's employment status*". Case management matters are dealt with in a separate order.

4. I heard evidence from both claimants and from Hazel Aitken, the chief executive of the respondent. I also had a bundle of documents that included the contracts under which the claimants worked. Having heard evidence and the submissions of the parties, I reserved my decision. This document records my decision and the reasons for it.

THE CONTEXT

5. The respondent provides swimming lessons at one of its centres. These were not described in any great detail to me, but the hearing proceeded on the basis that they were largely if not entirely lessons for children. The children would be signed up for lessons by their parents, and these lessons would be outside the usual school day, though it seemed that there could be some lessons during the school day either for school groups who visited or for pre-school children. In generally these lessons continued year-round with three sets of two week breaks during school holidays. Children would be expected to move on from one class to another on achievement of particular milestones.

6. Ms Aitken explained (and I accept) that these swimming lessons were a new venture for the respondent following the opening of the centre with the swimming pool in 2019. The extent of demand for the classes was, at least at first, uncertain. The respondent had to be able to respond to fluctuations in demand, and may open and close teaching sessions depending on demand. Payment for most if not all of the classes was by monthly direct debit, and presumably the intention was that if the children were to gain any benefit from the classes they would need to regularly attend for a reasonable period of time. This did enable the respondent to plan ahead, and the fluctuations in demand were not such that they respondent was unable to plan on a week-by-week or month-by-month basis. In general, once a particular class had started at a particular time it was expected to continue at that time on a weekly basis. No doubt from time to time the respondent had to rearrange classes, but I accept the evidence I heard that once a class was established at a particular time it could be expected to continue more-or-less indefinitely, barring some unforeseen slump in demand or occasional reorganisations by the respondent. The children that made up the class would graduate to other classes, but could be expected to be replaced by others moving up to that class or those newly starting lessons.

7. I will come on to the respondent's arrangements for staffing those classes later, but I note that it was the respondent's (and the parents') expectation that in order to get the maximum benefit from the classes there would have to be some continuity in the teacher for any particular class. This was expressed clearly in an email from the Lisa Collyer of the respondent to the claimants (and,

presumably, other swimming teachers who worked for the respondent) in which she said:

> *"Following feedback from parents regarding the continuity of lessons being taught by a regular teacher, and an increasing rise in cover for classes being asked for by some swim teachers, has led to the introduction of attendance targets for class cover, this is to help minimise repeat or last minute cover requests, as the impact of different teachers in classes is having a negative impact on customer satisfaction.*
>
> *The rule of thumb is that it should be the exception rather than the norm.*
>
> *We try to be as flexible as possible and appreciate last minute issues arise from time to time, however, we also require continuity for the teaching of classes within terms i.e. between breaks.*
>
> *To help move this forward to gain a more positive outcome, an attendance minimum of 85% will be expected for all scheduled lessons …"*

8. While I am discussing this in terms of teachers taking individual classes, in fact it seems that the most common form of work was for a teacher to commit to a particular period of work during which they would teach a number of consecutive classes so, for instance, a teacher might be booked to teach from 09:00 – 12:00 on Saturday mornings, during which time they would lead multiple classes consecutively.

9. Although this point was not discussed before me, it appears that the respondent's view was that any of its swimming teachers were capable of delivering any of its lessons. The desire for continuity was more about the teachers getting to know the children, their progress and the best approaches to take with them individually than it was about particular teachers being considered particularly suitable for particular classes. Perhaps there were teachers who in practice were thought best suited to beginners or others who were thought most suited to improvers, but on the whole the idea seemed to be that any teacher was capable of doing the work involved with any class.

10. The classes had operated for around a year before the first Covid-19 lockdown started. The first lockdown amounted to an absolute bar on swimming lessons of the kind offered by the respondent. I was not taken through the restrictions in any detail, but it appears that on the initial lifting of lockdown lessons restarted in a more limited, socially distanced, way, in accordance with guidelines prepared by the ASA. By December 2020 there was a further lockdown period during which lessons of any kind were prohibited, which as I understand it continued until the end of the claimants' contracts.

