THE INDUSTRIAL TRIBUNALS

CASE REF: 5982/18IT
5983/18IT

CLAIMANTS: **Gerard McCabe**
Kerri Quinn

RESPONDENT: **Northern Ireland Opera**

DECISION

The unanimous decision of the tribunal is that the claimants are entitled to holiday pay as set out in this decision.

Constitution of Tribunal:

Vice President: **Nr N Kelly**

Panel Members: **Dr Carol Ackah**
Mr Michael McKeown

Representation of the Parties:

The claimant was represented by Mr Brian McKee, Barrister-at-Law, instructed by Donnelly & Kinder Solicitors

The respondent was represented by Ms Bobbie-Leigh Herdman, Barrister-at-Law, instructed by Elliott Duffy & Garret Solicitors

Background

1. The claimants are actors.

2. The respondent is a company limited by guarantee which is engaged in theatrical productions.

3. The claimants were engaged by the respondent to perform in a joint production with the Lyric Theatre of the Three Penny Opera by Bertolt Brecht, to be performed at that venue.

4. They each received a fee.

5. That fee did not contain any element of holiday pay.

6. The claimants lodged tribunal claims seeking unpaid holiday pay.

7. The claimants argued that they were, at the relevant times, workers for the purposes of the Working Time Regulations (Northern Ireland) 2016 and that they were therefore entitled to be paid holiday pay.

8. The respondent argues that the claimants, at the relevant times, were not workers for the purposes of the 2016 Regulations and that they were not entitled to be paid holiday pay.

Procedure

9. The claims were case managed by telephone conference call on 10 August 2018.

10. The central issue was identified; i.e. whether the claimants, at the relevant times, had been workers for the purposes of the 2016 Regulations.

11. The two claims were consolidated and were directed to be heard together.

12. Directions were issued for the interlocutory procedure and for the exchange of witness statements.

13. The hearing was listed for one day on 14 November 2018.

14. The witness statement procedure was used. Each witness swore or affirmed to tell the truth, adopted their previously exchanged witness statements as their entire evidence in chief, and moved immediately to cross-examination and re-examination.

15. The two claimants each gave evidence. Mr Boswell of the Equity trade union gave evidence on their behalf.

16. Mr Lindsay, a director of the respondent company, gave evidence on its behalf.

17. The parties made oral submissions at the end of the evidence.

18. The parties were directed to provide written submissions, if they wished to do so, and to provide an agreed calculation of actual financial loss by ***23 November 2018.***

19. The tribunal met on 30 November 2018 to consider the evidence and the submissions of the parties.

20. Counsel for the respondent sought permission to add a further written submission. Both parties were granted permission to lodge further written submissions ***by 5.00 pm on Wednesday 7 December 2018.*** No further submissions were lodged.

21. On 10 December 2018, the tribunal invited the parties to make further written submissions on whether the claimants had, at the relevant time, been employees under a short fixed term contract of employment within the meaning of paragraph (a) of the definition of "worker" in Regulation 2(2), by 1.00 pm on 12 December 2018. The parties provided those further submissions.

22. It is obviously not the case that the tribunal is obliged to provide a draft decision for comment. It is also not the case that a tribunal is obliged to seek comment if it

relies on legislation or case law which has not been advanced by either party. Neither step would be either practicable or desirable in a tribunal of this nature. However, if an entirely new argument appears, or is considered relevant, it can in certain circumstances be appropriate, as in the present case, to ask the parties for comments. That is what the tribunal has done in this instance.

23. All the written submissions received from the parties, numbered in order of their receipt, are attached to this decision.

Relevant Law

24. Directive 2003/88 EC issued on 4 November 2003. It laid down "minimum safety and health requirements" for the organisation of working time. That Directive did not seek to define "worker". However it stated at Article 1(3) that:

> *"This Directive shall apply to all sections of activity, both public and private, within the meaning of Article 2 of Directive 89/391 EEC -"*

Article 2 of the 1989 Directive stated in paragraph 1:

> *"This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural (tribunal's emphasis), leisure etc.)*

25. The 2003 Directive replaced Directive 93/104 EC and Directive 89/391 EC. That earlier Directive had resulted in the Working Time Regulations (NI) 1998.

26. The 2016 Regulations came into force on 28 February 2016 and continued to implement the 2003 Directive. They replaced the 1998 Regulations.

27. Regulation 15(1) provides that "subject to paragraph (4), a worker is entitled to four weeks annual leave in each leave year."

Regulation 16 provides for the entitlement to an additional 1.6 weeks.

28. Regulation 20 provides that a worker taking such annual leave is entitled to be paid "at the rate of a week's pay in respect of each week of leave." Like the 1998 Regulations, it provided at paragraph (2) that Articles 17 to 20 of the 1996 Order shall apply for the purpose of determining the amount of a week's pay.

29. Regulation 2(2) provides a definition of "worker". It states in identical terms to the 1998 Regulations;

> *"Worker means an individual who has entered into or works under (or, where the employment has ceased, worked under) –*
>
> *(a) a contract of employment, or*
>
> *(b) any other contract whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or*

customer of any profession or business undertaking carried on by the individual;

and reference to a worker's contract shall be construed accordingly."

30. Regulation 43(1)(b) provides that a worker may present a complaint to an Industrial Tribunal that an employer has failed to pay the whole or any part of the amount due under Regulation 20.

Issues

31. The factual background to these claims has largely been agreed. It was agreed between the parties at the start of the hearing that the claimants had not been employees working under a contract of service or of employment for the purposes of paragraph (a) of the definition of worker in Regulation 2(2). The parties therefore agreed that the relevant part of the definition of "worker" in the 2016 Regulations was in paragraph (b) of that definition in Regulation 2(2); the claimants either qualified as "workers" under that paragraph, or they did not qualify at all. With respect to the parties, the tribunal, having heard the evidence, and having examined the contracts, does not accept that it is obvious that the claimants were not working under contracts of employment and therefore does not regard paragraph (a) as irrelevant. This is a question of law: not a question of fact. The tribunal does not regard itself as bound by any concession made by the claimants in this respect. As indicated above, written submissions were invited from the parties in relation to paragraph (a).

32. For the purposes of paragraph (b) of the definition of "worker" it was agreed by the parties that the claimants had entered into a written contract and that they had each undertaken to personally perform work for another party.

33. The remaining issues for the determination of this tribunal were:-

    (i) the identification of the relevant contracts;

    (ii) whether the contracts were contracts of employment for the purposes of paragraph (a) of the definition of "worker" in Regulation 2(2);

    (iii) whether the contracts were "any other contract" as described in paragraph (b) of the definition of "worker" in Regulation 2(2); and if the answer is yes, whether the status of that other party to such contracts had been that of a client or a customer of any profession or business undertaking carried on by the individual claimants.

Relevant Findings of Fact

Gerard McCabe

34. Mr McCabe has been a professional actor for approximately 20 years.

35. He is represented by a theatrical agent, Infinity Artist Management Ltd (Infinity). Mr McCabe's CV, with pictures and relevant details, such as press clippings, is available on Infinity's website. That website is open to the general public on a

normal Google search. However, it is unlikely that many members of the general public would be motivated to make such a search. The tribunal is satisfied that Infinity maintains the website, not to entertain random web browsers but to seek engagements with a small section of that public; producers looking for actors.

36. Anyone seeking the services of actors for a theatrical production could submit a casting brief to the theatrical agent. The theatrical agent would then respond to the casting brief and would negotiate the terms of any resulting contract.

37. The contract between the claimant and Infinity was in standard terms. Infinity would seek to promote Mr McCabe and to obtain acting roles for him. It would negotiate terms but would seek his agreement before entering into any binding arrangement on his behalf. Mr McCabe undertook to maintain his subscription to an online service known as "Spotlight" and to Equity. He agreed to pay Infinity a commission on earnings. If Mr McCabe secured any engagement directly with a theatre or a production company, he undertook to refer that engagement to Infinity immediately after the first contact, to enable Infinity to negotiate the appropriate contract.

38. The contract between the claimant and Infinity stated in paragraph 8R:

> *"The client (Mr McCabe) is solely responsible for all payments relating to the client's income tax, national insurance contributions, VAT (if registered) and the client hereby indemnifies the Agent and shall keep the Agent indemnified in full in respect of all such liabilities."*

The contract was not one of employment between Mr McCabe and Infinity. It was expressly a contract between a client and an agent.

39. Mr McCabe paid a subscription to Spotlight which published a detailed CV which was made available online to interested subscribers such as casting agents and theatres. It was not open to the general public.

40. Ultimately, it would be up to Mr McCabe to decide whether he would accept any roles offered to him, on the terms negotiated by Infinity. He could be influenced by financial and other terms and by career progression.

41. In 2017, Mr McCabe was approached directly by the casting director of the Respondent and offered what was described as an "ensemble" part in the production of the Three Penny Opera by Bertolt Brecht. That was a joint venture between the Respondent and the Lyric Theatre. It was to take place at the Lyric Theatre.

42. Mr McCabe referred the offer to Infinity to negotiate an appropriate contract.

43. The fees paid for performances at the Lyric Theatre did not prove to be negotiable. The standard payment of £500.00 per week to an actor increased marginally each time that actor had appeared in the Lyric. Mr McCabe was offered £540.00 per week on this occasion. The total payable was paid in two lump sums through his agent, but it was based on a weekly fee. While Infinity attempted to negotiate that fee, it "didn't get very far". Since Mr McCabe was already based at Belfast, other payments in relation to living and travelling expenses did not arise.

44. On 28 November 2017, Mr McCabe entered into a written contract with the Respondent to act in certain roles in the production. He undertook to be available for rehearsals and performances between 2 January 2018 and 10 February 2018.

45. Paragraph 2.3 of that contract stated:

> *"Please be advised that as of April 6th 2014, all entertainers, persons employed as actors, singers or musicians or in any other similar capacity who are engaged under a contract for services will be subject to taxation and national insurance as self-employed earners. It is each individual's responsibility to ensure that they are registered as self-employed with HMRC and make the necessary payments to HMRC as and when due."*

46. Mr McCabe missed one rehearsal because of illness. He did not miss any performances.

47. At the time of the rehearsals with the Respondent, he did other unrelated work in the Waterfront Theatre. However, that other work commenced at 7.00 pm, after rehearsals with the Respondent had concluded at 6.00 pm. His other work did not interfere in any way with the performance of contracted work for the Respondent.

Kerri Quinn

48. Ms Quinn had been a professional actor for 14 years.

49. She is represented by a theatrical agent; Cowley, Knox and Guy (CKG). CKG's website does not contain a detailed CV for Ms Quinn or for other actors. It is not available to the public.

50. The contract between Ms Quinn and CKG was in standard terms. CKG would seek to promote Ms Quinn and to obtain work for her. It would negotiate contractual terms but necessarily would have to seek her consent before entering into any binding arrangements on her behalf. Ms Quinn undertook to maintain her subscription to Spotlight and to Equity. If she was contacted directly by a theatre or by a production company, she undertook to refer that potential engagement to CKG to enable CKG to negotiate contractual terms.

