EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001728/2024

Held in Glasgow on 17 and 18 March 2025

Employment Judge M Robison

Mrs J Shanks	**Claimant** **In Person**
Scottish Qualifications Authority	**Respondent** **Represented by** **Mr W Rollinson** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

1. The claimant was a "worker" as defined in section 230(3) of the Employment Rights Act 1996 in respect of her role as both invigilator and chief invigilator.
2. The claim for holiday pay in respect of the 2024 contract succeeds.
3. The respondent shall pay to the claimant the sum of £348.18 in respect of holiday pay for the 2024 contract.
4. The claim for other arrears of pay in respect of the 2024 contract is not well-founded and therefore dismissed.
5. The claim for holiday pay in respect of the 2023 contract is time barred and therefore dismissed.

REASONS

1. This hearing, which had originally been listed as a preliminary hearing on employment status, was converted to a final hearing following the unopposed request of the claimant.

2. The claimant argues that she should have been paid holiday pay in respect of her role as invigilator for the national exam diet of 2023 (the 2023 contract)

and for her role as chief invigilator for the national exam diet of 2024 (the 2024 contract), as well as arrears of pay in respect of the 2024 exam diet.

3. At the start of the hearing, we considered the issues for determination which were agreed as follows:

1) whether the claimant was a "worker" or not (the claimant having confirmed that she will not argue that she was an employee);
2) whether the claimant was entitled to holiday pay for the 2023 contract;
   (i) If so, was that claim lodged out of time;
   (ii) If so, was it reasonably practicable for the time limit to be extended.
3) whether the claimant was entitled to holiday pay for the 2024 contract;
4) whether the respondent was due to make payment to the claimant for additional hours worked but not paid for, in respect of an "admin fee" for the 2024 contract.

4. The claimant lodged a schedule of loss and the respondent a counter schedule. Parties agreed that the sum due for holiday pay in 2023 was £89.46 and for 2024 was £297.

5. The Tribunal heard evidence from the claimant and from Mrs J Faulds, who is the head of service for appointee management with the respondent.

6. The parties lodged an agreed statement of facts. The Tribunal was referred to a joint file of documents relied on by parties during the hearing.

Findings in fact

7. On the basis of the evidence heard and the productions lodged, the Tribunal makes the following relevant findings in fact.

8. The respondent is the awarding and accreditation body for national qualifications and other qualifications, which is responsible for writing assessments, quality assurance, invigilating exams and delivering certifications.

9. The respondent engages around 19,000 appointees each year to assist with the delivery of these functions, of whom around 10,000 are invigilators.

10. The respondent engages invigilators, deputy chief invigilators and chief invigilators on short term contracts for the national exam diet each year.

11. These invigilators are sourced by the centres (schools) and the centre advises the SQA who they have selected, who are usually individual based in the local community. The SQA issues contracts and deals with disclosure under the Protection of Vulnerable Groups (PVG) scheme.

12. Centres will advertise using information prepared by the SQA. On occasion, individuals, such as the claimant, may respond to an "advert" issued by the SQA. There is an "advert" setting out the duties and requirements of successful candidates of the role of invigilator and chief invigilator.

13. For invigilators, successful candidates must:

- have internet access, basic IT skills and a personal email address;
- be suitable to work in an education environment;
- be physically able to undertake the duties of the role;
- not be an employee of the centre or associated with the centre;
- live within easy reach of the centre – in rural areas this should be no more than 5 miles from the centre.

14. Chief invigilators must in addition have "excellent organisational skills".

15. The "advert" states that any exceptions to these requirements must be approved in advance by SQA. It also states that PVG registration is required and no contracts will be confirmed until registration is approved. Potential candidates who are interested in becoming an invigilator are asked to contact their local centre to discuss.

Terms and conditions of invigilator appointments

16. The SQA has issued terms and conditions of appointment for invigilation. The following extracts are relevant.

17. Section 1.1, headed “basis of the relationship between you and SQA”, states that, “this document, together with your contract, sets out the terms on which you will provide services to SQA as an appointee….As an appointee you are not an employee, director, or officer of SQA, and nothing in these Terms and Conditions is intended to create any such relationship….in accepting the appointment you undertake to be bound by these terms and conditions”.

18. At section 1.2, headed “confidentiality”, it is stated that “during your appointment to SQA you may obtain information concerning SQA, its candidates, employees, assessments, systems , and other information that is confidential, including candidate materials or scripts (‘confidential information’). SQA requires you to maintain the highest levels of discretion in dealing with confidential information”.

19. At section 1.4, it is stated that, “the duration of your appointment is specified in your contract. Subject to the termination provisions in section 5 the appointment will continue for the period specified in the contract. There is no commitment on the part of SQA to renew the appointment at the end of the appointment period. At any time during the contract period SQA may terminate this contract for any reason without notice. If the contract has not been terminated sooner it will terminate automatically at the end of the contract period or on completion of the required services whichever comes first”.

20. In section 1.6, it is stated that, “the Code of Conduct sets out the standards of conduct that is expected of you as an SQA appointee… you must familiarise yourself with the contents of the Code of Conduct below and comply with the standards it describes at all times. Any breach of the Code of Conduct may result in the termination of your contract”.

21. At section 1.8, headed “working safely with children, young people and adults at risk of harm”, behaviour guidelines are set out for dealing with young people or people who are classed as vulnerable groups. These are described as “guidelines” but set out behaviour requirements. In particular, if an invigilator has concerns about a candidate’s welfare, this must be reported to the chief

invigilator, who must in turn report this to the head of centre and to SQA's child and adult protection team.

22. The terms and conditions of appointment include requirements relating to health and safety, insurance, environmental impact and equal opportunities.

23. The role profile for invigilators at section 2 states that:
"An invigilator undertakes the duties of invigilation for the external assessment of the National Qualifications, in accordance with SQA policy and procedure. These activities will be under the direction of the Chief Invigilator (CI).
Outline of duties

- Attend an invigilator training session prior to the examination cycle.
- Support the CI with the secure storage and management of external assessments during the examination cycle, ensuring compliance with SQA security requirements.
- Carry out invigilation duties as requested by the CI and ensure that external assessments, including those for Assessment Arrangements candidates, are conducted in accordance with SQA policy and procedures.
- Assist with the collation of candidates' external assessment material on completion of the external assessment.
- Report any irregularities in the conduct of an external assessment, or concerning matters arising during the course of an external assessment, to the CI.
- Accurately record sessions worked throughout the examination period and submit claims to the CI for authorisation".

24. For chief invigilator, the role profile states as follows:
"A Chief Invigilator (CI) is responsible for the organisation and supervision of invigilation of all external assessments for National Qualifications, in accordance with SQA policy and procedures as detailed in the Invigilator Handbook. The activities will be under the direction of staff from SQA. Close liaison will be required with the Head of Centre and/or SQA Co-ordinator

throughout the external assessment period to ensure the effective management of external assessments.

Outline of duties

- Responsible for the secure storage and management of external assessments before and during the examination cycle ensuring compliance with SQA security requirements.
- Responsible for ensuring that external assessments, including those for Assessment Arrangements candidates, are concluded in accordance with SQA policy and procedure.
- Deliver a training session(s) to all Invigilators prior to the examination period.
- Allocate and advise Invigilators of their duties and dates required – updating as required throughout the examination cycle.
- Maintain an accurate record of training attended and sessions worked by all Invigilators throughout the examination period and verify all claims for fees prior to submission to SQA.
- Supervise Invigilators and conduct daily briefings to the Invigilation team prior to the start of each examination session.
- Responsible for the accurate submission of candidates external assessment materials to SQA.
- In accordance with SQA's guidelines, complete comprehensive reports on any irregularities in the conduct of an external assessment and submit to SQA where necessary. For example:
    - Any incident concerning possible malpractice
    - Any issue concerning the content of a question paper
    - The unauthorised removal of a question paper or examination material from the examination room either by candidates, invigilation or centre staff
    - Faulty question papers, faulty digital question paper discs or faulty audio CDs
    - Any instances of sickness, interruptions or disturbances during an assessment".

25. Section 3 sets out information about the use and protection of personal information, and in particular at 3.4 requirements relating to social media, states that "what you say must not harm the reputation of SQA or breach the confidentiality of SQA's information". Where social media is used, appointees must not: identify themselves as an SQA appointee; disclose any confidential information or post any materials related to the role; make any comments which could be attributed to the role; express views about other appointees, members of SQA staff, centres or centre staff or candidates which are offensive, defamatory, threatening, abusive or discriminatory; or link any commercial activities to the role.

