EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4103476/2023

Preliminary hearing held in Glasgow on 7 and 8 November 2023

Employment Judge M Whitcombe

Mr James Harper	**Claimant**
(1) Red Hot Chilli Pipers Limited **(2) Mr Jay Hepburn**	**Respondents**

JUDGMENT ON PRELIMINARY ISSUES

(1) The claimant was an "employee" for the purposes of section 230(1) of the Employment Rights Act 1996, and similarly worded provisions.

(2) The claimant was a "worker" for the purposes of section 230(3) of the Employment Rights Act 1996, and similarly worded provisions.

(3) The claimant was an "employee" for the purposes of section 83 of the Equality Act 2010.

(4) The effective date of termination was 12 January 2023. Consequently, since no arguments were advanced on reasonable practicability, the following claims must be dismissed because the Tribunal has no jurisdiction to hear them:

a. unfair dismissal;

b. unlawful deductions from wages, including unpaid holiday pay, (whether claimed as unlawful deductions from wages or under regulation 30 of the Working Time Regulations 1998);
c. notice pay as damages for breach of contract.

REASONS

Introduction and background

1. The claimant is a skilled musician and a graduate of the Royal Conservatoire of Scotland. He was formerly a bagpiper with "the Red Hot Chilli Pipers", the band operated by the first respondent. The band plays both traditional pipe tunes and contemporary compositions in a style which it calls "bagrock". The first respondent markets the band as "the most famous bagpipe band on the planet". The second respondent was and is the band's drummer.

2. By a claim form received by the Tribunal on 23 June 2023 the claimant brought complaints of unfair dismissal, discrimination on grounds of sexual orientation and religion or belief, breach of contract in relation to notice pay, unpaid entitlement to paid annual leave and failure to provide a written statement of particulars of employment.

3. This preliminary hearing was arranged to decide preliminary issues of employment status and jurisdictional time limits. Further details can be found in the note and orders following the Preliminary Hearing for case management conducted by EJ Kemp on 23 August 2023.

Issues

Employment status issues

4. Whether the claimant was an "employee" as defined by section 230 of the Employment Rights Act 1996 for the purposes of:
    a. various types of complaint under that Act;
    b. complaints of breach of contract (e.g. notice pay) under the ETs (Extension of Jurisdiction) (Scotland) Order 1994.

5. Whether the claimant was a "worker" as defined by section 230(3) of the Employment Rights Act 1996 and the textually identical regulation 2 of the Working Time Regulations 1998 for the purposes of:
    a. various types of complaint under the Employment Rights Act 1996;
    b. complaints under the Working Time Regulations 1998.

6. Whether the claimant was an "employee" as defined by section 83 of the Equality Act 2010 for the purposes of claims brought under that Act.

Time limit issues

7. Whether the Tribunal had jurisdiction to consider the claims, having regard to the time limits in sections 23 and 111 of the Employment Rights Act 1996, regulation 7 of the ETs (Extension of Jurisdiction) (Scotland) Order 1994 and regulation 30 of the Working Time Regulations 1998 (all containing "reasonable practicability" tests).

8. Whether the Tribunal had jurisdiction to consider the claims, having regard to the time limits in section 123 of the Equality Act 2010 (entailing possible consideration of a discriminatory act extending over a period, and containing a test based on justice and equity).

Concessions and orders by consent

9. In response to my questions during the hearing, the respondent conceded

that the definition of employment in section 83(2)(a) of the Equality Act 2010 was met. The basis of the concession was that the claimant was engaged under a "contract personally to do work". The existence of a contract was not in dispute (at least while the claimant was working), nor was it disputed that the claimant's contractual obligation was to do the work *personally*. This contrasted with the position taken by the respondent at the start of the hearing, when in response to a direct question no concessions whatsoever were made on any issues of employment status.

10. Given the way the notice of hearing and EJ Kemp's order were each framed, I raised with the representatives the implications of the judgment of Ellenbogen J in ***E v X, L and Z*** (UKEAT/0079/20/RN), which would appear to preclude me from deciding that any issues of jurisdiction were better left to the final hearing. Instead, I would be obliged to decide the questions of jurisdiction once and for all at this preliminary hearing, even if to do so fairly would require the calling of evidence which neither side had envisaged to be necessary.

11. The parties reached the following agreement, which provided a route around that problem. I adopted it as a consent order.

    a. Jurisdictional time limit arguments in the claims brought under the Equality Act 2010 would be left to the final hearing. The issues for that hearing would include whether there was a discriminatory act extending over a period, and (if necessary) whether it was just and equitable to hear the complaint out of time.

    b. I would only be asked to decide jurisdictional time limit issues in relation to the claims in which time limits entailed a "reasonable practicability" test. That was because the claimant did *not* argue that it would not have been reasonably practicable to have brought those claims within time. The sole issue in dispute was the effective date of termination ("EDT"). If I accepted the claimant's argument regarding the EDT then the claims were in time and the reasonable practicability

issue did not arise. If I accepted the respondent's argument regarding the EDT then the claimant accepted that the claims were out of time and that the Tribunal had no jurisdiction to hear them.

Evidence

12. I heard oral evidence from just two witnesses, both of whom gave their evidence on oath and were cross-examined:
    a. the claimant, Mr James Harper;
    b. Mr Kevin McDonald, a practising chartered accountant, a piper and an owner and director of the first respondent. He is also the finance director of 5 other companies.

Relative credibility

13. Where their evidence differed, I preferred the claimant's evidence. The claimant came across as an honest and straightforward witness whose evidence was generally supported by the contemporaneous documentation. He dealt confidently and persuasively with the points point to him in cross-examination. In contrast, Mr McDonald's evidence and the instructions given by him to the respondents' representative were not always supported by contemporaneous evidence, and the respondent had failed to provide some important documents that ought reasonably to have been available to them. Examples include the alleged "contractor form" and the full extent of the invoices allegedly sent by the claimant. The failure to produce them undermined the credibility of Mr McDonald's evidence, especially given his qualifications and training. Gaps in an audit trail carry particular weight in those circumstances. Mr McDonald also gave second order hearsay evidence about sums allegedly earned by the claimant for other work, when better evidence could easily have been called if that allegation were true. Overall, the claimant was a more impressive witness than Mr McDonald.

Documentary evidence

14. I was also provided with a joint file of documents running to 392 pages. There had been a dispute about the admissibility of transcripts derived from covert recordings. However, the respondent accepted that the transcripts were accurate and that there had been time to take instructions on them. I refused the respondent's application that they should be ruled inadmissible for reasons given orally at the time.

