EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No 4111370/2021

Held in Edinburgh on 9, 10 June and 19 August 2022

Employment Judge: M Sutherland

Julie Browne	**Claimant** **In person**
South East Scotland Regional Scout Council	**Respondent** **Represented by:** **Ms S Macphail,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant had employment status during individual engagements for work but she did not have employment status between those engagements.

REASONS

1. The claimant has presented various complaints including of unfair dismissal. The Respondent accepts that the Claimant was a worker but denies that she was an employee. An open preliminary hearing was arranged to determine whether the claimant had employment status.

2. The claimant appeared on her own behalf. The respondent was represented by Ms Macphail, Solicitor.

3. The claimant gave evidence on her own behalf and led evidence from Neil Kirk (Activities Manager). John Bruce (ex Interim Centre Manager) and John Campbell (ex Centre Manager) gave evidence on behalf of the Respondent.

4. Parties had prepared a joint bundle of documents.

5. Both parties made written and oral submissions.

Findings of fact

6. The Claimant is an experienced multi-activities instructor.

7. The Respondent is a charity which operates the Bonaly Outdoor Centre ('Bonaly') where groups of Scouts, other uniformed organisations and schools, participate in outdoor adventure activities on either day or residential visits.

8. In 2014 the Claimant undertook work for the Respondent as a volunteer instructor at Bonaly. In 2015 the Respondent changed their business model and the Claimant then undertook paid work as an instructor at Bonaly which continued intermittently until September 2020.

Contractual documentation

9. The Claimant held a number of contracts in respect of her work at Bonaly.

10. On 22 February 2015 the claimant was issued with a contract with the respondent which she accepted. It expressly stated that it was a permanent contract of employment; that it was a zero hours contract; and that there was no guarantee of any work.

11. On 24 August 2015 the claimant was issued with a further zero hours contract for employment which she accepted.

12. On 1 July 2018 the claimant was issued with a further zero hours contract which expressly stated that –

    a. The Claimant was engaged as a casual worker with casual and intermittent hours of work
    b. It was not an employment contract and did not confer any employment rights.
    c. There shall be no mutuality of obligation between the parties "when you are not performing work"
    d. The Claimant's job title was Activities Instructor and her place of work was Bonaly

e. There was no relationship between the parties between assignments although it sought to regulate confidentiality in perpetuity

f. The Claimant must comply with the Respondent's rules, policies and procedures

g. The Respondent was under no obligation to offer any work and the Claimant was under no obligation to accept it. However if she did accept "you are required to complete it to the organisation's satisfaction"; "you must inform [the respondent] immediately if you will be unable to complete it for any reason"; "[The Respondent] reserves the right to terminate an assignment at any time for operational reasons".

h. The Claimant was to be paid by the hour monthly in arrears with deduction of tax and national insurance.

i. She was to be paid in lieu of accrued but untaken holidays at the end of each assignment

j. Any grievances should be raised according to the policy and procedure described in the staff handbook.

k. The agreement could be terminated by either party giving one weeks notice.

l. There was an entire agreement clause noting that it superseded any prior agreement and was intended to be "a true, accurate and exhaustive record of the terms on which we have agreed to enter a casual work relationship"; only valid variation to be written and signed.

13. The Claimant was concerned about some of these terms and was initially unwilling to agree but she ultimately did so.

14. The Claimant had never seen the staff handbook which was available to employees. She understood the reference to policies and procedures meant the SOPs and the health and safety risk assessments.

15. There was no material change in the practical working arrangements between the parties following the issue of these contracts.

<u>Pay and pension</u>

16. Throughout the period of her contracts the Claimant received an hourly rate of pay of based upon the hours that she worked. In practice if she was booked for work which was cancelled less than 14 days prior to the start date she would be paid for that work. She was paid regardless of whether the Respondent was paid by the customer.

17. The Claimant was paid by the hour monthly in arrears with deduction of tax and national insurance. The Claimant was automatically enrolled in a pension scheme in respect of which the Respondent contributed about 3%.

18. Her hourly rate of pay was reviewed and increased as follows: £8.75 in 2017; £9.20 in 2018; £9.40 in 2019 onwards.

Holidays

19. The Claimant received a percentage increase to her pay to reflect 'rolled up' holiday pay. Unlike the office staff the Claimant did not have to request to take holidays.

Organisational structure

20. The Activities Manager at Bonaly was responsible for allocation of work to the Activities Instructors and for management of that work. Neil Kirk was the Activities Manager at Bonaly from 2016 until August 2020.