26. Section 4 sets out details relating to financial information, stating at 4.2 that "fees will be paid direct to your bank or building society account…fees completed, authorised and approved by the 15th of the month will be guaranteed payment on the 15th of the following month".

27. At 4.3 it states that all appointees will be taxed on a PAYE basis, and explains that SQA does not operate class 1 national insurance on fees. This is in line with HMRC guidance.

28. At section 4.4, it is stated that "auto-enrolment is a duty on all UK employers to automatically enrol all workers who meet age and earnings criteria into a pension scheme that meets specific requirements and to make a minimum level of contribution to that Scheme. The definition of worker under the new legislation includes individuals who have a contract with SQA as a fee earner, for example, appointees". Thus where eligible, the respondent is required to auto-enrol staff in a workplace pension scheme. This is in accordance with an (oral) instruction from the DWP.

29. Section 5 sets out details about suspension and termination of contracts and section 6 sets out reporting procedures for "improper activity".

Other relevant SQA policies

30. The SQA appointee expenses policy makes it clear that it does not apply to invigilators, who cannot therefore claim any expenses related to the role.

31. The SQA has issued a grievance policy which applies to members of SQA staff only. The respondent does not offer any other benefits to invigilators or chief invigilators. Other than a personal mobile phone and a personal email address, invigilators do not require any particular equipment to undertake their duties.

The day-to-day requirements of the invigilator roles

32. An invigilator's hand book sets out in considerable detail the day to day requirements of the roles. The duties of the invigilator are intended to maintain the integrity of the system, prevent cheating, ensure that exams start and finish at the appropriate time and that every candidate has a fair and equal chance to sit exams in whatever conditions are agreed between the school and the respondent.

33. Invigilators require to attend a pre-exam diet training session, which will be delivered by the chief invigilator, who will show them where the exams will take place at the centre.

34. Before the exam diet, the chief invigilator contacts every invigilator on the team and asks for their availability during the exam diet. The chief invigilator will collate all invigilator availability and calculate the number of invigilators required on the basis of the number of candidates and the numbers requiring one to one invigilation. The chief invigilator will then allocate shifts based on invigilator availability.

35. Chief invigilators require to be available to take delivery of the exam papers. After the exam papers are delivered, they are put into a lockfast cupboard in a lockfast room to which only the chief invigilator has access. On the day of the relevant exam, invigilators will assist the chief invigilator to retrieve papers for the relevant exam.

36. One invigilator is appointed for every 35 candidates. Additional invigilators may be required for candidates requiring alternative arrangements, which are approved in advance by the respondent. Invigilators may be required to invigilate in one to one situations, such as where candidates who cannot sit

in the main hall require an alternative room; assistance with reading or writing answers; and for those with physical disabilities. The chief invigilator may be required to deal with pupils attending from a different school because their school does not offer the exam in question.

37. The chief invigilator and the deputy chief invigilator will normally be located in the main exam hall with the appropriate number of invigilators. Other invigilators will be sent to attend candidates on a one to one basis in alternative arrangements.

38. At the conclusion of the exam, all question papers and answer booklets are returned to the chief invigilator who packages them in the prescribed manner.

39. Chief invigilators have additional duties in regard to senior pupils, and in particular S6 pupils who require to submit a portfolio of evidence which is collated and packaged in a different manner to national 5s and highers.

40. Any unusual event, such as a disruptive pupil or a fire alarm, or if a candidate fails to attend, must be reported to the chief invigilator.

41. Invigilators will sign in and sign out for each exam on time sheets which are retained by the chief invigilator. These are submitted as claims for payment of fees by the chief invigilator on behalf of the invigilators.

42. There is some flexibility during the exam diet regarding attendance at allocated shifts. On occasions an invigilator will advise the chief invigilator that they cannot after all attend on a particular day, and another invigilator will be asked to step in and cover for them. Otherwise, additional dates may be added if additional candidates are found to require one to ones based on approval from SQA.

43. Invigilators would not, as a matter of course, have the contact details of other invigilators, which would be held by the chief invigilator. If an invigilator became unavailable for a shift, for whatever reason, they would require to contact the chief invigilator to advise them of that reason. The chief invigilator would then contact the other invigilators not rostered for that shift and request that they cover for the absent invigilator.

44. The chief invigilator performs their duties under the direction of staff from SQA, and will have frequent contact directly with SQA staff, including with the invigilation team, the events and expenses team, and the team which is responsible for setting the exam questions.

The claimant's contract as invigilator

45. The claimant retired as a detective inspector with the police force in October 2021 after 30 years' service. In or around late 2021, she answered an advert issued by the SQA looking for invigilators for the 2022 national exam diet to work as invigilators for around 5 weeks from end April to end May.

46. The claimant was contacted by SQA who advised that she had been successful in her application to invigilate at Cumbernauld Academy (the school). She was sent a contract and terms and conditions of appointment. In order to access the contract and the terms and conditions, the claimant was sent an e-mail with instructions how to log in to the SQA portal. The claimant was engaged on a fixed term/fixed task contract to carry out invigilation duties for the national exam diet for 2022. The claimant's engagement was governed by the terms and conditions set out above and in an appointment letter.

47. In or around February 2023, the respondent sent the claimant an e-mail to her personal e-mail address advising that she should log on to the SQA portal to accept or decline a new contract for the 2023 diet at the school. She accepted the 2023 contract.

48. The claimant received the following response from appointee services confirming her appointment as follows: "I am pleased to confirm that you have been selected to act as an Invigilator for Cumbernauld Academy for the 2023 examinations. Your appointment will be for the specific purpose of completing particular tasks and your contract will therefore end when these tasks are complete. SQA also reserves the right to terminate contracts at any time as per section 5.2 of the Terms and Conditions of Appointment".

49. The 2023 invigilator fee structure was an hourly rate of £10.90 and a minimum daily rate for three hours of £32.70. Examples of how the fee structure was

applied were given. The claimant was asked to accept or refuse the contract within ten days of receipt, which she did by accessing the portal.

50. The appointment was confirmed to Bob Bishop, the chief invigilator for school, and the SQA co-ordinator, who is the deputy head at the school responsible for liaising between the invigilators and the respondent.

51. In or around mid March 2023, Bob Bishop contacted the claimant and others who had accepted contracts for the 2023 exam diet to attend a training and briefing session at the school prior to the 2023 diet.

52. There was a team of around 20 invigilators for Cumbernauld Academy. All invigilators attended the two hour briefing and training session. This was designed for new invigilators to familiarise themselves with the process and the areas used in the school, and a refresher for those who had previously been engaged. The chief invigilator explained the roles and responsibilities of invigilators and provided each invigilator with a copy of the invigilator handbook, which provided a detailed breakdown of the duties of invigilators, deputy invigilators and chief invigilators. It includes detailed information about how to prepare for exams, including the procedure for starting and finishing, with a very detailed timetable for exams and what paper and equipment candidates use during exams.

53. The claimant's contract as an invigilator ended on 31 May 2023. The claimant received payment for "invigilator fees" for the hours worked on 14 July 2023, totalling £741.20 net, tax having been deducted. There was no payment for holiday pay. There was no deduction for national insurance.

54. In early 2024, the claimant was again invited to invigilate for the 2024 exam diet, and subsequently accepted as an invigilator on the standard conditions.

55. A few weeks after accepting the role, the claimant and the other invigilators engaged for the school were contacted by Bob Bishop to attend an informal meeting when he advised he was stepping down due to ill health. He asked if any invigilator would be interested in applying for the role of chief invigilator.

56. The claimant and one other expressed an interest. The claimant then met Bob Bishop, the SQA co-ordinator and the head teacher at the school to assess if the claimant was a suitable candidate for the role. The other candidate who had expressed an interest withdrew due to ill-health. As the only candidate expressing an interest, the claimant was offered the role.

Appointment as chief invigilator

57. The claimant received confirmation of her appointment as a chief invigilator from the SQA. The letter of appointment from appointee services included the fee structure for 2024 of an hourly rate of £14.50 per hour and a minimum daily rate for 3.5 hours of £50.75.

58. In addition, it set out an additional "admin fee", which is paid on a sliding scale depending on the number of exam candidates at the centre. The fee is based on the consequent predicted volume of work. Cumbernauld Academy attracted a band 4 payment, for between 1,000 and 1999 candidates, of £410. That fee was stated to cover all pre-examination activity, including creating the rota for invigilators, in-house invigilator training day(s) and the receipt and checking of exam materials. The claimant was advised that this fee was under review because of an increase in the real living wage from 1 April 2024.

59. The claimant was asked to accept or refuse the contract within 14 days and advised to "ensure that you have read your terms and conditions, specifically section 3.4 Social Media".