51. The contract between Ms Quinn and CKG stated:

> *"2.6 At no time will CKG become the employer of the artiste, only the appointed Agent to handle these contracts. The employer will be the company to whom the artiste's services are offered and contracted through CKG."*
>
> *"3.2 <u>For the purposes of income tax</u>, (tribunal's emphasis) the artiste will be considered to be self-employed and CKG will make no deductions in relation to tax."*

52. Ms Quinn also paid a subscription to Spotlight which published a detailed CV which was made available on line to interested subscribers such as casting agents and theatres. It was not open to the general public.

53. Ultimately, it would be up to Ms Quinn to decide whether she would accept any roles offered to her, on the terms negotiated by CKG. She could be influenced both by financial and other terms and by career progression.

54. In 2017, she was approached by Mr Sutcliffe, a production director employed by the Respondent. She was offered a particular role in the Three Penny Opera production. She went on to take part in the audition process but, in her case, that had been to an extent a formality. When she was offered the role, she referred the matter to CKG to negotiate the terms of the contract.

55. As with Mr McCabe, the level of fee was determined in accordance with the rules of the Lyric Theatre. Given the number of occasions on which she had previously performed in that location, her fee was £580.00 per week. Again, while the total amount payable was paid in two lump sums through her agent, it was based on a weekly fee.

56. On 24 October 2017, Ms Quinn entered into a written contract with the Respondent to act in a particular role in that production. She undertook to be available for rehearsals and performances from 2 January 2018 to 10 February 2018.

57. Paragraph 2.3 of that contract stated:

> *"2.3 The performer shall be responsible for all matters relating to tax, self-assessment and national insurance. Please complete the BACS form on the back page and return with your contract."*

Equity

58. Equity provides a number of industry standard contracts for performers. These contracts reflect collective agreements between Equity and various theatrical organisations. Some production companies and theatres use those contracts. Not all do so. The Lyric Theatre does so and the Respondent does not.

59. Those industry standard contracts, which were not used in the present cases, provided for holiday pay to be paid to actors such as the two claimants. For example, the standard contract for opera singers provides at paragraph 9:

> *"The artist shall be entitled to 28 days paid holiday a year, pro rata. The 28 days include statutory holidays. Provided that:*
>
> *9.1 A Manager shall at the expiration of the engagement, pay up (sic) to the artist's (sic) four days in lieu of any holiday to which he/she shall have become entitled but shall not have taken."*

60. The opera singers' contract also states at 14.8 and 14.9:

> "Maternity Leave.
>
> The artist shall be entitled to statutory maternity pay in accordance with the relevant legislation from time to time in force."

"Paternity Leave.

The artist shall be entitled to statutory paternity pay in accordance with the relevant legislation from time to time in force."

DECISION

First Issue

The identification of the relevant contracts.

61. The contracts, which have to be considered by the tribunal to determine whether or not the claimants' were at the relevant time "workers" for the purposes of the 2016 Regulations, are the contracts that they entered into with the respondent. In those contracts, the two claimants each agreed to provide personal services for the respondent. They made several specific commitments in relation to availability and in relation to attendance at rehearsals and performances. In return, the respondent entered into a commitment to pay specified fees to the claimants.

62. The separate contracts which had been entered into by the two individual claimants with their two theatrical agents are not directly relevant to the question before the tribunal. Those contracts were standard contracts between a client and an agent, whereby that agent agreed to perform certain services, such as attempting to find work for the client, and whereby the clients undertook to pay commissions and to maintain their subscriptions to Spotlight and to Equity. Those contracts did not relate directly to the performance of the services which are relevant to the present case ie the participation of the two claimants in the Opera production on foot of their contracts with the respondent.

<u>Statutory Interpretation</u>

63. The second and third issues centre upon the proper interpretation of the term "worker" as it appears in the 2016 Regulations.

That is a question of interpretation where the proper approach to be taken by the present tribunal must be distinguished from that taken by the tribunal in relation to the first issue in the recent case of ***Agnew and Others v the Chief Constable*** (employmenttribunalsni.gov.uk) and from that taken by the GB Court of Appeal in ***Gilham v Ministry of Justice [2017] EWCA Civ 2220.*** In each of those cases, the legislative provision which required interpretation was an entirely domestic provision without any EU underpinning. In the ***Agnew*** case the matter raised in the first issue before that tribunal was the proper interpretation of the Employment Rights (Northern Ireland) Order 1996. In the ***Gilham*** decision, the issue before the tribunal was the proper interpretation of the Employment Rights Act 1996.

In the present cases, the situation is markedly different. The legislative provision which requires interpretation is that contained within the 2016 Regulations. Those Regulations are a transposition of the Working Time Directive 2003/88/EC. On that basis, the approach to be undertaken by the tribunal in relation to the proper interpretation of this provision must be different from that undertaken by the tribunal in ***Agnew*** in relation to the first issue in that case, or by the GB Court of Appeal in ***Gilham.***

64. It is trite law to state that such Regulations, which transpose into domestic law a EU Directive, must, so far as possible, be construed to give effect to the objective of the Directive which they were designed to implement. – See ***Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR 1-4135.*** That teleological or purposive approach has to be contrasted with the more text-based approach typical of the interpretation of domestic-based legislation.

It is equally clear that there are limits to what can be done by way of purposive construction where the respondent is a private company rather than part of the domestic state. The EAT stated in ***Byrne Brothers (Formwork) Ltd v Baird & others (EAT/542/01):***

> *"8(4) – While, of course, the Regulations must be construed, so far as possible so as to be compatible with the requirements of the Directive, it is not possible, at least in a claim against an employer who is not "an emanation of the state", frankly to disapply the explicit provisions of a statutory instrument."*

65. Therefore, the definition of worker, whether in paragraph (a) of the definition in Regulation 2(2) or in paragraph (b) of that definition must, if possible, be given an interpretation which is consistent with the purpose of the Directive, which is to extend the relevant protection to <u>all</u> sectors of activity in the economy, including to the cultural sector.

Second Issue

Whether the contracts were contracts of employment for the purposes of paragraph (a) of the definition of "worker" in Regulation 2(2).

66. The distinction between an employee (second issue) and a worker in the extended sense (third issue) can be difficult to distinguish in some cases.

Standing back from the statutory definition as worded in the 2016 Regulations, the distinction between workers and non-workers for the purposes of EU law is the distinction between those who are employed and those who are self-employed. Those who fall within the former category can be 'employees' in the old fashioned sense as set out in paragraph (a) or workers in the more extended sense, as set out in paragraph (b). Many of the relevant characteristics which help to identify either employees or workers will be common to both.

67. The contracts are described in the Relevant Findings of Fact above. They were for relatively short periods of time, just under six weeks. Actors frequently move from one contract to another, and from one location to another. Unless they are fortunate enough to be engaged in a lengthy production, their contracts are often for relatively short periods.

The fact that a contract is for a short duration does not, of itself, necessarily mean that such a contract is not a contract of employment.

68. In ***Cornwall County Council v Prater [2006] IRLR 362***, the Court of Appeal (GB) considered the case of a teacher who had been engaged, almost continuously, for a

period of ten years as a home tutor to disadvantaged pupils. The issue in that particular case was whether the claimant had been continuously employed throughout the period of ten years. That issue is irrelevant to the present cases. What is relevant is how the Court of Appeal (GB) regarded each of the individual contracts, which each might have been for periods as short as a few months.

The Court held that each such contract was a contract of employment. It stated:

> *"43. - There was a mutuality of obligation in each engagement namely that the county council would pay Mrs Prater for the work which she, in turn, agreed to do by way of giving tuition to the pupil for whom the council wanted her to provide private tuition. That to my mind is sufficient 'mutuality of obligations' to render the contract a contract of employment if other appropriate indications of such an employment contract are present".*

69. The Court of Appeal (GB) stated in ***Quashie v Stringfellows Restaurant Ltd [2013] IRLR 99***.

> *"10. - Typically an employment contract will be for a fixed or indefinite duration, and one of the obligations will be to keep the relationship in place until it is lawfully severed, usually by termination on notice. But there are some circumstances where a worker works intermittently for the employer, perhaps as and when work is available. There is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration, as a number of authorities have confirmed - ".*
>
> *"12. - However whilst the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement, the fact that a worker works only casually or intermittently for an employer, <u>may depending on the facts</u> justify an inference that when he or she does work, it is to provide services as an independent contractor rather than as an employee."*
>
> *[Tribunal's emphasis]*

70. The Court of Appeal (GB) therefore did not suggest in either case that a contract of limited duration could not be a contract of employment.

71. In ***Windle v Secretary of State for Justice [2017] 3 All ER 568***, the Court of Appeal (GB) considered the status of interpreters who worked for the Courts and Tribunals Service. They did quite a lot of work but on a case-by-case basis. As part of its consideration of Section 83(2)(a) of the Equality Act 2010, it concluded:

> *"(8) - The first – "a contract of employment" – means a contract of service."*

72. In looking at the related question of whether the interpreters had acquired the status of worker in the extended sense (see the third issue in the present cases) the Court of Appeal in ***Windle*** stated;

> *"23. I do not accept that submission. I accept of course that the ultimate question must be the nature of the relationship during the period that the work is being done. [Tribunal's emphasis] But it does not follow that the absence of mutuality of obligation outside that period may not influence, or shed light on, the character of the relationship within it. 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 a lack of subordination in the relationship while at work which is incompatible with employee status, even in the extended sense".*

That cannot mean that, of necessity, where a contract is of a limited or fixed duration, it cannot be a contract of employment. With every fixed term contract, of whatever length, there is a lack of mutuality of obligation and a degree of independence outside that fixed term. The important issue is the relationship which existed between the claimants and the respondent during the, approximately, six weeks of the production. The relationship, or lack of any relationship, outside that period cannot be determinative. If it were, there would be no short fixed term contracts of employment. It has, however, to be considered, as part of a balancing exercise, when assessing a range of factors against the statutory test.

73. The term "contract of employment" is not defined in the 2016 Regulations or in the Working Time Directive. However, (see ***Windle*** above), the terms "contract of employment" and "contract of service" are identical in meaning. The latter is the more archaic version of the former.

74. There is no easy definition of an "employee", a "contract of employment" or a "contract of service". The correct approach is to balance a range of factors and to reach a common sense decision on the basis of those factors.

