



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107215/2023 & 4107216/2023

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Held in Glasgow on 16 May and 10 & 11 September 2024

Employment Judge L Doherty

10 **Ms A Taylor**

**First Claimant
Represented by:
Mr J Kiddie -
Counsel**

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Ms A Fountain

**Second Claimant
Represented by:
Mr J Kiddie -
Counsel**

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M&M Theatrical Productions Ltd

**Respondent
Represented by:
Ms D Maguire -
Consultant**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The judgment of the Employment Tribunal is that the claimants are workers for the purposes of the Working Time Regulations 1998, the National Minimum Wage Act 1989 and the Employment Rights Act 1996; that the Tribunal has jurisdiction to consider the claims presented by the claimants, which will now proceed to a final hearing.

REASONS

- 35 1. This was a Preliminary Hearing (PH) to consider the issue of the claimants' employment status, in particular if they are 'workers'. Mr Kiddie, counsel appeared for the claimants and Ms McGuire, Consultant appeared for the respondents.

2. The second named claimant had presented a claim under the Equality Act 2010 (the EQA) however, Mr Kiddie confirmed that this has been withdrawn. The remaining claims are presented under the Working Time Regulations 1998 (the Regulations), the National Minimum Wage Act 1989 and the
5 Employment Rights Act 1996 (the ERA). In order for the tribunal to have jurisdiction to consider such claims the relevant issue is to determine whether the claimants were workers.
3. It is not contended that the claimants are employees; their position is that they are workers. The respondents dispute this; their position is that the claimants
10 were self-employed contractors.
4. The Tribunal heard evidence from both the claimants, and for the respondents' evidence was given by Mr Mcausland, a Director of the respondents and Rachel Egan, an actor/ Team leader with the Respondents.

Findings in fact

15 *The respondents*

5. The respondents are a Theatrical Production company engaged in the provision of theatrical productions primarily in primary schools. They are based in Ayr, but provide productions which tour across the UK.
6. The respondents recruit independently from among actors who do not have
20 agents as well as via agencies; their recruitment pool includes recent graduates. Candidates submit CV's and headshots and are selected after audition.
7. Each tour has 4 actors, one of whom is a team leader. Tours often cover a significant geographical area. Accommodation is offered for the period of the
25 Tour as is transport in a company branded van from that Accommodation to venues.
8. The respondents have around 32 office staff and engage around 70 to 80 actors at peak season.

The claimants

9. The first claimant, whose date of birth is 22 January 2000, graduated from Acting College in October 2022. Prior to their engagement with the respondents, they had undertaken some work as an Extra, and had performed in an advertisement. Their income from this employment was paid gross of tax. They also worked in jobs other than acting time to time, from which income was paid net of tax.
10. The second named, whose date of birth is 19/03/97, graduated from Acting school in 2018. They have held a number of acting jobs. They have obtained a number of contracts with the respondents, the first one of which was taken up via their agent. The second claimant currently has part time employment unconnected to acting from which they earn £12,500. They have held a number of jobs where remuneration for which have been paid net of tax.
11. Both claimants regard acting as their principal career. Neither claimant has any source of income other than earned income. They have to meet their living expenses from this income.

Engagement with the respondents/Contracts

12. The first claimant was successful in securing a role/s in one of the respondent's productions as a show team member and driver. They signed a contract with the respondents on 11/01/23.
13. The second claimant secured a position as a Show Team Leader. They signed a contract with the respondents on 10/01/23.
14. It was accepted that there was no material difference in the contracts signed by each of the claimants, other than rates of pay, and job title, and the fact that the first claimant was also engaged as a driver and the second claimant as a team leader.
15. The contracts are headed:

*M&M Theatrical Productions Ltd (Show Team/Team Leader) Member
Acts (Actor) Contract for Services'*

16. The preamble provided:

5 *"By signing this you confirm you have read and understood the Policies and
Guidelines Manual which forms a supplementary part of your contract. You
may wish to seek legal advice before signing as you will be legally bound to
the terms and conditions contained within once the contract is signed by you
and your signature witnessed."*

