EMPLOYMENT TRIBUNALS

Claimant: **Mr A Khan**

Respondent: **Nuffield Health**

Heard at: **Sheffield** **On:** **29 May 2018**

Before: **Employment Judge Brain**

Representation

Claimant: Ms L Kearsley, Solicitor
Respondent: Mr M Foster, Solicitor

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that the claimant was an employee of the respondent within the meaning of section 230(1) of the Employment Rights Act 1996 and was a worker within the meaning of section 230(3) of the 1996 Act and Regulation 2(1) of the Working Time Regulations 1998.

REASONS

1. The claimant presented his claim form on 14 September 2017. His grounds of claim are succinct and read as follows:

   "*The claimant was employed by the respondent as a personal trainer. His case [is] that he was an employee and/or worker. He was dismissed on 18 May 2017 and claims unfair dismissal, non payment of holiday pay, non payment of sick pay and failure to pay notice*".

   The grounds of claim go on to say that the claimant has made a subject access request under the Data Protection Act 1998 (which was then in force) and that further particulars would follow. Further particularisation of the claimant's claim has not yet come to pass.

2. The respondent presented its response form to the Tribunal on 17 October 2017. Amongst other things, the respondent put in issue the claimant's entitlement to pursue his complaints upon the basis that at all material times he was self employed.

3. On 29 November 2017 Employment Judge Keevash caused a notice of hearing to be sent to the parties. He directed that there should take place an open preliminary hearing to determine whether the claimant was an employee and/or a worker of the respondent within the meaning of section 230(1) or section 230(3) of the Employment Rights Act 1996.

4. The open preliminary hearing was listed for 9 January 2018.

5. The matter came before me on that day. For the reasons set out in the note to the Order that was promulgated on 23 January 2018 the preliminary hearing was aborted and was listed to commence *de novo* on 16 March 2018. By consent, the hearing was adjourned and was listed for 29 May 2018.

6. At the resumed open preliminary hearing I received evidence from the claimant. He also put in evidence a signed and dated witness statement from Gavin Murray, a former employee of the respondent. Mr Murray did not attend the hearing in order to give his evidence.

7. On behalf of the respondent I heard evidence from:-

   7.1. Ian Parkin. He is currently employed as general manager at the respondent's Fitness and Wellbeing Centre in Wakefield. Between around 2008 and November 2016 he was employed as the general manager at the respondent's Fitness and Wellbeing centre in Doncaster. Mr Parkin worked alongside the claimant at the respondent's centre in Doncaster (which I shall now call 'the centre' for short).

   7.2. Peter Marsden. Mr Marsden is currently employed as general manager at the centre. He is Mr Parkin's successor to that role.

8. The Claimant's entitlement to the continued pursuit of his complaints before the Employment Tribunal turns upon his status. The 1996 Act provides employees with a number of rights including protection from unfair dismissal and from unlawful deductions being made from earnings.

9. Unfair dismissal protection is afforded to employees. The 1996 Act states that an employee is an individual who has entered into or worked under (or, where the employment has ceased, worked under) a contract of employment - section 230(1). The 1996 Act goes on to provide that 'contract of employment' for the purposes of section 230(1) means a contract of service, whether express or implied, and (if it is express) whether oral or in writing – section 230(2).

10. Protection from the making of an unlawful deduction from wages is enjoyed by workers. The definition of 'worker' is subject to a more detailed definition than is the term 'employee' in the 1996 Act. Section 230(3) defines a 'worker as "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 any other 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".

11. Thus, all employees are workers, but not all workers are employees. An identical definition of worker to that in section 230(3) of the 1996 Act appears in Regulation 2(1) of the Working Time Regulations 1998 which may be relevant to issues in the case around holiday pay.

12. These statutory definitions are not comprehensive. The issue of employment and worker status is one which frequently troubles the court and tribunal. Existing case law discloses a lack of consensus on what criteria should be applied to determine whether a particular individual is an employee or an independent contractor. The courts have rejected the notion that there is one single factor that can determine whether a contract is a contract of service/employment. Instead, the issue is approached by examining a range of relevant factors. This is commonly referred to as the 'multiple test' and was first advocated in **Ready Mix Concrete (South East) Limited v Minister of Pensions and National Insurance** [1968] 1 All ER433. In that case, Mr Justice MacKenna set out the following three questions:-

- Did the worker agree to provide his or her own work and skill in return for remuneration?
- Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?
- Were the other provisions of the contract consistent with it being a contract of service?

13. Later cases established that it is impossible to draw up a complete list of factors that should be weighed in the balance as every case will depend very much on its own facts. Some factors are relevant to almost every situation and in **Carmichael and Another v National Power Plc** [1999] ICR 1226 the House of Lords held that there is an 'irreducible minimum' without which it will be all but impossible for a contract of employment to exist. That irreducible minimum was control, mutuality of obligation and personal performance.

14. The concept of control requires that the ultimate authority over the purported employee in the performance of his or her work rests with the employer. Indirect control, which exists by virtue of an employer's right to terminate the contract if the worker fails to meet the required standards of skill, integrity and reliability, is not by itself sufficient. Some element of direct control of what the worker does is needed.

15. Mutuality of obligation is usually expressed as an obligation on the employer to provide work and a corresponding obligation on the employee to accept and perform the work offered. The absence of this mutuality of obligation can defeat a claim for employee status even where the purported employer operates a significant degree of direct control over how work is carried out.

16. A couple of illustrative examples from very well known cases demonstrate the application of this principle in practice. In **Cheng Yuen v Royal Hong Kong Golf Club** [1998] ICR 131, a golf caddy argued that he was an employee of the club where he worked. He was required to wear uniform, to behave well on the club premises and to charge a fee per round on a scale which was uniform for all

caddies, which was fixed and collected by the club and paid to the caddies. However, the club was not obliged to give him work or pay him other than the amount owed by the individual golfer for whom he caddied. By the same token, he was not obliged to work for the club and he had no obligation to the club to attend in order to act as a caddy for golfers. The Privy Counsel held that this meant that there was insufficient mutuality of obligation for a contract of employment to exist.

