THE EMPLOYMENT TRIBUNAL

SITTING: at London South (video hearing)

BEFORE: Employment Judge Tueje

BETWEEN:

NOEL AGABI

Claimant

-and-

BRIGIT'S AFTERNOON TEA LIMITED

Respondent

ON: 12th November 2024

Appearances:

For the claimant: in person (unrepresented)
For the respondent: Ms Ibrahim (counsel)

JUDGMENT

At the relevant time, the claimant was not an employee and/or worker of the respondent as defined by section 83(2) of the Equality Act 2010. The claim is therefore dismissed because the Tribunal does not have jurisdiction to determine it.

REASONS

Introduction

1. The matter was listed for a preliminary hearing to determine whether the claimant is a worker, as defined by section 83(2) of the Equality Act 2010.

2. The respondent is a bakery and tour bus operator of 12 route master buses providing tours of London while afternoon tea is served onboard. The claimant was hired as an entertainer from 21st July 2023 until 3rd March 2024[1].

3. Early conciliation started on 14th February 2024 and ended on 22nd March 2024. The claim form was presented to the Tribunal on 22nd March 2024. It was

[1] These are the dates given in the ET1 claim form, different dates are given elsewhere, for instance in the claimant's witness statement dated 3rd November 2024.

accompanied by a 5-page document/attachment. The respondent's ET3 form and Grounds of Resistance are dated 24th April 2024.

4. The substantive claim is based on the following complaints:

   4.1 Direct disability discrimination;
   4.2 Indirect disability discrimination;
   4.3 Discrimination arising from disability;
   4.4 Direct race discrimination; and
   4.5 Indirect race discrimination.

5. The respondent denies the substantive allegations, and additionally maintains the claimant was self-employed so is not entitled to the protection of section 83(2) of the Equality Act 2010.

6. On 28th May 2024, Employment Judge Fredericks-Bowyer directed that:

   The claimant's employment status needs to be confirmed before the claims can continue.

   I have directed a public preliminary hearing is listed to consider the claimant's employment status.

7. Although concluding parts of the letter suggest the preliminary hearing would also deal with whether the claimant was disabled, in light of the clear text above, references to the preliminary hearing determining whether the claimant is disabled may be an error. In any event, the respondent confirmed it accepts the claimant is disabled as a result of Generalised Anxiety Disorder. Furthermore, having found against the claimant in respect of his alleged worker status, and consequently dismissing the claim, the issue of whether he is disabled does not need to be determined.

8. The preliminary hearing was a remote hearing, which took place on 12th November 2024. The claimant, who was not legally represented, gave evidence. The respondent was represented by Ms Ibrahim, counsel, with Mr Sahabi, the respondent's operations manager, giving evidence on its behalf. I read the pleadings, and the parties provided additional documentation as set out below.

9. The Tribunal was provided with the following documents by the claimant:
   9.1 An electronic hearing bundle containing 97 pages;
   9.2 An electronic evidence bundle containing 83 pages;
   9.3 An undated 8-page skeleton argument;
   9.4 An application to amend the claim form;
   9.5 An Exhibit A evidence bundle containing 31 pages; and
   9.6 An e-mail from the claimant sent on 12th November 2024 attaching a document titled *"Rejection of Skeleton Argument."*

10. The Tribunal was provided with the following documents by the respondent:

10.1 A witness statement dated 5th November 2024 from Mehran Sahabi, the respondent's operations manager, plus exhibits (25 pages);
10.2 An bundle containing 7 authorities from the respondent; and
10.3 A skeleton argument on behalf of the respondent (which was not taken into account for the reasons stated at paragraphs 12 to 16 below)

11. The Tribunal announced its decision orally at the end of the hearing on 12th November 2024. By an e-mail sent to the Tribunal on 13th November 2024 the claimant requested written reasons. That e-mail was forwarded to me on 14th November 2024. These are the written reasons.

The Respondent's Skeleton Argument

12. Before hearing any evidence, the Tribunal dealt with the claimant's e-mail sent on 12th November 2024 referred to at paragraph 9.6 above. As the subject title of the document indicates, the claimant objected to the respondent's skeleton argument which was sent to him the previous day.

13. Ms Ibrahim explained the skeleton argument contained the submissions she would be making as part of her oral closing submissions. She therefore considered the claimant would not be prejudiced, and may in fact benefit from having the skeleton argument, which gave him advance notice of the respondent's submissions. Additionally, she argued that the preliminary issue raised a legal question so it would be necessary to consider the authorities, which were also referred to in her skeleton argument.

14. Despite what Ms Ibrahim said about her skeleton providing advance notice of her closing oral submissions, the claimant nonetheless maintained his objection to the skeleton argument on the grounds that he had had insufficient time to absorb the contents due to his mental health problems.

15. Taking into account that Ms Ibrahim's skeleton argument had been sent to the claimant not long before the hearing, and he objected to it being relied on, I informed the parties I would not take the contents into account, and asked Ms Ibrahim to present her arguments orally.

16. I clarified with the claimant that it was only Ms Ibrahim's skeleton argument he objected to, and not the authorities. He confirmed that was the case. In any event, I note that the claimant has cited authorities in his own skeleton argument, so it would be inappropriate to exclude the respondent's bundle of authorities, yet allow the claimant to rely on authorities. Particularly as deciding the preliminary issue requires an analysis of statutory and case law authorities, and there was some overlap between some of the authorities each party relied on.

17. The symptoms of the claimant's Generalised Anxiety Disorder include brain fog and confusion. Therefore, as a reasonable adjustment the proceedings were conducted in a manner that allowed him time to process information and documents, and we took periodic breaks.

18. After dealing with the respondent's skeleton argument, we took a break before

starting the preliminary hearing so that, amongst other things, a copy of the claimant's bundle could be forwarded to Ms Ibrahim. The preliminary hearing began at around 11.20am.

Factual Background

19. Unless otherwise stated, the facts set out in this factual background are agreed or unchallenged.

20. Although the claimant was hired by the respondent to work as an entertainer, in his online profile the claimant describes himself as an actor and performer. His CV sets out his work history, including film work that he has done, and states his ambition is to do more film work. However his profile does not list his work at the respondent company.

21. The respondent's unchallenged position is that individuals who are entertainers only are all engaged on a self-employed basis. That is set out at paragraph 2 of the Grounds of Resistance, and paragraph 28 of Mr Sahabi's witness statement.

22. In his oral evidence, the claimant accepted he wants to work as an actor, and that he differentiates between working as an entertainer and an actor.

23. It's common ground that the claimant did not have a written contract. In his witness statement dated 3rd November 2024, the claimant says prior to being hired by the respondent, he was communicating with its entertainment manager, JP Boriau regarding working as an entertainer. The claimant's witness statement continues (at paragraph 2):

    However, in line with the Employment Rights Act Section 230.(3,b) I was a Limb(b)worker and it was a verbal agreement made on 30 May 2023 between my self and the Respondent's Entertainment manager Mr J P Boriau. (See page 1 of the Evidence Bundle).

24. Page 1 of the evidence bundle contains WhatsApp messages between the claimant and Mr Boriau exchanged on 30th May 2023, which indicate they spoke. The claimant's statement refers to a *"verbal agreement",* and so the messages do not specify whether, and if so, what, working arrangements may have been discussed.

25. Prior to working with the respondent, the claimant also observed a shadow tour as a form of training for which he was paid.

26. Paragraph 4 of the claimant's witness statement continues by stating "*Mr J P Boriau mentioned that adding me to payroll was doable and that he would reach out to HR to place me on a 0 Hour Contract. However, he did not follow up on his issue with me (Please see page 3 of the Evidence Bundle)."*

27. Mr Boriau's message in response, sent on 21st July 2023, reads: *"That's doable absolutely, I can get the HR to put you on a 0 hour contract. Let me confirm on Monday."*

28. However, he was not given a zero hours contract, and in his witness statement, the claimant says: *"I decided not to pursue the matter further because I was concerned that doing so might lead to my gradual exclusion from employment due to the absence of a signed contract … But my plan was to try to work for them full-time to establish a form of employer and employee relationship."*

29. It's common ground the claimant was not required to work a set or minimum amount of tours. It's agreed that work was allocated on the basis of the entertainers telling the respondent when they were available, the respondent might then offer them a tour, which the entertainer was free to either accept or reject. The claimant submitted invoices for each tour he worked on, based on the rate of pay set by the respondent, which the respondent paid to him directly.

30. It is also common ground that the respondent provided scripts for entertainers to use. The respondent states in most cases following the scripts was not compulsory as entertainers were given latitude. However, there were some themed tours, such as Peppa Pig, which were more prescriptive to comply with licencing requirements. Some themed tours also required entertainers to were a uniform or costume such as the Grinchmas.

31. There is no dispute that while working with the respondent the claimant had other jobs. In his oral evidence the claimant said that he worked for SAW until October 2023, and simultaneously worked for BreakAway bike tours ("BreakAway"). The claimant stated it was not unusual for actors to have "side work" for instance in hospitality. He explained his work on tours for the respondent and on the bike tour was side work because acting work was short term. He also said that apart from acting jobs, all other work he did was as an employee, where he was paid wages which were taxed on a PAYE basis.

32. At paragraph 6 of his witness statement, the claimant says: *"On 1 October 2023 I received a email from Mr J P Boriau which contained a job description that I now believe to be a written statement of Employment particulars. The email detailed my job responsibilities, tasks and corresponding remuneration."*

33. In his oral evidence the claimant said from around October 2023 to January 2024 he intended to work for the respondent full time. In support of this he relied on a message he sent to BreakAway on 9th November 2023 which stated:

    Looks like I have found a good balance of work. Work full time from April til August with you and full time for Birgitta from mid October til January. And then any tours you both have lying around.

34. He accepted there were no documents or communications in any of the bundles confirming he informed the Respondent about his intention. Although he also relied on the fact that the invoices he submitted during this period reflected that he was effectively working full time hours.

35. Additionally, the claimant also relies on receiving an Enhanced DBS certificate naming the respondent as his employer as evidence that he was the respondent's employee.

36. His witness statement continues: *"On 21 Of November 2023 Mr J P Boriau added me to an APP called When I Work. It is an app that employers use to organize work schedules for their employees. At this point, I considered myself an employee who had to manage my own taxes. This situation was unusual, but I had no alternative."*

37. As to attending for allocated shifts, the claimant accepts there was one occasion he cancelled a tour assigned to him by the respondent because of a clash with a BreakAway tour. But he disputed the respondent's contention that his other working commitments caused him to cancel tours on any other occasions, and no other occasions of cancelling a tour with the respondent due to his other work commitments was put to him.

38. However, Ms Ibrahim put to him various other occasions when he arranged a substitute to cover his tours, as set out at paragraphs 17.1 to 17.25 of Mr Sahabi's witness statement. These paragraphs detailed various messages where the claimant was mostly unable to do a rostered shift, or on other occasions when he was late. And he accepted that the respondent was flexible where entertainers arranged substitutes, although he said that was the only aspect of the working arrangement that was flexible.

39. A selection of the examples in Mr Sahabi's witness statement of when the claimant tried to arrange a substitute or was unable to carry out one of his allocated tours were as follows:

    39.1 He sent a message to Mr Boriau on 8th November 2023 explaining he was unable to travel into work that day because he had lost his bank card. It seems he subsequently found his bank card, but missed the tour.

    39.2 11th November 2023 he asked if someone would cover his tour that day.

    39.3 At 9.42am on 17th December 2023 the claimant e-mailed the entertainers' WhatsApp group asking if anyone wanted the shift he was due to start at 1.15pm that day.

    39.4 On 17th January 2024 he message the group asking if anyone could cover his shift that day.

    39.5 At 7.42pm on 30th January 2024 the claimant messaged the group asking if anyone could cover his shift the next day.

    39.6 Due to tube line closures, at 1.08pm on 3rd February 2024, the claimant messaged Ms Boriau explaining he may be late for his 1.40pm, then messaged shortly afterwards to say he'd have to miss that tour.

40. As stated, these are a selection of the shifts which were missed or substituted for different reasons, or sometimes without a reason being given. The parties agreed that no real sanctions were imposed, even where this happened at short notice.

41. During cross examination Mr Sahabi accepted Mr Boriau was an employee, that he had tried to arrange a substitute for one of his shifts, adding it was because Mr Boriau was unwell.

42. When e-mailing his invoice to the respondent on 1st February 2024, the claimant also stated: *"I would like to discuss the possibility of having a 0 hours contract with the company so that they could do my taxes for me starting from march (just to give the company time to process it)*
It will also help me to ease my anxiety"

43. Ms Ibrahim put to him that he asked for a contract because he was aware at that point he was not a worker. The claimant responded that he asked for the contract because he wanted the respondent to deal with his tax.

44. On 13th February 2024, the respondent e-mailed the claimant explaining he would not be offered a zero-hours contract. Early conciliation started the following day; it ended on 22nd March 2024, being the same day the claim form was presented.

The Claimant's Submissions

45. In his skeleton argument the claimant relied on paragraphs 38 and 41 of *Uber BV v Aslam [2021] UKSC 5*, quoting the latter which reads:

> *Limb (b) of the statutory definition of a "worker's contract" has three elements: (1) a contract whereby an individual undertakes to perform work or services for the other party; (2) an undertaking to do the work or perform the services personally; and (3) a requirement that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual.*

46. The claimant also quoted paragraph 31 of *Bates van Winkelhof v. Clyde & Co LLP [2014] UKSC 32,* and cited *Sejpal v. Rodericks Dental Ltd [2022] EAT 91* and *Autoclenz Ltd v Belcher [2011]* in his skeleton argument.

47. The claimant addressed substitutions by reiterating that Mr Boriau, as an employee, was not precluded from seeking a substitute. In his oral evidence he said that he only changed shifts with individuals within the company. Although he went further during closing submissions and argued substitutions from outside the company were prohibited.

48. In support of his contention that he was an employee of the respondent, the claimant argued he had no control over what he did as shown by the detailed job description he was given. He was provided with paid training, which he argued is inconsistent with being self-employed. The respondent decided on the rate of

payment, he was integrated in to the respondent's workplace, and the respondent was named as his employer on the DBS certificate. The claimant also relied on HMRC's online tool which identified him position as an employee. However, the information he entered online stated he never sent a substitute to cover for him.

49. The claimant argued an employee's contract may be oral, and submitted that the three elements of worker status set out in *Uber v Aslam* were present in his arrangement with the respondent. Namely that by his contract with the respondent he undertook to perform work or services, he undertook to do this personally, and the respondent was not his client or customer.

The Respondent's Submissions

50. On behalf of the respondent, Ms Ibrahim argued the starting point is the statutory test, at section 83(2) of the 2010 Act, which she adds, is underlined in the case law authorities. The authorities clarify that there are various tools which may assist in determining whether an individual has worker status. In this case, she submits the relevant ones are:
    50.1 Whether the claimant was obliged to provide services personally;
    50.2 Whether there was a mutuality of obligation between the parties; and
    50.3 The degree to which the claimant was expressly/impliedly under the respondent's control.

51. Ms Ibrahim relied on paragraph 69 of *R (on the application of Independent Workers Union of Great Britian) v Central Arbitration Committee [2023 UKSC 43,* and paragraph 84 of *Pimlico Plumbers Ltd v Smith [2017] ICR 657,* where it was held that a virtually unfettered power of substitution was inconsistent with an employment relationship, which required an individual to provide personal service. She submitted if there is a conditional right of substitution, the nature and degree of the fetter on a right of substitution is relevant.

52. Ms Ibrahim also argued that on certain licensed tours the respondent is necessarily more prescriptive about how the tour is conducted. But aside from that, entertainers are provided with training and a script but are given latitude to adapt the tour to suit their artistic style. She emphasised the degree of flexibility afforded to entertainers to arrange substitutions at short notice, which the claimant made use of.

53. Ms Ibrahim continued that the flexibility the claimant had was distinguishable from the degree of control Uber exercised over its workers in *Uber v Aslam*. In that case fares were fixed by Uber, drivers were required to accept Uber's standard contract, their choice was constrained when they were logged into the app, including as regards the route taken. She cited paragraph 101 of the *Uber* decision which referred to the various aspects of the drivers' work which was tightly regulated and controlled by Uber. The relationship between the driver and passenger was restricted, and drivers were prevented from doing future work for passengers, with drivers being sanctioned by being logged off the app if they did not meet Uber's standards.

54. Further, as regards substitution, Ms Ibrahim dealt with the claimant's point that only substitutions within the WhatsApp group were permitted, arguing the claimant had not put that to Mr Sahabi in cross examination. While accepting that all substitutions were between those in the WhatsApp group, she argued that was a convenient way of finding someone with the aptitude and willingness to do this work at short notice, but there was no evidence that a substitute from outside the group was prohibited. There was only the claimant's assertion made during closing submissions which I do not accept for the following reasons. Firstly, because, as Ms Ibrahim said, that was a convenient way of finding a willing and able substitute at short notice. Secondly, the fact that substitutions were only arranged within the group does not mean substitutions outside the group were prohibited. During closing submissions, the claimant asserted for the first time that they were. That assertion was an elaboration on his oral evidence, Mr Sahabi was not cross examined on it, therefore I attach little weight to this assertion. I find that the claimant was not prohibited from arranging a substitution from outside the company.

55. Yet further, Ms Ibrahim argued, entertainers were only allocated shifts when they were available, which they could accept or reject. They were not arbitrarily allocated shifts, for instance at times when they had indicated they were unavailable.

56. As to the claimant's contention that he was integrated into the respondent company, she relies on *Hospital Medical Group Limited v Westwood [2013] ICR* to argue this is not a determinative factor. In any event, she adds the claimant's online profile shows that he advertised generally his services as an actor and a performer, he was looking to do more film work, at times he worked for other tours, and so was not an integral part of the respondent company.

57. Ms Ibrahim submitted many working in the role are aspiring actors who look for flexibility in their work so that they can attend auditions when needed, and take up any acting roles offered to them. She continues, the claimant benefitted from this flexibility because there were a number of occasions when he did not attend for an allocated shift, mostly for non-health related reasons.

The Law

58. As stated, this case is regarding the definition of employment under section 83(2) of the Equality Act 2010, which uses different wording to the definition of worker at section 230 of the Employment Rights Act 1996.

59. The definition at section 83(2) reads:

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

60. Nonetheless, the case law dealing with the definition in the 1996 Act is still relevant guidance, because the different wording has no material effect of the meaning of either definition (see *Sejpal v Rodericks Dental Ltd [2022] I.C.R.*

1339). This seems to be accepted by the parties who both cited in support of their respective positions, *Uber v Aslam* which is regarding the definition of worker status under the 1996 Act.

61. I remind myself that the focus is on the actual arrangement between the parties, and whether or not that arrangement is one to which section 83(2) of the 2010 Act applies. In order to meet that test, all three elements of the *Uber* test need to be satisfied. As to the statutory definition, a feature of this case is on whether the claimant was obliged to provide services to the respondent personally or whether he had the power of substitution.

62. *Uber v Aslam* states:

> *68. The judgment of this court in the Autoclenz case made it clear that whether a contract is a "worker's contract" within the meaning of the legislation designed to protect employees and other "workers" is not to be determined by applying ordinary principles of contract law …*
>
> *69. Critical to understanding the Autoclenz case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts … was to determine whether the claimants fell within the definition of a "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation.*
>
> *70. The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose. In UBS AG v Revenue and Customs Comrs [2016] UKSC 13; [2016] 1 WLR 1005, paras 61-68 , Lord Reed (with whom the other Justices of the Supreme Court agreed) explained how this approach requires the facts to be analysed in the light of the statutory provision being applied so that if, for example, a fact is of no relevance to the application of the statute construed in the light of its purpose, it can be disregarded. Lord Reed cited the pithy statement of Ribeiro PJ in Collector of Stamp Revenue v Arrowtown Assets Ltd (2003) 6 ITLR 454 , para 35:*
>
> > *"The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."*
>
> *The purpose of protecting workers*
>
> *71. The general purpose of the employment legislation invoked by the claimants in the Autoclenz case, and by the claimants in the present case, is not in doubt. It is to protect vulnerable workers from being paid too little*

for the work they do, required to work excessive hours or subjected to other forms of unfair treatment (such as being victimised for whistleblowing)

63. In *Sejpal v Rodericks Dental Ltd [2022] I.C.R. 1339* the EAT advised on the approach to implement the above guidance, it stated at paragraph 7:

The entitlement to significant employment protection rights depends on a person being a worker. Deciding whether a person is a worker should not be difficult. Worker status has been the subject of a great deal of appellate consideration in recent years. Worker status has come to be seen as contentious and difficult. But the dust is beginning to settle. Determining worker status is not very difficult in the majority of cases, provided a structured approach is adopted, and robust common sense applied. The starting point, and constant focus, must be the words of the statutes. Concepts such as "mutuality of obligation", "irreducible minimum", "umbrella contracts", "substitution", "predominant purpose", "subordination", "control", and "integration" are tools that can sometimes help in applying the statutory test, but are not themselves tests. Some of the concepts will be irrelevant in particular cases, or relevant only to a component of the statutory test. It is not a question of assessing all the concepts, putting the results in a pot, and hoping that the answer will emerge; the statutory test must be applied, according to its purpose.

Conclusions

64. In light of the above, deciding this preliminary issue requires an analysis of the particular facts in this case to identify the true nature of the arrangement between the parties in order to determine whether their arrangement meets the statutory definition.

65. In my judgment, the power of substitution available to the claimant, and the corresponding flexibility this allowed him, combined with the limited restrictions or control placed on him fulfilling the role are relevant in this determination. There were numerous examples of him swapping his tours for various reasons, sometimes without giving a reason, and sometimes at short notice. That is more consistent with someone who is self-employed rather than a worker, because it indicates there was no requirement for the claimant to carry out the work personally. Therefore, the degree of substitution indicates the claimant personally carrying out the tours allocated to him was not a "dominant feature" of the arrangement.

66. I do not consider the power of substitution was undermined by the fact that all substitutions were arranged within the WhatsApp group. I have already found that the claimant was not prohibited from finding a substitute from outside the company. However, even if he was, I consider the degree of the fetter is consistent with the claimant being self-employed. It was appropriate that the respondent ensures a substitute was competent to carry out the role even where the claimant is engaged on a self-employed basis (see *Ready Mixed Concrete (South East) Limited v Minister of Pensions [1968] 2 QB 497).*

67. I do not consider Mr Boriau, as an employee, trying to arrange a substitute for one of his tours particularly supports the claimant's position. Mr Sahabi's evidence was that Mr Boriau tried to arrange this because he was unwell. That is different to the claimant's situation where he was unable to attend for various reasons, and sometimes gave no reason at all

68. The claimant's profile does not mention his work with the respondent or for any other companies where he has carried out a similar entertainer's role. His profile states that he is an actor and performer, it lists his acting credits, and states he is keen to increase his film work. That gives the impression that he prioritises acting and performing over any work as an entertainer, which is supported by his description of this as *"side work",* being work an actor might do in-between short term acting jobs. Furthermore, advertising his services to the public, is more consistent with him being self-employed

69. The claimant's other work, and his seeming to prioritise acting roles, also supports the respondent's case that the claimant was not integrated into the respondent company. His own message to BreakAway also indicates that the arrangement was closer to seasonal or casual, rather than a worker integrated into the company (see paragraph 33 above). He is effectively saying he would like to work on bus tours during the winter, bike tours during the summer, and go wherever the work is in between. Finally, as regards integration, I do not consider him being added to the respondent's WhatsApp group amounts to integration. Mr Sahabi's unchallenged evidence is that all those who were entertainers only were self-employed. Therefore, as the other entertainers in the WhatsApp group were self-employed, membership alone of the group would not make the claimant a worker.

70. The degree of flexibility the claimant had was more consistent with someone who is self-employed. It was common ground that he was not required to do a minimum number of tours, and the tours allocated to him were only at times when he said he was available, he was not required to make himself available for a tour. And even if he had indicated he was available, he was free to decline a tour if one was offered. Except where licensing conditions prevented it, he was free to use or adapt the respondent's script.

71. Another factor, although perhaps not the most significant one, is that the claimant provides different dates for when he says he became a worker. Firstly, he said that he was a worker by virtue of a verbal agreement with Mr Boriau entered into on 30th May 2023 (see paragraphs 23 to 24 above). In July 2023 he states (see paragraphs 26 to 28 above) that he planned to work full time in order *"… to establish a form of employer and employee relationship."* When he was later added to the respondent's WhatsApp group on 21st November 2023 he said (see paragraph 36 above): *"At this point, I considered myself an employee who had to manage my own taxes."* Yet on 1st February 2024 the claimant requested a zero hours contract, which suggests at that stage he did not consider he was a worker. The lack of clarity as to when the claimant says he became a worker, tends to undermine his contention that there was such an arrangement between him and the respondent.

72. His evidence also suggests that he has conflated working full time with being a worker. For instance, as stated at paragraph 28 above, in July 2023 his *"… plan was to try to work … full-time to establish a form of employer and employee relationship."* Furthermore, during his oral evidence he relied on an exchange with BreakAway stating he intended to work full time for the respondent from October 2023 to January 2024, as evidence of his worker status. He considered the fact that he invoiced for full time hours during this period supported his argument. However, it is the nature of the arrangement and not the number of hours worked that is relevant to whether an individual is or is not a worker.

73. The other matters the claimant relies on to support his position are not determinative. He relies on the fact that the respondent provided him with a job description, which sets out what is required of him in the role. However, that is not uncommon in either a worker or self-employed context. That the respondent fixed the tour rate is also not determinative either way: a worker may negotiate for their preferred rate of pay, or accept a rate that's fixed by the other party. To the extent that the payment rate is evidence of the degree of control the respondent had, I consider the other considerable flexibility afforded to entertainers outweighs the respondent's control over payment rates. The DAB certificate describing the respondent as the claimant's employer does not assist because it is a standard certificate produced by a third party, it is not intended to, and would not affect, the actual arrangement between the parties. Finally, the HMRC tool does not assist because, as Ms Ibrahim pointed out, the answer it gave is influenced by the information provided, and the claimant incorrectly input that he had no sent a substitute in his place.

74. Although, as stated, the analysis is fact sensitive, taking a step back, and comparing the arrangement between the parties in this case to the reported cases relied on, supports this conclusion. For instance in *Pimlico Plumbers* where individuals wore the company uniform, carried company ID, used a company phone, hired a company van, expected to work 5 days and 40 hours per week.

75. In *Uber,* the rate of pay was fixed by Uber which collected the payment, as is the case here. But in most other respects, Uber exercised a degree of control that is absent in this case. For instance, drivers were required to accept Uber's terms and conditions. Drivers could decide when they logged on to the Uber app, but once they did so, the driver's freedom about whether to accept a job was constrained by Uber. The driver's cancellation rate was monitored by Uber, and where this fell below a particular level, an escalating scale of sanctions could be imposed. The drivers are expected to follow the route the journeys prescribed by Uber, and restricts the discussion between drivers and passengers.

76. For the above reasons, in my judgment, the claimant is not a worker. Accordingly, his claim is dismissed.

Employment Judge Tueje

Date: 13th December 2024