21. The Activities Manager was regarded by the Respondent as a permanent employee. The Activities Manager reported to the Centre Manager (being John Bruce from July 2018 to July 2019 and then Mark Campbell until 31 August 2020). There were 5 roles at Bonaly which the Respondent regarded as permanent employees: the Centre Manager; the Site Manager; the Activities Manager; and two administration roles, who worked in the office.

22. The Activities Manager had an approved list of around 15 instructors who had been deemed competent to undertake some of the work at Bonaly ('the approved instructors'). Within that list of approve instructors there was a core of around 5 instructors (including the Claimant) who were allocated the majority of the work assignments ('the core instructors'). The Claimant was regarded by the Respondent as a preferred instructor and was regularly

offered assignments because of the breadth and standard of her instruction and because of her availability and reliability.

Allocation of work assignments

23. Following an enquiry from a prospective customer the Activities Manager would make an initial enquiry with some of the approved instructors to determine their availability to undertake that assignment of work.

24. Following booking by the customer the Activities Manager would then make an offer of work to the instructors based upon their availability and the needs of the customer. There was no obligation on the Respondent to make that offer to an instructor. If offered there was no obligation on the Activities Instructor to accept it and there was no formal penalty for declining that offer. However if anyone regularly changed their availability between initial enquiry and offer they would ultimately be considered less reliable and offered less work. The Claimant never changed her availability between her response to the initial enquiry and the offer being made by the Respondent (i.e. she always accepted the offer) other than on 1 or 2 occasions.

25. If the offer of work was accepted it was expected the instructor would undertake that assignment unless the instructor was unwell or there was a domestic emergency. The Activity Instructor Work Hours sheet issued to Claimant noted: “This sheet gives you details of the groups and activities we have booked over the next month that you have agreed to work. The details below show the hours required. These times include set up and take down times. If there are variances to these times please note this on your timesheet and give a reason why.” There was only one occasion during the period at which she worked at Bonaly on which she failed to undertake the agreed work assignment and this occurred on 23 September 2017 because she was unable to attend work that day because of a domestic emergency and she advised the Respondent accordingly.

Personal service

26. The Claimant was expected to undertake the work personally and she did not have any right to provide a substitute activities instructor (whether arranged informally by swapping with an approved instructor or otherwise).

Supervision and training

27. The activities manager would engage in periodic supervision of the instructors by having a 'walk about' of Bonaly centre each day when the activities were being provided. There would be a spot check of the Claimant's instruction; closer supervision was provided of the less experienced instructors.

28. Each year the approved instructors were given around 1 week's training by the Activities Manager on how to instruct each of the activities to ensure that the instructors were competent to give instruction and were delivering that instruction according to the Respondent's health and safety risk assessments and SOPs (standard operating procedures). The training was on both hard and soft skills – the way it must be delivered and also how it should be delivered.

29. The Claimant was and remains qualified to provide instruction in all of the activities which were offered at Bonaly (including archery and high rope work).

30. Whilst there was some informal review of her work by the Activities Manager there was only one formal documented review which was conducted in 2018.

Nature of work, control and integration

31. The Claimant provided instruction in all of the activities offered at Bonaly during the relevant period (including archery, high rope work, axe throwing and bush craft).

32. The instructors (including the Claimant) were required to wear a uniform which was limited to a branded polo shirt supplied by the Respondent.

33. The order and timing of the activities to be undertaken by the instructors was determined by the Activities Manager.

34. The work was undertaken using equipment supplied by the Respondent (with the minor exception of use of her own knife during bushcraft activities). The

Activities Instructors assisted in the maintenance of the supplied equipment under the instruction and supervision of the Activities Manager.

35. The work required to be undertaken in accordance with Risk Assessments Standard Operating Procedures. In order to fulfil customer expectations the work required to be undertaken in the same way by the different instructors although there was some scope for personal expression when delivering the activities particularly with respect to bushcraft.

36. There were staff meetings attended by the Centre Manager; the Site Manager; the Activities Manager; and two administration roles. The Activities Instructors did not attend the staff meetings.

Insurance

37. The Claimant did not require to take out her own liability insurance in respect of the instruction work because her instruction was covered by the Respondent's group insurance.

Timing and duration of work

38. The activities instruction was undertaken outdoors and the work was accordingly seasonal. Around 90% of the work was undertaken in the period starting with the Easter holidays and ending with the October holidays (the high season). During the high season the Claimant undertook some paid work each week (Sunday to Saturday) for the Respondent. The busiest time was the school and scout residentials in May and June when the Claimant would regularly work 46 to 48 hours a fortnight for the Respondent. Only about 10-20 days instruction work arose in the low season. The Claimant undertook very little work for the Respondent during the low season because there was very little work available.