10 17. The Policies and Guidelines Manual (the Manual) set out rules and
instructions over 11 pages on the following matters:

15 *Rehearsals; accommodation; costumes; health and safety; setting up and
striking scenery; use of pyrotechnics; sound and lighting equipment; stage
combat; skin character work; company vehicles and drivers; health and well-
being; team conduct and dress; social networking policy; complaints;
necessary documents.*

18. The contents page of the Manuel provided:

*"Please read this manual carefully as it forms an important part of your
Contract for Services."*

20 19. The contract provided for an arrival date of 6/02 and expected completion
date of 21/07/23.

20. It provided there may be extended breaks for which the claimant would not be
paid, and no accommodation would be made available.

21. In practice these breaks reflected school holidays. The claimants were not
paid during those breaks.

25 22. The first claimant's Title per the contract was Team Member/ Driver. The
contact (clause 12) provided that drivers will be required to drive the vehicle
to and from any performance venues and accommodation. It stated: *"there
are several rules with regard to the company vehicles, which must be adhered*

to so as to ensure the safety and well-being of all occupants. Please refer to our policies and guidelines manual for details of these.”

23. The manual contained 21 points under this heading, including that every team member was responsible for the general maintenance, care and cleanliness of the vehicle. During the induction second claimant was given training in aspects of vehicle maintenance which she had to carry out.
24. In practice, both claimants were required to carry out vehicle checks and to clean the vehicle. There checks were performed in accordance with a rota shared among three team members at any one time which also dealt with the tasks of cleaning and repairing costumes used in the show and the maintenance/ cleaning of technical equipment used in the shows.
25. The manual provided that drivers were personally responsible for parking penalties, which if paid by the company would be deducted from the completion bonus to which they were entitled.
26. The contracts at clause 5 provided details of the role(s) assigned to the claimants. The contracts provided the actor would be required to perform an average of 15 shows per week, with a maximum of 3 shows per day. In practice the norm was to provide between 2 and 3 shows per day, which were followed by workshops. The actors, including the claimants , also had to unload the van and set up the scenery/ light sound and other technical equipment for the shows in accordance with the health and safety rules in the Manuel.
27. The practice was that actors attended a two week induction/rehearsal period in Ayr prior to the commencement of a tour. Both claimants did this. Training and instruction was provided at the induction on various matters including setting up of scenery /light sound equipment and health and safety aspects of this/ van maintenance and, in the second claimant’s case, sales.
28. There was limited personal licence in terms of performance, however considerable instruction was given on performance which was closely directed during the rehearsal period.

29. Clause 8 of the contract dealt with fees and payment. It provided the a fee of £500 would be paid to each claimant within 5 working days of the end of the rehearsal period; the first claimants weekly fee was thereafter £380; the second claimant's weekly fee was thereafter £400 claimant. The contracts provided that a £20 completion bonus would be deducted from this each week. It stated:

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"Your completion bonus will be paid within two weeks of successful completion of your contract, subject to invoicing, provided the usual criteria have been met i.e equipment/costumes/ vehicle are returned undamaged and all accommodation has been properly maintained."

30. Payment was made fortnightly.

31. Prior to the termination of their contracts by the respondents both claimants were paid as per the contract terms.

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32. The contract provided that the actor was responsible for their own travel costs at the start/ finish of the contract and during any breaks. This reflected what happened in practice.

33. At clause 10, the contracts provided that:

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"The Act is personally responsible for all Tax and Ni's due as a result of the agreement. If you have not already registered yourself as self-employed with your local tax office, you should do so prior to the start of this contract."

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34. Both claimants submitted tax returns in which the declared themselves self-employed for tax purposes in respect of the income they received from the respondents. This was in distinction to income which they received from other employment which they carried out in the same tax year on which tac was paid at source.