17. In **Stringfellow Restaurants Ltd v Quashie** [2013] IRLR 99 a lap dancer was subject to a similar degree of control by the club where she performed. She was rostered to work on particular days and was obliged to attend a weekly meeting at which the rota was set. On the nights she worked, she was paid by customers in a form of voucher the club would exchange at the end of the night for sterling, minus deductions. The deductions included commission paid to the club, a house fee and fines for such things as absence and lateness. The Court of Appeal held that since the dancer's earnings came entirely from what was paid by customers, and it was possible that on any particular night they were less than she was obliged to pay to the club, there was an absence of any obligation on the part of the club to pay her any wages. Thus, she was not an employee.

18. The final factor which is part of the irreducible minimum is that of personal performance. In **Ready Mix Concrete**, it was said that, "freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, although a limited or occasional power of delegation may not be". An unfretted right to provide a substitute is inconsistent with an undertaking to provide service personally, while a conditional right to provide a substitute may not be. It depends upon the degree to which the right is limited or occasional. A right to substitute only where the contractor is unable to carry out the work is consistent with personal performance whereas a right to substitute limited only by the need to show that the substitute is as qualified as the contractor to do the work is inconsistent with personal performance. A right to substitute only with the consent of another who has an absolute and unqualified discretion to withhold consent is consistent with personal performance.

19. Determining whether an individual is an employee is not simply a matter of looking to see whether the three factors together said to constitute the irreducible minimum are present or not. Other factors may be relevant such as the provision of equipment, tools and uniforms. Financial consideration will also be taken into account to see who bears the financial risk in a business. How a purported employee is paid is also a relevant factor. Payment of tax and national insurance on a self employed basis is not conclusive proof of a contract for services but plainly is a relevant consideration. The degree to which an individual is integrated into an employer's organisation may shed light on whether he or she is an employee. Matters that might fall for consideration are whether the individual is subjected to the employer's disciplinary and grievance procedures, whether he or she must seek permission to take time off or to take rest breaks.

20. The wording of any contract entered into between the parties may also be relevant. The parties' stated intentions as to the status of their working relationship may be a relevant factor but the courts will always look at the substance of the matter and how the parties conducted themselves in practice. The fact that an employee requested that he or she be treated as self employed will not prevent him or her from later claiming that the arrangement is still in substance a contract of service. A contractual description of the relationship may

carry considerable weight and will continue to be important in cases where all of the factors are evenly balanced. In **Massey v Crown Life Insurance Co** [1978] ICR 590, CA, Lord Denning MR said that "when it is a situation which is in doubt or which is ambiguous, so that it can be brought under one relationship or the other, it is open to the parties by agreement to stipulate what the legal situation between them shall be".

21. A misrepresentation of the true position between the parties to a written agreement may result in a tribunal or court finding an element of the contract to be a sham. Courts and tribunals may readily look behind the terms of a written agreement. Courts and tribunals should be alerted to this possibility by reason of the fact that generally the parties do not have equal bargaining power. The leading case upon this issue is **Autoclenz Ltd v Belcher & Others** [2011] ICR 1157, SC. The Supreme Court held that an Employment Tribunal had been entitled to find that car valets whose contracts specified that they were self employed sub contractors were, in reality, employees. The tribunal was not deterred from this conclusion by two clauses that, on their face at least, negated employment status: a clause allowing the 'subcontractors' to supply a substitute to carry out the work on their behalf, and a clause stating that there was no obligation on the putative employer to offer work or upon the putative employees to accept it. The tribunal found that these clauses did not reflect the reality of the claimant's working situation. They were expected to turn up and do the work provided and were fully integrated into the business and subject to a considerable degree of control.

22. Of relevance in that case was that the claimant had no control over the way in which they did their work or their hours of work, they had no real economic interest in the way the work was organised, they could not source materials for themselves and they were subjected to the direction and control of the putative employer's employees on site. Their rates of pay were determined by the putative employer who felt able to increase or reduce those rates unilaterally. There was nothing that the claimants could do to make their putative businesses any more profitable. The claimants might work elsewhere but only on days when the respondent had no work for them to do. The substitution clause did not reflect what was actually agreed between the parties which was that the claimants would show up each day to do work and would be offered work provided it was there for them to do. The claimants would have to give notification in advance if they were unable for work and it was expected that they would turn up unless such notice had been given by them.

23. The Supreme Court held that by reason of a general inequality of bargaining power in the work place, courts and tribunals have much greater scope to look behind the written terms of a contract in the employment context than the ordinary law of contract generally allows. However, clear evidence of employee status, such as control, mutuality of obligation and personal performance will be required before an express contractual term that negates employment status can be disregarded.

24. As I have already observed, if an individual establishes that he or she is an employee as defined in section 230(1) and (2) of the 1996 Act and in accordance with the principles and case law that I have summarised so far, then he or she will also be a worker pursuant to section 230(3)(a). It is however possible for an individual to be a worker but not an employee. In such circumstances the dispute

over worker status will focus upon the statutory definition in section 230(3)(b). To fall within that definition an individual must:

- Have a contract with the person or business that it is claimed is the employer.
- Be obliged to perform the work or services under the contract personally.
- Not be contracting with a client or customer of his or her business or profession.

25. The intention behind 'limb (b)' (as it has become known) is to create an intermediate class of protected worker made up of individuals who are not employees but equally could not be regarded as carrying on a business. The distinction to be drawn is that between those who carry on a profession or a business undertaking on their own account and who enter into contracts to provide work or services for clients or customers and those who provide their services as part of a profession or business undertaking carried on by someone else. On the face of it, the question of whether a claimant is carrying out services as part of a profession or business undertaking carried on by someone else seems a very different enquiry to those relevant to the question of employment status and whether a claimant is working under a contract of employment. Facts which arise for consideration under the multiple test are however relevant to determining whether a claimant is a 'limb (b)' worker as it is often relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies and the level of risk undertaken.