Relevant facts

15. Many relevant facts were undisputed. Where facts were disputed, I made my findings on the balance of probabilities, in other words a "more likely than not" basis. I will only set out the facts which had a bearing on my decision. It was not necessary to make findings on every disputed fact.

Joining the band

16. The claimant is a musician who studied at the Royal Conservatoire of Scotland ("RCS") from 2013-2018. His main instrument was the bagpipes. The claimant's final exams were in May 2018. By June he had finished most of his academic work but had not yet graduated.

17. While at the RCS the claimant had played at some ceilidhs and undertaken some other performance work under the auspices of the RCS but, overall, he did very little performing while studying. He formed a ceilidh band with other students, but it was by no means professional. Following the completion of the claimant's studies in the summer of 2018 his band was receiving bookings for a maximum of a couple of ceilidhs a month.

18. Through the traditional music scene, the claimant knew someone who played with the Red Hot Chilli Pipers (from now on, "RHCP"). The claimant was recommended to the band. Kevin McDonald contacted the claimant on 9 June 2018 and that led to the claimant's first gig with RHCP – a corporate gig for Heineken at Murrayfield Stadium on 16 June 2018. After that the claimant

was quickly offered more corporate gigs with the respondent.

19. On 22 August 2018 the claimant was sent a spreadsheet of "potential Chilli gigs" for the year from 31 December 2018 to 31 December 2019. The claimant was among the musicians being offered first refusal on the available gigs, to the extent that they fitted with personal circumstances. Mr McDonald wrote, "*For demonstration purposes, I have put all three of you into the diary so you have an idea of the commitment that I am giving to you in terms of gigs and you can also see whether this fits within your own personal circumstances.*" In subsequent years the equivalent communication from Mr McDonald said that "*it was important that you all get a first crack at the gigs*." The inference is that if the claimant wanted to play those gigs, the respondent would be happy for him to do so.

20. At around the same time in August 2018 Mr McDonald asked the claimant about his personal circumstances, whether he could drive, whether he had a partner and what his passions were in life. When the claimant answered "*my life is about music*" Mr McDonald approved. They discussed what would be expected of the claimant, the number of gigs he would fulfil and his manner on stage. The claimant was asked to "*respect the red sporran*", a catchphrase which referred to part of the distinctive on-stage uniform, and which meant that members of the RHCP should respect the gig, respect the performances, be respectful on stage and generally uphold the band's reputation and brand.

21. The claimant was expected to be a "full-time" bagpiper, to do most of the solos, and to be available for all the tours. The claimant found the volume of gigs available to be incredible and exciting, if a little daunting.

22. The main band (sometimes referred to as the "A" band) was fronted by 3 bagpipers. To either side were a guitarist and a bass guitarist. Behind the pipers a drummer played a drum kit and there was also a keyboard player. Occasionally there was also a percussionist. In total there were therefore 7 or 8 positions for musicians in the full band. Additionally, there was sometimes a singer.

23. Sometimes, more than one band would perform under the RHCP name on a given day. The “A band” was the main band. That was the “big band”, with a focus on on-stage performance with a drum kit. It undertook gigs including foreign tours. For corporate events and weddings, it was more usual to book the “B band”, which was slightly scaled down. Sometimes both could be in action simultaneously, with the A band performing a big band gig while the B band did a corporate gig.

24. Towards the end of 2018 the claimant was offered “the full-time gig” in the main band as “Pipes 1”, also referred to occasionally as “lead bagpiper”. Although he was often shown as “Pipes 2” in a spreadsheet used by RHCP internally to plan for gigs, I accept the claimant’s evidence that this did not accurately reflect his musical role. More often than not, the claimant played the main melody. That was usually the role of “Pipes 1”, while the harmony was usually played by “Pipes 2” or sometimes by “Pipes 3”. “Pipes 3” usually doubled up on one of the other lines, either melody or harmony. The claimant normally wore the wireless microphone pack labelled “Pipes 1” and was referred to as “Pipes 1” during sound checks. I do not accept that this was an arbitrary numbering system. I find that it reflected a musical hierarchy among the three pipers.

25. By the end of 2018 the claimant had told his own ceilidh band that they probably needed to find another piper for the few gigs that they had.

26. Once the claimant had honoured pre-existing commitments such as ceilidh gigs with his own band, it was only very rarely that he declared himself unavailable for a RHCP gig offered to him. The evidence was limited to one instance of an agreement to play at a friend’s wedding and another of a clashing family holiday, causing the claimant to miss just two corporate gigs. Otherwise, the claimant accepted all the RHCP gigs that he was offered, including the tours. His perception was that he would not be able to turn down many gigs if he wanted to keep his place in the band, although there was no evidence that any member of the respondent’s management said that in

terms.

27. While the claimant continued to be approached from time to time by other individuals with opportunities for gigs, he rarely accepted them. From late 2018 onwards he only undertook 2 or 3 non-RHCP gigs a year. Mr McDonald accepted that it was a "*stable long-term engagement*" lasting about 4 years.

28. The claimant only had one holiday during his time with the band.

29. The claimant was not provided with any formal contractual documentation, nor did he ask for any. However, Mr McDonald said that musicians who had played with the band a few times would be sent a "contractor's form". Neither a blank example form nor a completed one specifically relating to the claimant was included in the file of documentary evidence. On the balance of probabilities, I find that the claimant was not sent a "contractor's form" if any such form existed at all, and that he certainly did not complete one.

30. The first respondent's position is that it had just 8 employees at the relevant times: the four directors, two drivers and two merchandise sellers. There is, of course, a dispute about the claimant's employment status and similar arguments might be made by other musicians. Leaving that dispute aside, the 8 employees conceded by the first respondent were all paid a monthly salary and all of them were issued with written contracts of employment. The drivers were engaged on "zero hours" contracts.

Hierarchy and roles

31. The claimant understood Kevin McDonald and Willie Armstrong to be his "bosses" in the band. Initially, both also played in the band. Kevin McDonald and Willie Armstrong were and are directors of the first respondent. Mr McDonald used that title in communications. Steve Richmond, the "sound guy" was also referred to as a director. Barry Young, known as "Baz" was the musical director and also the main keyboard player.

32. Mr McDonald was responsible for preparing and coordinating the gig list and sending it out to musicians. He decided which musician fulfilled which role in the band. He also decided the set lists.

