EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no: 4107130/2023

Final Hearing Held in Dundee on 29 April to 3 May and 23 – 25 October 2024

Employment Judge A Kemp
Tribunal Member J Lindsay
Tribunal Member J Whitfield

Mr D Lithgow	**Claimant** **In person**
Adventure Aviation Limited	**First respondent** **Represented by:** **Ms A Bibi,** **Senior Litigation Consultant**
A C Logan	**Second respondent** **Represented by:** **Ms A Bibi,** **Senior Litigation Consultant**
J D Alexander	**Third respondent** **Represented by:** **Ms A Bibi,** **Senior Litigation Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that:

(i) The claimant was not an employee for the purposes of section 230 of the Employment Rights Act 1996 or the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994.

(ii) The claimant was an employee for the purposes of section 83 of the Equality Act 2010, and a worker for the purposes of the Working Time Regulations 1998, section 230 of the Employment Rights Act 1996 and the Employment Act 2002.

(iii) The first respondent did not breach sections 13, 26 or 27 of the Equality Act 2010 and those claims are dismissed.

(iv) The claims as directed against the second and third respondents are dismissed.

(v) The first respondent made unlawful deductions from the wages of the claimant in relation to annual leave to which he was entitled under the Working Time Regulations 1998 and an award in the sum of £531.96 is made in favour of the claimant.

(vi) The first respondent is in breach of its duty to provide written particulars to the claimant under sections 1 and 4 of the Employment Rights Act 1996 and an award in the sum of £561.48 is made in favour of the claimant under section 38 of the Employment Act 2002.

(vii) The total sum awarded to the claimant is therefore ONE THOUSAND AND NINETY THREE POUNDS FORTY FOUR PENCE (£1,093.44) payable by the first respondent.

REASONS

Introduction

1. This was a Final Hearing into claims made by the claimant for

(i) direct discrimination on grounds of age under section 13 of the Equality Act 2010,

(ii) harassment in relation to age under section 26 of that Act,

(iii) victimisation under section 27 of that Act,

(iv) notice pay which is one for breach of contract,

(v) holiday pay which is a claim for unauthorised deductions from earnings under Part II of the 1996 Act and

(vi) for not having a written statement of particulars under section 1 of the 1996 Act.

2. The claimant is a party litigant and the respondents are now represented by Ms Bibi. The claimant was initially accompanied by his brother and for the last three days of the hearing by Mr J Gharabally, but neither acted as his representative.

3. Preliminary Hearings had been held on 26 January 2024, 18 March 2024 and 18 April 2024. In respect that EJ Kemp had considered them, and addressed an earlier matter as to strike out, the parties were asked by two emails from the Tribunal whether they had any objection to his being on the Panel hearing matters at the Final Hearing, latterly by noon on 25 April 2024, and they did not intimate any objection.

4. Both parties sought strike out which was addressed at the commencement of the Final Hearing, discussed further below. The respondent also sought to amend its amended Response Form shortly after the start of the commencement of its cross examination of the claimant, by in brief summary stating that Skyranger 1 Ltd and the first respondent were separate legal entities. The first respondent had earlier pled that it had changed its name. For the reasons given orally the Tribunal, having heard Ms Bibi, and the claimant in reply, he opposing the application, refused the application to amend. It did so having regard to the authority of ***Selkent Bus Company v Moore [1996] ICR 836***, which was approved by the Court of Appeal in ***Ali v Office for National Statistics [2005] IRLR 201,*** as further explained in ***Vaughan v Modality Partnership [2021] IRLR 97*** in which the EAT summarised the authorities and concluded that there was a balance of justice and hardship to be struck between the parties. Given the very late and material proposed change, on a matter which the first respondent had particular knowledge, the prejudice to the claimant who had had no notice of the matter until then, and that the respondents

were represented professionally, the balance favoured refusing the application.

Applications for strike out

5. The respondents and claimant sought strike out of the Claim and Response respectively. The Tribunal heard argument from each, and having addressed the issues as below decided unanimously to refuse both applications. The following is a very brief summary of the reasons for that given orally.

6. The law in relation to strike out has been addressed in the earlier Judgment refusing the application. In addition the respondents referred to ***Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 32.*** The circumstances of that case were entirely different to those in the present case. The Tribunal did not consider that it had been established that there had been a deliberate and persistent disregard of required procedural steps. Each side alleged that it had complied with the case management order or at least that any breach was not wilful or deliberate. The claimant argued that he acted benevolently for his son who had issues of intermittent incapacity, and made payments to a form of trust arrangement for his benefit. He argued that not all of the income the respondents claimed he had received were his own. The claimant stated his view that Working Tax Credits, which he accepted he received and had not referred to in his Schedule of Loss, was not a benefit that required to be disclosed. These are in each case a disputed fact, but we could not address them without hearing evidence, in our view.

7. We were also satisfied that a fair hearing remained possible, with each party able to cross examine the other including as to alleged breaches of the orders made. The respondents now had access to unredacted bank statements, and whilst the claimant's allegation of a form of trust in favour of his son did not appear to have legal basis as a trust in law, there was the possibility of it falling within the different concept of *negotiorum gestio*.

The Tribunal considered that all such issues required to be addressed after the hearing of evidence.

8. The same position applied with even more force to the claimant's application where the respondents' position is that they had complied with all their duties so far as able to do so. It is not possible to know at the stage of these arguments whether or not that was correct.

The issues

9. At the commencement of the Final Hearing the Judge proposed to the parties that the following were the issues in the case. They were amended in discussion and are the following:

1 Was the claimant an employee or worker of the first respondent?

2 Did the first respondent directly discriminate against the claimant because of his age contrary to section 13 of the Equality Act 2010?

3 Did the first respondent harass the claimant by subjecting him to unwanted conduct related to his age contrary to section 26 of the Equality Act 2010?

4 Did the claimant do any protected act under section 27 of the Equality Act 2010 in stating that he was to raise a grievance under the said Act orally to the respondent on 26 August 2023, and orally to the second respondent with the third respondent present on 2 September 2023?

5 If so, did the first respondent victimise the claimant for doing so contrary to section 27 of the Equality Act 2010?

6 Are either the second or third respondents or both of them liable for any breaches of the Equality Act 2010 under sections 111 or 112?

7 Did the first respondent terminate their contract with the claimant in breach of contract?

8 Did the first respondent make an unauthorised deduction from the wages due to the claimant in relation to pay for annual leave under section 13 of the Employment Rights Act 1996?

9 Did the first respondent fail to provide written particulars of employment under section 1 of the Employment Rights Act 1996?

10 If any claim is successful to what remedy is the claimant entitled, and in that regard:

(i) What losses has he or will he suffer?
(ii) Do they include stigma damages?
(iii) Did he contribute to the dismissal?
(iv) Did he mitigate his loss?
(v) What annual leave was due at termination?
(vi) What is the appropriate award in relation to written particulars of employment?
(vii) Was there any breach by either party of the ACAS Code of Practice on Disciplinary and Grievance Procedures?
(viii) If so should the award be increased or reduced under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

The evidence

10. The parties had provided two volumes of a Bundle of Documents, and a third comprising a Supplementary Bundle, comprising a total of around 850 pages, most but not all of which was spoken to in evidence. Further documents were added during the hearing, without opposition initially, but latterly there was. That occurred on the sixth day of the hearing on 23 October 2024. The respondents opposed the receipt of new productions the claimant sought to rely on. For the reasons given orally one email chain was received, the other documents were not.

11. Evidence was given by the claimant, who did not call any witnesses and by the second and third respondents as well as by their witnesses Mr Eddie McDowell and Mr Simeon (Sim) Culpin, both of whom are flight instructors with the first respondent. There was then an adjournment for a

lengthy period as the evidence was not concluded and further evidence was given in October 2024 by the second respondent concluding his evidence, and thereafter the third respondent. The Tribunal asked questions to elicit facts under Rule 41, and having regard to the terms of the overriding objective in Rule 2. The claimant whilst a party litigant is someone who holds a law degree, whose CV referred to work at a law firm, and who from the pleadings he produced shows an understanding of the Equality Act 2010 in particular. The respondents are not represented by a solicitor but by a Senior Litigation Consultant at a large professional company. We considered that there was a limited need to secure that the parties were on an equal footing on such a background, but did so to the extent that it considered appropriate.

Facts

12. The Tribunal considered all of the evidence before it. Not all the evidence heard is set out specifically in this Judgment. The Tribunal found the following facts, material to the issues before it, to have been established:

Parties

13. The claimant is Derek Lithgow. His date of birth is 1 October 1957.

14. The claimant is a pilot. He qualified as a commercial pilot, and has a rating as a flight instructor. He has substantial experience of flying and flight instruction, with flight instruction commencing in August 2005. Prior to becoming a pilot he had passed professional examinations with the Law Society of Scotland, then a Diploma in Legal Practice at the University of Edinburgh. He commenced training as a solicitor with Taylors Solicitors in Edinburgh, but left that role without completing the training. He has not been admitted as a solicitor.

15. The first respondent is Adventure Aviation Limited. It operates a flying school at Balado airfield near Kinross, an unlicenced airfield. It provides flying instruction in microlight aircraft, and flights for leisure and trial purposes.

16. The second respondent is Alexander Colin Logan. He is the first respondent's Chief Flight Instructor, and a Director of it. He is a former

police officer, at the rank latterly of Inspector. He is qualified to fly microlight aircraft and for flight instruction.

17. The third respondent is James Alexander Douglas. He is a Director of the first respondent. He is qualified to fly microlight aircraft.

18. The second respondent and third respondent were also directors in Skyranger 1 Ltd, with a third director Keith Edwards. Skyranger 1 Ltd was incorporated in about 2019. Mr Edwards ran a flying school from Balado airfield trading as “Fly Scotland”. Skyranger 1 Ltd took over the running of that flying school in or around 2019.

19. In about 2021 the first respondent changed its name to Adventure Aviation Ltd and started to trade such that it took over the operation of the said flying school, doing so under the trading name “Adventure Aviation”. In about 2022 Mr Edwards left his role with Adventure Aviation, and commenced a new flying school at Strathaven airfield, using the trading name “Fly Scotland”. In early 2023 the two microlight aircraft used by Adventure Aviation flying school had ownership transferred from the name of Skyranger 1 Ltd to the name of the first respondent.

20. The first respondent offers flying tuition to students, and related services. It operates using microlight aircraft. It has three fixed wing microlights, and one flex wing microlight.

21. The operation of Balado airfield is undertaken by Balado Airfield Limited. Balado Airfield Limited is a not for profit company. It funds flying scholarships from excess funds generated from operating the airfield. Balado airfield is situated on a farm owned by the third respondent.

Background

22. On 13 January 2022 the claimant emailed the third respondent to offer to assist with flight instruction. He attached a CV. It stated under “Employment History” that from January 2009 to date “Flight Instructor/Charter Pilot freelance”. The CV also noted for the period April 1995 – November 1998 “Lawyer ‘Taylors’ Solicitors Edinburgh”.

23. Emails were exchanged thereafter, and a meeting arranged for 28 February 2022.

24. At around that point, on a date not given in evidence, the second respondent's wife carried out an internet search in relation to the claimant, and discovered that he had made an earlier Employment Tribunal claim [referred to below].

