Case No: 2302222/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr A Cook

Respondent: 1. Sparring Partners Ltd (Trading as Gymbox and/or MOB45)
2. Ms H Curtis-Nunn

Heard at: London South remotely by CVP
On: 10 May 2024

Before: Employment Judge Heath

Representation
Claimant: Ms E Ikeogu (Lay representative)
Respondent: Mrs H Hogben (Counsel)

RESERVED JUDGMENT

The tribunal has determined the following issues as preliminary issues:

1. The claimant was not an employee or worker as defined in section 230 Employment Rights Act 1996, nor an employee as defined in section 83 Equality Act 2010, in respect of his role as Studio Instructor.

2. The claimant was not an employee or worker as defined in section 230 Employment Rights Act 1996, nor an employee as defined in section 83 Equality Act 2010 in respect of his role as Personal Trainer.

3. The claimant was not an employee as defined in section 230 Employment Rights Act 1996 in respect of his role as Personal Trainer Manager. The claimant was a worker as defined in section 230 Employment Rights Act 1996 and an employee as defined in section 83 Equality Act 2010 in respect of this role.

4. The claimant was not an employee as defined in section 230 Employment Rights Act 1996 in respect of his role as Personal Trainer Educator. The claimant was a worker as defined in section 230 Employment Rights Act 1996 and an employee as defined in section 83 Equality Act 2010 in respect of this role.

REASONS

Introduction and procedure

1. This was a public preliminary hearing to determine the claimant's employment status in respect of four engagements under written agreements with the first respondent.

2. The claimant held roles as:

    a. a Studio Instructor (or Group Exercise Instructor) under an agreement dated 12 June 2019;

    b. a Personal Trainer under an agreement dated 6 March 2020;

    c. a PT Manager under an agreement dated 6 March 2020;

    d. a PT Educator under an agreement dated 1 September 2021.

3. The claimant brings claims of unfair dismissal against the first respondent, direct sex discrimination against both respondents, and an unauthorised deductions from wages claim against the first respondent. In respect of the discrimination claim the tribunal is to determine whether he was an employee for the purposes of the Equality Act 2010 ("EqA"). In respect of the unfair dismissal claim, the tribunal is to determine whether he was an employee within the meaning of section 230 of the Employment Rights Act 1996 ("ERA"). In respect of the wages claim, the tribunal is to determine whether he was either a worker or an employee within the meaning of section 230 ERA.

4. Employment Judge Curtis set out the issues in the case in a Case Management Summary following a private preliminary hearing on 7 November 2023. He also made case management orders for the preparation of a public preliminary hearing to determine employment status. He also made a deposit order in respect of the discrimination claims, which I have dealt with in a separate document. A public preliminary hearing was listed for 26 February 2024, which was not effective because of the claimant's representative's ill health.

5. I was provided with a 202 page bundle, witness statements from the claimant and the second respondent (who I will refer to by name from now on) and written submissions from the respondents. At the hearing I dealt with issues relating to the deposit order first. I heard evidence from both witnesses who were cross-examined, and I heard oral submissions from both representatives. During the course of closing submissions Ms Ikeogu conceded that the claimant was engaged on a self-employed basis in respect of the Studio Instructor role, but maintained that he was employed in the other roles. Time did not allow me to give an oral decision, and so I reserved the decision.

The facts

6. The first respondent operates a chain of gyms and fitness studios. Ms Curtis-Nunn is a Group Fitness Director who is based at the first respondent's head office, and her role includes managing a team of studio managers and trainers, on-boarding these fitness professionals, overseeing their contractual terms and paying them for their services. She set out in her witness statement that a key part of her role was to make decisions on how the first respondent engages individuals to provide services.

7. The claimant is a fitness professional. Prior to his engagement with the first respondent he had worked as a fitness class instructor and fitness trainer in self-employed capacities.