39. In tax year 2017 (30 April to 31 March) she undertook some paid work for the Respondent each week (Sunday to Saturday) during the period April to October 2017.

40. In tax year 2018 (30 April 2018 to 31 March 2019) the Claimant undertook 1234 hours of paid work for the Respondent (including rolled up holidays of

12.07%). The substantial majority of that work was undertaken during the period April to October 2018 when she undertook some paid work each week (Sunday to Saturday) for the Respondent. The Claimant undertook little work for the Respondent in the low season and undertook no work in January 2018.

41. In tax year 2019 the Claimant undertook 1442 hours of paid work for the Respondent (including rolled up holidays of 12.07%). The substantial majority of that work was undertaken during the period April to October 2019 when she undertook some paid work each week (Sunday to Saturday) for the Respondent. The Claimant undertook little work for the Respondent in the low season and undertook no work in January 2019.

42. In tax year 2020 the Claimant was put on furlough from 1 April 2020 to 31 August 2020 based upon 1102 hours of work. From 1 September 2020 onwards, the Claimant did not undertake and was not paid for any work because there was no work to be offered to her.

Other work

43. The Claimant was not prohibited by the Respondent from undertaking other paid work. The Claimant undertook some work as an activities instructor for other organisations when the Respondent was unable to offer her any work. This work constituted about 10% of her annual income. This work was undertaken by her on a self-employed basis and she issued invoices to those other organisations. The Claimant had created a limited company for that purpose in around 2018.

Lead instructor

44. The Respondent and the Claimant agreed that the Claimant would be given a temporary role of Lead Instructor within the activities team for the period 11 February to 18 August 2019 to cover the majority of the duties of the Activities Manager during his parental leave. She was guaranteed normal working hours during the duration of the contract. (The Claimant had previously provided such cover in respect of prior parental leave for 4 weeks in August 2018.)

45. The Claimant was issued with written terms which stated that the general terms "would be the same as for your existing employment as an activities instructor".

Furlough

46. The 5 core instructors (including the Claimant) were put on furlough by the Respondents (the other instructors on the approved list were not). The Claimant was accordingly on furlough from 1 April 2020 to 31 August 2020 during which time she was not allocated any assignments. The staff which the Respondent regarded as employees received a top up payment of 20%. There was a rumour circulating that the core instructors would also receive this top up payment but this never materialised.

47. The letter advising the Claimant of furlough made a number of references to her "employment status" and her "contract of employment". Those statements were made by the Respondent in error because they used a standard template – they did not regard the Claimant as a permanent employee.

Redundancy situation

48. In August 2020 the Respondent was of the opinion that Bonaly operating as an activities centre was not financially viable and that they needed to consider a new way of operating which would allow it to make a profit or at least break even. In September 2020 the respondent proposed a new operating model which entailed increasing its use as a residential centre by Scouts and other uniformed organisations, decreasing its provision of outdoor activities, and in respect of those activities, making recourse to unpaid volunteers rather than paid instructors. It was proposed that the volunteer teams would be created in 2021 and that the new model would be fully operational by 2022. (Implementation of the plan in fact took longer than proposed and the plan is still not fully operational).

49. The five roles which the Respondent considered to be their permanent employees were placed at risk of redundancy. Two of those employees were appointed to new roles of Warden and Deputy Warden. The Activities

Manager was made redundant. A volunteer Activities Team Leader was to be appointed.

50. On 10 December 2020 the Claimant was advised by the Respondent that it was unlikely that they would require to engage paid instructors in the foreseeable future. The other activities instructors were advised in the same terms. The Claimant anticipated that the Respondent would need paid instructors to train the volunteers.

51. In September 2020 the Claimant advised the Respondent that she considered herself to be an employee and therefore ought to be included with the redundancy consultation, selection and redeployment process. The Claimant was advised by the Respondent that she was not an employee and it was noted that on her Facebook page created in September 2020 that she described herself as "Outdoor Instructor, Bonaly Outdoor Centre – Freelance". The Claimant and the Respondent engaged in a protracted written dispute regarding her status which culminated in her raising a grievance on 21 December 2021. In January 2021 the respondent issued the claimant with an outcome to her grievance.