35. The respondents paid the claimants' gross with no deductions for tax or national insurance.

36. The second claimant submitted invoices to the respondents for payment, five of which are produced. They were shown how to prepare these by a member of the respondent's administrative staff.
37. Two invoices contained the following: "*by signing this document, the customer agrees to the services and conditions described in this document.*" Two invoices contained a statement: "*thank you for your business.*" One invoice made reference to a self-employed UTR number.
38. At clause 14 under *Sickness*, the contract provided:
- "The company reserves the right to replace the Act and terminates the Act's contract if you are unable to perform a show at any time regardless of the reason i.e long term illness, injury contagious conditions. If you are unable to perform for any reason, we would be happy for you to provide a suitable qualified substitute to, at your own expense and subject to our approval."*
39. On one occasion the first claimant had to go to a family wedding. They were told they could not have the day off unless they found cover. The first claimant provided two actors as proposed options to substitute for the role. The respondents accepted one of the options, who was an individual who had previously toured with the respondents.
40. The respondent, if providing a substitute, will often draw the substitute from among actors who have previously performed with them.
41. On 19 June 2023, the first claimant became ill and was certified as unfit to work due to stress and anxiety. They wished to return to work, however their contract was terminated by Emma Mitchel, one of the respondent's directors on 28 June 2023. They were not given the option of providing a substitute.
42. The second claimant requested time off in February following the death of her step farther. This request was refused. They had a day off in March 2023 to attend the funeral. The respondents found cover for them on that occasion. The second claimant was told by the respondents that the respondents had found a substitute so they would not have to.

43. On 22 July 2023, the second claimant attended a remote meeting with Emma Mitchell. They thought the meeting was to have a chat about how things were going, however the second claimant's contract was terminated by Ms Mitchell further to the respondents having received allegations of bullying against second claimant.
44. On the occasion when actors ask for time off for example to attend a wedding or graduation, and provides a substitute who is approved by the respondents for that occasion, or if the substitute is provided by the respondent, the actor pays the substitute, and the actor is paid by the respondents.
- 10 45. Clause 15 of the contracts provided that accommodation costs would be covered with the exception of contract breaks. It stated:
- 15 *"You are not obliged to stay in the accommodation provided. However, the Company has put in place rules and regulations which must be adhered to by an Act using the accommodation. Failure to follow these rules will result in your immediate expulsion from the company accommodation. You will then need to find your own accommodation for the remaining weeks of your contract. The accommodation rules can be found in our Policies and Guidelines Manual."*
- 20 46. The manual sets out 10 rules about accommodation, including that the actor would be required to share a room; that it had to be kept in an acceptable condition and that cleaning rotas would be organised for communal areas, and that accommodation could and would be inspected by the owner or any member of the office team without notice; that any damage to the property had to be reported to the team leader; and that the actor had to provide their own food, towels and personal items.
- 25 47. In practice, the accommodation was inspected from time to time, generally by the landlord.
- 30 48. Both claimants were on tours of schools across the UK, which required them to move location and accommodation frequently, sometimes staying in reasonably remote locations. It was not feasible for either claimant to source

their own accommodation due to the logistics of their tours or the cost of doing so.

49. While actor is not obliged to stay in the accommodation and in some instances an actor is able to live a home during a tour because of its location, the majority of actors take up the accommodation provided by the respondents as a result of the logistics of the tour and the costs of doing otherwise.

50. The same consideration applied to the use of the company vehicle to travel to venues. While an actor is not obliged to use the transport provided, both claimants had to use it as result of the logistics involved in traveling between venues which could be some distance from each other and sometimes quite remote, and the cost of doing so. This was the case for the majority of actors.

51. Clause 18 dealt with time keeping and provided:

“Time keeping is over the utmost importance during the tour; lateness will not be tolerated. If for any reason you fail to catch pre-arranged transport to a performance venue, it will become your full responsibility to arrange, and pay for, alternative travel to the performance venue. Should a performance be cancelled due to the Act failing to appear, the Company reserves the right to claim from the act all monies lost. This would include all box office receipts, performance revenue travel and legal expenses.”

