EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr K Muyulu	**v**	**London Borough of Harrow**

Heard at: Watford Employment Tribunal (via CVP)

On: 2nd, 3rd and 23rd May 2024

Before: Employment Judge King

Appearances
For the Claimant: Mr Bridgewater (lay representative)
For the Respondent: Mr Amunwa (Counsel).

RESERVED JUDGMENT

1. The claimant was a worker but not an employee within the meaning of s230 Employment Rights Act 1996.

2. The claimant's claim for unfair dismissal is dismissed as the Tribunal has no jurisdiction to hear the claims as the claimant is not an employee.

RESERVED REASONS

1. The claimant was represented by Mr Bridgewater (lay representative). The respondent was represented by Mr Amunwa (counsel). I heard evidence from the claimant. I heard evidence from Mr Chan-Oliver, Ms Zaveri on behalf of the claimant.

2. I heard evidence from Mr Abdu, Mrs Johnson, Mr Shergill, Ms Kassie on behalf of the respondent. The respondent had provided a witness statement of Mr Scanlon but Mr Scanlon did not attend the hearing and give evidence as he was off work from the Respondent on sickness absence. His statement therefore has limited weight given the inability of the claimant to ask questions of this witness.

3. The claimant and respondent exchanged witness statements in advance and prepared an agreed bundle of documents which ran to 891 pages and in addition some information to summarise timesheets was provide by the respondent to assist the Tribunal. The paper copy pagination differed from the electronic pagination of the bundle of documents which provided additional challenges. The claimant's witness statements contained little page references so during the morning adjournment on day one the claimant's representative was invited to provide a list of key documents the claimant wanted me to consider. The claimant's representative provided that in a written document to which I have had regard.

4. At the outset we discussed the preliminary hearing issues to be determined. The matter was originally listed for a preliminary hearing on 13/14 February 2024 which had been postponed to 2/3 May 2024. There had been historic issues of the parties not being ready for the preliminary hearing which were discussed at the preliminary hearing on 7th November 2023.

5. At the outset of the hearing the preliminary issues were confirmed as being whether or not the claimant was an employee under the Employment Rights Act 1996. It was not in dispute that the claimant was a worker but the claimant asserted employment status to bring a constructive unfair dismissal complaint and the respondent accepted that the claimant was a worker but not that he was an employee. Depending on the outcome of this preliminary issue, a second preliminary issue had been identified as to time and whether the claim was filed in time and if not whether it was reasonably practicable for it to be so presented or whether it was within such further reasonable period. The claimant's position was that statutory notice should be added such that the effective date of termination (EDT) fell later and the claim is in time. The respondent's position was that the claim was 5 days out of time as the EDT was as set out by the claimant in his claim form.

6. The hearing was listed for two days but given that there were seven witnesses giving evidence this left insufficient time to conclude the case and the Tribunal listed for a third day to conclude the evidence and then hear submissions. This was without the oral evidence of Mr Scanlon and a more accurate listing would have been 3-4 days. The respondent provided written submissions and expanded on these orally. The claimant's representative made factual submissions orally and the Tribunal has had regard to both sets of helpful submissions. Even with listing of an additional day as soon as the Tribunal and the parties could accommodate resulted in the Tribunal having to reserve judgment in the case.

7. The preliminary issues were agreed at the outset to be:

<u>Status</u>

7.1 Is the claimant an employee within the meaning of s230(1) of the Employment Rights Act 1996?

Time

7.2 If the claimant is an employee, is he entitled to statutory notice to determine the EDT?

7.3 If so when was the EDT?

7.4 Was the claimant's claim for constructive unfair dismissal presented within the time limits under S111(2)(b) of the Employment Rights Act 1996 taking into account any extension from ACAS EC?

7.5 If not was it reasonably practicable for the claimant to have presented the claim within time?

7.6 If not whether the claim was presented within a reasonable period after the time limit had expired?

The Law

8. An '*employee*' is defined in section 230(1) of the ERA 1996:

> ***230.— Employees, workers etc.***
> *(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.*

9. A 'worker' is defined in section 230(3)(b) of the ERA 1996, which provides:

> *(3) In this Act "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.*

10. There has been a wealth of case law in the area of employment status. The Respondent referred to a number of authorities within their written submissions to which I have had regard as follows:

Bates van Winkelhof v Clyde & Co LLP and another [2014] 1 W.L.R. 2047

Ready Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968] 2 QB 497
Autoclenz Ltd v Belcher and others [2011] ICR 1157
Nethermere (St Neots) Ltd v Gardiner and anor [1984] ICR 612
Carmichael and anor v National Power plc [1999] ICR 1226
Byrne Brothers (Formwork) Ltd v Baird & others [2002] ICR 667
Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51
Independent Workers Union of Great Britain v Central Arbitration Committee and another [2021] EWCA Civ 952
Independent Workers Union of Great Britain v Central Arbitration Committee [2024] I.C.R. 189
Uber BV v Aslam [2021] ICR 657
Express and Echo Publications Ltd v Tanton [1999] IRLR 367
Pimlico Plumbers Ltd v Smith [2017] ICR 657
St Ives Plymouth Ltd v Haggerty [2008] UKEAT 0107/08/2205
Chatfield-Roberts v Phillips UKEAT/0049/18

11. The claimant made reference to a several cases in his witness statement to which I have had regard in so far as they were relevant to the issues as follows:

Clark v Oxfordshire Health Authority [1998] IRLR 125

Ministry of Defence HQ Defence Dental Service v Kettle EAT 0308/06

Carmichael and anor v National Power plc [1999] ICR 1226

James v Greenwich London Borough Council [2007] ICR 577

McMeechan v Secretary of State for Employment [1997] ICR 549

Khan v Checkers Cars Ltd EAT 0208/05

Williamson and Soden Solicitors v Briars EAT 0611/10

Wilson v Circular Distributors Ltd [2006] IRLR 38

Ready Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968] 1 All ER 433

White and anor v Troutbeck SA [2023] IRLR 949

Protectacoat Firthglow Ltd v Szilagyi[2009] ICR 835

Autoclenz Ltd v Belcher and others [2011] ICR 1157

12. In respect of the time point, the relevant provisions are found at Section 111(2)(b) of the ERA 1996 requires as follows:

> *111.— Complaints to [employment tribunal]1 .*
> *(1) A complaint may be presented to an [employment tribunal]1 against an employer by any person that he was unfairly dismissed by the employer.*
> *(2) [Subject to the following provisions of this section]2 , an [employment tribunal]1 shall not consider a complaint under this section unless it is presented to the tribunal—*

(a) before the end of the period of three months beginning with the effective date of termination, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

13. S207B of the Employment Rights Act 1996 states that:

207B Extension of time limits to facilitate conciliation before institution of proceedings
(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").[...]
(2) In this section—
(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.
(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

14. The respondent has relied on further authorities in its written submissions to which the Tribunal has had regard:

Luton Borough Council v Haque [2018] ICR 1388
Bodha v Hampshire Area Health Authority [1982] ICR 200
Marks & Spencer Plc v Williams Ryan [2005] I.C.R. 1293
Cygnet Behavioural Health Ltd v Britton [2022] EAT 108.

Findings of Fact

15. From 2009 to 2010, the claimant was one of a number of volunteers in the Youth Development Service at the respondent. The claimant had something to offer and a particular interest and skill in music related matters. The respondent set out that it recruited the claimant into a paid role as a "as and when worker" after the claimant made an application for the appointment at the end of October 2011.

16. It was not in dispute that the claimant was provided with an offer letter on 1st November 2011 which provided a definition of an "as and when worker" which did not fit the claimant's role and this letter stated that:

At all times you retain the right to refuse work offered and the Council is under no obligation to offer you regular work and retains the right to remove your name from the list of casual staff without notice.
…
'As and When' staff are casual staff whose work:
(I) occurs only once and for a period of less than 4 weeks, or
(ii) occurs more often on an irregular or unpredictable basis, i.e. no pattern of employment can be established.

17. The claimant had essentially provided his services to the respondent for a period of far longer than 4 weeks and had done so for almost 11 years. He has been accepted to legally fall within the definition of a worker by the respondent and there was no dispute that the claimant was a '*hard worker—committed, punctual, reliable, and trustworthy*.' He clearly gave a lot to the service and the youth being supported by Harrow Council and was clearly highly regarded and thought of amongst the witnesses. He was reliable and dependable, and this resulted in him being offered additional projects to work on something described by the respondent's counsel as "over asking". As was heard in evidence the claimant had a positive impact on the young people he worked with and a positive impact on the service.

18. The claimant's paid role arose out of funding from the National Citizens Services (NCS) programme initially. The claimant's position was that he had not signed his contract with the respondent but I do not consider this to be material as he had worked under it. The claimant did not dispute he started out as an "as and when worker" but that his position was that the his role significantly changed during 2013/2014. I do not accept this as it is not borne out by the evidence in the case.

19. During the period 2011 to 2014/15 the claimant carried out the NCS work which tended to be seasonal and then additional work for the respondent in between on projects.

20. From 2015 the claimant moved into working for the Youth Offending Team (YOT) (now called YJS). He moved across to the role at the suggestion of Mr Adu to provide a more stable income to the claimant. In 2016 the respondent issued a policy concerning "as and when workers" and again it was accepted that the claimant did not clearly fit within the definitions in this policy which indicated that "as and when" workers would be used on a flexible irregular or infrequent basis to cover sudden peaks in work or staff shortages, for shorter periods with frequent breaks in employment, to undertake specific activities which are short term or fulfil specific requirements and not to provide cover for longer periods e.g. maternity leave when the temporary cover will be provided by employees issued with temporary or fixed term contracts. The policy set out that if a manger was

concerned about mutuality of obligations advice should be sought from HR. The policy set out the sort of benefits that would apply such as holiday pay and other benefits typical for workers.

21. It is not in dispute that the claimant was provided with a mobile phone and laptop computer. The claimant would work remotely from where the service was being delivered and at the office from time to time particularly prior to the pandemic as there was an open plan office at the Harrow Civic Work Office for all staff to use. In his witness statement the claimant suggested that he attended 3-5 days a week and that his office hours depended on appointments and meetings but generally his hours aligned with standard 9am to 5pm workdays but this is not borne out by the evidence as this would have resulted in significant hours on a weekly and thus monthly hours on a regular basis. This would therefore have been reflected in his hours and pay. It simple was not.

22. The claimant submitted timesheets for approval and the claimant was paid an hourly rate with monthly payments made for hours worked in that month to his bank account via payroll. The hourly rate increased over time but by March 2022 it was at the rate of £17.47 as the claimant's rate was set in accordance with the respondent's payroll grades at G5 scale point 18.

23. Initially there was a pool of "as and when workers" but over time this significantly diminished leaving around 4/5 by 2015 according to the oral evidence on the last day and further diminished by 2018. The claimant and a handful of others remained but the claimant was highly regarded and his skill sets suited some of the projects offered better than others so he was offered additional projects. In time the respondent relied on him more.

24. The claimant could not recall asking for holiday and the evidence was he told the respondent when he would want time off for example he typically took a break after the Tallships sailing trip as it was so intensive. The claimant did not need to request permission merely to communicate that he was not available. This was never questioned by the respondent.

