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EMPLOYMENT TRIBUNALS

Claimant ***Respondents***

Miss T Zunic **AND** Chelsea and Westminster Swimming Club

Heard at: London Central **On**: 15/16 October 2018

Before: Employment Judge Russell, (sitting alone)

Representation
For the Claimant: Miss Ramage-Hayes
For the Respondent: Miss Long

REASONS

Background and Issues

1. This matter came before me as an Open Preliminary Hearing following a Case Management on 15 August 2018. The issue for determination at this Hearing is principally the Claimant's employment status namely whether she is an employee, a worker whether employed or not or self-employed. Subject to that I am to make further Case Management Orders as are necessary for the

final Hearing of the claims. The claims are potentially ones of unfair dismissal, equal pay, whistleblowing, outstanding holiday and sick pay. The Claimant originally claimed harassment and victimisation but it was agreed at the Case Management Hearing that these were not going to remain as but may be relevant as background for her other complaints.

2. It was agreed prior to the determination of the Hearing that the Claimant's application for an amendment of the ET1 in respect of equal pay claim would be agreed. Further information is ordered to be included in an amended particulars of claim after paragraph 33 as set out in Ms Ramage-Hayes letter of 9 October 2018 which provides inter alia as follows: -

> "The Claimant Tamara Zunic was an £18 per hourly paid swimming coach for the Chelsea and Westminster Swimming Club ("The Club") she was therefore a person employed on work equal to the work that comparators Geoffrey Roache and John Wood £20 an hourly paid swimming coaches for the same Club (in addition to the existing comparator, Christopher Bennett). All were employees of the Club. The Claimant's work was equal to that of the comparators in that it was like work the same or broadly similar to the comparators. Both the Claimant and the comparators taught noncompetitive and competitive swimming at the Club under the same terms. Such differences as there may be between their work are not of practicable importance in relation to the terms of their work. The Claimant's work is also equal in that it has the same demands on the Claimant in terms of effort, skill and decision making although arguably her work was more demanding because she had responsibility for more swimming squads. The Claimant therefore claims that £2 per hour difference for her hours of work between November 2012 to December 2017 and interest on this".

Further details as to how this would be dealt with by the Tribunal as set out by me in Case Management Orders.

3. Both representatives provided helpful written submissions. The Claimant argued that the Respondent exercised , to a serious degree of control , the

activities of the Claimant and in paragraph 26 of her submissions she set out many examples of this. She also argued that she had to get consent for any holiday or other absences, was wholly integrated in to the Respondent's organisation and could not in reality provide a substitute to undertake her work other than by arranging cover by other Respondent coaches. Whilst she could undertake freelance work for other organisations when she wanted so could other respondent workers/ employees. There was no material difference between the Claimant and salaried staff and the Respondent's committee treated her as an employee prior to April 2016 when, for administrative reason, the Respondent put all staff on to PAYE .Something they had been giving consideration to for some time .Because they had always thought that she had been an employee in the previous eight years or so that she had worked for the Respondent. Even if this is not reflected in the label give to her , employment status wise.

4. The Respondent's solicitor argued that the Claimant was self-employed at all material times prior to April 2016 when the Respondent now cautiously accepted that she was an employee whilst observing that she did not have two years continuous employment prior to being dismissed, which is obviously relevant to her unfair dismissal claim. Less than two-year service the Tribunal does not have jurisdiction to hear this complaint. He also listed evidence to highlight her self-employed status and like the Claimant's representative referred to relevant case law including the well-known case of Ready Mix Concrete (South East) Ltd v Ministry of Pensions and National Insurance (1968) and the recent rulings in Pimlico Plumbers 2017 and 2018 cases that both advocates sought to use to establish their own arguments on employee status reflecting a considerable factual dispute in this case. The Respondents admitted that the evidence clearly showed the Claimant had an ability yo substitute another worker to do her work which is inconsistent with personal performance, operated her business separate from the Respondent and had total control as to her hours and the way in which she taught her swimming pupils. She signed an independent self-employed contract for services, claimed tax on self-employed contractor basis and was never paid or claimed that she was paid holiday or

sickness benefit or indeed maternity when she had time off through pregnancy in 2012/13.