33. After performances the claimant received instruction and encouragement from the first respondent's directors Kevin McDonald and Willie Armstrong. Mr McDonald demonstrated to the claimant the way in which he wanted certain things to be done on stage.

Provision of clothing and instruments

34. The first respondent provided the distinctive outfits in which the band performed. Prior to the claimant's first gig with the band Kevin McDonald said to him, "*send me your kilt measurements and I'll get all the gear sorted*". The distinctive black and red RHCP stage uniform is an important part of the brand and consists of a kilt, a red sporran, a shirt, socks, flashes and brogues. The brogues provided to the claimant did not fit well so he wore his own instead, but otherwise all elements of the claimant's stage outfit were provided by the first respondent. There was no freedom to wear anything else while on stage representing the RHCP. The whole of the band wore the same basic kit, except for the lead singer who wore "tartan trews". Mr McDonald wanted "*a brand image rather than an individual image*". It was a way of differentiating RHCP from "other trad bands".

35. The expectation was that the claimant would keep his uniform clean and ironed and that he would wear well-polished brogues. That applied particularly to the pipers. The presentation of stage outfits was an important aspect of the "*respect the red sporran*" motto.

36. The claimant owns his own bagpipes. They are a family heirloom from the 1920s or 1930s which had originally belonged to his grandmother. In his opinion, which is entitled to respect, they are high quality pipes which sound extremely good.

37. However, the claimant was required to use pipes supplied by the first respondent during his performances with the RHCP. He was not permitted to use his own pipes for those performances. The claimant set up the pipes with the reeds that the first respondent gave to him and the chanter that the first respondent gave to him. He wanted to adjust them to sound more like his own instrument, but he was told the way in which it was to be set up and tuned.

38. The claimant did not contribute to the cost of the pipes provided by the first respondent and he was not asked to do so. The claimant estimates that the value of the professional quality pipes provided to him was in the region of £1,000 to £1,200. That estimate was not disputed by the first respondent.

Travel

39. For gigs in the UK, the claimant would meet up with the rest of the band in the Glasgow area, initially in Bellshill and later in Springburn. The band and crew were then transported to the gig in two minibuses. The band travelled in a 9-seater minibus and the crew travelled in a 6-seater minibus with the amps, speakers, and other equipment. The vans carried RHCP branding. The claimant was never expected to make his own way to gigs, but only to the pre-arranged muster point for onward transport by RHCP minibus. The claimant did not and was not asked to make any sort of financial contribution towards the cost of travel.

40. There were different arrangements for touring overseas, but the position was nevertheless that the first respondent covered the costs of transport and made all the necessary arrangements. The claimant's responsibility was limited to getting to the airport. Initially that part (only) was at his own expense, but later a minibus was provided from Bellshill. Flights were organised and paid for by the first respondent. For tours in continental Europe the branded minibuses were taken over separately. For tours in North America cars were hired and the band travelled in groups of 3 or 4. The first respondent covered

the costs of road transport and made the necessary arrangements.

Food

41. For gigs in the UK the claimant was either provided with food before a gig or was given money to get his own. Usually, hot food or other catering was provided by the client and was covered by the rider. If there was no catering, then the band were given money to buy their own food. Ultimately, that money came from the client and was passed on to the band by the first respondent. The arrangements were made by the first respondent.

42. Arrangements were similar on tour. The rider meant that there would either be sandwiches, crisps and the like at the venue, or else the first respondent would give the band money to go out and buy their own food. On tour days without gigs the first respondent paid a food allowance so that band members could sort out their own food.

Tour accommodation

43. Through Mr McDonald, the first respondent arranged and paid for bed and breakfast accommodation while on tour. The cost of that accommodation was not recharged to any members of the band.

Substitution

44. The procedure was that the claimant would contact Kevin McDonald "*to ask if it was OK*" and then Mr McDonald would find cover from the pool of suitable musicians known to him. It was not the claimant's obligation to find or to provide suitable cover, although as a courtesy and in an effort to be helpful he might suggest a suitable name to Mr McDonald. Sometimes Mr McDonald would ask the claimant if he could suggest a suitable name because he was keen to recruit RCS graduates. It was not permissible for the claimant simply to send a substitute piper to cover for his own unavailability. Mr McDonald would have to be involved and would have to approve the substitute. As Mr McDonald put it, "*ultimately I choose the substitute, I can't have one imposed*

on me".

Rehearsals

45. The claimant and other musicians were paid £10 per hour for rehearsals. Kevin McDonald made the arrangements. The musical director ran the rehearsal. Rehearsals for shows typically ran from 0900 or 1000 to 1700, but rehearsing and arranging material for albums could go on until midnight. While Mr McDonald said that rehearsals were not mandatory and that there was no penalty for failing to attend, there was no evidence that the claimant had ever failed to attend a rehearsal when asked to do so. I find that there was a strong expectation that the core musicians, such as the claimant, should attend rehearsals. A band is a collective endeavour, and the first respondent was concerned to produce a performance of consistently high quality. That could not be achieved if core musicians skipped rehearsals.

46. Before a tour there would be a day of rehearsal going through the probable set list. On each night of the tour the band would perform the same or a very similar set.

Choreography and performance

47. For "big band" events there was also band choreography devised by a dance teacher and choreographer. Each song had its own set of dance moves. Learning and practicing them formed part of the rehearsal process.

48. As the claimant put it, "*any piper trained to play bagpipes can look at manuscript and see the notes to be played, but RHCP have their own style, slurs, trills, it's fancy. No one else has the same level of choreography and movement. They play fast, not traditionally.*" That style of performance was well within the claimant's skills. He adapted to it and adopted it. It was rock music involving bagpipes, not traditional bagpipe music.

Extent of the claimant's involvement RHCP activity

49. The Appendix at the end of these reasons lists, month by month, the total number of days on which the claimant was involved in RHCP activities, whether gigs, rehearsals, filming days or recording days. Scheduled travel days are not usually included. The overseas tours could be very long. The longest tour the claimant went on lasted for about 8 weeks. He was also involved in a 9-week tour with a couple of days off in between dates in Germany and Switzerland.

50. While no two gigs were the same, a typical format for a gig in Scotland might be as follows:

a. Arrive at 1500.
b. Sound check 1630-1700.
c. On stage 2145.
d. 60 min set.
e. 15 mins break.
f. 50 min set.
g. Two encore sets, making over 2 hours of playing in total.
h. After packing up, return to Glasgow by midnight or 0100.