25. I asked questions of the claimant about training and staff events like socials and Christmas parties. The claimant could not provide any specific examples. The respondent's evidence was that the claimant would be invited to team events if they were of relevance in terms of training. There may have been social events but that these were not funded by the respondent as there would have been no budget to do so. I accept that evidence.

26. In around June 2017, the claimant was involved in the Tall Ships programme (youth and students sailing from Southampton to France via the Channel Islands). He was the face of the YOT and attended both meetings in advance of the trip but also accompanied the youths on the sailing trip on multiple occasions. He got involved in the planning and

organisation for the trip and during the course of the evidence we saw many examples of the claimant being the face of Harrow in this regard. The overall management of the project did not rest with him but sessional workers picked up a number of tasks that permanent staff could not spare time away from their case work to do such as purchase kit for the trip, arranging training for the youths and ensuring documentation and passports were in place. Again Mr Shergill gave evidence on this which I accept.

27. His email signature at this time read '*YOT Project Coordinator/Youth Worker*' and listed his contact details and extension number. The claimant was clearly instrumental in the project and seen as the face of it.

28. Indeed during his time with the respondent the claimant was involved in a number of projects not just Tallships. We heard significant evidence of the claimant's involvement in the projects as the respondent accepts he was involved. There was some dispute about the wording which reflected the level of involvement during the evidence. This included the Goldseal project, Inspire to empower, the music programme and other initiatives set out below.

29. Goldseal was a project which was run by external providers and was a program supporting young people in music that ran for four years. The claimant would work with case workers and social workers who had youths to refer onto the service. The claimant would liaise with them to see if the youth was suitable but it was only the case worker who could nominate them. The claimant would attend the delivery of the session by the Goldseal worker and the session or referral is not something he would have created himself. Mr Shergil gave evidence as to the nature of the role of being 1-2 hours a week attending the delivery of the session with a member of the Goldseal team and then the claimant would feedback to the practitioner/case worker on how the session went orally or in writing. I accept that evidence. The evidence was that when this was being delivered the claimant was the most available as and when worker so he became more integral in the delivery of the project at that stage.

30. The claimant said that he would make notes on the youth's electronic file but this was disputed by the respondent as they maintained that he would not have such access given the data it held. In evidence it was explained that there was a shared folder that others would have access to but that this was different from a specific log in to the Capita system. It was agreed that the claimant would feedback to the social worker on the progress of an individual they had referred. The claimant's witness statement goes a lot further in saying that he was involved in reviewing the caseloads of case workers. This is not correct as he was not formally qualified or authorised to do so. It is an exaggeration of the updating of the youth's progress in any given programme he was involved in. Unqualified staff cannot exercise the practitioner's statutory duties or responsibilities towards those young people. I do not accept the extent of the claimant's "reviewing of case loads".

31. The claimant also said he would mentor youths and provide a mentoring service. The respondent denied there was any such formal process. It may be more the semantics of the terminology as the claimant considered himself instrumental in turning the youth around and clearly both loved his work and was good at the role. It is this more informal source of mentoring and male role model that I accept took place in reality. The youths involved would no doubt have seen him as a mentor figure but this is not the same as being an official mentor.

32. Inspire to Empower was another initiative and project that the claimant was heavily involved in. The Inspire to Empower project lasted around 6 weeks and was an initiative targeted at young people from a BAME background which ran annually for around four years. Again the claimant was involved with Mr Chan-Oliver in the delivery of the project and helped create the content including attending the sessions. It was a programme which was short in nature but then repeated over a number of years.

33. Another role the claimant undertook was that as an appropriate adult for young people in custody. He stepped down from this role. This was a separate role for which the claimant was part of a bank of staff. The claimant does not expressly rely on it as evidence towards his status as it was a separate stand alone role but it is merely mentioned for completeness.

34. During the pandemic the claimant offered an "Art Development Programme" so that there could be a virtual music project. This was another project he was involved in.

35. The claimant did not work set hours or a minimum number of hours. He was working as and when required to fulfil the tasks he needed to do. The claimant's payslips illustrate significant fluctuation in his weekly hours (save as during the pandemic as set out below). The claimant's hours on timesheets varied in the period 2011 to 2020 and in some months there were either very low working hours or gaps where there were no working hours e.g. January to June 2012 and January and April 2021 for example. When asked about this in the evidence the claimant could not recall there being a specific reason for this such as hospital admission, serious bout of ill health or period of extended travel for example.

36. His hours and payslips show significant variation which is reflective of the nature of the work he did. A series of projects, he was involved in more than most as he was available and willing. The projects were short in duration such as Tall Ships and Inspire to Empower but repeated in annual cycles. All of his work centered around these projects and there is no evidence of a base of specific tasks always allocated to him that was then supplemented by the project work in the later years.

37. In around 1 February 2019, Mark Scanlon discussed with the claimant the creation of a new role to support the YOT / Youth Offer. The email made

passing reference to C's '*line manager*' although no individual was identified the claimant's line manager. The respondent denied the claimant had had a line manager. The claimant felt that this had changed over time. Given the role of Mr Scanlon conducting supervisions and the need to report to someone it is clear this is a role that he adopted on a quasi basis from late 2021 onwards. It was Mr Scanlon who conducted supervisions, challenged the work that was being done and introduced the tracking system as set out below.

38. In around March 2019, the respondent introduced a role of Integrated Youth Service Officer, at pay grade 'G8' as an employed role. On 3 April 2019, Mark Scanlon emailed the claimant and others to arrange a meeting to devise a job description for the role. The claimant assisted in preparing the job description which incorporated parts of his role. The claimant applied for this role but was unsuccessful. No explanation was given for this but clearly this was a source of great upset for the claimant who felt that his contribution was being overlooked. His upset was understandable as his evidence was he could do much of what was on the job description and by this time he had made a great contribution to the work by the Council. At this point an employed role was created and the claimant did not get it. Things continued as they had done to date.

