THE INDUSTRIAL TRIBUNALS

CASE REF: 17410/18

CLAIMANT: **Jonathan Caren**

RESPONDENT: **Irish Hockey Company Ltd by Guarantee**

DECISION

The unanimous decision of the tribunal is that the claim of unfair dismissal is dismissed. The tribunal does not have territorial jurisdiction to hear the claim. Even if it did, the claimant had been a self-employed contractor rather than an employee at the relevant time and therefore could not bring a claim of unfair dismissal under the Employment Rights (NI) Order 1996.

CONSTITUTION OF TRIBUNAL

Vice President: **Mr N Kelly**

Members: **Mrs M O'Kane**
Mr I Atcheson

APPEARANCES:

The claimant was represented by Mr Sean Doherty, Barrister-at-Law, instructed by Millar McCall Wylie Solicitors.

The respondent was represented by Ms Louise Maguire, Barrister-at-Law, instructed by Murphy O'Rawe Solicitors.

BACKGROUND

1. The claimant is a sports coach.

2. The respondent organises the game of hockey in Ireland, including the national teams.

3. The claimant was engaged as a coach by the respondent from 2010. That arrangement came to an end in 2018.

4. The claimant alleges that he was unfairly dismissed for the purposes of the Employment Rights (Northern Ireland) Order 1996 (the Order).

5. The claimant argues that at the relevant times he had been an employee for the purposes of the Order and that he had been automatically, procedurally and unfairly dismissed by the respondent.

6. The respondent argues that the tribunal does not have territorial jurisdiction to determine this matter. It further argues that the claimant, at the relevant times, had been a self-employed contractor rather than an employee for the purposes of the Order. If the tribunal has territorial jurisdiction and if the claimant had been an employee for the purposes of the Order, the respondent argues that he had not been unfairly dismissed, whether automatically or otherwise.

RELEVANT LAW

7. Article 3 of the Order provides:-

> *"3(1) In this Order, "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 Order "contract of employment" means a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing."*

Article 126(1) of the Order provides:

> *"(1) An employee has the right not to be unfairly dismissed by his employer."*

Therefore, only an employee as defined by the Order can pursue an unfair dismissal claim under the Order.

8. In ***Windle v Secretary of State for Justice [2017] 3 All ER 568***, the Court of Appeal (GB) considered the status of interpreters who worked for the Courts and Tribunals Service. The interpreters were engaged frequently but on a case-by-case basis. As part of its consideration of Section 83(2)(a) of the Equality Act 2010, it concluded:-

> *"(8) - The first – "a contract of employment" – means a contract of service."*

9. There is no easy definition of an "*employee*", a "*contract of employment*", or a "*contract of service*". The correct approach is to balance a range of factors and to reach a common sense decision on the basis of those factors.

10. An early definition appeared in ***Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2 QB 497:-***

> *"A contract of service exists if these three conditions are fulfilled.*
>
> *(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.*
>
> *(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.*

(iii) The other provisions of the contract are consistent with its being a contract of service -".

11. One of the factors to be taken into account in deciding whether a contract is a contract of employment (or of service) is whether the individuals concerned ie both parties to the contract, regarded the claimant's position as being that of a self-employed worker. In the present case, the claimant had accepted self-employed status for HMRC purposes. He had operated on that basis for some 8 years in respect of the respondent. That had been to his financial benefit. That is an indication of self-employed status, but no more than an indication. It is commonly recognised that in many areas of employment, that status is used for administrative convenience or for financial benefit to either or both parties to the contract and that it does not necessarily provide a definitive answer in relation to the correct status of an individual. In ***Autoclenz Limited v Belcher [2011] IRLR 820***, the claimants had been categorised for some considerable time as self-employed workers and that status had been recognised by the HMRC. That had been to the financial advantage of the claimants and their employer. However the Court of Appeal and the Supreme Court both recognised that a tribunal should take an objective view in relation to status. Smith LJ stated that a person should not be estopped from contending that he was an employee "*merely because he has been content to accept self-employed status for some years*." That does not mean that repeated declarations of self-employed status should be disregarded, whatever the circumstances. It means simply that it is, depending on the circumstances of the case, not necessarily determinative. The ***Autoclenz*** decision is not on all fours with the present case. In ***Autoclenz*** the car valeters were operating for one organisation in an employment setting. In the present case the claimant was, latterly, operating two businesses; one in the Republic and one in Northern Ireland, for a variety of clients including the respondent. The claimant had also had the benefit of independent professional advice from an accountant.

12. If the claimant can provide another worker (or substitute) to carry out the relevant services for the respondent, that is an indicator that the claimant is a self-employed contractor. Conversely, if substitution is not permitted, that can be an indicator that the claimant is an employee. There will however, be many cases where the nature of the services provided for the respondent means that substitution is not a practical possibility, and therefore where this particular factor has little weight. The present case is one of those cases.

13. Another factor to be considered when determining the employment status of an individual has been described as "mutuality of obligation" ie an obligation on the employer to provide work and an obligation on the employee to do that work.

    In the present case, the claimant provided relatively regular services to the respondent over a significant period to time. There had been, latterly, a regular flat rate monthly payment which strongly suggests that work had been offered on a regular and settled basis and that the claimant had been expected to perform that work. That is one factor which is more consistent with employment rather than self-employment.

14. In ***Cotswold Developments Construction Limited v Williams [2006] IRLR 181***, the EAT stated that "employment" tends to need mutual obligations, whereas the

extended "worker" definition tends to concentrate on the element of personal service by the individual and not on the obligation of the employer to provide work. It suggested a four step test;

"(i) was there one contract, or a succession of shorter ones?

(ii) If one contract, did the claimant agree to undertake some minimum (or at least, a reasonable) amount of work for the company in return for pay?

(iii) If so, was there such control as to make it a contract of employment?

(iv) If there was insufficient control (or some other factor negativing employment) was the claimant nevertheless obliged to do some minimum (or reasonable) amount of work personally, this qualifying him as a worker?"

15. As indicated in ***Cotswold***, another factor to be considered when determining the correct employment status for an individual is described as the "control test". In general, an employee does whatever his employer tells him to do. However, in many cases, much the same can be said of a self-employed contractor.