THE WRITTEN TERMS

11. The claimants had identical "statements of employment particulars", in a standard form prepared by the respondent and that Ms Aitken said was used for all casual workers, not just casual swimming teachers.

12. The statement of employment particulars that each of them held was described as setting out "*certain particulars of the terms and conditions of your employment … in accordance with section 1 of the Employment Rights Act 1996*". They pre-date the extension of s1 to cover "workers" as well as employees.

13. There are multiple references across the six pages of this document to "employment", "employer", "employee" and so on. I have not counted them all, but those words are used perhaps twenty times, across multiple different clauses. This includes such things as "*the title of the job in which you are employed is swimming teacher*", "*any lawful payments due to* [the respondent] *on the termination of your employment will be deducted from your final salary*" and (in a data protection clause) "*after you have ceased to be an employee*".

14. In those circumstances I was somewhat surprised that the respondent sought to argue that the claimants were not employees.

15. The reference to the claimants being employees continued up to and including the eventual ending of their contracts, where they are described as "*causal employees*".

16. Mr Hoyle based his argument that the claimants were not employees on paras 1.5 and 1.6 of the statements of particulars of employment, which read:

> *"This Agreement governs the individual's engagement from time to time by the Company as a Bank Worker. This is not an employment contract and does not confer any employment rights on the Individual (other than those to which workers are entitled). In particular, it does not create any obligation on the Company to provide work for the Individual and by entering into this Agreement the Individual confirms their understanding that the Company makes no promise or guarantee of a minimum level of work to the individual and they will work on a flexible "as required" basis. It is the intention of both the Individual and the Company that there be no mutuality of obligation between the parties at any time when the individual is not performing an Assignment.*
>
> *Each offer of work by the Company which the Individual accepts shall be treated as an entirely separate and severable Assignment. The terms of this Agreement shall apply to each Assignment but there shall be no relationship between the parties after the end of one Assignment and before the start of any subsequent Assignment. The fact that the Company has offered the individual work, or offers the individual work more than once, shall not confer any legal rights on the Individual and,*

in particular, should not be regarded as establishing an entitlement to regular work or conferring continuity of service."

17. There are also clauses 7.1 and 7.2, as follows:

"There are no regular hours for this appointment and you may be offered work as and when it becomes available, however you have no obligation to accept it …

However, it you do accept a shift, and subsequently cannot fulfil that shift, you must give as much notice as possible, to allow the shift to be offered out to others."

THE OPERATION OF THE CONTRACT

18. The claimants and other teachers were paid an hourly rate based on timesheets they submitted. The timesheets reflected work they had actually done (including if they covered for other people) rather than the work they had been booked to do.

19. There seemed to be broad agreement between the parties as to how the contract operated in practice. A teacher had the expectation of being offered a regular class or classes by the respondent. Subject to possible one-offs or different arrangements such as school lessons, if this occurred it would be offered indefinitely on a weekly basis subject to the respondent's usual holiday breaks. It was not suggested to me that there were casual staff under these contracts who had never been offered classes. The respondent was not under any obligation to offer anyone holding these contracts any particular classes, but the circumstances in which someone was offered no classes at all would be very unusual, and I was given no instance of that happening. If a class was offered there was no obligation on an individual to accept it, but presumably it was in their financial interests to accept what they were offered to the extent that they could.

20. While it was the claimants case that they would always honour any class they had committed to teach, it was clear that substitution of teachers occurred regularly. That much is clear from the 85% attendance target, which is not the 100% attendance target that might otherwise be expected. We also have instances of the claimants covering for others, Mrs Martins arranging cover for her classes when she was unable to take them and, on at least one occasion, Mr Martin covering for Mrs Martins.

21. I accept that entering into this contract did not oblige the respondent to offer particular hours to anyone (though they usually did), and that teachers were free to refuse the hours offered. I also accept that even after they had accepted a class they were not obliged to teach it. They had to keep to 85% attendance and give as much notice as possible, but otherwise they could arrange cover

from other of the respondent's teachers or the respondent would arrange it itself.

