EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105396/2022

Held via Cloud Video Platform (CVP) in Glasgow on 1 & 2 February 2023

Employment Judge C McManus

Mr R Cheshire	**Claimant** **In Person**
Seafari Adventures (Oban) Ltd	**Respondent** **Represented by:** **Ms J McLaughan - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant was not an employee of the respondent and his claim of unfair dismissal is dismissed.

REASONS

Background

1. The claim is for unfair dismissal only. The respondent's position is that the claimant is not entitled to bring a claim of unfair dismissal against them because the claimant was not an employee of the respondent and did not have the required qualifying service.

Issue for Determination

2. This PH was listed to determine:

   (1) whether the claimant was an employee of the respondent;

   (2) if so, the claimant's length of service as an employee of the respondent.

Proceedings

3. This PH took place via video ('CVP'). Evidence was heard from the claimant and from Tony Hill, who is a director and owner of the respondent business. Evidence from each was heard on oath or affirmation, by questioning in evidence in chief, cross examination and re-examination. At the stage of re-examination, the claimant had the opportunity to make a statement on anything which had arisen in cross examination which he wished to clarify. Reliance was placed on documents in a Joint Bundle, with numbered pages JB1 – JB110. The references in this decision to documents JB1 – JB110 are to documents included in that Joint Bundle. After hearing the evidence, oral submissions were made by both the claimant and the respondent's representative.

Findings in Fact

4. The following facts were admitted or found to be proven:

5. The respondent business operates wildlife and nature boat trips. The tours offered include the Corryvreckan Tour. The Corryvreckan Whirlpool is the third largest whirlpool in the world. A high degree of seamanship skills is required to negotiate a vessel through the Corryvreckan Whirlpool, which is required on the Corryvreckan Tour.

6. The claimant worked for the respondent as a Skipper on the touring vessels. Provision of the claimant's labour was made to the respondent via the claimant's business (Ocean Breeze Marine Services LLP). Invoices for the work carried out by the claimant for the respondent were submitted by Ocean Breeze Marine Services LLP (JB30 – JB71) and payment in respect of these invoices was paid into a bank account in the name of Ocean Breeze Marine Services LLP. The claimant and his wife are partners in Ocean Breeze Marine Services LLP. The earnings from Ocean Breeze Marine Services LLP are shared between the claimant and his wife. Ocean Breeze Marine Services LLP business is to provide services driving boats for others. These services are provided by both the claimant and his wife, both of whom are fully qualified skippers. The claimant's wife did not provide skipper services

to the respondent, although she was qualified to do so. In the 2020 season, the claimant's wife provided crew services to the respondent. Payment for work done for the respondent by the claimant's wife was invoiced for and paid in the same way as work done for the respondent by the claimant. An invoice submitted to the respondent by Ocean Breeze Marine Services LLP could include details of work carried out by the claimant and also by his wife.

7. During the period when the respondent could not operate normally because of the Covid pandemic lockdowns, it was accepted by both the claimant and Tony Hill that there was no basis for furlough payments to be made to the claimant from the respondent. During the Covid pandemic lockdowns, the claimant's business (Ocean Breeze Marine Services LLP) received government support funding. The claimant carried out some maintenance work for Tony Hill during this period. Tony Hill is the owner of a number of businesses. That work was offered and accepted as a means of the claimant receiving income during the lockdown period.

8. There was no written contract between the claimant and the respondent, or between Ocean Breeze Marine Services LLP and the respondent. Other boat skippers operated on the basis of a written contract of services, in terms of that at JB93 – JB94.

9. The vessels operated by the claimant when he worked for the respondent were owned by the respondent. While working for the respondent, the claimant wore his own salapettes, boots and gloves. He also wore some clothing provided by the respondent and branded with their name, such as t-shirts and caps. The claimant was encouraged to wear these branded items, but it was not compulsory. Lifejackets were provided by the respondent. Some of the provided clothing was branded 'Team Seafari'. There is a statutory requirement for the skipper and crew to be easily identifiable. A skipper is in charge of the boat and has a statutory responsibility for the safety of the vessel, the crew and the passengers.

10. The majority of the claimant's earnings were from the respondent. A breakdown of this is shown in JB109 – JB110. This shows that 97% of the

claimant's earning in that period were from the respondent. Given the relatively remote location of the respondent's operations, and the need for specialist skills, particularly in respect of ability to negotiate the vessel through the Corryvreckan Whirlpool, there was a limited pool of those who had the necessary skills and qualifications to supply skipper services to the respondent. There was limited availability of similar work in the area. The claimant understood that there would be an expectation that he would do work for the respondent as and when required. In the period when the claimant carried out work for the respondent, he also provided skipper services to the Easdale Ferry on occasions. Due to the relatively remote location, the limited number of people who had the necessary skills and qualifications to skipper the ferry and the local community's reliance on the ferry's operations, it was understood that where the ferry required the claimant to provide skipper services, he would do so.