52. Clauses 19 to 21 of the contract deal with prohibitions on smoking, alcohol and drugs. Smoking was prohibited in any venue, the company vehicle, office and in the accommodation. Drinking alcohol was prohibited at any time during the working day and in any public place while in company uniform.

53. Clause 22 was headed ‘*Line of Contact*’ and provided that the Act agreed to have contract with the customers only through the line of communication ‘laid open’ by the respondents.

54. Clause 23 deals with *Behaviour* and provides:

“Our shows are written and produced for children aged 4-14. It is imperative that the Act agree to ensure their behaviour whilst in or around a performance

venue is suitable and appropriate for the target audience. If, at a time, the behaviour of the Act come up could in any way jeopardise the company reputation or branding we reserve the right to terminate this contract. If during this contract the Act or their public image is tarnished in such a way as to be considered inappropriate for our target market we reserve the right to cancel this contract.”

55. Clause 24 under *Conduct and Performance Standards* provides:

“If the Acts standards of performance and conduct cause dissatisfaction, their services may be terminated, and they may not be requested to undertake further assignments. The Act must be willing to adhere to the Company's Policies and Guidelines Manual.”

56. The respondent's managers attended the performances fairly regularly, generally on an unannounced basis. In the first claimant's tour, such visits took place around once every two weeks; the second claimant had around 10 visits in her last Tour. The manager audits the performance and provide notes on the on the performance and on other matters which they think need improvement such as sales / van cleanliness.

57. The manual contains 11 points which the actor must follow including that they arrive at the venue well groomed, tidy and wearing the company uniform and ID badge. The respondents provided actors with a branded T shirt, jacket and ID badge which they had to wear while at work.

58. Actors were required to obtain and carry with them a basic Disclosure certificate. This type of Disclosure is in distinction to an enhanced Disclosure Certificate which can only be obtained for employees of the company.

59. Clause 29 provided that the actor had to adhere to the policy on social media set out in the manual. The manual provided that the Actor was not to post on sites during the working hours.

60. Clause 30 dealt with *Force Majeure* and provided that no party would be liable for failure in their obligations occasioned by *Force Majeure*.

61. Clause 33 was headed *No Employment relationship*. It provided:

5 *“Nothing in this Agreement shall create or be deemed to constitute or give rise to a partnership, joint venture, agency or any employment relationship between the Parties, or any employment relationship between any worker and (either) the Company (or the Act) or any other fiduciary relationship other than the contractual relationship expressly provided for in this Agreement.”*

62. The contract contains the following clause prior to the parties signatures:

10 *“The Company reserves the right to terminate the agreement of any Act proved to disregard any of the above regulations or for any offence considered to be gross misconduct. Actions which are so serious as to justify possible termination of contract, such as theft or fraud; physical violence or bullying; deliberately accessing internet sites containing pornographic, offensive or obscene material; serious insubordination; serious incapability for work brought about by alcohol or illegal drugs; a serious breach of health and safety*
15 *rules; or a serious breach of confidence.”*

Other work

63. The first claimant conducted obtained a signing assignment during the course of her Tour for which she was paid £175. The second claimant did not do any other work during her Tour.

20 64. The peripatetic nature of most Tours impacts the ability of actors to hold other jobs while being on Tour with the respondents, although some work is capable of being accommodated by some actors while on Tour such as a signing assignment, delivery work (e.g. as a Deliveroo driver) or online work

Note on evidence

25 65. Albeit there is a disagreement between the parties as to employment status, and how matters should be interpreted, there was not in reality a great deal between them on the facts which are relevant for the purposes of determine the issue before the Tribunal.

66. There was no dispute as to the content and signature of the documentation before the tribunal.

67. Both claimants impressed the Tribunal as being credible and in the main reliable witness. It appeared to the Tribunal that they both went to some lengths to recall matters carefully and to give a truthful recollection of events. Both were able to make appropriate concessions, which enhanced their credibility in the Tribunal's view. For example, both accepted without difficulty that they had completed tax returns on a self-employed basis to reflect income received from the respondents, and in the second claimant's case that she had submitted invoices for payment to the respondents. The first claimant readily accepted that on one occasion she was able to undertake other work while on Tour.