Studio Instructor role

8. On 12 June 2019 the claimant entered into a service agreement in respect of the Studio Instructor role at the first respondent Westfield gym. He had "auditioned" for this role shortly before this and was engaged. The first respondent provided him with a pro forma "Contract for Services Agreement" which he signed freely.

9. The agreement included the following terms:

    a. Clause 2e) "*The Agent will use his / her own initiative in how the Services are to be provided and will have flexibility as to the hours worked, as far as reasonably possible and as agreed with the Company"*.

    b. Clause 2h) "*The Company and the Agent declare and confirm that it is the intention of the parties that the Agent will have the status of a self-employed person and will be responsible for all income tax liabilities and national insurance or similar contributions in respect of his / her fees and accordingly the Agent hereby agrees to indemnify the company in respect of any claims that may be made by the relevant authorities against the Company in respect of income tax and national insurance or similar contributions relating to the Agent's services under this Contract for Services. For the avoidance of doubt, this Contract for Services will not give rise to a contract of employment between the Company and the Agent. The relationship between the parties is that of an independent Agent, and nothing in this Contract for Services will be construed to create an employment, agency, joint venture or similar relationship*."

    c. Clause 2i) "*The Agent may, at his/ her discretion send a substitute to perform the Services. The proposed substitute must be an appropriately qualified and experienced substitute from the Gymbox or MOB45 cover list and such substitute will be subject to the same terms and conditions as the Agent. This right to send a substitute is unfettered and unlimited and agreement of the Company is not required under any circumstances*".

d. Clause 4a) "*The Agent is free to undertake other Contracts for Services for other parties at any time, either before, after, or concurrently with this Contract for Services*".

e. Clause 7: "*Either party will have the right at any time to terminate this Service Agreement by giving due notice as detailed in Schedule 1.*

In addition, the Company will have the right to terminate this Contract for Services at any time by summary notice without any payment in compensation in the event of the Agent:

a) Being in material or persistent breach of any of the terms of this Contract for Services.
b) Having a bankruptcy order made against him / her or making any arrangement with his / her creditors or having an interim order made against him / her.
c) Unprofessional behaviour; persistently and willfully neglecting or becoming incapable for any reason of efficiently performing the Services, including a failure to remedy any fault in Services provided within a reasonable period of time of being notified of that fault;
d) Being late for a class more than twice; or
e) Doing any action manifestly prejudicial to the interests of the Company or which may, in the opinion of the Company, bring it into disrepute."

10. There was no obligation on the first respondent to provide the claimant with any work. The first respondent issued class timetables to its members every month, which were provided to its bank of Studio Instructors, of which the claimant was one. Studio Instructors would notify the first respondent via app which classes they wished to run. The first respondent would then assign the classes to respective Studio Instructors. A timetable would be drawn up, which showed which studio Instructor would be running which class. The Studio Instructor would invoice the first respondent each month for the classes they had run, and the first respondent would pay them at a set rate per class.

11. It was agreed by the claimant that the right to send a substitute was unfettered, as per the agreement. The only stipulation would be that the substitute was suitably qualified to deliver the services. Substitutes could be arranged via an app. The claimant availed himself of this facility on a number of occasions. At the relevant time, the first respondent had around 600 individuals who could cover classes.

12. The studio instructor could also give two weeks' notice that they would not be running a class. Again, the claimant availed himself this on a number of occasions.

13. In terms of the content of each class, the Studio Instructor had complete freedom to design and deliver the content, provided it was in scope of the class. For example, an Ashtanga Yoga class should not feature a different form of yoga.

14. The understanding of the claimant, and, on the evidence, all other Studio Instructors engaged by the first respondent, was that he was engaged on a self-employed basis. He accounted to HMRC in respect of tax and national insurance on this basis. He was able to, and occasionally did, work for others. On 13 March 2020, in the early days of the pandemic, Ms Curtis-Nunn emailed him to say she was researching some action Studio Instructors may wish to take as "a self-employed person" in the light of pandemic related issues. He responded to say he would be grateful for any information "about self-employment". There was no question of him, or any other of the Studio Instructors, coming under the furlough scheme.