16. In ***White v Troutbeck SA [2013] IRLR 949***, the Court of Appeal considered the case of claimants who were caretakers of a farming estate which had been owned by an off-shore company. The owners rarely visited the estate. However they expected it to be maintained and prepared for their occasional visits. The issue was whether the claimants had been employees. At first instance, the Employment Tribunal took the view that there had been an insufficient element of control in that case. The claimants had been left very much to themselves as to how they conducted their duties. The EAT overturned that decision. The EAT held that in modern circumstances, the relevant test had to recognise that many employees had substantial autonomy in how they performed their duties. At paragraph 45 the EAT stated "the question is not by whom day to day control was exercised but with whom and to what extent the ultimate right of control resided." That was upheld by the Court of Appeal (GB).

17. In the present case, the claimant was required to provide coaching services to the respondent. As an assistant coach, he would have had to make decisions on a daily basis. However, as an assistant coach, his work would have been subject to significant and ultimate control by the Head Coach. That is a factor which could apply equally to employees and self-employed contractors who had been engaged to provide coaching services, or indeed any specialist services.

18. Another factor to be taken into account in determining the employment status of an individual is what is known as the "organisational test". In ***Stevenson Jordan and Harrison Limited v MacDonald and Evans [1952] 1 TLR 101***, the Court of Appeal stated;

> *"Under the contract of "employment" a man is employed as part of the business, whereas under a contract for services his work, although done for the business, is not integrated into it but only accessory to it."*

The issue is therefore whether, and to what extent, the claimant had been integrated into the respondent's organisation.

19. Another factor is what is known as the "economic reality" test. That requires an assessment of the opportunities for profit and loss and the degree, if any, to which the worker was required to invest in the job by cash or time or by the provision of tools or equipment, together with the skill required for the work and the permanency of the relationship. In essence, the question is whether the claimant was a small business person, or a person operating a profession, rather than an employee or a worker.

20. The nature of the work undertaken by the claimant was such that some tools and equipment were necessary. Those were provided by the respondent. The claimant was required to invest his time and skill as necessary. He did not invest any money in the respondent organisation and there was no evidence that he had provided equipment or premises. Nevertheless, he was latterly operating two businesses, one in Northern Ireland and one in the Republic, invoicing a range of individuals and bodies, including the respondent.

21. All the above factors have to be taken into account in a balancing exercise to properly determine whether a contract is a contract of employment (or of service), rather than a contract of either a worker in the extended sense or that of a self-employed individual.

22. ***Hall (HM Inspector of Taxes) v Lorimer [1994] IRLR 171*** was, as the name suggests, an income tax case, where the Special Commissioner had determined that an individual had been self-employed rather than an employee. That individual had been a vision mixer for TV productions and had had 580 separate engagements over approximately 800 days. Each engagement had usually been extremely brief ie for a day or two. The longest had been for ten days. Mummery J heard an appeal from the Special Commissioner who had held that the individual had been self-employed for income tax purposes. His decision was affirmed by the Court of Appeal (GB). He stated:-

> *"- This is not a mechanical exercise of running through items on a check-list to see whether they are present in, or absent from a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and making an informed considered qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.*

The process involved painting a picture in each individual case. As Vinelott J said in **Walls v Sinnett [1986] 60 TC 150:**

> *"It is, in my judgement, quite impossible in a field where a very large number of factors have to be weighed, to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are common, what are different and what particular weight is given by another tribunal to common facts. The facts as a whole must be looked at, and what may be compelling in one case in the light of all the facts may not be compelling in the context of another case."*

23. In ***Suhail v Herts Urgent Care (UKEAT/0416/11RN)*** the EAT concluded that the employment tribunal had been entitled to conclude that the claimant had been operating a business on his own account. He had been self-employed rather than either an employee or a worker. The claimant had been a registered general practitioner and had worked as an out-of-hours GP. The respondent had provided those services to the local Primary Care Trust. It had approximately 250 registered GPs on its panel; including the claimant. It used a mixture of "self-employed" and directly employed GPs. The claimant had been engaged as a "self-employed" GP.

24. The EAT concluded that:-

> *"The finding by the Employment Tribunal that the respondent was in business on his own account is fatal to the suggestion that he was either an employee or a worker. This finding seems to me to be crucial and conclusive. The claimant was clearly marketing his services to whichever provider of medical services might wish to provide him with work."*

25. The EAT recognised that certain factors in that case had pointed towards worker or employee status. Other factors had pointed towards self-employed status. The EAT had considered all these factors. In that case those had been a written contract for service, described as such. The EAT concluded that the contract for service had been clear and that it had meant what it said.

Territorial Jurisdiction

26. As with everything else in this case, the situation is complicated by the failure on the part of both parties to provide any contemporaneous or written documentation; in this respect, in relation to the amount of time spent by the claimant in either Northern Ireland or the Republic of Ireland. At most, there was some documentation which referred to some international competitions. That could only deal with a small part of the amount of time spent by the claimant providing services to the respondent and appears to have been grossly overstated by the claimant in his claim form as 30% of the total working time. If that percentage were accurate, the senior men's team and the U21 team would have had to be remarkably successful international teams. No-one appears to have kept any detailed records about when and where coaching services were provided by the claimant; ie whether in Northern Ireland, the Republic, or elsewhere. The tribunal was certainly not referred to any such records. Similarly, the claimant has stated in his claim form that he spent 40% of his time working in Northern Ireland. The nature of that work was primarily *"analysis"* of individual performance using software as appropriate. It seems unlikely that such work, at a location some considerable distance from the respondents' training facilities, could have amounted to 40% of the claimant's working time. There was no documentation which would have supported the claimant's assertion.

27. The Order does not expressly contain any limit on territorial jurisdiction in relation to unfair dismissal. However as Lord Hoffmann in ***Lawson v Serco Limited [2006] IRLR 289*** indicated, the right to pursue a claim for unfair dismissal before an Industrial Tribunal must necessarily have implied territorial limitations. It cannot have world-wide effect, or even effect in the Republic of Ireland.

