Case no: 3300180/2023
3300333/2023

EMPLOYMENT TRIBUNALS

First Claimant

Kit McGuire

Second Claimant

Elizabeth Graham

V

Respondent

David Crilly t/a The Cambridge Shakespeare Festival

Heard at: Cambridge

On: 7 July 2023 (in person)

Before: Employment Judge L Brown

Appearances
For the Claimant: Mr I. Ameer, Counsel
For the Respondent: Mr S. Sunak, Counsel

RESERVED JUDGMENT ON A PRELIMINARY ISSUE

The Judgment of the Tribunal is:

(1) The Claimants are "limb "b"" workers as defined in S.230(3) of the Employment Rights Act 1996.

(2) The Tribunal makes a declaration to that effect; and

(3) Unless remedy can be agreed between the parties, a Remedy Hearing is to be listed.

REASONS

Background to the case

1. The Claimants in this case have both worked in different locations performing as actors in the production of plays. The two claims for the Claimants were initially issued with separate case numbers but were then listed together due to the same issues of law in each case. They bring claims on the basis they are both "limb 'b'" workers pursuant to section 230(3) of the Employment Rights Act 1996 ("ERA") that is a worker who:

   "has entered into or works under…. 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".

2. The Respondent, who I shall hereafter refer to as "the Respondent" or "the Festival", produced Shakespeare Plays each year and it was run on an annual basis by the Respondent during the period between the end of June and the end of August ("the Festival Period") and took place in or around the University of Cambridge.

3. Mr McGuire, the first Claimant, left before the end of the Festival Period after the final performance of Twelfth Night on 30 July 2022.

4. Ms Graham, the second Claimant, whilst she was suffering from the effects of Covid-19 and was self-isolating, was notified by the Respondent on 3 August 2022 that she had been replaced from her role in the Festival,

Conduct of the hearing

5. This hearing was listed as a final merits hearing but at the outset of the hearing both Counsel invited me to turn this hearing into a preliminary hearing to determine whether or not the Claimants were limb "b" workers within the definition of s.230 (3) of the ERA 1996, as there was insufficient time to determine both this preliminary issue and to then go on to decide, if necessary, what claims should succeed. I therefore ordered that the hearing be turned into a preliminary hearing to determine the issue of whether or not the Claimants were limb "b" workers within the meaning of the ERA 1996.

6. At the end of the hearing, I reserved my Judgment. It was agreed that written submissions would be sent to the Tribunal one week later on the 14 July 2023.

7. Counsel for the Claimant in his written submissions stated that the name of the Respondent should be changed to David Crilly t/a The Cambridge Shakespeare Festival in place of the two named Respondents.

8. Dr Crilly gave clear evidence he was trading as a sole trader and not as a company and accordingly I order that the name of the two Respondents is changed to that of one Respondent that being David Crilly t/a The Cambridge Shakespeare Festival.

Evidence Used

9. Both Claimants gave evidence and did not call any witnesses in support of their claims.

10. The Respondent gave evidence by Mr Crilly and did not call any other witnesses in support of their Response.

Findings of Fact – Kit McGuire

11. The First Claimant, Mr Kit McGuire, initially issued his proceedings under the name of Mr Ciara Wilson. During these proceedings he said he had changed his name to Kit McGuire and wished to use that name going forward. This was also his professional/performance name.

12. Mr McGuire had originally auditioned to work for the Respondent in 2019. He referred to [P 110-111] a document on the casting website referred to in the hearing as “Mandy”. This page showed the profile of Mr McGuire and was the way in which he obtained work in the acting industry. It was in effect similar to a page such as LinkedIn where you could market yourself to anyone needing your services.

13. The form was contrasted with the form above of another individual, Laura Jean Marsh. On her profile it stated, “*the user has requested only to be contacted about paid work”.* Mr McGuire’s profile did not have that caveat on it, and it was not in dispute during the hearing that he was willing to be contacted about any type of work. This included work that he was not paid for. I found therefore that Mr McGuire was marketing himself to carry out work on both a paid and unpaid basis.

14. Another document [P108 -109], which was a document produced by the Respondent, was an invitation to actors to audition for the Festival. This set out that they were preparing for their 35th season including eight open air productions taking place in the gardens of the Cambridge University colleges and that the Festival was a high-profile event hopefully attracting large audiences from all over the world and also attracting a good deal of media attention.

15. It went on to say that during 2021 they had staged eight productions, each lasting between three to four weeks over the summer, and that the total budget for the Festival was in excess of £250,000 pounds, and that due to the production, i.e., it being in the open air, there was a high risk factor. They also said that the accommodation costs for the cast were around £100,000 pounds. They said they could therefore pay for all company members to stay at the Lucy Cavendish college and that rehearsals would take place in the open air and began on the 27th of June. They went on to say that beyond that: -

> "I'm afraid we are only able to make a token gesture contribution of just £50 per week towards expenses."

16. They added they would like the situation to be different in terms of what they could pay individuals but that in one year alone the company lost around £45,000 because of the weather. They concluded that they did not want to ask people to work on the cheap but that the artistic director regularly lost thousands of pounds and, *"it is sometimes profitable, and it sometimes isn't".* They then said it was very much a collaboration in which *"you would be involved on a purely voluntary basis".*

17. Mr McGuire stated that he did not receive that document in 2022. He said when he was invited to audition in 2019, he received a somewhat similar but much shorter message on the casting website Mandy, but he no longer had a copy of the message. However, it was not in dispute what the terms were in any event. I deal with these terms in more detail below.

18. Having worked for the Festival in 2019 Mr McGuire emailed them on the 2 February 2022 [P126] saying he'd love to work for them again.

19. Mr McGuire was offered the role of Antonio/Captain in Twelfth Night and Dauphin/Williams in Henry the V [P76] on the 7 April 2022. The email said: -

> 'I'm sure you are aware of the financial deal, but just to reiterate, it's 50 pounds per week - it is of course not a wage, but it's something towards your expenses. Accommodation including the rehearsal period is free. If you are able to stay at a friends or family for the duration, let me know and you will receive an additional accommodation allowance.'

20. He replied to the e-mail [P128] accepting the role. I found that those two emails constituted the terms of agreement between Mr McGuire and the Respondent, in that he would be paid £50 cash a week and be provided with free accommodation.