Personal Trainer role

15. On 6 March 2020 the claimant and first respondent entered into a written agreement for the "Provision of Personal Training Services". The agreement included the following terms:

    a. Clause 2.2: "*For the avoidance of doubt, the PT can work elsewhere as a personal trainer as long as the PT notifies the Company in advance and this does not impose on their ability to provide the Personal Training Services under this Agreement*".

    b. Clause 2.3: "*The PT shall provide the Personal Training Services and it any Additional Services to the Company and its applicable Members and/or Guests in accordance with this agreement from the date of this agreement.*"

    c. Clause 5.1: "*In consideration of the provision of access to a Club by the Company, the PT shall pay the Premium and the Monthly Licence Fee. The PT may, at its option, pay the Monthly Linked Rent and the Company will provide the PT access to each of the Clubs set out in Part B of Schedule 2*."

    d. Under Clause 8 the Personal Trainer shall indemnify the company for any loss, liability for costs incurred because of a breach of the terms, and shall ensure that insurance policies were taken out to cover such liabilities.

    e. Clause 11.1 "*This agreement constitutes a contract for the provision of services and not a contract of employment or a contract of engagement as a worker and accordingly the PT shall be fully responsible for and shall indemnify the Company for and in respect of*" income tax, national insurance and Social Security contributions and other liabilities.

16. Essentially, the Personal Trainer pays a fee to the first respondent in order to carry out training sessions at one of their gyms. The Personal Trainer

would have access to the first respondent's members and could contact them directly to arrange personal training sessions with them directly. The claimant was free to agree his own content and pricing for these sessions (I accept Ms Curtis-Nunn's evidence that there was no minimum price. There was no contractual provision for this, no documentary evidence supporting it and it appears to run counter to the general terms of the agreement). The claimant would keep all fees paid by those he provided personal training to. If he did not arrange sufficient sessions, he would be liable to make a loss. He would be free to run as many or as few training sessions as he wished. There was no specific provision for substitution in the contract. It is difficult to see how a substitution arrangement would have worked, as the claimant appears to have negotiated and provided personal training to customers directly. Any question of substitution would more probably have been a matter for the Personal Trainer and the individual being trained.

Personal Trainer Manager Role

17. Under Schedule 1 (Additional Services) of the Personal Trainer agreement of 6 March 2020 the claimant entered into a written agreement to provide the additional services of a Personal Trainer Manager. The schedule set out the additional services to be provided.

18. Under the heading "services to be provided" the following was set out:

> *"We expect the services to be, as follows:*
> *• Oversight of the PT team in the PT Manager's Home Club and responsibility for the delivery of all personal training services provided;*
> *• Assist the Company to adhere to the club budget (the "Budget") for the PT Managers Home Club;*
> *• Attendance at least 2 or more recruitment days held at a company club; and*
> *• Attendance at a monthly PT Manager meeting to include provision of feedback on your delivery of the Additional Services.*
>
> *Each month the Club Manager and/or the Group Personal Training Manager will notify the PT Manager at least two days in advance of the recruitment days and the monthly PT Manager meeting for that month."*

19. Under the heading "Core hours commitment (per calendar month)" the following was set out: "*The exact hours to be provided to be agreed in advance between the PT Manager and the Group Personal Training Manager".*

20. Under a heading "Additional Payment Terms" it was set out that if the "PT Managers Home Club" was achieving budget on successful delivery of additional services a fee was payable at a rate depending on which tier the club fell into. A lower amount was payable if the home club was not achieving budget. The Personal Training Manager would invoice the first

respondent at the end of each month for additional services, and would be paid for undisputed invoices.

21. Under the heading “Line Manager” it was set out that this would be the Club Manager of his Home Club. I accept the evidence of Ms Curtis-Nunn that the claimant was not overseen, or managed, in any particular way in how he carried out this role.

