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**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4111229/2019 & 4112518/2019 (V)**

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**Preliminary Hearing held over Kinly CVP on 22 & 23 June and  
15 July 2020**

**Employment Judge I McFatridge**

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**Mr A Higgins**

**First Claimant  
Represented by:  
Mr E Villiers**

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**Mr G E Villiers**

**Second Claimant  
In person**

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**University of St Andrews**

**Respondent  
Represented by  
Ms McGrady,  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The claimants were neither employees nor workers employed by the respondent.

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The claims are dismissed.

## REASONS

1. The claimants both submitted claims to the Tribunal which were subsequently conjoined. Mr Villiers claimed that he was owed arrears of pay. This was based on his contention that he had been a worker  
5 employed by the respondent and that he had been paid at less than the rate of the National Minimum Wage over a number of years. Mr Higgins claimed that he had been unfairly dismissed by the respondent. The respondent submitted a response in which they made the preliminary point that neither of the claimants were either employees or workers employed  
10 by the respondent. A preliminary hearing was fixed in order to determine the claimant's employment status. The hearing took place over the Kinly CVP system and witness statements were used. Both of the claimants gave evidence on their own behalf. Evidence was also led on behalf of the claimants from Peter William Adamson who had been captain of the  
15 St Andrews University Ju Jitsu club in 2009/10 and Daria Adamson who had been captain in 2010/11. Neither were cross examined in relation to their evidence. In addition, evidence was led on behalf of the respondent from Leah Allcock the President of the University Athletic Union for the academic year 2019-20 and Gillian Ogg who is PA to the Director of  
20 Human Resources of the respondent. It should be noted that Ms Allcock gave two witness statements since a supplementary statement was provided following receipt by the respondent of Mr Higgins' statement. At the preliminary hearing the claimants had indicated that their position was that the last payment Mr Higgins had received from the respondent was in  
25 or about 2012. It was clear from his statement that Mr Higgins was now departing from that position and this could not have been anticipated by the respondent at the time Ms Allcock's initial statement was produced. I therefore considered it appropriate to allow Ms Allcock to lodge a supplementary statement dealing with this issue. The parties also lodged  
30 a joint bundle of productions. I should note that for the sake of completeness that productions were provided in electronic and in paper format. On the basis of the evidence and the productions I found the following essential facts to be proved or agreed.

## Findings in fact

2. The University of St Andrews was founded by papal bull in 1413. It is currently governed by various Acts of Parliament and has the status of a legal corporation. St Andrews University has a number of sporting and social clubs. One of these is the Jujitsu Club. The constitution of the club was lodged (p733-743). The constitution bears to have been last updated in April 2019. The constitution is in the form of a constitution for an unincorporated voluntary association. The St Andrews Jujitsu Club is an unincorporated voluntary association.
3. As one would expect the respondent as a university impose certain standards and certain requirements on clubs which are associated with the university and wish to seek to take part in competitions and other representations of their sport on the basis that they are “representing” the university. For reputational reasons they impose certain minimum standards on unincorporated voluntary associations or other clubs in areas such as financial probity and in relation to the protection of vulnerable groups legislation. The university also provides advice, funding and some facilities to sporting clubs which are associated with the university of which the Jujitsu club is one.
4. The respondent’s interactions with clubs and organisations such as the Jujitsu club is primarily dealt with via an organisation called the Athletic Union. The constitution of this body was also lodged. (p346-352) The constitution is in the form of an unincorporated voluntary association. The Athletic Union is an unincorporated voluntary association. The constitution provides that various posts in the Athletic Union be held ex-officio by members of the university. The university provides funds to the Athletic Union are made available by the respondent to the Athletic Union which are used amongst other things for disbursement to clubs. As one would expect the university imposes various rules on the Athletic Union designed to ensure that certain standards are met with a view to safeguarding the reputation of the institution.
5. Mr Villiers and Mr Higgins are exponents of jujitsu. Mr Higgins runs a jujitsu club at Burntisland. This club is part of a federation of jujitsu clubs

with which Mr Higgins is involved. The precise legal status of the Burntisland club and the federation is not known.