11. The claimant would normally receive an email from the respondent setting out what work was required for the following day. There was no obligation on the claimant to accept that work, although in practice, he did not refuse work offered by the respondent. Because of the nature of the work, and the safety implications of operating boat tours in inclement weather, the Skipper's decision on whether or not it was safe to do the tour was final. The claimant and other skippers who operated the tours for the respondent normally discussed whether the weather was too poor to take the boats out. In making these decisions they took into consideration that the tours involved visitors who were likely to be unused to sea conditions. The threshold for postponing a tour because of weather conditions was therefore lower than for commercial operations not involving general members of the public. On occasions the claimant worked for the respondent on commercial operations, such as work supporting cable replacement operations out of Largs Marina. The claimant sometimes worked as a crew member, but was usually the boat's skipper, working with one crew member.

12. The claimant first carried out work for the respondent when working on supporting cable replacement operations out of Largs Marina. Tony Hill had

asked the claimant to help him out at short notice. Tony Hill had then asked the claimant if he was interested in working as a skipper, driving boats and providing his services to get jobs done. The claimant then provided skipper services, through his business (Ocean Breeze Marine Services LLP). The respondent company contracted with client companies and the claimant and other skippers drove the boats, as required for the ultimate clients. The obligations to provide the contractual services to the respondent's clients was on the respondent.

13. There was no agreed minimum level of work to be offered to the claimant by the respondent. If the claimant was unwell or otherwise unable to do the work, he received no payment from the respondent. The respondent organised a replacement for the claimant, if required. The work was seasonal. The claimant did not organise holidays during the season, which ran from April to October. There was one occasion when the claimant was unable to work for the respondent, due to his mother being unwell. On that occasion the respondent arranged for another skipper to do the work.

14. Due to the seasonal nature of the work, there were significant periods of time when the claimant did no work for the respondent. The document at B113 is a logbook showing work carried out by the claimant for the respondent. This records that in the period from 15/1/22 until 3/3/22 and in the period from 13/12/20 until 22/2/21 the claimant did not carry out work for the respondent. On some occasions, particularly during the winter and in the Covid lockdown period, the claimant carried out work for the respondent other than skipper / crew work, e.g. he operated a dump truck and helped with building renovations. Payment for that work was made on submission of invoices.

15. The claimant was paid at a rate set by the respondent, which was the same rate paid to all who carried out work as a skipper for them.

16. On 17 August 2022 the claimant wrote to Tony Hills in the terms set out in email at JB 88. The claimant's position in that email was "*If you require an opinion from me as to whether someone is competent or otherwise to work as skipper in addition to my usual work requirements there will be a further*

charge in addition to the usual skipper rate." That email led to the termination of the contractual relationship between the claimant's business and the respondent. The claimant wrote to the respondent on Ocean Breeze Marine Services LLP headed notepaper on 24 August 2022 (JB89). Tony Hill replied to that letter (JB90), referring to "During this season you will have been aware of growing tension between businesses. We felt Ocean Breeze, as a provider of skipper services to Seafari, had at the last 3 skippers' meetings, openly made criticisms of Seafari, your customer, in front of other members of staff."

17. The claimant first considered that he may have been an employee of the respondent after receiving legal advice.

Comments on evidence

18. Evidence was taken on oath from the claimant and from Tony Hill for the Respondent. There was little dispute on the material facts. In circumstances where there was dispute the Tribunal preferred the evidence of the claimant, who was found to be entirely credible and reliable. The claimant answered all questions put to him in an open manner. He was not evasive in his answers. He made concessions where appropriate. He freely conceded that it was not until he sought legal advice after the termination of the contract that he thought that he may have been an employee of the respondent. His evidence was that it was '*quite possible'* that there would have been periods of at least four weeks when he did not carry out any work for the respondent. His evidence was '*the bulk of the business is in the Summer season. Outside of that it was very ad hoc'* and that there were '*almost definitely'* periods of at least a week when he did not work for the respondent, '*especially over the Winter period*.'

19. There was reference in the evidence to 'Crew Agreements' listing the crew on a boat at a particular time, but no such Crew Agreements were included in the Bundle.

Submissions

20. Both parties made oral submissions. I have addressed their positions in submissions in the 'Discussion and Decision' section below.