5. These are always difficult cases especially with a lack of Respondent documentation. Self-employed workers within our society now account for some 15% of the UK work force. A significant minority of employers are circumventing employment legislation and many self-employed individuals are not in fact self-employed, perhaps as much as one in ten according to a CAB report in 2015 .Employees obviously pay a higher rate of NIC than self-employed employees and employers have to pay NICS on employees' wages but not on money paid to self-employed contractors. So the employer who chooses a self-employed contractor over an employee pays less whilst the contractor often takes home more despite losing out on sick pay, holiday pay and pension contributions. The Exchequer is the loser.

6. I have to determine the matter as to employment status as a matter of law but based on intrinsically linked findings of fact . In the O'Kelly v Trust House Forte, Sir John Donaldson master of roles in the Court of Appeal at the time explained "the test to be applied in identifying whether a contract is one of employment or for services is a pure question of law and so is its application to the facts. But it is for the tribunal not only to find those facts but to assess them qualitatively and within limits which are indefinable in the abstract. Those findings in that assessment will dictate the correct legal answer. In the familiar phrase "its all a question of factor degree".It is only if the weight given to the particular factor shows that misdirection in law is an appellate court with a limited jurisdiction can interfere. It is difficult to demonstrate such a misdirection and to the extent that it is not done the issue is one of fact".

With this in mind these are my findings of fact .

Findings of fact

7. The Claimant worked as a swimming coach for the Respondent from 1 March 2008 until she was dismissed on 8 December 2017 she was clearly a very

good swimmer herself and became an excellent coach. She initially worked very much on a part time basis, she worked with children in different groups sorted according to age and ability and competitiveness. The swimmers were in named groups such as “orange hats” “blue hats”, “black hats”, “silver squad” and the like. Her work was linked primarily to coaching sessions at swimming pools in London principally Kensington and Holland Park area but until the late Autumn of 2014 she worked for less than seven and a half hours a week and for most of that period under five hours a week. Throughout this period she undertook some private work with he Respondent’s consent.

8. From November 2014 however, she started to undertake more work for the Respondent principally through undertaking administrative tasks and coordinator role as well as her coaching. She became a lead coach in 2015, she was given a generic job description but designed principally for a colleague who was a salaried employer at the time. She was not treated as a salaried employer herself but it was expected by the Respondent that she might become one in the future.

9. On or about 5 November 2014 there was a communication between the Claimant and the Respondent where the Claimant requested help with her accommodation crisis. She had given birth to her daughter by that time and as a result of this and housing shortages within the local council she needed confirmation of at least sixteen hours work a week to persuade the council to give her local housing and needed a written contract provided by the Respondent. To their credit the Respondent turned this around quickly and provided her with one which showed that she undertook at least eight hours swimming and eight hours administration and assisted her in getting suitable accommodation at a difficult time. This contract labelled her as an independent contractor and not an employee reflecting the fact that she was paid on an hourly basis which she was, gross pay and with the Claimant paying her own tax. However, I find the contract was only produced to assist the Claimant at the time and there is no evidence of anyone else in the Respondent organisation ,whether employed or not, ever getting a written contract. Even now this seems to be the case and it is in breach

of Section 1 of the Employment Rights Act 1996 which the Respondent although even though a small organisation are no doubt looking in to.

10. In addition to her administrative duties which I find the Claimant could do whenever she wanted the Claimant provided cover for the coaches and they did for her. However, she rarely sought others to cover her sessions and when she did the cover was dealt with her Manager the Head Coach initially Bram Montgomery. This was not a formal line management role but she effectively answered to him and successor head coaches and I find that she could not simply provide an external coach to cover her sessions by way of a substitute even a qualified coach. Even if this was occasionally done by the Respondent and or the Head Coach on the Respondent's behalf it was not done by the Claimant nor would it have been permitted. The Respondent naturally preferred other salaried staff to cover coaching sessions that the Claimant and other hourly paid coaches could not do because they were already paying for the salaried employees, but my central finding is that there was no unfettered right for her to substitute someone to do her coaching sessions.