75. An early definition appeared in ***Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2 QB 497;***

> *"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 -".*

76. One of the factors to be taken into account in deciding whether a contract is a contract of employment (or of service) is whether the individuals concerned ie either party to the contract, regarded the claimant's position as being that of a self-employed worker. In the present cases both the claimants had accepted self-

employed status for HMRC purposes. That is an indication of self-employed status, but no more than an indication. It is commonly recognised that in many areas of employment, that status is used for administrative convenience or for financial benefit to either or both parties to the contract and that it does not necessarily provide a definitive answer in relation to correct status. In ***Autoclenz Limited v Belcher [2011] IRLR 820***, the claimants had been categorised for some considerable time as self-employed workers and that status had been recognised by the HMRC. That had been to the financial advantage of the claimants and indeed their employer. However the Court of Appeal and the Supreme Court both recognised that a tribunal should take an objective view in relation to status. Smith LJ stated that a person should not be estopped from contending that he was an employee "merely because he has been content to accept self-employed status for some years."

77. In ***FV Kunsten Informatie En Media v Staat Der Nederlanden [2015] All ER (EC) 387,*** the ECJ stated at paragraph 36, in relation to the extended meaning of 'worker':

> *"It follows that the status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that person acts under the direction of his employer as regards, in particular, his freedom to choose the time place and content of his work -, does not share in the employer's commercial risks – and for the duration of that relationship, forms an integral part of that employer's undertaking -."*

In that case, a collective labour agreement had been reached for the pay and conditions of substitute members of orchestras. The substitutes fell into two categories; firstly substitutes who were engaged as direct employees and, secondly, substitutes who were regarded as self-employed. The issue was whether the collective agreement had contravened anti-competition rules by including "undertakings", when it also applied to self-employed substitutes. The ECJ held that it did not do so. It described the self-employed substitutes as 'false self-employed'.

78. In the present cases, the tribunal does not regard the claimants' status for HMRC purposes as determinative. Given the terms of the relevant contracts, it seems that they were, for the duration of the contracts, "false self-employed" to use the terminology of the ECJ.

79. Another factor to be taken into account is that a contract of employment will generally require personal service on the part of the employee. In many cases, this has resolved to a discussion about whether or not and, if so, to what extent, the individual in question can provide a substitute to carry out work on his own behalf. In the ***Ready Mixed Concrete*** case (above) the individual concerned, a driver, was held to be an independent contractor. One of the critical features had been that he had not been required to personally drive the relevant vehicle. He had been allowed to provide a substitute driver who could operate the vehicle on his behalf.

In the present cases, there is absolutely no question of substitution being permitted or even contemplated by the respondent. The two claimants had been chosen specifically by and recruited by the respondent to perform their roles personally.

The tribunal heard no evidence in relation to "understudies". However, if there had been understudies held in reserve for the roles played by the claimants, there was no evidence that it had been up to the claimants to provide those understudies. There was no contractual provision to that effect.

80. In ***Pimlico Plumbers Limited v Smith [2017] IRLR 323***, Etherton MR dealt with the issue of substitution in relation to the statutory definition of "worker" which had required "personal service". Although the case went further to the Supreme Court, nothing further was said at that level on this point;

> *"- In the light of cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. 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 different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. 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."*

81. As indicated above, in the present cases, there was absolutely no possibility of substitution of any nature, with or without the permission of the respondent.

82. Another factor to be considered has been described as "mutuality of obligation" ie an obligation on the employer to provide work and an obligation on the employee to do it.

Looking at the nature of the relationship and the nature of the work at the time at which the work was performed, it is clear that, in the present cases, detailed contractual arrangements had been agreed in relation to the hours and the days on which the claimants had to be present and in relation to the provision of work by the respondent. Similarly detailed arrangements had been agreed in relation to pay.

83. In ***Cotswold Developments Construction Limited v Williams [2006] IRLR 181***, the EAT stated that "employment" tends to need mutual obligations, whereas the extended "worker" definition tends to concentrate on the element of personal service by the individual and not on the obligation of the employer to provide work. It suggested a four step test;

"(i) was there one contract, or a succession of shorter ones?

(ii) If one contract, did the claimant agree to undertake some minimum (or at least, a reasonable) amount of work for the company in return for pay?

(iii) If so, was there such control as to make it a contract of employment?

(iv) If there was insufficient control (or some other factor negativing employment) was the claimant nevertheless obliged to do some minimum (or reasonable) amount of work personally, this qualifying him as a worker?"

84. In the present cases, there was one contract in relation to each claimant; albeit of limited duration. That limited duration, in itself, as indicated above, does not rule out a contract of employment. It is also clear that the claimant agreed to undertake specific work in return for pay. It is also clear that there had been a significant degree of control. In the present cases, (ii) and (iii) above would be answered in the affirmative.

85. Another test applied to determine whether there was a contract of employment is described as the "control test". In general, an employee does whatever his employer tells him to do.

86. In ***White v Troutbeck SA [2013] IRLR 949***, the Court of Appeal considered the case of claimants who were caretakers of a farming estate which had been owned by an off-shore company. The owners rarely visited the estate. However they expected it to be maintained and prepared for their occasional visits. The issue was whether the claimants had been employees. At first instance, the Employment Tribunal took the view that there had been an insufficient element of control in that case. The claimants had been left very much to themselves as to how they conducted their duties. The EAT overturned that decision. The EAT held that in modern circumstances, the relevant test had to recognise that many employees had substantial autonomy in how they performed their duties. At paragraph 45 the EAT stated "the question is not by whom day to day control was exercised but with whom and to what extent the ultimate right of control resided."

That was upheld by the Court of Appeal (GB).

87. In the present cases, there may have been some element of artistic license which might have been afforded to the two claimants in the performance of their roles. Equally it may not have been. It all depended on the director. A total right of control resided with the respondent. It could direct exactly where the two claimants stood on the stage, what lines they uttered, how those lines were uttered, what costumes they wore, etc.

The final submission from the respondent suggested at paragraph 5 that:

> *"It is accepted that the claimants were under the direction of an artistic director during the relevant period. It is, however, the very nature of what it is to be an actor or an actress that a performer will bring an individuality to each role which is not controlled by any director producer or otherwise."*

88. The tribunal does not accept the respondent's argument in relation to the control test. It is not uncommon that employees bring a level of individual skill to their jobs; whether as a doctor or a driver or in any other role. Equally it is not uncommon

(see ***Troutbeck*** above) for employees to have significant input into how they perform their jobs. However the important issue is the ultimate control rested with the respondent. It could direct the employees to perform their duties in a different manner; in a manner that it determined.

89. Another factor to be taken into account in deciding whether an individual was an employee is what is known as the "organisational test". In ***Stevenson Jordan and Harrison Limited v MacDonald and Evans [1952] 1 TLR 101***, the Court of Appeal stated;

> *"Under the contract of "employment" a man is employed as part of the business, whereas under a contract for services his work, although done for the business, is not integrated into it but only accessory to it."*

The issue is therefore whether, and to what extent, the individuals have been integrated into the respondent's organisation. Looking at the nature of the work and the nature of the relationship between the claimants and the respondent at the time the work was performed, it is clear that the individual claimants were wholly integrated into the performance and into the business conducted by the respondent. They were fully a part of the work of the respondent and were not simply providing services in the same way as a self-employed contractor might have provided services.

The respondent accepted in their final submission that the claimants had been "immersed in the respondent's production" at a relevant time. It argued however:

> *"The claimants were not integrated into Northern Ireland Opera as a production company but were accessories to the relevant production for the relevant period of time."*

The claimants had not been part of the administration or core functions of the respondent's organisation at the relevant times. They had not been involved in setting up or sourcing productions in general; any more than someone employed to work in any other capacity in relation to a specific production. However, it is not a requirement that an employee has to be integrated into the administration or the core function of an organisation. It is at best merely an indication.

90. Another test is what is known as the "economic reality" test. That requires an assessment of the opportunities for profit and loss and the degree, if any, to which the worker was required to invest in the job by cash or time or by the provision of tools or equipment, together with the skill required for the work and the permanency of the relationship. In essence, the question is whether the claimant was a small business person, or a person operating a profession, rather than an employee.

91 In the case of ***MacAlinden v Lazarov and Others UKEAT/0453/13***, a decision relied on by the respondent in the present cases, the actors in a low budget 'fringe' production had operated on a profit share basis. They had invested their time and efforts with no guarantee of a return. To use the words of ***FV Kunston*** above, they had shared in the commercial risks of their employer. In any event, that decision focussed on the approach of the Employment Judge at first instance, and in particular on his failure to give adequate reasons. Little of assistance can be gleaned from that decision.

92. In the present cases, the claimants were not required to and did not invest in the production. They simply provided their services in exactly the same way as an employee would provide their services in any other area of work. Their pay was guaranteed and not subject to commercial risk.

93. All the above factors have to be taken into account in a balancing exercise to properly determine whether a contract is a contract of employment (or of service), rather than a contract of either a worker in the extended sense or of a self-employed individual.

94. ***Hall (HM Inspector of Taxes) v Lorimer [1994] IRLR 171*** was, as the name suggests, an income tax case, where the Special Commissioner had determined that an individual had been self-employed rather than an employee. That individual had been a vision mixer for TV productions and had had 580 separate engagements over approximately 800 days. Each engagement had usually been extremely brief ie for a day or two. The longest had been for ten days. Mummery J heard an appeal from the Special Commissioner who had held that the individual had been self-employed for income tax purposes. He stated:

> *"- This is not a mechanical exercise of running through items on a check-list to see whether they are present in, or absent from a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and making an informed considered qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.*
>
> *The process involved painting a picture in each individual case. As* Vinelott J said in ***Walls v Sinnett [1986] 60 TC 150:***
>
> *"It is, in my judgement, quite impossible in a field where a very large number of factors have to be weighed, to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are common, what are different and what particular weight is given by another tribunal to common facts. The facts as a whole must be looked at, and what may be compelling in one case in the light of all the facts may not be compelling in the context of another case."*

95. The limited duration of the contracts and the fact that the individuals were content to describe themselves as self-employed, are factors which point away from the status of employee. However the degree of control, the necessity of personal service, the lack of commercial risk, the organisational integration and the mutuality of obligation all point towards the present contracts being short-term contracts of employment.

96. In ***Lorrimer*** (above) both Mummery J and the Court of Appeal held that the individual had been self-employed for income tax purposes. At first glance, that case and the present cases have some similarities. In particular, each involve contracts of limited duration. However in ***Lorrimer*** the individual had been

engaged on extremely short contracts; much shorter than in the present cases. Furthermore, when bookings had clashed, he had, with the consent of the production company, provided a substitute; something which would not have been allowed in the present cases.

However, as Mummery J indicated (see previous paragraph), there is perhaps little to be gained by seeking to draw a comparison, factor by factor, with a decision reached in relation to another case, on different facts, and in a different context (income tax). The important thing is to stand back from the accumulation of detail in the present cases and to make a decision on the basis of the overall picture in the context of the present cases.

97. The tribunal therefore determines that the claimants, while working for the respondent in the relevant production had been working under a contract of employment for the purposes of paragraph (a) of the definition of "worker" in Regulation 2(2) of the 2016 Regulations.