Relevant Law

21. The Employment Rights Act 1996 ('the ERA') defines 'employee' as an individual who has entered into or works, or worked, under a contract of employment (s 230(1)). The term 'worker' is also defined in the ERA, at section s 230(3)(b).

22. Where a valid contract has been formed, the nature of the contractual relationship should be identified. That includes identification of the nature of the identity of the parties in the contract, e.g. a contract between an employer and an individual person, or between a business and independent contractor.

23. In *Market Investigations Ltd v Minister of Social Security 1969 2 QB 173, QBD*, Mr Justice Cooke's held that 'the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no", then the contract is a contract of service.'

24. The terms of a written contract are not definitive in identifying whether there is a contract of employment. In *Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC*, the Supreme Court definitively accepted the premise that employment contracts are an exception to ordinary contractual principles in respect of looking to the reality behind the wording of the contract, as the contract may be a sham. In *Protectacoat Firthglow Ltd v Szilagyi 2009 ICR 835*, CA, the Lady Justice Smith stated that a tribunal faced with a 'sham' allegation must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them. This approach should be taken because of the difference in bargaining power between an employer and an employee. The courts have stressed the

differences between commercial and employment contracts, in respect of the parties' respective bargaining powers.

25. In *Uber BV and ors v Aslam and ors 2021 ICR 657, SC*, the Court held that not only is the written agreement not decisive of the parties' relationship, it is not even the starting point for determining employment status. That case concerned 'worker' status, but is also relevant to 'employee' status cases.

26. An employment contract may be implied, if there is no written contract (*Airfix Footwear Ltd v Cope 1978 ICR 1210, EAT*, cited with approval by the Court of Appeal in *Nethermere (St Neots) Ltd v Gardiner and anor*). Mutuality of obligation may be implied from the course of conduct over many years, although the Court of Appeal emphasised that each case will need to be carefully considered on its facts and that many decisions will be borderline.

27. Following *McMeechan v Secretary of State for Employment 1997 ICR 549, CA*, unless there is a global contract of employment spanning gaps between jobs e.g. where the work is seasonal, the individual hirings must each take the form of contracts for services. Issues re whether the individual has sufficient continuity of employment for the purposes of many rights under the ERA would then arise. A gap between contracts will operate to break continuity unless it can be seen as a temporary cessation of work or an arrangement whereby the individual in question is to be regarded as continuing in employment (ERA section 212(3).

28. When determining whether a claimant has employee status, a Tribunal must apply a multi factorial approach, considering all the relevant factors and may look beyond the terms of the contract itself. The main requirements of a contract of employment are control, mutuality of obligation and personal performance. No one test or feature is conclusive, in every case it is necessary to weigh all the factors in the particular case and ask whether it is appropriate to call the individual an 'employee'.

29. Relevant factors to be taken into account in respect of the 'control test' are whether the individual was under a duty to obey orders, had control over his or her hours of work and holiday, was supervised as to the mode of working,

and provided his or her own equipment. Control is not conclusive of there being a contract of employment, but is an essential part of the 'multiple test' approach in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD*, and subsequent decisions. In *Montgomery v Johnson Underwood Ltd 2001 ICR 819, CA*, the Court of Appeal held that control is a separate factor, no less vital to the creation of an employment relationship than mutuality of obligation.

30. The concept of 'mutuality of obligations' means an obligation on the employer to provide work and an obligation on the employee or worker to do that work. For a contract of employment to exist, there must be an 'irreducible minimum' of obligation on each side (*Nethermere (St Neots) Ltd v Gardiner and anor 1984 ICR 612, CA*, and *Carmichael and anor v National Power plc 1999 ICR 1226, HL*). This will usually be expressed as an obligation on the employer to provide work and pay a wage or salary, and a corresponding obligation on the employee to accept and perform the work offered.

31. In *Hellyer Brothers Ltd v McLeod and ors; Boston Deep Sea Fisheries Ltd v Wilson and anor 1987 ICR 526, CA*, the Court of Appeal held that there were no facts from which it could properly be inferred that the men had ever placed themselves under a legally binding obligation to make themselves available for work in between crew agreements or to refrain from seeking or accepting employment from another trawler owner during such periods. In addition, there was no continuing obligation on the employer to offer employment to any particular individual. There was no 'continuing overriding arrangement which governed the whole of [the parties'] relationship and itself amounted to a contract of employment'.