25. The claimant, second respondent and third respondent met on 28 February 2022 and discussed matters. At the meeting, for which no written record was taken, it was agreed that the claimant would commence in that role and invoice for his services. He was to be paid £45 per flying hour.

26. The agreement was not committed to writing. The claimant was aware of that, and content with it.

27. The claimant sent a photograph for use on the first respondent's website, but that was not used. One was taken with the claimant in the first respondent's badged flying jacket. The claimant was later provided with his own such badged flying jacket, and T shirt. The claimant received an induction and the key codes for access to premises used by the first respondent including a club house and hangar, a fuel store, a safe and codes for alarms. Those codes were also provided to members. The claimant was provided with keys to the first respondent's premises, which members did not have.

28. The claimant undertook a flight with the second respondent so that the claimant would become familiar with the microlight used by the first respondent, after which he was given login details for a GPS system on the aircraft known as Sky Demon. Those details were for the account of the second respondent.

29. The aircraft and equipment required to undertake flight training was provided by the first respondent. The first respondent provided insurance, fuel, oil, and premises including a briefing room. Students were secured by the first respondent, which carried out advertising. The first respondent's premises included a Clubhouse.

30. The first respondent referred to the claimant as a member of its team on its website. The claimant was under the general direction of the second respondent as Chief Flight Instructor. The second respondent decided which of the flying instructors would carry out the instruction for which student. Most of those the claimant went flying with were seeking to gain a licence for flying microlight aircraft. In addition there were some who had been given gift vouchers for a pleasure flight as a single event, and others who were qualified but wished further tuition or a form of refresher or otherwise of which some had their own aircraft.

31. Initially the claimant invoiced a company named Skyranger 1 Limited, at the request of the second respondent. The rate was £45 per hour when giving tuition to a student, which included any other time spent to support that. The rate was increased to £49.50 per hour in January 2023. The rate was set by the first respondent in line with that used in the industry more widely. The claimant was also able to use the aircraft initially for £50 per hour, but that was increased to £100 per hour in May 2023 to be the same as that for the other instructors. £50 per hour was less than cost.

32. An online application was used to manage bookings for flights with the first respondent, called Shlott. It showed availability of aircraft, being two microlight aircraft, and flight instructors. The claimant was given administrator rights for it. He was able to state when he was available to book flights with and when not. Flights could be booked by those seeking to do so, principally as students seeking to obtain a licence but also others such as those using a gift voucher for a trial flight or those who had a licence but wished additional experience or assistance.

33. The claimant generally made himself available for flights for at least five days per week. The second respondent suggested by email that the claimant consider making his availability on the system for seven days per week, although he could decide not to and if he was available could decline any flight. On average the claimant would undertake flights about two days per week, and have about four flights on each day. He would also on occasion take on extra work on days he was not scheduled to be available. On occasion he requested that the hours of a flight instruction lesson work around his actings as a musician.

34. The claimant volunteered to carry out extra duties of administration, in particular if the second respondent was not present. He had not been instructed or requested to do so.

35. The claimant's son is also a musician, who has had mental health difficulties. The claimant has assisted his son with his music career, including by driving him to and from gigs when his son was disqualified from driving, and playing with him at gigs. The claimant's son is essentially a solo musician, with the claimant accompanying him on mandolin on many occasions, but not at all gigs.

36. The claimant has been acting on an informal basis managing his son's business affairs. The claimant has received some of the income his son makes, had that paid that into his [the claimant's] bank account, and then transferred funds from his account to a separate Building Society Account in the name of "Sean's Trust". The claimant transferred £9,000 from his account to that in name of "Sean's Trust", being a reference to his son, on 12 September 2022 and a sum of £4,000 on 24 September 2022. It is not a formally constituted trust. The claimant has not received income from assisting his son either as a musician or managing his business affairs.

37. On 1 June 2022 the claimant took a cousin for a leisure flight on the first respondent's aircraft. He paid the first respondent £100 for that flight being for two hours at the rate of £50 per hour. He was paid £280 by his family member at the amount it would be paid by a student for a training flight. He recorded the other person present as "student" which she was not.

January to March 2023

38. In about January 2023 the claimant gave the second respondent a document (which was not before the Tribunal) providing his date of birth, in order to seek a certificate in relation to Protection of Vulnerable Groups. That certificate was later issued.

39. On 2 February 2023 the claimant and second respondent exchanged emails with regard to two students, and for one of them the second respondent said "If he doesn't bring fuel, which he probably won't, we can sell him some…."

40. The claimant was able to use the microlight aircraft operated by the first respondent. On the first occasion he did so the third respondent agreed that the cost be £50 per hour, although that was below the actual cost incurred by the first respondent to operate the aircraft. The claimant took one flight on such a basis.

April and May 2023

41. On 30 April 2023 the claimant sent an email to the second respondent with his invoice for that month. The second respondent sent an email to the claimant the same day stating "We have been Adventure Aviation for a little while, so if you could make the invoice to 'Adventure Aviation Ltd' please". He also invited him to attend a meeting with the third respondent, Mr Culpin and Mr McDowell about flex wing training, which the second respondent did although he said that he thought that the claimant may not be interested in such training. The message referred to going for a curry.

42. A flex wing microlight is a different form of aircraft to a fixed wing microlight. Mr McDowell had experience of flying a flex wing microlight. The claimant, second and third respondents, Mr Culpin and Mr McDowell had a discussion about the possibility of purchasing a flex wing microlight to offer training in it. The claimant did not wish to proceed with that, but the others present did wish to do so, and all were content with that.

43. The claimant replied on 1 May 2023 to confirm that he was not interested in the flex wing training, but had enjoyed the curry.

44. On 2 May 2023 the claimant was flying with a student named Neil Anderson. The student was to undertake the first flight outside the area of the airfield known as the circuit. The claimant tried to log in to the Sky Demon GPS system, but was unable to do so. He raised that with the second respondent who said that the login details were his personal ones and he had required to change the password as he had not been able to access his account shortly beforehand. The second respondent said that he had changed the password. He considered that the claimant should obtain his own login details, and pay the cost personally which was of the

order of £100 per annum, as other pilots did. He referred to the first respondent taking on two new Flying Instructors, who had not yet joined them.

45. This was the first occasion when the relationship between the claimant and second respondent began to deteriorate. Each considered the other unreasonable. The claimant drafted a message about the matter on 5 May 2023 but did not send it.

46. Shortly thereafter the two new Flight Instructors joined the respondent working in that role on the basis of self-employment. Mr Sim Culpin was aged about 43 and had recently become qualified as a flight instructor, and Mr Eddie McDowell was aged in his mid-fifties. They regarded themselves as self-employed.

47. The claimant was thereafter allocated no new student and other flying work by the first respondent. That work was allocated to Mr Culpin and Mr McDowell.

48. The claimant had very substantial experience in flying and teaching in 3 - axis microlights. Mr Culpin and Mr McDowell had very little if any such experience, but had experience in 2 - axis microlights, and Mr McDowell in flex wing microlights.

49. In May 2023 the claimant was informed that the cost of using the aircraft for his own personal flights would increase to £100 per hour, and that Mr Culpin had been paying that rate for some months before that. Mr Culpin had initially done so as a member of the flying club operated by the first respondent and before he became a flight instructor.

June 2023

50. From around June 2023 the second respondent allocated a number of students to Mr Culpin. He did so as Mr Culpin was a new instructor seeking to build his experience of doing so. Many of those so allocated were not paying customers, and Mr Culpin was not paid for doing so. For those students and others for whom payments were made the sums paid to Mr Culpin were broadly similar to the sums paid to the claimant for the flying instruction he carried out.

July 2023

51. On 2 July 2023 the claimant emailed the second respondent with his invoice for June 2023. The second respondent replied that day stating that he had paid it and raising an issue regarding brakes on an aircraft.

52. The claimant responded again on the same day stating "I have been thinking about the change in method re payment for instructing." He then referred to HMRC deeming those self-employed to be employed where criteria for self-employment were not met, and referred to an arrangement at Eshott airfield whereby students were invoiced directly by the flight instructor. The second respondent replied to say that "the point about self-employment is well made", and to the effect that such an arrangement as the claimant had suggested would be introduced in August 2023, which would also effect a VAT reduction.

53. The part of the former invoice that the student paid to the first respondent for the sum payable to the flight instructor was thereafter invoiced directly by the flight instructor, with no VAT added as the flight instructors were not required to be VAT registered. The remaining part of the former invoice was paid to the first respondent with VAT added. The effect was to reduce the VAT amount for the first respondent.

54. That arrangement was not however to apply to gift vouchers, in respect of which the voucher was paid to the first respondent, and the flight instructor who carried the flight out then invoiced the first respondent for that.

55. With effect from August 2023 the claimant was paid directly by students he gave flight instruction to. He did not send invoices to the first respondent for August or September 2023.

10 August 2023

56. On 10 August 2023 the claimant took a friend on a flight from Balado airfleld lasting 22 minutes as flying time around the Loch Leven. The time taken to taxi and for preparation after taking brakes off and putting brakes on produced a total time of about 30 minutes. During the flight the claimant noticed a tug aircraft towing a glider behind it from Portmoak Gliding Club. That Club is situated about four miles from Balado airfield, and situated on

the east side of Loch Leven, with Balado airfield situated on the west side. The claimant's aircraft was about 600 feet above the other aircraft. The claimant was about 1,600 feet above the airfield used by the Gliding Club, and about 1,600 to the south of it on the horizontal plane. The Gliding Club has four tug aircraft to launch gliders, as well as a winch mechanism to launch them. There can be around 30 gliders flying around the Club airfield.

57. The pilot of the other aircraft shortly afterwards reported that there had been a near miss, with potential for collision. That report was then intimated to the first respondent as the owner of the aircraft. The claimant was informed of the report by the second respondent, and the claimant provided a detailed account of that by email on 28 August 2023.

58. The report was investigated by the Airprox Board. The claimant did not agree that there was any such risk. The claimant did not accurately record the flight time of the flight. He stated it as 10 minutes. He had not taken a knee board with paper and pen with him on that flight which normally was used to record flight details.

59. The first respondent carried out its own investigation, including the radar information as to the track of the flight taken by the aircraft used by the claimant. It was noted that that came within an area of intense gliding activity as marked on a map used by pilots for navigational purposes. Neither the second nor third respondent thought that such a track, within that area, was appropriate or safe because of the increased risk of collision with a glider, tug, or cable used in launches. The first respondent also investigated the claimant's record of the timing of the flight and considered that it had under-recorded the time by about 20 – 30 minutes.

26 August 2023

60. On 26 August 2023 the claimant spoke to the second respondent to raise the lack of new work he was receiving, and why Mr Culpin was being allocated it. He said that after the two remaining students completed their courses he would have no work. The second respondent said something to the effect that Mr Culpin was undertaking flight instruction to build up hours, and that he, Mr Culpin, was interested in undertaking a Rotax

engine maintenance course. Rotax engines are used to power many microlights. The claimant said that he could not understand why he was being excluded from new work or students.

61. On 28 August 2023 the claimant received a call from Ms Wigginton, one of those the claimant was teaching. She asked him where the fuel sump drain valve was located, lest that be asked of her in the skills test she was about to undertake that day. The checklist of actions required at the start of each day on which the C42 aircraft is flown includes draining fluid from that valve to check that it has not been contaminated. Such a check is required. If fuel is contaminated that may cause the engine to fail in flight, with a risk of serious accident or death to the pilot and any passenger.