28. In ***Jeffery v British Council; Green v SIG Trading Limited [2019] IRLR 123,*** the Court of Appeal summarised the legal position as:

> *"2. The question of the territorial reach of British employment legislation has notoriously given rise to problems in recent years and has produced a plethora of reported cases, including one decision of the House of Lords and two of the Supreme Court –* ***Lawson v Serco Ltd [2006] UKHL 3, [2006] ICR 250;*** **Duncombe v Secretary of State for Children, Schools and Families (no. 2)** ***[2011] UKSC 36, [2011] ICR 1312****; and* ***Ravat v Halliburton Manufacturing & Services Ltd*** **[2012] UKSC 1, [2012] ICR 389***. The effect of those decisions has been fairly recently reviewed in this Court in* ***Bates van Winkelhof v Clyde & Co LLP*** **[2012] EWCA Civ 1207, [2013] ICR 883, and** ***Dhunna v CreditSights Ltd*** **[2014] EWCA Civ 1238, [2015] ICR 105***. It will not be necessary in these appeals, and would indeed be likely to be positively unhelpful, to attempt a further comprehensive survey of that well-travelled ground. The position as now established by the case-law can be sufficiently summarised for the purpose of the cases before us as follows:*
>
> *(1) As originally enacted, section 196 of the Employment Rights Act 1996 contained provisions governing the application of the Act to employment outside Great Britain. That section was repealed by the Employment Relations Act 1999. Since then the Act has contained no express provision about the territorial reach of the rights and obligations which it enacts (in the case of unfair dismissal, by section 94 (1) of the Act); nor is there any such provision in the Equality Act 2010.*
>
> *(2) The House of Lords held in* ***Lawson*** *that it was in those circumstances necessary to infer what principles Parliament must have intended should be applied to ascertain the applicability of the Act in the cases where an employee works overseas.*
>
> *(3) In the generality of cases Parliament can be taken to have intended that an expatriate worker – that is, someone who lives and works in a particular foreign country, even if they are British and working for a British employer – will be subject to the employment law of the country where he or she works rather than the law of Great Britain, so that they will not enjoy the protection of the 1996 or 2010 Acts. This is referred to in the subsequent case-law as "the territorial pull of the place of work". (This does not apply to peripatetic workers, to whom it can be inferred that Parliament intended the Act to apply if they are based in Great Britain.)*
>
> *(4) However, there will be exceptional cases where there are factors connecting the employment to Great Britain, and British employment law, which pull sufficiently strongly in the opposite direction to overcome the territorial pull of the place of work and justify the conclusion that Parliament must have*

intended the employment to be governed by British employment legislation. I will refer to the question whether that is so in any given case as "the sufficient connection question".

(5) In ***Lawson*** *Lord Hoffmann, with whose opinion the other members of the Appellate Committee agreed, identified two particular kinds of case (apart from that of the peripatetic worker) where the employee worked abroad but where there might be a sufficient connection with Great Britain to overcome the territorial pull of the place of work, namely (a) where he or she has been posted abroad by a British employer for the purposes of a business conducted in Great Britain (sometimes called "the posted worker exception") and (b) where he or she works in a "*British *enclave" abroad. But the decisions of the Supreme Court in* ***Duncombe*** *and* ***Ravat*** *made it clear that the correct approach was not to treat those as fixed categories of exception, or as the only categories, but simply as examples. In each case what is required is to compare and evaluate the strength of the competing connections with the place of work on the one hand and with Great Britain on the other.*

(6) In the case of a worker who is "truly expatriate", in the sense that he or she both lives and works abroad (as opposed, for example, to a "commuting expatriate", which is what ***Ravat*** *was concerned with), the factors connecting the employment with Great Britain and British employment law will have to be specially strong to overcome the territorial pull of the place of work. There have, however, been such cases, including the case of British employees of government/EU-funded international schools considered in* Duncombe*.*

(7) The same principles have been held by this Court to apply to the territorial reach of the 2010 Act: see ***R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs*** **[2016] EWCA Civ 438, [2016] ICR 975***.*

I emphasise that this is not intended as a comprehensive summary of the effect of the decided cases. I am simply setting the background for the issues that arise in these appeals."

29. Regulation EU 1215/2012 applies in civil matters, including matters concerning individual contracts of employment. Article 21 provides:

"1. An employer domiciled in a Member State may be sued:

(a) In the courts of the Member State in which he is domiciled or

(b) In another Member State

(i) *in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or*

(ii) *if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated."*

30. In relation to a limited company, such as the present respondent. Article 63(1) provides that a limited company is domiciled where it has its

(a) statutory seat (registered office)

(b) central administration or

(c) principal place of business.

In the present case all are located in Dublin.

31. In ***Noguiera v Crewlink Ireland Ltd*** and ***Osacar v Ryanair Designated Activity Company***, the ECJ considered the predecessor to Regulation (EU) 1215/2012 and stated:

> *"The habitual place of work can be defined as "the place where or from which the employee principally discharged his obligations towards his employer". It follws that, in order to determine that place, the national courts should adopt a circumstantial method, namely take into account all the circumstances of the particular case in order to determine the State with which the professional acting his the greatest connection."*

PROCEDURE

32. The claimant lodged his tribunal on 2 November 2018 alleging unfair dismissal and unlawful discrimination on the grounds of race/nationality.

33. The respondent lodged a response on 30 January 2019 denying those claims. In particular, the respondent disputed the territorial jurisdiction of the tribunal and argued that the claimant had not been an employee at the relevant times for the purposes of the Order and that therefore he could not bring a claim of unfair dismissal.

34. A Case Management Discussion was heard on 17 April 2019. Directions were given in relation to the interlocutory process. A further Case Management Discussion was arranged for 31 May 2019 to determine whether or not a Pre-Hearing Review was required in relation to the question of territorial jurisdiction and the question of employment status.

35. At the second Case Management Discussion on 31 May 2019, the parties confirmed that there would be no application for a Pre-Hearing Review in respect of those two legal issues. Further directions were given in relation to the use of the

witness statement procedure and for the substantive hearing which was listed for 14-18 October 2019.

36. Agreed legal and factual issues in relation to both the claim of unfair dismissal and the claim of unlawful discrimination on the grounds of race/nationality were lodged in the tribunal on 7 August 2019.

37. A further Case Management Discussion was held on 3 October 2019. The hearing was postponed to 25-28 November 2019 and the claimant confirmed that the unlawful race discrimination claim was withdrawn. That claim was dismissed on withdrawal.

38. The claim of race discrimination was misconceived from the start. The claimant had stated:

> *"I strongly believe have I have been racially discriminated against on the grounds of my race – as I am the only coach living in Northern Ireland."*

The domestic location of any individual cannot ground a claim of race discrimination. It is surprising that this claim was maintained until shortly before the substantive hearing.

39. At the substantive hearing, the claimant gave evidence on his behalf using the witness statement procedure. He did not call any other witnesses.

40. At the substantive hearing, Mr Jerome Pels, the Chief Executive Officer of the respondent company from January 2017, Mr Adam Grainger, the Performance Director from the last two years, and Ms Catherine McManus, formerly the Accountant for the respondent company, all gave evidence on behalf of the respondent using the witness statement procedure.

