EMPLOYMENT TRIBUNALS

Claimant: **Mr C Wheeler**

Respondent: **Aweswim Ltd**

Heard at: **Norwich Employment Tribunal (in public, by CVP)**

On: **4 December 2025**

Before: **Employment Judge Gordon Walker (sitting alone)**

Representation
Claimant: represented himself
Respondent: Mr R Kohanzad, counsel

RESERVED JUDGMENT

1. The claimant was not an employee (within the meaning of section 83(2)(a) Equality Act 2010) nor a worker (within the meaning of section 230(3)(b) Employment Rights Act 1996) of the respondent.

2. The claim is therefore dismissed because the Tribunal does not have jurisdiction to determine it.

3. The respondent's application to strike out the claim pursuant to rule 38(1)(a)-(b) Employment Tribunal Rules 2024 is dismissed.

REASONS

Introduction

1. A public preliminary hearing was held on 4 December 2025 to decide the claimant's employment status and the respondent's application to strike out the claim.

2. These reasons do not seek to address every point about which the parties have disagreed. They only deal with matters relevant to the issues for determination at the preliminary hearing on 4 December 2025. If something has not been mentioned, that does not mean that it has been overlooked, it means it is not relevant to the issues.

Issues for the preliminary hearing

3. The purpose of the preliminary hearing was:

    3.1 To determine the respondent's application to strike out the claim pursuant to rule 38(1)(a)-(b) Employment Tribunal Rules 2024;

    3.2 To determine the claimant's status with the respondent, specifically, was he:

        3.2.1 An employee (within the meaning of section 83(2)(a) Equality Act 2010);

        3.2.2 A worker (within the meaning of section 230(3)(b) Employment Rights Act 1996).

Procedural history

4. By claim form dated 26 March 2024 the claimant presented claims of unfair dismissal, disability discrimination, and for notice and holiday pay.

5. On 20 June 2024 the Tribunal accepted the claims of disability discrimination, notice and holiday pay. The claim of unfair dismissal was rejected: the claimant did not have sufficient service to bring the claim.

6. By notice of claim dated 20 June 2024 the respondent was sent the claim form and informed that they must complete the response form and submit it to the Employment Tribunal by 18 July 2024.

7. The respondent presented their response after 18 July 2024.

8. On 24 September 2025 the respondent was granted an extension of time to present the response and the response was accepted. A preliminary hearing for case management was listed for 3 October 2025.

9. The 3 October 2025 private preliminary hearing was before Employment Judge French. The list of issues (for the claims of disability discrimination, notice and holiday pay) was discussed and recorded. The claimant intimated

an application to amend to add a claim of unfair dismissal. When the service requirement was explained, he did not pursue that application. A public preliminary hearing was listed for 4 December 2025 to determine the issues set out above. The respondent was ordered to send the claimant and the Tribunal its written strike out application by 17 October 2025.

10. The respondent submitted their strike out application on 20 October 2025. On 6 November 2025 Employment Judge French wrote to the parties directing that the strike out application be heard on 4 December 2025, notwithstanding its late submission.

11. On 20 November 2025 the claimant made a rule 50 application. On 2 December 2025 Employment Judge French wrote to parties stating that the application would be considered at the hearing on 4 December 2025 if there was sufficient time to do so.

Procedure at the hearing, documents, and evidence heard

12. The claimant represented himself and was a witness at the hearing on the issue of status. He produced the documents listed below. I read and considered the witness statement, the written submissions, the documents in the bundle that I was taken to (either by way of the witness statement or during the hearing), and the additional documents insofar as they were relevant to the issues I had to determine:

    12.1 Bundle of documents: 635 pages;

    12.2 Witness statement signed and dated 22 November 2025;

    12.3 Written submissions:

        12.3.1 Skeleton argument dated 12 November 2025
        12.3.2 Opening submissions dated 4 December 2025
        12.3.3 Skelton argument dated 4 December 2025

    12.4 Additional documents:

        12.4.1 Disability impact statement dated 22 October 2025;
        12.4.2 Proposed list of issues;
        12.4.3 Eight emails dated 5 October 2025 to 4 December 2025, some of which were dealt with by Employment Judge French in correspondence dated 5 November 2025 and 2 December 2025.