68. In contrast, the Tribunal formed the view that Mr McCausland was on occasion evasive and was unable to make appropriate concessions. This extended to an initial refusal to accept that the respondent's theatre company was not the Royal Shakespeare Company and their performances were not high art. He countered this suggestion by responding it was high art to the children and pointing out that *Oliver Twist* (one of the performances), was based on classic literature. His refusal to make such appropriate concessions fortified the Tribunal in its view that from time to time sought to put a gloss on the position, in particular with regard to the reality of how much freedom actors had to work elsewhere while on Tour, their ability to fund their own accommodation and the degree to which their performance was monitored. For example, he refused to accept that being on tour limited in any way the ability to undertake other work. When it was put to him in cross examination that for example an actor could not hold a part time job in Asda at the same time as being on Tour, he responded by saying that would depend on Asda allowing the actor to move around different branches and he was not aware if Asda allowed that. He insisted that actors had the freedom to choose not to stay in the accommodation provided by the respondents without qualification as to reality of the economic impact of this.

69. Taking its impression this into account the Tribunal preferred the evidence of the claimants as to the degree to which they were directed in their performance of the shows. It did not accept, as suggested by Mr McAusland that they had enhanced artistic licence because they were performing to children.
70. The Tribunal formed the view that Ms Egan, while not deliberately intending to mislead, and in all likelihood motivated by her very apparent love of her job, also sought to put a gloss on some matters. For example the Tribunal formed the impression that that she exaggerated to some degree the opportunity which existed to carry out other work, extent to which the Manuel constituted 'guidelines', and the extent of artistic freedom.
71. The Tribunal did not accept, as suggested by the respondents witnesses, that the Manuel mainly constituted 'guidelines' intended to help the actor. The Manuel set out detailed rules, along with consequences of failing to adhere to the rule. on numerous matters and was specifically incorporated into the written contracts signed by the claimants.

Submissions

72. Mr Kiddie presented the Tribunal some written notes and both parties made oral submissions, which in the interests of brevity are not rehearsed here but are dealt with where relevant below.

Consideration

73. These claims are concerned with the exercise before the Tribunal of statutory rights under the ERA, the Working Time Regulations 1989 and the National Minimum Wage Act 1989.
74. The definition of worker in the ERA is replicated in regulation 2 (1) of the Working Time Regulations 1988 (the Regulations) under which both claimants present claims. For the purposes determining of worker status, it was accepted by the parties that the relevant definition of a worker is found in section 230 (3) of the Employment Rights Act 1996 (the ERA). Section 230:

(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.*

5 (2) *In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*

(3) *In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*

10 (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;*

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and any reference to a worker’s contract shall be construed accordingly.

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

75. In order therefore for the Tribunal to conclude that the claimants were workers it must be satisfied that:

1. that there was contract, whether express or implied, and, if express, whether written or oral;

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2. that contract must provide for the individual to carry out personal services

3. 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.

76. There was no argument that there was no intention to create legal relations
5 between the parties. The dispute centred on the nature of that relationship.

77. In approaching the issue of worker status the tribunal began by considering the guidance given by the Supreme court in the case of *Uber BV and ors v Aslam and ors 2021 ICR 657, SC*, referred to by both parties. That was to the effect that whether a contract was a "workers' contract" within the statutory
10 meaning was not to be determined by applying ordinary principles of contract law, (*Autoclenz Ltd v Belcher [2011] UKSC 41, [2011] 4 All E.R. 745, [2011] 7 WLUK 790* - referred to by Mr Kiddie) .