While the contracts had been of a fixed duration, that duration, six weeks, had not been insignificant. They were obliged to perform their duties personally, with no possibility of a substitute. They were at all relevant times under the direction and control of the respondent. They worked for payment; although that was paid in two lump sums through an agent, it was based on a weekly wage.

The claimants were clearly in a subordinate role to the respondent, both in seeking work and in performing it.

It is not correct to say, as the respondent has argued, that each of the claimants had "actively marketed his services as an independent person to the world in general" (see paragraph 53 of ***Cotswold Developments Construction Ltd v Williams [2006] IRLR 181***). They each used theatrical agents, not to market their services as an independent person to the world in general, but to seek employment in their chosen trade from a particular group of potential employers. That seems little different from a typist registering his or her availability with Grafton for temporary or short-term jobs as a typist.

The respondent argued that it had been significant that the claimants were able to work for other employers. However, that ability is not inconsistent with employment. What is important in the present cases is that the claimants had not been at liberty to work for another employer during times when they had been required under contract to work for the respondent. The tribunal does not accept the argument that there had not been a "traditional structure" of employment. There is nothing non-traditional or unusual in an employee being permitted to work for another employer, even one in the same industry, outside contracted working hours.

Looking at all the various factors together, the tribunal concludes that the claimants had been employees working under contracts of employment for the relevant six week period.

98. If the tribunal is incorrect in its conclusion on the second issue, and if the claimants had therefore not been working under a contract of employment for the purposes of the 2016 Regulations, the next issue for determination is the third issue ie whether they qualified as "workers" in any event under paragraph (b) of the definition of

"worker" in Regulation 2(2). Many of the points discussed above will be equally applicable to that issue.

Third Issue

Whether the contracts were "any other contract" as described in paragraph (b) of the definition of worker in Regulation 2(2) and if the answer is yes, whether the status of that other party to such contacts had been that of a client or customer of any profession or business undertaking carried on by the individual claimants.

99. The definition of "worker" as it appears in Regulation 2(2) of the 2016 Regulations is in slightly wider terms than the definition of "employment" which appears elsewhere in anti-discrimination statutes. For example, the Sex Discrimination (NI) Order 1996 states at Article 2(2) that:

> *"'employment'" means employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly."*

The Race Relations (NI) Order 1997 at Article 2(2) uses identical terms.

Like those other provisions, Regulation 2(2) first of all refers to standard contracts of service or of employment which relate to employees. Like those other provisions it then refers to engagement under "any other contract" to personally perform work or services for another party. Where it goes further is that it states that the other party to that contract should not be a person whose status is by virtue of that contract that of a client or customer of any profession or business undertaking carried on by the individual.

100. In essence, however, the definitions are the same. It has been the case for some time in EU litigation that the distinction between individuals who are workers as a result of a contract to personally perform services for another, and those who are not workers as a result of such a contract, is the distinction between those who are either employed or quasi-employed and those who are in effect self-employed and operating a business.

The 2016 Regulations uses more words to make that clear but the same principle applies as elsewhere in the anti-discrimination statutes.

101. In the ECJ decision in ***Lawrie-Blum v Land Baden-Wurttemberg [1987] ICR 483***, Advocate General Lenz stated in his opinion that the term "worker" covered any employed person who was not self-employed. The Court stated at paragraph 17 of its judgment;

> *"That concept (ie of "worker") must be defined with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."*

102. In ***Kurz v Land Baden-Wurttemberg [2002] EC 1-10691***, the Court stated at paragraph 32 that;

> *"32. - In order to be treated as a worker, the person must pursue an activity which is genuine and effective, to the exclusion of activities on such a small scale as to be regarded as purely marginal or ancillary. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the directions of another person in return for which he receives remuneration. By contrast, neither the sui generis nature of the employment relationship under national law, nor the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of the remuneration can have any consequence in regard to whether or not the person is a worker for the purpose of Community law."*

103. It is therefore clear that where an EU based provision, albeit in domestic legislation, falls for interpretation, the meaning of the term "worker" has a particular definition in Community law. In paragraph 66 of ***Allonby v Accrington and Rossendale College [2004] ICR 1328***, the ECJ stated;

> *"Accordingly, the term "worker" used in Article 141(1) EC cannot be defined by reference to the legislation of the member states but has a Community meaning. Moreover, it cannot be interpreted restrictively."*

104. The Court went on to state;

> *"67. For the purposes that provision, he must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration -."*

The ECJ in ***Allonby*** went on to state;

> "*71. The form of classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of Article 141(1) EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article."*

The ECJ was clearly recognising that the classification of an individual, for the purposes of income tax and other regimes within domestic states, may well not reflect the reality of the employment relationship for the purposes of EU law. In the present cases, the individuals were described as self-employed for income tax and national insurance purposes. The relevant contractual provisions related specifically to those areas and did not attempt to set out any wide ranging agreement that a self-employed status applied in other respects. (See also ***FV Kunsten above).***

105. In ***Percy v Board of National Mission of the Church of Scotland [2006] 2 AC 28***, the House of Lords considered a sex discrimination claim under the Sex Discrimination Act 1995 which had been brought by a woman who had been a minister in that Church. The House of Lords determined that she had been

employed within the meaning of that Act. Lord Hoffmann dissented on the basis that the claimant had been the holder of an office. However he stated at paragraph 66 that if the arrangement had been contractual rather than by virtue of a particular office, it would plainly have been a contract of service. Lord Hoffmann stated at paragraph 73 that the term "worker" is a term of art in Community law which was defined by the ECJ in ***Lawrie-Blum***. Baroness Hale stated at paragraph 141;

> *"The distinction is between those who worked for themselves and those who worked for others, regardless of the nature of the contract under which they are employed".*

106. At paragraph 145 of ***Percy***, Baroness Hale quoted Sir Robert Carswell in ***Perceval-Price v Department of Economic Development [2000] IRLR 380.***

> *"All Judges, at whatever level, share certain common characteristics. They all must enjoy independence of decision without direction from any source, which the respondent quite rightly defended as an essential part of the work. They all need some organisation of their sittings, whether it be prescribed by the President of the Industrial Tribunals or the Court Service, or more loosely arranged in a collegiate fashion between the judges of a particular court. They are all expected to work during defined times and periods, whether they be rigidly laid down or managed by the Judges themselves with a greater degree of flexibility. They are not free agents to work as and when they choose, as are self-employed persons. Their office accordingly partakes of some of the characteristics of employment –."*

At paragraph 146, Baroness Hale stated;

> *"I have quoted those words at length because they illustrate how the essential distinction is, as Harvey says, between the employed and the self-employed. The fact that the worker has very considerable freedom and independence in how she performs the duties of her office does not take her outside the definition. Judges are servants of the law, in the sense that the law governs all that they do and decide, just as clergy are servants of God, in the sense that God's word, as interpreted in the doctrines of their faith, governs all that they practise preach and teach. That does not mean that they cannot be "workers", or in the "employment" of those who decide how their ministry should be put to the service of the Church."*

107. In the present cases, the claimants were under the close direction and control of the producers and directors of the respondent company. They were "not free agents to work as and when they choose, as are self-employed persons." They were directed as to how they should play the parts for which they were engaged. They had considerably less freedom and independence of thought, word and action than the freedom and independence accorded to judges and, possibly to a lesser extent, to clergy. The supervision and control under which they worked went much further than basic supervision and control in relation to times and dates of work and administrative support. Each and every action or inaction in relation to the roles which they played was subject to the control and direction of those employed by the respondent company to produce that particular production. They could not improvise at will.

108. In the present cases it is clear that the two individual claimants entered into individual contracts with the respondent to personally perform services for that respondent. That much is not in dispute.

109. In the view of the tribunal it cannot be rationally argued that, in doing so, they were operating in a self-employed manner or that they were operating a profession or business on their own behalf, whereby the respondent company had simply been a client of that profession or business. Their situation is, in reality, no different to an individual who engages a recruitment agency eg Grafton or Blue Print, to source work for them in call centres as a temporary call centre operator. During each engagement, working for various call centres, perhaps in a succession of maternity leave covers or sickness leave covers, such a person would clearly have been a "worker", if not an employee. Such a person could not be argued to have been operating a profession or a business whereby the individual call centres were clients of that profession or business. Another analogous example would be that of crop pickers who make themselves available through a gang master or an employment agency for a succession of engagements at different times of the year, in different locations, picking different crops. During each of those engagements, they are clearly "workers" for the purposes of EU law and it cannot be argued that they were individually operating a profession or a business, with the different farmers as clients.

110. The respondent sought to argue at the hearing that the claimants had in some way been different from other individuals in that they brought a certain degree of artistry to their work. When it had been suggested to Ms Herdman that the claimants had been given precise directions by Mr Sutcliffe in relation to the performance of their work, she stated:

> *"(that) does a disservice to actors and 'the industry' to suggest that their only role as an actor is to turn up and stand where you are told to stand, wear what you are told to wear, and read the lines that are in the script."*

With respect to the claimants, who, it must be said, did not advance that argument, that is not correct. It cannot be uncommon that anyone, who is engaged to provide services for another in exchange for remuneration, does their best to perform their services well or that their ability to provide those services depends on their individual talent, or that it increases with experience. That is the same for May McFettridge performing in a Christmas pantomime, as it is for someone who periodically works as a temporary call centre operator or in some other area of intermittent employment. There is no particular magic, at least in legal terms, in relation to being an actor. An actor provides services for a series of employers for money, in the same way as a peripatetic teacher, a temporary call centre operator, or an itinerant crop picker. In terms of EU law, all are the same. All are workers. They work for money, otherwise than as self-employed persons operating a business or profession in an independent manner.

111. The tribunal therefore concludes that if the actors did not qualify as "workers" under paragraph (a), they did so in any event under paragraph (b). The actors were "workers" at the relevant times and that they were therefore entitled to be paid holiday pay and to recover unpaid holiday pay.

Remedy

112. The calculation of loss has been agreed between the parties. The remedy awarded is;

(i) Ms Quinn £374.68.

(ii) Mr McCabe £348.84.

113. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: 14 November 2018, Belfast.

Date decision recorded in register and issued to parties:

Re: Kerri Quinn & Gerard McCabe –v- Northern Ireland Opera
Case referenes: 5982/18 & 5983/18

While the oral hearing was brief and concluded in one morning, the legal issues raised are complex and have been the subject of considerable litigation in the last ten years. There is presently an appeal outstanding to the CJEU for which we only have Advocate-General Whal's opinion. It may be prudent for any determination to await the court's ruling.

The Claim

Kerri Quinn and Gerard McCabe are actors who were recruited directly by the respondent to appear in The Threepenny Opera.

They were required to appear personally and had no right to substitute anyone else for their respective roles.

Throughout the rehearsals and shows they were fully integrated into the NI Opera production and were under the direct supervision and control of the artistic director, Walter Sutcliffe.