26. Against this somewhat lengthy exposition of the relevant principles, I now turn to the facts of this case. It is not in dispute that on 14 February 2011 the claimant signed a written statement of terms and conditions of employment (which are in the bundle at pages 62 to 67). These written particulars were also signed upon behalf of the respondent. The date of commencement of employment was given as 2 February 2011. *(The claimant in fact says in his ET1 that he commenced employment with the respondent on 20 September 2010. Nothing turns upon this, it not being in dispute that the claimant was an employee for a short time from 2 February 2011 at the latest).*

27. The claimant was employed as a personal trainer at the centre. His rate of pay was given as *"£6 per gym hour and £15 per PT hour".*

28. Mr Parkin told us that employed personal trainers have to undertake a number of hours of gym work (such as being on the gym floor to check that customers are properly using equipment and lifeguarding shifts). This type of work is to be distinguished from 'PT' or 'personal training' work. The claimant says in paragraph 3 of his witness statement that, "At the time my employment started the respondent told me that they would pay me £6 an hour for attending work with the intention that I would use this time to build up my workload. I would then get a higher rate of pay for any sessions that I carried out". He goes on to say that, "All bookings with clients that were made had to be made through the respondent's system. I would take people to the desk and arrange payment to be done from them either by the receptionist or by myself. All bookings had to be done on the respondent's branded forms which they would

manage. This system remained in place during my employment with the respondent up to my dismissal in 2017".

29. A code of conduct for personal trainers was also signed by the respondent and the claimant on 14 February 2011 (pages 68 to 70). Mr Parkin's evidence (at paragraph 7 of his witness statement) is that the code of conduct applies to all employees.

30. Also on 14 February 2011, the claimant and respondent entered into the personal training agreement that we see at pages 123 to 139. This was said to be supplemental to the personal trainer's contract of employment with the respondent. Consistent with the written statement of terms and conditions of employment, personal training sessions undertaken by the claimant (defined as the 'personal trainer' in the personal training agreement) was at the rate of £15 per session. This was consistent with the terms and conditions of employment. The amount payable for personal training sessions was subjected to deductions for income tax and national insurance contributions.

31. The claimant (in his capacity as personal trainer) was under an obligation to:-

    31.1. Complete the weekly booking sheet by filling in his shifts and the full name of all personal training clients in the appropriate time slot prior to the completion of any booked sessions.

    31.2. Sign the weekly booking sheet and ensure that the Manager, Fitness & Wellbeing Advisors have this information on an agreed day each week.

    31.3. Obtain payment from clients for their personal training sessions in advance through the till at reception and not accept payment in hand.

    31.4. Keep a record of the sessions upon the PT record card maintained for each client.

    31.5. Not promote any other interest or business other than that of the respondent.

    31.6. Follow the respondent's procedures in order to take holiday for which he would be paid holiday pay.

    31.7. Notify the respondent if unable to attend through illness.

    31.8. Wear the respondent's uniform.

    31.9. Attend mandatory personal training work shops, trainings or meetings as required by the respondent and maintain certain qualifications.

    31.10. Carry out the personal training session outside of the personal trainer's usual shifts unless permission has been received.

    31.11. Comply with targets in respect of the number of personal training sessions to be undertaken which if missed may result in action being taken against a personal trainer.

32. On 7 February 2011, the claimant completed an employment health questionnaire. The claimant declared himself free of any condition precluding him working at the centre. Page 118 is a copy of a new employee start form setting out the relevant rates of pay.

33. The parties then entered into a consultancy agreement dated 14 March 2011 (pages 132 to 149). About this, the claimant says (at paragraph 7 of his witness statement) that, "A month after I signed my employment contract, Ian Parkin and Dorn Colette from the respondent approached me and told me that I would make more money if I went self employed. They asked me to sign a consultancy agreement a copy of which can be found at pages 132 to 149 of the bundle. I trusted that the respondent was doing this to help me earn more money. I was led to believe that it benefit me in the long term".

34. The claimant goes on in paragraph 8 to say that, "This agreement was presented to me only a month after I had signed my contract of employment and 6 months after I started by employment with the respondent. I did not feel that I was in a position to refuse or negotiate as the respondent was telling me that it was the thing to do". In evidence before the Tribunal the claimant said that he had been "naive" and that he did not read the consultancy agreement before signing it as he "did not think it mattered". In evidence given under cross-examination Mr Parkin said that he had some difficulty in recalling the circumstances in which the claimant came to sign the consultancy agreement. Mr Parkin said, "It was in the claimant's interest regardless of how it came about. We suggested it to him as an option I imagine. We wouldn't have forced him to sign it".

35. On 4 April 2011, Dorn Colette emailed 'Doncaster admin' to advise that the claimant was transferring to self employment status. She said that "Ian *[Parkin]* has agreed an increase to his PT rate to £20 per hour due to his commitment and the increase of PT clients he has brought to the club". On the same day (4 April 2011) a 'colleague leaving form' was completed. This is at pages 157. At page 158 we see what appears to be one of the respondent's pro forma documents named 'PAY2-consultant starting or changing details.' This recorded the claimant as changing 'from hourly to self employed' as of 14 March 2011. This was signed by the claimant and on behalf of the respondent.

36. Mr Parkin says, at paragraph 10 of his witness statement, that the claimant "was the only self employed PT at the centre but he did work alongside our other employed PTs".

37. At paragraph 10 of his witness statement the claimant says that, "In 2014 the respondent decided that they were going to make all of the PTs employees. I believe that this was because they realised that they were all, in fact, employees and that it was wrong for them to be considered as self employed. I believe that they were attempting to cover themselves for if this was ever looked into by a court or Tribunal. At this time, I was delivering a very high number of weekly sessions and making a good living". He goes on in paragraph 15 of his witness statement to say that, "The PTs were given an ultimatum. We could either become employees or our contracts would be terminated. When I looked at the package that was being offered I calculated that it would result in my earnings reducing by up to £25,000 a year. This was simply not a possibility for me financially. I went to the manager at Doncaster and pointed out that if I was sacked the gym would lose a high number of members that I was providing sessions for. My manager accepted my point and went up to his management to request that they make an exception for me. I am aware that this was escalated to the highest level of the organisation. Eventually it was agreed that I could remain on the same deal

that I had been on since March 2011. Every other PT at Doncaster either left, was sacked or signed to the new contract".