13. The respondent was represented by Mr Kohanzad, on a pro bono direct access basis. I read his skeleton argument. The respondent produced a bundle of documents on the strike out application and the issue of status: I read the documents I was referred to. The respondent called two witnesses on the issue of status: Ms Parris (owner) and Ms S Chamberlain (swimming instructor) who produced written statements. The respondent also produced written statements from three witnesses who did not attend the hearing due to work commitments: I gave their evidence no weight as their statements were not signed (their name was just typed in a different font) and their evidence could not be tested by cross examination.

14. The following adjustments were made:

    14.1 Ms Parris stated that she needed breaks because she has multiple sclerosis. Ms Parris was told to inform me if she needed any additional breaks. She did not do so.

    14.2 The claimant stated that he needed to take a break after being asked questions to allow him time to process the information. The claimant estimated that he might need three to four minutes after each question. This adjustment was made. The claimant was told to take the time that he needed after each question to process the information.

    14.3 I asked the claimant on two occasions whether he needed to take a break as he had placed his hand over his face. On the second occasion the claimant accepted the invitation to take a break.

    14.4 The claimant stated that he wished to supplement his oral submissions in writing. The respondent objected to this request as their counsel did not have capacity to respond to any such submissions. The claimant made skilful and relevant oral submissions at the hearing, supplemented by the written submissions presented before the hearing. I declined to make this adjustment because (1) there was no need for the claimant to make any further submissions in writing; (2) if the claimant made such submissions, it would cause delay because, due to my sitting pattern, I would not have capacity to provide this reserved judgment before 6 January 2026.

15. The claimant's rule 50 application was discussed. This application related to the claimant's disability and medical records. It was agreed that, as these were not issues to be determined at the 4 December 2025 hearing, it was not necessary for the rule 50 application to be determined before deciding the respondent's strike out application and the issue of status. There was insufficient time to hear submissions on the rule 50 application at the 4 December 2025 hearing.

16. Fourteen members of the public observed the hearing. Some of these people owned or were employed by other swimming schools which the claimant had made Employment Tribunal claims against.

Findings of fact

17. I took all evidence that I was referred to into account. I only made findings of fact relevant to the issues to be determined at the preliminary hearing.

18. The claimant is aged 34 years. He is a qualified swimming instructor. He has worked for 34 companies throughout his working life. He has presented or intimated Employment Tribunal proceedings against 18 of those companies. He has brought multiple claims against some companies. He has started ACAS early conciliation and/or presented Employment Tribunal claims on 26 occasions. He uploads videos to YouTube where he provides advice to other potential litigants. He is familiar with the Tribunal process and concepts such as strike out, unless orders, and costs warnings.

19. The respondent is a swimming school that, at the material time, hired a swimming pool at Wessex Gardens School where it ran swimming lessons. It also ran lessons at a site in Royston. The respondent is owed by Ms P Parris. At the material time it was managed by Ms R Kennedy, due to Ms Parris' family commitments.

20. The respondent offers to engage swimming instructors on an employed or self-employed basis. I use the terms employed and self-employed to reflect the terminology used by the respondent and not as a determination of employment status of these instructors. My conclusions on employment status of the claimant are set out in the conclusions section below.

21. The respondent's model is widely used in the swimming industry. The instructor can elect whether they wish to be engaged on a self-employed or employed basis. Those that are self-employed are paid a higher rate. At the material time, a level 2 swimming teacher was paid £18 per hour as an employee and £20 per hour if self-employed.