5 6. The Jujitsu Club is run by a committee of students. In or about 2009 students who were currently office bearers of the club indicated that they were considering changing from their current instructors at the club. Mr Higgins met with these student representatives of the club along with those he described as his team. This team comprised Mr Villiers and one other. He discussed with the student representatives what he could do. Mr Higgins then taught a taster session for the Jujitsu Club which was attended by the outgoing Club Captain, the 2007-2008 Club Captain, the incoming Club Captain and the Club Secretary. These students interviewed Mr Higgins and his coaching team to decide whether or not to take them on. The session was a success. Thereafter there was a vote of the club committee in accordance with the club constitution and Mr Higgins was formally invited to become the permanent Club Instructor. From that time on Mr Higgins and Mr Villiers who was part of Mr Higgins' team provided coaching services to members of the Ju-Jitsu club.

20 7. There was a divergence of evidence in relation to what the initial arrangement was. Mr Peter Adamson gave evidence that all three instructors were paid by the St Andrews Jujitsu Club per semester. Ms Adamson gave evidence that the arrangement was on a voluntary basis and that the club agreed to cover the instructor's petrol costs for the semester. Mr Villiers and Mr Higgins referred to an initial arrangement which involved the instructors being paid by the club which then changed to payment of petrol expenses after the club ran into a problem with VAT. My finding is that the initial arrangement was for the Jujitsu Club to make a payment per semester but it is clear at some point shortly after this started it was changed and the club, Mr Villiers and Mr Higgins agreed that in future the instructors would be paid a sum which bore to be an estimate of the likely travel costs to be incurred by each instructor when attending regular sessions of the club. This payment was payable to Mr Villiers and to Mr Higgins but it would appear that in practice the petrol allowance was paid to Mr Higgins who thereafter distributed the appropriate share to Mr Villiers. The respondent university were not

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involved at all in this arrangement. Simply in order to deal with a point made by Mr Villiers I should say that it was Mr Villiers' contention that the sum agreed by way of expenses could in certain circumstances amount to an overpayment in the sense that if he and Mr Villiers shared a car then the amount which was meant to be reimbursement would end up being higher than the amount which HMRC allow as expenses. I should say that this was not in fact established in evidence but even if it was I consider the matter to be entirely irrelevant. Mr Villiers' position appeared to be that because the club was paying more than would strictly be allowed to be classed as expenditure then this meant that the club were paying Mr Villiers and Mr Higgins a wage which therefore made them workers which therefore entitled them to be paid at the rate of the national minimum wage. I consider this to be completely wrong. There no doubt can be circumstances where payments are classed as expenses in order to avoid being taxed as wages. There was no suggestion that this was the case here. Mr Adamson's evidence was quite clear that the club had agreed to cover the instructor's petrol costs for the sessions and payments made by the club related to petrol costs.

8. Various payments were made by the Jujitsu Club to Mr Higgins over the years. I should say that in evidence Mr Higgins sought at various points to contend that certain of these payments had come from the university. He prevaricated in his evidence in relation to this. I find categorically that those entries which appeared in his bank statement as saying "Received from St Andrews Univer's" were payments from the Jujitsu Club.

9. Both Mr Villiers and Mr Higgins received certain payments from the university in or about 2012 and in Mr Higgins' case in 2014.

10. The circumstances in which certain payments came to be made were set out in Ms Allcock's witness statement and I entirely accepted her evidence in relation to this. The Athletic Union is responsible for promoting opportunities for students to engage with sport and for promoting and supporting the AU affiliated clubs. It also participates in what appears to be a marketing or umbrella body known as Saints Sport which comprises the athletics union and the university sports department. Ms Allcock

described this as the “brand name of sport at the university”. 53 sports clubs are affiliated to the Athletic Union and at the relevant time the Jujitsu Club was one of them. As noted above the Athletic Union imposes various requirements on clubs which they have to meet before they can be affiliated. Ms Allcock has set these out helpfully in paragraph 21-24 of her witness statement.