The claimants worked for the respondent for 6 weeks from 2nd January to 10th February 2018 during which they took no annual leave. They received no payment for untaken annual leave.

Jurisdiction

The claims are brought under regulation 43 of the Working Time (NI) Regulations 2016 ("WTR") for failure to pay their entitlement to annual leave earned under regulations 15 and 16. The claimants right to the payment for untaken leave crystallised when their work for the respondent terminated on 10th February 2018.[1, 2]

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[1] Reg 17

The claimants also have a parallel claim brought under article 55 of the Employment Rights (Northern Ireland) Order 1996 ("ERO") for unlawful deduction of wages contrary to article 45 of the ERO.

The Legal Principles

The Statutory Framework

The safety and health of workers is a fundamental principle of EU Law.[3] Protections were afforded by Directive 89/391/EC and further by the Working Time Directive, 93/104/EC.

The Working Time (Northern Ireland) Regulations 1998 regulations were introduced to implement Directive 93/104/EC. The Directive was replaced by 2003/88/EC. Article 7 of the 2003 Directive provides:

> "1. Member states shall take measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlements to, and granting of, such leave laid down by national legislation and/or practice."

The WTR 2016 replaced the 1998 regulations. A worker's right to annual leave is set out in regulation 15(1):

> 15.—(1) Subject to paragraph (4), a worker is entitled to four weeks' annual leave in each leave year.

Regulation 16 provides for an additional 1.6 weeks subject to a maximum of 28 days.

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[2] The date of the deduction is the last date payment could have been made: *Taylorplan Services v Jackson* [1996] IRLR 184. In this case the right to payment crystallised on 10th February. There is no limitation point in this case as the ET 1 lodged on 9th May 2018.

[3] Article 118a of the EC Treaty: "Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of conditions in this area, while maintaining the improvements made."

The right to be paid annual leave is set out in regulation 20:

> 20.—(1) A worker is entitled to be paid in respect of any period of annual leave to which the worker is entitled under regulation 15 and regulation 16, at the rate of a week's pay in respect of each week of leave.

The right to be paid outstanding annual leave at the termination of a contract is set out in regulation 17:

> "17.—(1) This regulation applies where—
>
> (a) a worker's employment is terminated during the course of the worker's leave year, and
>
> (b) on the date on which the termination takes effect ("the termination date"), the proportion of leave taken to which the worker is entitled in the leave year under regulation 15 and regulation 16 differs from the proportion of the leave year which has expired.
>
> (2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, the employer shall make a payment to the worker in lieu of leave in accordance with paragraph (3)."

The definition of "worker"

The definition in the ERO and the WTR is the same:[4]

> "... 'worker' ... means an individual who has entered into or works under ...
>
> (a) a contract of employment; or

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[4] WTR reg 2(2); ERO art 3(3)

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

EU Caselaw

As the WTR implements an EU Directive it should be interpreted in so far as possible to give effect to the objective of the Directive: *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135. The purpose of the 1993 directive was to lay down minimum safety and health requirements for the organisation of working time. This included daily rest, weekly rest and annual leave.[5]

In *Union syndicale Solidaires Isère*,[6] the scope of the directive 2003/88 was considered to be broad apply to all sectors of activity, both public and private and activities including educational, cultural and leisure.

While there is no definition of "worker" in the directive, it is a term used widely in EU law. The ECJ caselaw relating to discrimination cites other ECJ cases relating to Freedom of Movement and Working Time. This limited commonality of definition forms a central pillar of the reasoning of Advocate General Wahl in his opinion on 28th June 2018 in the case of *Sindicatul Familia Constanta and others v Direcția Generală de Asistență Socială și Protecția Copilului Constanța*[7] a case which considers whether foster parents are workers within the scope of Directive 2003/88/EC. The Advocate General considered

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[5] Article 1
[6] C-428/09, EU:C:2010:612
[7] [2018] EUECJ C-147/17 O

hat "worker" should be defined in accordance with EU Law and that national law does not have a bearing on that classification under EU Law:

> "58. In *Union syndicale Solidaires Isère*,[8] a case concerning seasonal workers at children's holiday camps employed under special contracts, the Court emphasised that 'worker' must be interpreted autonomously in EU law. Consequently, that concept, as a matter of EU law, must be defined in accordance with objective criteria that distinguish the employment relationship by reference to the rights and duties of the persons concerned. By reference to its case-law under Article 45 TFEU, the Court held that the essential feature of an employment relationship, for the purposes of the application of Directive 2003/88, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.[9]
>
> 59. In other words, a 'worker' within the meaning of Directive 2003/88 is a person that performs services in an employment relationship. That in turn, implies a relationship of subordination.[10] According to the Court, an indicator in that regard may be the circumstance that a person acts under the direction of another person as regards, in particular, his freedom to choose the time, place and content of his work.
>
> 60. For the present purposes, it is of crucial importance that the Court has emphasised that the special nature of a

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[8] C-428/09, EU:C:2010:612

[9] paragraph 28 with reference to judgments of 3 July 1986, Lawrie-Blum, 66/85, EU:C:1986:284, paragraphs 16 and 17, and of 23 March 2004, Collins, C-138/02, EU:C:2004:172, paragraph 26. See also judgments of 3 May 2012, Neidel, C-337/10, EU:C:2012:263, paragraph 23, and of 7 September 2004, Trojani, C-456/02, EU:C:2004:488, paragraphs 15 and 16

[10] judgments of 8 June 1999, Meeusen, C-337/97, EU:C:1999:284, paragraph 15, and of 4 June 2009, Vatsouras and Koupatantze, C-22/08 and C-23/08, EU:C:2009:344, paragraph 26 and the case-law cited.

> contractual relationship under national law does not have a direct bearing on the classification of a person as a worker for the purposes of EU law.[11] Indeed, it seems that just as in other areas of EU social and employment law, the protective umbrella of the concept of worker may in certain cases cover persons who are not regarded as such under national law.

The point is illustrated above: Article 45 of the TFEU relates to Freedom of Movement. The caselaw under article 45 is used to inform the definition of worker for the purposes of the Working Time Directive. In a similar vein, in case of Allonby v Accrington and Rossendale College (case relating to alleged gender discrimination in access to a pension scheme) the ECJ adopted the definition of worker given in *Lawrie-Blum v Land Baden-Wurttenberg*[12] (a freedom of movement case)

> "there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration"[13]

as opposed to:

> "independent providers of services who are not in a relationship of subordination with the person who receives the services".[14]

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[11] Judgment of 14 October 2010, Union syndicale Solidaires Isère, C-428/09, EU:C:2010:612, paragraph 30, with reference to judgment of 20 September 2007, Kiiski, C-116/06, EU:C:2007:536, paragraph 26 and the case-law cited. See also judgments of 11 November 2010, Danosa, C-232/09, EU:C:2010:674, paragraph 56, and of 1 March 2012, O'Brien, C-393/10, EU:C:2012:110, paragraphs 42 to 51.

[12] [1986] EUECJ R-66/85

[13] Paragraph 67 of Allonby and paragraph 17 of Lawrie-Blum

[14] Paragraph 68 of Allonby

The ECJ repeatedly relies upon the notion of the provision of services under the direction of another for remuneration. The commonality was acknowledged by Elias LJ in Clyde 7 Co v Bates van Winkelhof in the Court of Appeal.[15]

In *Hashwani v Jivraj (London Court of International Arbitration intervening)*[16], Lord Clarke, having reviewed the EU case law reached the conclusion that the appropriate test was performing services for and under the direction of another in return for remuneration:

> 34 ... The essential questions in each case are therefore those identified in paras 67 and 68 of *Allonby* [2004] ICR 1328, namely whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services. Those are broad questions which depend upon the circumstances of the particular case. They depend upon a detailed consideration of the relationship between the parties. As I see it, that is what Baroness Hale meant when she said that the essential difference is between the employed and the self-employed. The answer will depend upon an analysis of the substance of the matter having regard to all the circumstances of the case. I would not accept the Court of Appeal's analysis (at para 21) of Baroness Hale's speech in this regard.

This adopts the approach of the ECJ. Lord Clarke also referred to the speech of Lord Hoffman in *Percy v Board of National Mission of the Church of Scotland*[17] in

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[15] [2012] EWCA Civ 1027 at paragraphs 23-25
[16] [2011] UKSC 40
[17] [2005] UKHL 73

which at paragraph 73 he described "worker" as "a term of art in Community law which was defined by the Court of Justice in *Lawrie-Blum v Land-Wurttemburg* at paragraph 17".

Domestic Caselaw

The Supreme Court decided Autoclenz on the same day as Hashwani. The Supreme Court decision was that the valeters who had been seeking worker status were employees. When the case had been in the Court of Appeal, Aiken LJ had analysed limb (b) in the following way:

> "75. There are three requirements. Two are positive and one is negative. First, the worker has to be an individual who has entered into or works under a contract with another party for work or services ...
>
> 76. The second requirement of the statutory definition in paragraph (b) of s.230(3) is that the individual undertakes to do or perform personally the work or services for the other party ...
>
> 77. The third requirement relates to the status of the other party to the contract. That other party must not, by virtue of the contract, have the status of a client or customer of any profession or business undertaking carried on by the individual who is to perform the work or services ... in most cases at least, it is easy enough to recognise someone who has this status. It includes, for example, the solicitor's or accountant's client or a customer who seeks and obtains services of a business undertaking such as from an insurance broker or pensions adviser."

In 2012 the English Court of Appeal considered the definition of workers in a claim for unpaid annual leave in *Westwood*.[18] McKay LJ adopted the analysis of Aikens LJ.[19] Westwood was a general practitioner, the senior partner in his practice. He performed minor operations. He performed hair restoration for a company called Transform. He subsequently also performed operations for the respondent, Hospital Medical Group. During this time he also worked for another company called Albany Clinic in which he gave advice on transgender issues.

The argument put forward on behalf of the respondent was:

- Whether a person is engaged in business on his own account is a question of fact for the ET. It unequivocally found that Dr Westwood was so engaged.
- Dr Westwood dealt with HMG in the course of that business.
- HMG was therefore Dr Westwood's "client or customer" in his profession or business.

The Court rejected this argument on three grounds:

> Firstly, they effectively emasculate the words of the statute. If Parliament had intended to provide for an excluded category defined as those in business on their own account, it would have said so, rather than providing a more nuanced exception.
>
> Secondly, whilst it is true that Mr Green's approach has the attraction of greater simplicity and predictability, it simply does not fit with the words of the statute. The status exception does indeed provide a third, albeit negative hurdle.
>
> Thirdly, it is counterintuitive to see HMG as Dr Westwood's "client or customer". HMG was not just another purchaser of Dr Westwood's various medical skills. Separately from his general practice and his work at the Albany Clinic, he

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[18] Hospital Meical Group Ltd v Westwood [2012] EWCA
[19] See paragraph 11

contracted specifically and exclusively to carry out hair restoration surgery on behalf HMG. In its marketing material, HMG referred to him as "one of our surgeons". Although he was not working for HMG pursuant to a contract of employment, he was clearly an integral part of its undertaking when providing services in respect of hair restoration, even though he was in business on his own account.