60. The claimant met with Bob Bishop to discuss the role. She also met with the deputy chief invigilator who was very experienced for advice about the role. She had two meetings with staff at the school, to ensure that the exam diet ran smoothly including with the SQA co-ordinator and the learning support teacher who was responsible for the one to one requirements, both of whom were new to the role. The claimant attended the SQA chief invigilator teams training days on 19, 20 and 21 March 2024.

61. The claimant was responsible for co-ordinating a team of 24 invigilators. This involved delivering a training session to them on 19 April 2024. As there were

no national training materials available, the claimant devised and delivered a training session to the invigilators allocated to the school. The claimant also created name badges and lanyards for the invigilators and prepared briefing packs for the training (there being no SQA national template).

62. The claimant collated invigilators' availability during the exam diet and populated an approved spreadsheet with the information. She chased up invigilators who had not replied, and asked them if they could commit to further days. She had to contact the SQA because they had not supplied sufficient hand books to issue to those invigilators who had accepted the appointment but not yet signed the contract.

63. The claimant as chief invigilator created a spreadsheet, there being no SQA national template, of invigilator availability and matched that to exam requirements. The claimant then allocated invigilators to appropriate exams based on their availability. She assessed who was best placed to carry out the one to one invigilations.

64. The claimant took delivery, over two separate days, of the exam papers and ancillary materials, which she required to file in secure facilities in chronological order of exams.

65. The chief invigilator is the only person who received communications from the SQA; the only person who deals with the dates and times of the exams and the exam materials; and any issues arising during exams.

66. As chief invigilator, she was sent a spreadsheet from SQA which she populated with the hours which the invigilators, including herself, had worked, usually on a daily basis, to record the hours that each invigilator had worked over the five weeks.

67. At the end of the exam diet, on or around 30 May 2024, she double checked the spreadsheet against the daily sign-in sheet to ensure that the entries were accurate. She then submitted the completed spreadsheet with the hours worked for the whole team, including her own, to the respondent.

68. The chief invigilator will undertake invigilation duties, but invariably with at least one other invigilator. That is because there invariably requires to be at least two invigilators to allow for comfort breaks or to corroborate issues that might arise during the exams. Although not required, it is expected that the chief invigilator is available for the whole of the exam diet.

69. The deputy chief invigilator is another line supervisor for the running of the exams on a day to day basis. The deputy chief invigilator will often supervise another group of candidates while the chief invigilator is in the main exam hall.

70. On one occasion the claimant had to get an emergency dental appointment. She contacted the deputy chief invigilator to cover for her.

71. If the claimant as chief invigilator had taken ill, she would require to contact the SQA who would require to make alternative arrangements. This is not least because only the chief invigilator is responsible for the security of the exam papers.

72. During the exam diet, the claimant was contacted on the morning of an exam by a member of staff at the SQA to be advised of a correction to a digital exam paper.

73. On 15 April 2024, the claimant wrote to the respondent at invigilation@sqa.org.uk pointing out that she had attended the chief invigilator training days on 19, 20 and 21 March 2024, but had only been paid for 6 hours, and not the minimum three hours per day as she believed was due under her contract. She sought payment for 10.5 hours. In response, she was advised that she would be paid 3.5 hours minimum only when undertaking invigilation duties but not for training.

74. By letter dated 2 July 2024, the claimant was advised that she met the criteria for auto-enrolment, and therefore was being automatically enrolled into the NEST pension scheme with effect from 1 July 2024.

75. The claimant completed her admin duties on or around 28 June 2024. On 15 July 2024, the claimant received payment for “invigilator fees” for the hours

worked. The claimant was paid for 164 hours worked as an invigilator plus the agreed admin fee.

76. She was paid a total of £2,884 net, tax having been deducted (but not national insurance). This was inclusive of the revised block admin fee of £424. The admin fee was based on undertaking administrative work for 30 hours paid at a lower hourly admin fee (of £14.13). This did not include holiday pay. It did include payment for "EE NEST Pension" of £94.56.

Claim for holiday pay

77. On 9 July 2024, the claimant wrote to the respondent requesting holiday pay for the 2023 and 2024 exam diets.

78. In the respondent's internal communications, on 10 July 2024 in response to an inquiry from one member of staff to another on how to deal with this query, the inquirer (name redacted) was told to "draft a response based on the usual first line response re appointees not being eligible for holiday pay and let's see where it goes from there". The inquirer was advised of the standard wording to be used.

79. On 12 July 2024, the claimant was advised that the role of invigilator, like all other appointees, does not attract holiday pay, in line with other UK awarding bodies. She was advised that the respondent was currently reviewing their relationship with all appointees and that she would be informed should the position regarding holiday pay change.

80. On 16 July 2024, the claimant sent relevant extracts to the respondent from the gov.uk website which states that all workers are entitled to pro rata holiday pay, and requesting that they take legal advice.

81. On 18 July 2024, the respondent replied that "currently invigilators like all other SQA appointees, are not classified as employees or workers" but advised that policy was actively under review and that if "the employment status changes" she would be informed.

82. On 19 July 2024 the claimant e-mailed the respondent advising that she had been informed by Acas that "regardless of what you call me (an appointee) in terms of employment law, I am classed as a worker, and am thus entitled to paid holiday pay. I am not self-employed, I am paid an hourly rate by SQA, pay tax via SQA payroll and am enrolled by SQA in the NEST pension scheme. Can you please provide me with a formal response prior to me escalating this matter to a grievance".

83. On 22 July 2024, in the respondent's internal communications a member of staff who sought advice on this was advised by another that "we will hold our line re appointee status as we have done previously".

84. On 24 July 2024, Jacqui Faulds wrote to the claimant to confirm what she had previously been told about holiday pay and the review.

85. On 25 July 2024, the claimant wrote to the respondent to raise a grievance but on 7 August 2024, the claimant was advised by Jacqui Faulds that there was no grievance procedure in place for appointees as they are not members of SQA staff, advising that the process for handling her complaint had been exhausted. She was advised again that the matter was under review.

86. The claimant contacted Acas in regard to early conciliation on 12 August 2024. An EC certificate was issued on 23 September 2024.

87. The claimant did not make any request to the respondent for payment of "unpaid hours" prior to lodging this claim in the employment tribunal on 22 October 2024.

88. On 21 January 2025, the claimant was advised by the respondent (following a freedom of information request regarding the review referenced in correspondence) that the SQA review, which was to analyse and comment on the employment status of the population of appointees currently working for SQA, had begun on 19 July 2023 and was ongoing.

Claimant's other short term engagements

89. Towards the end of 2023, the claimant was contacted by Bob Bishop and advised that invigilators were required for a period of approximately two and a half weeks to invigilate the prelim exams at Cumbernauld Academy. She agreed to his request and was engaged on a short term contract by North Lanarkshire Council. The invigilator role was the same job as that undertaken for the respondent, with the same duties, and the same responsibilities and on the same pay scale. The claimant attended a training session when she was taken through the process including the process for payment, which mirrored that in place for the respondent.

90. In or around May 2024, the claimant was engaged through a recruitment agency as an election assistant for the general election in July 2024. She undertook three days of work counting postal votes in respect of which she was paid a fee which included holiday pay.

91. On 9 July 2024, the claimant e-mailed North Lanarkshire Council advising that she was a "casual" employee and believed that she was entitled to pro rata holiday pay. After being told that "invigilators don't receive holiday pay", she wrote back with relevant excerpts from the gov.uk website stating that "by law all workers including agency and casual staff, are entitled to holiday pay". She asked for the enquiry to be escalated to the next level. The query was passed to their payroll supervisor and after the claimant followed up her enquiry the claimant was paid holiday pay on 17 September 2024.

92. When the claimant contacted Acas for advice about claiming holiday pay, she was advised that she could only make a backdated claim for two years. She was aware that there was a time limit for lodging a claim in the employment tribunal.

Tribunal deliberations and decision

Observations on the evidence and the witnesses

93. The claimant gave evidence in a clear, straightforward and measured manner, and I was in no doubt that her evidence was credible and reliable. I also heard

evidence from Mrs J Faulds. While I accepted her evidence was credible, I did have some misgivings regarding its reliability. That was relevant because there was some dispute on important facts, particularly in relation to the key matter of personal service, discussed further below.

94. I have taken account of the fact that the claimant has undertaken the role of both invigilator and chief invigilator. While I note that Mrs Faulds has worked in her role for 20 years, and she has worked closely with a number of very experienced invigilators, I was aware that she had not in fact carried out the role and did not have direct knowledge of the role on the ground. As the claimant noted, I did not hear evidence from any of the experienced chief invigilators on the group of four who Mrs Faulds said she consulted for advice.