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11. Setting the requirements for affiliation is the extent of the Athletic Union’s involvement in the club and they do not have any say in the running of the club. The club requires to meet the standards required as part of the affiliation process. In addition the Athletic Union may from time to time provide some financial support to a club. From time to time the Athletic Union will make a grant to a club such as the Jujitsu Club to cover things such as the provision of coaching. This was the case in the academic year 2012-13. The Jujitsu Club has not received a grant in the period since then.

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12. Where a grant is payable to assist the club with the provision of coaching services the Athletic Union requires payments to be made in accordance with the university’s accounting standards. In principle the university consider that they have a duty of care to ensure that the appropriate tax is paid on any payments made to external coaches. In the academic year 2012-13 the respondent operated a system for paying the coaches of those clubs who were receiving grant assistance. Coaches were being paid by virtue of an AU grant so that the money was coming from the university rather than the club’s resources.

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13. The document setting out this coach payment system was lodged at page 339. It appears to be designed to be sent to sports club treasurers. It does not mention either claimant

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14. I should say that Mr Villiers referring to this document as his schedule of terms and conditions of employment as he did throughout the hearing was inappropriate and completely misconceived. The document is certainly not a statement of terms and conditions of employment of anyone far less the claimants. It is addressed to clubs and provides that the club requires to provide a named individual with information about their coaches prior to

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the start of the year. It describes the forms which have to be completed with the note "We will get the coaches put into the system and then budgets will be set as to how much is to be afforded to clubs. .... After budgeting there will be a tri-partite agreement signed by the club, AU and the coach ...". It then goes on to state with regard to taxation

"If the completed form provides us with the unique tax reference number we will treat these payments as self-employed which means no addition employer's costs will apply. If the form advises the coach is not self-employed we will deduct the basic rate tax and national insurance contributions which means the employer will also incur national insurance costs (as per the attached Inland Revenue rates:- 12.8% on monthly earnings in excess of £476 per month). As no contract of employment is being issued holiday will not apply."

15. It then goes on to state that after that the Athletic Union would raise an invoice through the university system for the club to reimburse the university for the coaching money they have paid out including the additional costs.

16. It appeared clear to me that the purpose of this document was to set up an administrative procedure whereby the university could fulfil their duty of care to ensure that tax would be deducted and that public money was not being used to pay coaches who would then not declare the tax on this. The arrangement was pragmatic. If a coach provided a UTR this meant that they were already in the self-assessment system and they would be trusted to include any sums they were being paid for coaching in their annual tax return. If the coach did not provide a UTR then tax and national insurance would be taken off at source.

17. I should say that I accepted Ms Allcock's evidence that she had not seen the document prior to it being lodged in these proceedings and that if this document was issued at all it referred only to payments in 2012-13.

18. I accepted on the basis of the limited evidence available that the Jujitsu Club had received a grant of £500 for coaching fees for the year. This is

evidenced by an e-mail sent to the club by Peter Burgon the Student Sport Development Manager on 4 September 2012. (p154)

19. In December 2012 Mr Villiers was paid a net payment of £192 by the university. This was in response to an invoice lodged by Mr Villiers which showed gross fees of £240 from which tax of £48 had been deducted. The records disclose that this was the only payment ever made by the respondent to Mr Villiers. It was made on behalf of the Jujitsu Club. In order to put the payment through their records Mr Villiers was set up as an employee on the university PAYE system. No further payments were made and in March 2013 at the end of the financial year the respondent, no doubt as part of an administrative tidying up exercise, issued Mr Villiers with a P45. I note that in his evidence Mr Villiers denied receiving such a P45. Ms Ogg who gave evidence on behalf of the respondent in relation to the matter was very careful to state that she was unable to say anything about the precise details of Mr Villiers' case from her own knowledge but was able to describe in detail what the system said had happened. On balance, my view was that a P45 had been issued. It is entirely possible that Mr Villiers received it and then forgot about it. The records do however show that it was issued. This would appear to fit in entirely with the way the university dealt with the matter and the way they ought to have dealt with the matter. In addition to this, I considered that if Mr Villiers had not received a P45 then P60 then he would have raised the matter with the respondent since presumably he would wish to include the payment in his tax return.