62. The claimant then called the second respondent to ask him the location of the said valve. The second respondent was in his car driving back to the airfield with the third respondent as a passenger. The call was heard on a speakerphone. The second and third respondent were each shocked by that request, as the claimant had flown the C42 aircraft so often, and had taught many students using it. The second respondent provided the location of the said valve to the claimant, which is in the middle lowest part of it. The second and third respondent were each concerned at what appeared to them to be a breach of a safety requirement as the claimant had not known the location of the drain valve, and it appeared to them had not taught students about it or followed the requirement of the checklist to do so.

63. The second respondent later spoke to students that the claimant had been teaching to ask them if they knew about the location of the said valve and the requirement to drain fluid as a check for the first flight each day. Mr Anderson stated that he did not know the location of it, or that about the check. The second respondent informed him of that. [The date on which that occurred was not given in evidence.]

September 2023

64. The claimant's son had been disqualified from driving and the period of the same was due to end. The claimant sought to arrange insurance cover for him in late August 2023. The prospective insurer asked for a letter to

confirm the claimant's position with the first respondent. The claimant initially spoke to the second respondent with regard to that by telephone and said that he was to be a guarantor. The claimant then wrote to the second respondent by email on 1 September 2023 saying that he needed a letter of validation for insurance purposes fairly urgently, and attached a draft of it. He asked that it be on the first respondent's headed paper. The draft referred to the claimant and that he "is currently employed with Adventure Aviation Balado……[and] has been a member of Adventure Aviation staff since March 2022."

65. On 2 September 2023 the claimant met the second respondent at the Club House of the first respondent. The claimant asked if the second respondent could provide the letter, and the second respondent replied to the effect that the claimant was not an employee. The claimant became angry and agitated about that and the lack of signing the letter. He said that he needed the second respondent to sign the letter. He referred to there being a letter from the insurers on his iPad [which was not before the Tribunal], and initially showed it to the second respondent, but before it could be read the claimant pulled the iPad away. He asked if he was valued by the first respondent. The second respondent said that two students had said that they did not want to fly with him. When the claimant asked who they were the second respondent gave the names David Reid and Scott Cushnie. The second respondent offered to provide the claimant with a letter stating that he [the claimant] was self-employed.

66. The claimant was shocked by the remark that students had said that they did not want to fly with him. He had flown for around one hour with each student, Mr Cushnie on 14 May 2022 and Mr Reid on 21 August 2022. Nothing had been said to him about either student at the relevant times or subsequently.

67. He sought to raise matters with the third respondent, who was at that time with the father of a person being given a free flight. The father had asked about the discussion between the claimant and second respondent. The third respondent spoke to the claimant away from the father, and said that they would discuss it later. The claimant was agitated at that time.

68. A meeting to do so did not take place.

69. Shortly after 2 September 2023 the other student completed his course.

70. In early September 2023 the second and third respondents had a discussion with regard to the claimant, and decided that the claimant's contract should be terminated. They did so because of the airprox incident, which they considered compromised safety, the call in relation to the drain which they considered compromised safety, the request for a letter stating employment which was not they considered accurate, and the manner in which the claimant had sought to raise that when the second respondent had not signed the letter, which they considered unacceptable.

71. They decided that the third respondent should inform him of that as the relationship between the claimant and second respondent had deteriorated to such an extent.

72. On 13 September 2023 a student being taught by the claimant, Mr Neil Anderson, had a flight under tuition from the claimant.

Termination of contract

73. On 14 September 2023 the claimant was telephoned by the third respondent. The third respondent told him that the first respondent would not require his services in future. The claimant was shocked by that. About five minutes later he called the third respondent and asked for reasons for that. The third respondent raised the issue of his call to the second respondent in relation to the location of the sump drain. The claimant said after a pause that the second respondent had not shown him where the sump drain was, or words to that effect. The third respondent also made reference to the flight which had been alleged as an airprox, and that that had not been recorded correctly and underpaid. The claimant said that he would pay it. The third respondent said just to leave it. The claimant said that he was taking advice and would pursue a claim. The third respondent said that the first respondent would take advice, after which the call ended.

74. The claimant raised the issue of a student Ms K Wigginton who wished to continue flight training in her brother's aircraft, which was not a microlight, and asked if the claimant could do so at Balado airfield. The third respondent did not agree to that.

75. The claimant wrote to the third respondent on 15 September 2023 by email alleging that the first respondent's treatment of him had been "at various junctures hostile, unfair and discriminatory. He referred to raising not being allocated new students or gift voucher flights, and stated "I was informed that Sim [Mr Culpin], being a younger member of staff and intending to make a career as a flight instructor was being favoured for allocation of work. Whilst I wish Sim well, I don't consider it fair to be discriminated against on account of my age in the workplace." He added "For the above reasons the companies [sic] treatment of me feels extremely wrong and I believe it gives rise to certain legal claims relation to employment and discrimination which I will formally intimate to you in due course."

76. The third respondent replied on 20 September 2023 stating that all flight instructors offering services to the first respondent do so on a self-employed basis, stated that there was no contract and to deny discrimination. The message had the heading "Instructor services no longer required".

77. The claimant and Ms Wigginton corresponded thereafter with regard to the claimant continuing her training.

Early Conciliation

78. The claimant commenced early conciliation against the first respondent on 8 October 2023, and the certificate was issued on 19 November 2023. The claimant commenced early conciliation against the second respondent on 21 October 2023, and the certificate was issued on 23 October 2023. The claimant commenced early conciliation against the third respondent on 21 October 2023, and the certificate was issued on 23 October 2023.

79. The Claim Form was presented to the Tribunal on 25 November 2023.

Financial matters

80. In the period June 2022 to May 2023 the claimant received £7,851 as income from the first respondent, an average of £654.25 per month.

81. For the month of June 2023 the claimant received as income from work undertaken with the first respondent the sum of £379.50. For the month of July 2023 the claimant received as income from work undertaken with the first respondent the sum of £631.12. The claimant received payment of those sums direct from the first respondent to 31 July 2023. From 1 August 2023 no invoices were rendered to the first respondent, and sums for flight instruction were paid direct to the claimant by each student. The total of the claimant's income from those students in August 2023 was £526.15. The total of the claimant's income from those students for the period 1 – 14 September 2023 was £337.49.

82. The claimant received Working Tax Credits prior to and during the period when he worked with the first respondent, and they continued after the termination of contract. The amount of such credits changed from time to time, but was of the order of £50 per week.

83. With effect from 30 October 2023 the claimant was in receipt of his State Pension.

84. The claimant sold a number of items such as a painting and mandolin after the termination of contract to raise funds. He also received money from an insurance claim.

85. No documents in relation to any income tax return submitted by the claimant was before the Tribunal.

Other matters

86. The claimant maintained a Facebook and Linked In profile, each of which stated that he was a self-employed flight instructor.

87. About two weeks after the termination of contract Mr Cushnie telephoned the claimant and said something to the effect that he had become aware of the termination from the first respondent, and that he had not said that he did not want to fly with him, but that he did not want to swap instructors. Mr Cushnie separately spoke to the second respondent and re-iterated his views about the claimant as earlier expressed to the second respondent.

88. The issue of the flight reported by the tug pilot on 10 August 2023 was addressed by an Airprox Board, which is a board constituted jointly between the Civil Aviation Authority and the UK military to address such reports. The Board issued a Report on 10 January 2024 stating that the incident was assessed at the lowest Category, E, meaning "normal safety standards pertained." It stated that it may have been prudent for the claimant to have made a radio call to the other aircraft from the Gliding Club.

89. Reports of issues and incidents are assessed under a "Just Culture" approach, which seeks to avoid allocation of blame and encourages open reporting of issues so that lessons can be learned. That approach is endorsed by the Board.

90. The claimant took a week's holiday in March 2023. He gave notice of that to the second respondent at the time, and made a diary entry in the Shlott booking system. He did not request holiday pay for it at the time. No holiday pay was paid to him by the first respondent, as it did not regard him as other than self-employed.

91. On or around 3 October 2022 Mr Alex Kelly a pilot working through the first respondent was taxiing an aircraft of the first respondent at Balado airfield when one of the wings came into contact with the hangar door. Damage to the wingtip was sustained which the second respondent repaired. The pilot was permitted to continue flying with the first respondent after that incident. The second respondent, who had built the aircraft initially, undertook a repair to the wingtip himself and added that to the log book for the aircraft. It was later inspected by a qualified inspector for the annual inspection, which it passed.

92. In 2017 the claimant had pursued a claim including for unfair dismissal against Border Air Training Ltd and another at the Employment Tribunal, during which he applied to amend to include a claim of age discrimination, which application the Tribunal refused. The respondent had defended the claim including as to status, arguing that the claimant was self-employed. The claim was settled on terms not confirmed in evidence.

Submissions

93. Both parties had most helpfully prepared written submissions, and Ms Bibi expanded on the terms of hers orally. In brief summary of each the claimant emphasised the impact of the termination of contract on him and the respondent argued that there was no contract between the parties, that if there was the claimant was neither employee nor limb (b) worker, that if he was there had been no discrimination.

The law

(i) Discrimination claims

94. The Equality Act 2010 ("the Act") provides in section 4 that age is a protected characteristic. Age is further addressed in section 5.

95. Section 13 of the Act provides as follows:

> "**13 Direct discrimination**
> A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

96. Section 23 of the Act provides

> "**Comparison by reference to circumstances**
> (1) On a comparison of cases for the purposes of sections 13,14 and 19 there must be no material difference between the circumstances relating to each case…."

97. Section 26 of the Act provides

> **"26 Harassment**
> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

……

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are

….age…..”

98. Section 27 of the Act provides:

“**27 Victimisation**

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

……

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.”

99. Section 39 of the Act provides:

“**39 Employees and applicants**

…….

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

……."

100. Section 83 provides:

(2) "Employment" means—

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;…."

101. Section 109 of the Act provides:

"**109 Liability of employers and principals**

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer….."

102. Section 123 of the Act provides

"**123 Time limits**

(1) Subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable…….

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it."

103. Section 136 of the Act provides:

"**136 Burden of proof**

If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened

> the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

104. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). Provisions as to the effect Early Conciliation has on timebar are found in Schedule 2 to the Enterprise and Regulatory Reform Act 2013, which creates section 140B of the 2010 Act. The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 give further detail as to early conciliation. The statutory provisions provide in basic summary that within the period of three months from the act complained of, or the end of the period referred to in section 123 if relevant, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place. If EC is not timeously commenced that extension of time is inapplicable, but there remains the possibility of a just and equitable extension where it has taken place albeit late.

105. The provisions of the Act are construed against the terms of European Union Directive 2000/43 implementing the principle of equal treatment. The Directive was retained law under the European Union Withdrawal Act 2018 and is now called assimilated law under the Retained EU Law (Revocation and Reform) Act 2023.