Remuneration

51. In the UK the claimant was paid by the gig. When on an overseas tour he was paid a set weekly rate. The respondent had a fee structure, but it was not negotiated with the claimant. The rates were simply notified by Kevin McDonald on behalf of the first respondent and the claimant was not involved in the determination of those rates at all.

52. Examples in the file of documents were £175 for a gig on Monday to Thursday, £200 for a Friday, Saturday or Sunday gig, and overnight allowances for return times after 1am, increasing if the return time was after 1pm. Tour fees were a flat rate of £850 per week (later increased to £1,000

per week), regardless of the number of gigs booked in that week.

53. The revised rates notified in October 2021 were £250 for a big band gig, £200 for a corporate gig and £10 per hour for rehearsals, with £50 paid for a return to Glasgow after 1am, and a further £50 if return was after 5am. If a musician had to leave at 5pm or earlier to get to a gig then RHCP would provide a meal.

54. Occasionally the claimant submitted invoices to the first respondent, but mostly he did not and was paid regardless. The claimant estimated that 90% of the time he was paid without an invoice. I accept that estimate. Sometimes, the first respondent asked the claimant to submit invoices for reasons which were unclear to the claimant. Sometimes the claimant was paid first and was asked by the first respondent to submit an invoice after the event.

55. I do not accept Mr McDonald's evidence that the first respondent would have been able to produce more invoices from the claimant but for an email or other IT problem. Mr McDonald is a trained accountant, and he must be aware of the importance of invoices in order to provide an audit trail. Further, an alleged IT problem in 2019 or 2020 does not explain why he was unable to produce any of the additional invoices allegedly submitted by the claimant in 2021 or 2022. On the balance of probabilities, I conclude that if there really were any more invoices then they would have been safely stored, retrieved and produced by the first respondent for inclusion in the joint file of documentary evidence.

56. The claimant's evidence was that he only submitted 6 invoices during the whole of the time he played with RHCP. On balance I accept that evidence. Invoices with a slightly more formal appearance were submitted in the name of "James Harper Music" or "James Harper Music Services" on 16 June 2018 (the claimant's first gig with RHCP), 20 July 2018 (the claimant's second gig with RHCP), the end of a tour in May 2022, the end of June 2022 and the end of December 2022. There was also an extremely informal invoice hastily written on a phone in November 2022. The contact email addresses on the

invoices were bookings@jamesharper.uk or jamesharpermusic@gmail.com.

57. While the respondent makes a reasonable point that the numbering sequence of the invoices suggests gaps and that other invoices must have existed, on balance I accept the claimant's evidence that his numbering system was slightly arbitrary and discontinuous. I accept the claimant's evidence that he only submitted 6 invoices in total, and none at all between July 2018 and May 2022. When that is compared with the appendix to these reasons, it will be seen that the claimant was paid for a very considerable volume of work without submitting an invoice.

58. I accept the claimant's evidence that he was not doing any other paid work as a musician or music tutor from the end of 2018 until the end of 2022. There is no cogent evidence to the contrary and the suggestions made to the claimant in cross-examination were assertions unsupported by evidence. His musical income in that period was solely derived from work with and for RHCP. He occasionally did free live streams during the covid-19 pandemic, jams with friends, or performances in aid of charities, but none of that was paid. One free live stream for a charitable venture called "Folk in Crisis" led to some recording work, but none of it was paid and no royalties were generated. The cost of hiring the room was covered by the musicians themselves. The claimant also helped as an unpaid volunteer for a charitable foundation based in Govan.

59. While the claimant was engaged with RHCP his earnings were around £30,000 per year (a figure agreed by both sides). The claimant was responsible for payments of tax and national insurance on his earnings from work with RHCP.

60. Surprisingly, the claimant's P60s were not contained in the file of documentary evidence, so it was not possible to compare the declared income against the earnings from RHCP activity. Had there been a difference then that might have been consistent with the respondent's suggestion of paid work from other sources. I was told that the respondent had not requested

the P60s.

61. The respondent did not maintain a pension scheme and the claimant was responsible for his own pension arrangements, if any.

Publicity and marketing

62. The claimant appeared on posters and other promotional material associated with RHCP. No additional fees were paid for that.

Recording

63. The claimant wrote several songs on the RHCP album “Fresh Air”. The main one, “Bleaching Cloths” featured in live shows as well. The claimant had written it while at university and took it to a paid rehearsal with RHCP. The claimant contributed to the creation of other RHCP material, as well as performing it.

Paid time off

64. In early 2022 the claimant was offered paid time off at Kevin McDonald’s suggestion. The context was the claimant explaining that he was “having a bit of trouble” with the drummer, the second respondent. The specifics were never discussed, but it was made clear to the claimant that he could take time off if he wished and that he would be paid for it. The claimant’s evidence on this point was supported by the transcript of a phone call with Steven Richmond (another director of the first respondent) on 10 June 2022, in which the claimant says that he had been offered paid time off by Kevin McDonald without query or contradiction by Steven Richmond. The claimant did not take up the offer of paid leave.

The Covid-19 pandemic

65. The first respondent's business shut down during the pandemic. During the cessation of activities, the claimant and other members of the band were occasionally paid £50 by the first respondent. Otherwise, during the pandemic the claimant supported himself through state benefits, payments from Musician's Union funds and financial support from his parents. The claimant's rent was paid by benefits. While the first respondent used the CJRS in relation to the 8 people it admits having employed, it did not use that scheme in relation to the claimant or any other musicians.

Legal principles

Employment under the Employment Rights Act 1996

66. The statutory wording of the relevant parts of section 230 of the Employment Rights Act 1996 is as follows.

(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.

67. The Act does not provide any further definition of "contract of service" or "contract of apprenticeship". Those concepts have been defined, refined and developed by case law.

68. This is essentially a question of the correct characterisation of the contract (if any) between the parties. However, inequalities of bargaining power can mean that the true categorisation depends on a wider range of factors than those arising from ordinary principles of contractual interpretation.

69. The well-known judgment of MacKenna J in ***Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance*** [1968] 2 QB 497 remans one of the best starting points, once allowance is made for the rather dated language of "master" and "servant". In ***Autoclenz v Belcher*** [2011] ICR 1157, SC, Lord Clarke called it "*the classic description of a contract of employment*". It sets out what some textbooks call a "multiple test" of employment. There are three elements.

a. The putative employee 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 the putative employer (**mutuality of obligation** and **personal performance**).
b. The putative employee agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other the employer (**sufficient control**).
c. The other provisions of the contract are consistent with it being a contract of employment (**a multifactorial assessment**).