52. On 20 July 2021 claimant terminated her contract with the respondent.

53. The Claimant was not allocated any assignments by the Respondent in the period from 1 September 2020 until the termination of her contract 20 July 2021. The Claimant did not receive any pay from the Respondents during that period.

Observations on the evidence

54. The standard of proof is on balance of probabilities, which means that if the Tribunal considers, on the evidence, that the occurrence of an event, etc was more likely than not, then the Tribunal is satisfied that the event did occur.

55. There was little if any dispute on the evidence. The witnesses were wholly credible and reliable and gave evidence which was consistent both with each other and the documentary evidence.

The law

56. There Section 230 of the Employment Rights Act 1996 provides: "(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

57. An employment contract is a contract to give service rather than to provide services. The classic description of a contract of employment found in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD* provides for a multifactorial approach. However there requires to be an irreducible minimum entailing: mutuality of obligation; personal performance; and sufficient control (*Nethermere (St Neots) Ltd v Gardiner and anor 1984 ICR 612, CA and endorsed by Carmichael and anor v National Power plc 1999 ICR 1226, HL*). Furthermore all other factors must be consistent with it being a contract of employment rather than a contract for services (*Ready Mixed*).

58. A contract of employment does not require to be in writing. In considering any contractual documentation the issue is whether it represents the true intentions of the parties gleaned from all the circumstances given the likely inequality of their bargaining power (*Autoclenz Ltd v Belcher [2011] UKSC 41*). Given the need for a purposive interpretation in the context of assertion of a statutory right, the focus is on the reality of the situation (*Uber BV v Aslam [2021] UKSC 5)*.

Mutuality of obligation

59. Any contract to perform work requires mutuality of obligation to undertake work for remuneration. During the subsistence of that contract the first strand of the irreducible minimum is satisfied regardless of its duration and notwithstanding that it is terminable at will (*Cotswold Developments Construction Ltd v Williams [2006] IRLR 181, EAT and Prater v Cornwall County Council [2006] 2 All ER 1013 CA*).

60. Where there is a series of short term engagements it will be necessary to consider whether the second and third strands of the irreducible minimum are satisfied *during* each engagement and/or whether there is a global/ over-arching/ umbrella contract such that the first, second and third strands are satisfied *between* engagements (*Nethermere (St Neots) v Gardiner [1984] ICR 612, 623, approved by Lord Irvine of Lairg in Carmichael v National Power plc [1999] ICR 1226, 1230*).

Personal Service

61. The existence of a contract of employment contract requires personal performance of the work and any limited right to provide a substitute, properly construed, must be such that it is not inconsistent with that requirement (*Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51*, *[2017] IRLR 323*).

Control

62. A contract of employment depends upon their being sufficient control of when and how to do the work which is commensurate with the nature of the work.

63. Control may mean ultimate control rather than day to day control especially where skilled or senior employees may be given substantial autonomy (*White v Troutbeck SA [2013] IRLR 949, CA).*

Other factors

64. Other factors affecting the relationship must be consistent with it being a contract of employment rather than a contract for services. Other relevant factors include but are not limited to: the nature of remuneration; the degree of risk borne; the extent of organisational integration; and the categorisation by the parties. A check list approach should not be adopted in relation to these other factors and the tribunal must stand back from the accumulated detail and consider the overall picture.

Claimant's submissions

65. The claimant's submissions were in summary as follows –

a. In the event of a dispute her evidence and that of her witness should be preferred because the Respondent's witnesses were not familiar with her role.

b. She was required to undertake the agreed work. She undertook the work personally. There was sufficient control of her work by the Activities Manager. She undertook the substantial majority of her work for the Respondent. The contract was a sham because it did not reflect the reality of the work. She was therefore in an employment relationship with them.

Respondent's submissions

66. The respondent's oral submissions were in summary as follows –

a. In the event of a dispute the evidence of the Respondent witnesses should be preferred

b. The claimant was a limb(b) worker and not an employee from 2015 until she terminated the engagement on 20 July 2021

c. The issue of employment status is a question of fact and law (*Carmichael*).

d. Mutuality of obligation, personal service and sufficient control are the irreducible minimum for employment status (*Nethermere*).

e. A lack of obligation to provide work and to accept work would result in the absence of that irreducible minimum of mutuality of obligation (*Carmichael*)

f. Even if the irreducible minimum is established there is no prima facie presumption of employment status and the other facts must also be assessed (*Revenue and Customers Commissioners v Atholl House Productions Ltd 2022 EWCA Civ 501*).

g. Worker status is an issue of statutory rather than contractual interpretation and the purpose of the legislation (to protect the subordinate and dependent) should be kept in mind (*Uber*).