Direct discrimination

106. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572***. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In

other cases, such as ***Nagaragan,*** the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15.*** The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions referred to further below) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377.***

Less Favourable Treatment

107. In ***Glasgow City Council v Zafar [1998] IRLR 36***, a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. He must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

108. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***, also a House of Lords authority it was held that an unjustified sense of grievance could not amount to a detriment. In ***R (ex part Birmingham) v EOC [1980] AC 1155*** it was held that it was not enough for the claimant to believe that there had been less favourable treatment. The test is an objective on – ***HM Land Registry v Grant [2011] ICR 1390***.

Comparator

109. In ***Shamoon*** Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

110. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences between that person and the claimant. Guidance was given in ***Balamoody v Nursing and Midwifery Council [2002] ICR 646***.

111. The EHRC Code of Practice on Employment states at paragraph 3.23 that the circumstances of the claimant and comparator need not be identical but nearly the same, and it provides, at paragraph 3.28:

> "Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'"

Substantial, not the only or main, reason

112. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a "substantial reason" for the decision. In ***O'Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause. In ***Igen v Wong [2005] IRLR 258*** the test was refined further such that it part of the reasoning that was more than a trivial part of it could suffice in this context: it referred to the following quotation from ***Nagarajan***

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.'

113. The Court considered arguments as to whether an alternative wording of no discrimination whatsoever was more appropriate, and the wording of EU Directives. It concluded as follows:

> "In any event we doubt if Lord Nicholls' wording is in substance different from the 'no discrimination whatsoever' formula. A 'significant' influence is an influence which is more than trivial. "

114. The law was summarised in ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673***, heard in the Court of Appeal.

Harassment

115. Guidance was given by the then Mr Justice Underhill in ***Richmond Pharmacology v Dhaliwal [2009] IRLR 336,*** in which he said that it is a 'healthy discipline' for a tribunal to go specifically through each requirement of the statutory wording, pointing out particularly that (1) the phrase 'purpose or effect' clearly enacts alternatives; (2) the proviso in sub-s (2) is there to deal with unreasonable proneness to offence (and may be affected by the respondent's purpose, even though that is not *per se* a requirement); (3) 'on grounds of' is a key element which may or may not necessitate consideration of the respondent's mental processes (and it may exclude a case where offence is caused but for some other reason); (4) while harassment is important and not to be underestimated, it is 'also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase'.

116. Para 7.9 of the Equality and Human Rights Commission Code of Practice states that the provisions in section 26 should be given 'a broad meaning in that the conduct does not have to be because of the protected characteristic'. This was applied in ***Hartley v Foreign and Commonwealth Office UKEAT/0033/15*** where it was held that whether there is harassment must be considered in the light of all the circumstances; in particular, where it is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording. The test for "related to" is different to that for whether conduct is "because of" a characteristic. It is a broader and more easily satisfied

test – ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and another EAT 0039/19.***

117. There can be harassment under this provision arising from an isolated incident; for an example, see ***Lindsay v London School of Economics [2014] IRLR 218.*** It is not necessary for the claimant to have expressed discomfort or air views publicly ***Reed and Bull Information Systems Ltd v Steadman [199] IRLR 299.***

Victimisation

118. There are two key questions – (i) has the claimant done a protected act (ii) if so did he suffer a detriment because he had done so, which is a causation test - ***Greater Manchester Police v Bailey [2017] EWCA Civ 425.*** Guidance on the issues that arise is in Chapter 9 of the EHRC Code of Practice.

119. What amounts to an allegation for these purposes in predecessor legislation was addressed in ***Waters v Metropolitan Police Commissioner [1997] IRLR 589*** in which the Court of Appeal said in relation to predecessor provisions:

> "The allegation relied on need not state explicitly that an act of discrimination has occurred – that is clear from the words in brackets in s 4(1)(d). All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of s 6(2)(b)."

120. In ***Durrani v London Borough of Ealing UKEAT/0454/2012*** the EAT held that "it is not necessary that the complaint referred to [the protected characteristic, in that case race] using that very word. But there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies." There the claimant had used the word "discrimination" but when asked whether that was race discrimination had stated that it was more of unfair treatment generally.

121. In ***Fullah v Medical Research Council EAT/0586/12*** it was held that context was relevant and that "An employer is entitled to more notice than

is given by a simple contention that there is victimisation and discrimination."

122. On the issue of detriment the question is - "Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" as explained in ***Shamoon.*** It is to be interpreted widely in this context – ***Warburton v Chief Constable of Northamptonshire Police EA-2020-000376*** and ***EA-2020-001077.***

Burden of proof

123. There is a two-stage process in applying the burden of proof provisions in discrimination cases, arising in relation to whether the decisions challenged were "because of" the relevant protected characteristic, as explained in the authorities of ***Igen v Wong [2005] IRLR*** 258, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court approved the guidance from those authorities.

124. Discrimination may be inferred if there is no explanation for unreasonable behaviour (***The Law Society v Bahl [2003] IRLR 640*** (EAT), upheld by the Court of Appeal at ***[2004] IRLR 799.***

125. In ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and held that the onus did remain with the claimant at the first stage. That it was for the claimant to establish primary facts from which the inference of discrimination could properly be drawn, at the first stage, was then confirmed in ***Royal Mail Group Ltd v Efobi [2019] IRLR 352*** at the Court of Appeal, and upheld at the Supreme Court, reported at ***[2021] IRLR 811***. The Supreme Court said the following in relation to the terms of section 136(2):

> " s 136(2) requires the employment tribunal to consider all the evidence from all sources, not just the claimant's evidence, so as to decide whether or not 'there are facts etc'. I agree that this is what s 136(2) requires. I do not, however, accept that this has made a substantive change in the law. The reason is that this was already what the old provisions required as they had been interpreted by the courts. As discussed at paras [20]–[23] above, it had been authoritatively decided that, although the language of the old provisions referred to the complainant having to prove facts and did not mention evidence from the respondent, the tribunal was not limited at the first stage to considering evidence adduced by the claimant; nor indeed was the tribunal limited when considering the respondent's evidence to taking account of matters which assisted the claimant. The tribunal was also entitled to take into account evidence adduced by the respondent which went to rebut or undermine the claimant's case."

126. The Court said the following in relation to the first stage, at which there is an assessment of whether there are facts established in the evidence from which a finding of discrimination might be made:

> "At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account."

127. In ***Igen Ltd v Wong [2005] ICR 931*** the Court of Appeal said the following in relation to the requirement on the respondent to discharge the burden of proof if a prima facie case was established, the second stage of the process if the burden of proof passes from the claimant to the respondent:

> "To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive."

128. The Tribunal must also consider the possibility of unconscious bias, as addressed in ***Geller v Yeshurun Hebrew Congregation [2016] ICR 1028***. It was an issue that was also addressed in ***Nagarajan***.

Employee and worker

129. Section 230(3) of the 1996 Act provides:

> (1) In this Act "employee" means an individual who has entered into or works under, (or where the employment has ceased, worked under) a contract of employment……
>
> (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;"

130. The definition of a worker under the Working Time Regulations 1998 is addressed in Regulation 2 and is to the same effect as section 230(3) above. It implements the terms of the Working Time Directive 2003/88/EC, and requires to be construed purposively. What is often called a "limb (b) worker" has essentially the same test as that in section 83 of the 2010 Act set out above, as confirmed in the case law below***.*** It is assimilated law following the UK's exit from the European Union.

131. The test for an employee under the 1996 Act definition has a a 'mixed' or 'multiple' test and is to consider a number of factors while having regard to the arrangement as a whole: ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions [1968] 2 QB 497*****.** The Court stated the following, which has been described as the classic test for employment:

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other

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

132. All of the evidence is considered. Factors that are relevant include whether or not there is mutuality of obligation, the degree to which there is control, and whether there is anything inconsistent with the relationship being one of employment.

133. The test for a limb (b) worker or under the 2010 Act definition of employee is different.

134. In ***Allonby v Accrington & Rossendale College [2004] ICR 1328*** the European Court of Justice held that

> "Pursuant to the first paragraph of Article 141(2) EC, for the purpose of that article, pay means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. It is clear from that definition that the authors of the Treaty did not intend that the term worker, within the meaning of Article 141(1) EC, should include independent providers of services who are not in a relationship of subordination with the person who receives the services (see also, in the context of free movement of workers, case ***C-337/97 Meeusen [1999] ECR I-3289,*** paragraph 15)."

135. Factors that are relevant include whether the individual markets the services offered as an independent person to the world in general, or is recruited to work for the principal as an integral part of its operation – ***Cotswold Developments Construction Ltd v Williams [2006] IRLR 181***.

136. In ***Autoclenz Ltd v Belcher and others [2011] ICR 1157*** the Supreme Court held that "the question in every case is, ……what was the true

agreement between the parties?" and made reference to the importance of looking at the reality of the obligations of the situation. All of the evidence is to be considered, and the relative bargaining positions of the parties taken into account.

137. In ***Jivraj v Hashwani [2011] ICR 1004*** the Supreme Court considered the case law of the Court of Justice and concluded that, whilst often useful to consider, 'dominant purpose' which had been the test utilised should not be the sole test; the focus should instead 'be on the contract and the relationship between the parties rather than exclusively on purpose'.

138. It is not enough that the person carries on a profession or business undertaking so as to be "self employed"; it is also necessary for the exclusion to apply that the other party is a client or customer - ***Hospital Medical Group v Westwood [2012] ICR 415***.

139. In ***O'Brien v Ministry of Justice [2013] OCR 499*** the Supreme Court held that the distinction between a worker and a self-employed person was to be determined from "the true picture of the reality". Lord Hope explained that:

> "The self-employed person has the comparative luxury of independence. He can make his own choices as to the work he does and when and where he does it. He works for himself. He is not subject to the direction and control of others. Of course he must adhere to the standards of his trade or profession. He must face the reality that, if he is to succeed, he must satisfy the needs and requirements of those who engage his services. They may be quite demanding, and the room for manoeuvre may be small. But the choices that must be made are for him, and him alone, to take."

140. In ***Bates van Winkelhof v Clyde & Co LLP [2014] ICR 730*** Baroness Hale said "I agree with Maurice Kay LJ that there is not 'a single key to unlock the words of the statute in every case'. There can be no substitute for applying the words of the statute to the facts of the individual case."

141. Also relevant as a consideration is whether or not there is mutuality of obligation ***Secretary of State for Justice v Windle and Arada [2016] ICR 721***

142. The statutory language of the 1996 and 2010 Acts is different but the same test applies in determining whether a person is a worker under each: ***Pimlico Plumbers Ltd and another v Smith, [2018] ICR 1511***, such that those employed under "a contract personally to do work" within s.83(2)(a) are treated as being the same as workers under s.230(3)(b) (often referred to as "limb (b) workers"). The individuals in that case were presented as self-employed in documentation, and for tax purposes, but were held to be workers.

143. The Court of Justice of the European Union considered the position further in ***B v Yodel Delivery Network Ltd [2020] IRLR 550,*** and held that the key in EU law is whether the individual is 'subordinate' in a work hierarchy; and commented that:

> "[The Working Time] Directive 2003/88/EC …… must be interpreted as precluding a person engaged by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a 'worker' for the purposes of that directive, where that person is afforded discretion:
>
> – to use subcontractors or substitutes to perform the service which he has undertaken to provide;
>
> – to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;
>
> – to provide his services to any third party, including direct competitors of the putative employer, and
>
> – to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer,
>
> provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer."