22. There were other differences in the way things worked for instructors that elected to be employed as compared to those that elected to be self-employed:

    22.1 Employed instructors received benefits such as holiday pay, whereas self-employed instructors did not;

    22.2 Employed instructors were provided with branded T-shirts to wear at work. Self-employed instructors were asked to wear white T-shirts, although this was not compulsory;

    22.3 Self-employed instructors could provide a substitute to do their work. The substitute had to hold the relevant swimming instructor qualification, be a member of a governing body, and have a clear DBS check. There were no other restrictions on the right of self-employed instructors to provide a substitute. Mr R Cox was a self-employed instructor who provided substitute cover through his mother (Ms S Chamberlain) and others. Mr R Cox was paid £30 per hour as he worked a Sunday parent and baby shift. He paid his substitutes a lower hourly rate. Other self-employed instructors provided substitutes to cover their lessons in the same way. I have reached these findings of fact based on the witness evidence of Ms Parris and Ms Chamberlain which I accept. The claimant did not really challenge these facts. He submitted that even if there was a right to substitute it was not an unfettered right.

    22.4 Employed instructors were paid through the respondent's payroll with deductions for tax and national insurance. Self-employed instructors submitted invoices and were responsible for their own tax affairs;

    22.5 Employed instructors were required to attend mandatory team meetings, but self-employed instructors were not;

    22.6 There were no restrictions on self-employed instructors working for other swimming companies;

22.7 Prior to Covid-19 self-employed instructors would provide their own equipment. Since Covid-19, all instructors at Wessex Gardens used the school's own equipment for lessons;

22.8 Self-employed instructors were responsible for renewing their qualifications and public liability insurance. Employed instructors were offered support with this. All swimming instructors (whether employed or self-employed) will be a member of a governing body, which provides personal public liability insurance.

23. The respondent has a training manual which provides guidance to both employed and self-employed instructors on "*how to run a smooth, fun and effective swimming lesson*". The respondent produces a week planner for employed and self-employed instructors which specifies a stroke for each week of the training course. The instructors are expected to at least "*touch on*" that stroke in their lesson, to ensure that the students receive a rounded swimming education.

24. The claimant worked for the respondent for three shifts on 20 February 2024, 27 February 2024 and 5 March 2024.

25. The claimant produced a transcript of his WhatsApp messages and other communications with Ms Kennedy. Ms Kennedy no longer works for the company and did not provide evidence for the respondent so they could not say whether the messages were accurate. The transcript shows that:

25.1 On 30 October 2023 Ms Kennedy sent messages to the claimant thanking him for his phone call, stating that she was impressed with his CV and providing a list of available shifts on each day of the week;

25.2 On 30 October 2023 the claimant replied with his availability.

25.3 In early November 2023 Ms Kennedy and the claimant exchanged messages about a potential trial shift, which the claimant did not attend due to travel issues, for which he apologised.

25.4 In December 2023 Ms Kennedy messaged the claimant again asking if he was interested in the role, he responded to say that he was.

25.5 On 8 February 2024 they exchanged messages about a potential Sunday shift: the claimant was unavailable for the full shift.

25.6 On 9 February 2024 Ms Kennedy proposed a Tuesday shift 4-6:30pm. The claimant replied that "*Tuesday would be perfect*". A trial shift was agreed for 20 February 2024.

25.7 On 22 February 2024 Ms Kennedy sent a message "*thanks for coming in on Tuesday, you did great! If you're happy to proceed with this Tuesday shift permanently, please send over your email address and I will send you over the relevant documents and contract. Thanks!*"

26. On 5 March 2024 Ms Kennedy sent the claimant two emails attaching the training manual and a document entitled "*things to remember*".

27. The things to remember document set out the various documents that an instructor had to submit to the respondent such as their qualification certificates and DBS. The document had a section about employee status which stated:

Employment Certificate

Employers now need to determine employees' status within the tax laws. This is known as IR35, and may or may not affect you as a self employed/contract worker. To enable Aweswim to determine your status, please follow the link, https://wwww.gove.uk/guidance/check-employment-status-for-tax or copy and paste it into your browser, and complete the details. You must then forward the results to wages@aweswim.co.uk.