In 2014, Lady Hale gave the judgment of the Supreme Court in Bates van Winkelhof. The Court approved the position that a self-employed individual can be a worker:

> "25 ... the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in *Hashwani v Jivraj (London Court of International Arbitration intervening)* [2011] UKSC 40, [2011] 1 WLR 1872 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else. The general medical practitioner in *Hospital Medical Group Ltd v Westwood* [2012] EWCA Civ 1005; [2013] ICR 415, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a "worker" within the meaning of section 230(3)(b) of the 1996 Act."[20]

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[20] Per Lady Hale in Clyde & Co LLP v Bates von Winkelhof [2014] UKSC 32 at paragraph 25

"31. As already seen, employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self- employed but do not fall within the second class."[21]

Lady Hale continued by commenting that there was no single test which could be applied to determine worker status:

39. I agree with Maurice Kay LJ that there is "not a single key to unlock the words of the statute in every case". There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of "subordination" to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves. As Elias J recognised in *Redcats*, a small business may be genuinely an independent business but be completely dependent upon and subordinate to the demands of a key customer (the position of those small factories making goods exclusively for the "St Michael" brand in the past comes to mind). Equally, as Maurice Kay LJ recognised in *Westwood*, one may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into the other party's operation as to fall within the definition. As the case of the controlling shareholder

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[21] At paragraph 31

in a company who is also employed as chief executive shows, one can effectively be one's own boss and still be a "worker". While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker."

While, there was no one test identified by Lady Hale, the examples she refers to mirror integration and subordination: the tests used by the ECJ. In 2017 the Court of Appeal in England in Pimlico Plumbers v Smith[22] with whom the Supreme Court subsequently agreed, considered the issue:

"94 In deciding whether a worker is a limb (b) worker or falls within the second category in paragraph 66 above, the ET carries out an evaluative exercise, with an intense focus on all the relevant facts: Hashwani v Jivraj [2011] UKSC 40, [2011] 1CR 1004 at [34]. There is no single touchstone, such as whether there is a relationship of subordination of one party to another, for resolving the issue: Bates van Winkelhof at [39]. Subordination might, nevertheless, be relevant, as might be such factors as whether there are a number of discrete separate engagements, whether obligations continue during the breaks in work engagements (sometimes called an "umbrella contract"), and also the extent to which the claimant has been integrated into the respondent's business: Windle v Secretary of State for Justice [2016] EWCA Civ 459, [2016] ICR 721; Halawi v WDFG UK Ltd; James v Redcats (Brands) Ltd [2007] ICR 1006.

...

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[22] [2017] EWCA Civ 51

> 116. Having considered all those factors, the tribunal rightly stood back and asked and answered (in paras 52 and 53 of the decision) the over-arching question whether the better conclusion was that the company was a client or customer of Mr Smith's business or rather the company should be "regarded as a principal and Mr Smith was an integral part of the company's operations and subordinate to the company". In carrying out its evaluation and reaching its conclusion that it was the latter, the tribunal made no error of law or principle and did not reach a decision outside the ambit of what was judicially permissible. In that latter context, it is entitled to the respect due to a specialist tribunal carrying out that kind of evaluation: compare Banco Santander Totta SA v Cia Carris de Ferro de Lisboa SA [2017] 1 WLR 1323, para 67."

On the basis of the domestic and EU caselaw the tribunal should examine all the facts and specifically consider whether the claimants were subordinate to respondent while they were working, whether they were integrated into the respondent's business for the duration of the work.

Response to respondent's oral submissions

The respondent made a number of arguments at the oral hearing.

Advertising or Marketing

It has been argued that a touchstone for the difference between the self-employed worker and the independent self-employed is whether or not the individual advertised services to the world.

> It is clear that the statute recognises that there will be workers who are not employees, but who do undertake to do work personally for another in circumstances in which that "other" is

neither a client nor customer of theirs – and thus that the definition of who is a "client" or "customer" cannot depend upon the fact that the contract is being made with someone who provides personal services but not as an employee. The distinction is not that between employee and independent contractor. The paradigm case falling within the proviso to 2(b) is that of a person working within one of the established professions: solicitor and client, barrister and client, accountant, architect etc. The paradigm case of a customer and someone working in a business undertaking of his own will perhaps be that of the customer of a shop and the shopowner, or of the customer of a tradesman such as a domestic plumber, cabinet maker or portrait painter who commercially markets services as such. Thus viewed, **it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."** [my emphasis]

This analysis is troublesome. It is not disputed that the claimants were an integral part of the respondent's production which would categorise the claimants as self-employed workers.

The respondent argued that because they marketed themselves on Spotlight the tribunal is required to conclude that the claimants were in fact independent. A premise of the argument is false and in any event the conclusion does not follow from the premises.

First, the principle is not categorical. puts the test no higher than an indicator.[23]

Second, the distinction is not valid if there are people who advertise to the world in general to become fully integrated into the principal's operations. The claimants fall into this category. Therefore the distinction is a false dichotomy.

The decision is at EAT level which is only of persuasive authority.

Further, the decision which was made in 2005 does not consider any of the existing EU caselaw (Lawrie-Blum 1986, Allonby 2004) and pre-dates all of the significant higher level domestic decisions (Pimlico 2017-18, Bates van Winkelhof 2014, Autoclenz & Hashwani 2011) and recent EU decisions (Isere 2009)

As far as it purports to present a touchstone it would run directly counter to the subsequent decisions of the Supreme Court (Lady Hale in in Bates von Winkelhof)

In any event, in the present case, the claimants were recruited by the respondent and the issue of advertising or marketing does not, as a matter of fact, arise.

Relative Bargaining power

The relative bargaining power of the parties must be taken into account in determining what was the true agreement.[24] The respondent was in a considerably stronger position. The claimants were both paid the rate set by the Lyric, there was no negotiation. The claimants both had to sign the terms presented by the respondent. There was no negotiation.

MacAlinden

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[23] McKay LJ referred to the passage as "specifically ... indications rather than principals of universal application" at paragraph 16 of Westwood.
[24] Autoclenz at 34-35 approving the Court of Appeal summary

The respondent also seeks to rely upon the Employment Appeal Tribunal case of MacAlinden t/a Charm Offensive Lazarov.

This was a case in which a tribunal had found that actors were workers. The EAT remitted the case for rehearing on the grounds that the evidence before the tribunal had raised a real issue as to whether the claimants were carrying on a profession or undertaking. The judge failed to make findings about the way the claimants carried on their work. The EAT criticised the judge for referring to textbooks rather than caselaw.

The case provides no principles nor guidance. It is simply a critique of the shortcomings of the employment tribunal's decision. It is limited to its facts.

Flexibility

The respondent suggested that the flexibility afforded to Ms Quinn to collect her child from daycare was an indicator of independent self-employment.

The argument must be:

- flexibility is only provided to self-employed workers;
- the claimant was afforded flexibility;
- therefore the claimant is independently self-employed.

This is a flawed argument.

The first premise is fundamentally flawed: flexibility may be granted to employees, workers, casual workers, and anyone independently self-employed.

The argument could be turned to provide further establish that the claimant was subject to the respondent's control:

An individual does not need to be granted flexibility to leave work unless the time and place of work is controlled

The claimant was granted flexibility

Therefore, her time and place of work was controlled

Freedom to take another job

The respondent also suggested that the fact that each claimant took other work established that they were independently self-employed while working for the respondent.

This argument must be premised on the ground that a worker or an employee cannot take a second job outside working hours. This starting position is unsustainable so the argument must fall.

Contractual Labels

Workers and employers cannot agree, whether in a contract of employment or otherwise, to exclude any rights under WTR or ERO without entering a compromise agreement.[25]

Summary

The WTR implements EU Law. EU caselaw defines workers as those who provide services personally for another under their direction for remuneration.

Domestic caselaw identifies 3 types of worker: the employed, the independent self-employed and the self-employed worker as an intermediate class. IN determining the lines to be drawn between these classes the courts have acknowledged the importance of subordination and integration as tools for determining worker status but has provided a caveat that there is no single touchstone. Advertising or marketing to the world in general is a factor which may militate against worker status.

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[25] ERO art 245 and WTR reg 45. The concern was voiced by Elias J that lawyers would simply exclude obligations to accept or provide work: para 57-59 of *Taunton* above.

- The claimants were approached by the respondent and individually recruited;
- The claimants were working for the respondent at the standard Lyric rates to present The Threepenny Opera to the public;
- For the duration of the production the claimants were obliged to carry out the work personally. There was no right of substitution and the contracts allowed the respondent to terminate the contract with either claimant if they were unable to perform.
- When they were preforming their obligations under the agreement, the claimants were both under the strict control of the respondent represented by the artistic director Walter Sutcliffe.
- Throughout the claimants were completely integrated into the production.

The claimants had worker status when they were actually working for the respondent.

The claimants seek declaration that they were workers and an award in the agreed sums.

Brian McKee

Bar Library

23rd November 2018

2

THE INDUSTRIAL TRIBUNAL & FAIR EMPLOYMENT TRIBUNAL
CASE REF. 5982/18 & 5983/18

BETWEEN:

KERRI QUINN & GERARD MCCABE

Claimants

v

NI OPERA

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENT TO BE CONSIDERED IN CONJUNCTION WITH ORAL SUBMISSIONS

Agreed Factual Background

1. The Claimants are full-time, actors. They regard themselves as self-employed and pay tax and national insurance as self-employed persons.
2. The Respondent is Northern Ireland's national opera company, providing high quality opera to the widest possible audience and is funded by the Arts Council of Northern Ireland.

3. The claimants were engaged by the respondent to perform in its production of Brecht's Threepenny Opera directed by Walter Sutcliffe: Ms. Quinn in the role of Jenny Diver; Mr McCabe as Filch/Walt Dreary and part of the ensemble. The claimants' work included rehearsals from 2nd-26th January and public performances from 27th January to 10th February - a period of six weeks in all.

4. The Claimants are each represented by an agent/artist management company. The primary purpose of the agent is to negotiate all contracts between the Claimants and casting professionals. Mr McCabe's agent also performs an advertising function by holding a profile for him on their website, detailing his previous experience and photographs of him undertaking other acting roles. Agents also source opportunities for the Claimants to audition for new acting opportunities. Opportunities, particularly within Northern Ireland, often come to the Claimants directly or arising out of other performances. All opportunities are ultimately referred to the

agent to negotiate the terms of the engagement. The rates set for the claimants for the Threepenny Opera were a standard rate set by the Lyric Theatre based on the number of previous appearances, and were not negotiable. The Claimants had both previously performed in productions at the Lyric Theatre.