41. The evidence was heard on 25, 26 and 27 November 2019. Oral submissions from both parties were heard in the afternoon of 27 November 2019. The tribunal met on 16 December 2019 to consider the evidence and the submissions and to reach a decision. This document is that decision.

42. The agreed legal issues for determination at this hearing were as follows:

> *"**Jurisdiction; Employment Status:***
>
> *1. Was the Claimant an employee under Article 3(1) of the Employment Rights (NI) Order 1996 (ERO 1996)?*
>
> ***Jurisdiction; Territorial:***
> *2. Does the Industrial Tribunal have jurisdiction to hear and adjudicate the Claimant's case, pursuant to article 21 of Regulation (EU) No 1215/2012, in particular:*
>
> *a. Was the Claimant an employee of the Respondent?*
>
> *b. If the Claimant was an employee of the Respondent:*

i. *did he habitually carry out his work in any one country?*

ii. *If the Claimant did carry out his work in any one country where was the last place that he did so?*

iii. *If the Claimant did not carry out his work in any one country where was the Respondent business situated when it employed the Claimant?*

Unfair Dismissal:

3. *If the Claimant was an employee, was he dismissed by the Respondent pursuant to Article 127 of the ERO 1996?*

4. *If the Claimant was an employee, was he unfairly dismissed contrary to Article 126 of the ERO 1996?*

5. *Was the Claimant automatically unfair dismissed contrary to Article 130A(1) of the ERO?*

6. *If the Claimant was automatically unfairly dismissed contrary to Article 130A(1) of the ERO to what award uplift is he entitled, pursuant to Article 17 of the Employment (NI) Order 2003?*

7. *If the Claimant has been unfairly dismissed, has he mitigated his loss?*

Discrimination:

8. *Was the Claimant in the Respondent's employment, pursuant to the meaning set out in article 2 of the Race Relations (NI) Order 1997?*

9. *Did the Respondent subject the Claimant to less favourable treatment on the basis of his race contrary to Article 3 of the Race Relations (NI) Order 1997*

10. *Did a provision, criterion or practice applied by the respondent place the Claimant at a substantial disadvantage in comparison to his co-workers who were not native to Northern Ireland?*

11. *Was the provision, criterion or practice applied objectively justifiable?*

12. *Who is the comparator that the Claimant relies on?*

43. Given the late withdrawal of the claim of unlawful race/nationality discrimination, the legal issues numbered 8-12 are no longer relevant.

RELEVANT FINDINGS OF FACT

44. After hearing the evidence and submissions of both parties and after examining the contemporaneous documentation, the conclusion of this tribunal is that neither party, that is, neither the claimant nor the respondent, had at any stage, before the commencement of this litigation, turned their minds to whether or not the claimant

had been engaged on a self-employed or on an employed basis. It is also the conclusion of this tribunal that neither the claimant nor the respondent had at any stage considered the contractual terms, under which the claimant had been engaged by the respondent, with any degree of formality or with any consideration of the legal issues arising in this case. The situation before the tribunal is one where the claimant had been engaged in a haphazard and amateurish fashion by the respondent and where the parties have only now, and belatedly, turned their attention to the correct legal status of the claimant's relationship with the respondent, once that relationship had broken down. In essence, what the parties ask the tribunal to do is to retrofit the relationship between the claimant and the respondent into one of two legal categories; ie either the category of employee or the category of self-employed contractor, when it is perfectly clear that neither party had given this matter the slightest thought at the time of the initial engagement, or at any other subsequent time before that relationship had come to an end, and where neither party had made any effort to reduce that contractual relationship to writing at any stage. That is regrettable. It has resulted in a significant expenditure of legal costs and of this tribunal's time in a situation where, if the parties had acted with any degree of ordinary competence, clear written contracts would have been agreed and signed. In such circumstances, this dispute could have been avoided, or at least minimised.

45. The claimant is a qualified hockey and sports coach.

46. The respondent organises hockey in Ireland on a 32 county basis. Its registered office and its central administration are both in Dublin. It has no office or place of business in Northern Ireland.

47. The claimant commenced work for the respondent in or around January 2010 as a Strength and Conditioning Coach for those members of the Irish national squad who had been based at that time in Northern Ireland.

48. Although the claimant, in his claim form and in his evidence in chief (his witness statement), stated that he had considered himself to have been an employee of the respondent from that point in time, the claimant suddenly and without warning, changed his position in cross-examination. He made it plain that, in the period between January 2010 October 2012, he had been a self-employed contractor, providing coaching services through his business on an intermittent basis to the respondent. He had provided those services under the direction of Mr Paul Revington who had been the Head Coach at that time. That was a significant and abrupt change in evidence.

49. At that stage, the claimant had operated his business, providing coaching services to a range of clients, including to the respondent, under the trading name "Smart Conditioning". The majority of the services provided by the claimant to the respondent during that period between January 2010 and October 2012 were provided within Northern Ireland. He had been providing specific services to a small group of players who had been resident in Northern Ireland.

50. Apart from that brief period between 2010 and October 2012, when it now appears that both parties accept that the claimant had been a self-employed contractor, utter confusion reigns. No arrangements between the parties were reduced to writing and recorded. No arrangements were set out in any form of written contract. No

contemporaneous correspondence or other documentation set out, or even attempted to set out, the contractual relationship. No-one apparently wrote anything down. The art of writing might as well not have been invented.

51. The confusion continued into the pleadings in this matter. The claimant stated in his ET1 that he had been *"promoted"* to Assistant Coach of the senior men's team in May 2012. It is not clear what the term *"promoted"* means in this context, where it seems clear that the claimant has now accepted in cross-examination that he had been engaged as a self-employed contractor up to October 2012. The claimant also asserted in his ET1 that he had been *"appointed"* Head Coach of the U21 team at an unspecified date in 2013, following *"a series of interviews".*

52. The respondent, in a Notice for Additional Information dated 3 May 2019 asked at paragraph 5:

> *"In relation to the allegation at 7.4 of the ET1 that the claimant was "promoted to Assistant Coach of the Irish senior men's team" please state:*
>
> *(a) how the claimant acquired the alleged promotion, eg whether by application interview etc;*
>
> *(b) the persons who promoted the claimant;*
>
> *(c) the terms of the promotion.*

53. In replies dated 29 May 2019, the claimant replied to this question in the following manner:

> *"(a) The claimant completed an application process and was interviewed for the role of Assistant Coach in the UCD office in 2013 by then CEO Mike Heskin, and board member, John McKee.*
>
> *(b) Mike Heskin, CEO of the respondent.*
>
> *(c) The claimant was never provided with a written contract or terms."*

54. Therefore, despite the claimant in his claim form clearly drawing a distinction between a *"promotion"* in May 2012 (when he now accepts he had been self-employed) to the role of Assistant Coach, to the senior men's team and a *"appointment"* following *"interviews"* to the role of Head Coach to the under 21 team in 2013, he appears in this answer to have confused the latter with the former. It has not been alleged in the claim form, or apparently elsewhere, that there had been any form of interview process in May 2012, in relation to the role of Assistant Coach to the senior men's team. It would, in any event, be problematic since the claimant now accepts that he had been self-employed at that time.