22. The parties did not provide a significant amount of evidence about this role, it appeared agreed between them that this was a role which required him to act as a sort of coordinator of the Personal Trainers within the Westfield gym. He was given certain tasks in respect of recruiting and onboarding Personal Trainers and providing them with contracts. The contract does not provide for substitution, and Ms Curtis-Nunn accepted that there was no arrangement for substitution. The evidence was that the remuneration for this role took the form of deductions being applied to the claimant’s premium in respect of his Personal Trainer role. The number of Personal Trainers within each club would dictate the level of remuneration. The claimant was provided with an email address which was along the lines of “westfieldtrainermanager@”. While he performed the role, only he had access to it. If the claimant did not carry out the services, the services would not be done would be carried out by someone else within the first respondent. I also accept that there was no obligation on him to perform these services, and that if he did not do them he simply would not be entitled to invoice and be paid for services.

<u>Personal Trainer Educator role</u>

23. On 1 September 2021 the claimant and the first respondent entered into a written agreement for provision of further services. The agreement in the bundle is in identical terms to the Personal Trainer agreement with the identical additional services under schedule 1 for the Personal Trainer Manager role.

24. However, it appeared agreed between the parties that the claimant was to carry out additional tasks which involved delivering training to other Personal Trainers engaged by the first respondent on how they would fulfil their roles. This was carried out over two days each month. Ms Curtis-Nunn’s evidence was that it was entirely down to the claimant to arrange when these days would be. The claimant’s evidence was that, in practice, he was instructed to hold these training days in the fourth week of every month. There is no documentary evidence which assists in determining which account is accurate. The overall probability is that the “recruitment” of Personal Trainers on a rolling basis would mean that some sort of consistency in terms of dates is likely. I am satisfied that there was some sort of arrangement, possibly not a particularly formal or inflexible one, arose whereby the claimant carried out this role on reasonably regular days of the month.

25. In terms of content, the content of the education delivered to the Personal Trainers was designed by the first respondent. The respondents accepted that there was no written or de facto substitution arrangement applicable

to this engagement. However, if the claimant was unable or did not wish to carry out the tasks the first respondent would simply get someone else to carry out the work and the claimant would not invoice and would not be paid for it.

Other matters

26. I accept the evidence of Ms Curtis-Nunn that no uniform as such was worn by the claimant. He simply had to wear exercise clothing identifying that he was a personal trainer, and did not wear first respondent branded clothing. There is no reference to uniform within any of the contractual documentation or other documents within the bundle.

27. Ms Curtis-Nunn's evidence was that, very much in broad brush terms, self-employed contractual status was the norm in the fitness industry. This was put to the claimant in cross-examination, and he responded that it was "50/50". He accepted, however, that he had been engaged in the fitness industry, both before and after his engagements with the respondent, on a self-employed basis. On this basis I accept that those who run exercise classes and work as personal trainers within the industry largely do so on a self-employed basis. There is insufficient evidence to determine on what basis those who perform tole such as the Personal Trainer Manager and Personal Trainer Educator roles do so.

28. On 4 October 2022 a staff member of the first respondent made a complaint, essentially, of bullying and other unacceptable behaviour by the claimant. The truth or otherwise of these allegations is irrelevant for me in determining issues of employment status, and I make no findings in relation to these allegations. However, I observe that the claimant was invited to a hearing on 23 January 2023 in which these allegations were put to him, he was given an opportunity to put across his account and his engagements were terminated in writing on 27 January 2023. He was given the opportunity to appeal this finding, which was upheld.

The law

29. Section 230 Employment Rights Act 1996 ("ERA") provides:

> *(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
>
> *(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*
>
> *(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*
>
> > *(a) a contract of employment, or*
> >
> > *(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual*

undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract; and "employed" shall be construed accordingly.