95. For these reasons, to the extent that the evidence reveals a different position between the claimant and Mrs Faulds, I have preferred the evidence of the claimant.

Worker status

96. This is primarily a claim for holiday pay. In order to be entitled to holiday pay, the claimant must establish that she is a worker.

97. Section 230 (3)(b) of the Employment Rights Act 1996 (ERA) states that, “In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)— (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker’s contract shall be construed accordingly.”

98. There are thus three elements to the statutory definition of a worker, by which I mean a limb (b) worker, all of which require to be satisfied. That is: there must be a contract to perform work or services; there must be a requirement

for the individual to undertake that work or services personally; and the other party to the contract must not be a client or customer of the claimant. I consider each of these in turn.

Was there a contract to perform work or services?

99. There is no dispute in this case that there was a contact between the claimant and the respondent, given there is an express written agreement signed by the claimant. There is no question here either of looking beyond the written agreement, or that this was not reflective of a true agreement between the parties (per *Autoclenz Ltd v Belcher* [2011] UKSC 41). In any event, nothing in the agreement reached between the parties would preclude a conclusion that the role of invigilator meets the statutory definition of worker.

100. The question then is whether the contract between the parties meets the limb (b) requirements. In support of his argument that this contract does not meet those requirements, Mr Rollinson relied on elements of the test normally relied on when distinguishing between an employee and a self-employed contractor to support his argument that the claimant is not a worker, submitting the circumstances are more consistent with self-employment.

101. In *Ter-Berg v Malde and Hancock* [2025] EAT 23, HHJ Auerbach considered the test which marks the boundary between being a worker and being neither a worker nor an employee. He relied on the conclusions of Mr Recorder Underhill QC as he then was when sitting in the EAT in *Byrne Brothers (Formwork) Ltd v Baird* [2002] ICR. He stated there that "the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects…..Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the

exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers". HHJ Auerbach confirmed that ultimately the answer to whether the individual was or was not a worker will depend on the tribunal's evaluation of the picture painted by all the relevant facts and circumstances in the given case.

102. Mr Rollinson relied on these various factors to a greater or lesser extent in this case as indicating the type of contract between the claimant and the respondent. I considered each factor relied on in turn before going on to consider the personal service question separately, it being an essential requirement, and not simply a relevant factor to be taken into account. I initially focussed on the question whether the individual undertakes to do or perform work or services.

103. First I considered the relevance of the question of mutuality of obligations. Mr Rollinson relied on an absence of mutuality of obligations in this case. In the draft written submissions, he stated that the question is whether the employer had to provide work and the individual had to accept work offered. He submitted that the question is whether there is an irreducible minimum of obligations rather than a total commitment.

104. He argued that as an invigilator and chief invigilator, the claimant was able to terminate her contract with the respondent at any stage without penalty; that she need never perform any services; that she could decline to perform services at any stage; and that she could arrange for another invigilator to attend an exam on her behalf at short notice; that as chief invigilator, she could request the deputy to perform certain services on her behalf.

105. Relying on *Cotswold Developments Construction Ltd v Williams* 2006 IRLR 181 and *Johnston v GT Gettaxi (UK) Ltd* [2024] EAT 162, he argued that there was no mutuality of obligations because there was no requirement for the invigilator to do a minimum amount of work personally and the minimum

requirement for the chief invigilator was to take delivery of the scripts. An invigilator could reject as many offers of "shifts" as suited and could swap or cancel a shift after accepting a shift and which did not attract any penalty.

106. Clearly there is an element of overlap here, when considering whether the contract entered into meets the limb b requirements, which includes performing work or services *personally*. However, leaving aside the position regarding the swapping of shifts, discussed later in this judgment relating to personal service, I considered whether beyond the mutual obligations required to create a contract at all, there was the necessary mutual obligations required to fulfil the essential elements of limb (b).

107. HHJ Auerbach in *Ter-Berg v Malde and Hancock* [2025] EAT 23 stated at [21] that "The concept of mutuality, or an irreducible minimum, of obligation may be used refer to the fact that (whether for employee or worker status) there must, at the relevant time, be a contract, in which both parties have undertaken legally binding obligations to the other, and/or to the fact that those obligations must be of a kind which fulfils the essential elements of a contract of that type". HHJ Auerbach noted that this usually came into play where the nature of the relationship is that it involves intermittent discrete assignments, and where issues arise about the position (as to the existence and/or the content of a contract) both during and between assignments.

108. The focus in this case is the agreement which the parties entered into which it is accepted is a contract of short duration for a fixed task which ended when the exam diet ended. There is no question here of an overarching contract between exam diets.

109. While Mr Rollinson is no doubt correct to state that there is no irreducible minimum obligation in regard to the contract overall, which would indicate that it is not a contract of employment, the absence of an irreducible minimum of obligation in regard to the contract overall is not necessarily inconsistent with 'worker' status. That is because account requires to be taken of the position when the claimant is actually working.

110. That was made clear by the Court of Appeal in the case of *Nursing and Midwifery Council v Somerville* 2022 ICR 755. There are some parallels here with the circumstances in that case, including the fact that the respondent was a regulatory body. The claimant in that case had entered into an agreement to provide services as a fee paid member of the NMC's fitness to practice committee. The NMC was not obliged to offer him a minimum number of sitting dates and he was free to withdraw from dates he had accepted. The Court of Appeal upheld the decision of the employment tribunal that the claimant was not an 'employee', since there was no irreducible minimum of obligation, but agreed that he was a 'worker'. The focus in that case was on individual contracts in respect of which the claimant had agreed to attend each hearing. The fact that the claimant could withdraw from the agreement to attend even after he had accepted did not matter. The agreement was for the claimant to attend the hearing and the NMC to pay the fee. The requirement was to provide services on a particular occasion and the fact that the parties are not obliged to offer, or accept, any future work was irrelevant. The Court of Appeal also considered that this conclusion was consistent with the Supreme Court's decision in *Uber BV v Aslam* [2021] UKSC, where the claimants were providing services under individual contracts while working.

111. In this case, it is clear that that once an invigilator has accepted the allocation of a shift by the chief invigilator, and undertaken the shift, the agreement between the parties required that the invigilator should get paid. The respondent accepts that there was a minimum requirement in the chief invigilator's contract (to take delivery of the scripts) but beyond that, likewise, once the chief invigilator accepted and undertook the work, she was entitled to be paid. The fact that the contract overall did not oblige the individual to undertake a minimum number of shifts does not mean that the individual cannot thereby be a worker.

112. Turning to the extent of "control", Mr Rollinson suggests that the relevant question here is how much freedom the individual has to decide for themselves how, where and when the work is done; the greater the extent of the control the stronger the case for classifying the individual as a worker,

rather than self-employed. He accepts that, as an invigilator, the nature of the claimant's duties require that the work (when performed) is required to be undertaken on particular dates, times and locations per the relevant exam diet. Otherwise, the chief invigilator can chose when, where and how some of her duties are undertaken.

113. Relying on the decision of the Supreme Court in *Uber*, and focussing on questions of subordination and control, the respondent's position is that the evidence, especially in relation to invigilators, does not demonstrate the necessary degree of subordination and control.

114. Mr Rollinson submitted that this is a unique set up, where the contract between the invigilator and the respondent is for the exam diet, but it leaves the day to day control and management and supervision to the exam centre because that is where the candidates are. Any issues arising are to be resolved by the centre, and the SQA is not equipped to be a manager on site. The invigilator may never meet anyone from the SQA because they will interact through the chief invigilator or the deputy chief invigilator or the SQA co-ordinator. The timetable indicates what is to be done and when they should be done by, which is a symptom of the exam diet, but he otherwise stressed, that in terms of where and when the duties had to be done, it was a matter for the chief invigilator.

115. The respondent accepts that the chief invigilator has more interaction with the SQA, but argued that at least some of the claimant's duties could be undertaken how, where and when she chose. In terms of "control", Mr Rollinson submitted that the only clear requirements were taking delivery of the exam scripts and that the chief invigilator is otherwise left to decide when and where they do their other duties.

116. Mr Rollinson also relied on the fact that the respondent is not, he submitted, involved in recruitment. He suggested that there was no evidence that they advertise the role, but rather that they leave it to the centres to arrange. Although neither Mr Rollinson nor Ms Faulds described the relevant documents as "adverts", it is apparent that is an apt description for them. It is

clear that, although these may be used by the local centres, these are prepared by the SQA and set out the criteria that successful candidates must meet, noting that any exceptions must be approved in advance by the SQA and with the comment "if you are interested in becoming an invigilator, please contact your local centre to discuss".