39. When the pandemic hit all work on these projects ceased as they could no longer take place face to face. The claimant conducted some meetings via teams during this period. Recognising the inability of agency and non-fixed term workers to earn during this period the respondent made a policy decision to pay a standard hourly rate to these individuals if they had been with the respondent for more than 12 weeks. The claimant benefited from this arrangement during the pandemic and was paid for a guaranteed standard of 25 hours per week. This is the only period of set hours during the relationship. It is unique arising out of the pandemic and was a policy decision to benefit those that worked with the Council. I accept the Council's submissions that to look at this as indicating an employment relationship alone would be wrong.

40. However, the Claimant clearly then began to rely on the set weekly income and it took some time for the Council to change it. The Council took two attempts to revert back to payment by the hour as the Claimant continued to submit his claim for the set hours as set out below.

41. During 2021 Mr Scanlon started making supervision notes regarding the claimant's working arrangements. On 5 December 2021, Mr Scanlon informed the claimant by email that following the pandemic restrictions, the respondent was now able to revert to the usual arrangement of offering hours and types of work based on the needs of the service. He confirmed that from January 2022 (giving the claimant 4 week's notice of the change) but that all work requests would be referred to and agreed in advance by Deputy Team Managers, and that in essence the claimant was to be paid for work done going forward not a set amount of in effect guaranteed pay. That this may impact on hours going forward but this was budgetary and

that they were seeking additional funding. The claimant replied seeking clarity as to his role going forward. It is clear from the evidence that it was around this time that the claimant's role became to be more closely scrutinised by Mr Scanlon.

42. Around this time the respondent introduced a tracking system (ie. spreadsheet) wherein management were able to book the claimant's time and track the outcomes of his work with young people. The claimant was reminded again by email of 21st January 2022 of the need for the claimant to get authorisation from the Duty Team Managers ("DTM's) before commencing any work.

43. Mr Scanlon met with the claimant for supervisions in January 2022 noting that the claimant was bringing in his own DJ equipment at times and the claimant argued that as such he should command a higher rate of pay. Another supervision took place in February 2022. These were very much 1-2-1's discussing various aspects of the claimant's role.

44. In March 2022, the claimant raised his concerns to Mr Scanlon by email that there was a lack of management of his work on a day to day to day basis. Mr Scanlon explained in his responding email the need to use the spreadsheet and also that if there was no one else to report to the claimant should report to Mr Scanlon so he can get a decision. The claimant later that month raised issues with Mr Scanlon about payroll and that he had not been properly paid as he submitted his timesheet to Danielle and she passed it on. Mr Scanlon escalated this with payroll to seek a special pay request.

45. Following the payroll issues the Claimant emailed Mr Scanlon on 29 March 2022, cancelling all sessions that week. He was not seeking permission to be released but communicating his decision not to do the sessions. The claimant cited stress from late payment. He did not report sick in the usual way an employee would but merely indicated that he was cancelling his sessions and the evidence did not reflect informing a line manager he was too unwell to do the sessions. He did not expressly report in sick. The language used in the email from the claimant is less indicative of an employment relationship.

46. The evidence was from Ms Johnson that the claimant could decline work and if he was unavailable it would be offered to other as and when workers. The March 2022 email is the only example we have of him declining to work in writing. The respondent witnesses accepted that there was this right to decline work but that in reality the claimant often accepted and over time the number of as and when workers had naturally declined and he was offered more. I heard evidence that the claimant did not go on every Tallships project and that after covid the initiative did not run for example.

47. On 6 May 2022, Mr Scanlon requested that the claimant refrain from using '*Project Coordinator*' on his email signature. The email acknowledged that

although the claimant may have led on some youth projects however it was now recognised not to be suitable for a sessional worker. The difficulty with the evidence in this case on exactly what the claimant did day to day is that the respondent has sought to downplay the claimant's involvement and tasks and the claimant has a view that such tasks were perhaps more than they were. The reality is somewhere in the middle. However, the claimant was clearly highly regarded and his work valued so it is particularly unfortunate that the relationship should end up here.

48. The claimant emailed Mark Scanlon on 9th May 2022 concerning the music programme for young people. He expressed his disappointment with the handling of the situation stating his disappointment with the changes that are being made to the role and that the respondent had not told him sooner there was an issue over funding now the Integrated Youth Service Officer was in place. In this email, the claimant accepted that he was a sessional worker with no contractual hours but felt that he was an employee when he stated '*I am aware that I am a sessional worker and this position leaves me with zero contractual hours*, *however as an employee of 12 years I would have expected some clarity.*"

49. In the May 2022 supervision meeting the claimant was told that contracted staff must be there for his sessions and on 19 May 2022, one of the DTM's wrote to the claimant and others confirming that sessional workers should not be working without a lead / Early Support practitioner present and that there should be a lead or ES practitioner present with only one sessional worker present and a lead practitioner needed to be the one managing and coordinating the group as well as managing the cohorts and waiting lists. This was not to be the claimant.

50. On 15 June 2022, Mr Scanlon met the claimant for a further supervision to discuss the claimant's working arrangements. The claimant expressed his frustrations and wanted clarity on his working arrangements. The claimant was told to only submit timesheets for actual hours but he expressed a concern he could not do less than 25 hours and accepted he had not been working the 25 hours but had continued to submit the timesheet for that covid amount. As a result in that meeting Mr Scanlon agreed that from the third week of July he would only submit for hours worked and this was subsequently confirmed in an email to the claimant on 16th June 2022 that "*on the basis of the confusion he would agree to a period of 5 weeks notice after which timesheets should reflect only hours of work requested/agreed by one of the managers*." Whilst the claimant may not have liked this, this merely reconfirmed the clear instruction with effect from January 2022 in any event and should have been actioned sooner by both sides.