70. In ***Revenue and Customs Commissioners v Atholl House Productions Ltd*** [2022] EWCA Civ 501 the Court of Appeal stated that there was no conflict between the ***Ready Mixed Concrete*** line of authorities and those which focussed on whether an individual was in business on their own account (e.g. ***Market Investigations Ltd v Minister of Social Security*** [1969] 2 QB 173 and ***Hall (Inspector of Taxes) v Lorimer*** [1994] ICR 218, CA). Both approaches recognised that mutuality of obligation and the right of control were necessary preconditions to a finding that the contract was one of employment. Those were necessary, but not sufficient, conditions. If they were satisfied then both approaches required the identification and overall assessment of the relevant factors in the particular case, in other words, a "multi-factorial" assessment.

71. I will not set out any of the important principles governing the correct approach

to written contractual documentation, since there is almost none to consider in this case. However, it remains relevant to mention the general approach required by ***Autoclenz v Belcher*** [2011] ICR 1157, SC, and ***Uber BV v Aslam*** [2021] ICR 657, SC. It is necessary to discern the true agreement between the parties. It is also necessary to consider the purpose of employment legislation, which is to protect vulnerable workers who have little or no say over their pay and working conditions because they are in a subordinate and dependent position in relation to a person or organisation which exercises control over their work. Employers will often be in a stronger bargaining position than their employees or workers.

72. The requirement for a sufficient degree of control must not be misunderstood. Control can be exercised both directly and indirectly, and it can be exercised both in a practical sense and in the sense of legal entitlement. It is no longer sufficient or realistic to look for control in the sense of a power to direct the way in which the work is done, since many employees apply a skill or expertise that is not susceptible to direction by anyone else in the employing organisation (***Catholic Child Welfare Society*** [2013] IRLR 329, SC, Lord Phillips). Consider, for example, employed surgeons, professional footballers, conservators or those involved in scientific research. The question does not depend on the presence or absence of instances of control *in practice*, but rather on what is known or what can be inferred about the putative employer's *contractual right* to direct the individual in relevant respects (***Wright v Aegis Defence Services (BVI) Ltd*** (EAT/0173/17)).

73. Control is also a matter of degree. The issue is whether it is enough control to make the relationship one of employer and employee. Often, the issue will not be whether there is practical day-to-day control over the putative employee, but rather whether there is a *contractual right of control* over them (***White v Troutbeck SA*** [2013] IRLR 949, CA).

74. A requirement of personal service is not negated by a "*limited or occasional power of delegation*": ***Ready Mixed Concrete*** at 515E, citing Professor P S Atiyah's *Vicarious Liability in the Law of Torts (1967) pp 59 to 61*. Atiyah's

work summarised the principles in this way: "*it seems reasonably clear that an essential feature of a contract of service is the performance of at least part of the work by the servant himself. If, therefore, the person in question is entitled to delegate the entire performance of the work to another it is thought that this would be conclusive against the contract being a contract of service*" (emphasis added).

75. The general trend of the recent leading authorities (e.g. ***Uber*** [2021] UKSC 5 and ***Pimlico Plumbers v Smith*** [2018] UKSC 29) has been to focus on the reality of the way in which the work is done and to ask whether the dominant feature of the contract is still one of personal service, rather than to analyse the breadth of any substitution clause as a matter of contractual construction (as in ***Express and Echo v Tanton*** [1999] ICR 696, CA).

Worker under the Employment Rights Act 1996

76. The relevant provision is section 230(3).

> *(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.*

77. Obviously the first part of that definition incorporates "employment" into the definition of worker. The second part, often referred to as the definition of "limb (b) worker", therefore has three elements (***Uber BV v Aslam*** [2021] UKSC 5, at paragraph 41):

a. there must be contract, whether express or implied, and if express, whether written or oral;
b. that contract must provide for the individual to carry out personal services;
c. those services must be for the benefit of another party to the contract who must not be a client or customer of the individual's profession or business undertaking.

78. The third aspect, "the client or customer exception" is intended to distinguish workers whose degree of dependence is essentially the same as employees, from contractors who have a sufficiently arms-length and independent position to be treated as being able to look after themselves (***Bryne Brothers (Formwork) Ltd v Baird*** [2002] ICR 667, EAT). The considerations are mostly the same as those arising in tests of "employment", but with the boundary pushed further in the individual's favour.

79. It is also important to remember that the statutory question is not limited to whether the individual is genuinely self-employed or carries on a business undertaking. It is also necessary that the other party should be their client or customer (***Manning v Walker Crips Investment Management Ltd*** [2023] EAT 79).

80. While many cases have reminded Tribunals that there is no substitute for an application of the statutory language (***Bates van Winkelhof v Clyde & Co LLP***) [2014] ICR 730, SC), and that there is no single touchstone with which to unlock that language (***Hospital Medical Group Ltd v Westwood*** [2013] ICR 415, CA), the "integration test" outlined by Langstaff J in ***Cotswold Developments Construction Limited v Williams*** [2006] IRLR 181, EAT will often be relevant to the question whether a person is a worker or in business dealing with a customer or client. The question whether the "dominant feature" of the contract was the execution of personal work or labour is also often useful (***James v Redcats (Brands) Ltd*** [2007] ICR 1006, EAT).

81. However, while the concept of subordination *may* sometimes be an aid to resolving questions of worker status, it is not a freestanding and universal characteristic of being a worker (***Bates van Winkelhof***, above).

82. In the recent case of ***NMC v Somerville*** [2022] EWCA Civ 229, Lewis LJ suggested that no purpose was served by introducing an additional concept of an obligation to perform some minimum amount of work.

Employee under the Equality Act 2010

83. Given the respondent's concession during the hearing, I will keep the summary of legal principles to the minimum. Section 83 of the Equality Act 2010 provides (so far as relevant) as follows:

> *(2) "Employment" means—*
>
> *(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;*

84. It is now well established that the extended definition of "employment" in section 83(2)(a) of the Equality Act 2010 ("a contract personally to do work") is effectively the same as the definition of "worker" in section 230(3)(b) of the Employment Rights Act 1996 (***Bates van Winkelhof v Clyde & Co*** [2014] ICR 730, SC at paragraph 31), albeit without the express exception for clients and customers. However, a similar exception or qualification has been read in by a different route (see e.g. ***Jivraj v Hashwani*** [2011] ICR 1004, SC).