30. Section 83 EqA sets out that employment means "*employment under a contract of employment, a contract of apprenticeship or a contract personally to do work*". The Supreme Court has held that the definition of an employee under the EqA is essentially the same as a worker under section 230(3)(b) of the ERA (*Pimlico Plumbers Ltd v Smith* [2018] IRLR 872 and *Uber BV and others v Aslam and others* [2021] IRLR 407).

31. In determining whether the claimant is a worker, the classic starting point is the test set out in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497:

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

32. There is substantial case law on what amounts to an employment relationship under section 230(2) ERA (and its predecessors).

33. In *Express & Echo Publications Ltd v Tanton* [1999] IRLR 367the Court of Appeal held that: (1) the tribunal should establish what the terms were of the agreement between the parties, and that is a question of fact; (2) the tribunal should then consider whether any of the terms of the contract were inherently inconsistent with the existence of a contract of employment, (3) if there are no such inherently inconsistent terms, the tribunal should determine whether the contract is a contract of service or for services, having regard to all the terms.

Contract of employment

34. It is impossible to set out a definitive set of criteria for what constitutes an employee, and the authorities advise against a checklist approach. A determination should be made on the accumulation of relevant detail. However, the case law suggests that determination of the issue is likely to

focus on various indicia of employment, the presence or absence of which individually is unlikely to be determinative.

a. Was there mutuality of obligation in that the employer was obliged to provide work and the worker to do it?

b. Was the worker given an unfettered right to send a substitute to perform the work?

c. What degree of ultimate control did the employer hold over the worker (it being recognised that skilled workers often hold a large degree of autonomy in how they actually perform the tasks)?

d. To what extent was the worker integrated into the business?

e. What was the remuneration and how was it paid?

f. Did the worker invest in his or her future and, did they share in the opportunity for profit and loss?

g. Did the worker supply their own tools or equipment?

h. How did the parties categorise their relationship?

i. Was the worker tied to one employer?

j. What was the traditional structure of the industry?

k. What was the tax and national insurance situation?

l. How was the arrangement terminable?

35. The irreducible minimum for a contract of employment is:

a. Control;

b. Personal performance; and

c. Mutuality of obligation.

Worker contract

36. In *Uber* the Supreme Court held:

a. Whether a contract is a “worker’s contract” within the meaning of legislation designed to protect workers is a statutory question rather than a contractual one.

b. The task for the tribunal is to determine whether the claimant falls within the definition of the worker so as to qualify for the rights irrespective of what had been contractually agreed.

c. The true agreement between the parties would have to be gleaned from all the circumstances of the case, of which the written agreement is just a part. That did not, however, mean the terms of a written agreement should be ignored.

d. Any terms which purports to classify the party's legal relationship to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment are of no effect and have to be disregarded.

e. There is no substitute for applying the words of the statute to the facts of the individual case.

f. In applying the statutory language, it is necessary to view the facts realistically and to keep in mind the purpose of the legislation, which includes protection of vulnerable workers from being paid too little, required to work excessive hours or otherwise being treated unfairly.

g. The greater the extent of control of the worker the stronger case for classifying the individual as a worker employed under a worker's contract.

37. In *Pimlico Plumbers* the Supreme Court held that an unfettered right to substitute is inconsistent with an undertaking personally to perform the work. A conditional or fettered right is not necessarily inconsistent, but whether it is will depend on factors such as the contractual arrangements, the nature of the fetter and the extent to which the right to substitute is in fact practiced. A limitation based solely on the need to show the substitute is qualified to do the work, in the absence of exceptional facts, is unlikely to be inconsistent with personal performance.

Conclusions

Studio Instructor

38. It was conceded that the claimant worked on a self-employed basis under this contract. I consider this was a proper and realistic concession.