20. Mr Higgins received two payments during this academic year. One was a payment of £96.88 which was paid on 31 August 2012. This bore to be in response to an invoice raised by Mr Higgins in which a gross payment of £120.88 had been sought from which £24 had been deducted for tax giving a net payment of £96.88 (p135). A copy of Mr Higgins' invoice for this sum was lodged (p133). This shows that the payment was in respect of a lecture on architecture one hour at £47.94, a lecture on self-defence for students one hour at £47.94 and travelling expenses of £25. Rather strangely the heading on this invoice has not photocopied and the copy lodged does not show an address for Mr Higgins. Given that it contains



reference to Mr Higgins' architectural practice at the bottom it would appear that this invoice was issued on the letterhead of Mr Higgins' architectural practice.

21. Mr Higgins also received a payment of £432 from which no tax was deducted which was paid on 31 December 2012 (see p215). What happened is that at the time of the first payment Mr Higgins had not provided the university with sufficient evidence of his UTR so as to allow them to make a payment without deduction of income tax. By the time of the second payment he had provided them with his UTR and accordingly the payment could be made without deduction of tax. A P45 was issued to Mr Higgins on 27 September 2012 which no doubt contained details in relation to the first payment. Another was issued on 26 March 2013. Once again I preferred Ms Allcock's evidence as to what the respondent's records showed rather than Mr Higgins' evidence to the effect that he had not received any of these two P45s. Mr Higgins also received a payment from the university by Giro Credit on 30 September 2014 which he believed was for coaching at a "pre-season" event. I did not hear much evidence regarding this save that it appeared to have been a one-off event.
22. Apart from the above no other payments were made by the respondent to either claimant. The Jujitsu Club made various payments to Mr Higgins. Some of these were payments of his petrol expenses. Some of these were in respect of insurance which Mr Higgins organised or payment for events which Mr Higgins was collecting for. Some were in respect of various pieces of equipment which Mr Higgins supplied to members of the club.
23. The club operates its own bank account. It collects all money from membership and other sums therein and pays out payments to suppliers such as the claimants. The university has no access to the bank account and is not a signatory to the bank account. As noted above the university does reserve to itself certain rights to interfere in the financial affairs of the club if they are being mismanaged. This is a condition of the club being affiliated.

24. The university provides a sports hall and other sporting facilities to the various clubs. The Jujitsu Club trains in a university sports hall. The AU allocates training slots in the sports hall. The clubs contact the AU at the start of the year and try to arrange times which are mutually suitable. The AU makes every effort to accommodate clubs' requirements. If a club asks for additional training slots then the AU tries to accommodate them. The club are free to train outwith the slots provided at the sports hall provided they can find another venue. The club are free to train externally if they wanted to.
25. The sports hall is a university building and the AU controls who has access to the building using a smartcard system. Student members require to pay an annual fee for access. Coach members also require to pay for a smartcard. The Athletic Union reserves the right to refuse coaches entry to premises if they consider the circumstances justify it.
26. It is as well to record that although I do not require to make findings of fact in relation to the matter, the principal allegation in Mr Higgins' case relates to an assertion that he was told by the Athletic Union that he was no longer permitted to attend coaching events on university property. This followed an allegation of aggressive conduct made against Mr Higgins followed by a meeting at which it was once again stated that Mr Higgins' conduct was aggressive and inappropriate. Mr Higgins and Mr Villiers clearly feel aggrieved at the decision to ban him from the sports hall and have decided that their remedy lies in the realms of employment law.
27. Mr Higgins' evidence was that following the allegation he decided to "voluntarily suspend himself" from further coaching until the matter had been resolved. As pointed out by the respondent's representative this did not suggest that Mr Higgins was in the position of an employee or worker. It is clear from correspondence that the university Athletic Union whilst they considered that they could ban Mr Higgins from having access to the sports hall they believed it was not within their power to prevent him providing coaching to the Jujitsu Club. The correspondence makes it clear that the decision as to whether or not to continue to engage Mr Higgins as a coach was one for the club. The letter banning Mr Higgins was lodged

(p431). The AU's position re it being up to the club to decide whether or not to dispense with his services is set out in a voluminous correspondence which includes a letter from Leah Allcock to the club dated 16 July (p457) where she confirms at point one that the AU is asking  
5 the club to dispense with Mr Higgins' services.