144. The Supreme Court held in ***UberBv v Aslam*** **[2021] ICR 657**, that:

> "In determining whether an individual is a 'worker', there can, as Baroness Hale DPSC said in the ***Bates van Winkelhof case [2014] ICR 730***, 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 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'."

145. The EAT considered the issue of worker status more recently in ***Johnson v GT Gettaxi UK Ltd [2024] EAT 162***, referring to the fact specific nature of the analysis. It is not a case of seeking to find to which authority the facts are closest.

(ii) Other claims

146. The Tribunal has jurisdiction in relation to a claim as to breach of contract by an employee under the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994. The word "employee" is not defined in the Order. Under article 4 it must arise at or be outstanding on termination of employment, and not be a matter falling within article 5.

147. The standard in contract for termination of employment without giving notice, which in law is where the other party has committed a material breach of contract which justifies rescission of the contract, is not an error of judgment or momentary lapse, but substantial carelessness or disregard of reasonable precautions (Walker Civil Remedies page 873).

148. The right to annual leave is provided for in the Working Time Regulations 1998, and a failure to make payment of what is due may also be pursued as an unauthorised deduction from wages under Part II of the Employment Rights Act 1996. The right is that of a worker as defined both under the Regulations and 1996 Act.

149. There is a requirement for written Particulars of employment under sections 1 and 4 of the Employment Rights Act 1996, for specified terms including matters which are changed. If not provided, and a relevant other right is breached, an award of two to four weeks' pay may be made under section 38 of the Employment Act 2002 again where the person is a "worker".

150. The ACAS Code of Practice on Disciplinary and Grievance Procedures includes the following provisions:

> "4. …….
>
> - Employers should carry out any necessary investigations to establish the facts of the case…..
> - Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made…..
>
> 9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification…
>
> 12. ……. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be

> given an opportunity to raise points about any information provided by witnesses. ……
>
> 23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence…"

151. If it is breached the Tribunal may increase or reduce an award by up to 25% under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

Remedy

152. Where there is the ending of a contract part way through a year, entitlement to accrued annual leave is due under Regulation 14.

153. There is a requirement to provide a worker with written particulars of employment under section 1 of the Employment Rights Act 1996. If that is not done, the Tribunal may award 2 – 4 weeks' pay in compensation under section 38 of the Employment Act 2002.

Observations on the evidence

154. Before addressing each witness it is appropriate to make some general comments. The claimant clearly had a burning sense of unfairness. That was apparent from his evidence but also for example from the email he sent a former student on 11 February 2024 which referred to the termination of his contract "in circumstances which I believe were unfair and extremely prejudicial….." He did not have the service to claim unfair dismissal, assuming that he was an employee, and there was a sense that he sought to find another basis in law as a vehicle by which to pursue claims to address that sense of unfairness.

155. The respondents felt that it was clear that he was self-employed, as the second and third respondents were, and that he had been dishonest both with them and in relation to earnings as a musician. They considered the complaints made malicious, with evidence having been fabricated to pursue it.

156. The parties were therefore taking highly contradictory and somewhat antipathetical positions. Both had very strong feelings about it, particularly the claimant and second respondent. They each addressed matters in some respects at great depth not all of which was, as the Tribunal have assessed, fully relevant to the claims before the Tribunal. Whilst the majority of the reasons for that arose from the claimant, he was not alone in having responsibility for that. It was unfortunate that the hearing was not concluded within the five days originally fixed, as could have been possible had all concerned focussed on the issues directly before the Tribunal. Neither party focussed as fully as might reasonably have been expected on evidence relevant to the issues before the Tribunal. The evidence presented was not always as clear as it might have been.

157. The respondent raised some aspects of time-bar, essentially for any acts said to have occurred before 27 July 2023. But the majority of the focus was on the decision to terminate the claimant's work with the first respondent and any act before 27 July 2023 was relevant evidence to the issues that were certainly within the Tribunal's jurisdiction on the issue of their timing. The Tribunal was satisfied that it had jurisdiction to hear the claims made before it.

158. Given that the claims were made and defended, the Tribunal required to make an assessment of the evidence that it heard.

159. **The claimant** gave evidence that he believed true, such that we did not consider that he had fabricated evidence in the manner alleged by the respondents. The allegations of fraud which the second respondent made against him on a number of occasions in his evidence we did not consider established. We address that further below.

160. We considered that there was a mixture of aspects of the claimant's evidence that were reliable, and others which were not. We considered that he had a very strong focus on flying and flight instruction, and was at time somewhat naïve in how he approached matters. He considered that his long flying experience which was greater than that of the second and third respondents was such that his views prevailed over theirs. A part of his cross examination of the second and third respondents was over their experience and judgment, seeking to attack both and to contrast that with

his own. He seemed primarily concerned about his reputation as a pilot, rather than the claims he was making before this Tribunal. Whilst unwarranted claims against him could be evidence as to discrimination, much of his evidence and cross examination went well beyond such an issue.

161. The naivety we refer to was evidenced by the email on 2 July 2023. It was put to him that he was laying the groundwork for a claim, but the content did more to damage any claim as he was clearly suggesting a way to minimise the prospect of HMRC assessing the relationship as one of employment, for tax purposes. We consider that it is a factor that he actively put forward such a comment in a direction that was opposite to his being an employee for statutory purposes before us, but that was nevertheless what he argued.

162. We were concerned that he had not disclosed the documentation required by the Order of 18 April 2024. He had redacted bank statements by excluding all Working Tax Credits, some of the payments made in relation to gigs although he did not know which payments related to which gigs and whether he had been present at them, and other payments that should have been provided unredacted. He explained that he had done the best he could in the time he had, but we considered that there was a lack of full candour in what he had done. As a matter of fact the respondents were able to access the documents and get past the redactions, but we did not consider that he had fully complied with the order.

163. We did however accept generally most of the explanations as to how he assisted his son in his career as a musician, did not receive income personally for doing so, and as to the sale of assets or the proceeds of an insurance claim.

164. What we considered was relevant to the assessment of his reliability was the failure to include some elements related to the first respondent's business, such as a payment of £280 made by his cousin after a flight to Oban, where the documentation did not support his explanation, nor what he said in evidence was the breakdown of that amount which at best accounted for £234 of it, and when it was suggested that he had profited from the flight there was a long delay before he answered "I would not put

it like that." We did not consider that chapter of evidence from the claimant as reliable.

165. Similarly the flight that led to the airprox report referred to further below, which was under-recorded in the time taken by around twenty or more minutes leading to an underpayment for the aircraft by him was not explained. Taking the matters in respect of which there had not been compliance with the order, and that there had not been provision of documentation with the candour that can reasonably be expected of a party litigant, we concluded that those failures did impact on his reliability to an extent.

166. The claimant tended somewhat obstinately to maintain his allegations against the respondents as to how safety matters had been managed, even when shown contrary documentation such as in relation to the accident when the wingtip of an aircraft struck the hangar door, and the introduction to a document called CAP 793 which made clear that it was guidance and advice, not requirement. He was keen to give evidence on what he saw as safety breaches by the first respondent, and what he considered to be a selective attitude to safety, but we considered that those attempts did not succeed and were not of direct relevance to the claims before us for reasons given below.

167. Some of the aspects the claimant pled were not supported in his own evidence. This was we considered a material matter when assessing his reliability as a witness. For example, although the claimant said that someone had made a comment as to his age in relation to a skiing trip around March 2023 he could not recall whether that was the second or third respondent or someone such as the third respondent's father. In light of the lack of clarity of that evidence the Tribunal did not consider that that alleged matter had been proved. His position contrasted with the pled case.

168. The claimant also in effect accepted that the alleged intimations of a grievance for breach of the 2010 Act on 26 August and 2 September 2023 had not included anything indicating such a breach. That was not consistent with the pled case.

169. The claimant did accept that he had telephoned the second respondent to ask where the fuel sump drain valve was on the C42 aircraft on 28 August 2023. In his evidence he accepted that he was at home at the time, and not at the airfield. That call was a most surprising thing to do, when checking for fuel contamination using that valve was required as a daily check, and required to be part of student training. It did not appear to us that the claimant had explained that request adequately in his evidence other than that it indicated a lack of knowledge where it was situated, and that indicated also a lack of knowledge on his part, contrary to his evidence. But the claimant in cross examination sought to raise other explanations for it, despite both not giving such evidence and also not cross examining the third respondent on his evidence about the comment made about that by the claimant on 14 September 2023, as noted below. These were, we concluded, material inconsistencies on the part of the claimant.

170. Whilst the terms of the conversations on 2 September 2023 were disputed it was clear firstly that the claimant had on the previous day made reference to his acting as guarantor, and then changed that to an insurance matter, and had framed the draft letter “to whom it may concern” when he had said that a specific insurance company had made the request. Those changes of position and inconsistencies, as well as the reference to employment in the draft letter, caused the second respondent to be suspicious, and we accepted his evidence on that in preference to that of the claimant. The claimant’s explanations of how the discussions had gone did not appear to us reliable.

171. The handwritten note he said he took of that on the day did not include any reference to age, but the email the claimant sent himself the day after allegedly to record it further did so. That inconsistency was, we considered, significant. It appeared to us that the claimant was embellishing, perhaps subconsciously, the events of the day before in his own mind, adding a form of gloss to it, and that that was not reliable.

172. The meeting was also in the context of his earlier concerns that arose from the meeting he says took place on 26 August 2023 at which he felt that he was, to paraphrase, on the way out. Whilst we accept that he did raise

why he was not receiving new work, we did not accept that he had been told that Mr Culpin being younger was the reason, as the claimant alleged again that was a gloss that we consider the claimant added which was not reliable evidence.

173. The claimant denied being angry at the meetings on 2 September 2023, but accepts that he was upset. We consider it likely that the events did not occur exactly as either the claimant stated. We consider it likely that the conversation was heated emotionally so far as the claimant was concerned, that he was agitated as the second and third respondents both spoke to and that he did not have an accurate recollection of the meetings with each of them that day.

174. A number of matters were raised in the respondents' evidence which had not been put to the claimant, and in those respects we did not consider it appropriate to give those matters any weight. The claimant had not had the opportunity to comment on them. Putting a point in cross examination where the witness is aware of the matter where that is the subject of later evidence is a basic function of the process of cross examination.

175. Our conclusion is that the claimant was genuinely shocked and upset at having his role terminated, felt that his reputation was at stake, and that that has coloured his recollection of events. There are several areas of his evidence where we had substantial concerns over its reliability.

The second respondent

176. The Tribunal had some concerns over the evidence from the second respondent. For example, as originally pled in the Response Form it was alleged that during the incident on 10 August 2023 there was a near collision and that the situation was dangerous. The second respondent said that the other pilot had been in a state of fear and alarm. That was a form of guess. The second respondent did not speak to that pilot, nor indeed to the claimant, about the incident. That was surprising in relation to the claimant at least, particularly so if there were the safety concerns both as to a possible collision but also the track of the flight close to an area of intense gliding activity as the second respondent spoke to, and

after the respondents saw the reply from the claimant sent to the Board on 25 August 2023.

177. We did however consider that the concerns over safety in relation to that flight were genuine. The second respondent would not have flown where the claimant did, in the circumstances that he did so close to a gliding area. There had been an airprox report, and the second respondent drew the inference from that that the other pilot had been in a state of fear and alarm. That inference may have been taking matters further than appropriate, but it was a genuine belief.