38. At paragraph 12 of his witness statement the claimant says that, "Following this change, out of 92 PTs in the respondent's business I was the only one that remained on the previous arrangement".

39. The claimant's account is that after signing the consultancy agreement in March 2011, nothing changed about the way that he worked for the respondent other than that income tax and national insurance was not deducted from the money paid to him by the respondent for his services. After the events described by the claimant is 2014 (leaving him (on his case) as the only personal trainer working pursuant to the 2011 arrangement) he says that, "Whilst I accept that there were slight differences in the way that I was paid and that I took out public liability insurance to cover my work (because I was told that I had to do this by the respondent), my day to day working arrangements were the same as the other PTs and the same as they had been throughout my entire employment with the respondent".

40. In paragraph 41 of his witness statement, Mr Parkin refers to an exchange of texts with the claimant in November 2014 about his rate of pay and *"Nuffield's move to try to engage only employed PTs".* Mr Parkin's reference to the respondent engaging in moves during 2014 to try to engage only employed PTs seems at odds with the evidence at paragraph 10 of his witness statement that the claimant was the only self employed PT at the centre. It also sits at odds with the respondent having a *pro forma* "consultant starting or changing details" form such as that at page 158.

41. The text exchange referred to by Mr Parkin at paragraph 41 of his witness statement (at page 165e) is dated 26 November 2014. Mr Parkin refers agreement being reached that the claimant was being "left as self employed". Mr Parkin expressed the hope that this would be an inducement for the claimant to stay with the respondent. He said, "You are an exception to the rule and your excellent ongoing performance allowed me to find a way around this". The claimant was also seeking in these texts to negotiate an increase from £20 to £22 as the rate of pay for his sessions.

42. Upon the issue of the trends within the respondent's business, I prefer the claimant's account. The claimant's case that he was not the only personal trainer to move on to a consultancy agreement is consistent with the respondent's case (as set out in Mr Parkin's statement *per* paragraph 40 above) that there was a move away from that kind of arrangement in 2014. That is also consistent with the evidence of the text messages at page 165e which refers to the claimant as the exception to the rule (that 'rule' presumably being that the personal trainers were henceforth to be retained as employees). Further, it would be strange for the respondent to have a *pro forma* such as that at page 158 if the claimant were, in 2011, to be a unique case.

43. I now turn to the consultancy agreement commencing at page 132. This provides that the relationship of the claimant with the respondent would be that of independent contractor and nothing in the agreement shall render him an employee. I refer to clause 13. The same clause goes on to provide that the agreement constitutes a contract for the provision of services and not a contract of employment. Other relevant provisions are that:-

43.1. The engagement of the claimant by the respondent upon the terms of the consultancy agreement were to continue until terminated as provided by the terms of it or by either party giving to the other not less than four weeks' prior in notice.

43.2. The claimant was obliged to provide the services (as described in schedule 1) with all due care, skill and ability and to use his best interests to promote the respondent.

43.3. The claimant was obliged to devote such time as he deems appropriate to the carrying out of these services.

43.4. He was entitled to appoint a suitably qualified and skilled substitute taken from the cover list kept by the respondent in the relevant centre.

43.5. The claimant gave an undertaking to the respondent that during the currency of the engagement he wouldl take all reasonable steps to offer to the respondent any business opportunities of which he became aware which may relate to the business of the respondent and prior to offering the same to any other party.

43.6. The claimant was obliged to meet targets in respect of the number of personal training sessions to be completed by the consultant and which were to be established by the manager at the centre to which the claimant was to carry out the services. The respondent reserved the right to terminate the agreement with immediate effect in the event of failure to achieve those targets.

43.7. The claimant was not prevented from being engaged, concerned or having any financial interest in any capacity (such as employee, agent or partner) in any other business, trade, professional occupation during the currency of the engagement bit when working by providing the services he was prohibited from promoting any interetes other than those of the respondent.

43.8. The claimant was obliged to carry personal liability for any loss, liability or costs incurred by the respondent in connection with him carrying out the services.

43.9. The claimant was obliged to attend mandatory personal training workshops, training or meetings, was required to maintain his registration with the register of exercise professionals and maintain other certificates and qualifications.

43.10. Pursuant to schedule 1, the claimant was obliged to wear suitable personal training wear in accordance with guidelines to be issued by the centre manager. He was obliged to complete weekly booking sheets and keep suitable records of all personal training activities and programmes. He was obliged to require that clients pay for their personal training sessions in advance. He was obliged not to promote any other interest or business other than those of the respondent whilst providing services pursuant to the consultancy agreement. He was prohibited from handling cash or accepting any payment direct from his customers.

44. We can see from the documents referred to in paragraph 38 of Mr Parkin's witness statement that the claimant complied with his obligation to take out

public liability insurance. The Tribunal was presented with evidence of public liability insurance taken out by the claimant between 26 July 2012 (page 159) and April 2017 over the whole of that period.

45. It is worth undertaking a comparison of the personal training agreement commencing at page 123 (said to be supplemental to the personal trainer's contract of employment) with the consultancy agreement commencing at page 132. The following provisions are strikingly similar:-

45.1. The requirements posed upon the claimant by clauses 2.2 to 2.7 of the personal training agreement inclusive (regarding weekly booking sheets and the keeping of records) with the provisions in schedule 1 to the consultancy agreement at clauses 4 to 7.

45.2. The performance/training obligations at clause 8 of the personal training agreement when compared with clause 4 of the consultancy agreement. Much of the former is replicated almost word for word in the latter. Amongst these was the obligation in both agreements for the claimant to achieve targets: see clauses 8.4 and 4.4 respectively.