22. At one point Mr Hoyle suggested that the claimants and other teachers were not obliged to complete a session once they had started it, suggesting that a teacher starting due to work from, say, 09:00 to 14:00 on a Saturday could leave at 10:00 if they felt like it. That surprising suggestion was not supported by the evidence, and was rejected by Ms Aitken who said that anyone who did such a thing (at least without very good reasons) would not be offered any more work. I find that once a teacher had started a session they were obliged to complete it, in the absence of some personal emergency or other very good reason.

FURTHER RELEVANT MATTERS

23. This decision does not need to go into the events leading up to the end of the claimants' engagement with the respondent, nor how their engagements came to be ended. I note, however, that correspondence from the respondent to the claimant is replete with references to employment (typically "casual employment"), and the letters ending their engagement say:

> *"Re: Termination of Contract – Causal Employment*
>
> *I write to regretfully inform you that your services as a casual Swimming Teacher with Achieve Lifestyle are no longer required, and this has resulted in your casual employment terminated with immediate effect."*

THE LAW

24. Section 230 of the Employment Rights Act 1996 contain the following definitions:

> *"(1) … "employee" means an individual who has entered into or works under … a contract of employment …*
>
> *(2) … "contract of employment" means a contract of service … whether express or implied …*
>
> *(3) … "worker" means an individual who entered into or works under …*
>
> *(a) a contract of employment, or*
>
> *(b) any other contract, whether express or implied … whereby the individual undertakes to do or perform personally any work or service 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 …"*

25. A different definition of "employee" applies for the purposes of discrimination law, and it is agreed that the claimants meet that definition.

26. A "worker" under s230(3)(b) is sometimes called a "limb (b)" worker, and while it is often the "limb (b)" worker who is the focus of arguments around worker status, it is clear from the statute that "worker" is a category that encompasses all employees.

27. Discussion of the law around employment status typically starts with Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] QB 479 at 515, which gave three elements that comprise employment:

> *"(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.*
>
> *(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.*
>
> *(iii) The other provisions of the contract are consistent with its being a contract of service."*

28. These concepts have been developed over time, with the concept of "mutuality of obligation" assuming particular significance in the case of "casual employees" after Carmichael v National Power Plc [1999] 1 WLR 2042 described it as being the "irreducible minimum" necessary to constitute a contract of service. Mr Hoyle based the respondent's case on this "irreducible minimum". It was not part of the respondent's case that if there was mutuality of obligation there was something else (such as a lack of sufficient subordination or control) that would mean the claimants were not employees and, as I have mentioned before, it was the respondent's position that the claimants were not self-employed.

29. Exactly what mutuality of obligation amounts to or how it should be understood has been controversial from the start, but all the more so since the review of employment or worker status in cases such as Autoclenz Limited v Belcher [2011] UKSC 41 and Uber BV v Aslam [2021] UKSC 5. While (so far as I am aware) none of these have suggested that mutuality of obligation is not necessary for an employment contract, the understanding of what such mutuality of obligation is has developed over time.

30. HMRC v PGMOL [2021] EWCA Civ 1370 is a modern case with useful commentary on employment and worker status. At paras 118 and 119 Elisabeth Laing LJ looked at mutuality of obligation in the following way:

> *"i. The question whether a single engagement gives rise to a contract of employment is not resolved by a decision that the*

overarching contract does not give rise to a contract of employment.

ii. In particular, the fact that there is no obligation under the overarching contract to offer, or to do, work (if offered) (or that there are clauses expressly negativing such obligations) does not decide that the single engagement cannot be a contract of employment. The nature of each contract is a distinct question.

iii. A single engagement can give rise to a contract of employment if work which has in fact been offered is in fact done for payment.

Those authorities do not support any suggestion that the criterion of mutuality of obligation is the sole, qualifying test for the existence of a contract of employment, so that if there is some mutuality, but it is not the right kind of mutuality, there can be no contract of employment …"

31. I take the modern position from Nursing and Midwifery Council v Somerville [2022] EWCA Civ 229, which was decided after (and took into account) the most recent authorities on employee and worker status.

32. Somerville is a case on (limb (b)) worker status, though I note that concepts of mutuality of obligation appear to be similar in employee and limb (b) worker cases, subject to questions of subordination that do not arise in this case (see, e.g para 91 of Uber).