32. A contract of service (i.e. a contract of employment) cannot exist without the irreducible minimum mutuality of obligation (including an obligation to perform the work personally) and a sufficient degree of control. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD*, Mr Justice MacKenna set out that the employee must have agreed to provide his or her own work and skill in exchange for a wage or other remuneration. He noted: '*Freedom to do a job either by one's*

own hands or by another's, is inconsistent with a contract of service, although a limited or occasional power of delegation may not be.' He identified three questions to be answered:

(1) Did the worker undertake to provide his own work and skill in return for remuneration?

(2) Was there a sufficient degree of control to enable the worker fairly to be called an employee?

(3) Were there any other factors inconsistent with the existence of a contract of employment?

33. In determining whether an individual is in business on his own account each case must be considered on its own facts. Some of the features which may be relevant are:

a. What is the degree of control? (The greater the scope for individual judgment on the part of the worker, the more likely he will be an independent contractor.)

b. What was the amount of the remuneration and how was it paid? — a regular wage or salary tends towards a contract of service; profit sharing or the submission of invoices for set amounts of work done, towards independence.

c. How far, if at all, did the worker invest in his own future: who provided the capital and who risked the loss?

d. Who provided the tools and equipment?

e. Was the worker tied to one employer, or was he free to work for others (especially rival enterprises)? Conversely, how strong or otherwise is the obligation on the worker to work for that particular employer, if and when called on to do so?

f. Was there a 'traditional structure' of employment in the trade?

g. How did the parties themselves see the relationship?

h. What were the arrangements for the payment of income tax and national insurance?

i. How was the arrangement terminable? - a power of dismissal tends to indicate there being a contract of employment.

34. In addition to such 'structural' matters, it may also be very relevant to look at the particular terms of the contract in question; for example, a genuine contract for services would not normally be expected to provide for sick pay or contractual holiday or pension entitlements. A person in business on his or her own account will carry the financial risk of that business. Thus, payment by commission only or lump sum payment 'by the job', or the right to set the rate charged or to participate in the profits (or the bearing of responsibility for losses), will usually point towards self-employment. Conversely, payment of a regular wage or salary is a strong indicator of employment.

35. How the parties themselves label their relationship is a relevant but not conclusive consideration. The status of the worker is to be decided by an objective assessment of all the factors, and the label attached by the parties is but one of those factors. In a borderline case where, apart from the label attached by the parties, it would be equally reasonable to conclude that the worker was an employee or that he was an independent contractor, then an express declaration by the parties may be conclusive. In particular, 'if the parties deliberately arrange to be self-employed to obtain tax benefits, that is strong evidence that that is the real relationship': *Massey v Crown Life Insurance Co [1978] 2 All ER 576, [1978] IRLR 31, [1978] ICR 590, CA, per Lord Denning MR; O'Kelly v Trusthouse Forte plc [1983] 3 All ER 456, [1983] IRLR 369, [1983] ICR 728, CA*. Deductions at source of income tax and national insurance point to employment; gross payments suggest self-employment. However, payment of tax and national insurance on a 'self-employed' basis is not conclusive proof of a contract for services (*Enfield Technical Services Ltd v Payne; BF Components Ltd v Grace 2008 ICR 1423, CA*) and, being part of the PAYE scheme and paying employees' national insurance contributions is not conclusive evidence that a worker works under a contract of service (*O'Kelly and ors v Trusthouse Forte plc 1983 ICR 728,*

CA). However, it is a highly relevant consideration (*Apex Masonry Contractors Ltd v Everritt EAT 0482/04*).

Discussion and decision

36. I considered all the circumstances of the case with no one material factor having weight over another. The following was considered to be significant:

- The claimant submitted invoices for work done
- Provision of the claimant's labour was made to the respondent via the claimant's business (Ocean Breeze Marine Services LLP)
- The invoices were submitted from, and payment was made to, the company (Ocean Breeze Marine Services LLP)
- An invoice submitted to the respondent from Ocean Breeze Marine Services LLP could include work carried out by both the claimant and his wife, detailed in the same invoice.
- During the Covid pandemic lockdowns It was accepted between the parties that there was no basis for furlough payments to be made to the claimant
- During the Covid pandemic lockdowns, the claimant's business Ocean Breeze Marine Services LLP received government funding support.
- The contractual relationship was between the respondent and Ocean Breeze Marine Services LLP, not between the respondent and the claimant as an individual.

37. Although there was no written agreement between the parties, it was not in dispute that the contractual arrangement was between the respondent and Ocean Breeze Marine Services LLP. There was no evidence that the contractual relationship was between the respondent and the claimant as an individual.