45.3. The restriction upon the acceptance of payment by cash or otherwise directly upon pain of termination of the agreements at clause 6 of the personal training agreement with clauses 11 and 12 of schedule 1 to the consultancy agreement.

46. The claimant gives evidence about the day to day working arrangements commencing at paragraph 14 of his witness statement. He says that the way in which he worked day to day did not change throughout the whole period of his employment/engagement with the respondent. He says that clients would book PT sessions with him which he delivered at the respondent's premises at the centre. He did not use any of his own gym equipment. Clients would need to have membership with the respondent for them to be able to book sessions. He was not able to provide sessions for non members. He says that around 80% of his contacts were supplied to him by the respondent. He gives as an example page 170VC: this is an email dated 1 February 2016 asking the claimant to contact a client who was wanting to organise a PT session with him. The claimant says that there was an expectation that he would see clients as directed by the respondent and he did so. He goes on to say that the respondent would invoice the client who would pay the respondent. The respondent would then pay to the claimant a flat fee for each session that he delivered. He did not have the ability to ask for more money for the sessions except when negotiating a pay rise.

47. The claimant says that he was subjected to the direction of Mr Parkin who was the centre manager. He gives as an example a requirement for him to spend 10 minutes each day completing paperwork and updating the whiteboard. He also cites as an example page 165AF in which he was rebuked by Mr Parkin for not completing his paperwork and administration around the PT sessions that he had delivered. The claimant says that he was circulated with emails (along with the other personal trainers) referring to targets for the number of personal training sessions to be undertaken. He cites as an example emails at pages 170NA and 170NB and page 184A. The claimant's sessions were included within the number of sessions delivered by the team and went to meet team targets. We can see from the photograph at page 231A that the

claimant had a personal trainer session target of 151 at around the time that the photograph was taken and that the claimant met that target.

48. The claimant also refers to the email at page 170A. He was proposing to deliver five personal training sessions per week for a client to be paid by way of direct debit. This was not signed off by the national fitness operations manager by reason that either the claimant or the client may become ill or may go on holiday and the complications that would then ensue in trying to resolve the issue of refunds. A similar issue arose in February 2016 in relation to another client (at page 170VD).

49. The claimant cites as evidence of him attending mandatory training models the documentation 165AP and 165B. He also refers to an email addressed to him by Mr Parkin dated 24 September 2012. This complimented him upon his numbers which were "looking fab this month" and a reminder for him to sign off risk assessments.

50. The claimant says that he was assigned a line manager, Gail Burton, who was employed by the respondent as a Manager Fitness & Wellbeing Advisor. She issued the claimant with a target of 100 sessions on 2 February 2012 (page 158A). She is referred to as his line manager in an email of 5 December 2014 (page 165EA). Gail Burton emailed the team (including the claimant) about building up the number of clients subscribing through direct debit (pages 170CA and 170CB) in May 2015. A similar email was sent upon the same issue in September 2015 (170VA and 170VB). A further example of a group email sent to all concerned (including the claimant) from Gail Burton may be found at pages 228AA and 228AC concerning the issue of targets and team performance.

51. The claimant gave unchallenged evidence at paragraph 14(l) of his witness statement that he was not held out as a self employed subcontractor by the respondent. He says that he was part of the team and was eligible to participate in and win prizes for performance along with other team members and was always invited to Christmas parties along with everyone else.

52. Mr Marsden confirmed, when asked by me, that the clients' agreements were with the respondent as opposed to being with the claimant. The clients would have no knowledge of the arrangement between the parties.

53. At paragraph 15 of his witness statement, the claimant says that the respondent did not require him to wear a uniform although there were stipulations about what he could wear. He said that the uniform policy was regularly disregarded by many of the personal trainers. At paragraph 15 he cites a number of examples of personal trainers not wearing the respondent's uniform and of complaints that he made about others not wearing Nuffield branded uniforms. For an example of the latter, I note page 170V being an email addressed to Mr Parkin of 8 September 2015 complaining about a colleague wearing Adidas tracksuit bottoms.

54. Mr Parkin cites a number of differences between the way in which the claimant operated and the way in which those whom the respondent accepts to be employees did. He says that the claimant was only performing personal training sessions. He did not do any gym work (as he was required to do when he was an employee for a short time in 2011). He says that the claimant was entitled to do as many or as few sessions as he wished. The

amount of work undertaken by the claimant was a matter for him. He says that the claimant was "responsible for getting his own clients and building relationships with them. I also did not have any responsibility to provide him with any other work at the centre and there was no expectation from Adeel that I had to do so". Mr Parkin accepts that there were occasions where a client would approach the centre to ask for a session with the claimant and gives as an example page 170VC. Mr Parkin says that the employed personal trainers were subject to performance targets whereas the claimant was entitled to do as many or as few sessions as he wished. It was a matter for the claimant to control his own diary. The claimant was not subject to any control of any kind in relation to his attendance whereas employees were subject to very clear requirements for reporting absences and required to seek permission to take holidays. They were also required to work set hours.

55. Mr Parkin says that the claimant exercised his right to engage a substitute citing as an example an instance of Samantha Sheldon covering some of his sessions in August 2016. The claimant fairly accepts that he did ask her to cover some sessions for him. However, he says that upon his return to work Mr Parkin made it clear to him that he should not have done this as it took her from her performance of her own duties with the respondent in order to assist the claimant in the furtherance of his business. In that connection, I asked Mr Parkin if it was open to the claimant to engage a substitute from outside the ranks of the respondent's employees. Mr Parkin said that it was although it would involve the respondent in checking the bonafides of the third party substitute. This had never, in fact, been done in practice.