28. Finally, since a considerable amount of evidence was heard in relation to this I should record that subsequent to Mr Higgins' ban from using university facilities the club advertised on their Facebook page that the club was organising an awayday at Burntisland Jujitsu Club. Photographs  
10 on their Facebook page showed Mr Higgins participating in this event and indeed being a principal instructor. This event was an event organised by Mr Higgins in his capacity as the person in charge of the Burntisland club. Members of the St Andrews club were invited to participate in this event and did so. Mr Higgins participated in the event and provided coaching  
15 services to members of the Jujitsu Club. Participants paid a fee for attending the event and for what it is worth I accepted Mr Higgins' evidence that he did not believe that he had made a profit out of it.

### **Matters arising from the evidence**

29. The strongest feature of this case was the claimants' scattergun approach  
20 to the evidence and considerable time was spent on matters which were entirely irrelevant. As noted above the claimants' principal grievance appears to be that the university excluded Mr Higgins from access to the hall from which he and Mr Villers coached and they felt this to be unjustified. It is clear that they wished to have those circumstances  
25 judicially investigated and made a series of somewhat inventive submissions designed to show that despite all the objective evidence they were employees/workers employed by the University of St Andrews. For this reason I have not made detailed findings of fact in relation to every single one of the allegations made by the claimants. The factual findings  
30 which I have made are sufficient to make it clear that it is quite impossible for the claimants to be employees/workers of the university which is the sole claim being made.

30. Dealing with the witnesses I considered Ms Allcock to be giving truthful evidence in relation to matters which were within her knowledge. She accepted that she had no personal knowledge of Mr Higgins or Mr Villiers however she was aware of the way the university system worked. Contrary to the claimants' submissions I found her evidence to be highly relevant as her evidence was required in order to refute the more bizarre allegations of Mr Villiers such as the Jujitsu Club was an agent of the university with ostensible authority to hire staff. She was also criticised on the basis that she could not give evidence as to law. This criticism is entirely misconceived since her role was to give evidence as to facts.
31. I also considered Ms Ogg to give completely truthful evidence. Mr Villiers criticised her evidence on the basis that it was hearsay in that she was passing on what she had been told about the payroll system by others. Hearsay is permissible in the Employment Tribunal and I saw absolutely no reason to disbelieve Ms Ogg or her evidence. What she said had a ring of common sense about it. Mr Villiers suggests that the respondent ought to have brought some others from the payroll department to speak to certain matters. Given that most of Mr Villiers' allegations were outlandish I completely understand the respondent did not wish to bring any more witnesses than they had to.
32. With regard to Mr Villiers that he was an extremely difficult witness to pin down. He has clearly managed to persuade himself that given his interpretation of the law both he and Mr Higgins were employees. Some of his assertions appeared to be based on an erroneous appreciation of the facts. He also appears to have a capacity for persuading himself that two and two make five. For example his position is that because the Athletic Union have the final say as to what times clubs are allowed to use the hall goes beyond simple timetabling but indicates that the Athletic Union and through them the university are exercising the degree of control which an employer would exercise over an employee. When questioned in relation to such matters his usual tactic was to change the subject and try to talk about something else. When facts were put to him which were clearly within his knowledge he would reply with a legal argument.