51. On 4 July 2022, the Claimant emailed Mr Scanlon and Danielle querying the provision of only 5 hours a week for music sessions and on 6th July 2022 he chased his one to one which took place on 11th July 2022.

52. The claimant raised a grievance on 20 September 2022 by form with supporting evidence, regarding changes to his hours and working arrangements. In the grievance one of the claimant's complaints was that he stated '*I have never had a line manager or regular supervisions…*' The claimant had a period of absence due to ill health. It is not clear why the claimant waited two months to do so.

53. The Respondent's Grievance policy stated that it applied to all "*directly employed staff excluding schools employees and "as and when workers". It does not apply to agency workers, interims or consultants."*

54. By letter dated 21 October 2022, Mr Scanlon responded to the claimant's complaints around the role, hours, alleged data breach, line management for the future and issues with pay. In the response Mr Scanlon explained how he had looked to convert the claimant's "post into a permanent role" but that this would be significantly less than 25 hours a week possibly 12-14 hours a week but the claimant had rejected this for financial reasons.

55. Mr Scanlon went onto explain that "*throughout this time, your role remained an as and when/sessional worker in support of the council YOT service. I realise you consider that your role at some points over the years had taken on additional layers of responsibility and value and that then reverting back to an "as and when" position was taking back of these. To some extent I would not disagree with this but I do maintain that throughout this the "sessional" and "as and when" nature of the role supporting the service did not substantially change and that in effect where you had been leading on the development of any programmes this was within the contract of having been asked to do so within your role.*" Whilst there was further correspondence the issues were not resolved.

56. On 10 November 2022, the claimant emailed Mr Scanlon and others setting out his frustrations and attaching his resignation. He expressed his intentions to issue employment tribunal proceedings and made reference to constructive dismissal. In this the claimant explained he was stepping away from his role as project coordinator as the change of conditions was untenable. The claimant asked to be informed of the appropriate notice period required of him and the opportunity to say goodbye to colleagues and young people he had been working with. The claimant did not actually work any period of notice and did not say goodbye to colleagues and others on a formal basis.

57. The claimant in evidence set out that it was around this time that the respondent cut off access to his work emails and the system. The claimant did not work again.

58. By letter of 23 November 2022, Mr Scanlon wrote to the claimant to offer him a minimum of 10 hours per week for 6 months and for him to reconsider his resignation but that if he did not then he would need to return the laptop and work mobile phone. The claimant did not accept this offer.

59. On 2nd December 2022 the claimant commenced ACAS EC against the respondent and the certificate was issued on 6th December 2022.

60. By letter dated 9 December 2022, the claimant expressed concern about the handling of his grievance and asked that the letter be an appeal against the outcome of the grievance.

61. On 14 December 2022, Mr Scanlon responded to the claimant's appeal informing him that as a sessional worker the grievance policy did not apply to him but that he had attempted to provide a substantive response to the concerns he raised and offered a meeting to resolve them. The Claimant responded by letter dated 4th January 2023.

62. The claimant presented his claim to the Tribunal on 17 February 2023. There was no evidence presented as to why the claimant delayed in bringing the claim. As far back as 10th November 2022 the claimant expressed his intention to bring a claim for constructive dismissal so was clearly aware of such claims.

63. The claimant asserted that he should be given a statutory notice period from the date of his resignation as he had requested that he be informed of the appropriate notice. He did not work nor was he paid beyond the 10th November 2022. The date given as the date his employment ended on the ET1 form by the claimant himself was 9th November 2022. The claim form provided no explanation for the delays given the stated last day of employment.

Conclusions

<u>Is the claimant an employee within the meaning of s230(1) of the Employment Rights Act 1996?</u>

64. S230 of the Employment Rights Act 1996 sets out the relevant tests in that an employee has to work under a contract of employment which is a contract of service. It is not in dispute that the claimant is a worker falling within s230 (3)(b) – the respondent does not accept that s230(3)(a) applies as this would result in a contract of employment being in place. In essence this reflects the position that all employees are also workers but not all workers are employees in basic terms.

65. As per *Autoclenz Ltd v Belcher and others [2011] ICR 1157* there is a need to balance all the factors in consideration. I have considered a number of factors. I consider mutuality of obligation to be an important factor so have started here but the remaining factors are considered in no particular order and indicated in bold below.

66. **Mutuality of Obligation.** Mutuality of obligations is a relevant factor and in my view an important factor that can point to employment or otherwise. It

is not solely definitive but is part of the considerations and an important factor as demonstrated by the case law.

67. It is clear from the evidence that there was (aside from the unusual covid period when lockdown meant that services could not be provided) there was never an irreducible minimum number of hours that the respondent was obliged to provide and the claimant was obliged to accept. The payslips and timesheets show a variation in hours during the relationship and that once the claimant was finally off the temporary fixed covid hours his actual hours were far reduced. This was because projects like the Tallships did not start up again and thus this was not project work he could be offered.

68. Again naturally the pool of as and when workers had diminished over time but there were times when others were available to take the work and the claimant could decline. We saw one example of him cancelling sessions in March 2022. There were periods during the relationship where he was working very few or nil hours in a week/month as per the pay information. There was a further decline after the fixed hours for covid ended. No set hours were agreed. Even after the resignation the respondent could only offer a smaller number of hours which the claimant did not accept.