11. She did not however have to take the sessions and work offered to her and for the early part of her service at the Respondent she accepts that she often did refuse work, while she may have obtained permission for absences I find that she did not have to do so. If she did it was out of courtesy rather than obligation. She had control to this extent. She could not select her hours as confirmed by Mark Rijkse in communication with the Respondent's committee which he sat on (incidentally he also confirmed that she could not just substitute herself for someone and although he said than in November 2017 I agree that it was true before April 2016 as well). But neither did she have to work the hours assigned to her if she did not want to take the coaching sessions. So the Claimant had significant control as to how she undertook her work pre April 2016 but not complete control. Another example is her swimming instruction. She could teach if she wanted but she had to have club objectives for the children in mind, she had autonomy but effectively reported to the Head Coach on some matters, she was involved in "moving up" decisions i.e. some children moving in to different groups according to aptitude and other swimming related considerations but the

final decision was not hers and was one for the Head Coach. The Respondent's control was limited but still evident, another example of this is the restricted use of mobile phones pool side.

12. The Claimant regarded herself as self-employed, certainly during the early part of her service of the Respondent. In an email to the Respondent in April 2016 just before she became an employee she talked about the fact that HMRC had accepted her as self-employed and that she had claimed a wide range of expenses on this basis, expenses an employee could never have claimed. But I also accept that neither she or the Respondent really considered the consequences of this. She said in evidence that she was only self-employed for tax purposes for instance. It may be that she believed that she could be employed on the one hand and claim expenses as self-employed on the other, even though obviously this is not possible. In any event I observe that the label the parties used in respect of employment status is not determinative for them or for me in this Judgment.

13. The Claimant's second witness Ms. Greengross a former Respondent committee member was certainly confused, and admitted as much , as to the difference between employees and self-employed workers. I accept her evidence that the issue of employment status did come up in committee meetings even though rarely minuted but it is also clear no decisive action was taken to move all Respondent workers to PAYE and employment status until April 2016 and then this was largely an administrative exercise to simplify payments. In other words, not a lot of thought had gone in to this and there were other more pressing matters as far as the Respondent was concerned in terms of their swimming operation, charitable work and non profit-making work.

14. There were material changes in April 2016 facilitated in part by the early appointment of Ed Walsh as another Manager in the organisation. I find that this is the time that all the Respondent workers were then moved on to PAYE and were paid or at least accrued holiday were obliged to wear uniforms sponsored by Underarmou. Although many wore some form of uniform before that, I find there was no obligation to do so until that time. The Claimant's hours on the

whole increased along with her responsibilities, she received a job description , was also enrolled in to the Respondent's pension scheme and the layers of management increased (including the arrival of Chris Bennet and Lisa Bates) albeit in a somewhat disorganised way. She was assigned to particular swimming groups in internal timetables. But equally some of the previous practices remained. The Claimant continued to undertake some private work as others within the Respondent organisation did and there was little regulation of the employees when it came to for example taking holiday. There was no employer handbook to e.g. include any disciplinary policy and still no formal appraisals.

15. I do not accept the Respondent's argument that the Claimant undertook business of her own prior to April 2016.She did what all the Respondent staff , including the salaried staff , did in taking private lessons, I do not find that she advertised her such work in any overt sense. It is understandable that she should take on private work when she had the chance, for instance with Westminster School and people needing extra training and the extra money was no doubt welcome and the Respondent permitted this.

Application of the Law

16. There are various definitions of "employee" "worker" scattered around the employment statutes and regulations. As a starting point is the Employment Rights Act 1996, Section 230(1) states that "employee" means an individual who has entered in to works under (or where the employment is ceased, worked under) a contract of employment .Section 230(2) states "contract of employment" means a contract of service or apprenticeship, whether expressed or implied and (if it is expressed) whether oral or in writing, Section 230(3) states "worker" means an individual who is entered in to a works under (or where the employment is ceased, worked under) (a) contract employment or (b) any other contract whether expressed or implied and (if it is expressed) whether oral or in writing whether the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the

contract that of a client or customer of any profession or business undertaking carried on by the individual.

17. So, the position is that it is not straight forward even for Employment Lawyers. Not all workers are employees but some individuals who may otherwise regard themselves as self-employed may in fact be workers. The statutory definition of employee simply incorporates the common law concept of what is a contract of service or employment, traditionally distinguished from the contract for services which is a self-employed arrangement.

18. There are however many cases on what amounts to a contract of employment one of the best known is Ready Mix Concrete (South East) Limited v Ministry of Pensions and National Insurance (1968) and the summary that might be applied here is from that case is as follows

"the contract of service exists if these three conditions are fulfilled. (1) 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. (2) He agrees expressly or impliedly that in the performance of that service he will be subject to the others control in a sufficient degree to make that other master. (3) The other provisions of the contract are consistent with it being a contract of service. "

So, this remains the starting point although the language of master and servant is obviously very outdated now.