55. Against the background where

(i) the claimant stated in plain terms that he had been *"promoted"* to Assistant Coach to the senior men's team in May 2012 when he had been a self-employed contractor;

(ii) where the claimant had then stated in cross-examination that he had acquired this role in October 2012; and

(iii) where the claimant had stated in Replies that he had been appointed to this role in 2013, the witness statement of the claimant further confuses the issue.

In that statement, the claimant repeats the claim that he had been *"promoted"* to the post of Assistant Coach to the senior men's team in May 2012, at the time when he now accepts he had been a self-employed contractor. He also stated that he had to apply for the post of Assistant Coach to the senior men's team, apparently in 2013 and that he had been appointed to that role and to the post of Head Coach of the U21 team after one interview; not a series of interviews. That was inconsistent, not just with the claimant's assertion in cross-examination that he had been appointed as Assistant Coach to the senior men's team in October 2012, but with the assertion in the ET1 that he had been promoted to that role in May 2012, with several interviews (not one) in 2013 resulting in his appointment as Head Coach of the U21 team (one appointment).

56. The tribunal was not drawn to any correspondence or to any attempt to resolve this apparent confusion. It is difficult enough for this tribunal to work out what the parties intended in this matter, or what the parties had achieved in this matter, when nobody could be bothered to write anything down at the time. That task is not assisted by further significant confusion in the pleadings.

57. The best the tribunal can do in these circumstances is to conclude on the balance of probabilities that the claimant had been appointed as Assistant Coach to the senior men's team in October 2012 and that he had been appointed to the role of Head Coach to the under 21 team on some unspecified date in 2013.

58. In relation to the latter appointment, the claimant alleged in his ET1 that he had been subject to a *"series of interviews"*. No documentary evidence such as invitations to interview, interview notes etc have been provided to the tribunal. It is entirely unclear whether there had been formal interviews or informal discussions; or indeed whether anything of that nature had occurred at all.

59. Throughout the period from 2010 (including the period from 2010 to 2012 during which the claimant now accepts that he had been self-employed) to the conclusion of the contractual arrangement in 2018, the claimant submitted monthly invoices to the Respondent's administration office in Dublin. During that period he had not been on the payroll system, and he did not pay national insurance contributions (or the equivalent deductions in the Republic) as an employee through the respondent. That pattern of invoices had originated from January 2010 and did not change in 2012 when the claimant now states that he became an employee.

60. The claimant did not allege in his witness statement that he had continually or repeatedly sought to have his tax deducted through the PAYE system as an employee. In that witness statement, he had referred to one conversation with Ms McManus in 2015 where he alleges he had raised the issue. Nevertheless, in cross-examination, he alleged that he done so repeatedly with Ms McManus on *"numerous occasions"*.

No contemporaneous emails or other documentation was produced to support this assertion. The tribunal therefore does not accept that that was correct. It is significant that in cross-examination the claimant accepted that he had known that the fact that he had not been on the respondent's payroll was potentially significant. Yet in his witness statement, he did not state that he had raised the issue *"on numerous occasions"* as he alleged in cross-examination. In fact, he suggested that the opposite had been the case. He stated: *"In hindsight, I ought to have been more vocal in demanding my salary be paid through normal payroll."* That statement does not support the claimant's statement in cross-examination that "*It was not from lack of trying or asking"* or that he had raised this issue on *"numerous occasions".*

61. Throughout this period, the claimant had been responsible for payment of income tax as a self-employed person. His tax returns had been completed by him or on his behalf. He had declared himself to be self-employed for tax purposes at all stages during his engagement with the respondent. He had an accountant throughout and had access to professional advice.

62. It is clear that the claimant had repeatedly declared, for tax purposes, that he had not been an employee and that he had been self-employed. When this was put to the claimant in cross-examination he stated that this had been at the direction of Ms McManus, the respondent's accountant.

    However, the claimant then accepted in cross-examination that he had only spoken to Ms McManus about this subject after October 2015. That was after five years of income tax declarations as a self-employed person. The claimant's cross-examination response in which he attempted to fix responsibility for these declarations on Ms McManus was therefore clearly incorrect and self-serving.

    The claimant ultimately accepted that Ms McManus could not have given him the advice, which he stated she had given, in relation to his earlier tax returns between 2010 and 2015. That leaves the question of why that answer had been given by the claimant in cross-examination without qualification.

63. The claimant then stated that Ms McManus had advised him to set up a limited company in the Republic.

    Having heard Ms McManus give evidence, the tribunal was impressed by her testimony which was clear, consistent and credible. Ms McManus is no longer employed by the respondent and has no axe to grind in this matter. She was adamant that she had not at any stage advised the claimant to set up such a limited company. She had not been qualified to do so and she would not have known how to do so. The tribunal accepts her evidence.

64. In the period from 2010 to 2015, the claimant invoiced the respondent from Northern Ireland using his trading name. In 2015 he set up a limited company in the Republic; Coached Plus Ltd. From 2015 he appears to have invoiced the respondent through Coached Plus Ltd. From 2015, other clients in Northern Ireland continued to be invoiced under the trading name *"Smart Conditioning";* other clients in the Republic were invoiced by Coached Plus Ltd.

65. The claimant had provided coaching services for other clients in the period 2010-2018. Those clients included individuals, schools and hockey clubs. They included:

(i) Methodist College Belfast – 2010-2015;

(ii) Harlequins Hockey Club, Belfast – 2010-2015

(iii) Monkstown Hockey Club Dublin – 2013-2016

(iv) Pembroke Hockey Club, Dublin – 2016-2018.