117. This submission was at odds with the claimant's evidence. I noted that the claimant's evidence, which I accepted, was that she applied for the invigilator role directly to the SQA, and submitted her application through the SQA website; and that she was approached by the outgoing chief invigilator in regard to the chief invigilator role. I noted too that the letters of appointment, sent by the SQA, state that successful candidates have "been selected to act" and the contract engaging them is issued by SQA.

118. The claimant's evidence was broadly that the requirements of the role of both invigilator and chief invigilator are heavily prescribed, and are set out not only in the terms and conditions of appointment published by the SQA but also the invigilator handbook. As noted above invigilators and chief invigilators are required to undertake work (when performed) on particular dates, times and locations per the relevant exam diet. They are required to act in line with prescribed requirements. The invigilator undertakes their duties under the direction of the chief invigilator, who in turn performs their duties under the direction of SQA staff. The fact that the direct control was at the centre and that SQA staff were not directly involved does not negate the fact that SQA through the terms of appointment and the handbook does exercise significant control over invigilators and chief invigilators. It is clear that the chief invigilator co-ordinates the work of the invigilators, and the chief invigilator is bound to act in accordance with the terms of their engagement with the SQA. I did not therefore accept Mr Rollinson's submission that the respondent did not have the requisite degree of control over the claimant to support a conclusion that the claimant was not a worker in either of her roles.

119. With regard to pay and tax, the agreed evidence is that income tax is deducted through PAYE. Payments are described as "fees" although the language used is certainly not definitive. The respondent does not operate NIC on fees.

Invigilators may be responsible for payment of their own NICS and may need to account to HMRC in respect of fees paid to them. This, Mr Rollinson submitted, underlines the decision that invigilators are not to be treated the same as other workers, but it was not clear to me why that should take on such significance, that is of making the difference between the claimant being a worker and not. As the claimant pointed out, she does not submit invoices for the work she had done, which would be the case if the SQA were a client, and which may have pointed to self-employment, but the respondent accepts that is not the case here in any event.

120. Given that the respondent in this case deducts income tax at source via PAYE, which the respondent accepts may be indicative of worker status, I take the view in this case that this is a factor which points towards the claimant being a limb (b) worker.

121. On the matter of financial risk, I understood Mr Rollinson to accept that this question is not a relevant factor in this case. It cannot in any event be said that the claimant bears any financial risk in the way that a self-employed person would.

122. With regard to benefits, the respondent accepts that a worker will generally not be included in benefit schemes, but will have certain statutory rights, unlike a self-employed person. Here the only benefit which invigilators are entitled to is, where eligibility criteria are met, is auto-enrolment in a workplace pension scheme. According to the evidence of Mrs Faulds, this is in fulfilment of an oral instruction from the DWP. Arguably this is a significant pointer, discussed further below, indicating worker status.

123. On the matter of integration, Mr Rollinson submitted that invigilators are not integrated to any degree into the organisation. While that is broadly correct, the evidence was that chief invigilators at least had some interaction with SQA staff. Again however that factor would have much greater relevance in distinguishing between an employee and a self-employed contractor.

124. In regard to other factors, the respondent accepts that a worker may be subject to some of an employer's rules and policies, but argues (without much

rationale) that here the rules and policies applicable to invigilators are more consistent with self-employment than worker status. In contrast, the claimant relied on the requirements, set out in the terms and conditions of appointment, to implement invigilation duties in accordance with SQA policy and procedures, to comply with a code of conduct, to comply with child protection guidelines; to comply with health and safety requirements; as well as obligations in regard to environmental impact and equal opportunities. There are requirements to meet obligations in regard to using and protecting information, including duties of confidentiality and social media, the latter being specifically stressed in the letter of appointment as chief invigilator. I take the view that this tends to point to worker status.

125. The respondent argues that a worker uses at least some equipment provided by the employer, whereas someone who is self-employed typically uses their own equipment. The respondent's position is that invigilators do not need any particular equipment to undertake their duties, and that chief invigilators ought to be provided with the necessary equipment through their centres. The claimant did not appear to accept that any necessary equipment was supplied by the centre, but given no particular equipment is required, this is hardly a relevant factor.

126. On the matter of exclusivity the respondent does not restrict invigilators or chief invigilators from working elsewhere. Here invigilators and chief invigilators are engaged to provide services over one exam diet, and may not necessarily be called upon to provide any services during the relevant exam diet. There is no question here of exclusivity, but again the answer to this question is more relevant when seeking to distinguish between an employee and a self-employed contractor.

127. With regard to the purpose of the legislation, Mr Rollinson submitted that there can be no suggestion that the SQA is trying to deprive the claimant of her rights. The claimant took great exception to Mr Rollinson's suggestion that invigilators and chief invigilators are typically retired individuals and that as such they are not in need of the usual statutory protections in respect of holiday pay. She explained in evidence that invigilators come from all walks

of life and include for example students and others with several other jobs. In any event, in *NMC*, the Court of Appeal indicated that there was no policy reason to justify a conclusion that an individual is not a worker where the purpose underlying the relevant provisions is to ensure that the relevant rights are available to workers as well as employees and self-employed persons.

128. Taking account of these factors in the round, particularly given the lower "pass mark" to qualify as a worker rather than an employee, cumulatively these factors come together to point to the claimant, in both her roles, being a worker.

Is there a requirement for personal service?

129. Crucially however, in order to satisfy the requirements of the section, any contract to undertake work or services must be to do or undertake that work or services personally. Section 230(3)(b) states that the requirement of a worker contract is that "the individual undertakes to do or perform personally any work or services".

130. On this requirement for personal service, Mr Rollinson made submissions in regard to each of the five categories set out in the decision of the Court of Appeal in *Pimlico Plumbers Ltd v Smith* [2017] ICR 657.

131. In the *Pimlico* case, after reviewing various authorities, Sir Terence Etherton MR said at [84]: "In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal

performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance".

132. Subsequently, in *Stuart Delivery Ltd v Augustine* [2022] ICR 511 it was stressed that *Pimlico* does not set out rigid categories or rules of law. It only sets out two principles: that an unfettered right of substitution is inconsistent with an obligation of personal service, and that a conditional right may or may not be, depending on the nature or degree of the fetter. So it is therefore unhelpful to try to shoehorn the given case into one of these supposed categories. With that caveat, I considered the five categories set out there.

133. Dealing first however with the evidence, there is a conflict of views. Mr submitted that the respondent's evidence was to be preferred on the basis of Mrs Fauld's 20 years of experience in her role.

134. Mrs Faulds evidence was that there was no requirement to inform the SQA and no requirement to inform the chief invigilator or anyone else for that matter. Mr Rollinson summarised the position by submitting that "they are not bothered by someone who does not turn up".

135. Mrs Faulds evidence was that that invigilators can and do "swap shifts". The SQA do not need to know about or approve the swapping or exchange of shifts. When asked what would happen if an invigilator was not available on a particular day, Mrs Faulds said that "if it was offered and the invigilator was not available, the chief invigilator would allocate someone else; or if they had accepted then were not available at the last minute, there are options depending on the time they realised, they could speak to the chief invigilator and the chief invigilator could then find cover; or if at the last minute they could ask another invigilator to swap and tell the chief invigilator they had made arrangements". She said that invigilators work "very closely together so there

is a lot of interaction between them". When she was asked whether in her experience, invigilators would swap days, she said "I do believe they do, but they do not require to tell the SQA. I speak to chief invigilators and this does happen from time to time". This "could be a last minute illness; a lot of couples [are engaged] so they could speak to their partner to cover the exam if they are unwell". She said that similarly, if a invigilator cancelled because they simply did not want to cover the shift, the chief invigilator or the individual could arrange for alternative cover.

136. In particular, in answer to a question, what if the invigilator "just did not fancy turning up that day", Mrs Faulds said that the chief invigilator or the individual could arrange alternative cover. However, she qualified her answer stating that "the chief invigilator may think that they were not reliable and they may not be offered [other] slots in the exam timetable".

137. In contrast the claimant's evidence was that there was some flexibility in regard to the time table, and that if an invigilator could not attend one of their shifts then another invigilator may be asked by the chief invigilator to step in. If the claimant was not available to cover a shift, then she would contact the chief invigilator to advise that she could not attend, and the chief invigilator would arrange for another one of the invigilators from the centre to cover the shift. When asked if she would make arrangements directly with another invigilator to cover, she said that she did not have details of the other invigilators because these are only held by the chief invigilator. She considered that she had an obligation to let the chief invigilator know because the contract specifies that she is responsible to the chief invigilator. She said that this was what she would expect when she was in the role of chief invigilator. Thus while an invigilator could get a stand in for an emergency, the chief invigilator would arrange that. Further, although where the chief invigilator was not available in an emergency, such as in this case where the claimant had an emergency dental appointment, the depute chief invigilator could step in, that was in relation only to covering an invigilation shift and not the other work which the chief invigilator was obliged to do.