Submissions

85. The parties made their submissions primarily in writing. I do not think that much would be added by setting them out or summarising them here. Instead, I will deal with the main points in my reasoning below.

86. I will, however, deal directly with two of the authorities cited. The respondent relied on two ageing cases involving the same well-known orchestra:

Addison v London Philharmonic Orchestra [1981] ICR 261 and ***Winfield v London Philharmonic Orchestra*** [1979] ICR 726, but I do not find them helpful for two broad reasons. First, they are easily distinguishable on their facts. The structure, management, performance environment and culture of the London Philharmonic Orchestra is quite different from that of the RHCP, on which I have made the detailed findings above. Second, those authorities pre-date almost every important decision on employment status apart from ***Ready-Mixed Concrete***. The legal landscape of employment status has changed dramatically since the late 1970s and early 1980s, with several important Supreme Court decisions in the last few years. The correct approach and the correct starting point is now very different.

Reasoning and conclusions

87. Although I will set out my reasoning under separate headings derived from the well-known principles considered above, some facts could be placed under more than one heading. I will begin with the ***Ready Mixed Concrete*** test of employment.

Formation of a contract and mutuality of obligation

88. While there was no comprehensive written agreement between the parties, there was a largely oral agreement between them. The only written components were messages identifying particular gigs or rehearsals and messages agreeing to attend and play at them. The rates were also set out in writing. Otherwise, the obligations were notified and agreed orally.

89. The claimant agreed to undertake work and the respondent agreed to pay him for the work that he did. The parties conducted themselves on the basis that they were each obliged to perform their side of that work/wage bargain. That is all that is required. The respondent's submission that it was necessary for the first respondent to be obliged to offer a minimum amount of work, and for the claimant to be obliged to accept a minimum about of work, is incorrect

(see ***NMC v Somerville*** [2022] EWCA Civ 229). I will deal separately below with the question whether there was one "overarching" contract or just a series of separate contracts.

90. The necessary precondition of mutual obligations is therefore satisfied.

Obligation of personal performance

91. I can deal with this shortly because it was conceded by the respondent (at least for the purposes of the discrimination claims) that the claimant was obliged to perform the work personally. That concession was properly made given the way in which the band operated. There was no *right* of substitution inconsistent with personal service, and the claimant was contracted to provide his own talent, musical skills and performance skills *personally*. The dominant feature of the contract was one of personal service.

92. Substitution was rare in practice and it was not properly regarded as the claimant's right or power at all. On the rare occasions that a substitute was necessary the substitute was chosen by Mr McDonald of the first respondent from a pool of suitable musicians known to him. The claimant's influence was limited to suggesting potentially suitable names. The claimant certainly could not impose a substitute on Mr McDonald. The claimant did not have a right to send a substitute of *his* choice at all, still less a right to delegate *all* of the work that he was contracted to do to a chosen substitute. As MacKenna J noted in ***Ready Mixed Concrete*** (above) a limited or occasional power of delegation is insufficient to negate personal service, and the situation easily met Professor Atiyah's test of "*the performance of at least part of the work by the [employee] himself*".

93. Importantly, if a substitute piper were to undertake a gig initially accepted by the claimant, then that substitute piper would be paid direct by the respondent, and not by the claimant.

Sufficient control

94. For the following reasons, I find that the first respondent exercised a high degree of control over the claimant. It certainly met the ***Ready Mixed Concrete*** threshold of "sufficient" control. This is a concise summary of the relevant factors, which are set out in more detail in my findings of fact, above.

a. The claimant was required to "*respect the red sporran*", which meant that he was expected to adhere consistently to the band's ethos, to take pride in the performance and to uphold the band's reputation and brand.

b. Through Mr McDonald, the first respondent prepared and coordinated the gig list before sending it out to band members. Mr McDonald decided which musician fulfilled which role in the band. He also decided the set lists. This amounted to direction of the work.

c. The first respondent's directors Kevin McDonald and Willie Armstrong demonstrated to the claimant the way he was to do certain things on stage. To that extent, they directed his work. The claimant was obliged to adopt the RHCP style of play.

d. Similarly, the claimant was obliged to adopt the RHCP choreography as part of his performance. He was not free to devise or to adopt his own.

e. The claimant did not provide his own stage outfit, except for his shoes which he provided only because the ones supplied by the first respondent fitted badly. In all other respects the first respondent provided a distinctive stage uniform which was itself part of the respondent's brand. The first respondent took the claimant's measurements and arranged for a kilt to be supplied. The claimant was not permitted to wear any other outfit on stage. The first respondent bore the cost of that uniform and the claimant did not have to pay for it. This amounted to control of the way in which the claimant dressed and presented on stage.

f. The claimant was not permitted to use his own bagpipes when playing with the band. Instead, he was required to use bagpipes supplied or procured by the first respondent. It was a valuable instrument of

professional quality, but the claimant was not required to contribute anything towards the cost.

g. The first respondent also directed the way in which the instrument was to be set up and tuned.

h. The respondent organised and paid for travel to gigs and touring. Sometimes, and especially within the UK, that was done in RHCP branded mini-buses. The claimant did not have to contribute anything towards the cost of travel.

i. Bed and breakfast accommodation on overseas tours was organised and paid for by the respondent. The claimant did not have to make any financial contribution at all.

j. The right of substitution was limited and for all practical purposes controlled by Mr McDonald. Mr McDonald would choose a substitute performer if required and one could not be imposed on him by the claimant or anyone else. The claimant might suggest a suitable candidate, but that fell far short of a *right* to send that person to substitute for the claimant, regardless of Mr McDonald's wishes.

k. There was a strong expectation that the claimant would attend rehearsals as required.

l. The rates of remuneration were set by the respondent, without any negotiation.

95. I attach no particular significance to the provision of food as part of a rider since that is customary in the industry, whatever the employment status of the musician.

96. In my assessment, the aggregation of the factors listed above easily meets the test of "sufficient control" for a contract of employment to exist.

97. Therefore, I am satisfied that the "necessary preconditions" of a contract of employment identified in ***Ready Mixed Concrete*** are established. The remaining question is whether the other provisions of the contract are consistent with it being a contract of employment.

Other relevant factors – multifactorial assessment

98. The claimant was responsible for his own payments of tax and national insurance. The parties attached no particular label to their relationship. They certainly did not call it employment, but nor did they categorise it as self-employment. I have rejected the evidence that the claimant was sent and required to sign a "contractors form".