39. Focusing on the relevant factors:

a. The contract was clear that there was very minimal control over the claimant in terms of the number of hours worked or how he performed the services. The way the contract operated in practice was in line with the contractual terms.

b. The contract provided for flexibility in how services were provided, and, again, the reality of how it was performed was in accordance with it. The claimant had complete freedom as to the content of the exercise classes, as long as he delivered the exercise discipline appropriate to the class.

c. The parties categorised the relationship itself as one of self-employment.

d. The claimant was responsible for his own tax and national insurance.

e. The contract provided for an unfettered right of substitution. The reality was that this right was genuinely unfettered, or fettered only by the fact that a substitute must be qualified to perform the services.

f. The claimant was free to, and did, work for others.

g. There was no obligation on the respondents to provide work. If the claimant did not want to do the work, he could either send substitute or, if he was able to give two weeks' notice, by giving notice.

h. The one factor potentially pointing in the direction of worker or employment status is the fact that the claimant was put through something akin to a disciplinary process when complaints were made about him.

40. I conclude that there was insufficient degree of control, a lack of obligation personally to perform the services, and a lack of mutuality of obligation here. The quasi disciplinary process is something potentially supportive of some kind of status, but I accept Ms Curtis-Nunn's evidence that this was simply a matter of common fairness in investigating serious allegations and giving the claimant an opportunity to respond.

41. This is sufficient for me to make this determination. However, the evidence pointed towards it being extremely common (if not notorious custom and practice) that those providing similar services within the industry do so generally on a self-employed basis.

42. In the circumstances, I conclude that the claimant was neither an employee nor a worker when performing services under this contract. For the avoidance of doubt, he was not an employee under section 83 EqA.

<u>Personal Trainer role</u>

43. In this role the claimant essentially paid the first respondent a monthly premium which allowed him to use the first respondent's facilities to deliver personal training services to its members.

a. There was very little control indeed retained within the contract or operated by the respondent in how the claimant carried out this work.

b. The claimant was free to charge members whatever he liked and deliver whatever content he agreed with members.

c. There was no obligation on the respondent to provide the claimant with work or for him to do it.

d. The claimant could, in offering as much availability as possible, and setting his own prices, be the master of his own destiny in terms of the opportunity for profit and loss.

e. The claimant was free to and did work for others.

f. The parties themselves categorised their relationship as one of self-employment. The claimant was responsible for his own tax and national insurance.

g. The claimant did not wear a uniform.

h. Apart from using the gym premises, there was no evidence of the claimant being provided with equipment.

44. The absence of any significant degree of control and of mutuality of obligation means that the contract was not an employment contract.

45. The claimant very much appears to have been in business on his own account. The accumulation of relevant detail strongly suggests that the claimant was undertaking to perform work for the first respondent as a client or customer of his profession as a fitness professional. He was essentially renting facilities from them in which to provide personal training to their members.

46. I bear in mind the observations of the Supreme Court in *Uber* about keeping in mind the purpose of the legislation to ensure workers are not being sufficiently remunerated all working excessive hours. However, I note here that this was a contract which enabled the claimant to set his own rates and work as many hours as he wished. There is nothing, having regard to those observations, and viewing how the contract operated beyond the words on the page, to suggest that this contract was anything other than how the parties categorised it and structured their affairs accordingly.

47. In the circumstances, I conclude that the claimant was neither an employee nor a worker when performing services under this contract. For the avoidance of doubt, he was not an employee under section 83 EqA.

<u>Personal Trainer Manager</u>

48. I have found as a fact that there was no obligation on the claimant to perform the services set out in Schedule 1 of the relevant agreement. There was a degree of control in that the schedule set out the services to be provided and prescribed the manner in which some of them were to be performed (attendance at two or more recruitment days and a monthly PT Manager meeting. The first respondent notified the claimant of the days on which these meetings would take place. Nonetheless, the degree of control was not particularly significant. There was no right to substitution and the expectation was that the claimant would personally perform these tasks.

49. In terms of other relevant indicia of employment, I note that Schedule 1 was a schedule to the Personal Trainer contract, and the categorisation of the contract as a self-employed one is the same.

50. The remuneration of the role was by way of discount to the claimant's Personal Trainer fees to the respondent.

51. In terms of integration into the first respondent structure, the claimant had an email address provided by the respondent. He also had a line manager, albeit one that did not carry out a particularly significant degree of line management. He had more of an organisational role within the structure, in that he was coordinating other Personal Trainers.