56. Mr Parkin gave evidence at paragraph 34A of his witness statement to the effect that the claimant bore some of the financial risk. This contention arose out of a claim that was intimated by one of the claimant's clients. It was suggested by her that she had sustained injury as a consequence of the claimant allegedly setting her exercises that she was not fit to undertake. The claimant refuted her claim and added that she was the author of her own misfortune by refusing to accept his advice to purchase more appropriate footwear. Relevant email correspondence around this is at pages 170TA to 170U. On 24 August 2015 Mr Parkin emailed the claimant to say, "good news fella … looks like we are defending on your behalf". The claimant's contention was that this was consistent with him bearing no financial risk as the injured party's claim had been intimated against the respondent who was taking responsibility for it. The respondent's position is that they got involved because of the possibility that the claim related to defective equipment at the centre as well as or instead of a claim against the claimant arising out of negligent training advice. Mr Parkin's evidence was difficult to understand given that there was no intimation by the injured party of any claim arising out of allegedly defective equipment at the centre.

57. Mr Parkin said that the claimant was paid at a considerably higher hourly rate than were the respondent's employees. He also says that on a number of occasions the claimant sought to increase his hourly rate and was successful in doing so. It was not in dispute that the claimant was extremely successful and provided a significantly higher number of personal training sessions than did others. It is upon this basis that Mr Parkin says that, "Adeel knew his value to the centre and he frequently sought to achieve a higher rate of pay". He says that the claimant's rate increases were agreed outside the normal

centrally agreed pay rises given to the employed personal trainers. There is evidence in the bundle (for example at pages 170A to 170C) of the claimant engaging in what appeared to be quite complex negotiations around his rate of pay. It is not necessary to recite the details of those negotiations here. Suffice it to say that the claimant and respondent each engaged in a commercial process of negotiation and there was no evidence of any of the other employed personal trainers doing so. A further example of the claimant entering into negotiations with Mr Parkin may be found at pages 170X and 170Y. The negotiations in March 2016 appear to have continued into April 2016. At page 171 Mr Parkin emailed the claimant. This followed a telephone discussion in which there had plainly been in a conversation about the merits or otherwise of the claimant remaining self employed. The email of 21 March 2016 at page 170X is illustrative, in my judgment, that the claimant knew of his worth to the respondent and the significant contribution that his clients were making to the centre's revenue.

58. There appeared to be no resolution of this matter at around the time of Mr Parkin's departure from the centre. We can see from the email of 10 November 2016 at page 203 that the claimant was wishing to get matters resolved before Mr Parkin's departure. There were then further exchanges the following day (at pages 226 to 228). The claimant was offered a revised agreement for services (pages 192 to 202). However, this was never signed by the claimant (albeit that Mr Parkin did sign it). The agreement was therefore never concluded. This agreement seemed to embody Mr Parkin's understanding that the respondent would pay to the claimant the receipts from each session that he undertook less £11 to effectively defray the cost of the claimant using the centre's equipment and facilities for each session.

59. After Mr Marsden took over, it appears that discussions continued. Mr Marsden's understanding was that the claimant's public liability insurance was due to expire in April 2017. Mr Parkin asked him for details of his up to date policy (page 230). Mr Marsden says that the claimant told him that he would not provide an updated public liability insurance and that he was contending that he was an employee and did not have to. Mr Marsden then served the claimant with notice to terminate the agreement of 9 November 2016 by reason of the failure to provide evidence of up to date public liability insurance being in place. I shall simply observe that the notice of termination appears to have been served pursuant to an agreement that was not completed (it not having been signed by the claimant).

60. The following evidence emerged from the cross-examination of the claimant:-

60.1. The claimant accepted that he could come and go as he pleased albeit that he qualified that concession by saying that he could do so so long as his targets were met.

60.2. The claimant fairly accepted that there were significant periods (of on occasions more than two weeks at a time) where he did not attend the centre without having given prior notification or made prior arrangements with the respondent.

60.3. The claimant accepted that he was not required to perform a set number of hours of work.

60.4. The claimant also accepted that he had on a number of occasions not turned in for a scheduled session (by reference to pages 230A and 230b) and that he had not informed the respondent that he was not going to turn up for them.

60.5. The claimant fairly accepted that he had been paid for the sessions undertaken by Samantha Sheldon and that it was his responsibility to then pay her in turn.

60.6. The claimant accepted that the respondent paid him gross and that it was his responsibility to make tax returns and sort out his own tax and national insurance contributions. He also said that he had told the Inland Revenue that he was self employed.

60.7. Although the claimant accepted that there was no restriction upon him performing work for others than the respondent he maintained that had he done so it "would not have gone down well". The freedom to undertake other activities set out in the consultancy agreement therefore did not occur in practice.

60.8. It was suggested to the claimant that those employed by the respondent were not required to carry public liability insurance. The claimant said that Gavin Murray had done so. It was put to the claimant that Mr Murray was not required so to do by the respondent.

60.9. The claimant accepted that he had not made prior arrangements with the respondent when he wished to take holiday. He said that as long as the target was met the respondent was "not bothered".

60.10. When it was suggested to him that his rate of pay was significantly higher than that of other employed personal trainers, the claimant said that it was open to everyone to seek to negotiate the best that they could. He said that he was paid the highest "because of my success".

60.11. The claimant fairly conceded that he had sought to set off his expenses (for example for the provision of uniform, food, and petrol) against his tax liability.

60.12. The claimant accepted that the only administrative requirements upon him were to complete the sheets recording the personal sessions. This was necessary in order that the respondent would know how many sessions he had undertaken and how much to pay him from the monies paid to the respondent by the clients.

60.13. The claimant accepted that he had sworn at Ian Parkin's wife on one occasion and that no disciplinary action had been taken against it. The claimant said that that was because it was "more of a personal thing".

61. The following emerged from the cross-examination of Mr Parkin:-

61.1. Following the claimant signing the consultancy agreement at page 132 he remained under an obligation to comply with the code of conduct at pages 68 to70.