21. Mr McGuire also referred to the undated joining document [P74-75] that he received after accepting the role. In that document participants were told to e-mail Dr Crilly about being picked up from the station but that if they had to get a taxi to keep a receipt and he would reimburse them. In particular the last paragraph stated:

"Finally, it's later than you think, and two weeks is very little time to get four shows on their feet. Please make sure you know as much of both plays when you arrive as possible (ideally off book by day one). The rehearsal periods are for rehearsing -not line bashing- and it will slow the process down if you're not up to speed. OK … enough from me … ticket sales are already going really well - So we have to do it now!!"

22. I found that at the point Mr McGuire had been engaged by the Respondent, and after accepting the role, that he was being given instructions about how to prepare for the production and was following the directions of the Respondent.

23. Mr McGuire gave evidence, and I found, that he was told by Sean McGrath that the £50.00 per week was a "goodwill gesture". They were told if they had any expenses relating to shows they would be paid back with an itemised receipt for example if they had to buy a costume piece or a prop.

24. Mr McGuire gave evidence that everybody in the Festival would rehearse for two weeks and then perform for three weeks in the first show, and whilst the first show was being performed during the days of those three weeks they would then rehearse the second show, and then for the second show they would perform in the evenings for the following three or four weeks.

25. There would be a production every night and a single matinee on a Saturday. In total therefore they had agreed to work for the Festival for a period of around six weeks on two shows six days a week.

26. Mr McGuire, as part of his duties, also had to find, arrange, compose and practice music to be performed in the shows and to teach this music to fellow cast members when necessary (Para10 WS). This was not challenged in Mr McGuire's evidence.

27. Mr McGuire also gave evidence in relation to the leafletting that all actors had to carry out twice a week, and said that the costumes they were given to wear by the Respondent could not be given to "random people" for them to hand out leaflets on their behalf. This was not challenged on cross-examination.

28. Mr McGuire worked on the productions without incident, but he stated that due to the way he was treated [Para 5 WS] he decided to leave on the 31 July 2022. He advised the Respondent of this on the 20 June 2022 by text [P133) where he stated that: -

"Hi David, firstly apologies for the late message I'm not long back from Downing. I hope you're doing alright with the stresses of the weekend. I realise this may come as a surprise, but I've decided I'd like to leave the festival rather than continue into Henry V. I'm currently dealing with some medical issues that are causing me significant personal stress and I am afraid there have been other stresses since arriving this summer that have made me feel uncomfortable with living and working here. I'm sorry to leave you on the Henry V cast like this. It's been a pleasure working with you again and I have had fun in rehearsals and I'm sure the show will be fantastic. I hope you can

understand that I need to put my health and well-being first. All the best for the show and the rest of the festival."

29. The Respondent replied and stated that [P134]: -

"Hi Kit - Yes that's quite a shock and leaves me and the rest of the company in a very difficult position. I don't really know what to say. I engage people in the festival on the assumption that the commitment to take part means just that, but I have no control over whether or not people will fulfil that commitment. Obviously, I'd like you to stay and finish 12th Night as to leave right away would create a much more serious problem for me. I don't think I've experienced a festival quite like this one. DC."

30. When Mr McGuire was cross examined he was asked about his statement in his ET1 form which was that, in effect, he considered the working conditions to amount to an "exploitative business model" [P11] and it was put to him there was no mention of this in his email to the Respondent [P133]. In reply he said at that point he did not wish to set out why he was leaving, which was because of the pay issue, and because he was at this point still talking to Equity about his options and he did not want to disclose this. I found Mr McGuires evidence on this to be credible.

31. Dr Crilly asserted [Para 19 WS] that the only reason Mr McGuire had brought this claim was because he had been given a minor role, and that if he had been given a major role he would never have left and brought this claim, which he said was based on malice and spite.

32. I found Mr McGuire to be an entirely honest and credible witness. I found Dr Crilly's' evidence at times to be evasive and contrived in that he would try and avoid using certain words when replying to questions put to him. Overall, I preferred Mr McGuires evidence to that of Dr Crilly.

33. I found the only reason Mr McGuire left the employment of the Respondent was due to the working conditions and pay and not because of malice or spite due to not being given a major role. In any event the reason for the Claimant leaving has no bearing on the preliminary issue of whether he is a limb "B" worker or not.

Elizabeth Graham

34. Ms Graham, the Second Claimant, started working for the Festival on the 27 June 2022 until she was replaced on the 3 August 2022 and when she was informed that she had been replaced in the production and was no longer employed [P 199].

35. She also had a profile on the Mandy website [P110] and this also did not state that she was only open to paid work. I found therefore, as I found for Mr McGuire, that she was open to both paid and unpaid work.

36. She was offered the roles for the first half of the Festival of Maria/Officer in Twelfth Night, and in the second half of the Festival she was offered the role of Titania/Hippolyta, in A Midsummer Night's Dream. The terms were set out in similar terms and identical wording of that sent to Mr McGuire, in that she was to be given £150 cash a week and this was not disputed between the parties. Her higher payment was because she was not using the accommodation provided by the Respondent, and was staying at a friend's house, as per the terms set out in the joining document.

37. Ms Graham initially emailed them asking [P78] for a bit of time to get back to them, and then asked some questions about Covid. On the 21 April 2022 she then accepted the role and said she looked forward to working with him [P77]. She went on to say as follows: -

> 'May I ask for one N/A to go to a wedding in Scotland on Saturday 2nd of July? I would probably need the first and the third for travel. That would be my only N/A if permitted.'

38. I found that Ms Graham, had to ask for days off, as evidenced by this email and there was never any suggestion she could send in a substitute.

39. During the production she became unwell with Covid and missed some rehearsals. She stated that after she tested positive for Covid she immediately informed Matthew Parker [Para11 WS] and I found that she did report her illness straight away to a Director of the Respondent by WhatsApp[P84]. It was not disputed that the message she sent to Mr Parker then quickly reached Dr Crilly. She gave evidence, and I found, that she had no intention of leaving and was going to return to finish the production she was in [Para11 WS].