99. However, even if the parties had attached a clear label to their relationship, it would have been a factor of very little weight, especially given their inequality of bargaining power. Similarly, and even if HMRC had determined that the claimant was self-employed, it would carry no weight if the reality of the relationship were otherwise (***Manning v Walker Crips Investment Management Limited*** [2023] EAT 79, paragraph 105, DHCJ Ford KC).

100. The claimant only invoiced the respondent rarely. Almost all the time he was paid without an invoice.

101. The claimant was offered paid leave by the first respondent. That is a hallmark of employment, rather than a more arm's length relationship.

Overall conclusion on s.230(1)(a) ERA 1996

102. I am satisfied that the parties were in a contractual relationship founded on mutual obligations in the form of a work/wage bargain. The claimant was obliged to perform at least some of that work personally, and in practice he performed almost all of it personally. There was more than sufficient control for the contract to be one of employment. The other features of the contract were, overall, quite consistent with a contract of employment. My finding is that the claimant was an employee for the purposes of section 230 of the Employment Rights Act 1996, in that he was engaged on a contract of employment.

103. An argument might arise as to whether the claimant was an employee only when working for the first respondent, or whether he was also an employee between engagements.

104. I find that the intensity of the claimant's work for the respondent was such that there was an overarching contract, even at times when the claimant was not on tour, attending a gig or booked to attend a gig. In practice, from the end of 2018 the claimant always had RHCP gigs in his diary (except for the period affected by the Covid-19 pandemic). The claimant was one of those given first refusal on gigs listed in a spreadsheet for the year ahead. The claimant undertook very nearly all of the gigs offered to him. Mr McDonald explained in correspondence at the time that the spreadsheet gave "*an idea of the commitment that I am giving to you in terms of gigs*". I find that the description of it as a "commitment" was apt. The claimant was regarded as "Pipes 1", and he was fundamental to the band's success from that point onwards. He was fully integrated into the band. That is reflected in the sheer volume of gigs undertaken, the fact that he earned around £30,000 from it, the fact that he had no income from any other source, and the fact that he was also involved in other RHCP activities such as writing and recording RHCP releases and appearing in promotional material. As the first respondent's director Mr McDonald put it, it was a "*stable long-term engagement*" lasting about 4 years. That can be contrasted with the language used in the respondent's written submissions, of "successive agreements to perform on a sessional basis". That is not an accurate characterisation of the evidence and I reject that submission.

Conclusion in relation to s.230(3)(b) ERA 1996

105. Since I have found that the claimant was an employee, he is by definition also a worker for the purposes of the Employment Rights Act 1996. However, even if that had not been the case, I would have found that the claimant was a "limb (b) worker". The test summarised in ***Uber*** is satisfied:

a. There was an oral contract.
b. Under that contract the claimant was obliged to carry out work personally.
c. The work was for the benefit of the first respondent, and the first respondent was not a client or customer of the claimant's profession or business undertaking.

106. On the last point, I attach little weight to the facts that the claimant had professional sounding email addresses and that he issued a few invoices. In my experience, performers of all types do similar things to present as well-organised and committed artists. It costs little or nothing to adopt an email address or to create a simple website or social media presence. It is an attempt to look professional and to be professional, but it is only a very weak indicator that they are in business on their own account.

107. More importantly, the claimant did not work for anyone except the first respondent once he had fulfilled a few existing commitments with his own ceilidh band. Subject to that, he earned significant income of around £30,000 a year from work for the first respondent but earned nothing from any other work as a musician. In reality, the claimant had no clients or customers, and he was not really running a business.

108. Further, I find that the dominant feature of the contract was the execution of personal work or labour as a RHCP piper, and that the claimant was fully integrated into the first respondent's enterprise. The claimant was in a relationship of subordination. It was not a contract between commercial equals.

109. As a final check, it is important to remember that the first respondent conceded during the hearing that the claimant was an employee for the purposes of section 83 of the Equality Act 2010. There is now understood to be very little practical difference between that test and the definition of "limb (b) worker" for the purposes of the Employment Rights Act 1996 (see ***Bates***

van Winkelhof and ***Jivraj***, above).

Jurisdictional time points

110. For the reasons set out above, the parties agreed that jurisdictional time limits in claims brought under the Equality Act 2010 will be left to the final hearing. I am therefore concerned solely with claims such as unfair dismissal, which are subject to time limits with an exception for lack of "reasonable practicability". It all turns on an analysis of the effective date of termination. My reasoning, together with some additional relevant findings of fact, is as follows.

The effective date of termination

111. Words that potentially constitute dismissal or resignation must be construed objectively in all the circumstances of the case, in accordance with normal rules of contractual interpretation. Subjective intentions or understandings are not relevant. Matters must be assessed from the perspective of a reasonable bystander in the position of the recipient (see for example the recent case of ***Omar v Epping Forest District Citizens Advice*** [2023] UKEAT 132). Tribunals will look at events both before and after the incident in question and will take account of the nature of the workplace.

11 January 2023?

112. I do not accept the respondents' primary submission that the contract was terminated with immediate effect by words used by Mr McDonald at a meeting with the claimant on 11 January 2023[1]. In summary, the first respondent's case on this point has been inconsistent, I did not find Mr McDonald to be a credible witness on disputed matters, and the words used by him were ambiguous anyway.

[1] Respondent's written submissions, paragraph 45.

113. The ambiguous words "find another band" had been used many times before without any immediate intention to terminate the relationship and they carried no weight of that sort at the relevant time. Reasonably, the claimant did not understand them to be words of termination. An objective bystander understanding the context would not do so either. For a more extreme example of the same principle, see the classic case of the fish dock expletives which (at least in the 1970s) were merely a "general exhortation to get on with the job" in ***Futty v D&D Brekkes Ltd*** [1974] IRLR 130, ET.

114. If the contract really had been terminated on 11 January 2023, then the first respondent would surely have referred to that fact in the email sent on 12 January 2023 (below), but it did not. That is further evidence of the way in which the conversation would have been understood by an objective bystander at the time.