h. The Tribunal is entitled to consider whether the express terms of the contract reflect the true agreement between the parties having regarding to the overall factual matrix (*Autoclenz; Carmichael*).

i. The Instructor Agreement signed 2018 states clearly and explicitly that it is not an employment contract; does not confer employment rights; and supersedes any previous agreement; the Respondent is under no obligation to offer the claimant work and the claimant is under no obligation to accept. The claimant did not raise any complaints about this agreement which was not a sham and reflected their true agreement.

j. The definition of employee is a high pass mark (*Byrne Brothers (Formwork) Ltd v Baird and others [2002] ICR 667*)

Personal service

k. The irreducible minimum of personal service is accepted

Control

l. There was insufficient control to meet the irreducible minimum. When considering control it is necessary to consider the cumulative effect of the agreement and the surrounding circumstances (*Troutbeck*). The degree of control was reflective of the nature of the health and safety risk to children. The Claimant had discretion within these boundaries about how she delivered and taught the activities and there was no continual supervision. There was limited control over how many hours she worked.

Mutuality of obligation

m. There was insufficient mutuality of obligation to meet the irreducible minimum. To meet that there requires to be some measure of commitment on both sides (*Thomson v Fife Council UKEAT/0064/04*). In the absence of any obligation to offer or accept work (and no penalty for declining) “there was insufficient mutuality of obligation in this case for the contract to be a Contract of Employment” (*Coomber v South*

East Scotland Regional Scout Council 2021 (unreported), ET in respect of a complaint brought by a fellow activities instructor also working for the Respondent). The Respondent was under no obligation to offer work to the Claimant. The Claimant was under no obligation to accept offers of work. The Claimant was not prevented from working for others which she did. This approach is common in the outdoor activities sector. The Claimant advised periods of unavailability in advance of offers being made. The Claimant did on one occasion cancel a shift after acceptance of an offer. The Claimant had no expectation of any offers in the period between 1 August 2020 and her termination of the engagement on 20 July 2021.

n. Once an offer had been accepted she could cancel any work accepted without penalty.

o. Undertaking an abundance of work over a number of years is not sufficient for mutuality of obligation (*Clark V. Oxfordshire Health Authority [1997] Ewca Civ 3035*)

p. Where the contract is not a sham designed to create a false impression of casual work and where the terms are unambiguous that there is no mutuality of obligation in respect of offer or acceptance then a contract of employment cannot be implied (*Hafal Limited v Land-Angell UKEAT/0107/17*).

q. Mutuality of obligation requires satisfied to a high standard and a sufficient degree (*Secretary of State for Justice v Windle [2016] EWCA Civ 459*)

<u>Other factors</u>

r. All relevant factors should be judged objectively having regard to the contract and the surrounding circumstances (*Atholl*). Engagement of activities instructors as casual workers is industry custom and practice. The activities instructors did not attend weekly staff meetings, were not offered yearly performance reviews and were not provided with copies of the staff handbook. The uniform was for ease of identification only.

Recourse to the grievance procedure was in line with best practice. She went periods of time without carrying out any work for the Respondent e.g. in January 2018 and 2019. She carried out work for other employers throughout her engagement. Use of the term "employee" in the Lead Instructor Agreement and Furlough letters were administrative errors. These words are not decisive if they do not reflect the reality of the situation (*Young & Woods Ltd v West 1980 WL 149580*). The claimant was afforded rolled up holiday pay unlike the staff.

s. Where the contract is not a sham designed to create a false impression of casual work and the terms are unambiguous that there is no mutuality of obligation in respect of offer or acceptance then a contract of employment cannot be implied (*Hafal Limited v Land-Angell UKEAT/0107/17*).

Discussion and decision

67. The burden of proving employment status is upon the Claimant.

68. The Respondent submits that a "high standard"/ a "high pass mark" is required to satisfy the tests of employment status. That is somewhat misleading; what is required is a higher standard/ pass mark than that required for worker status, it being a lower pass mark (*Bryne*).

69. The first element of the *Ready Mixed* test for employment status requires mutuality of obligation. The Respondent was not obliged to offer any assignments and the Claimant was not obliged to accept any assignments offered. The contractual documentation reflected that. There was accordingly no mutuality of obligation between assignments. The claimant was not therefore retained under a global/ over-arching/ umbrella contract of employment during periods when she was not working.