40. On the 3 August 2022 [P118] she advised Dr Crilly that she was anticipating being able to be back by the following Monday. In reply Dr Crilly [P119] stated that he was surprised to hear from her and that he had had no contact with her since *'our conversation at the costume store.'* I have assumed this is a reference to their conversation on Wednesday the 27 July where he advised her that [Para 15 WS] her group communications about covid testing were inappropriate. In any event this conversation had no bearing on the issues in dispute in this case. However, he went on to say: -

> "You know too, that's all cast members are expected to help with the strike at the end of a production, but you chose to ignore that, too, and didn't help in any way at the end of 12th Night, choosing to stay in the dressing room until myself and all the other actors have done all the work."

41. He went on to complain that he had found out about her absence on social media, which I found was a reference to her advising Matthew Parker that she was unwell with COVID by WhatsApp and as referred to above. He stated that: -

"I am the owner and director of the Shakespeare festival. I'm afraid you can't just ignore what I say and come and go as you please ... as you didn't have the professional courtesy to contact me, I have had no option other than to replace you in the production".

42. When Dr Crilly was cross-examined about this reference to her not being able to 'come and go' he said that she should have advised him personally of her illness.

43. Further correspondence ensued between Ms Graham and Dr Crilly [P121 -123] wherein Ms Graham expressed her shock and asked him to reconsider. She pointed out that she had contacted Matthew and assumed that was in the proper order of things and that he was liaising with him. She set out that she had done her part during the strike by cleaning the dressing rooms and kitchen, collecting rubbish and emptying the bins while the others were elsewhere. She said she had kept her distance because she wondered whether she was coming down with covid. She pointed out that private messaging on WhatsApp was a personal communication and not social media. She asked if he was available for a discussion and that if he was ready to let her back that she would resume the role as soon as it was safe for her to do so.

44. Doctor Crilly's reply [P121] was unequivocal. He took issue with her not contacting him as the festival manager and said that she had deliberately kept him out of the loop, and it was unacceptable. He criticised her actions in view of the fact that she thought she may have COVID. He then went on to criticise her for ignoring him, refusing eye contact, refusing to sing in Dream musical festivals, addressing any of her questions to Matthew and not to him, absenting herself from the festival and letting him rely on the grapevine to find out what was going on. He told her she was unprofessional, and her behaviour was unacceptable and that she had deliberately circumnavigated him and assumed ignoring him was the answer. In particular he said: -

"I can't manage a festival if members of the team decide to ignore me and the protocols that I put in place."

45. I found the exchange of emails was compelling evidence of the high degree of control that Dr Crilly exercised over Ms Graham and of his expectations that she followed all his directions in rehearsals and during striking, and also that she always communicated with him personally and not another director.

46. In cross-examination he referred to her adopting a policy of '… ignoring everything I said and not taking part during music rehearsals …', and I found that he had taken offence at her not showing enough deference to him and following everything he asked her to do, and that this evidenced a high degree of control being exercised by him over Ms Graham.

47. I found that Dr Crilly had an expectation that the Claimants would report any absence to him personally and that advising another director in the company would not be acceptable. Whilst there was no disciplinary or sickness reporting

procedure given to the Claimants it was clear that he expected Ms Graham to report to him personally when she was ill with Covid.

48. I also found that Dr Crilly had an expectation that Ms Graham and others, including Mr McGuire, would be involved in the "strike" at the end of the production. Striking involved putting props away and packing them into a van after the production had finished. During cross examination Dr Crilly stated that Ms Graham had not 'mucked in' with the striking and that this was another example of her change in attitude. I found Ms Graham felt she had to follow Dr Crilly directions and orders on striking duties [P120]. This was evidenced by the fact that when Dr Crilly criticised Ms Grahams activities during striking she felt it necessary to defend herself and tell him what she had done. I preferred Ms Grahams evidence to that of Dr Crilly, and I found her an honest and credible witness.

49. I also found that there were no official understudies for both Claimants and if they were unable to perform it was up to the Festival to find substitutes as Dr Crilly did in the case of Ms Graham when she became ill with covid.

50. I found that the reason for the dismissal of Ms Graham by Mr Crilly was in part due to his views about her not participating in the striking, her alleged attitude towards him when she didn't look at him or communicate with him directly as he expected her to when he gave her directions, and finally due to advising another director, instead of him personally, that she was absent with covid.

Timing of rehearsals and working day

51. I found that both Claimants had no overall ability to negotiate the times of the rehearsals. The Respondent gave evidence that if they could not make the particular time, they would rearrange it, but I found the overall structure of rehearsals was set by the Respondent with both Claimants being expected to turn up in accordance with the schedule.

52. When Dr Crilly was taken to the bundle [P91] he agreed once the rehearsals were set it was not up to them to turn up or not and they all had to be present. This contradicted his witness statement [Para 10 WS] where he asserted that rehearsals were 'flexible and negotiable. 'I found his admissions that he set the rehearsal schedules and they were not negotiable to be the real situation on the ground. He also agreed during cross-examination that if he changed the rehearsals at the last minute the Claimants would be expected to fit in with this as evidenced in the bundle [P98].

53. Mr McGuire gave evidence and I found that in the second week of rehearsals both Claimants would work seven days a week and these days which were known as" technical days" could be very long. I found that Mr McGuires Tech day for Henry IV Part 2 finished after midnight.

54. To conclude, with rehearsals taking place between 9:00 AM and up to around 4:30 PM, and the show starting at 6:45 PM and finishing at around 10:00 PM,

both Claimants were working extremely long days and in the second week of the production a seven-day week.

55. During cross-examination Dr Crilly admitted that an actor could not simply choose to work say four nights out of the six nights, and I found that all rehearsal times, performance times and working hours were set by the Respondent.

56. Outside their formal duties I had regard to the fact that it was not disputed in any event that the Claimants were expected to work on their lines outside of rehearsals, and that Dr Crilly accepted during cross-examination that often directors would suggest that actors get together and go through a scene in their own time as a 'helpful recommendation for actors.' I found that both Claimants at all times were immersed in the Festival even outside performance of their formal duties.

Striking

57. It was also not disputed by either party, as referred to above in the case of Ms Graham, that in addition to performing in their role the Claimants were expected to help with" striking". Striking involved collecting all the props costumes and set pieces, stacking and moving chairs moving lights and cables, dismantling furniture and this would take place at around 11:00 PM at night after a production had finished. Dr Crilly admitted in his evidence that he oversaw the process deciding "what goes in the van first".