For further reading on IR35 and its implications, please follow this link.

https://www.gov.uk/uidance/understanding0off-payroll-working-ir35

28. The things to remember document had a section entitled time off which states:

- You can only take time off if it has been confirmed in writing with [Ms Parris] (email)
- Time off may not automatically be given, you will be refused if there is no cover! Just because you have booked a holiday does not mean you may get the time off!
- If time off is requested it is your responsibility to find cover in advance. Please make sure the person you ask is adequately qualified.
- If you have covered someone else's shift or have done extra time it needs to be emailed through with your hours that week.
- At least a week's notice is needed or time off cannot be given.
- If time off has not been agreed but taken anyway this may lead to a disciplinary. You may also be fined.
- If you fall ill, please let [Ms Parris] know ASAP so that appropriate cover or measures can be taken to cover your shift. If [Ms Parris] is unavailable please make contact with your venue's office. A text/email does not suffice you must call to make sure you have made contact
- Only one day of the same shift per term can be taken off. Pupils need continuity and it is unfair for them to have too many teachers per course.
- The rules still apply for "surprise" holidays but by partner/family member. Before booking a holiday time off must be booked as it may not be granted!
- If someone has covered your shift please be thankful as some people go above and beyond to make this happen, and remember you may need to return the favour. If you are found not to be a team player and taking too many holidays and not offering cover you will find it increasingly difficult to find cover yourself.

29. I find that the section "*time off*" in the things to remember document is the process that applies to employed rather than self-employed instructors. I reach that conclusion because:

    29.1 The things to remember document was sent to both employed and self employed instructors, as evidenced by the section on employment status contained in that document, which states that the respondent will determine status following completion of the IR35.

    29.2 The section about time off is consistent with how the respondent said it treated its employed instructors: who were given holiday pay. It is inconsistent with the evidence (which I have accepted) about how self-employed instructors could provide substitutes subject only to the substitute holding the necessary qualification, membership of a governing body, and valid DBS check.

30. On 5 March 2024 the claimant submitted an invoice for the three shifts. This was submitted from the claimant under the branding A-Class Swimming. The claimant confirmed under cross examination, that whilst A-Class Swimming is not a company, it is the way that he brands himself when providing his swimming instructor services. The claimant's hourly rate was stated to be £28.

31. The respondent replied stating that his rate was £20 per hour. The claimant responded querying this and his employment status. He was directed to contact Ms Kennedy or Ms Parris.

32. On 12 March 2024 the claimant emailed Ms Kennedy attaching a document entitled "Self-employd contract Awesim". The contract was drafted by the claimant and included the following terms:

    1. **Engagement and Services:** the company hereby engages the contractor to provide swimming instruction services as an independent contractor, and not as an employee of the company. The contractor shall provide the services described in schedule A attached hereto.

    4. **Independent Contractor Status:** the Contractor acknowledges that he is engaged as an independent contractor and is responsible for his own income tax, National Insurance contributions, and any other tax or business liabilities incurred in the course of providing the services under this Contract.

33. The covering email stated:

    Dear Rachel,

    I hope this message finds you well. As discussed, I am forwarding the contract outlining the terms of our agreement. Attached to this email, you will find the document titled "Contract_Agreement_.pdf" for your review.

    Please take your time to go through the contract thoroughly. Should you have any questions or require any clarifications regarding the terms outlined within, do not hesitate to get in touch with me. I'm available for a call or meeting to discuss any aspects you'd like to revisit or clarify.

Once you are comfortable with the contents, please sign and return a scanned copy of the signed contract to me via e-mail at your earliest convenience. If you prefer, a digital signature is also acceptable to expedite the process.

Our aim is to ensure that all terms are clear and mutually beneficial, paving the way for a successful partnership. Looking forward to working together and excited about what we can achieve.

Thank you for your attention to this matter. I await your feedback on the signed contract.

Best regards,

34. Under cross examination the claimant confirmed that, at this time, he thought that his status was self-employed contractor.

35. The respondent did not sign the claimant's proposed contract as it awaited the completed IR35.

36. On 12 March 2024 the claimant completed the IR35 which concluded, based on the answers given by the claimant, that he was classed as employed for tax purposes for his work for the respondent.