61.2. Upon the question of targets, Mr Parkin maintained that "strictly speaking" the claimant was not subject to any but wanted to be part of the team and of the league table. When the documents at page 158A, 170NA, 184A and 231A were put to Mr Parkin he suggested that there

would be no consequences for the claimant were he not to meet any targets set for him. It was suggested (by reference to the issue of direct debit targets at pages 170CA and 170VA) that the claimant was expected to deliver. Mr Parkin replied that, "it's what he did deliver on a regular basis".

61.3. It was put to Mr Parkin that there was a line management system in place (by reference to page 165EA) and that the claimant was subjected to performance review meetings (by reference to 161B). Mr Parkin replied that it was "sensible to catch up with him from time to time". When it was suggested that no action had been taken against the claimant was a reflection of the commercial reality of the claimant's value to the respondent (as opposed to an indicator of self employed status) Mr Parkin fairly accepted that no action was taken because of the service that the claimant delivered.

61.4. It was put that the claimant was subjected to the respondent's training regime by reference to the documents at pages 165AP and 165B. Mr Parkin attributed to that to "health and safety requirements".

61.5. Mr Parkin fairly accepted that restrictions were put upon on the claimant from time to time (by reference in particular to the wish to undertake five personal training sessions a week for a client: page 170A).

61.6. Mr Parkin fairly accepted in cross-examination that the reality was that the claimant was the subject of a significant performance target.

61.7. Upon the issue of substitution Mr Parkin accepted that the claimant was expected to arrange and deliver his sessions personally.

62. In supplementary evidence given shortly after he had been sworn in, Mr Marsden said that the claimant would not have been paid for a training session if the client had not paid the respondent. To that extend therefore there was some risk upon the claimant of not being paid for a session. No action had been taken against the claimant arising out of the missed sessions in 2017 referred to at page 230B. Mr Marsden said that action would have been taken against an employee who had missed so many sessions without good reason. Mr Marsden said that he felt unable to discipline the claimant arising out of the incident involving Penny Parkin by reason of the claimant's self employed status.

63. The following evidence emerged from the cross-examination of Mr Marsden:-

63.1. Employees who provided personal training sessions but who did not receive the money from the clients would also not have been paid for the session.

63.2. Mr Marsden was unsure whether the claimant's contribution to the centre's revenue was factored into the centre's budget.

63.3. Mr Marsden accepted that at no stage during his time as centre manager did the claimant approach him with a view to substituting another for him in the provision of a training session.

63.4. Mr Marsden said that he had never once seen the claimant wearing the respondent's uniform and that when he saw employees breaching the uniform requirement took action against them.

64. Having made the detailed findings of fact, I now turn to an application of the law to those facts. It is the claimant's case that the consultancy agreement commencing at page 132 did not reflect the true agreement between the parties. On the face of it, the claimant entered into a consultancy agreement shortly after entering into a contract of employment. As well as signing the consultancy agreement, the claimant completed the leaving form (at page 157) and a document signifying an agreement to a change of status (page 158). There was also an increase from £15 to £20 per session following upon the signing of the consultancy agreement. In general, a party must be taken to have agreed to the terms of the contract which he or she has signed albeit that in the context of employment contracts there is, as I have said, greater scope to look behind the written terms of the contract to examine the reality. As I have said, clear evidence of employee status – such as control, mutuality of obligation and personal performance – will be required before an express contractual term that negates employment status can be disregarded.

65. The irreducible minimum (in respect of control, mutuality of obligation and personal performance) was present in the **Autoclenz** case. There, the Employment Tribunal, Court of Appeal and Supreme Court were influenced by the significant inequality of bargaining power.

66. That feature (of inequality of bargaining power), it seems to me, is absent in this case. The claimant knew full well his value to the respondent. There is no dispute that the claimant's performance was exceptional. From the table that we see at page 231B, he delivered more personal training sessions than anyone within the respondent's network of centres throughout the whole country. The claimant used his success as the basis for negotiation and was successful in achieving significant increases in remuneration as a consequence. There is no criticism of the claimant intended by these remarks. He knew his value to the respondent and, as anyone would, sought to improve his own situation by reference to that knowledge of his value. There was in the instant case much more equality of bargaining power than was present upon the facts of **Autoclenz.**

67. That said, I do not read the case law as signifying that only in cases of significant inequality of bargaining power is the court or tribunal empowered to look behind the written terms of a contract in the employment context. The court or tribunal can still look for clear evidence of employee status even in cases of greater equality of bargaining power and if such is present consider whether an express contractual term that negates employment status can be disregarded. To do otherwise, it seems to me, is to elevate the issue of inequality of bargaining power to a primary consideration as opposed to being one of the factors to be taken into account.

68. In my judgment, there is much in the claimant's point that in reality little changed in practical terms between the ending of the contract of employment on the one hand and the commencement of the consultancy agreement in March 2011 on the other. I have referred above to some of the striking similarities between the contractual provisions in force both during the time when (by agreement) the claimant was an employee and thereafter. In particular, the provisions around targets deserve close scrutiny. It is worth citing the following provisions in full:-

68.1. *(From the personal training agreement at clause 8.4):* "Targets in respect of the number of personal training sessions to be completed by the personal trainer will be established by the Manager, Fitness & Wellbeing Advisors and will be reviewed as appropriate. If the personal trainer does not achieve these targets, the company reserves the right to terminate this agreement with immediate effect".

68.2. *(From the consultancy agreement at clause 4.4):* "Targets in respect of the number of personal training sessions to be completed by the consultant will be established by the Manager, Fitness & Wellbeing Advisors and will be reviewed as appropriate. If the consultant does not achieve these targets, the company reserves the right to terminate the agreement with immediate effect".

69. It can be seen that the provisions are to all intents and purposes identical. There was no challenge to the claimant's evidence that 80% of his work would come from the respondent. When asked about this in cross-examination, the claimant said that the other 20% came to him by word of mouth. The paperwork that I have seen is consistent with the claimant's case that the respondent would refer clients to him and there was an expectation upon him to provide services to those clients. The setting of targets by the respondent which is subject to review and the generation of the bulk of the claimant's work by the respondent together with an expectation that the claimant would perform that work personally is entirely consistent with there being a mutuality of obligations: for the respondents to provide work and for the claimant to undertake it. This is all the more so where a failure to meet targets was upon pain of termination of the agreements.