69. The claimant had a contract as an as and when worker. Although the claimant did not meet the time requirements of the respondent's own policy as he had been there far longer, he understood himself to be a sessional worker or someone to be called up as and when required and that he had the choice as to take the work. He decided when to take time out for example after Tallships as it was demanding. He did not need to seek permission simply to tell the respondent he was not available.

70. Taking into account all the evidence and the legal tests in the authorities referred to, I do not consider that there was mutuality of obligation.

71. **Personal service** is a more tricky question as the claimant was often relied on for his skills in music for example and he was involved in the creation of the Inspire to Empower initiative. The reality is that it was of great benefit for the respondent and the youths in the programme to have consistency of personal service from the claimant. This did not meant that convenience and availability prevented substitution. The claimant was reliable and dependable but the respondent could offer work instead to another as and when worker.

72. However, the claimant was part of a pool and when work was not done by him, he could be replaced by another as and when worker. Whilst he was relied on for the services he could decline and the respondent would ask another as and when worker from the pool. These workers were already vetted and there were no other fetters on the right to substitution. Other workers were used for example for Tallships and the respondent's evidence was that the claimant was offered the chance to help on the project but he was not obliged to do so. This is similarly the case with

other projects. On balance the claimant was not required to personally provide the services. The project or service did not rely on him personally and if he was not there it could not operate.

73. **The contractual position.** The only written contract between the parties was the as and when contract but the respondent accepts the claimant does not neatly fit within its own definitions for this type of contract. There was no other written contract.

74. The claimant clearly viewed himself as a sessional worker and saw the distinction between his worker status and applying for a permanent role in 2019 as the Integrated Youth Support Worker role as an employee. He was naturally disappointed that he did not get it.

75. The projects themselves were subject to budgets and often third party association. The fact that many of them ran successfully for more than one cycle is perhaps a testament to the work being done but there was no guarantee for the claimant that working on a project guaranteed future projects. Other factors such as budget and third parties impacted on their ability to continue for example Tallships ended when covid hit. Working on a project gave the claimant some hours work depending on the project this was often short term and offered no guarantees. Even in the face of losing the claimant and all his skills and experience, post resignation the respondent could not commit to a contract that met the claimant's needs. It was only at that time that the respondent offered the claimant a set number of hours which would have given him so mutuality but this was not accepted in any event.

76. The witness were at great pains to stress that they viewed the claimant as an as and when worker or sessional worker. The claimant was well known within the respondent for being available and reliable as one of their bank of sessional workers. The claimant's witnesses outside the organisation could not shed any light on the contractual position. The claimant himself during the time period when matters started to escalate in 2021 and 2022 referred to himself as a sessional worker. He accepts that he had effectively zero guaranteed hours and was a sessional worker but made reference to his employment length. At no stage did the claimant assert he was an employee or guaranteed a set number of hours etc until his resignation when he made reference to the Employment Tribunal and constructive dismissal.

77. A tribunal can look not just at the contract but the reality of the position if the contract does not reflect it. The fact that the claimant had a sessional workers contract does not prevent him from being able to assert employment status if the reality is something different. Here the contract referenced this and whilst the respondent's own definition does not fit his hours did vary and he was seen and held himself out as a sessional worker. I do not find that the contract was inconsistent with the reality of the relationship. The respondent's own definition of an as and when worker is not fatal and he was offered work as and when it was available

but he did not have to accept it and the respondent was free to offer it to others.

78. **Exclusivity.** The contract between the claimant and the respondent did not prevent the claimant from providing services or working with others. The claimant did not give evidence as to what he did outside of the work with the respondent but he had DJing equipment which is referred to below which he was able to use and bring to work.

79. The claimant's hours varied week to week and even during the covid period allowed sufficient time to explore other income. Regardless of the claimant's personal situation and whether he did so, the claimant was not prevented from doing so and there was no exclusivity in the relationship. The projects were not his alone and exclusively his others did and could work on them. There was no exclusivity in this relationship.

80. **Integration and organisation.** Turning now to integration into the organisation. There are a number of relevant subfactors to consider here, pay, equipment, nature of the work, his role in the organisation, whether he attended training events or staff parties with others.

81. The claimant was paid via payroll based on an hourly rate. He was not paid a salary save for during the pandemic getting set hours paid. The pay rate was set by reference to the respondent's pay rates and naturally the rate had increased during that relationship given its length. The claimant raised his pay and that this should be increased as he brought his own equipment at times. This gave him additional bargaining power and this is not indicative of the employment relationship. Rates of pay are not usually negotiated and an employee does not seek additional pay for bringing equipment to work as this would be unusual. The claimant's pay and hours varied significantly during the period of the relationship (outside the covid set period).

82. The claimant was paid holiday depending on the hours he had worked and was entitled to statutory sick pay – no enhancement was provided. He was only paid for the hours worked and outside the covid set period there was no minimum pay paid for a minimum number of hours. The holiday and sick pay paid are commensurate with worker status.

83. The claimant was given set hours during covid recognising that he could not work. I accept the respondent's submission that was an extraordinary time and should not result in the respondent being penalised for being more generous than it had to be given the length of the relationship and the extraordinary events at the time. One could criticise the respondent for allowing this to continue beyond January 2022 as the claimant had had notice it was coming to an end and it should not have allowed the status quo to continue until July 2022. This is particularly given it was public funds but this does go to the issue of control below and the lack of control over the claimant at that time. If anything the fact that pay was allowed to drift demonstrated a lack of control of the claimant.

84. The claimant was provided with some equipment of a mobile phone and a laptop. This is more indicative of employment as the self-employed would provide their own equipment. The laptop and mobile phone were also items that were provided to other as and when workers. In addition, the claimant did bring his own equipment to be used by the service as indicated above namely DJing equipment and asked for his pay to reflect and this is more indicative of self-employment.