37. On 13 March 2024 the claimant lodged a grievance about his hourly rate (stating that £28 was his hourly rate), alleging misclassification of his employment status, and challenging the mandatory completion of the IR35 form.

38. Ms Kennedy replied on 13 March 2024 asserting that completion of the IR35 was a legal requirement and stating "*£28 which is not the amount that was offered, we've decided that we no longer require your services and we have withdrawn your offered shifts with immediate effect*."

39. The claimant was ultimately paid for his three shifts at his proposed rate of £28 per hour.

40. In the claimant's claim against Swimming Nature Holdings Ltd 321952/2023, the claimant was given a choice between employed or self-employed status. He elected for the higher hourly rate as self-employed, foregoing the benefit of holiday pay. He subsequently sought to claim worker status and holiday pay.

Parties' submissions

41. The parties produced written submissions which speak for themselves.

42. The parties provided brief oral submissions.

43. In summary the respondent submitted that:

    43.1 The claimant's conduct was vexatious: his business was litigating against small swim schools and placing undue pressure on them through litigation tactics, often forcing them to settle the claims. He had no intention of working for the respondent but entered into the engagement with the intention of litigation.

43.2 A fair trial was no longer possible due to the claimant's conduct in bombarding the respondent with correspondence, applications and costs threats and the serious concerns about his honesty and integrity.

43.3 The claimant was self-employed. He provided his own terms and thought that he was self employed at the time he entered into the contract. He only later challenged his status as a litigation tactic. There was little control, the respondent was entitled to dictate what was taught to a certain degree to ensure that the students received rounded lessons. There was no personal service. There was a right to substitution which was exercised by other self-employed instructors and there was no basis on which the claimant could assert that he would have been treated any differently by the respondent.

44. In summary the claimant submitted that:

44.1 The respondent's strike out application was a malicious abuse of power and waste of Tribunal time, which was detracting from the merits of the case. He had made or intimated 26 claims against 18 employers but that was because he had legitimate claims. He did produce YouTube content but the respondent's transcript of this was inaccurate: he was simply advising other potential disabled litigants in person how to navigate the Tribunal system. He did not deploy unreasonable litigation tactics: he was mirroring the conduct that he had been subject to by respondents in previous litigation. The respondent's strike out application was submitted late.

44.2 As to status, the Tribunal had to look at the reality of the situation and not the labels:

44.2.1 The respondent controlled the venue, the shift, the rate of pay, and they received pay from the students' parents. They controlled the work by way of their manual and planner.

44.2.2 There was no genuine and unfettered right of substitution: any substitute had to be vetted by the respondent. He provided personal service.

44.2.3 The claimant was not marketing his own services or setting his own prices as a business.

The law

45. Section 230(3) Employment Rights Act 1996 states:

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

46. Section 83(2)(a) Equality Act 2010 states:

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

47. Rule 38(1)(a)-(b) Employment Tribunal Rules 2024 states:

> 38.—(1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds—
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious…

48. The parties did not refer me to any legal authorities.

49. There are many legal authorities on the issue of status. The relevant legal principles have been recently restated and summarised by HHJ Auerbach in the cases of **Ter-Berg v Simply Smile Manor House Ltd and ors** [2023] EAT 2; **Partnership of East London Co-operatives Ltd v Maclean** [2025] EAT 142; **Ter-Berg v Malde and anor** [2025] EAT 23. I had regard to these cases and the cases cited therein.

50. The relevant legal principles about strike out for vexatious conduct have been recently restated and summarised by the EAT in the cases of **Hargreaves v (1) Evovle Housing & Support and (2) McGrath** [2023] EAT 154, and **Bailey v Aviva Employment Services Ltd** [2025] EAT 109. I had regard to these cases and the cases cited therein.

Conclusion on status

51. There was a contract between the parties - the respondent did not submit otherwise. The parties intended to create legal relations, as evidenced by Ms Kennedy's message of 22 February 2023: "*If you're happy to proceed with this Tuesday shift permanently, please send over your email address and I will send you over the relevant documents and contract*" and the claimant providing the respondent with his preferred contractual terms. There were legally binding obligations on the parties: on the claimant to work (or provide a substitute) and on the respondent to pay him for that work.