178. After the Airprox Board Report was produced the pleading of the respondents changed to a reference to the view of the other pilot. The second respondent when asked to explain the change in examination in chief stated that the claimant was in his opinion too close to the Gliding Club, and should have taken a different route. The second respondent stated that there ought to have been radio communication, and the Report referred to that on the basis that it may have been prudent to do so. What was entirely missing was any suggestion that the second respondent's views were affected to any extent by the claimant's age.

179. The second respondent in the investigation into matters then discovered that the claimant had recorded the flight as one of 10 minutes' duration, not that taken which was at least 30 minutes in his view. Again that was a genuine belief, unaffected by age to any extent.

180. The second respondent said that after the call about the location of the fuel sump drain valve he had spoken to other students who told him that they were either not aware of its location, or had not been told of it by the claimant. We accept his evidence on that, and that there was a genuine concern that the claimant had not known where it was, and had not taught students about it effectively. That view was supported by the very call the claimant made, after being asked by Ms Wiggington, and the claimant's later comment to the third respondent on 14 September 2023.

181. The second respondent said that the first respondent did not sell fuel, but was then taken to an email in which he had referred to that being done, which he then described as a one-off. Although we accepted that that was

an exception not the rule, he had been adamant before that it was not done.

182. He was so keen to rebut some of the allegations that on one occasion he replied “no” to a question before it had been properly asked. On a number of occasions he added to an answer his allegations of fraud or similar conduct by the claimant in a manner that did not answer the question asked and was unnecessary. That was all in our view indicative of a material level of animosity between those parties, which we considered did affect the evidence of the second respondent.

183. The second respondent denied the allegations of comments as to the claimant’s age that he was said to have made. This was a simple contradiction between the claimant and second respondent. Taking account of all of the evidence we preferred the second respondent on that for reasons more fully explored below. The second respondent was aware from the start that the claimant had sought to make a claim of age discrimination. That the agreement to use the services of the claimant had been made in that knowledge was we considered a factor that supported his evidence that age had played no part in the decision. The second respondent was a broadly similar age to the claimant. His evidence that the reasons for the termination were related to the claimant’s attitude and particularly the behaviours on 2 September 2023 were, we considered, credible and reliable.

184. We also accepted his evidence as to how the document orders had been responded to and did not accept that there had been a deliberate or negligent failure to comply with them. We consider that he did the best that he could to do so but that there had been difficulties in accessing historic information from the provider Shlott on a web-based system.

185. In general terms we considered that the first respondent was a small business run more in the manner of a hobby by amateur enthusiasts than strictly as a commercial entity. There was an informality in how basic issues were addressed. The claimant’s flying qualifications, such as a current licence to instruct, were not checked. There was no written contract, not even a brief email outlining arrangements. Discussions which might have been expected to ask the claimant about the flight that led to

the airprox, or concerns over his knowledge of the fuel drain location, were not held with him.

Mr McDowell

186. Mr McDowell gave brief evidence, which was interposed during that of the second respondent by agreement, and we were satisfied that he was credible and reliable. He confirmed that he was self-employed. He also confirmed that there had been little actual work in flight instruction in the period May to September 2023.

Mr Culpin

187. Mr Culpin also gave brief evidence interposed similarly, and we were satisfied that he was credible and reliable. He confirmed that he was self-employed, and also as to the limited flight instruction work.

The third respondent

188. The Tribunal was initially concerned at an obvious inconsistency between the pled case in the original Response Form, and the evidence of the third respondent. The third respondent alleged that he had raised with the claimant on 14 September 2023, during a second call when the claimant had asked for reasons for the decision both the call in relation to Miss Wigginton and the location of the fuel drain and that the claimant in relation to the latter matter had said something to the effect “You’ve got me there”. He said that he had also mentioned the airprox incident. That stands in very stark contrast to the initial Response Form prepared by the respondent’s then solicitors which alleged that the third respondent had not given the claimant any reasons for termination to spare him embarrassment. The third respondent was asked to explain that in questions by the Tribunal, and said that that was the position for the first call, but that when the claimant had raised what the reasons were in a second call made shortly afterwards he had given those. That second call, and the reasons, were not pled in that initial Response Form. When the respondent’s current agents assumed agency an amended Response Form was tendered, but it did not address the calls on 14 September 2023 at all.

189. Whilst there was that somewhat glaring inconsistency between the evidence and the initially pled case in that respect the Tribunal considered that the third respondent's evidence was generally credible and reliable. We accepted that he made those two calls on 14 September 2023 but as he said without taking any pleasure in doing so, and to the contrary finding them difficult to do. He explained that they had discussed the claimant's request to use the airfield to fly with Ms Wigginton using her brother's aircraft, that he had rejected that request and the reasons for that. That part accorded with the claimant's evidence of such a discussion about Ms Wigginton, and we concluded that the third respondent's evidence of the two calls was generally accurate. We preferred his evidence to that of the claimant where there was a dispute over what had been said.

190. The third respondent's evidence on the events of 2 September 2023 broadly corroborated that of the second respondent, although the third respondent had not seen and heard everything that had initially transpired. We accepted that the claimant had been, as the third respondent stated, highly agitated, and had approached him seeking to discuss matters when it was obvious that the third respondent was with someone else such that he had done so in an inappropriate manner.

191. We also accepted the third respondent's evidence that there had been a discussion a few days thereafter, on a date not confirmed in evidence but between 2 and 14 September 2023, with the second respondent about the claimant, that the decision had been taken by them jointly, and that the reasons were as the third respondent stated in his evidence, with age not being any part of those decisions.

Discussion

192. The Tribunal dealt with each of the issues identified above as follows:

Was the claimant an employee or worker of the first respondent?

193. These matters require to be assessed separately. Confusingly the word "employee" means different things in different statutes. The first aspect of the issue is whether the claimant was an employee for the purposes of section 230 of the 1996 Act and the equivalent provision in the 1994 Order.

The Tribunal considered that he clearly was not. There were a number of reasons for that conclusion, considering all of the evidence given, but the following were regarded as of particular importance –

(a) His CV stated that from 2009 he had been a "freelancer". There is no suggestion that he raised in discussions with the second and third respondent any other arrangement.

(b) He was not required to work particular hours or days, and generally could choose when he wished to carry out work. He said that he would work flexibly, and he did so. The work was organised where necessary around his engagements in musical events with his son

(c) He invoiced for his services, without arrangements for tax, or national insurance. No payslips were issued, and there was no evidence that he asked for any.

(d) Latterly in August and September 2023 he was to be paid directly by the students, also not consistent with employment by the first respondent. For those months the first respondent did not pay him. That resulted from an email of 2 July 2023 he had sent proposing that very arrangement, with the email referencing the HMRC attitude to such arrangements. From that email it appeared to us to be clear that he sought to avoid employee status for tax purposes, and whilst not determinative under section 230 is relevant to take into account.

(e) He did not seek a contract of employment, and when he sought a letter for insurance purposes on 1 September 2023 which the second respondent replied to by saying that he was not an employee the claimant said in evidence that he had suggested other wording referencing self-employment, rather than maintaining that he was an employee.

(f) He did not apply for annual leave to be taken in the manner that an employee would, rather he intimated when he was to be taking leave

194. None of these matters either individually or collectively is determinative, but the overall clear picture was of a relationship inconsistent with that of an employee and employer for the purposes of the 1996 Act and 1994 Order. Claims relying on that status are outwith the jurisdiction of the Tribunal accordingly and are dismissed.

195. The second aspect is whether the claimant was a worker under the 1996 Act or 1998 Regulations, or an employee under section 83 of the 2010 Act the test for which is in essentials the same. The words of the statutes must be applied to the facts. The full issues to be addressed are set out in the case law addressed above. A person regarded as self-employed by the parties, and for tax purposes, may meet the statutory test. In ***Smith*** for example the individuals were described as contractors, and self-employed for tax purposes, but were held to have worker status.

196. The respondent argued that there was never any contract between the parties. The Tribunal rejected that argument. It was clear that there was a contract between the claimant and first respondent in terms of which the claimant provided flying instruction services to the first respondent's student customers, and to some other customers, for which he was paid. Whilst there was an argument over the position of Skyranger 1 Ltd that was an attempt to re-argue the point of amendment which had been refused. The respondents had pled that Skyranger 1 Ltd had changed its name to Adventure Aviation Ltd, such that it was the same legal entity.

197. The claimant had tendered invoices initially to the name of Skyranger 1 Ltd, and then to the name of Adventure Aviation Ltd. Those invoices had been paid. There was in our view certainly a contract between the claimant and first respondent accordingly, even if not committed to writing.

198. Whilst not directly raised in argument, there is a separate issue over what the position was after 31 July 2023. The invoicing to the first respondent then stopped, and students were invoiced directly by the claimant (although none were before us). There was no invoice for August or September 2023 addressed to the first respondent by the claimant. That is addressed below.

199. The evidence was that there was a contract between the claimant and first respondent, and that was for the claimant personally to do the work. We did not accept the argument for the respondent that there was a right of substitution. The documents it sought to rely on in that regard was one where the second respondent asked the claimant if he could do his work, not the other way round.

200. The Tribunal considered all of the evidence it heard, and concluded that the claimant did meet the statutory definition in this regard. The principal reasons for a finding in favour of that status are –

(i) The claimant worked for the first respondent, and there was no evidence of his working for other organisations in flying instruction at the material time, nor of other work – we rejected the argument that he was a professional musician receiving income for doing so, as we accepted the claimant's evidence that he personally derived no financial benefit from doing so and that he was simply helping his son.

(ii) Whilst there was no written contract between the claimant and first respondent the facts clearly established that the essentials of a contract existed. There is no requirement for a written contract under the Requirements of Writing (Scotland) Act 1995. There was in law a contract between the parties.

(iii) The claimant personally carried out the work for the first respondent, as a flight instructor

(iv) The claimant was represented on the first respondent's Facebook page as a new member of the team.

(v) The claimant was dependent on the second respondent who was the Chief Flight Instructor of the first respondent for allocation of work both for students and otherwise such as for gift vouchers or assisting those who were qualified.

(vi) The work in that regard was generated by the first respondent. The claimant did not generate any of his own work. His only flight instruction work was for the first respondent's customers.

(vii) The claimant was subordinate to the first respondent, and in a weaker bargaining position generally, given all the circumstances including at (v) above in particular

(viii) The claimant was paid an hourly rate for the work he did. The respondent we considered generally set the rates, including an increase in it.

(ix) The claimant had little if any realistic opportunity of increasing the level of profit from flight instruction given the financial arrangements

(x) The first respondent provided the large majority of the equipment to carry out the services, including the aircraft, use of its equipment, the booking system, the students or other customers, a badged jacket and T-shirt, and the claimant provided only his own clothing, which he wore most often, expertise and time.

201. There were however some facts pointing away from worker status. The most significant of them were firstly the issue of mutuality and secondly that of whether the claimant was genuinely self-employed. The claimant did have flexibility as to when he worked in fact. He could choose not to. But when he did work he came under the contractual arrangements, even if they were never committed to writing, and what work he did was largely as given to him by the second respondent, who allocated it. Whilst the precise day and time was a matter under his control the volume of work overall was not.