85. Role within the respondent. The claimant worked on several projects with the respondent that ran for short duration but repeated in a cycle often annually. The claimant used the job title "project co-ordinator" on his emails for some period of time until it was challenged in May 2022. It was not allocated to him but to be fair to the claimant he did work on and contribute to the coordination of projects so it was not factually inaccurate. The job title is not indicative of employment one way or the other in my view.

86. As set out above I heard a lot of evidence as to the claimant's involvement in various projects over the course of the hearing. The claimant's role was more akin to facilitation attending the sessions and feeding back to the youth practitioners or care workers. The claimant could not discharge the statutory duties of the youth practitioners and care workers but did attend sessions and feedback. He assisted in coordination of the projects but was not doing this alone. He was not managing the project or conducting risk assessments but assisting with specific tasks and no doubt contributed to the overall effort in offering these projects. The claimant offered support to others within the respondent and externally on these projects, he was not in a managerial role. He did not provide mentoring or conduct any case work.

87. The evidence as to the project work was extensive and really only relevant to the tests of integration and control. The fact that someone carries out specific tasks such as admin for example does not make them any less of any employee. It is a multi-factorial test and is relevant for integration and control not indicative in its own right.

88. Length of time. There were periods of weeks without any work or pay for the claimant but the relationship continued for a long time, longer than many employment relationships in fact. It's length meant that the claimant did not fit the respondent's own definition of an as and when worker. Had the claimant worked regular hours over a sustained period this would be evidence pointing towards an employment relationship and mutuality of obligation and integration within the organisation but the claimant did not work regular hours and his pay and hours fluctuated greatly. The length of time was relied on by the claimant as indicative of the employment relationship. It is fair to say that integration can occur the longer a relationship continues and I can see why the claimant (who is not legally represented) would feel that he has been there so long he is an employee

but that is not the test. It is far more complex than that and the authorities are clear that a number of factors need to be taken into account.

89. Training. The respondent's evidence was that the claimant would be invited to team events if they were of relevance but the claimant could not provide any specific examples of this. There would have been a requirement for him to have certain knowledge for certain projects from a safeguarding perspective but the claimant was not compelled to attend any specific training events and neither side could provide any specific evidence on this point to give examples. The respondent's position was he was invited but not compelled to attend and anyone working in the organisation would be invited. This was therefore not persuasive either way.

90. Staff parties. The claimant believed that there may have been some events such as a Christmas party but could not provide any specific evidence on this. The respondent's evidence was that there would have been no council budget for such events so again there was no evidence that supported either side here. This is not something that was persuasive either way.

91. The claimant was to a degree integrated into the respondent's workforce which came partly from the passage of time and the "over asking" of the claimant which counsel for the respondent referred to. He was good at what he did, reliable and highly regarded but taking into account all of the above I find that he was only partially integrated into the respondent not fully. He was seen as and regarded himself as a sessional worker willing to help out but without the full integration of an employee day to day.

92. **Control**. The claimant was not subject to a great deal of control. It was only in 2022 that the respondent tried to get some visibility and grip on what the claimant was actually doing.

93. The claimant had a high degree of control in how the tasks he was allocated were conducted. He worked on specific projects and was not micro-managed on a day by day basis. The claimant did not have a formal line manager something he was aggrieved about and which he raised several times. He had issues with getting timesheets authorised and paid as there was no oversight.

94. The claimant started to have 1-2-1's/supervisions and this appeared to be more at his instigation as he would request them with Mr Scanlon. The claimant was not subject to an appraisal or feedback system that reviewed what he was delivering or how effective it was. Towards the end of the relationship there were attempts to get better visibility of what he was doing and who was authorising the hours in order to manage budgets. It was an attempt to stop the claimant deciding what he was doing and submitting a timesheet for it but to get him to seek permission first. This is indicative of the lack of control that had existed for some time but as the budgets were under close scrutiny and with the respondent seeking

additional funding for projects it could not allow to go unchecked. The claimant still had some control over both his hours and what he spent the time doing as long as the hours themselves were authorised on a specific project.

95. The claimant did not have control of any specific budgets but he could request petty cash for some expenses linked to the project. He was not involved in funding the projects or securing that.

96. The claimant did not manage specific projects but rather would work with others. Management oversight was necessary for certain elements of the work but the session content was not closely controlled. Content was set by the external provider or the objectives of the project and the claimant had a certain degree of freedom for example bringing and using his DJing equipment with no evidence of this being asked or authorised in advance but is indicative of the claimant having some "creative freedom" in the way the sessions were delivered at times particularly where he had been involved in developing the project with others. The nature of the projects meant that whilst he was a contributor to risk assessments he did not have overall responsibility for them or indeed for discharging the statutory duties of case workers.

97. The claimant could have access to the staff office but also needed to assist in the delivery of certain projects at a specific place. When this was not required the claimant would often choose to work from the open plan office but was not compelled to. Sometimes he would work remotely.

98. The claimant would not line manager or control other employees and the claimant had no line manager or nor was he controlled by such a person. He sought authority from a number of individuals for his hours as this was very much project based.

99. On balance the claimant was not subject to a high degree of control. His hours were controlled by budgets and the work that was available but how he delivered the work and where, was more in the claimant's control than the claimant being controlled by the respondent. The claimant was not appraised or his performance reviewed albeit the respondent does accept that praise was given where due. The claimant could control his hours and decline the offer of work at any time. The freedom of the relationship until it deteriorated clearly suited both sides and was less than would be expected in an employment relationship.

100. **Financial risk.** The claimant had no certainty of hours and these fluctuated. Once the pandemic set hours paid came to an end the budgetary constraints were such that the respondent had fewer hours to offer. The claimant expressed his dissatisfaction with this on several occasions and even in the face of his resignation the hours offered could not match the claimant's expectation or requirement.