58. Mr McGuire gave evidence there was no risk assessment carried out for this and often the lighting was inadequate. None of this was disputed during the hearing and I found that this was the case, in that striking was carried out by both Claimants in a workplace where no risk assessment appeared to have been carried out.

59. As set out above the alleged failure of Ms Graham to take part in the striking at the end of the production and the reference to her 'failure to muck in' as referred to by Dr Crilly during cross-examination demonstrated the high degree of control exercised by him over the Claimants and his expectation they would work late after a production had ended to help pack away everything into his van.

Leafletting

60. In addition to acting and striking the Claimants and others were also expected to go leafletting. They were expected to go leafleting twice a week and they would be allocated a weekday and then the whole cast would also go out on a Saturday.

61. Evidence was given by Ms McGuire that the activity of leafleting was strictly controlled by Dr Crilly and I found that it was. At page 100 of the Bundle was a WhatsApp message from the Respondent stating, *"12.30pm – 2.30 pm – leafleting."*

62. I found that the Claimants were given a costume to wear, when leafleting, as can be seen in the email from Simon Bell dated 27 June 2022, and that there were strict directions on how and when 'to leaflet' and that the Claimants were to "Always leaflet in FULL costume" [P117].'

63. In cross examination Dr Crilly gave evidence that he produced a guide about how the leafletting was carried out as he wanted to distinguish his performances from the student productions [P117]. I found that the document started each line with a direction, such as, *"Do not …, Always …, You can …, Wear shorts … ".* I found the Respondent exercised a high degree of control over the Claimants in how they carried out leafletting and that this was not just a 'Guide' as suggested by Dr Crilly.

64. I found that there was no suggestion in the email from Mr Bell that this was only a "guide". The email set out clear instructions with very specific instructions on how to distribute the leaflets, what they must wear when leafletting, and they were told how to carry out the activity.

65. They were also told they must get rid of all of their leaflets. Each actor was given a pile of 70 leaflets, and they were told not to stack them in piles in shops, that they must hand out the flyers to individuals. They were told not to take their lunch break until they had finished handing out their leaflets. None of this evidence was disputed, and I found that this was how the leafleting activities took place in that both Claimants were given specific instructions and costumes to wear when leafletting.

66. I found that Dr Crilly exercised a high degree of control over how the leafletting activities were carried out by both Claimants in order to distinguish his firm from student productions, and to market his production as being a commercial level production.

Providing their services personally and right of substitution

67. I found that the services provided by the Claimants to the Respondent had to be provided personally. Acting in the roles the Claimants had been given had to be carried out by them personally, and so did leafletting and striking, and I found they could not send in a substitute for any of these services. This was also evidenced by Ms Graham asking for approval for some days as 'N/A' prior to taking up the role as referred to above.

68. On cross examination when Dr Crilly was asked what would happen if an actor, or say one of the Claimants, was not available for some reason on a given day and he confirmed that they would have to personally inform him and he would arrange for one of the directors to step in and perform the role to cover for the actor. Dr Crilly also admitted that an actor wouldn't be required to send in a friend as a replacement for themselves if they were unavailable. He said it was a "moot point" in a company of actors, and said the previous year, when the

leading lady lost her voice, he found someone to read in the part and the actress didn't have to find a replacement.

69. Mr McGuire gave evidence, that whilst they could audition for other roles with other productions during the Festival Period, it was only permitted if they gave notice to him that they would be unavailable for certain rehearsals.

70. However, Mr McGuire gave evidence that they were not allowed to miss shows of the Respondent for auditions in other shows or to undertake other paid work during the Festival Period. Mr McGuire said that the Respondent told them to treat Festival as work and to prioritise it. He also gave evidence, that Simon Bell told him in his audition in 2019 that if he accepted a role at the festival, they expected him to fulfil the obligation and not accept other offers, barring "getting cast in a Steven Spielberg movie". I therefore found that during the Festival Period they could not take up work with other organisations.

71. It was not in dispute during the hearing that some new directors of the Festival were paid although Mr McGuire did not know what the terms were. He also said there was no scope for them to negotiate their terms or the rate of their pay i.e., the £50 pounds per week, and I found the Claimants were not able to negotiate their rates of pay.

72. Mr McGuire gave evidence that the interpretation of his roles would be performed as directed and they were not able to make any major changes in accordance with the norms of conventional theatre.

73. Dr Crilly admitted during cross-examination that generally during rehearsals the actors followed the direction of the director, and from this I found it was not like a student play where improvisation could take place and the interpretation of the role would be down to the individual actor, but instead they had to follow the direction of Dr Crilly on the interpretation of their roles.

74. Dr Crilly also admitted that actors were expected to learn their lines prior to the production starting. He said it was impracticable if the rehearsal periods were spent reading lines. He asserted that it was not 'an expectation or directive,' in reply to cross examination on this issue but I found that the words used [P74-75] in the invitation document denoted both clear expectations and, to the contrary, was a directive to the Claimants when it said: -

    ".. make sure you know as much of both plays when you arrive…"

    and,

    "The rehearsal periods are for rehearsing – not line bashing – and it will slow the process down if you're not up to speed.'

75. Dr Crilly, in cross-examination, admitted that actors were required to help with other aspects of the Festival as well as acting, and Dr Crilly admitted that "everyone does whatever needs to be done to get the event to happen" and

that there was a "team ethic… to do everything required for the event to take place".

Props and Receipts

76. I found that all costumes and props were provided to the Claimants and if a new piece of costume was required, such as a new pair of shoes or a prop for a performance, whilst the Claimants or others may purchase them whilst in town they would keep the receipt and would be reimbursed by the Respondent.

HMRC review

77. Dr Crilly [Para13 WS] referred to an investigation by HMRC's Small Business Compliance Team wherein they found that the status of the actors was that of 'volunteers.' However, I was not assisted by those findings by HMRC.

Submissions

78. I read, but do not repeat here, the written submissions by Counsel for the Claimant and the Respondent.

The Law

79. S.230(3)(b) of ERA 1996 defines as a 'worker' an individual who has entered into or works under:

> a. a contract of employment; or
> b. any other contract, whether express or implied and (if 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.