138. As noted above, to the extent that there is a difference of opinion, I have preferred the evidence of the claimant. While it is clear that invigilators are permitted to swap shifts with others, an invigilator will be expected to let the chief invigilator know, and could only invite another invigilator (assuming they knew how to contact them) who had an SQA contract, who had been vetted for PVG disclosure and who was in the pool for the school. That was in any event at least the implication of Ms Fauld's evidence. This is because invigilators could not undertake work if they did not have a contract from SQA, they are allocated to a particular centre and have undertaken training and are aware of the set up at the school. The shifts which any invigilator works at a particular centre are as allocated by the chief invigilator, who would at least need to know about any swap.

139. Mr Rollinson made submissions relating to each of the five Pimlico principles. The first states that an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Mr Rollinson argued that while the claimant may not have exercised this right, it does not mean that such a right is not available. I did not accept this submission. The evidence is clear that there is no unfettered right to substitute another person. An invigilator will require at the very least to inform the chief invigilator. Even if, to use Mrs Fauld's example of one spouse covering for another, they did not require to inform the chief invigilator before hand, still the spouse would require to have a contract with SQA, to have PVG disclosure and to be in the pool of invigilators for that school.

140. Mr Rollinson argued that, if the Tribunal did not accept that the two roles fell within that first category, the second of the five categories of *Pimlico* applies, namely that there is a conditional right to substitute another person. This may or may not be inconsistent with personal performance depending on the conditionality. In *Pimlico*, it is stated that "it will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional".

141. Mr Rollinson argues that other than having to be PVG checked, and being in a pool of invigilators, there are no conditions applied to the swapping of shifts or providing another invigilator to cover the role. This is because they are not required to sign up to any covenants and the invigilator turns up and gets paid. The respondent argues that is inconsistent with personal service.

142. I came to the view that, to the extent that an invigilator has a more limited right to substitute, any right will be limited or occasional, and would on the evidence rarely be relied on in practice. If an invigilator decided that they did not want to cover their shift for no reason (specifically that they were not inclined to) then this would certainly cause difficulties for the chief invigilator. Taking a holistic view of the evidence in the round, I came to the view that there is no "right of substitution" of the kind envisaged by this second type.

143. By reference to the third category, which is, by way of example, a right of substitution only when the contractor is unable to carry out the work, this will be consistent with personal subject to any exceptional facts.

144. In my view, the evidence points much more clearly to this being the situation here, that is that there is a right of substitution only when the contractor is unable to carry out the work, which in this case is indicative of personal service. Mrs Faulds when asked about an invigilator being unavailable assumed from the question that this was a reference to a "last minute illness" and clarified her answer only on being prompted and asked directly about "where someone cancels because they do not fancy it".

145. On the forth *Pimlico* category, which again is an example, a right of substitution limited only by the need to show that the substitute is as well qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal service.

146. Mr Rollinson submits that this situation falls squarely within this category for invigilators and chief invigilators because they require no special qualifications other than a PVG and no qualifications on what is needed to provide a substitute.

147. I did not accept the respondent's submission that the situation falls "squarely within this category". It cannot be said that any right to substitute is only limited by the need to show a substitute is as well qualified. This is an example which does not fit well with the situation of the invigilator. As noted above the invigilator must at least have a contract with the SQA and disclosure clearance,

148. With regard to the fifth category (again by way of example) a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance. Mr Rollinson relies on this to support his argument against personal service because substituting does not require the consent of the SQA.

149. It was clear from the evidence that there is no requirement for consent from the SQA in regard to the invigilator role, where the liaison would be with the chief invigilator, who would not have the right to withhold consent. The situation is slightly different with the chief invigilator, where the evidence indicates that in their absence the SQA would need to become involved. However this again is by way of example and it is apparent that this example does not tend to fit the situation here.

150. On the matter of personal service, Mr Rollinson also relied on the decision of the CAC in *IWU v Roofoods Ltd (t/a Deliveroo)* TUR 1/985 (2016) in which the CAC decided that Deliveroo riders were not workers. In that decision, at paragraph 76 headed "substitution in practice", it is stated that there was no policing of a rider's use of a substitute should they chose to use one and no evidence of penalty or adverse consequences where another could attend in their place. That was the case here, he argued, where there was no policing by SQA of any substitute that the invigilator might engage and no penalty for swapping shifts.

151. Considering that decision as a whole, I do not consider that the position of the Deliveroo rider can be said in general to be analogous to the role of the invigilator, not least because it was apparent that there was clearly an unfettered right to substitute in that case.

152. I came to the view that to the extent that there was any right to substitute another that was only when the invigilator was not able (through illness primarily) to carry out the shift, which most closely aligns with the third category of *Pimlico*. This is said to be consistent with personal service subject to any exceptional facts, and I conclude that there was no exceptionality here.

Was the SQA a client or customer of the claimant?

153. Mr Rollinson accepted that the SQA was not a client or customer of the claimant in a profession or business undertaking. Accordingly this third element of the test for establishing worker status is met.

154. That is of course a key element of this test, highlighting an important distinction between a worker and a self-employed person. It is significant it seems to me that the respondent accepts that there is no question that the claimant falls into such a category.

Relevance of other factors and engagements

155. Mr Rollinson submitted that this present case is not similar to other cases on worker status, which are largely in the gig economy, in precarious roles, where the work is on demand. While I accept that is broadly correct, the reason for that may be because other roles which are similar to the role of the invigilator already do attract holiday pay so that the matter does not require to be litigated. The evidence in this case, where the claimant received holiday pay in her role as election agent and in her role as invigilator with North Lanarkshire Council, is certainly suggestive of that. Mr Rollinson did however rely in his submissions on the conclusions in a number of these “gig economy” type cases.

156. Mr Rollinson said that the focus is on “employment law” but which I understood him to mean that the relevant test needs to be applied to the circumstances of each case.

157. Of course that is correct, and the fact that the claimant’s engagement as a election assistant and then as an invigilator with North Lanarkshire Council attracted holiday pay is no answer to the question in this particular case.

158. However, I do note that the claimant's position was that it was because of the fact she was paid holiday pay for working three days as an election assistant that prompted her to question why she was not paid holiday pay for the invigilating role. It is interesting to note, and I put it no higher, that North Lanarkshire Council, on reflection in regard to what must surely be an identical role, decided that holiday pay was due.

159. It is also interesting to note that the respondent themselves have had queries about this before (although apparently not many given the numbers engaged) and that they had taken the decision to undertake a review on the question and suggested to the claimant that the position might change.

160. Further, perhaps of greater background significance, is the fact that apparently on verbal instruction from the DWP following a meeting with UK award bodies the SQA (and presumably other award bodies) were required to auto-enrol invigilators (whose pay met the required threshold) in a pension scheme.

161. I invited Mr Rolllinson to consider the definition of "worker" for the relevant legislation, which I understand to be the Pensions Act 2008. Section 88(3) defines "worker" as "an individual who has entered into or works under (a) a contract of employment or (b) any other contract by which the individual undertakes to do work or perform services personally for another party to the contract". Section 88(4) states that "a contract is not within subsection 3(b) if the status of the other party is by virtue of the contract that of a client or customer of a profession or business undertaking carried on by the individual concerned". Section 88(5) states that "for the purposes of subsection 3(b), it does not matter whether the contract is express or implied or (if it is express) whether it is oral or in writing".

162. Mr Rollinson appeared to suggest that there might be something significant in the different order of wording used to that in s.230 of the ERA specifically the reference to the individual undertaking to do or perform personally any work or services for another party. He said there "must be a reason" but was not able to speculate what that reason might be. He did not explain why that would

be significant, and it was not apparent to me. In my view the provisions are substantively the same.

163. I fully accept that is not sufficient to support a conclusion that an invigilator is a worker for the purposes of the ERA (or indeed the Pension Act) but it is a notable cross reference given the conclusion I have otherwise reached applying the relevant legal tests.

Conclusion on worker status

164. Here I have found that the claimant is engaged under a contract to undertake personally work or services for the SQA, which is not a client of any business of the claimant. Taking into account the various other factors indicative of worker status, and bearing in mind the lower threshold or pass mark, I have conclude that the circumstances satisfy the requirements of section 230(3)(b) such that the claimant is a worker.