78. It was said in *Uber* that the rights which the claimants sought to invoke were created by legislation and therefore had to be determined by statutory
15 interpretation, taking a purposive approach. The purpose of the legislation invoked was to protect vulnerable workers from being underpaid, required to work excessive hours or subjected to other forms of unfair treatment. That protection would be undermined if employers were able to contract out of it; therefore, it would be inconsistent with the legislative purpose to take the
20 written contract as the starting point in determining whether an individual fell within the definition of a "worker".

79. The tribunal also had regard to paragraphs 87 of the decision in *Uber*, referred to by Mr Kiddie as follows:

87. *In determining whether an individual is a "worker", there can, as
25 Baroness Hale said in the Bates van Winkelhof case at para 39, "be no substitute for applying the words of the statute to the facts of the individual case." At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are
30 subordination to and dependence upon another person in relation to*

the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a “worker” who is employed under a “worker’s contract”.

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80. The determination of worker status involves the evaluation by the Tribunal of the factual circumstances in which the work is performed, and is a question of fact.

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81. Unlike *Uber*, in this case there is an express contract between the parties which is constituted in writing, to which the Tribunal had regard to alongside the other facts found, in considering the question of the claimant’s worker status.

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82. The Tribunal began by considering the degree of control exercised by the respondents over the claimants.

83. The Tribunal was satisfied that both in reality of the situation and in terms of the written contract the respondent exercised a very considerable degree over the claimants in the performance of their work.

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84. Mr McCausland sought to suggest that the contents of the manual written largely by team leaders with a view to providing helpful information, and that it comprised of guidelines rather than just rules, although he accepted that it contained some rules.

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85. However on a plain reading of it, the manual comprises a detailed set of what are frequently referred to as rules and instructions on multiple areas over 11 pages on the following matters: rehearsals; accommodation; costumes; health and safety; setting up and striking scenery; use of pyrotechnics; sound and lighting equipment; stage combat; skin character work; company vehicles and drivers; health and well-being; team conduct and dress; social networking policy; complaints and necessary documents.

86. The terms of the manual are specifically incorporated into the written contract of employment.
87. Moreover, the evidence supported that in reality the respondents did exercise very considerable control over many areas of work. Actors had to wear a uniform and an ID badge; they had to comply with health and safety regulations in setting up scenery for the play; they had some limited personal input into the performance, but had close direction as to how to perform and their theatrical performance was monitored by the respondents who paid unannounced visits to the venues; they were restricted as to what they could post on social media; there were prohibitions on smoking and drinking; if they stayed in the accommodation provided, (which in reality most actors including the claimants had to of necessity) that had to abide by the rules and accommodations, were subject to inspection; they had to maintain the costumes provided and maintain the company vehicle.
88. Ms McGuire argued that many of the provisions in the Manual simply reflected the requirements of the respondents' clients, who had the care of children, or adults with learning difficulties. It was only reasonable she argued, that the respondents should require the actors to follow these rules and not for example post on Social media, conduct themselves in an appropriate manner and follow health and safety guidelines. The rules on accommodation she argued simply reflected what any landlord would require, and in any event or an actor was not required to stay in the accommodation. The same applied to the company vehicle; the actor could choose not to use the company vehicle to travel back and forward to the venues.
89. It appeared to the Tribunal however, that the fact that the respondent's own clients require particular behavioural standards in the service they purchase from the respondents, and the respondents have in turn to ensure that the actors comply with standards in order to sell their services, does not serve to mitigate the degree of control which the respondents exercised over the claimants or lessen the relevance of it. If anything it served to underpin how significant it was for the respondents that they had theses controls in place for their performers.