It is clear that the claimant had been operating a business providing coaching services to those clients in the Republic and Northern Ireland.

66. It is clear that the claimant had at no stage asked for permission from the respondent to undertake these activities. The claimant accepted in Replies that he did not receive the consent of the respondent to carry out other business activities. However the claimant alleges and on the balance of probabilities the tribunal concludes that it is correct, that the respondent had been aware of such activities, at least in general terms.

67. When cross-examined about his initial decision to invoice the respondent on a monthly basis and his decision to continue this practice thereafter until the arrangement terminated in 2018, the claimant alleged that he had been told to do so by the first Head Coach, Mr Revington. That is not something which was raised by the claimant in his ET1 or in his witness statement. The claimant's next Head Coach was Mr Meredith and the claimant accepted that Mr Meredith had not told him at any stage to invoice the respondent, on a monthly basis or otherwise.

68. The claimant accepted in cross-examination that if he had considered the respondent had been his employer, he would not have invoiced the respondent in that way.

69. During the period from 2010 to 2018, the claimant was not part of the respondent's sick pay scheme or pension scheme. He did not have a holiday allowance and never asked for or was granted holidays. He did not receive a work email address. He was not on the payroll. The respondent did not maintain a personnel file for the claimant.

70. In the period from 2010 to 2012, the period when the claimant now accepts that he had been a self-employed contractor, the payments were irregular. In or around 2012 he moved on to a more regular payment of €1,000.00 per month. He stated that that was a result of Mr Meredith being appointed as Head Coach of the senior men's team in or around October 2012. The claimant had agreed the sum with Mr Meredith. As usual, the tribunal was not taken to any contemporaneous or other documentation in relation to this matter. The claimant stated that he had suggested the figure of €1,000.00 and that it had been settled between Mr Meredith and Mr Heskin, who had been the CEO at that time.

71. This payment was paid on a monthly basis, even if the claimant had been unable to work on any particular date. However the significance of that is diminished by the

fact that the claimant had only been absent from work for extremely brief periods. Given the level of disorganisation in any event in relation to the operation of the respondent's activities, the fact the payment continued during those brief and intermittent periods does not seem to be a significant factor pointing towards the status of employment rather than the status of self-employed contractor. It is also clear, and the claimant accepts, that he had never been required to self-certify or to provide a doctor's note in respect of any of his extremely short sick absences. The claimant continued to invoice on a monthly basis for the settled fee of €1,000.00 per month, whether there had been any gaps in attendance at work during that month.

72. That payment was increased to a regular monthly payment of €2,083.83 in or around October 2015.

73. The nature of the claimant's activities as Assistant Coach would have been subject to a significant degree of control by the Head Coach. The clue is in the job titles. It was not a case where the claimant would have had untrammelled autonomy to determine the coaching for members of the senior team. He would have had a greater degree of autonomy in relation to members of the under 21 team in his role as Head Coach of that team. The tribunal was not however provided with any evidence of the amount of time the claimant spent working with the U21 team, or the amount of time the claimant spent working with the senior men's team. Working with a large group of people in the senior team and the assistant staff for the senior team would have involved a fair amount of co-ordination and organisation subject to the overall control of the Head Coach.

74. The claimant accepted in cross-examination that when his role changed, according to the claimant, from self-employed contractor to an employee in 2012, that had been related to his acquisition of the post of Assistant Coach to the senior men's team. He stated that this post had involved more training times and more games. However he accepted that no-one had told him at that time that he had been an employee. He had simply *"felt"* he had been an employee.

75. When pressed on why he felt that he had become an employee at this point, the claimant maintained that the number of games had increased and that he had been expected to do more work. He had therefore felt, apparently on that basis alone, that he had been an employee. That answer does not make any sense. The same variation in amount of work could apply equally to a self-employed contractor as it could apply to an employee. If a self-employed contractor is asked to do more work, or even more regular work, the increase in the amount of work, or in the regularity of that work, does not make that self-employed contractor an employee. The claimant alleged in cross-examination that he had worked for *"40 plus hours"* per week. That was specifically put forward by the claimant in cross-examination as his reason for *"feeling like an employee"*. However there was no mention in his ET1 or in his witness statement of working *"40 plus hours"* per week and no documentation to support that claim.

76. Mr Meredith left as Head Coach and Mr Fullerton was appointed. Again there was no discussion or documentation of the claimant's employment status at that point or during the changeover of Head Coaches. The claimant in cross-examination maintained again that he had felt that he had been an employee at that time, because of the amount of work that he had been doing.

77. The claimant also alleged that Mr Michael McKinnon, the other assistant coach to the senior men's team in or around 2012 had been an employee with an employment contract. That was incorrect and seems to have been a careless assertion on the claimant's part. He made similar assertions in relation to two other Assistant Coaches to the senior men's team; Jager and Bessel. Those assertions were also incorrect.

78. The claimant accepted in cross-examination that all the assistant coaches in relation to the senior men's team had been self-employed contractors rather than employees (despite his earlier assertions). The claimant's sought to argue that the position had been different in relation to the women's team. Those assistant coaches had been employees. However that distinction is neither here nor there in determining the contractual status of the claimant. There had been no claim of sex discrimination.

79. The claimant had travelled up and down from Northern Ireland between October 2015 and 2017. He had worked in a shared office space in Dublin. That office space would have been used by employees, contractors and volunteers. It also seems clear that there had been no fixed office hours and work had varied in accordance with the demands from time to time on the team or teams and their participation in any particular competition. The claimant accepted that he could have worked from anywhere and that he did in fact work from time to time at home. He had not been required to work from any fixed or particular office space. There was no documentation or corroborative evidence showing, in even general terms, the amount of time the claimant spent in that shared office space.

80. Mr Pels was appointed as Chief Executive Officer in 2017. He did not interview or meet formally with the claimant because the claimant had not been identified by the respondent as an employee. The claimant had not been on the payroll and there had been no personnel file.

81. The claimant states that from time to time he had been given a uniform and clothing with Irish Hockey logos. However it would appear that such clothing was given to everyone who had been part of the team or the backroom staff for that team. That had included volunteers and self-employed contractors.