33. The passage cited above was approved by the Court of Appeal in Somerville, and at para 55 it went further to say "*the fact that the claimant could withdraw from the agreement to* [carry out work] *even after he had accepted it does not alter matters.*"

34. It is clear from that that a right for the individual to withdraw from work that they have previously committed to does not mean that there is no mutuality of obligation. (See also para 122 of PGMOL: *"… if there is a contract, the fact that its terms permit either side to terminate the contract before it is performed, without breaching it, is immaterial. The contract subsists (with its mutual obligations) unless and until it is terminated by one side or the other.*")

DISCUSSION AND CONCLUSIONS

Employment when working or during an "Assignment"

35. I mentioned earlier my surprise that the respondent should say the claimants were not employees despite being issued with "statements of particulars of employment" and later dismissed from "casual employment". There are profound difficulties with such an argument.

36. The first relates back to my initial discussion with Mr Hoyle about whether the claimants were employed or self-employed. Setting aside esoteric statuses

such as officeholders, it seems to me that individuals in the claimant's position are bound to be either employees or self-employed. Workers falling under s230(3)(a) are employees. Workers under s230(3)(b) are typically self-employed. There is no distinct legal status of "limb (b)" worker that means that someone is neither employed nor self-employed. It being the respondent's position that the claimants were not self-employed, the only realistic explanation of their status seems to be that they are employed, at least while actually carrying out work.

37. It may be that Mr Hoyle was intending to refer to "self-employed" as a status outside that of worker. Sometimes that is how things are spoken of, but if so that still leaves the problem that there is no distinct status of "limb (b)" worker explaining the basis on which the claimants worked.

38. The second is that almost everything in the statement of particulars of employment and the respondent's dealing with the claimants suggests that they are employees. They are described as such in the statement of particulars of employment.

39. I have said that Mr Hoyle placed considerable reliance on paras 1.6 and 1.7 of the statement of particulars of employment. To break down those paragraphs:

    39.1. The description of the claimants as "bank workers" is not inconsistent with employment status. We know that "employees" are "workers" even if not all workers are employees. "Bank" adds nothing to that which would suggest they are not employees.

    39.2. A phrase saying something is not a contract of employment when it is entirely set up as a contract of employment is absurd and cannot be allowed to prevent employment status when everything else points that way.

    39.3. I accept in principle that there is no obligation under the agreement for the respondent to provide work or a minimum level of work to the claimants, but that says nothing about what their status might be when actually working for the respondent.

    39.4. It is said that there is no mutuality of obligation "*at any time when the Individual is not performing an Assignment*". There are two points that seem to follow from that. The first is that excluding mutuality of obligation where there is no "Assignment" seems to me to suggest that there is mutuality of obligation during an "Assignment". If there was not, there would be no need to exclude it outside an "Assignment". Beyond that, there must be mutuality of obligation when an individual is actually working. I do not see that there is any other way in which the agreement could work. To say there is no mutuality of obligation when working would mean that an individual could simply walk out during a lesson (which both Ms Aitken and I have already rejected), conduct a lesson poorly or that

the respondent could refuse payment for sessions carried out by the individual without there being any legal consequences. That cannot be right.

39.5. Treating each offer of work as a separate assignment (to which "*the terms of this agreement shall apply*") simply emphasises that each individual assignment is carried out by the individual as an employee.

39.6. An "entitlement to regular work" or "continuity of service" are separate matters which do not suggest that there is no employment when the individual is actually working.

40. Para 1.7 says: "*there shall be no relationship between the parties after the end of one Assignment and before the start of any subsequent Assignment*". As far as I can tell "Assignment" is not defined in the statement of particulars, but the start of para 1.7 says "*each offer of work by the Company which the Individual accepts shall be treated as an entirely separate and severable Assignment*". That raises the question of what an "offer of work" might be. As I understand it, except for occasional cover or perhaps school lessons, the "offer of work" made by the respondent to a teacher was for regular weekly hours, which typically did not have an end date. In general the respondent did not offer arbitrary hours to arbitrary teachers from week to week. We have seen that the respondent sought continuity. So far as possible, and assuming the teacher was satisfactory, they sought the same teacher for the same sessions each week. In those circumstances, the most common "offer of work" would be a booking of a period of hours at the same time each week indefinitely unless or until there was a reorganisation or removal of particular classes. In those circumstances periods "*between Assignments*" would seldom in practice arise unless, for instance, a teacher left to do other things for a few months and then returned to pick up work.