165. As Mr Rollinson recognised, it may have been appropriate to determine that the chief invigilator was a worker for the purposes of the statutory test, but that the role of invigilator was not. As is clear from the above, I have taken the view that both the invigilator role and the chief invigilator role meet the test.

Holiday pay

166. The law relating to holiday pay is contained in the Working Time Regulations 1998. Regulation 30(1)(b) states that a worker may present a complaint to an employment tribunal where his employer has failed to pay him the whole or any part of any amount due to him by way of payment in lieu of accrued but untaken leave upon termination of employment.

167. There are however two routes to establish a claim for holiday pay, and the claimant in this case relies on the failure to pay holiday pay as an unlawful deduction from wages, pursuant to section 13 ERA. That provision, discussed further below, states that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is authorised by a statutory

provision or a relevant provision of the worker's contract or he has the worker's consent.

168. Having concluded that the claimant was a "worker" for the purposes of the relevant provisions, it is accepted that she was entitled to holiday pay. The sums that she is said to be due in regard to holiday pay have been agreed.

169. The respondent in such circumstances accepts that the claim for holiday pay in regard to the hours worked invigilating during the exam diet for 2024 totals 164 hours. I accordingly find that the claimant is due to be paid the sum of £297 in respect of unpaid holiday pay.

170. In regard to the claim for the exam diet in 2023, the respondent argues that such a claim is time barred. I now to turn to consider that question.

Time bar

171. The law relating to time limits in respect of deductions to pay is set out in the ERA. Section 23(2) states that an employment tribunal shall not consider a complaint under section 13 unless it is presented before the end of the period of three months beginning with the day of payment of the wages from which the deduction was made.

172. Section 23(3) states that where a complaint is brought in respect of a series or deductions or payments, time runs from the date of the last deduction in the series.

173. Section 23(4) states that where the employment tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the appropriate date, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

174. Thus, where this type of claim is lodged out of time, the tribunal must consider whether it was not reasonably practicable for the claimant to present the claim in time, the burden of proof lying with the claimant. If the claimant succeeds in showing that it was not reasonably practicable to present the claim in time,

then the tribunal must then be satisfied that the time within which the claim was in fact presented was reasonable.

175. The Court of Appeal considered the correct approach to the test of reasonable practicability in *Lowri Beck Services Ltd v Brophy* [2019] EWCA Civ 2490. Lord Justice Underhill summarised the essential points as follows:

(1) The test should be given "a liberal interpretation in favour of the employee" (*Marks and Spencer plc v Williams-Ryan* [2005] EWCA Civ 479, which reaffirms the older case law going back to *Dedman v British Building & Engineering Appliances Ltd* [1974] ICR 53);

(2) The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was "reasonably feasible" for the claimant to present his or her claim in time: see *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119….

(3) If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will [not] have been reasonably practicable for them to bring the claim in time (see *Wall's Meat Co Ltd v Khan* [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made;

(4) If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (*Dedman*)…

(5) The test of reasonable practicability is one of fact and not law (*Palmer*).

176. Here the claimant is relying on a claim for an unlawful deduction from wages in terms of section 13 ERA. The ERA allows for a claimant to link a series of deductions for the purposes of time bar, but Mr Rollinson argued that this is not an example where that would apply. While it is possible to link claims in a series under s23(3), the respondent's position is that the natural reading of

the provision which makes reference to the contract is that there will be a series of deductions only where there is a series of payments under a contract. Here it was accepted that the claimant was issued with separate contracts in 2022, 2023 and 2024. Accordingly Mr Rollinson submitted, and I agreed, that this is not a case where it can be established that there is a link between the contracts such that there has been a series of deductions.

177. Here the claimant's contract ended on 31 May 2023. The claimant accepts that she was engaged on separate contracts from year to year, in the role of invigilator and separately in the role as chief invigilator. Mr Rollinson submitted that the claim in respect of the 2023 contract was time barred because the date which the claimant should have been paid (and was paid) was 14 July 2023 so any claim should have been intimated within three months of that date. The claimant approached Acas on 12 August 2024, which was 13 months after the payment of fees; and the claim was lodged on 22 October 2024 which was 15 months after the payment.

178. It follows therefore that the claim in respect of the 2023 diet has been lodged out of time. That being the case, it is for the claimant to show that it was not reasonably practicable to lodge the claim in time.

179. Mr Rollinson submitted that the claimant has failed to provide a reason why the claim was lodged out of time. In cross-examination she confirmed that nothing had prevented her from lodging a claim; the only reason given was a lack of knowledge or misunderstanding, but the claimant had contacted Acas in August 2024. He submitted, relying on *Porter v Bandridge Ltd* [1078] IRLR 271, that the claimant ought to have been aware of the relevant time limit.

180. The respondent's position is that it was reasonably practicable to submit the claim on time, and the claimant has failed to discharge the burden of showing that it was not. If the Tribunal does not accept that, then the respondent argues that the claimant did not lodge the claim in such further period as was reasonable, relying on *RBS v Theobald* UKEAT/0444/06 which states that it is incumbent on the claimant to provide a full and frank explanation of how and why the delay occurred.

181. The respondent argues that the explanation was not full and frank; that the claimant became aware of issue of time limits after consulting Acas in August 2024. While her claim was lodged in time for the 2024 contract, she gives no reason why she did not lodge at that time in relation to the 2023 contract. The claimant said she knew by July 2024 that she had a claim for holiday pay but there is no evidence why she did not then lodge a claim for the 2023 holiday pay. A claim brought in October 2024 was therefore not brought within a reasonable time of the claimant becoming aware of the claim.

182. In this case, I accept that the claim for the 2023 holiday pay was lodged out of time, given it ought to have been lodged by 13 October 2023.

183. On the question whether it was not reasonably practicable to lodge the claim in time, the claimant made requests to the respondent for holiday pay in July 2024. As I understood the claimant's evidence, she was unaware of any right to claim for holiday pay until that time. She said in evidence that she only became aware of the possibility of a claim in or around July 2024, when she received payment for holiday pay in respect of her role as an election assistant.

184. Until that point, she was ignorant of her rights relating to holiday pay. I was prepared to accept in the particular circumstances of this case that ignorance was reasonable. This is not least because the respondent's strongly advanced argument in this case is that the claimant was not in fact entitled to holiday pay. Accordingly I find that it was not reasonably practicable for the claimant to have lodged her claim in time.

185. The next stage is to consider is whether, once the claimant became aware of the right to claim holiday pay, she lodged the claim within a reasonable period thereafter.

186. The claimant lodged her claim on 22 October 2024. She had become aware of the potential to claim holiday pay in early July. She contacted Acas on 12 August. As I understood her evidence, she understood from what she was being told by Acas that she could make a claim for holiday pay but that she was only entitled to claim up to two years before the date of making the claim.

She understood this to mean that she was in time to claim holiday pay for the 2023 contract, but not the 2022 contract. This presumably relates to the Deduction from Wages (Limitation) Regulations which limits the backdating of such claims to two years.

187. The claimant became aware of her right to claim holiday pay from around July 2024. She said in evidence that she was aware that there are time limits for lodging such claims. She did not however appear to appreciate the significance of that for her claim dating back to 2023. I take the view in the circumstances that the claimant ought to have appreciated the significance of the requirement to lodge a claim in time, or that she ought to have taken advice on the matter, given that she was aware of the existence of time limits.

188. The claimant did not lodge the claim until 22 October 2024. I consider in the circumstances that the claimant did not lodge that claim within a reasonable period following her appreciation that she was entitled to make a claim for holiday pay, that being early July 2024, almost four months earlier.

189. Accordingly I find the claim for holiday pay for 2023 is time barred, and although it was not reasonably practicable to have lodged a claim in time, she did not lodge the claim within a reasonable time after she became aware of her rights. That claim must be dismissed.

Unlawful deductions from wages – arrears of pay – admin fee

190. This claim includes a claim for arrears of pay which the claimant described as “unpaid work”, and which she claims was an unlawful deduction from wages under section 13 ERA.

191. As noted above, section 13 ERA states that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is authorised by a statutory provision or a relevant provision of the worker’s contract or he has the worker’s consent.

192. Section 13(3) ERA states that a worker must establish that he has been paid less than the amount that is “properly payable”. The onus of proof is therefore on the claimant.

193. Mr Rollinson by reference to section 13(3) states that this relates to sums properly payable under the contract. He argued that the flat rate administration fee was paid as agreed in terms of the contract, so there could be no deduction of wages as all sums properly payable had been paid.