82. In 2017/2018, the claimant decided that he wanted more money from the respondent for the services that he provided. That appears to have been caused by the decision of one of the claimant's other clients to terminate their relationship because of the amount of time the claimant had been spending with the respondent. The claimant had decided that he wanted to work exclusively for the respondent and, in so doing, to receive the same amount of income from the respondent that he had previously received in aggregate from the respondent and from other clients. The claimant sent an email in 2017 asking for €55,000 per annum. He did not specifically seek any additional payment in respect of his role for the under 21 team. He stated in cross-examination that he had assumed that it had all been part of one role. That is difficult to comprehend since it appears to have been two separate appointments and two separate roles, one as assistant coach and one as head coach. He had drawn a clear distinction between the two roles in his ET1.

83. The respondent asserts that the claimant's role in relation to the under 21 team had been as a volunteer. The monthly invoices submitted by the claimant during 2010 to 2018 did not mention the U21 team or services provided in support of that team.

84. The claimant met Mr Grainger on 3 August 2018. The respondent alleges that the claimant was offered €10,000 in relation to the under 21 team and a daily amount of €200.00 for work in relation to the senior team. The claimant alleges that that is incorrect and he was offered only €10,000 in relation to the under 21 team. To the extent that it matters, the tribunal concludes on the balance of probabilities that the respondent did offer €10,000 in relation to the U21 team and a daily amount of €200.00 for the senior team. There was no evidence that another Assistant Coach to the senior team was being appointed at that stage and the claimant's services would still have been required by the respondent.

85. The claimant applied for his current post in Holywood Golf Club on 22 July 2019 and was appointed at a salary of £45,000.00. He applied for no other roles before that point. There had been no applications for jobs between 3 August 2018 and July 2019. He had not sent a CV to other employers. When challenged he stated that he had thought about it, but the thought of sitting behind a desk *"did not appeal to me"*.

DECISION

Credibility

86. The tribunal has already expressed its annoyance at having to retrofit the terms of the engagement between the claimant and the respondent into one of two entirely separate legal categories, when neither the claimant nor the respondent had ever attempt to address, much less to record, the issue contemporaneously, or at any stage until the relationship had broken down. The tribunal has therefore been required to assess the respective ex-post facto rationalisations energetically put forward by each party and on behalf of each party in oral evidence and submissions. It would have been of some assistance if the issue of credibility in this case had clearly pointed the tribunal towards one side rather than to the other. Unfortunately the reality is that the tribunal was not impressed by the credibility of any witness except Ms McManus, whose evidence was clear consistent and entirely credible. She is no longer employed by the respondent and gave her evidence in a careful and neutral way. That cannot be said of any other witness.

87. The claimant specifically stated in his witness statement that he had started work for the respondent in January 2010. He had stated clearly, and without any form of qualification, that:

> *"When I began working, I considered myself an employee".*

He therefore, in a carefully prepared witness statement, which was to take the place of his evidence in chief, had stated that he had regarded himself as an employee from January 2010. He had sworn that that statement had been correct and that he adopted it as his evidence.

88. However, almost immediately in his cross-examination, he reversed his position and stated, without any particular pressure being applied to him, that he had in fact been

a self-employed contractor between January 2010 and 2012. He stated that his employment status had changed in October 2012 when he was appointed as Head Coach by Mr Meredith. He also seemed unsure of the precise date on which his status had changed, speculating whether it had been May 2012, before settling on October 2012.

89. That abrupt change in his evidence seemed to catch everybody in the tribunal by surprise and casts significant doubt upon the claimant's general credibility when giving evidence. He had clearly carefully prepared his witness statement and had sworn to his witness statement as correct only a few minutes before changing his position.

90. The claimant also stated, when he was challenged in cross-examination about the respondent not being responsible for the payment of his income tax or national insurance contributions that it had *"not been for want of him trying and asking to be added to the payroll".* That is an important piece of evidence which, for some reason, the claimant had not included in his witness statement. If it had occurred, the claimant would have included it in his witness statement. Furthermore, Ms McManus, the accountant, to whom the claimant claimed to have made the request on several occasions, was completely clear that no such request had been made. The tribunal was impressed by her evidence and accepts that evidence as correct. In any event, if, as the claimant now alleges there had been repeated requests from him to be included on the payroll as an employee, that evidence would not only have been included in his witness statement; there would have been contemporaneous documentation, emails or letters or meeting notes, to substantiate those requests. There was none.

91. The claimant also asserted that various other individuals who had worked as Assistant Coaches had been engaged as employees when the claimant accepted in cross-examination that they had not been. The fact that those assertions were made without evidence and were so readily dropped, again detracts from the claimant's credibility.

92. The claimant asserted that he had declared himself as self-employed for tax purposes on the basis of conversations that he had with Ms McManus. On further cross-examination he accepted that he had done so for some years before Ms McManus had ever been appointed. That again reflects badly on the claimant's credibility.

93. In respect of Mr Pels and Mr Grainger, the tribunal was unimpressed at their reluctance to accept that the two relevant coaches for the female team, Ms Logue and Mr Stewart, had been employees. That had in any event, not been a particularly crucial factor in the determination of the claimant's own employment status. There is nothing to prevent an employer engaging individuals, who do similar, or even identical work, in different ways. Nevertheless both Mr Pels and Mr Grainger were reluctant to accept that both those individuals had been employees. They then sought to draw a particular distinction in any event between the work of Assistant Coach to the female team and that of Assistant Coach to the male team ie that for some reason work in relation to the female team had been more intensive. That had not been a distinction which had been apparent at the time to Ms McManus who had seen and who had dealt with every payment in respect of those teams, which would have meant that she would have seen and had

knowledge of their respective payments and commitments in respect of coaching between the male and female teams. None of that reflected well on their credibility. Throughout that cross-examination, they seemed more anxious to support the respondent's position, or rather the respondent's ex-post facto rationalisation of the position, than to address the questions which had been put to them, correctly and openly. Their performance in cross-examination was best described as cautious and combative.

DECISION

Territorial Jurisdiction

94. The jurisdiction of the Industrial Tribunal in relation to a claim of unfair dismissal depends on their being a *"sufficient connection"* with Northern Ireland or a *"territorial pull"* towards Northern Ireland. Regulation EU 1215/2012 formalises that position.

95. The respondent was a limited company incorporated in the Republic. Its registered office was 6 Harcourt Street in Dublin. Its main administrative office (and there was no evidence of any other office) was in UCD Dublin. The claimant had invoiced the respondent on a monthly basis throughout the period from 2010 to 2018 at that address in Dublin. When shared office facilities had been provided to the claimant, amongst others, those facilities had been provided in Dublin.