101. This was not the sort of case where the claimant has other financial risks like someone in business as to whether he made a profit or not, the only financial risk comes from the lack of mutuality of obligation in this case. As such, the claimant had a degree of financial risk as this case from the lack of mutuality of obligations or set working pattern. The reality was the claimant had got used to set hours during covid and did not want less.

102. **Summary,** considering the many factors in this case, there was no mutuality of obligation or exclusivity, the claimant was not required to personally provide the service other as and when workers could be and were used from time to time. The claimant was to a degree integrated into the respondent workforce but was more in control than being subject to a degree of control**.** The claimant took a degree of financial risk as there was no mutuality of obligation and no set hours but this is different from the level of financial risk as if he was in business on his own account. The contract was that of sessional worker and not an employee.

103. Having heard all the evidence and considering the multitude of factors, I find that the claimant was not an employee but a worker of the respondent. There was no exclusivity and no mutuality of obligation, the contract set out that the claimant was an as and when worker and that was the reality. There were periods where no work was conducted. The claimant could largely control the way he delivered the services and had the ability to decline project work or unilaterally decide to cancel sessions or that he was unavailable.

104. The claimant understood himself to be a sessional worker and the creation of an employment role, he did not get did not change his status. His obvious grievance that he did not get that role is illustrative that this was different to his own role. Had he got the role then it would most likely not have been in dispute that the claimant was an employee as it was an employed role with set hours and pay.

105. This was an unusual case given the disputed evidence as to the extend of the claimant's role and the length of time over which he had a relationship with the council. The fact the respondent had not changed its definition of a sessional worker is not helpful but is not definitive. Whilst I have some sympathy for the claimant in feeling as he did this does not mean that working somewhere for a long period of time (with gaps and fluctuations) means that you are given a certain status or the same rights, this is not the correct legal test.

106. The contract and the multicity of factors as set out above are indicative that the claimant is a worker and not an employee. He therefore cannot bring an unfair dismissal claim as the Tribunal only had jurisdiction to hear such complaints from employees. It therefore follows that given the claimant's status as a worker and not an employee within the meaning of s230 Employment Right Act the Tribunal does not have jurisdiction and the claims are dismissed.

107. For completeness I have also briefly dealt with the issue as to time. I have considered the first three issues as to time together.

<u>If the claimant is an employee, is he entitled to statutory notice to determine the EDT?</u>

<u>If so when was the EDT?</u>

<u>Was the claimant's claim for constructive unfair dismissal presented within the time limits under S111(2)(b) of the Employment Rights Act 1996 taking into account any extension from ACAS EC?</u>

108. It is not uncommon for an employee to resign without notice. The claimant did not work any notice and merely enquired as to the length of the notice period. It was not in dispute that his IT access was revoked and he did not work again.

109. There was no contractual requirement for the claimant to give notice. The statutory provisions do not apply as the claimant was not an employee. If I am wrong about that there is no automatic adding of the statutory notice period when someone resigns to change the effective date of termination save for when an employee claims continuous service which adds the notional notice period.

110. The claimant completed his ET1 with the 9th November 2022 as his last working day and clearly had in his mind at that time his relationship came to an end then. The claimant was only paid for the hours he worked so this was the last time he was paid also.

111. I do not find the claimant's argument in the hearing that some form of notice period to be added an attractive one to change the last day of employment. I therefore concur with the respondent's submissions that the claim is out of time.

112. The primary limitation period is 9 February 2023 (ie. 3 months less a day from the date of resignation on 10 November 2022). I find that the respondent has used the 9th November and it should be the 10th November. I agree that it is correct that the claimant contacted Acas for Early Conciliation on 2 December 2022 ('Day A').

113. Acas issued a certificate of Early Conciliation on 6 December 2022 ('Day B'). By the effect of section 207B(3), the primary limitation period is extended by 4 days (ie. '*the period beginning with the day after Day A and ending with Day B*') to 13 February 2023.

114. I accept the respondent's submissions that the EAT guidance suggests that subsections 207B(3) and (4) are applied sequentially and while subsection (3) applies in every case, subsection (4) only applies in the circumstances to which it refers.

115. Since 13 February 2023 is not less than 1 month after Day B, section 207B(4) does not operate to extend time for a further period of a month after Day B. Limitation expired on 13 February 2023. It is not in dispute that the claimant filed his ET1 on 17 February 2023. This makes the claim some 4 days late.

<u>If not was it reasonably practicable for the claimant to have presented the claim within time?</u>

116. Having regard to s111(2)(b) and the authorities referred to there are a number of principles as to whether it was reasonably practicable for the claim to have been brought in time. This is less of an exercise of judicial discretion than the Equality Act provisions. The time limits are intended to be strictly interpreted.

117. Critically here the claimant has not advanced any evidence as to why the claim was late. The claimant in his resignation made reference to the Employment Tribunal and constructive dismissal he was not ignorant of his rights. He made no reference to why the claim was presented out of time and the led no evidence on the matter in his witness statement. He could not provide any credible explanation in evidence.

118. I therefore find that even if the claimant was an employee it was reasonably practicable for the claimant to have presented his claim on time. There is no evidence to the contrary. Had he succeeded in establishing status his claim would have been out of time and dismissed in any event.

119. It therefore follows that as the only claims the claimant has before the Tribunal require him to be an employee and have brought the claims in time all claims are dismissed and any further hearings are vacated accordingly. The claim ends here.

_____
Employment Judge S King
Date: ……19.08.24……..
Sent to the parties on:
3 September 2024
…….....

For the Tribunal Office