90. Similar consideration applies to the rules attached to the use of the accommodation and the company vehicle. Even if the rules around the use of accommodation reflected standards imposed on the respondents by landlords, these then became rules imposed on the claimants on a contractual basis. While the tribunal accepts there was no obligation to stay in the accommodation or travel in the company vehicle, it was also satisfied that neither claimant could afford not to stay in the accommodation or not take up the transport offered. The Tribunal was also persuaded given the peripatetic nature of touring, and the income which the work generated, this was likely to be the case for the majority of actors engaged by the respondents.
91. Further, the claimants had to comply with the standards of behaviour imposed by the respondents in terms of clauses 23 and 24 of the contract and in the catch all clause at the end of the contract. In the event the respondents considered the claimants were in breach of these standards, they would be dismissed. The evidence supported that this clause again reflected the reality of the situation in that the second claimant was dismissed summarily after the respondents had received an allegation of bullying.
92. Other factors which pointed towards worker status were that the respondents fixed the rate of pay and could make deductions from it in the event of certain contingencies which on the face of it were at their discretion (maintenance of costumes and accommodation rule breaches). There was no evidence to suggest that the claimants had any power to negotiate their rate of pay or any terms and conditions. While the second claimant had an agent when she signed her first contract with the respondents, and she had signed a number of contracts, Mr McAusland described the contract as an *industry standard*, and there was nothing to suggest that its terms were open to negotiation. All of these factors suggest that the claimants were in a subordinate position to the respondents.
93. There are also factor which pointed away from the existence of worker status and the Tribunal had regard to these.

94. It was accepted by both claimants that they completed tax returns on a self-employed basis in respect of the income which they received from their work with the respondents. Their doing so is consistent with the terms of the contract. Ms McGuire attached considerable weight to this in submitting that the claimants were not workers, and she also attached considerable weight to the fact that the second claimant had submitted invoices, some of which contained a statement '*thank you for your business*' and some of which made reference to self-employed tax status. Ms McGuire also referred the Tribunal to an article which she produced commenting on the Inland Revenue rules and the self-employed status of actors. She submitted it was not consistent for Equity to suggest for the purposes of tax that actors were self-employed but for the purposes of employment rights that they were workers.
95. The Tribunal considered the fact that the claimants were paid gross and they declared themselves to be self-employed in their tax returns for the purpose of their income from the respondents, was a factor to which some weight could be attached. It is not however determinative of the position. The Inland Revenue is not bound by any decision of this Employment Tribunal and nor is this Tribunal bound by any decision of the Inland Revenue.
96. The fact that second claimant submitted invoices in the terms set out in the findings in fact is also a matter to which the tribunal had regard as part of the overall picture. In general terms, the issues of an invoice is supportive of the conclusion that the relationship was one between independent contractors and their clients or customers. It does however have to be viewed alongside the other factors present in this case, which include the extent to which the claimants were an integral party of the respondent's operation as evidenced by into the degree of control exercised by the respondents over the claimants.
97. Further, there was mutuality of obligations. The respondents undertook to provide work for the claimants and to pay them an agreed amount for that. The claimants undertook to perform that work in return for payment. The first claimant was paid without submitting invoices.

98. In terms of the contract there was limited financial risk to the claimants (clause 18 - time keeping) and there was no evidence to support that this had ever been invoked in practice.
99. The Tribunal considered that the cases of *Philip v Working Partners Ld and Harper Collins Publisher LLC EA 2022 SCO-000076JP* and *MacLinden v Lazarov and others UKEAT/4531/13/JOJ*, referred to by Ms McGuire, which deal with independent contract arguments, could be distinguished on the facts.
100. The Tribunal also had regard to the extent to which there was a right of substitution. The requirement to provide personal service is clearly a key aspect of worker status, as identified in Section 230 (3) (b).
101. A broad and virtually unfettered right to appoint a substitute is inconsistent with worker status.
102. Ms McGuire referred the Tribunal to *MPG Contracts Ltd v England and anor EAT 0488/08* which she submitted was similar to this case, in support of the proposition that there was an unfettered right of substitution which rendered the claimants self-employed. The EAT held in that case that while a right to provide a substitute would not necessarily negate an obligation of personal service, the fact that the claimant was free to engage labour other than himself to fulfil the contract was 'wholly inconsistent' with a contract for personal services.
103. The relevant contractual term is clause 14 – *sickness*.
104. In support of the position that clause 14 could not be interpreted as conferring such a right Mr Kiddie referred to *Pimlico Plumbers Ltd and anor v Smith 2017 ICR 657, CA*. He argued that clause 14 did not confer a right of substitution,. It was no more than an expression of an agreement to agree. In any event any substitution was constrained the respondents' power of veto
105. The Tribunal considered the extent of the right of substitution conferred by clause 14 and how that operated in practice.