5. Neither of the claimants' agents was involved in the process of selection for the roles. Ms. Quinn was approached directly by the artistic director, Walter Sutcliffe, and Mr McCabe was approached directly by the assistant artistic director.

6. The Claimants each operate a profile on the 'Spotlight' website, the purpose of which is to connect actors with casting opportunities around the world. Details of actors are available only on a subscription basis. This website is used extensively by performers, agents and casting professionals in respect of work in England and Wales and beyond. It is also utilised within Northern Ireland but to a lesser degree than in England and Wales and further afield. Spotlight was not used by the respondent in selecting the claimants for the production.

7. The Claimants are free to audition for a number of productions scheduled to run within the same timeframe and, if successful, to select the opportunity most advantageous to them. Negotiations of payment on their behalf by their agents would factor into this decision-making process.

8. The Claimants had to perform the work they were contracted into personally. They could not substitute themselves with other actors.

9. The manner in which the claimants worked was controlled by the artistic director, Walter Sutcliffe. The claimants were required to perform in accordance with his instruction.

10. Their contracts specified that the Claimants were to notify the producer of their daily availability to participate in rehearsals. The Claimants gave unchallenged evidence that they received the schedule for each day of rehearsals on the afternoon of the day before and therefore considered that they had to be available for the full day of each rehearsal until advised otherwise. The Claimants accepted that they would not have been required for the full rehearsal period on each and every day of rehearsals in reality but state that they would not have known when they were required until the afternoon of the preceding day.

11. The Claimants accepted that they enjoyed a degree of flexibility and that the artistic director would facilitate family obligations and other appointments where possible.

12. The Claimants were permitted to undertake other work during the period of the contract provided it did not interfere with their contractual obligations and both did so: Mr McCabe took part in performances with Soda Bread Theatre Company on 19th and 20th January. This production company was formed by Mr McCabe and another actor; Ms. Quinn undertook session singing work in AM:PM's Cabaret Supper Club on Saturday evenings. All the work was outside the performance period of Threepenny Opera and did not interfere with any contractual obligations.

Loss

13. The calculation of holiday pay entitlement has been agreed between the parties as pro rata for 6 weeks based on 5.6 weeks annual leave. If entitled to holiday pay, Ms Quinn would be entitled to a payment of £374.68. If entitled to holiday pay, Mr McCabe would be entitled to a payment of £348.84.

Statutory Framework and Issue for Determination

14. The Claimants claim that they are entitled to accrued holiday pay for the 6 week period within which they were contracted with the Respondent. The Claimants claim that they had the status of workers for that period of time.

15. Regulations 15 and 16 of the Working Time Regulations (Northern Ireland) 2016 provide for employees and workers to have an entitlement to 5.6 weeks of paid annual leave per year.

16. It is common case that the Claimants were not employees of the Respondent. It is contended that they were workers during the 6 week period covered by their contracts with the Respondent. The Working Time Regulations define a worker as follows:

""worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract **whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual**;

and any reference to a worker's contract shall be construed accordingly" **(emphasis added)**

17. It is conceded by the Respondent that the Claimants entered into a contract to perform personal services for the Respondent, namely rehearsing and performing the roles they successfully auditioned for within the production of the Threepenny Opera. The sole issue for the Tribunal to consider, therefore, relates to the portion of the definition of work as highlighted above. Namely, was the Respondent a client or customer of a profession or business undertaking carried on by each of the Claimants? If this question is answered in the affirmative, the Claimants are not workers and are not entitled to holiday pay. If the question is answered in the negative, the Claimants are workers and are entitled to holiday pay.

Precedent

18. The Tribunal has been provided with the decision of the Employment Appeal Tribunal of ***McAlinden t/a Charm Offensive -v- Lazarov & Ors UKEAT/0453/13/JOJ***. This decision involved consideration of the precise issue that falls to this Tribunal for consideration and within the context of actors undertaking roles within a 4 week production period. Some of the Claimants were semi-professional and professional actors. Others were operating at an amateur level. The lower tribunal had determined that it was, "...clear on the facts of this case that the other party was not a client or customer so that issue falls away." The EAT ultimately concluded that the lower tribunal had been wrong to dismiss this consideration in this way, and in doing, considered the leading authorities on this issue, helpfully for present purposes, applying them to the context of actors.

19. ***McAlinden*** reviews the leading authorities of ***Cotswold Developments Construction Ltd (appellants) v. Williams (respondent) - [2006] IRLR 181, Hospital Medical Group Ltd v Westwood [2012] IRLR 834 and Bates van Winkelhof v Clyde and Co LLP and Anr [2014] IRLR 641.*** It is useful in terms of its review of the relevant case law and analysis on the very issue before the Tribunal. It is not submitted that it is binding, but given that the Court of

Appeal in Northern Ireland has not spoken on this issue, and that ***McAlinden*** considers and applies case law of the House of Lords and Court of Appeal in England and Wales, it is submitted that it should be assigned significant persuasive weight.

20. ***Cotswold*** confirms as follows: *"The paradigm case falling within the proviso to 2(b) is that of a person working within one of the established professions: solicitor and client, barrister and client, accountant, architect etc. The paradigm case of a customer and someone working in a business undertaking of his own will perhaps be that of the customer of a shop and the shop owner, or of the customer of a tradesman such as a domestic plumber, cabinet maker or portrait painter who commercially markets services as such.* ***Thus viewed, it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."***[1] ***(emphasis added)***

21. ***Westwood*** dealt with the case of an employed GP who, as a separate activity, worked for an organisation running cosmetic surgery and other procedures. In that capacity, the doctor agreed to provide his services exclusively to the Hospital Medical Group Ltd and did not offer that service to the world in general and had been recruited to work as an integral part of the organisation's operations. He was assessed to have been a worker, the level of his integration having been an important factor in the determination.

22. ***Van Winkelhof*** confirmed that there is no 'magic test' to be applied in order to allow easier determination of the issue of whether or not an individual is a worker. Each case will be fact specific. Lady Hale concluded that, *"While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker."*[2]

23. In considering the above case law and applying it to the facts of that case, the EAT made the following observations:

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[1] Paragraph 53
[2] Paragraph 39

- After considering the evidence of one Claimant outlining aspects of her career and experience, the EAT concluded: *"This description is strongly suggestive of a person who has embarked on a profession or business undertaking. She appears to be actively marketing her services as an independent person to the world in general rather than being recruited to work for any individual as an integral part of that individual's operations.* ***She was, no doubt, immersed in the Respondent's play once she had been cast in it; but she was not integrated into the Respondent's theatre production business."***[3]

- *"The Employment Judge made no findings about the way in which the Claimants carried on their work as actors. He does not appear to have recognised that there was a potential issue in this respect. In my opinion there clearly was. It is no doubt true that some of the Claimants were just starting out on what they hoped would be acting careers.* ***The question, however, still arises: upon what were they embarking? Was it a profession or business undertaking (or both); if they were actively marketing their services as an independent person to the world in general, picking up or attempting to pick up work where available from a variety of sources, this may be a powerful indication that they were not "workers".*** *(emphasis added)*

- *"It is true, I think, that the words "client" and "customer" would not usually be used in this way. But this is true in other areas: for example, a doctor may well be in independent practice, but one would not usually describe those whom he treats as his "clients" or "customers": one would describe them as his patients. It is important to look at the definition as a whole and to understand its purpose within employment law as laid down by the cases."*[4]

- *"For these reasons I conclude that the Employment Judge has not approached the question of worker status correctly and has not given sufficient reasons for his decision. The matter must be remitted for re-hearing."*[5]

19. One further relevant case post-dated the decision of ***McAlinden*** and therefore did not form part of the discussions therein, namely the case of ***Suhail v Barking, Havering and Redbridge NHS Trust UKEAT/0536/13. Suhail*** distinguished the case of ***Westwood*** and involved and an out-of-

[3] Paragraph 25
[4] Paragraph 28
[5] Paragraph 29

hours GP offering his services generally and who was determined not to be a 'worker' in relation to the respondent health trust, which was merely one of his professional clients. Unlike Dr Westwood, Dr Suhail was not carrying out his out-of-hours work alongside employment and, furthermore, unlike Dr Westwood, Dr Suhail did not offer his services to only one health trust to the exclusion of all others. There can be doubt that Dr Suhail was fully integrated within each health trust during the period of each shift he carried out as an out-of-hours GP. The nature of his overall business, however, was not such as to make any such integration determinative of his status as a worker. **Dr Suhail was integrated for the duration of each shift he undertook, but overall was not integrated into any one health trust.**

20. The Court of Appeal of England and Wales and the Supreme Court have both considered the issue within the cases of ***Pimlico Plumbers Ltd and another (Appellants) v Smith (Respondent)***[6][7] That case focussed on the issue of personal service and had little to say on the issue that falls for determination by this Tribunal. The determination on the client/customer issue in the ***Pimlico Plumbers*** case came to be effectively determined by the findings made in respect of the issue of personal service. Review of these decision also reinforces the fact that each case will be acutely fact specific. For completeness, the relevant paragraphs of the Court of Appeal decision are paragraphs 114 and 115 and those within the Supreme Court decision are at paragraphs 48 and 49. Interestingly, one factor given significant weight by the Supreme Court in this case was the fact that the contract included a suite of covenants restrictive of the Claimant's working activities following termination.

Analysis

21. It is clear from the reported case law from every level that the starting point for the Tribunal's consideration is the wording of the statute. The question for determination, therefore, is: was the Respondent a client or customer of a profession or business undertaking carried on by each of the Claimants?

22. It is submitted that, when answering this question, the Tribunal must first consider the nature of the Claimants' businesses as a whole and not focus solely on the 6 week contractual period with

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[6] [2017] EWCA Civ 51
[7] [2018] UKSC 29

the Respondent. It is respectfully submitted that to make consideration of that 6 week period determinative of the issue would be to err in law.

Claimant Submissions

23. Submissions were made on behalf of the Claimants that their activities during the contractual period were entirely controlled by the artistic director, who required them to learn a script, to wear costumes selected for them, to stand where they were required to and to move as directed. It was submitted that this degree of control, integration and subordination is such that it is clear that the Claimants were workers during the relevant time.

Respondent Submissions

24. The Claimants are professional actors who regard themselves as self-employed. They market and advertise themselves professionally through online marketing tools and, in the case of Mr McCabe, also through his agent. They offer their services and their profile to the casting industry in the hope of being approached to audition for a role in a new acting opportunity. Opportunities also often arise out of being 'spotted' while performing in another role. Once they have the opportunity to audition for a role or roles and if they are successful, they are entirely free to accept or reject any opportunity offered, and if offered more than one clashing opportunity, to select the opportunity most beneficial to them either financially or in terms of career development. The terms of any contract they enter into is negotiated for them by experienced talent agents, who seek to obtain the best possible fees and terms on their behalf. In this sense there is considerably less inequality of bargaining power than there might be if they negotiated contracts on their own behalf.