38. With regard to whether the work required to be personally performed by the claimant, I took into account the undisputed evidence in respect of the skill

required for the work, particularly in respect of negotiating a safe passage through the Corryvreckan Whirlpool. I had regard to the EAT's decision in *Byrne Brothers* case, and in particular the EAT's statement that 'as a matter of common sense and common experience, where an individual carpenter or labourer is offered work on a building site, the understanding of both parties is that it is he personally who will be attending to do the work. That consideration, said the EAT, is admissible as part of the factual matrix. In this case, I accepted that due to the level of skill required and the relatively remote location, there was a limited pool of people who could provide skipper services for the tours offered by the respondent. I took into account that although the claimant's wife was a qualified skipper, she was not engaged to work for the respondent as a skipper. There was no evidence that on occasions when the claimant could not skipper for the respondent, that he would or could offer his wife as a substitute skipper. The evidence was that on the few occasions when the claimant could not skipper when required by the respondent (e.g. when the claimant's mother was unwell) , that he respondent would arrange a substitute.

39. With regard to the economic reality test, on the evidence the claimant was independent of the respondent business. His services were paid for via invoices submitted by Ocean Breeze Marine Services LLP. The claimant was not required to invest in the business by way of provision of tools, etc. The claimant was not truly in control of the work as the work was allocated to him. He was allocated to skipper on certain tours. He then used his own skills and knowledge to determine the particular route, taking into account what requires to be shown in terms of the tour offered. There was no evidence that the claimant had any opportunities of profit or loss in respect of the work carried out by him for the respondent. The work was seasonal, with several gaps. The claimant was paid on the basis of an agreed rate. He was paid for hours worked and did not receive any pay for days when he did not carry out any work for the respondent. There was no risk attached to the claimant in respect of the work carried out by him for the respondent. Taking all these relevant factors into account, the answer to the question 'was the worker really a small

businessman rather than an employee?' is 'yes'. The claimant was in business on his own account.

40. In looking at some of the other factors relevant to the multiple test:

a. the degree of control – the claimant, as fully qualified skipper, was free to exercise his own skill and judgement on the job but was told what to do to the extent of what tours to carry out.

b. the amount of the remuneration and how it was paid? The claimant was paid via submitted invoices, at an agreed rate. There were no deductions for tax at source and no National Insurance contribution deductions. He submitted invoices via Ocean Breeze Marine Services LLP for set amounts of work done.

c. The claimant did not provide capital or risk loss with the respondent's business.

d. The respondent provided the boats and some personal protective equipment.

e. The claimant worked for the respondent on a number of jobs. He did not consider himself as being in a position to be able to refuse work.

f. During the COVID lockdown, the parties regarded the relationship as one of the claimant providing services to the respondent via his separate business, Ocean Breeze Marine Services LLP.

41. I required to objectively assess all the factors of this case in determining whether the claimant was an employee. The claimant provided his own work and skill in return for remuneration. He provided this through his separate business, Ocean Breeze Marine Services LLP. Although the claimant carried out the skipper tasks using his own skills and local knowledge, there was evidence of a considerable degree of control exercised by the respondent. The claimant carried out additional tasks such as cleaning. I accepted the claimant's evidence that if he refused to do these additional tasks it would '*not have gone down well*.". At no time during the period when the contact was

effective had the parties considered or claimed that the contract was an employment contract. The terms of the correspondence from both parties at the time of termination of the contract does not indicate that the parties believed there was an employment contract. The contractual relationship was clearly between Ocean Breeze Service LLP and the respondent, and not between the respondent and the claimant as an individual. Taking into account all of the relevant factors on which evidence was heard, I concluded that the (unwritten) contract was a contract for services rather than an employment contract (a contract for service). I therefore concluded that the claimant was not an employee of the respondent. He is therefore not entitled to employment rights, including in respect of unfair dismissal, which is the only claim raised.

42. Although it was the claimant's position that he had been continuously employed by the respondent for over two years, it was not disputed that the work was seasonal. There were a number of periods of over one week when no work was done by the claimant for the respondent. Had I found that the claimant was an employee of the respondent, I would then have required to consider the effect of these accepted breaks in continuity of service. On the undisputed evidence before me, there were breaks of over a week which would break continuity of service. An employee requires to have continuous service of at least two years to qualify for entitlement to bring a claim of unfair dismissal. If he were an employee, then the claimant would not have had two years of continuous service with the respondent.

43. In this case I did not require to decide whether the claimant was a worker, and entitled to certain rights as a result, such as in respect of certain paid holidays. The statutory test in respect of worker status is lower than that on respect of employee status.

44. The claimant's claim of unfair dismissal is dismissed because the claimant was not an employee of the respondent.

Employment Judge: **C McManus**
Date of Judgment: **03 April 2023**
Entered in register: **04 April 2023**
and copied to parties

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