33. He was also inclined to simply try to obfuscate facts. For example he lodged a fee payment instruction form (p598). He initially maintained that this claim for expenses of £285 had been paid by the university. His bank statement which was lodged quite clearly showed that it had been paid by the club as did the Jujitsu Club's bank statement. He eventually confirmed that actually the only payment he had received was the sum of £192 paid in 2012. Given that he had clearly spent a lot of time thinking about the case and was clearly familiar with the documents I considered that this was a deliberate attempt to obfuscate and avoid admitting to what was clearly a massive problem with his case.

34. As noted above he continued to refer to the document at page 339 as his terms and conditions of employment. When he was painstakingly taken through this document by Ms McGrady who put to him such obvious points as that it did not contain his name, it wasn't a contract, it didn't contain any of the matters listed in the Employment Rights Act he also obfuscated. At the end of the day my view of his evidence was that he was not a witness who could be relied upon. If pushed he would eventually agree that matters were not quite as he originally stated but there was certainly no sense that he was in any way trying to assist the Tribunal by giving honest evidence and letting the Tribunal apply the law to the facts which it found. Every statement he made was driven by his own particular interpretation of the law.

35. With regard to Mr Higgins I had even less confidence in his evidence. He frankly prevaricated with regard to the evidence in relation to payments from the club. At the preliminary hearing there had been a discussion regarding the request for an order from the respondent that the claimants provide copies of their bank statements so that the respondent could establish when, if any, payments had been made by the respondent to the claimant. During discussion, both Mr Villiers and Mr Higgins indicated that the last payment which had been made to Mr Higgins was in 2012. I note Mr Higgins now denies that he said this and claims that the statement was only made by Mr Villiers. That is not my recollection.

36. Mr Villiers indicated that any payments made by the club since then had been made to Mr Higgins alone and he had received his share. Mr Higgins said on more than one occasion that he had not received any payments direct from the university since about 2012. Thereafter it would appear  
5 that Mr Higgins obtained his bank statements where payments from the Jujitsu Club have been shortened to "St Andrews Univ". It would then appear that he and Mr Villiers decided that they would obfuscate in his witness statement to give the impression that these were payments which came from the university rather than the club. When questioned about this  
10 in cross examination Mr Higgins denied that he had made the statement he had made at the preliminary hearing. He prevaricated about whether he believed these payments were from the club or the university. The difficulty which he had was of course that the club's bank statements had been produced and the payments were quite clearly from the club. I  
15 intervened and put this to Mr Higgins who accepted that he himself believed that the payments had come from the club and not from the university. I thought that was the end of the matter but in re-examination Mr Villiers sought to have him backtrack on the concession he had clearly made to myself and thereafter to Ms McGrady that he believed these  
20 payments had come from the club. Once again he denied having made this statement attributed to him at the preliminary hearing this is despite the fact that in paragraph 55 of his witness statement he makes reference to this when he says

25 "It therefore appears that I was wrong in stating the university had not paid me directly since 31<sup>st</sup> December 2012."

I have to say that given Mr Higgins' prevarication in relation to a matter which could be easily checked I was reluctant to accept his untested account of anything else.

37. Finally, I should say that in his written submissions Mr Higgins suggests  
30 that I should give his statements extra credence because the concept of honour amongst martial arts practitioners such as himself is such that he would find it impossible to tell a lie. I would simply ask any reader to

compare the statement he makes in his submissions with the clear statement at para 55 of his witness statement set out above.

38. Finally, I should say I accepted the evidence of Mr and Mrs Adamson as accurately recording their recollection of events when the claimants started coaching for the club. As noted above there was a divergence in evidence as to whether they were paid a fee or whether they only received expenses. I consider that both were probably accurately reflecting what they understood the position to be during their respective year in office and I have reflected this in my findings of fact.

## 10 Discussion and decision

39. The evidence concluded too late on the second day for there to be time for the parties to make submissions. Each party agreed that the submissions be made in writing and I considered the submissions and responses to submissions in chambers on 15 July. Mr. Higgins, despite being represented by Mr. Villiers was also permitted to lodge his own additional submissions. The sole issue which I required to determine was whether either or both claimants were either employees or workers employed by the respondent. The respondent is the University of St Andrews. The claim is directed against them. Although the respondent's representative has dealt with the matter in her submissions it is not in any way necessary for me to make a determination as to whether or not the claimants were employees or workers employed by some other organisation such as the Jujitsu Club. I should also say that I found it somewhat disheartening that Mr Villiers began his submissions to say that the claimants' primary position was that both were workers. The only claim which Mr Higgins is making is a claim of unfair dismissal. If he is a worker he cannot claim unfair dismissal and any claim of unfair dismissal based on worker status has been misconceived from the start. I should say in fairness to Mr Villiers that he does go on later to state that actually he thinks that they both may be employees by operation of an "implied contract".

## Relevant law

40. I considered that the respondent has correctly set out the law in this matter. Section 230(1) of the Employment Rights Act 1996 states that an employee is defined as an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment. Under Section 230(2) of the Employment Rights Act 1996 a contract of employment means

“A contract of service or apprenticeship whether express or implied and (if it is express) whether oral or in writing.”

The legal definition of a worker is set out in section 230(3) of Employment Rights Act 1996 and is

“an individual who has entered into or works under (or where the employment has ceased, worked under)

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express)

whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual”.

41. What is common to both definitions is that a contract between the parties must exist. There must be a contract between the respondent, in this case the University of St Andrews and the claimants. My findings of fact make it clear that absolutely no such contract exists. Such contract or agreement as exists is clearly between the claimants and the Jujitsu Club. Mr Villiers has argued that the Jujitsu Club and the university are effectively the same or that the Jujitsu Club acts in some sense as an agent of the university. I considered both submissions to be incorrect. The fact that the university exercises a degree of control over clubs by insisting that they meet certain standards before they can be affiliated does not mean that they are the same organisation. The fact that many of the personnel within the Athletic Union are there on an ex-officio basis because of their post in the university does not make the Athletic Union an arm of the university. Nor, incidentally does the fact that their sabbatical officer is paid by the



5 university. In employment law it is not at all uncommon for a situation to be found where two different limited companies have the same owners and directors. Employees of one company are not employees of the other company. It is clear from the evidence of the two independent witnesses called by the claimants namely Mr Peter Adamson and Mrs Daria Adamson that the process by which the claimants were engaged was carried out solely by the Jujitsu Club. The Jujitsu Club chose them. The university took no part in this. The suggestion that the university somehow give the right to hire and fire staff on their behalf to a committee of students is improbable and there was no evidence to support that this was what had happened.

10 42. The claimants have absolutely no contract with the university. That bare fact is sufficient to dispose of the case however given that the respondent has made detailed submissions on the matter and given that a two day hearing was held I consider it appropriate to comment on other aspects of the case with a view to setting out my view as to just exactly what the status of both claimants was.

15 43. With regard to the claimants' assertion that there was some sort of implied contract of employment I agree with the respondent's representative that one must look at the irreducible minimum set out in the case of ***Ready Mixed Concrete (South East Ltd) -v- The Minister of Pensions and National Insurance [1968] 2QB497***. The first point is that there must be an agreement to provide the servant's own personal work and skill in the performance of service for the master in return for a wage or remuneration.

20 In this case not only is there no contract with the university but it is absolutely clear that the claimants were not providing personal service to the university. They were providing personal service to the Jujitsu Club. In my view however they were not doing so in return for a wage or remuneration. The respondent in her final submissions has referred to the very recent case of ***Varnish -v- British Cycling UKEAT/0022/20***. This is a judgment of Mr Justice Choudhury President of the Appeal Tribunal handed down on 14 July 2020. The respondent was only able to refer to this in her most recent submission and the claimant has also provided further comments. I have accepted these comments although they were

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lodged following the final date for submission. I have done so on the basis that it is appropriate to give the claimant the opportunity to comment given the matter has been raised late in the day albeit this was no fault of the respondent. The 'varnish' case was a case where the respondent agreed to provide the claimant with various support including coaching support, team clothing and equipment, sport science support, medical services, travel and accommodation expenses and access to facilities and that the value to the claimant of these services over a four year period was said to be in the region of £600,00 to £700,000. The Tribunal found that the claimant agreed to a high level of control under the agreement. Nevertheless the Tribunal found that the claimant in that case was neither a worker nor an employee. The decision that the claimant was not an employee was not in fact challenged on appeal. The decision that she was not a worker was challenged but the EAT upheld the tribunal decision. There was a discussion within this appeal judgment of the approach to be taken by Tribunals. The analysis of the Tribunal clearly shows that they considered the question of remuneration and the issue of whether the payments which the cyclist claimant was receiving was remuneration or not was an important matter. They decided in this case that the provision of services and support was not remuneration.

44. In this case I considered that on the basis of the evidence before me the arrangement between the claimants and the sports club was not a contract of employment. Mr Villiers has referred to the English doctrine of consideration. He has done so on several occasions despite conceding at various other points that consideration is not part of the Scots law of contract. For the avoidance of doubt I would say that my view is that it is not necessary for the formation of a contract in Scotland that there be any consideration involved. The position is however that a contract of employment requires there to be remuneration. In the case of the claimant's contract with the sports club there was no remuneration. The arrangement was that the claimants would be paid their petrol expenses. Even if I accepted the somewhat vague evidence given by the claimants to the effect that the expenses amount overcompensated them for the travel costs they actually incurred then this does not amount to performance of work in exchange for remuneration.

45. Even had I been persuaded that they were receiving remuneration it is clear to me that the degree of control which the club had was minimal. I accepted Mr Villiers' submission that where one is dealing with a situation where a worker has a particular skill which the employer does not have then there may well be practical limits as to the degree of control which an employer can exert. In this case however the claimants' freedom from control went considerably beyond that. It was clear to me that Mr Higgins and Mr Villiers were very much in control of what happened both during their coaching sessions and in the manner in which they provided their services. I also considered it significant that at the outset of the arrangement Mr Higgins joined with "his team" comprising Mr Villiers and one other. This does not in any way suggest the level of control required for the claimants to be employees. Furthermore, I note that as mentioned by the respondent's representative, Mr Higgins decided to suspend himself from performance of his duties when faced with an allegation he did not agree with. This is not something an employee can do.

46. With regard to the suggestion that they were workers providing services to the club the principal problem is that they were not doing so in exchange for remuneration for the reasons I have set out above. They simply had their expenses reimbursed. They were unpaid volunteers. It is significant that in fact the claimant himself said at the outset that the claimants were volunteer workers for the respondent. As I have set out above I consider it irrelevant that the amounts paid by way of petrol expenses may have in certain circumstances exceeded the amount required to properly reimburse the claimants. In my view it would be an extremely strange state of affairs if a voluntary worker who is paid expenses and who occasionally receives expenses which are slightly more generous than they ought to be can then claim worker status with the consequence that the organisation which he has been providing unpaid services to for many years may suddenly be faced with a bill for payment at the rate of the national minimum wage for the whole period. In addition, even if I am wrong on the issue of remuneration then it does appear to me on the basis of the evidence that the test for being a worker is not met. Even if I had made a finding that the respondent had engaged the claimant to provide the personal service of jujitsu instruction to their members in exchange for

remuneration it would appear that this was something which was done by Mr Higgins and Mr Villiers in a situation where the club were clients or customers of a business undertaking which they carried out. It is clear from his own evidence that Mr Higgins is heavily involved in running another club. He also appears to be involved with the federation. Mr Villiers also appears to be in that situation. Mr Higgins, Mr Villiers and the other individual came as Mr Higgins' "team". It appears to me that on the basis of the evidence I heard neither claimant would qualify as being a worker employed by the Jujitsu Club either. As mentioned above however this was not a decision which I was required to make. The only matter I am required to rule on is whether the claimants were employees or workers employed by the respondent university and for the reasons given above they clearly were not. Since both claims depend on them having such status the claims are dismissed.

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**Employment Judge:**  
**Date of Judgment:**  
**Date sent to parties:**

**Ian McFatridge**  
**03 August 2020**  
**04 August 2020**