194. He argued that the claimant's contract did not entitle the claimant in the role of chief invigilator to be paid anything other than a flat rate for the work described. That admin fee had been calculated on the basis of a notional number of hours expected to be undertaken based on centre size and calculated on the basis of a lower rate of pay than the agreed hourly rate. The contract is clear that one admin fee is payable no matter how many hours were worked in regard to the agreed tasks. If a chief invigilator worked less than the notional hours used to calculate the fee then they would get paid the same amount.

195. In any event, Mr Rollinson point out, in claiming for hours worked, the claimant has not taken account of the admin fee already paid (£424), which must be deducted from any sum which she seeks.

196. Further, relying on *Kingston Upon Hull City Council v Schofield and others*, EAT/0616/11, Mr Rollinson submitted that the claimant could not pursue such a claim because the amount was unquantifiable. The arrears sought are based only on the claimant's best estimates. The respondent submits that she did not undertake 26 hours worth of additional admin duties. The respondent argues that the Tribunal is illegitimately being asked to determine without an evidential basis how many hours she worked, where the amount payable is not capable of proper quantification. Further, the Tribunal must not only decide on how many hours she has worked, but also at what rate.

197. I have decided that the claimant is not entitled to claim for unpaid hours in addition to the admin fee which she has been paid for the following reasons.

198. Section 13 entitles a claimant to make a claim for unauthorised deductions from wages. In essence, deductions can be authorised by statute or by a contract (or where the worker consents). It is for the claimant to establish that she has been paid less than the amount that is properly payable.

199. The amount which is "properly payable" will depend on the terms of the contract. The question therefore is whether the claimant is contractually entitled to the additional sums which she claims. The sums that are properly payable are those which have been agreed in the contract.

200. Here in regard to the claimant's appointment as chief invigilator, the agreement reached states that the claimant will receive an hourly rate for invigilating. That is subject to a minimum daily rate of 3.5 hours. That according to the respondent, relates only to invigilation, not to training, although that is not entirely clear from the terms of the appointment (the claimant has in any event made no separate claim for any additional hours relating to that, which she raised with the respondent in March 2024).

201. The agreement also sets out a sliding scale for an "admin fee", which it is stated is based on the number of exam entries at the centre and the predicted volume of work that this translates into. The admin fee is a set fee, and it is stated that it "covers all pre-examination activity, including creating the rota for your invigilators, your in-house invigilator training day(s) and the receipt and checking of exam materials".

202. The claimant was paid the agreed (revised) set admin fee of £424. The claimant is not, under her contract, entitled to more than that agreed amount.

203. Further and in any event, the amount due must be capable of quantification to amount to wages "properly payable" (see *New Century Cleaning Co Ltd v Church* 2000 IRLR 27). In this case, I accepted Mr Rollinson's submission that the amount in respect of any additional hours worked was not objectively ascertainable. Here the claimant repeatedly admitted in evidence that the hours that she said she had worked were estimates. She admitted that no time sheets had been submitted, and indeed that she had not kept a record of her hours. These, as I understood it, were estimates of hours worked determined after the event for the purposes of the claim in this tribunal. As Mr Rollinson pointed out, the claimant had not made any request or demand for payment of such additional hours at the time, and had not raised the matter until she brought this claim.

204. There were further difficulties with the quantification of the claim. In particular, the claimant had included a claim for two days when she said she required to keep herself free into order to attend the centre to accept the exam scripts from the courier, as she would only be given very short notice of the exact time when she required to attend. She agreed with Mr Rollinson that she was given a window of two hours to receive the exam papers so that she would not require to be at the centre for eight hours over two days. She accepted that she could do other work relating to the invigilation role during that time, so that could amount to double recovery if she were to receive payment for those hours. Further, she also accepted that she may have taken longer to undertake tasks because this was her first year as chief invigilator.

205. Given that context, and on the basis of what was agreed between the parties, I did not accept that the claimant was entitled to receive any payment for these unpaid hours as an unauthorised deduction from wages. Accordingly that claim must be dismissed.

Holiday pay on the admin fee

206. I came to understand that although the claimant asserted that she was entitled to holiday pay, the figure agreed with the respondent related only to the hours paid for invigilation and training and not the admin fee. I suggested that if I find that the claimant is entitled to holiday pay, then she may be entitled to holiday pay in respect of the admin fee which was properly due and paid.

207. Mr Rollinson's position was that the claimant had not claimed holiday pay for the admin fee. In any event, given that this relates to a time before the amendment to the Working Time Regulations 1998 he suggested, the claimant would not be entitled to holiday pay for the admin fee because it does not relate to work always done and is not similar to a shift premium or regularly paid supplement.

208. It is clear, given the respondent's position, that the admin fee does not include holiday pay. Following questioning during Mrs Fauld's evidence, it was accepted that the admin fee was based on a formula that a certain number of hours would be required to be worked in light of the predicted volume of work

given the number of exam entries at the centre. For a bank 4 centre, that was calculated on the basis of 30 hours paid at a lower admin hourly rate of £14.13 per hour, giving a total of £424 which was paid to the claimant (and upon which tax was paid).

209. I take the view that the fact that the claimant, having claimed holiday pay, has not specifically sought that sum would preclude a conclusion that she is due it, because she has a statutory entitlement to holiday pay on hours worked as defined.

210. The Working Time Regulations were extensively amended by the Employment Rights (Amendment, Revocation and Transitional Provisions) Regulations 2023 which came into force on 1 January 2024, and relate to a leave year commencing on or after 1 April 2024. These amendments codify the EU-based case law relating to components of a worker's pay that must be included within holiday pay at WTR reg.16(3ZA - ZG) which in the case of irregular hours and part-year workers includes all of their statutory annual leave (formerly WTR Regulations 13 and 13A leave and now 15B).

211. In terms of regulation 15F(1), a worker is an irregular hours worker in relation to a leave year if the number of paid hours that they work in each pay period during the term of their contract is wholly or mostly variable. This covers "payments which are intrinsically linked to the performance of tasks which a worker is obliged to carry out in terms of their contract" (reg.16(3ZA). Irregular hours workers will accrue leave at a rate of 12.07% of the hours worked in each pay period (reg.15B(3)(b)).

212. I appreciated that this was not something which had been directly claimed by the claimant, I took the view that the admin fee was paid in fulfilment of obligations under her contract with the respondent. Given that holiday pay is a statutory entitlement as set out above, the claimant is entitled to be awarded holiday pay in respect of the admin fee as well. Accordingly, 12.07% of the payment for the pay period of £424 amounts to £51.18. I find that the claimant is also entitled to such sum in respect of holiday pay for the 2024 exam diet.

213. I appreciate that this was a matter which I raised only during closing submissions. I appreciate that parties did not have an opportunity to reflect at length on the current amended regulations. In the event that parties believe that an alternative approach should be taken to this element of the holiday pay due, then they should make an application for a reconsideration of this decision.

Acas uplift

214. The claimant argued that she was entitled to an uplift of compensation for a failure to follow the Acas Code of Practice.

215. This seems to relate to the failure of the respondent to allow the claimant to follow their grievance procedure. In any event, this does not apply to the claimant because it is clearly stated that it only applies to members of staff.

216. Mr Rollinson argued that there should be no uplift on any sums found to be due. Although he accepts that section 13 claims are the types of claims that would attract an uplift, such claims require to be brought by an employee in accordance with section 207A. I agreed that these provisions do not apply to workers, as is evident from the Acas guidance, which states that an employer may wish to use the same procedure for workers. Accordingly, the claimant is not entitled to any uplift.

Preparation time order

217. The claimant in this case indicated that she intended to make an application for a preparation time order.

218. While I considered that such an application was premature, Mr Rollinson in any event made submissions on the point. In particular, he argued that this is not a case which falls into the category where preparation time orders would normally be made. That is because it could not be said that there has been vexatious behaviour on the part of the respondent. They have not pursued a defence with no reasonable prospects of success; and the respondent has not applied for a postponement other than in the early stages of the claim.

219. While I indicated that the claimant would nevertheless be entitled to make an application for a preparation time order after this judgment was issued, I would encourage her, before doing so, to research the law on that point further taking account of the respondent's submissions.

Conclusion

220. The conclusion of the Employment Tribunal is that the claimant, in her roles as both invigilator and chief invigilator, was a worker within the meaning of section 230 of the Employment Rights Act 1996. She is however entitled to holiday pay in respect of the 2024 exam diet only, the claim in respect of the 2023 diet being time barred. While the claim in respect of unlawful deduction from wages in respect of additional hours on top of the "admin fee" is not well founded and is dismissed, I find that the claimant is also entitled to holiday pay on the element of the fee which has been paid.

Date sent to parties **01 May 2025**