52. The lack of mutuality of obligation means that the claimant did not enjoy employment status. I do not consider that the degree of control exercised by the second respondent was of a sufficient degree to point to status as an employee. The way the parties characterised the contract as not being an employment contract and the tax arrangements also point away from employment status.

53. However, the slightly greater degree of control, largely set out in the schedule itself, and the integration, to a degree, within the respondent's structure points towards worker status, at least on the two or three days a month the claimant was carrying out the relevant tasks. He was providing services personally (with no right of substitution) to the first respondent but not providing them to the respondent as his client or customer. He was not in business in his own account of providing Personal Trainer coordination services. The first respondent was not a client or customer of his in this regard. He was working for them under a worker contract on the days he performed the services. It follows that he was also an employee under section 83 EqA (but not under the ERA definition).

Personal Trainer Educator

54. I find that there was no obligation to offer the claimant work as a Personal Trainer educator, and no obligation on him to accept it. If he chose not to perform the tasks he simply would not be required to do them, another person could fulfil the tasks and the claimant would not be able to invoice for them.

55. I consider that there was a degree of control, in that training days would, in all likelihood, be towards the end of the month. The content delivered at these events would not have been designed by the claimant – he would deliver the first respondent's content. However, he would not actively have a line manager, and would be given a substantial degree of latitude as to how he performed the role.

56. Again, the role is an add-on to the Personal Trainer role and the contractual documentation is an identical schedule to that of the Personal Trainer Manager role. Again, the parties categorised the relationship as a self-employed one, with the same tax arrangements as all other roles.

57. I find that the lack of mutuality of obligation, and the not particularly significant degree of control in conjunction with the self categorisation and tax position point against employment status. This direction of travel is not sufficiently undermined by the factors which point in the other direction.

58. As with the Personal Trainer Manager role, I do, however, find that the claimant was personally providing services to the respondent. He was not in business on his own account of providing Personal Trainer Educator services to the respondent as his client or customer. He was working for them under a worker contract. It follows that he was also an employee under section 83 EqA (but not under the ERA definition).

The way forward

59. The consequences of this decision, taken together, with my decision on the claimant's application for a reconsideration of the decision to strike out his discrimination claim for non-payment of deposit are these:

    a. I have determined that the claimant was not employed under a contract of employment for any of his engagements. He therefore cannot bring a claim of unfair dismissal.

    b. Although I have made determinations that the claimant was an employee for the purposes of the EqA in respect of his Personal Trainer Manager and Personal Trainer Educator roles, his discrimination claim has been dismissed and I have declined to vary or revoke that judgment.

    c. I have determined that the claimant was a worker in respect of his Personal Trainer Manager and Personal Trainer Educator roles. The claimant is able to pursue a claim for unauthorised deduction from wages as a worker. I note from the List of Issues set out in the Case Management Summary of EJ Curtis sent to the parties on 9 November 2023 that the claimant claims £600 deduction from wages. I am uncertain how, if at all, my above determinations have affected this claim. The parties should note that this is the only claim that will proceed.

60. Without having heard from the parties I am minded to dismiss the unfair dismissal claim, to list this matter for a final hearing with a time estimate of half a day, and to convert the hearing of 10-13 November 2024 to a half day hearing on 10 December 2024 to determine the unlawful deduction from wages claim. I will also make standard case management orders for the disclosure of documents, preparation by the respondent of the bundle, and exchange of witness statements. I stress that the case management orders will be directed towards the wages claim. Disclosure will be confined to this issue and the parties should confine their witness statements to this issue. Unless I hear alternative proposals from the parties within 14 days from the date this judgment is sent out, that is what I will do.

Employment Judge **Heath**
Date: **28 May 2024**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
Date: 30 May 2024
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FOR EMPLOYMENT TRIBUNALS

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/