19. Mutuality of obligation is often the central issue in determining whether an individual is an employee, worker or generally in business on his own account. I take account of the House Law decision in Carmichael v National Power Plc confirming that there is an irreducible minimum of mutual obligation necessary to create a contract of service. It follows as was confirmed in Montgomery v Johnson Underwood Limited that unless there is a mutuality of obligation and a sufficient degree of control there cannot be a contract of employment.

20. One leading domestic authority on workers status is Bates Van Winkelhof v Clyde and Co in which it was held that a member of a limited liability partnership was a "limb (b)" worker Lady Hale said the , "ordinary meaning of "employed by" is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others. Within the latter class the law now draws distinction between two different kinds of self-employed people, one kind of people who carry on a professional business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them.... the other kind of self-employed people who provide their services as part of a professional business undertaking carried on by someone else. "

21. In Janus v Red Cats (Browns) Ltd Elias J provided the following analogy "in a general sense the degree of dependents is in large part what one is seeking to identify – if employees are integrated in to the business, workers may be described as semi-detached and those conducting a business undertaking as detached. Where exactly the lines are to be drawn is very murky.The different statutory provisions mean that there is not the same requirement for mutuality obligation, control or integration that is necessary for there to be an employment relationship. In essence the pass mark for determining a worker as opposed to an employee is a lower one. "

22. I observe that personal performance is an explicit component of the "limb (b)" definition of worker under the Employment Rights Act for instance, going back to the Ready-Mix Concrete case, McKenna Jay said of personal service "the servant must be obliged to provide his own work and skill to do a job either by one's own hands or by another's is in consistent with a contract of service though a limited or occasional power of delegation may not be". The requirement for personal service for employees is obviously higher than that for a worker.

23. In applying the case law to the facts of this case I recognise that I am not bound by the labels the parties attached to their relationship. In this case, words

such as “staff”, “employees”, “self-employed” and others are all used frequently and at times in the wrong context and not meaning what is naturally said, but I am only concerned with the real nature of the relationship between the parties. In this case I find that the Claimant could and sometimes was substituted by another coach to do her work, that she had no obligation to work if she did not want to, no obligation to wear a uniform until after the Spring of 2016 and a considerable degree of autonomy. She was not paid holiday or sick pay or maternity pay and she considers herself self-employed at least for a certain period of time and certainly for tax and claiming expenses. But also I found that there was no unfettered right for her to substitute herself for someone else, there was some degree of management control from the Claimant and certainly from 2014 onwards she had administrative responsibilities and became a lead coach, was more linked in with the Respondent’s business, as reflected by the fact that her name and other coach names were sent round as being responsible for certain training sessions for the different groups of children rather than it being, for instance, anyone of the coaches. Rather like going to a specific GP rather than making an appointment with a practice without having any particular doctor in mind. I found that she did not undertake a business on her own account and she provided services to the Respondent. It was simply that she had other work was ancillary to the work that she did for the Respondent. That work (i.e. with the Respondent) became more integrated as the years went on, witness the job description given to her as lead coach even in a generic format. And I see a clear distinction between the different periods of here work. The initial years, 2014 to 2016 and to the date of here EDT.

24. She started to undertake administrative work in November 2014 and I have decided that this is the line in the sand that should be drawn. At this time, she, in my judgment , ceased to be self-employed and became a worker, what the Taylor review talks about rebranding as “a dependent contractor”. The tests under Section 230(3) limb (b) are fulfilled at that point. She provided services to the Respondent and other work was incidental and permitted by the Respondent. But I cannot find that there was a contract of employment at that time for the reasons given above. The connection was simply not sufficient until the Spring of 2016 . At that point however , from April 2016 when the Respondent

transferred all staff onto PAYE, she became an employee. This was when there was a material change in her employment status, she was self-employed until November 2014, she was a worker from November 2014 until she lost her employment in December 2017 and she was employed, as well as being a worker of course, from April 2016 until she ceased to be employed and the remainder of my judgement and future directions in this case flow from that determination.

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Employment Judge Russell

Dated:. 30 October 2018

Judgment and Reasons sent to the parties on:

30 October 2018

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For the Tribunal Office