80. In the leading authority of **Uber v Aslam [2021] UKSC 5,** it was stated that:

> "41. Limb (b) of the statutory definition of a "worker's contract" has three elements:
> (1) a contract whereby an individual undertakes to perform work or services for the other party.
> (2) an undertaking to do the work or perform the services personally; and
> (3) a requirement that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual."

81. Although a limb (b) worker is defined in the legislation Lady Hale stated in **Bates van Winkelhof v Clyde & Co LLP and anor 2014 ICR 730, SC** that 'there can

be no substitute for applying the words of the statute to the facts of the individual case'.

82. It has been established in various authorities that in addition there is some degree of mutuality of obligation as a requirement for "limb "(b)"" workers' to be established. Whether this a freestanding test or whether it falls within the three tests set out and affirmed by **Uber** is the subject of some debate but in any event mutuality of obligation is a requirement for "limb "b"" workers.

Is there a Contract of Service?

83. In the recent case of **Plastic Omnium Automotive Limited -v- P Horton [2023] EAT 85** the central issue of whether there was a contract of service was addressed. It referred to HHJ Taylor in **Sejpal v Rodericks Dental Ltd [2022] EAT 91:** and said that: -

'the way through that complexity is, in my view, and as advocated by HHJ Taylor in Sejpal: to adopt a structured approach to the application of the words of the statute: -

"10. Accordingly, for an individual (A) to be a worker for another (B) pursuant to section 230(3)(b) ERA: A must have entered into or work under a contract (or possibly, in limited circumstances … some similar agreement) with B; and A must agree to personally perform some work for B. However, A is excluded from being a worker if:

a. A carries on a profession or business undertaking; and
b. B is client or customer of A's by virtue of the contract."

84. The decision in Sejpal was considered in the EAT, by **Mrs Justice Eady in Catt v English Table Tennis Association Ltd and others [2022] EAT 125.** In that decision Eady P said, when considering worker status, there must be a focus upon whether there was a contract between a Claimant and putative 'employer' through which the former undertook to perform work or services for the latter and Eady J held that the Tribunal in that case had not focussed on that key issue, instead examining questions of vulnerability, subordination and dependency. While relevant, those issues should not distract from the key issue of whether there was a contact between the parties at all. Eady P stated:

"… the primary underlying question will be one of statutory rather than contractual interpretation in each case, there is no substitute for applying the words of the statute to the facts of the individual case (and see per Baroness Hale of Richmond DPSC at para [39] Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32.)

85. Judge Eady noted that the EAT in **Sejpal** acknowledged that where there is a contract pursuant to which the individual undertakes to perform personally any work or services for the other party, concepts of integration, control and subordination might assist in determining whether that individual was excluded from being a worker because they carry on a professional business undertaking of which the other party is a client or customer.

86. On the facts of the case in **Catt,** which concerned the employment status of a non-executive director of the English Table Tennis Association Ltd, Eady P considered that the Employment Tribunal's reasoning suggested that it had lost sight of whether there was a contract between the Claimant and First Respondent whereby the Claimant undertook to perform work or services for the First Respondent. Instead, the Tribunal focused on questions of vulnerability, subordination and dependency. Eady P noted that those issues may well be very relevant in some cases and Eady P. observed that there was no dispute that the relevant director held an office whereby he personally undertook his duties for the Respondent organisation on a direct basis. However, there was a dispute about whether or not there was a relevant contract between the parties.

87. She observed that the first issue the tribunal needed to resolve was whether there was a contract between the Claimant and the First Respondent at all, "*that is, whether they had entered into an agreement containing legally enforceable obligations such as to constitute the consideration from each party necessary to create the contract.*'" **(Per Elias LJ in Quashie v Stringfellows Restaurants Ltd [2012] IRLR 99).** She concluded that, in error, the tribunal had failed to provide a clear answer to that question, describing that issue as, *"a necessary first step".* (See paragraph 46).

88. The absence of mutual obligations to offer/accept a minimum amount of work is not incompatible with worker status when the worker is in fact working (see **Somerville [2022] ICR 755).** In **Revenue and Customs Commissioners v PGMOL [2021] EWCA Civ 1370,** the Court of Appeal considered the status of football referees who were engaged under an overarching contract and a contract for each individual match. The Court of Appeal held that a single engagement, i.e., a contract for an individual match, could give rise to a contract of employment if work which had in fact been offered was done for payment.

89. Whilst there is no need for an umbrella 'mutuality of obligation', the nature of the relationship outside of the period the work is being done remains a relevant factor for the Tribunal. In **Windle v Secretary of State for Justice [2016] ICR 721,** the CoA held that:

> "23. … the ultimate question must be the nature of the relationship during the period that the work is being done. But it does not follow that the absence of mutuality of obligation outside that period may not influence, or shed light on, the character of the relationship within it. It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense. Of course, it will not always do so, nor did the employment tribunal so suggest. Its relevance will depend on the particular facts of the case; but to exclude consideration of it in limine runs counter to the repeated message of the authorities that it is necessary to consider all the circumstances.

90. The principle in **Windle** was approved by Lord Leggatt in **Uber** and applied in Johnson.

Was there an undertaking to do the work or perform the services personally?

91. In resolving whether a contract includes an obligation of personal performance is a matter of construction. Just because work is done personally does not mean that there was an undertaking it be done personally as established in **Redrow Homes (Yorkshire) Ltd v Wright 2004 ICR 1126, CA.**

92. In **Pimlico Plumbers Ltd and anor v Smith 2018 ICR 1511, SC** the issue of personal service was analysed. It was said in that case that to qualify as a "limb "(b)"" worker, S had to have undertaken to "perform personally" his work for the company and it was posited that it was helpful to assess the significance of S's right of substitution by reference to whether the dominant feature of the contract remained personal performance on his part, and **James v Redcats (Brands) Ltd [2007] I.C.R. 1006, [2007] 2 WLUK 531 applied, as did Jivraj v Hashwani [2011] UKSC 40, [2011] 1 W.L.R 1872.[2011] 7 WLUK 798.**

Was there a client or customer exception?

93. Among other things, the question identified in **Market Investigations Ltd v Minister of Social Security 1969 2 QB 173, QBD** was this: is the person performing the services under the contract in business on his or her own account?

94. The status of the other party to the contract must be that of 'client or customer' if the exclusion is to apply under the definition set out for "limb "b"" workers. In **Hospital Medical Group Ltd v Westwood 2013 ICR 415, CA, HMG Ltd** the employment tribunal rejected W's argument that he was HMG Ltd's 'employee' but went on to hold that he was a 'worker' under s.230(3)(b) ERA on the basis that he was engaged to perform work personally for HMG Ltd and furthermore, HMG Ltd was not a 'client or customer of any profession or business undertaking' carried on by W. The EAT upheld the tribunal's decision.

95. On further appeal by HMG Ltd, the Court of Appeal observed that the tribunal had clearly found that W was in business on his own account when he contracted with HMG Ltd. The crucial finding, however, was that that HMG Ltd was not W's 'client or customer'. It was not just another purchaser of W's medical skills. Furthermore, W was clearly an integral part of HMG Ltd's operations, even though he was in business on his own account — for example, he was referred to as 'one of our surgeons' in the company's marketing material.

96. In reaching this conclusion, the Court of Appeal rejected HMG Ltd's submission that a party must be a customer or client if it contracts with an individual who is in business on his or her own account. Such an interpretation would effectively

exclude all people in business on their own account from being workers. If Parliament had intended that result, it would have said so.

97. The EAT noted in **Manning v Walker Crips Investment Managements Ltd [2023] EAT 79,** that the decision in **Westwood** made clear that the client or customer element is an additional necessary ingredient of the statutory question, so that it is not sufficient that someone is genuinely self-employed or carries on a business undertaking. It stated almost the same considerations as arise in deciding whether someone is an employee will apply but with the boundary pushed further favour of the worker.

98. The EAT went on to say that a decision of HMRC on the question of whether someone is self-employed for tax purposes cannot displace the primary task of the tribunal to find facts and decide for itself whether those facts, viewed realistically, mean that someone makes the specific terms of the statutory definition of worker.

99. In **Pimlico** it was said there was tight control over him, as reflected by its requirement that he should wear a branded uniform, drive its branded van, carry its ID card and follow the administrative instructions of the control room. The strict terms as to when and how much it was obliged to pay him was at odds with his being a truly independent contractor and that the tribunal was entitled to conclude that the company could not be regarded as S's client or customer.

100. The EAT in **Johnson v Transopco UK Ltd [2022] ICR 691** likewise placed importance on the 'integration' factor:

> "85. What mattered was the factual image presented, and whether this was compatible with the respondent being a client or customer of the claimant. In cases such as Westwood, Pimlico Plumbers and Uber the descriptions of integration given by the operators to customers was a pointer to worker status."

Applying the Law to the Facts

Is there a Contract of Service between the parties?

101. I found that the terms of the Respondent engaging the First Claimant, were, as set out in the email of the 7 April 2022, that the Respondent offered to him free accommodation, £50.00 a week with all expenses paid on provision of receipts.

102. I found that the terms of the Respondent engaging the Second Claimant, were that the Respondent offered to pay her £150.00 a week with all expenses paid on provision of receipts.

103. I found that there was an exchange of emails between both Claimants and the Respondent that reflected the above offer and acceptance of the terms set out which amounted to legally enforceable obligations, and the passing of consideration necessary to create a contract. There was also an intention to

create legal relations. Finally, there was a legal obligation on the Respondents to pay the Claimants a fixed amount per week in return for the Claimants providing the acting services that they signed up for.

104. I found that a Contract of Service was formed between the Claimants and the Respondent. I deal below in more detail with why I found this was a Contract of Service and not a Contract for Services.

105. During cross-examination both Claimants said they did not think they could be sued upon leaving but this would have led to the absurd result that there was no binding contract between the parties. In finding there was a contract between the parties I had regard to the fact that the corollary of the suggestion of there being a contract between the parties would mean that the Claimants' could have provided their services, then not been paid, and have had the accommodation withdrawn, but with no legal remedy. This would be an absurd conclusion to draw, and I found there was a legally enforceable Contract of Service between the parties.

Was it a Contract to perform work or services personally for the Respondent?

106. I found the contract between the Claimants and the Respondent was a contract to perform work or services personally for the Respondents. I did not find that the findings of the Revenue dated 1 October 2018 were relevant to my determination of this matter in accordance with the case above of **Westwood.**

107. Although the Respondent had taken great care to describe the £50 or £150 paid to each Claimant as "expenses" it fell to me determine the "true agreement" as held in **Uber** between the parties and not what was set out in documents created by the Respondent. As my attention is focussed on the substance of the relationship, the fact that the emails dated 7 April 2022 asserted that *"£50/week – it is of course not a wage, but it's something towards your expenses"* is not determinative and I found that the joining email was not sufficient to preclude worker status.

108. I set out below why I found the Claimants had worker status.

The relationship between the parties

109. When determining the "true agreement" between the parties, I had regard to the following matters all of which I found indicated worker status: -

109.1 The Respondent had a significant degree of control over the Claimants. This was demonstrated by the fact Dr Crilly become so personally offended Ms Graham would not follow his direction during rehearsals that he held this against her and as I found, dismissed her because ultimately, she chose to inform a Director Matthew Parker, she had Covid

and not him. This demonstrated the degree of control he did exercise over her. In an email dated 3 August 2022, Dr Crilly cited her failure to help with 'striking' and her failure to notify him of her positive Covid-19 test as grounds to "replace [her] in the production". In the subsequent email from Dr Crilly sent on 4 August 2022, Dr Crilly complains of Ms Graham "ignor[ing] me, refusing eye contact, refusing to sing in Dream music rehearsals … and worst of all, absenting yourself from the Festival and relying on the grapevine for me to find out what was going on" [P 80]. I found that if she was truly self-employed or a volunteer it wouldn't matter to Dr Crilly if he was personally advised or not of the fact that she was ill, or whether she did or did not make eye contact with him when he spoke to her.

109.2 Dr Crilly also took great umbrage at the fact she did not do as much work as he perceived others did when the striking activities took place. Dr Crilly admitted in his evidence that he oversaw the process deciding "what goes in the van first". The whole cast were expected to help with striking, and it was evidenced by the fact that when Dr Crilly criticised Ms Grahams activities during striking that she felt it necessary to defend herself and tell him what she had done and she clearly felt she had to follow his direction on striking and that he expected her to [p120]. I did not find this level of control exercised by Dr Crilly over Ms Graham consistent with the Second Claimant being a volunteer, and this level of subordination akin to that of a worker.

109.3 Dr Crilly admitted that the Claimants could not send in replacements if they were unavailable for rehearsals or productions. He set the times of the rehearsals and I found that they generally had no latitude to change the rehearsal times and were under Dr Crilly's control on this. Dr Crilly admitted on occasion he would change the timings of the rehearsal at the last moment, and they would be expected to comply with this.

109.4 The Claimants had very limited say in how they carried out the performances. The performance times were all fixed by Dr Crilly, and actors arrived at around 6.45pm and each show lasted around 2 hours, starting at 7.30pm. The Claimants were expected to turn up and they were expected to act as directed.

109.5 The Shows were ticketed, and each Show ran for 6 nights on the allocated week(s). The Claimants could not say they only wanted to act for 3 nights, and not the full 6 nights, and Dr Crilly admitted in cross examination that if they said as much, he would take steps to replace them.

102.9 The Claimants were required to ask for permission in order to be absent or unavailable on any days during the rehearsal period [P77]. Even though the Claimants could ask to be absent or tell the Respondent that they may have difficulty attending a rehearsal, Dr Crilly would then arrange for someone to read in for them. In particular they were not

allowed to send in a substitute. I found the ability of the Claimants to say they were not available to attend rehearsals to be the exception to the rule and on the whole, they were expected to turn up and personally perform the role. In any event in the case of **Uber** the drivers could choose when they wanted to start working and their hours, and so this issue was not ultimately determinative in this case as it was not in **Uber.**

109.6 During rehearsals they were under the control and direction of Dr Crilly. This was evidenced by Dr Crilly becoming angry towards Ms Graham for her seemingly not wanting to follow his personal direction and control instead preferring to speak to Matthew Parker and as evidenced by his email to her on this topic on the 4 August 2022 [P121].

109.7 Both Claimants had to distribute leaflets twice a week, with all the casts. As admitted by Dr Crilly in cross examination, "that was the agreement". Even when leafleting, as can be seen in the email from Simon Bell dated 27 June 2022, there were strict directions on how and when 'to leaflet' and that the Claimants were to "Always leaflet in FULL costume" [P 117]. There is no suggestion in the email from Mr Bell that this was a "guide". The email set out clear instructions and by the Respondent to the Claimants about exactly how they should distribute the leaflets and what they must wear. This demonstrated the high degree of control exercised by the Respondent over the Claimants and denoted subordination typical of worker status.

109.8 Whilst working for the Respondent the Claimants had to work exclusively for him. This was set out in the witness statement of Mr McGuire and was not in dispute at the hearing.

109.9 I found there was a high degree of integration of the Claimants into the Respondents business in that they had to, for example wear supplied costumes, and ticket, i.e., market the Respondents business in exactly the way the Respondent directed. In particular Dr Crilly admitted this was very important to him in order to distinguish his company from what he called 'student productions.' This had striking corollaries with the case of **Uber** where the drivers had to wear the Respondents uniform and follow its procedures.

109.10 Mr McGuire had to find, arrange, compose and practice music to be performed in the shows and to teach this music to fellow cast members when necessary (KMWS [10]). This was not challenged in Mr McGuire's evidence and showed how Mr McGuire even between his other duties was fully immersed in the Festival.

109.11 Dr Crilly, in cross-examination, stated that actors were required to help with other aspects of the Festival other than acting, Dr Crilly's admitted that that "everyone does whatever needs to be done to get the event to happen" and that there was a "team ethic… to do everything required for

the event to take place". This was compelling evidence of the amount of integration of the Claimants into the operations of the Festival.

109.12 The Claimants' non-performance of their duties could, and did, lead to draconian penalties as demonstrated by Ms Grahams removal by Dr Crilly. The level of deference demanded by Dr Crilly of Ms Graham effectively lead to her being disciplined for what he seemed to see as insubordination and denoted control and subordination.

109.13 All costumes, equipment and props were provided by the Respondent to the Claimants and this again denoted the level of integration of the Claimants into the Respondents business.

Personal performance

110. The obvious nature of an acting role is that you personally perform that role. On the issue of personal performance of the services by the Claimants there was an obvious inherent tension in the Respondents case that they were volunteers but in any event on the evidence of Dr Crilly the Claimants were not entitled to exercise the right of substitution and send someone else in their place at any stage in relation to acting their roles, and also the same was true, significantly, in relation to the marketing duties they carried out. I found this a highly significant piece of evidence about the issue of personal service and it also denoted the level of integration into the Respondents business. Mr McGuire gave evidence that costumes could not be given to "random people" for them to hand out leaflets on his behalf and this was not disputed during the hearing.

111. Dr Crilly in cross examination said it was a 'moot point' in a company of actors as to whether they could send someone in their place but that he would find replacements, if necessary, though there had been no instance of this in 36 years in the Festival. The fact the Respondent would arrange any replacement pointed away from any right of substitution and I find that the Claimants had no such right.

Client or customer exception

112. The final limb of the definition of 'worker' is that the other party to the contract is not a "client or customer" of any profession or business undertaking carried on by the individual. In the present case, the issue therefore is whether the Respondents were clients or customers of the Claimants. I had regard to the Mandy website and whether it could be said that the Claimants were marketing themselves to clients or customers of their services.

113. The question I asked myself, as identified in **Market Investigations Ltd** was whether the Claimants performed the services under the contract in business on their own account? The words of the statute are the appropriate starting point, but as set out in **Manning,** the two key concepts in case law are:

116.1 to what extent is the individual recruited by the principal to work as an integral part of the principal's operations, as established in **Westwood**; and

116.2 what is the dominant feature of the engagement as established in **Bates**?

114. I found the Claimants were an integral part of the productions of the Respondent. They wore all the costumes provided, used all equipment and props, in both acting and leafletting. I found such a high level of integration, which extended beyond the shows themselves, into marketing activities in costumes provided by the Respondent firmly established worker status.