96. The senior team and the Under 21 team had been based in Dublin; nowhere else. According to the evidence, training facilities were also provided in Dublin and nowhere else. Meetings, when they were necessary, were conducted in Dublin. In reality, this had been a 32 county operation, based in Dublin.

97. The claimant had done some analysis work at his home address using the respondent's computer and software. That analysis work had been in relation to training carried out in Dublin. The claimant alleged that this had taken up 30% of his working time. That proportion had been increased to 40% by the time of the final submissions. In any event, either figure seems grossly excessive. There was a dearth of evidence in this respect. However downloading data and applying software seems unlikely to have taken up either 30% or 40% of the claimant's working time. As indicated, no documentary or corroborative evidence was put forward to support either figure.

    Similarly, the claim that 30% of the claimant's working time had been spent abroad in support of the respondent's participation in international competition seems grossly excessive. That would have necessitated almost four months of international competition per year. It would also have necessitated the qualification of the respondent's teams for such international competition. In any event, that assertion, of a very round figure, was not supported by adequate documentary or corroborative evidence.

98. Therefore for the purposes of Article 21(1)(a) of 1215/2012, the correct jurisdiction is the Republic. The alternative in Article 21(1)(b) could only apply of the claimant either habitually carried out his work in Northern Ireland or where the business had been situated in Northern Ireland.

Applying the definition used in ***NOGUIERA*** (above) it is clear that the claimant had not *"principally"* discharged his obligations to the respondent within Northern Ireland. He had worked mainly or *"principally"* within the Republic where, in any event, the business had been situated.

99. The reality is that this had been a job in Dublin, largely carried out in Dublin for an employer based in Dublin, by an individual appointed in Dublin who invoiced the respondent in Dublin. This was not a case of an expatriate employee employed by a Northern Ireland enclave. It was not a case of an employee working in a British or Northern Ireland employer abroad. The *"territorial pull"* had been towards the Republic. There had been insufficient connection with Northern Ireland.

100. The tribunal therefore does not have jurisdiction to determine the claim of unfair dismissal and the claim is dismissed on that ground for want of jurisdiction.

Employment Status of the Claimant

101. For completeness, the tribunal will briefly address the employment status of the claimant, even though this is no longer necessary.

102. This issue is unnecessarily complicated by the parties' failure to properly, or at all, apply their minds to this particular issue before the relationship between the claimant and the respondent had broken down and also by their failure to reduce any arrangement to writing.

103. A range of factors can point one way or the other; towards the status of employee or towards the status of self-employed contractor. No one factor is conclusive or determinative in the circumstances of any particular case. The tribunal has to consider the picture as a whole and then to stand back and reach a common sense decision.

104. The claimant had clearly been operating a business using the trade name *"Smart Conditioning"* in the period from 2010 up to 2015. He had operated for a range of clients including the respondent. Those clients included private individuals and various sporting clubs. In 2015, the claimant, who had been concerned about the impact on his income of currency fluctuations, had set up a limited company in the Republic known as Coached Plus Ltd. From that date, clients in Northern Ireland had been billed through the trading name Smart Conditioning and clients in the Republic, including the respondent, had been billed through Coached Plus Ltd. That presents a clear picture of a trading business. The respondent might well have been a significant client of that business but the claimant had still been operating a business as a self-employed contractor. As in ***Suhail*** (above) that finding is fatal to the claim (if indeed the tribunal had jurisdiction).

105. The claimant declared in repeated income tax declarations that he had been, at the relevant times, self-employed and not an employee. The Supreme Court in ***Autoclenz*** made it plain that such a declaration is not determinative in and of itself. Nevertheless the ***Autoclenz*** decision is distinguishable from the present case. In ***Autoclenz,*** the individuals, relatively low paid, had been working for one employer providing one set of services in one location for the customers of that one employer. That is entirely different from the present case were the claimant had been operating a business for a range of clients and in two jurisdictions. It is also notable

that in the present case the claimant did not simply make repeated declarations that he had been self-employed. He had effectively *"doubled down"* on that assertion by setting up a limited company in the Republic in 2015 and then billing the respondent, and other clients, in the Republic thereafter through that limited company. The claimant's assertion in cross-examination that this had all been Ms McManus' fault is unconvincing. That decision to set up a limited company in the Republic had been a conscious and deliberate decision by the claimant because he had been concerned about the effects of currency fluctuations.

106. The fact that the coaches to the female hockey team had been engaged on contracts of service is not determinative. There is nothing to prevent any employer which seeks broadly similar services obtaining those through employees and through self-employed contractors. The fact that he uses employees in one set of circumstances does not mean that he must use employees in all similar circumstances.

107. The strongest indication towards the status of employee is the regularity of the payment made by the respondent to the claimant in response to monthly invoices. That is more suggestive of employment status than self-employment status. However it is one factor amongst many and it is counterbalanced to some extent by the fact that invoices had been required and that invoices had to be approved by the CEO on a monthly basis. It is also counter balanced by the fact that the claimant had not been in the sick pay scheme, holiday scheme, or pension scheme and did not have a work email address.

108. The claimant's argument in cross-examination was in essence that when his work had increased in 2012, on his appointment as head coach to the senior men's team, he felt that he had been an employee. That is an unconvincing argument. The amount of work, or indeed the regularity of work, is not a determinative, or even a significant factor. No-one had told the claimant that he had become an employee and the claimant had continued to submit invoices and to pay tax as a self-employed person.

109. Similarly the claimant's assertion in cross-examination that he had sought to be paid through the payroll on *"numerous occasions"* is unconvincing and it is not accepted by the tribunal. It appears to be an assertion first raised in the course of cross-examination and an attempt by the claimant to bolster his claim. If such requests had been made *"on numerous occasions",* there would have been further evidence of those requests in the witness statement of the claimant and in the form of documentary evidence.

110. The tribunal therefore concludes, against a background of a totally amateurish approach to all of this by both parties, that, on the balance of probabilities, the claimant had been a self-employed contractor rather than an employee throughout the period of engagement with the respondent from 2010 to 2018 when that engagement terminated.

111. Therefore even if the tribunal had territorial jurisdiction to determine a claim of unfair dismissal under the Order (and it does not), the claim would still fail because the claimant had not been an employee as defined by the Order.

SUMMARY

112. The unanimous decision of the tribunal is that the claim of unfair dismissal is dismissed.

Vice President:

Date and place of hearing: **25, 26 and 27 November 2019, Belfast.**

Date decision recorded in register and issued to parties: