EMPLOYMENT TRIBUNALS

Claimants: **Alice Jolly (1) and Rebecca Abrams (2)**

Respondent: **The Chancellor, Masters and Scholars of The University Of Oxford**

Heard at: **Reading Employment Tribunal in person** **On:15-17 January 2024**

Before: **Employment Judge R Read**

REPRESENTATION:

Claimant: **Mr R O'Keeffe (Counsel)**
Respondent: **Ms A Beale (Counsel) and Mr Middleton (Trainee Solicitor)**

RESERVED JUDGMENT

I find both Claimants were engaged on a fixed term contract of employment as detailed in paragraph 36-37and are employees within the meaning of s.230 of the Employment Rights Act 1996 (ERA) and s.295 of the Trade Union and Labour Relations (Consolidation) Act 1996 (TULRCA).

REASONS

My judgment is as follows:

1. The Case Management Orders dated 31 July 2023 ordered that a Public Pre-Hearing should take place to consider if the Claimants have the status of Workers or Employees. Such a hearing took place from 15-17 January 2024 with the benefit of written submissions, witness statements, bundles over two

volumes, a bundle of authorities, and oral evidence by the claimants and three members of staff for the Respondent. This is the judgment determining the status of the Claimants engagement with the Respondent.

2. The Claimants state that they are employees within the meaning of s.230 of the Employment Rights Act 1996 (ERA) and s.295 of the Trade Union and Labour Relations (Consolidation) Act 1996 (TULRCA). The Respondent states this is not the case, they are not employees but workers, within the meaning of the ERA. The relevant date is 22 September 2022.

3. In reaching this decision on the employment status I do not make any judgment if a dismissal occurred, if there was a dismissal, whether that dismissal was unfair and the time limits or requirements associated with such a claim.

Background

4. The Respondent is a world class University that offers a vast range of academic courses, both on a full time and part time basis. One of those courses, delivered through the Department for Continuing Education (DCE), is a two-year part time Masters level qualification in Creative Writing, the Master of Studies in Creative Writing (the MSt). There are other courses the Claimants have contributed to, but it is agreed that their claim relates to the delivery of the MSt.

5. The MSt is a highly prestigious course that attracts students from around the world. Due to the global nature of the student cohort and part time timetable, the MSt is delivered in a format of several residential blocks, and online activity. Tutors such as the Claimants fulfil a variety of roles on the MSt from delivering lectures, teaching sessions, supervision of students, and setting and marking of coursework. Ms Jolly has been delivering the MSt since 2008 and Ms Abrams has been delivering the MSt since 2007.

6. It was agreed between the parties that the Claimants were engaged under contracts that differed little over the relevant period of engagement save for a

change about a substitution clause. The terms of that agreement will be considered later.

The Employment Status Claim

7. The Claimants originally advanced two grounds in support of their claim:

   7.1 They worked under a contract resulting from the parties' conduct from 2006 and 2007 onwards, which gave rise to a well-founded expectation that each year in August or September teaching work would be offered and accepted on both Year 1 and Year 2 of the MSt in Creative Writing course, and Year 2 supervision for the following academic year would be offered and accepted in June.

   7.2 Alternatively, the Claimants worked under fixed term contracts to teach on Year 1 and Year 2 of the MSt in Creative Writing, which included an obligation to supervise Year 2 students, and/or included a right to be offered Year 2 supervision for the following academic year each June.

8. The first basis of claim specified in 7.1 has been withdrawn by the claimants. The Claimants basis of claim has been refined to:

   8.1 sequential fixed term contracts to teach the MSt in Creative Writing (year 2), or alternatively Years 1 and 2 together under the same contract between September 2007 and September 2022, including in each case (save the 2016/17 academic year in the case of C1, and in 2018/19 in respect of C2) a schedule of work which included Year 2 supervision activity.

Factual Background

9. The MSt is a highly successful and sought after course attracting students from around the world. To ensure the course is broad and gives significant choice to the student body the University draws upon a wide number of experts in the

field as tutors. Depending on the number of students applying and accepted on the course it is possible that the numbers of students taking up individual assignments within the MSt across the options in the course can rise and fall. To be adaptive to this need the University has sought to engage the Claimants on a casual basis to be able to flex their workforce to meet the changing demand.

10. Witness evidence was provided by the claimants as well as a colleague, Ms Talbot, on the time they have spent working at Oxford University. All three witnesses were highly professional, learned members of the department, and demonstrated a level of dedication and care for their students that all educators should aspire to. They offered valuable evidence demonstrating their working practices and how they perceived their relationship with Oxford University.

11. The MSt runs over two years, guidance on what those two years look like for a student and a tutor is contained in the respective handbooks. Broadly the course consists of 5 residential teaching blocks (3 in the first year and 2 in the second) lasting 4 days along with a Guided Retreat that both Year 1 and Year 2 students attend lasting three days and a Research Placement. In those residential blocks, there can be several educational activities: lectures, workshops, tutorials, supervisions and assignments.

12. Those tutors who have run a seminar in Residential Blocks 1 or 2 will offer a follow-up assignment to the students, the number of those taking up that assignment will determine the amount of 45-minute tutorials that are assigned to the tutor in the following residential block. Between the residences, the tutor will read prior work, and mark submitted work in preparation for delivering the tutorials. Those tutors supervising Year 1 students will receive proposals for the student's ‘’Portfolio and Extended Essay’ for review, they will then meet the students to refine their proposals. The tutor will then arrange for a ‘very substantial draft’ to be submitted to them well in advance of the supervision session at the Guided Retreat this is so they can prepare for a detailed discussion.

13. Year 2 contains Residence Blocks 4, 5, and the Guided Retreat. The culmination of the MSt is the Final Project and Extended Essay work that is developed through Year 2. Despite this being a Year 2 activity the work for it begins from July when the Course Director receives a proposal from the current Year 1 students looking ahead and appoints a Year 2 Supervisor. The Tutors handbook states:

"A supervisor is assigned to each student for the whole year, and while the student is expected to work independently at Master's level, an appropriate degree of advice and guidance is expected from the supervisor. The elements of the supervision process, the expectations associated with it, and the remuneration procedures are set out below."

14. It is made clear to the Students in their handbook that Year 2 "Supervisors are assigned based on the Course Director's judgment of suitability, they are not chosen by the student."

15. In July, the Year 2 appointed supervisors are to make contact with the student, establishing the relationship. Sometime in the summer (before Residential Block 4 on or around the first week in October) a supervisor gives, "initial advice on proposals, suggests recommended reading, agrees how much draft work, both creative and critical, should be made available for first supervision." This must be done to "ensure s/he [the student] receives the material in good time to prepare for discussion", this effectively means this activity takes place in July-September. After this, there are set discussions within Residential Blocks 4, 5, and the Guided Retreat. In addition to these Residential Block supervisions a tutor can claim up to 8 hours per student per academic term of supervision time, and a fee for producing a supervision report per term. The end of the Guided Retreat is the end of the formal teaching/supervision period:

"Students should generally be in a position to work independently from the end of the Guided Retreat. Only in the most exceptional circumstances should additional guidance be offered to students after this point. The procedure for

claiming for supervision time expended about this work is set out below." Page 9, Tutors Handbook

16. Students are to submit their final 'Projects and Extended Essays' to the University on the third Friday of September of Year 2. The supervisor is deemed to be the first marker and marking should take place in late September/early October.

17. The Claimants have undertaken other educational work from the Respondent, such as an effective writing course but this does not form part of this claim and it is only their work on the MSt that is the subject of the action before this Tribunal.

18. From the evidence of both the Claimants, and it is unchallenged, it is entirely credible that given the professionalism and dedication of the teaching staff they work far more than the time they are financially engaged to deliver, this is even reflected in the Student Handbook, "Some tutors may be extremely generous and offer brief individual (out of class) comments on prework you have submitted. If this should happen, by all means, enjoy it and benefit from it, but do not mistakenly fall into thinking that this is part of the course offering and that it is open to you by right." Regardless of this, this case relates to the time spent on activity for a wage or other remuneration.

19. The above represents the work that could be undertaken by tutors on the MSt. That work was tasked and allocated to Claimants via the following process.

20. Around the beginning of each academic year, it is agreed between the course administrator and the educator the amount of paid activity they will undertake for both students in Year 1 and Year 2, this is sent via email containing the Schedule for Work, with a contract. In addition to this specified work, there was work that is intrinsically linked to this such as marking, and production of reports. For example, the Respondent's witnesses, Dr Macdonald confirmed there was an expectation for marking to be undertaken by the supervising tutor. Given the timing of when the contracts were sent out, around the beginning of

the academic year (in the case of Ms Jolly in the 2021/22 academic year not until 18 December 2021) there must have been an agreement reached in some form already. The tutor would have already made contact with incoming Year 2 student(s) they are supervising, to undertaken the required first contact, development of their proposal, and know when to deliver on Residential Block 4 (beginning the first week of October). Furthermore, there could be the addition of additional work that flows from the number of Year 1 students who select a relevant assignment, such work would be identified and promulgated later in the year.

21. Dr Macdonald offered an Exhibit (AM1), detailing the payments the Claimants have received, witness evidence has shown that this is not a reliable measure of the hours worked, being described by Ms Kelly, the Respondent's witness, as having errors and omissions and did not reflect all the work paid for. The Respondent agreed this evidence could be disregarded. The Claimants presented supplementary appendixes to their witness statements seeking to set out their average number of hours worked over a year. Ms Jolly states she works 165 hours and Ms Abrams 312 hours.

22. The Respondent disputes the Claimants figures as unrepresentative. On the accuracy of Ms Jolly's calculations, I find that it is reasonable given that Ms Jolly has specified a range of time to conclude sometimes the lower figure is relevant, sometimes the higher, it is, therefore, appropriate to take the mean average of those figures as representative. Work undertaken with the Year 2 students post the Guided Retreat as detailed above is only to be undertaken in the "most exceptional circumstances", and this is reflected in the student's handbook paragraph 18 above when it makes it clear such interaction is by the generosity of the tutor and not part of the course offering. Finally, the question of how many supervisions it is appropriate to consider Ms Jolly takes on for Year 1 and Year 2 students. I considered 'the number of students to supervise the table' (covering Year 2 students), a document that both parties consider broadly accurate, it shows Ms Jolly had a range of 4-0 students with the most common number of students being 2 Year 2 students since 2016. It was Ms Jolly's evidence that when asked how many Year 1 students she had,

"Sometimes 1 sometimes 2, more often 1". A fair average to apply would be the supervision of 2 Year 2 students and 1 Year 1 student per year. I find that the yearly figure of 135.5 hours is a fair representation of the hours Ms Jolly worked on the MSt.

23. Turning to the accuracy of Ms Abrams's average yearly hours working on the MSt. She has claimed she worked 312 however this is inaccurate as follows:

23.1 The summer school claimed took place post the date agreed as the operative date of September 2022 (the claimed date of dismissal).

23.2 The Effective Writing course was separate from the MSt and not part of the claim before the Tribunal.

23.3 The Historical Research Session has not taken place since 2017 and there was no evidence given to it being reinstated.

23.4 Pre-reading for the Year 1 seminar is not paid and, on this basis, Ms Abrams, no longer undertakes this work, it is agreed this is not contracted work.

23.5 Whereas Ms Abrams was attempting to assist the Tribunal in providing a range of hours worked she gave (unlike Ms Jolly) a rationale of how she arrived at these figures. I am satisfied on the balance of probabilities to accept her explanation that she most often (the mode) undertook the most number of hours she could.

23.6 Given the Claimant's revised case (they were the parties to a series of fixed term contracts of employment) it is agreed by Ms Abrams that there was a break in these contracts for Year 2 work. Regardless of this even looking back through the years only one Year 2 student is representative.

24. I find that the yearly figure of 141 hours is a fair representation of the hours Ms Abrams worked on the MSt.

The Law

25. The statutory definition of what constitutes an Employee, s230 of the ERA:

> "In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment."

26. In determining the nature of the contract between the parties the well-established case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433, offers a framework to look at the nature of the relationship. It was held a contract of service exists if these three conditions are fulfilled.

> "(i)The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii)The other provisions of the contract are consistent with its being a contract of service."

27. It is accepted that to decide this case I am required to look not only at contract provisions if they exist, but also the practices of the parties, this approach was followed in *Hafal Ltd v Lane-Angell* UKEAT/0107/17/JOJby Choudhury J. "Although there is a letter of appointment in this case, it cannot be said that the question of whether the Claimant was employed under a contract of employment is to be determined solely by reference to that letter."

28. The Claimants have been issued a significant number of contracts during their engagement with the Respondent. It is agreed they are in substantially similar form year after year, and this is not at issue, save for a change that was made in regards to a right of substitution. I noted that some of the contracts had been issued after works had commenced and the 2021/2022 may not have been signed but regardless of this it was accepted, they would have worked to the

terms in the prior contract. Some of the terms relating to the Respondent's intention and obligations are as follows:

28.1 “the arrangements recorded in this letter are a contract of services and not a contract of employment”. Preamble to contract.

28.2 “You will not be an employee of the University and at no time will there be any mutuality of obligation between you and the University. The University does not guarantee to provide work for you and, nor are you obliged to carry out the work provided”. Clause 2.

28.3 “You will provide your services at such times and for such hours as may be agreed from time to time with the University.” Clause 4.

28.4 “You are entitled during this engagement to be engaged, employed or concerned in any other business, trade, profession or activity, which does not place you in conflict with the services you are providing to the Department for Continuing Education” Clause 2.

28.5 “The University is under no obligation to offer, and you are under no obligation to accept any further work.” Clause 10.

28.6 “The University reserves the right to cancel a course or programme if circumstances, such as inadequate enrolment, make it necessary. The University cannot be held liable for cancellation and will not make any payment for a course which is cancelled in advance.” Clause 21.

29. It is clear the contract was drawn up by the Respondent with the intention of creating a legal relationship that does not amount to one of employee and employer. However, it is the Claimant's case that this is a sham and they are fixed term contracts of employment and this is demonstrated by the practices of the parties.

30. I was invited by the Claimants to consider *Uber BV v Aslam* [2021] UKSC 5, a case specifically looking at the distinction between self-employed and worker status. Regardless of this specificity, some areas are relevant in all status cases, and they turn to statutory employment rights, specifically Lord Leggatt's judgment (69) on the interpretation of statutory provisions.

" 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 not, unless the legislation required it, to identify whether, under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It 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."

31. Lord Leggatt (70) goes on to say how this is to be undertaken.

"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."

32. This is the approach that has been followed in considering the ERA.

Mutuality of Obligation

33. As outlined in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* for a person to be considered employed the person engaging the services needs to be obliged to provide work and the other party must be obliged to accept it, this is known as the mutuality of obligation.

34. Despite the Claimants being engaged for a comparatively low number of annual hours this in itself does not act as a bar from the formation of an employment relationship. However, the Respondent contends that any hours worked were irregular and sporadic (gaps in engagement punctuated by periods of work) to the point that there is no irreducible minimum of obligation achieved citing the cases of: *Quashie v Stringfellow Restaurants Limited* [2013] IRLR 99, *Nethermere (St. Neots) Ltd v Gardiner* [1984] ICR 612, *Clerk v Oxfordshire Health Authority* [1998] IRLR, *St Ives Plymouth Ltd v Haggerty* UKEAT 22/5/08 as authority.

35. The question of whether the Claimants worked on a series of individual, intermittent engagements each standing alone is an important factor. The cases cited by the Respondent are all cases where the need fluctuates during the time the work is provided and there are little or no duties between those periods of work. This position is reflected by Underhill LJ in *Windle and another v Secretary for State for Justice* [2016] ICR 721 an Equality Act 2010 when considering if there was a contract of employment:

    "It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense."

36. On the balance of probabilities, I find that an agreement of what work the Claimants would undertake was effectively reached as early as July, before the start of the academic year. This decision is based on the clear need for effective planning of the MSt going forward an entire year and meeting the expectations

set out in both the Tutor and Student guidance. For example, Year 2 Students need to be contacted pre-term, retreats need to be timetabled, and course literature such as CVs may need to be changed to meet the assurance given to the students they will have a year long Year 2 supervisor. The existence of prior planning and an agreement is also supported by the fact that this seemingly took place before contracts being issued:

36.1 Ms Jolly's contracts were not sent out until 29 September 2021 for the 2021/22 academic year and 18 December 2020 for the 2020/21 academic year.

36.2 Ms Abrams' contracts for the academic year 2022/23 were not sent out until 23 November 2022 (noting this is post the claimed effective date of dismissal it does provide evidence of a pattern showing the time such contracts are sent in the absence of the 2021/22 academic year contract before me).

37. I find that there was an agreement made between the Parties that work would be carried out over a 15 month period in the case of MSt. This work would consist of:

37.1 The work that was ultimately codified in the Schedule of work but agreed in the weeks and months before that.

37.2 Work that was ancillary to that work specified in the schedule of work, such as marking or taking on a Year one student flowing from the conducting of a Residency seminar.

37.3 The supervision of the agreed number of Year 2 students throughout the period.

37.4 In the case of Ms Jolly she was offered and accepted new Year 2 students consistently from the 2017/18 academic year to the relevant date. In the case of Ms Abrams, she stated in the 2020/21 academic

year she had not taken on a new student but continued to supervise a student who had held over on her studies from a previous year (due to COVID issues) but ultimately left the course around May (due to illness). In cross-examination, Ms Abrams accepted she has submitted no evidence to substantiate this claim of a Year 2 supervision student in the academic year 2020-21, and her account is undermined by the evidence that the schedule of work sent out on 18 December 2020 that did not mention supervision of a Year 2 student (carried over or new), if this was an omission then this went unchallenged by in Ms Abrams email reply on 1 February 2021. Therefore, I find that the agreement to take on a Year 2 student in July 2021/22 would be the first year in the series of such agreements, prior to this there was a break in relation to Ms Abrams.

38. It now turns to the question if once agreed, this work is an obligation for the Claimants to perform the works in the year or optional as the contract states, “nor are you obliged to carry out the work provided”.

39. I find the work that is offered outside the agreements as specified in paragraph 37, does not form part of the agreement and the Claimants are neither entitled to that work nor obliged to accept it. An example, of such work would be a request late in the academic year to take on an additional task as a ‘second marker’ (not specified in any pre-agreement, schedule or ancillary to such agreement) detailed in the email from Dr Morgan to Ms Jolly dated 31 June 2022.

40. However, once work is accepted, as agreed at the start of the year, Clause 4 of the contract states, “You will provide your services at such times and for such hours as may be agreed from time to time with the University”. Looking at this clause, the use of the word ‘will’ seemingly places an obligation on the tutor to provide the services agreed to. The agreement in this case is not a sporadic or a minimal one, most evident when it comes to the supervision of Year 2 students. The schedule of work is something agreed to before the start of the academic year and the level of interaction required is detailed in the Tutors

handbook and spans the entire period with a requirement of continuity of student/supervisor, "A supervisor is assigned to each student for the whole year, and while the student is expected to work independently at Master's level, an appropriate degree of advice and guidance is expected from the supervisor."

41. Clause 4 does go on to say, "These may be varied at the discretion of the University. Times, days, and hours will vary according to the needs of the University and its students and your own availability to teach." This seems to give a limited ability, if the tutor is unavailable to seek a variation but the primary requirement on the tutor remains.

42. I heard oral evidence from both the Claimants and Respondents' witnesses of how this worked in practice. Dr Macdonald's evidence was carefully considered, she agreed at the time of the offer of the work it could be turned down but once accepted there was an expectation rather than an obligation to undertake the work.

43. It is the Claimant's case that they were under an obligation to do the work, once accepted. This case has been going on for several years and the Claimants have had a significant amount of time to search their records for times that tutors, once accepted work have subsequently pulled out 'in year'. There are around 30 tutors on a course that has been running for circa 15 years. Excluding cases when a tutor has expressed a desire not to undertake some of the works in the following year or work they were not remunerated for I was furnished with one example of when a tutor has sought not to undertake work, 'in year' they have committed to. This was when Ms Abrams requested to move the date of one seminar (historical research) in May 2018 because her son was leaving for Australia for a year. A request a full-time employee may well have also made given its time dependent nature. That seminar was never run again. On the evidence before me tutors not meeting their commitments to teach appears to be an exceptional event.

44. I have also considered several factors of relevance. As a world leading University, the Respondents rightly attracts tutors of renown, professionalism, and quality. Ms Abrams's oral evidence was clear when she said words to the

effect of, ‘she could not abandon students. I could not stop supporting them.’ I find that the Respondent knew of this level of personal professional obligation to their supervisees and relied on it to oblige the Tutors to meet the obligations they made at the start of the course.

45. Ms Jolly described a power imbalance, her profession as a creative writer being very low paid compared with, in her words ‘one of the most powerful organisations in the world’. Ms Abrams spoke of the requirements to ensure they used ‘courtly language’ to ensure they did not seem they were upsetting the administrative staff. It is through that lens of inequality of relationship I have considered the question of expectation to carry out works rather than obligation.

46. I find that there was in effect an obligation for the Claimants to undertake the clearly defined work offered by the Respondent as detailed in paragraph 36 above.

Personal Service

47. To be a contract of service the performance of the service must be personally delivered by the Claimants. The Respondent claims this is not the case as there is, a right of substitution. This is contained in Clause 2 of the contract, “You may arrange a substitute tutor or lecturer, subject to the prior approval of the Programme Director; in this case, we will continue to pay your fee as provided below and you shall be responsible for the remuneration of (and any expenses incurred by) the substitute.” Both parties directed me to *MacFarlane v Glasgow City Council* [2001] IRLR 7. Of note is Lindsay J comment (11), which although is not on all fours with this case certainly has relevance.

“It would, for example, be easy enough to imagine a case where a person clearly to be taken to be an employee – say a schoolteacher employed by a local authority – might have in his or her contract a provision that if he or she was unable to take a class then he or she might arrange for another colleague from the local authority’s common room in the school to take it for him or her. No one, surely, could say that the presence of such a clause would deny the teacher the label, otherwise appropriate, of being an employee”

48. Also *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*, Mackenna J (515) added an important qualification to the requirement for persons service. He said:

"Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be …"

49. I am also guided by the invaluable scenarios set out by Sir Etherton MR, *Pimlico Plumbers v Smith* [2017] EWCA 51, 84. The two that are of greatest assistance are:

"Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using a different language, the extent to which the right of substitution is limited or occasional."… "Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

50. The contract term allowing substitution, "subject to the prior approval of the Programme Director" places no bounds on how the Program Directors may exercise this power. Even if this was not the case and there were to be a degree of conditionality implied in the contractual term the right is:

50.1 Occasional. There is very limited evidence of this happening over the span of the course. It seems so infrequent and rare that the procedure does not appear in the Tutors Handbook and again I have only been signposted to a single limited example.

50.2 Limited. Any tutor would have to likely be of the same academic standing as the person being substituted and in that limited sub-field of creative

writing. It is also likely they would have to be 'empanelled' (an Oxford University accreditation process) to deliver some of the tasks. It is highly likely the only realistic substitution would effectively be a shift swap with an existing tutor, akin to the Common Room switch detailed by Lindsay J in *MacFarlane v Glasgow City Council*.

51. I find the contract was one of personal service.

Control

52. The final requirement is control. The Respondent puts forward the argument the Tutors status is akin to that of the musicians in *Addison v Lonon Philharmonic Ltd Orchestra Ltd* [1981] ICR 261. The level of control the Respondent has over them is (272) "no more than required by the very nature of the work". I considered this case, and it is predominantly based on the individual circumstances of these musicians. The Claimants contend the Supreme Court judgment of Uber assists me in that Lord Leggatt (75) stated:

"The correlative of the subordination and/or dependency of employees and workers in a similar position to employees is control exercised by the employer over their working conditions and remuneration."

53. In this context the Uber judgment was looking at workers and statutory interpretation to find meaning to the terms subordination or dependency. It was undertaking this exercise in seeking statutory interpretation to prevent individuals vulnerable to exploitation (work hours under the Working Time Regulations, withholding or wages…) so it is of limited relevance as the Respondent already has said the Claimants have worker status and those protections. The methodology in determining if, expressly or impliedly, in the performance of a service the Claimants will be subject to the Respondent's 'control', in a sufficient degree, to make that other 'master' is already well set out in, *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*, Mackenna J (515):

"Control includes the power of deciding the thing to be done, how it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in sufficient degree to make one party the master and the other his servant. The right need not be unrestricted."

54. Significant evidence came before me on the nature of the relationship. There was little between the Claimants and Respondent on the level of control exercised. The tasks were agreed at the beginning of the year in the agreement to teach or supervise a specific class or student, once accepted the Claimants were not free to decide to teach a different class or supervise a different student without the Respondent's authority. The format of the teaching activity undertaken is dictated by the Respondent in the form of workshops, supervisions, marking, marking guides, the length of and format of assignment, tutorials, in person or via remote means, the number, duration, and subject matter. Some aspects were in the control of the tutor, for example, the teaching materials, handouts, choice of assignment titles, pre reading. On Year 2 supervision tasks, there was also some flexibility on the timing of when the supervisions took place and the online platform used, the nature of professional input to guide the student but the maximum number of sessions was set by the Respondent and they had to take place during the relevant terms. Ultimately Oxford University issues Masters level degrees based on their teaching, supervision, and assessment, I do not believe it is the case Oxford University had no control over the quality of education and assessment the students were receiving on a post-graduate qualifying degree.

55. In the Respondent's closing submissions counsel stated that in *Addison* "the ET accepted that there was some degree of control by the Orchestra when the claims were actually working "but no more than was required by the very nature of the work…". This case is different, the MSt was controlled by the Respondent but the Claimants were given a degree of freedom in the manner they delivered their teaching. Indeed, it is inherent in all teaching that the teacher requires a degree of flexibility to teach the subject they have been engaged; to teach otherwise they would effectively be reading from a script. If I were to accept the

Respondent's argument it could follow that because a hypothetical Oxford Don, in working full time under a contract of employment, who is free to determine their own reading lists, timings of their tutorials, teaching style, handouts, and content within the course framework is not an employee as they are not in the 'control' of the University.

56. I find the relationship was one in which the required amount of control was in place by the Respondent over the Claimants.

Other Factors

57. Although not critical to this case several additional factors have been introduced to demonstrate further factors that give meaning to the relationship. These include: the Tutors are not simply guest lecturers or speakers, they are given university credentials, and contact details (their students can contact them on, all year round) the standard terms of engagement have the Respondent claim Intellectual Property rights over their work and they are held out to be full members of the faculty (with biographies) in the student handbook.

Decision

58. For the reasons set out above I find both Claimants were engaged on a fixed term contract of employment as detailed in paragraph 36-37 and are employees within the meaning of s.230 ERA and s.295 TULRCA.

59. I will issue a separate order for the further progress of the claims.

Employment Judge Read
9 February 2024

Judgment sent to the parties on:
9 February 2024

For the Tribunal:

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/