202. Whilst the respondents sought to rely on ***Halawi v WDFG UK Ltd 2015 IRLR 50*** that case was before two later Supreme Court cases referred to above, including ***Uber*** which held that what the Tribunal should do is to assess the facts of the case realistically, and to keep in mind the purpose of the legislation. The degree of control is certainly a factor, and here there was a measure of that, but not completely so.

203. It is relevant that the model for invoicing changed in August 2023 with payment made by the students directly to the claimant, and he ceased to invoice the first respondent. That was not something imposed by the first respondent, but had been introduced on a suggestion by the claimant himself. At the time of termination therefore the claimant was not invoicing the first respondent, but receiving payment for services directly from the students themselves. At that stage there were three of them.

204. These two factors when combined pointed quite strongly away from worker status, and mean that the decision was a very finely balanced one. It required the Tribunal to weigh all the evidence it heard. That was in the context of the first respondent being a limited company. It was not one operated on a not for profit basis, or as a charity. It was however run on somewhat informal lines, not exactly as a hobby by the second and third respondents but having an element of that. That may explain why much

was not documented with no contract between the claimant and first respondent, no letter of termination of the relationship, and otherwise. But the first respondent operates a flying club on a commercial basis.

205. It appeared to us that the issue of mutuality referred to in ***Windle*** had been modified to an extent by the later Supreme Court decisions referred to above, and it was noticeable that in both of those cases the putative worker did not require to carry out work, but could choose whether or not to do so. Lack of mutuality of obligation was not therefore a bar to a finding of worker status. The control was limited in those cases (***Smith*** and ***Uber***).

206. We did consider then whether or not there was any contract between the claimant and first respondent from 1 August 2023 onwards. The reality of the claimant's situation was that the student made the arrangement for flight instruction through the first respondent's website and booking system. The first respondent owned the aircraft used for flight instruction, its equipment, and the system supporting that. The claimant was embedded within that system. He was part of the first respondent's team, as that was set out in the website entry provided to us. He was subordinate to the first respondent as without access to its students or aircraft no services could be provided by him to those students or other customers, who were the only persons he engaged with for flight instruction.

207. The change in arrangements had been proposed firstly by the claimant to address the issue of employment status for tax purposes, which is a different matter to that of worker status, but secondly it gave the first respondent a saving in VAT. If there had been gift voucher work allocated to the claimant after that change that would have been invoiced by the claimant to the first respondent. For other reasons no such work was in fact allocated to the claimant prior to the termination of the contract.

208. The degree of flexibility as to the work being carried out and the changed method for payment in August 2023, being of splitting payment for the flight instructor and aircraft use, were not, we considered, sufficient to lead to a conclusion of the claimant not meeting the statutory tests because he was in business on his own account on the basis explained in authority. There remained an implied contract between the claimant and first

respondent whereby the claimant provided flying services to the first respondent as well as to the student who was their customer. Invoicing was to the student, but the work was for the customer of the first respondent. The claimant gave the service to both the student and the first respondent. That allowed the first respondent, which provided flying training essentially, to do so and to hire out its microlight for that purpose. The only difference was that the payment for the instruction was directly made by the student, with otherwise the arrangements continuing.

209. Whilst the point is a narrow one, we concluded that there did remain a contract, and it was notable that that contract was ended by the third respondent in a telephone call, confirmed by a later email referring to "instructor services no longer required", inferring required by the first respondent. That supports the suggestion of there being a contract between the claimant and first respondent whereby the claimant provided services to support the operations of the first respondent, but with payment for those services made by the student to the claimant direct. In Scotland there is no requirement for consideration for there to be a contract.

210. Considering all of the evidence that we heard and applying the statutory provisions to which we have referred we considered that the claimant was a worker under the 1996 Act and 1998 Regulations, and an employee under section 83 of the 2010 Act from the time he commenced until 14 September 2023.

Did the first respondent directly discriminate against the claimant because of his age contrary to section 13 of the Equality Act 2010?

211. The claimant did we consider establish less favourable treatment in two respects – firstly that he was not being allocated new work from around June 2023 onwards, and secondly the termination of the contract on 14 September 2023.

212. The next question is whether that had been because of his age.

213. The first question in relation to that is whether or not the claimant has established a *prima facie* case such as leads to the burden of proof shifting to the first respondent. That focussed on whether the incidents during

which the claimant alleged that there had been reference to his age had happened, or not as the respondents alleged, or whether the circumstances established an inference that it might have been a factor consciously or unconsciously. At this stage the respondents' explanations are not considered.

214. Taking account of all of the evidence heard, but where this was generally a question of deciding between the evidence of the claimant and second respondent, we preferred the evidence of the second respondent. We considered it more likely that the second respondent had not made the references to age that the claimant claimed he had.

215. Firstly, the claimant said or wrote nothing at the time of each alleged matter when he says age was brought up to bring it formally to the attention of the first respondent. He has forthright views, and was not afraid to make comments on other matters, and it seems to us inconsistent that if an inappropriate remark of some kind was made the claimant would not have made some form of formal comment to challenge that at that time in written form. That was so particularly when he claimed that he was an employee, as he did before us, that he had been the subject of the age-related comments he alleged and that the first respondent was, again as he alleged, seeking to get him to leave. That was all in the context that he had earlier alleged age discrimination in respect of previous employment in 2017. The failure to document his allegations in those circumstances was we considered not supportive of his position overall. We considered it more likely that had the alleged comments been made the claimant would at the time have sought to raise them formally and in writing in some manner.

216. Secondly there were material issues over the reliability of the claimant's evidence. There were also some areas of concern over credibility, but we consider it appropriate to address matters within the context of reliability.

217. There were a number of issues of concern. They included his recording of 10 minutes flight time on 10 August 2023, when it should have been about three times that. The explanation that it was as he had forgotten his knee board we did not consider credible. The time of a flight is recorded on the aircraft on a system known as Hobbs. He should simply have recorded the

accurate time, and his failure to accept that his actions had been wrong was not conducive to being regarded as reliable at the least.

218. It was not however an isolated adminicle of evidence. The recording of the flight with the claimant's cousin, a trip to Oban, which was recorded as if a navigation exercise for a student, the charge for that was what a student would be charged, and the claimant's explanation for how that was made up accounted for only around £180 of the £280 amount, such that we did not regard his explanation as reliable at the least.

219. Seeking to redact the bank statements in the manner referred to above was we considered not the act of a reliable witness. A person in the claimant's position would simply have produced unredacted details, and explained them where that was appropriate to do. The argument that Working Tax Credits was not a benefit, for example, we considered not statable. These were deliberate redactions that the claimant made, very different in kind to the issues over compliance with orders by the respondent about which the claimant complained which are addressed below.

220. There were other significant inconsistencies, such as the explanation for the call made on 28 August 2023 to the second respondent about the location of the fuel drain which we did not consider statable. Putting it simply what the claimant said about the call when asking questions in cross examination did not make sense to us. He said something to the effect he was checking that he was right, when called without warning, but it appeared to us that it had been made to the second respondent as the claimant had not remembered where the fuel drain was, Ms Wigginton needed that for her skill test that day, and she did not appear to know either. The second and third respondents were entitled at the very least to be concerned that such a question had been asked by the person giving her flight instruction when it was an item on the daily checklist.

221. The third respondent said that when he told the claimant about that issue on the second call on 14 September 2023 the claimant had said something to the effect that "you've got me there", and the claimant did not cross examine on that point. We accepted the third respondent's evidence. That

comment is simply inconsistent with what the claimant sought to explain on an issue he gave little direct evidence on when giving evidence in chief.

222. We considered that the handwritten note of the meeting said to have taken place on 26 August 2023 was not likely to have been written at the time, as it purported to have been and as the claimant said in his evidence, but prepared for the purposes of the present claim. That is because of the general concerns over reliability to which we have referred, and the following aspect of this matter in particular: had the claimant been told that Mr Culpin was being prepared to take on some of the second respondent's role from him as he was younger than the claimant, we consider it most likely that the claimant would have raised that with the second or third respondents in some written form at the time. The claimant is a highly experienced pilot, used to recording matters accurately and contemporaneously in a manner accessible to those involved in matters. Whilst not a qualified solicitor he is someone with a qualification in law, and a Diploma in Legal Practice. It is clear from his lengthy pleadings in the case that he has a familiarity with the law generally. He had pursued an earlier age discrimination claim, or attempted to do so, in 2017. Doing nothing formal at that point, when he was concerned at having little work left such that he was, in his evidence, the victim of an attempt to get him to leave, was we considered not likely to have happened if the alleged comment had been made by the second respondent.

223. We also considered his claim that he had raised an oral grievance with the second respondent on 2 September 2023. We did not consider that likely. His handwritten note he says was taken that day does not refer to that, or to an age matter. The email to himself on 3 September 2023 does do so, but as discussed above we consider that that is a gloss added. It did not accurately record the discussion, and the claimant being in the agitated state described by the second and third respondents, whose evidence we accepted on this, was not in the best position to recall the detail of the discussions accurately. As addressed separately, his evidence was also that he had not specifically raised breach of the 2010 Act.

224. Related to that is the email of 15 September 2023. It refers to Mr Culpin as "being a younger member of staff". That Mr Culpin was younger is true,

but that is not sufficient for an argument of age discrimination or age-related harassment of itself. The email to the respondent in effect challenging the decision to terminate the contract refers only to discrimination in a broad sense, and gives none of the detail subsequently raised, such as what are alleged to be age discriminatory comments or actions, save the one reference to Mr Culpin being allocated work.

225. What is also of significance is that in that email the claimant does not suggest at least in clear terms that he made a formal grievance to the second respondent orally on both of 26 August 2023 and 2 September 2023. Given the proximity in time and the obvious importance of such alleged grievances had they been made those omissions are striking.

226. There was we considered no other evidence we considered we could accept of age being involved in the decision-making by the respondents. The claimant argued that the discussion with the second respondent on 2 May 2023 over the Sky Demon account was age related harassment, but we found no evidence of that discussion being related to age in any way at all.

227. The claimant's suggestion of an age related comment by the second or third respondents, questioning whether he was too old for skiing when about to go on holiday we did not accept. He did not state in evidence who had made the remark when that was put to him, it was not therefore clear whether either the second or third respondents had done so or someone else, and that remark was denied by the second respondent (the third respondent was not asked about it), and again the claimant did not raise it formally at the time. It seems to have been allegedly made around March 2023, but that was before the claimant said the relationship started to deteriorate in May 2023.

228. The claimant also suggested that the second respondent had asked him about his age in around May or June 2023. We did not consider that likely. The second respondent denied doing so. It was not at all clear from the claimant's evidence why such a question would be asked, or the context for it. Given the whole evidence we heard we did not consider the claimant's evidence as to this reliable.

229. So far as the failure to give him new work is concerned from around June 2023, that is the case as a matter of fact. Also true as a matter of fact is that Mr Culpin is materially younger. But those two facts are not sufficient in our view to raise a *prima facie* case. There requires to be something more that acts, to paraphrase, as some form of link to age. In our view there was not. There would have been had the claimant's evidence of comments as to age being mentioned by the second respondent been accepted, but they were not.