52. At the point the contract was formed, the parties intended the relationship to be one of independent contractor:

    52.1 This is consistent with the claimant's draft contractual terms and his confirmation to this effect under cross examination.

    52.2 The respondent was content for the claimant to elect self-employed status, consistent with industry practice, subject to completion of the IR35.

53. The written terms of the claimant's draft contract (which unequivocally describe him as an independent contractor) are not solely determinative of the issue of status, but they are relevant, because:

    53.1 The terms reflect the claimant's understanding of the reality of the situation at the time the contract was formed; and

    53.2 This was not a situation of unequal bargaining power where the respondent was enforcing its terms on to the claimant.

54. The claimant says that his view on status changed on receipt of documentation from the respondent which was more consistent with worker status. I reject that submission. I conclude that the claimant changed his position on status as a litigation tactic. I reach that conclusion because:

    54.1 The claimant provided clear draft terms as an independent contractor, after receipt of the respondent's written documentation. He also invoiced the respondent as an independent contractor under his own branding, after receiving the respondent's documents.

    54.2 The claimant has experience of the Employment Tribunal process. He has made frequent and numerous claims. He is familiar with the status requirements for Tribunal jurisdiction. The claimant adopted much the same strategy in his claim against Swimming Nature Holdings Limited.

55. There was no requirement for personal service. This is consistent with my finding that there was a genuine right to provide a substitute, as exercised in practice by other self-employed instructors. The only restriction on this right was that the substitute be qualified, a member of the governing body and DBS checked. This is in line with the fourth example in **Pimlico Plumbers Ltd v Smith** [2017] ICR 657: *"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 exceptional facts, be inconsistent with personal performance."* Although I note what the Court of Appeal in **Stuart Delivery Ltd v Augustine** [2022] ICR 511 said at paragraph 84. I conclude that the nature and degree of the fetter on the right to substitution was limited and that an unfettered right would have been unworkable in practice. Given the nature of the role (teaching swimming to children) and the inherent safety risks, any substitute instructor would need to be qualified and DBS checked.

56. The other circumstances of the relationship are not akin to worker status. The respondent exercised limited control over the claimant. Their policies simply provided guidance consistent with the service they offered the students. The claimant was free to run the lesson in accordance with his professional judgement. Contrary to the claimant's submissions he was not obliged to wear a uniform, he was given a choice about the available shifts, as evidenced by the WhatsApp exchange, and he set his hourly rate at £28 per hour, which was paid, albeit that the contract was then terminated. But, even if I had accepted the claimant's submissions on those matters, I still would have concluded that the claimant was not a worker, given the absence of personal service and the claimant's clear intention to enter into a contract as an independent contractor.

57. Although the term “employee” is used in the Equality Act 2010, its meaning is much the same as the definition of worker in the Employment Rights Act 1996. It follows from my conclusions above that the claimant was neither a worker nor an employee for the respondent.

Conclusion on strike out application

58. Given my conclusion on status, it is not necessary to consider the respondent’s strike out application. But, for completeness, I address it briefly below.

59. Even if I accepted the respondent’s submissions that the claimant’s conduct was vexatious, it was not so serious that the claimant forfeited his right to have his case heard.

60. It is therefore necessary to consider whether the matter is still capable of a fair trial.

61. I conclude that a fair trial would still have been possible. The respondent submitted that the claimant’s conduct in bombarding the respondent with applications and correspondence meant a fair trial was not possible. I reject that submission. Case management orders could have been made restricting the amount or frequency of correspondence from the claimant. The respondent submitted that there were serious concerns about the claimant’s honesty and integrity which made a fair trial virtually impossible. I reject that submission. Whilst I have concluded that the claimant changed his position on status as a litigation strategy, the respondent has not proven that the claimant’s honesty and integrity was of such concern that a fair trial would not be possible.

Approved by:

Employment Judge Gordon Walker

Date 5 December 2025

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

11/12/2025

FOR EMPLOYMENT TRIBUNALS