70. True it is that there was no obligation upon the claimant to work a set number of hours and that he could and did absent himself from work for significant periods of time. However, the evidence before me is that the parties entered into a working arrangement whereby targets were set for the claimant upon which there was an expectation that he would meet them by performing the work personally. That arrangement has all the hallmarks of mutuality of obligation.

71. My conclusion may have been different upon the issue of mutuality of obligation absent the target provision in the consultancy agreement. Had it been the case that the claimant was simply entitled to come and go as he pleased with no expectation upon him to provide a minimum number of sessions, then a contrary view may have been reached. The claimant not being required to undertake any sessions or a minimum number of sessions is plainly inconsistent with any obligation upon the part of the respondent to provide work to the claimant and thus destructive of the essential component of mutuality of obligation. However, the contractual provisions are clear as I have said in paragraphs 68 and 69. Also, the contemporaneous documentation is entirely consistent with the claimant's case that he along with everyone else was expected to meet the targets.

72. I now turn to the issue of personal performance, the Tribunal was furnished with only one example of an instance upon which the claimant did not perform the work personally and arranged for a substitute. In my judgment therefore the substitution provision at clause 3.3 of the consultancy agreement does not

reflect the reality of the position which was, as Mr Parkin fairly accepted, that there was an expectation upon the claimant to undertake the work personally.

73. In my judgment, the respondent exercised sufficient control over the claimant to satisfy that component of the irreducible minimum. The reality is that the claimant was line managed. As I have observed, the provisions over the completion of paperwork are to all intents and purposes identical in the employment contract as in the consultancy agreement. In my judgment therefore the claimant is right to say that matters changed little following March 2011. There is ample evidence in the bundle, in my judgment, of direct control being exercised over the claimant. He was obliged to undertake training sessions. He was required to meet targets. He was required to submit paperwork and his performance was subject to line management scrutiny.

74. I prefer the claimant's version upon the issue of financial risk pertaining to the personal injury claim. I agree with the claimant's description of Mr Parkin's actions upon this issue as an intention to convey the positive and welcome news to the claimant that the respondent would assume any liability for the incident in question and would indemnify him (as they would any other employee for a negligent act in the course of employment). In reality, the only financial risk being borne by the claimant was that engendered by him having no entitlement to receive remuneration unless he provided personal training sessions. Thus, he was being paid by results. That is not of course inimical to a contract of employment. Many employees are employed upon a commission only basis or something akin to that. The claimant had no responsibility for the provision of any equipment. The cost of the provision of the facilities where the sessions took place was entirely the responsibility of the respondent.

75. Although the claimant did not as he fairly accepted, wear the respondent's uniform he was nonetheless subjected to the code of conduct to wear smart attire. He was not the only personal trainer not to wear the respondent's uniform. In my judgment, that issue does not tell against the claimant being an employee given that he was subject to the restraints of the code of conduct (and in particular the section upon personal presentation). There was no suggestion that the claimant breached any of the provisions of the code in that respect (or indeed in any respect).

76. The respondent also pointed to the claimant negotiating individual rates of pay apart from the centrally agreed rates applicable to other employees. I agree with Ms Kearsley's submission (at paragraph 13) that comparisons between the claimant and other staff who were expressly employed under a contract of employment are of limited assistance as my task is to determine whether the claimant was in fact an employee or worker which test must refer solely to the relationship between the claimant and the respondent and not the relationships between the respondent and others. In my judgment, the claimant is right to say that it was open to other employees to seek to negotiate a better deal for themselves as he did. That he was paid in a different way to others is again not inimical to a contract of employment between him and the respondent.

77. That the claimant was paid gross and regarded as self employed by the Inland Revenue is not generally regarded as strong evidence. It is well established

that such will never be conclusive as to employment status. In my judgment, any significance of that factor is significantly outweighed by my findings upon the issues of control, personal performance and mutuality of obligation.

78. It is my judgment that the reality here is that the claimant was an employee of the respondent and that it is one of those cases where the Tribunal may look behind the terms of the consultancy agreement. I have not found this at all an easy case and the arguments are finely balances. However, what is decisive in my judgment is that the respondent set targets for the claimant which he was expected to meet (both in terms of the numbers of sessions and signing clients up to direct debits), that the claimant was expected to deliver the sessions personally, that the reality was that the substitution provision was invoked only once and in reality negated by the expectation upon the claimant to perform the sessions and that the respondent engaged a significant degree of control over the claimant in relation to the completion of paperwork, the delivery of targets, the obligation to undertake mandatory training and maintain his qualifications and the line management of him generally.

79. There is simply insufficient information for me to attach any significant weight to the incident involving Penny Parkin. The respondent could have but did not take action (pursuant to clause 4.4 of the consultancy agreement) against the claimant for missing the client appointments had it been the case that this may lead to the claimant missing targets. That the respondent chose to do nothing about them does not mean that there was no right to do so. In the final analysis, the setting of targets with a right of termination should they be missed is incompatible with a contract for services with the claimant having no obligation to undertake work provided to him by the respondent.

80. It follows from my conclusion that as well as being an employee, the claimant is a worker for the purposes of section 230(3)(a). However, for the avoidance of doubt and if I am wrong upon my conclusion regarding employment status, I have little hesitation in finding that the claimant was a 'limb (b)' worker. The claimant was so clearly integrated within the respondent's business that his services were plainly provided as part of the business undertaking being carried out by the respondent at the centre. As I have already said, as far as the public were concerned, their contract was with the centre and the claimant was the personification of the centre. The respondent was not a client or customer of the claimant.

81. My conclusion therefore is that the claimant was an employee of the respondent and in the alternative was a worker at all material times.

82. The matter shall now be listed for a private preliminary hearing upon the next available date.

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Employment Judge Brain

16/07/2018

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