106. Clause 14 comes under the heading *sickness* and provides that subject to the reservation that the company can terminate the contract if the actor is unable to perform a show at any time for any reason, that where the actor is “*for any reason unable to perform we would be will be **happy** (emphasis added) for you to provide a suitable qualified substitute , at your own expense and subject to our approval*”.
107. The requirement that that the actor pay the substitute is more consistent with the status of an independent subcontractor that a worker. The requirement that the substitute is suitably qualified is not inconsistent with an independent contractor status.
108. However, the clause does not confer an unqualified right of substitution. The clause only provides that the respondent would be ‘happy’ for the actor to provide a substitute subject to certain conditions, and subject to the reservation that the respondents could chose to terminate the contract if the actor is unable to perform for any reason. The Tribunal considered that the reservation of the right to terminate the contact was a very significant limitation; the effect of it was the respondents could chose to terminate the contact rather than consider a substitute.
109. Further, consideration by the respondents of a substitute was limited to circumstances where the actor is unable to perform for any reason; there is a further limitation in the requirement is not only that the substitute is suitably qualified , but also that they are approved by the respondents.
110. The Tribunal also considered how this clause operated in practice. There was evidence that performers occasionally offered substitutes to cover short periods of absence for attending event such as funerals or weddings. There was also evidence that proposed substitutes were accepted on some of these occasions and that where that happened, the actor paid them. The first named claimant offered two proposed substitutes to cover their attendance at a family wedding, one of whom was accepted.
111. The evidence also showed that where no suitable substitute was offered for short absences, the respondents provided a substitute whom the actor paid

for. This is what occurred when the second claimant needed to attend a funeral.

112. This was in contrast to what occurred when the actor became unable to perform over a longer period due to ill health. The first claimant's contract was terminated after she submitted a sick line to cover an absence of three weeks. Their fit note was submitted on 20 June 2023 and their contract was terminated on 28 June 2023. There was no evidence that the claimant offered a substitute or that the respondents suggested one whom she could pay for.
113. The Tribunal concluded that there was no unfettered right of substitution consistent with the claimants being independent contractors .It was satisfied that that the respondents reservation of the right to dismiss the actor it they could not perform for any reason, the limitations on when the respondents would consider a substitute ,(subject to that reservation that they could chose to dismiss the actor) and the conditions imposed on the substitute (that they were suitably qualified and that the respondents approved of them) were consistent with an obligation to provide personal service, and that the claimants were subject to such an obligation, and did not support the existence of an independent contractor/ client relationship.
114. Lastly, the Tribunal considered that fact that both claimants had signed the contract which contained clause 32 (*No Employment Relationship*) and Ms McGuire's submission that that had been signed without complaint, in particular, by the second claimant who had signed a number of contracts. Taking into account all of the other factors present in this case the tribunal did not consider this was a factor to which a great deal of weight could be attached.
115. The Tribunal then evaluated all of the evidence which it had before it. Taking into account the degree of control which the respondent exercised over the claimants, the mutuality of obligations which existed and the requirement to provide personal service, and the fact that the claimants were performing services for the benefits of the respondents who were not their client or customer, the tribunal was satisfied that clause 32 did not reflect the reality of

the situation and that the claimants were properly regarded as workers for the purposes of the claims brought.

- 5 116. The effect of this conclusion is that the claim will now proceed to a hearing on the merits. Parties should provide a note of their witnesses and time estimate for the hearing within 14 days. If either party consider a case management hearing is required, they should advise the Tribunal within 14 days.

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Employment Judge: L Doherty
Date of Judgment: 19 September 2024
Entered in register: 20 September 2024
and copied to parties

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