115. Further, in its response (form ET3 and attachments), the respondent had originally *denied* dismissing the claimant on 11 January 2023, stating instead that it simply wanted to "give him space" (see paragraphs 2 and 22(18) of the grounds of resistance). The first respondent's case in the response was that the meeting on 11 January 2023 was to discuss allegations that the claimant had made about other band members. That was at odds with Mr McDonald's evidence in chief at this hearing, when he said that he "*reaffirmed that the relationship was at an end*", arguing that he had dismissed the claimant even earlier, on 10 January 2023. That change of case was not reflected in the respondent's written submissions, though it was adopted seamlessly in oral submissions without reference to the inconsistency. I do not accept Mr McDonald's evidence, I think it was an attempt to construct facts which might help the first respondent on jurisdictional time limits, but which were inconsistent with the case the first respondent originally put forward.

12 January 2023?

116. I find that the relationship ended on 12 January 2023 when the claimant received and read the email sent to him by Willie Armstrong. That email notified the claimant that both he and Mr Armstrong would be replaced by other pipers on the forthcoming RHCP tour of the USA. I do not construe the words "prudent for all parties to take a break" as amounting to anything temporary. When read as a whole it is clear that the letter was intended to end the relationship, while not completely ruling out the possibility that it might be re-started in the future: "*you will still be considered for gigs with us in the future if you so wish, that's up to you. Hopefully when the band come back from America then we can all see where we stand with each other.*"

117. The question is not so much whether the terms of this email were sufficient to terminate the relationship, but rather whether it did so on notice or with immediate effect. On any view, there is no clear statement of the date on which the relationship would terminate. The email could have used the phrase "with immediate effect", but it did not. The email could have specified a date or a notice period, but it did not. It was not drafted by lawyers, and I must construe it realistically and in context.

118. On behalf of the claimant, it was argued that this was a termination on notice, expiring after the gigs that were due to happen in London on 24, 25 and 26 January 2023, but with a payment of wages for those gigs in an advance lump sum. The situation was said to be analogous to that considered by Lord Browne-Wilkinson in ***Delaney v Staples*** [1992] ICR 483 at 488F to 489F. I assume for the purposes of argument that the payment was made early, although I note the respondent's submission that it was made on 27 January 2023.

119. However, I do not think that the claimant's construction is the correct or most natural reading of the letter, nor do I think that the situation was truly analogous to the one considered by Lord Browne-Wilkinson above. In that hypothetical example there was no doubt that the employer had given proper

notice, the issue was the effect of advance payment of a lump sum. I do not think it is helpful to consider cases where there is an express provision that the contract is terminable *by and upon payment in lieu of notice* either. It is common ground that there was no such express provision in this case, but the respondent does not seek, or necessarily need, to rely on one either. The respondent does not argue that it terminated the contract *by* making a payment. It relies instead on the words used at the time.

120. I return to the words used in the communication of 12 January 2023. There is no reference in the email to "notice" at all, nor is there any reference to termination taking effect on any subsequent date, after any particular period, or upon the occurrence of any particular event. The gigs in London were referred to only in the context of payment, and not as a way of defining the date of termination. The context of that payment was "*so there is some comfort*", in other words to soften the financial and emotional blow of termination. I construe that email as amounting to termination with immediate effect, even though that phrase was not used by the non-lawyer drafting the email.

121. That was a breach of contract, but that does not have a bearing on the effective date of termination. At common law, the contract was terminable on reasonable notice. More importantly, the respondent may have terminated the contract unlawfully by failing to give the minimum notice implied by section 86 of the Employment Rights Act 1996. However, that does not mean that the contract is deemed to have continued in force until the earliest date on which it could have terminated lawfully. It is always open to an employer to terminate a contract wrongfully (i.e. without notice or with insufficient notice) at the price of a claim for breach of contract.

122. I therefore find that the effective date of termination was 12 January 2023, when the claimant was dismissed with immediate effect. It follows that contact with ACAS on 12 April 2023 and 14 April 2023 came too late to generate any extension of time, and that when the ET1 was received by the Tribunal on 23

June 2023 it was received out of time.

123. The claimant does not put forward any arguments on reasonable practicability, so the following claims must be dismissed on the basis that the Tribunal has no jurisdiction to hear them:

a. Unfair dismissal;
b. Unlawful deductions from wages, including unpaid holiday pay, whether claimed as unlawful deductions from wages or under regulation 30 of the Working Time Regulations 1998;
c. Notice pay as damages for breach of contract.

124. I understood the claimant's reference to a statement of employment particulars to be an argument in relation to section 38 of the Employment Act 2002, rather than to a freestanding claim with its own jurisdictional time limit (for example, the rarely seen reference to an ET under section 11 of the Employment Rights Act 1996). If I am wrong about that, then the reference under section 11 of the Employment Rights Act 1996 must be dismissed too for the same reasons.

125. Once they have had time to reflect on this judgment on preliminary issues, the parties are invited to discuss and, if possible, to agree directions for the future management of this case. It will shortly be referred to the allocated case management judge. If she is made aware of the parties' suggested directions then she will no doubt take them into account when making her own.

Employment Judge: **M Whitcombe**
Date of Judgment: **27 December 2023**
Date sent to parties **28 December 2023**

Appendix

Table showing total number of gigs, rehearsals and recording days on which the claimant was involved in RHCP activities. Scheduled travel days are not usually included.

Month	Number of gigs performed
June 2018	1
July 2018	1
August 2018	0
September 2018	9
October 2018	0
November 2018	0
December 2018	18
January 2019	13
February 2019	26
March 2019	26 (inc US tour)
April 2019	27 (inc recording)
May 2019	16
June 2019	16 (inc US and Hungary)
July 2019	16 (inc Japan)
August 2019	18 (inc US and Germany)
September 2019	22 (inc US tour)
October 2019	23 (inc German tour)
November 2019	22 (inc Germany/Switzerland)
December 2019	16
January 2020	8 (inc US tour)
February 2020	3
March 2020	7 (US tour, covid
April 2020	cancellations)
May -November	1 (Online, covid)
2020	0 (Covid)
December 2020	3 (Covid)
January 2021	0 (Covid)
February 2021	0 (Covid)
March 2021	1 (Covid)
April 2021	3 (Covid)
May 2021	0 (Covid)
June 2021	6
July 2021	7
August 2021	10
September 2021	14
October 2021	20
November 2021	19
December 2021	17

January 2022	7
February 2022	10
March 2022	30 (US tour)
April 2022	21 (inc US tour)
May 2022	15
June 2022	20
July 2022	16
August 2022	25 (inc USA and Canda tours)
September 2022	15 (inc USA tour)
October 2022	28 (inc German tour)
November 2022	23 (inc German/Swiss tour)
December 2022	13