230. More generally, it was we considered instructive that so little evidence as to matters related to age was placed before the Tribunal by the claimant. It did not feature in the claimant's written submission directly at all. For a case under three sections of the 2010 Act on the protected characteristic of age that was surprising at the least. As has been referred to, the fact of less favourable treatment, and having a protected characteristic, is not sufficient. The claimant appears to have had the belief that as work was being given to Mr Culpin and not him that the reason for that must have been the claimant's greater age. But that belief is not sufficient, and ignores a number of factors that we considered material, not least the reasons for termination which were because of what the claimant had said and done.

231. It is also appropriate we consider to make an obvious point. This is an Employment Tribunal. The Tribunal does not have the expertise of a body such as the Airprox Board. It cannot decide for example if the claimant's flying in the area of the gliding club at Portmoak was perfectly safe as he claims, or not as the respondents claim. The respondents argued somewhat similarly that the claimant had been conducting a business as a musician and had not declared income for that required for tax purposes to HMRC. They argued that we could refer that to HMRC. We did not consider that the evidence before us disclosed what the respondents argued it did in this regard, but in any event whether or not tax was payable or not declared is not a matter for us. This Tribunal decides the claims before it, which are employment claims.

232. In conclusion, as the references to age on which the claimant founded were not proved in evidence by him, for the reasons given above, we

considered that the claim of direct discrimination could not succeed as the claimant had not established a *prima facie* case.

233. We then considered, lest we were wrong on that, the position as to why the claimant was not given new work and why the contract was terminated. Was the claimant's age a significant, in the sense of more than minor or trivial, factor in each decision?

234. So far as allocation of work was concerned we accepted the second respondent's evidence. He was giving work to Mr Culpin who was a newly qualified instructor. Much of that work was not paid. It allowed Mr Culpin to build his experience as a flight instructor. After the airprox matter the second respondent had concerns over the claimant's safe flying. Without addressing that with the claimant, however, the second respondent did not give him new work while that was investigated, and that then led to the concern over under-recording the time of the flight, and not paying for it adequately. There was then the discussion on 28 August 2023 which further led to concerns over safety. Matters deteriorated thereafter, and led to the decision to terminate. We did not find any evidence to suggest that age played any part in the decision not to give the claimant new work in the period from around June 2023 to the termination. It played no part whatsoever in the decisions in that regard.

235. We then considered the decision to terminate the contract taken jointly by the second and third respondents. We concluded that even if the burden had passed to the first respondent it had proved that age was not a factor. It seemed to us that there were increasing concerns over the claimant, including the fact of the Airprox report which the first respondent (in the form of the second and third respondents themselves) genuinely considered a safety issue, and the call on 28 August 2023, but that what was a form of final straw was the two meetings held separately with each of the second and third respondents on 2 September 2023. How the claimant had behaved at them, the inconsistency of the explanation over the letter, the wording of the draft letter referring to employment, and then acting as the both the second and third respondent considered it to be in an aggressive and unacceptable manner led, we considered, to the

decision to terminate the contract. Those were the only reasons for the decision. The claimant's age played no part whatsoever in it.

236. The claimant spent a great deal of time in evidence challenging their views about the airprox incident. We consider that the pled reference to a near miss was not accurate. But their views of the incident being a safety one were genuinely held. The claimant had flown in an area they considered was a risk as it was one of intense gilder activity. The third respondent spoke to the use of cable launched gliders such that a cable could be present. The other pilot had submitted an airprox report, and they inferred from that that that pilot had been sufficiently concerned, in a state of fear and alarm was their view, to do so. That again may have been an assumption that was not necessarily correct, but it was their genuine view and one they were entitled to hold. Both were pilots. They were concerned at the absence of contact with the Portmoak radio, and the Board report stated that it would have been prudent to have done so. Whilst it received a category E outcome that was after the decision to terminate, and does not invalidate the views held by the second and third respondents assuming them to be genuine, as we find that they were.

237. The claimant also argued that to terminate the contract partly for this reason was a breach of the "just culture" approach favoured by the Civil Aviation Authority and others. That is a matter for that body. It is not a principle of law. The focus of the case before this Tribunal was the protected characteristic of age. It would only be if relevant to the conscious or subconscious decision on the basis of age as explained in authority that the point would be relevant. We did not consider that it was, before us.

238. In the investigation the second and third respondents made, they discovered that the claimant had logged the flight for 10 minutes, and it should have been at least 30. They questioned his honesty in that regard. That is understandable given the circumstances. Again they were genuine in their belief on that point.

239. The claimant also sought to argue that a very different incident when another pilot had a collision which resulted in damage to the wing tip of the aircraft led to no action, and that was evidence of disparity of treatment, with that being on account of age. There was nothing in that

argument. The two incidents were however entirely different. The other pilot accepted his degree of fault. The damage was to a wing tip, minor, and repaired. The claimant argued that the second respondent should not have done so himself, but the documentation before us supported the view that such damage did not require to be reported, and could be repaired in such a manner. The evidence of the second respondent we accepted, as we did his evidence that the aircraft underwent its annual inspection later with a qualified inspector and passed. In any event the other pilot was not suggested as an employee or worker of the first respondent. He was someone who had use of the aircraft as we understood it. If it was suggested that he was a comparator, which was not clearly done, in our view he was not someone within the statutory definition set out above as the facts were so substantially different.

240. The claimant's evidence on the call about the fuel drain we have addressed above. We considered that both with this and the airprox incident he was seeking to use the Tribunal as a vehicle by which he could challenge the views of the respondents, and seek to restore his reputation. That is not the issue before us for the reasons given.

241. Finally the incident on 2 September 2023 occurred when the claimant asked for a letter as a guarantor, changed the reasons for that when asking again, provided a draft letter in terms not consistent with what he had asked or how the first respondent viewed the relationship, and then became angry, heated and agitated when the second respondent did not agree to sign it. His behaviour towards the second and third respondents was, for understandable reasons in our view, regarded as unacceptable by them. Age was not a factor to any extent in that view.

242. The burden, if it shifted to the first respondent, has been discharged. The claim under section 13 is dismissed.

Did the first respondent harass the claimant by subjecting him to unwanted conduct related to his age contrary to section 26 of the Equality Act 2010?

243. For essentially the same reasons stated above we answer this in the negative. We did not consider that the claimant had proved anything from which it could be inferred that feelings he had as to how the first

respondent had treated him was related to age. He did for example feel concerned at not being allocated work, and that it was in effect about to end with the last student being shortly expected to pass his test, and he may have felt that the second respondent was treating him unfairly from the discussions they held, but that was not related to his age in any way. So far as he had such feelings, of being harassed under section 26, we did not consider that to have been reasonable in all the circumstances in any event. The claim under section 26 is dismissed.

Did the claimant do any protected act under section 27 of the Equality Act 2010 in stating that he was to raise a grievance under the said Act orally to the respondent on 26 August 2023, and orally to the second respondent with the third respondent present on 2 September 2023?

244. The Tribunal was clear that the claimant had not proved any protected act. He accepted in his evidence that he had only mentioned the issue of less favourable treatment, and that of itself was insufficient. He did not refer to the protected characteristic of age or breach of the 2010 Act in relation to it when speaking to the second respondent, as he accepted. His argument was that the respondents perceived him to be raising such a claim, but the evidential basis for such a view was we considered simply not there. The second respondent denied it, in so far as it was put to him, and we accepted the second respondent's evidence on that. In addition there was no evidence that he was to do so in future, for the reason given above. The claim under section 27 is dismissed.

If so, did the first respondent victimise the claimant for doing so contrary to section 27 of the Equality Act 2010?

245. This issue does not now arise. Even if it had, we were satisfied for essentially the same reasons as above that the sole reason for the decision to end the relationship that there was between them was because of the two concerns over safety, the circumstances of the draft letter he had asked to be signed, and his reaction when that was not done as he wished. Even if there had been a grievance in relation to age that did not play any part at all in the decision to terminate the contract.

Are either the second or third respondents or both of them liable for any breaches of the Equality Act 2010 under sections 111 or 112?

246. As no breaches of the Act by the first respondent have been found this issue cannot arise, and the claims against the second and third respondents are therefore dismissed.

Did the first respondent terminate their contract with the claimant in breach of contract?

247. This issue does not now arise as the claimant is not an employee under the 1994 Order. Even if it had, we consider from the evidence we heard that the first respondent was entitled to terminate the contract with the claimant in light of his behaviour on 2 September 2023, and the earlier call with regard to the location of the fuel drain which indicated a lack of adequate understanding of the basics of the aircraft he was teaching. There was from those matters at the least a material breach of contract which entitled rescission of the contract by the first respondent.

Did the first respondent make an unauthorised deduction from the wages due to the claimant in relation to pay for annual leave under section 13 of the Employment Rights Act 1996.

248. This is a right of a worker. A worker is entitled to annual leave. The first respondent did not recognise that right, and made no payment for annual leave. In light of that, and subject to proof of loss, the first respondent made unauthorised deductions under that section and the issue is answered in the affirmative accordingly.

Did the first respondent fail to provide written particulars of employment under section 1 of the Employment Rights Act 1996

249. This is also a right of a worker. The first respondent accepted that no written particulars were provided to the claimant. This issue is answered in the affirmative accordingly.

If any claim is successful to what remedy is the claimant entitled, and in that regard:

(i) What losses has he or will he suffer?

(ii) Do they include stigma damages?

(iii) Did he contribute to the dismissal?

(iv) Did he mitigate his loss?

(v) What annual leave was due at termination?

(vi) What is the appropriate award in relation to written particulars of employment?

(vii) Was there any breach by either party of the ACAS Code of Practice on Disciplinary and Grievance Procedures?

(viii) If so should the award be increased or reduced under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

250. Many of the sub-issues do not now arise as the claims that were successful are limited to those for pay for annual leave, and in relation to written particulars.

251. The claimant is entitled to an award in relation to accrued annual leave. It is calculated under Regulation 14 of the 1998 Regulations. The respondents did not cross examine on the quantification of any award, nor make any submissions on it.

252. There is a pro-rata assessment, and the Tribunal considered it appropriate to use the calendar year to do so. The period to 14 September 2023 is 247 days. The average work that the claimant did was of two days per week. A pro-rata calculation of the entitlement is to 7.58 days. The claimant gave evidence that he had a week of leave in March 2023 but that was unpaid. It appeared to us that the full 7.58 days of accrued paid annual leave were outstanding, and an award in that amount was made. Taking the evidence of income into account, and calculating that in accordance with the terms of the provisions as to week's pay in the Regulations and 1996 Act to which reference is made, produced a figure of £140.37 per week, and for each of two days worked per week that was £70.18 per day, and the award for 7.58 days is therefore £531.96.

253. The terms of section 207A apply to a worker under the 1992 Act. The remedy under section 38 of the 2002 Act also applies to a worker. The Tribunal has a discretion to award between two and four weeks' pay. No submission was made on this point.

254. The Tribunal considered that as there had simply been no particulars issued, the duty to do so being on the first respondent, that the appropriate award was for four weeks' pay. Taking the evidence of income into account, and calculating that in accordance with the provisions of the 1996 Act to which reference is made, produced a figure of £140.37 per week, and the award for four weeks is therefore £561.48.

255. The total award to the claimant is therefore £1,093.44.

A Kemp

Employment Judge

12 November 2024

Date of judgment

Date sent to parties **12 November 2024**