70. However, "the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement" (per *Windle* para 14 citing with approval

paragraphs 10,11 and 12 of Quashie v Stringfellows Restaurant Ltd [2013] IRLR 99). As described in *Quashie* para 12:

> *"there are some circumstances where a worker works intermittently for the employer, perhaps as and when work is available. There is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration, as a number of authorities have confirmed: see the decisions of the Court of Appeal in Meechan v Secretary of State for Employment [1997] IRLR 353 and Cornwall County Council v Prater [2006] IRLR 362".*

71. Once an assignment had been offered and accepted the Claimant was obliged to perform that work and the Respondent was obliged to pay for that work (with defined exceptions). The Respondent's submission that she could cancel any work accepted without penalty is not accepted. The contractual documentation provided that: there is no mutuality of obligation between the parties "when you are not performing work"; if she accepted an offer of work "you are required to complete it to the organisation's satisfaction"; "you must inform [the respondent] immediately if you will be unable to complete it for any reason"; "[The Respondent] reserves the right to terminate an assignment at any time for operational reasons"; there was an entire agreement clause. That did not wholly reflect the reality of the situation. The mutual expectation of the parties in the circumstances was that once the Claimant accepted an offer of work she would perform it and be paid for it (unless it was cancelled either by the Respondent more than 14 days in advance or by the Claimant because she was unable to perform the work e.g. because she was unwell). Accordingly, when the Claimant was performing the work during an assignment there was mutually of obligation between the parties. As recognised in *Quashie* para 10, "Every bilateral contract requires mutual obligations".

72. The second element of the *Ready Mixed* test for employment status requires personal service. As accepted by the Respondent, the Claimant was required to perform that work personally.

73. The third element of the *Ready Mix* test for employment status depends upon their being sufficient control of when and how to do the work which is commensurate with the nature of the work. The timing, duration and manner of the instruction work carried out by the Claimant was controlled by the Respondent. The Respondent supplied the equipment and a limited uniform. The Respondent submits that this control could be explained in part by health and safety considerations. However having a good reason for exercising control does not change the fact and the extent of the control being exercised.

74. The fact that the irreducible minimum of mutuality, performance and control are met, is not of itself sufficient for a finding of an employment status. The final element of the Ready Mix test for employment status requires all other factors to be consistent with it being a contract of employment rather than a contract for services.

75. According to *Quashie* para 12, "*the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee."* Further at para 23 of *Windle*, *"it does not follow that the absence of mutuality of obligation outside that period may not influence, or shed light on, the character of the relationship within it. It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense. Of course it will not always do so."*

76. The pattern of the Claimant's work was not in reality casual or intermittent. During the high season (Easter holidays to October holidays inclusive) the Claimant performed some work each week in 2017, 2018 and 2019. That pattern was interrupted by Covid during which time she was put on paid furlough. Her pattern of work did not of itself justify an inference that she was engaged as an independent subcontractor. The fact that she was engaged

intermittently did not in this case undermine the degree of control exercised when she was working.

77. As regards other factors: the Respondent provided the Claimant with annual training on the instruction work; the Claimant undertook some work each week for the Respondent during the high season; the claimant undertook very little work for the Respondent during the low season because there was very little work available; the Claimant undertook limited work for other organisations; the Respondent controlled the timing, duration and manner of the instruction work; the Respondent supplied the equipment and a limited uniform; the Respondent undertook daily spot check supervision of her work; the Claimant was paid an hourly rate for her work plus rolled up holiday pay; the Respondent bore the risk if the customer did not pay; there was limited integration with the other staff who worked in the office; the Respondent's grievance policy and procedure were applied to the Claimant. To the extent that the contractual documentation sought to assert that during (as opposed to between) engagements she was not an employee, it did not reflect the reality of the situation.

78. Considering the overall picture formed by the accumulated detail it is apparent that the Claimant worked under a contract of employment during assignments and therefore had the status of an employee when she was working.

79. Accordingly, the Claimant worked under a contract of employment when she was engaged to do work but was not retained under an umbrella or global contract of employment in respect of periods arising between those engagements. It therefore falls to be determined whether the claimant had 2 years continuous employment as at 20 July 2021 having regard in particular to the statutory provisions that the issue of continuous employment is determined week by week (a week ending with a Saturday) and that any weeks in which an employee is absent from work on account of a temporary cessation of work count towards the period of employment. If this issue is not conceded by the Claimant and/or the Respondent having regard to the facts already found it will require to be determined at a further Preliminary Hearing.

Employment Judge: Michelle Sutherland
Date of Judgment: 22 September 2022
Entered in register: 23 September 2022
and copied to parties