41. Somerville and PGMOL make clear that clause 7.2 (permitting an individual to withdraw from work previously accepted) does not assist the respondent in showing that there was no mutuality of obligation.

42. It seems to me beyond any doubt that the claimants were employees when actually conducting classes. I am also satisfied that they were employees during "Assignments". That is consistent both with the written agreement and with the way in which matters actually operated.

43. Given this, I strongly suspect that the continuity of service provisions at s212 of the Employment Rights Act 1996 are sufficient for the claimants to establish continuity of service at least up to their dismissal, even without there being ongoing obligations between periods of work. However, this was not the question that I was asked to decide and Mr Hoyle indicated that he had only been briefed at the last minute, so he was not in a position to address that point at this hearing and I did not hear any evidence or argument on it.

An "overarching" contract?

44. I will go on to consider whether the claimants can be regarded as employees on an ongoing basis between and beyond Assignments.

45. This is more what paras 1.6 and 1.7 seem intended to guard against, and I heard much from Mr Hoyle about the significance of mutuality of obligation and what that might mean for periods between work. The key point here is whether what is stated in para 1.7 about there being "no obligations" between "Assignments" is actually true.

46. A striking feature of this case is that if there were no obligations between the parties at a time when they were not working, the respondent's dismissal of the claimants is meaningless. The respondent has undertaken something which, on its case, it had no obligation to do. Similarly, the obligation on the claimants to give one week's notice (which appears to apply even in the absence of any actual work being done or any Assignments being offered) is meaningless. There clearly are some obligations that apply between Assignments, otherwise there is no need to provide generally for termination of the contract or for the respondent to give notice. "Termination of employment" is considered in the statement of particulars of contract to be a meaningful concept, as there are post-termination restrictions at 14.2 that apply only on "termination of your employment". This is not said to be limited to periods of work, or during Assignments.

47. That is peculiar, and goes to suggest that the claimants were employees even between "Assignments". However, I accept the terms of their contract with the respondent were such that there was no obligation on the respondent to offer, nor for them to accept, Assignments. If an Assignment ended, the respondent was not under any obligation to offer another, nor was a claimant obliged to accept any Assignment offered. In those circumstances, both PLMOG (see para 105 in respect of the decision of the FTT and UT) and Somerville (para 30) show that there is no "overarching" contract of employment that applied between Assignments.

Conclusions

48. The answer to the question that I have been set is that the claimants were employees of the respondent. More fully, the claimants were employees when actually working and during Assignments. They were not employees between Assignments.

49. Unfortunately that answer is insufficient to establish that they are employees with the right to claim unfair dismissal. Given the history of this case I foresee the possibility, indeed likelihood, of further disputes on matters that were not discussed in any detail before me and that I was not asked to decide, such as what an Assignment might be and whether s212 of the Employment Rights Act 1996 steps in to give the claimants continuity of service that they may otherwise

not have had. I have indicated in this decision that my provisional view is that the "Assignments" offered by the respondent were, in many cases, indefinite and had no end point. I have also indicated my view that it seems likely that any gaps in continuity could be filled in by s212 on the basis that they arose from sickness or "temporary cessation of work", such as the holiday periods or lockdown periods, but again I have not had sufficient evidence or heard submissions that would allow me to reach a concluded view on that.

50. A further order will provide for the respondent to set out its position on continuity of service (including any extension of the effective date of termination such as would allow the claimants have two years' service). It may be the respondent's position that the claimants do not have two years' service, but if so I hope that they will have come to that position on full consideration of the facts and law, rather than on the basis of any desire to take every point they can think of against the claimants, whether arguable or not.

Employment Judge Anstis

Date: 23 January 2023

Sent to the parties on: 3 February 2023

For the Tribunals Office