115. Although it may be suggested that the Claimants were marketing themselves to the world in general, for example through the Mandy website, the fact the Claimants were integrated into the running of the Festival suggests that they were not acting 'independently' at any point. In deciding this point, I had regard to the case of **MacAlinden (t/a Charm Offensive) v Lazarov MacAlinden (t/a Charm Offensive) unreported, HHJ Richardson) (17 October 2014).**

116. This was a case concerning actors in a production where it was found that the Tribunal had failed to consider the exception as to whether the Claimant was in business on his own account. That case involved a one-off production with a month's run to a very small audience. I considered that was different to this case where several productions (eight productions in 2021) took place to large audiences with a budget of circa £250,000.00. In **Macalinden** they ran the production on the basis of a 'pay category – profit share' to the actors which did not apply in this case.

117. In addition, I had regard to the fact that the Claimants in this case were not marketing their services on the Mandy website as say a comedian might, as a cohesive show independent of other shows. They were fully integrated into each performance and were an integral part of the whole cast with no right of substitution. Whilst I found that the Claimants did market themselves through the Mandy website they only did so up to a point and no more so than users of LinkedIn, or other websites such as Totaljobs for example do when attempting to find work.

118. I also had regard to the issue of the imbalance of economic power between the parties, i.e., vulnerability of the Claimants as per the Supreme Court's judgment in **R (on the application of Unison) [2017] UKSC 51,** where Lord Reed said,

"relationships between employers and employees are generally characterised by an imbalance of economic power. Recognising the vulnerability of employees to exploitation, discrimination, and other undesirable practises, and the social problems which can result, parliament has long intervened in those relationships so as to confer statutory rights on employees…"

119. In **Autoclenz Limited (Appellant) v Belcher and others (Respondents); [2011] UKSC 41,** Lord Clarke said;

> " … The relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent was agreed and the true agreement will often have to be gleaned from all the circumstances of the case of which the written agreement is only a part. This may be described as a purposive approach the problem. If so, I am content with that description."

120. Taking into account the lack of the relative bargaining power of the Claimants in that they could not negotiate on the £50.00/£150.00 respectively and also the degree of integration into the business of the Respondent I find that this present case is therefore distinguishable to **MacAlinden** where the Claimant's situation in that case was strongly suggestive of a person that was not "integrated into the … theatre production business". In fact that question was in any evented remitted back to the original Tribunal in **MacAlinden** and so I was not assisted by that case on this issue of integration in any event.

121. I also found that the Claimants agreed to provide their services exclusively to the Respondent during the Festival Period and it was not open to them to accept any other acting work that coincided with the Festival.

122. I found it was a fully dependent working relationship with a significant degree of subordination by the Claimants to the Respondents. Having regard to the high degree of control exercised by Dr Crilly over the Claimants I found the idea that the Respondent could be deemed to be a client or customer of the Claimants as highly unrealistic and in accordance with **Westwood,** where it was found that HMG Ltd was not W's 'client or customer', and it was not just another purchaser of W's medical skills, and that W was clearly an integral part of HMG Ltd's operations, even though he was in business on his own account, so here I also find that the Claimants were an integral part of the productions, and marketing activities running throughout the Festival Season, and the Respondent could not be deemed to be a client or customer of the Claimants.

Mutuality of obligation

123. I asked myself whether, during the productions, and when acting, striking and leafletting activities were carried out, whether there was there mutuality of obligation between the parties? I reminded myself that there is no requirement for an overarching mutuality of obligation between the Claimants and the Respondents for a finding of worker status, and that they were not obliged to perform work at every point in time throughout the Festival Period.

124. In deciding this question, I had regard to the case of **Nursery and Midwifery Council v Somerville 2022 ICR 755, CA.** The case concerned the employment status of S, a fee-paid panel member on the NMC's Fitness to Practise Committee, whose work was governed by a services agreement, with a stated status of an independent contractor. An employment tribunal found that S was not an 'employee', since there was no irreducible minimum of obligation,

but that he was a 'worker' – i.e., there was a series of individual contracts that arose each time that S agreed to sit on a hearing and in that case also an overarching contract in relation to S's provision of his services.

125. The Court of Appeal upheld the tribunal's decision, finding that each time the NMC offered a hearing date and S accepted it, an individual contract arose whereby S agreed to attend the hearing and the NMC agreed to pay a fee. The tribunal had found that under each individual contract, S had agreed to provide his services personally, and that the NMC was not the client or customer of a profession or business carried on by S. These findings were sufficient to entitle the tribunal to conclude that S was a worker. In particular they found that the statutory definition of 'worker' did not indicate that there must be some distinct, superadded obligation to provide services independent from the provision of the services on a particular occasion. Furthermore, the fact that the parties are not obliged to offer, or accept, any future work is irrelevant.

126. The Court also considered that this conclusion was consistent with the Supreme Court's decision in Uber where the obligation to provide personal service only arose while they picked up customers in their cabs.

127. I found that in accordance with the cases of **Somerville** and **Uber** that in this case there was irreducible mutuality of obligation between the parties. In reality I found there was almost no time for the Claimants to work for other organisations in any event during the Festival Period as they were mostly working six or sometimes seven-day weeks for the Respondent during the Festival Period. However, the fact they may have had some spare time on some days or attended auditions elsewhere during the Festival Period did not alter the fact that there existed an irreducible minimum of mutuality of obligation between the parties whilst they carried out their duties.

128. I also had regard to the fact that it was not disputed in any event that the Claimants were expected to work on their lines outside of rehearsals, and that Dr Crilly accepted that often directors would suggest that actors get together and go through a scene in their own time as a 'helpful recommendation for actors.' The reality was at all times they were immersed in the Festival even outside formal duties.

129. I found, just as was found in **Somerville,** and **Uber,** that each time their duties began they had to provide personal service, that they could not send in a substitute and whilst the £50.00/£150.00 covered a whole week that was still the agreed wage to be paid for the personal services they had to provide during rehearsals, productions, leafletting and striking throughout the Festival Period and I find that whilst they carried out their duties for the Respondent they were workers.

CONCLUSION

130. I therefore conclude and find that the Claimants were workers under s.230(3)(b) ERA 1996.

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Employment Judge L Brown

Date: …29 August 2023…….

Sent to the parties on: .30 August 2023.

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For the Tribunal Office