25. In respect of the suggestion that the Claimants were under the complete control of the artistic director for the contractual period, it is submitted that this undermines the very nature of what it is to be an actor or actress. The nature of this industry is that plays and operas (unless they are the more unusual improvised performances) are subject to artistic direction and follow scripts. They have set costumes and dance routines. They are blocked out at an early stage in rehearsal in terms of organising on-stage movement. This does not equate to each individual actor having nothing individual to bring to each role in terms of experience, talent and their own innovation and expression. To characterise the role of an actor as being under the complete control of the artistic director, as has been done on behalf of the Claimants, is to reduce the role to something

that would require no theatrical skill whatsoever. It is not accepted that artistic direction amounts to control in the manner suggested on behalf of the Claimants.

26. Applying the authorities outlined above, it is submitted as follows:

- The Claimants actively market their services as independent persons to the world in general and are therefore people who have clients or customers. ***(Cotswold)***
- The Claimants did not offer their services solely to the Respondent and, whilst they were certainly integrated in the project for the contractual period, they were at no time integrated within the Respondent's business. (***Westwood*** and ***Suhail***)
- The Claimants were free to offer their services to other organisations and did so during the contractual period, unlike the solicitor in ***Van Winkelhof*** who was prohibited from offering her services to other organisations. Mr McCabe referred to this in evidence as "double jobbing" and accepted that this would be common within the industry. (***Van Winkelhof*** and ***Suhail)***
- The nature of the Claimants' businesses as outlined at [24] above is strongly suggestive of people who have embarked on a profession or business undertaking. They are actively marketing their services as independent persons to the world in general rather than being recruited to work for any individual as an integral part of that individual's operations. They were, no doubt, immersed in the Respondent's opera once they had been cast in it, but they were not integrated into the Respondent's theatre production business. ***(McAlinden)***
- The Claimants were operating a profession and business undertaking. They were actively marketing their services as independent persons to the world in general, picking up or attempting to pick up work where available from a variety of sources. This ought to be a powerful indication that they were not "workers". ***(McAlinden)***

Conclusion

27. In conclusion, it is submitted that the Claimants were not workers during the contractual period as the Respondent was a client or customer of a profession or business undertaking carried on by each of the Claimants. The Claimants were self employed freelance actors carrying on a professional business undertaking, by which they marketed themselves to their professional world, seeking and capitalising on available opportunities and negotiating the most advantageous deals possible, through extremely experienced agents. In this sense, they were each truly self-employed and contracted with the Respondent as such. They were not workers and their claims for holiday pay ought to be dismissed accordingly.

Bobbie-Leigh Herdman
The Bar Library
20th November 2018

3

THE INDUSTRIAL TRIBUNAL & FAIR EMPLOYMENT TRIBUNAL
CASE REF. 5982/18 & 5983/18

BETWEEN:

KERRI QUINN & GERARD MCCABE

Claimants

v

NI OPERA

Respondent

SECOND WRITTEN SUBMISSION ON BEHALF OF THE RESPONDENT

1. This written submission is submitted on foot of an email received from the Tribunal Office dated 10th December 2018 raising the following issue: *"The Tribunal has noted that both parties have argued that the claimants had not at the relevant times, worked under a contract of employment for the purpose of paragraph (a) of the definitions of "worker" in Regulation 2(2). If either party wishes to comment on whether...the claimants had been engaged at the relevant times on short fixed-term contracts of employment, they should do so no later than 17th December 2018 at 1.00pm."*

2. The Respondent refutes the suggestion that either of the Claimants were engaged on short fixed-term contracts of employment at the relevant time.

Defining 'Employee'

3. Harvey on Industrial Relations and Employment Law deals with 'Employee' as a category of worker at A1.B and clarifies that a satisfactory definition of 'employee' has proved elusive. The core of the concept is reduced to the following: "...workers may generally be divided into two classes: employee and independent contractors. The employee undertakes to serve; the contractor does not. The employee sells his labour; the contractor sells the end product of his labour. In the one case the employer buys the individual; in the other he buys the job. The law

expresses that by saying that the employee enters a contract *of employment*; the contractor enters a contract *for services*."[1]

4. Traditionally it has been the essence of a contract of employment that the employee undertakes to provide *personal* service to his employer. It is accepted by the Respondent that the Claimants entered into contracts to provide personal service to the Respondent company but it is submitted that the examination of the other factors relevant to the status of an employee, together with the manner in which the Claimants were operating their businesses, illustrates that the Claimants were not employees during the relevant time.

Tests for Employment

5. The earliest test for employment which has developed in the case law is the 'control' test i.e. an assessment of the level of control of the 'master' over the 'servant'.[2] It is accepted that the Claimants were under the direction of the artistic director during the relevant period. It is, however, the very nature of what it is to be an actor or an actress that a performer will bring an individuality to each role which is not controlled by any director, producer or otherwise. This skill is, in fact, the 'end product' which is sold by the Claimants to the Respondent. This issue is dealt with at paragraph 25 of the Respondent's written submissions dated 20th November 2018. The Respondent does not exercise the requisite degree of control over the way in which the Claimants carried out their work in order for the 'control' test to be satisfied and for the Claimants to be classified as employees.

6. The 'organisational' test asks the question: would the ordinary person say the individual was part and parcel of the organisation?[3] Denning LJ in ***Stevenson Jordan and Harrison Ltd v MacDonald and Evans [1952] 1 TLR 101, CA*** set out the following proposition: "Under the contract of [employment] a man is employed as part of the business, whereas under a contract for services his work although done for the business is not integrated into it but only accessory to it." The Claimants were no doubt, immersed in the Respondent's production once they had been cast in it. The Claimants were not integrated into Northern Ireland Opera as a production company but were accessories to the relevant production for the relevant period of time. The Claimants were engaged for this production and indicated in evidence that they would have

[1] Harvey on Industrial Relations and Employment Law [A1.6]
[2] Harvey on Industrial Relations and Employment Law [A1.21]
[3] Harvey on Industrial Relations and Employment Law [A1.27]

been looking for their next opportunity during the course of the said production. More intensive integration with the production company would run contrary to the manner in which the Claimants operate their businesses and to the success of that business model, the Claimants having given evidence that their practice is to remain open to audition for and work with countless production companies. The question of integration is also dealt with in the Respondent's written submissions dated 20th November 2018.

7. The 'economic reality' test can be seen as the reverse of the 'organisational' test. The 'organisational' test enquires whether the individual is truly part and parcel of the organisation; the 'economic reality' test, whether he is truly independent of it. Harvey suggests that the question to be answered may be put in various ways, but that there is a common theme: Was the worker really a small businessman rather than an employee?[4] This issue has been dealt with in detail in the Respondent's written submissions dated 20th November 2018 and it is submitted that it is clear from the evidence before the Tribunal that the Claimants were operating businesses on their own account and were neither workers nor employees.

8. The 'multiple test' denies that any one of the above tests or features is conclusive. All the so-called tests should be regarded as useful general approaches, but in every case it is necessary to weigh all the factors in the particular case and ask whether it is appropriate to call the individual an 'employee'. There are three questions to be answered:

(1) Did the worker undertake to provide his own work and skill in return for remuneration?

(2) Was there a sufficient degree of control to enable the worker fairly to be called an employee?

(3) Were there any other factors inconsistent with the existence of a contract of employment?[5]

9. Questions 1 and 2 have been dealt with above at paragraphs 5 and 6. Question 3 has been dealt with in part at paragraph 7 above and also in the Respondent's written submissions dated 20th November 2018. The key factor which is inconsistent with the existence of a contract of employment is the very manner in which the Claimants choose to operate their businesses, and which is the standard practice across their industry. The Claimants do not seek employment status as it rails against the business model which they have chosen to adopt and which is the most effective way to pursue success within their industry.

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[4] Harvey on Industrial Relations and Employment Law [A1.32]
[5] Harvey on Industrial Relations and Employment Law [A1.38]

10. A number of other factors have been considered to be relevant in the assessment of whether or not an individual is an employee, including the following which are of significance in respect of these Claimants[6]:

- **How far, if at all, did the individual invest in his own future: who provided the capital and who risked the loss?** The Claimants provided all capital and bore all risk in respect of their businesses, having chosen to operate within an extremely competitive industry in which success is far from guaranteed. In doing so they have sought representation from talent management agencies to improve their bargaining positions and engaged in online marketing tools to boost their profiles. The Claimants have also entered into agreements with their talent management agencies which allows the said agent to take a commission on each assignment. The risk of loss was all their own, having invested in their own businesses in order to give the best chances of success. They each reap the rewards of their success personally and it is clear that both Claimants have made a success of their businesses within a challenging industry.

- **Was there a 'traditional structure' of employment in the trade?** As outlined above, the very nature of the relevant 'trade' or industry is such that there is no traditional structure of employment and, in fact, such a structure would run contrary to the manner in which the business model operates. Furthermore, employee status within an organisation such as NI Opera would not sensibly permit work to be undertaken by those workers in other competing organisations, such as that undertaken by Mr McCabe during the course of the relevant production. That this was permissible for both Claimants runs contrary to any suggestion that they were employees. A further indicator of the nature of the Claimants' work is the manner in which they were paid, namely in two installments on foot of an invoice issued on their behalf by their agents. The Tribunal also has access to the contracts between each Claimant and their agent, outlining the fact that the agent is paid a commission in respect of each assignment undertaken by the artist. Payment was made directly to the talent management agent for onward transmission to the Claimants, presumably less any commission taken by the agent. This method of invoicing and payment is not consistent with an employer/employee relationship and is further evidence of the self-employment of the Claimants.

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[6] Harvey on Industrial Relations and Employment Law [A1.44]

- **How did the parties themselves see the relationship?** The Claimants were clear in their evidence that they see themselves as self-employed individuals operating businesses on their own account. This view was shared by the Respondent and based on the manner in which the industry as a whole operates.

- **What were the arrangements for the payment of income tax and national insurance?** The Claimants were to make payment of income tax and national insurance personally. This was set out explicitly in their contracts and they confirmed in their evidence that this was their standard practice across their various performing engagements. The Claimants also confirmed in evidence that they submit tax returns under the self-assessment process. This would allow them to benefit from the advantages in terms of off-setting work-related expenses against earnings in order to reduce the tax payable but which would not be possible if they were employees.

Conclusion

11. It is submitted that the Claimants were not employees engaged in short fixed-term contracts during the contractual period. In determining this issue the Tribunal will have regard to the various 'tests' outlined above. It is submitted, however, that consideration of each and every of the relevant factors should be coloured and informed by the very nature of the Claimants' businesses as a whole and should not focus solely on the 6 week contractual period with the Respondent. To do so would be to examine one project on a stand alone basis and which can only be properly understood within the context of the wider business model.

12. The Claimants were self employed freelance actors carrying on a professional business undertaking, by which they marketed themselves to their professional world, seeking and capitalising on available opportunities and negotiating the most advantageous deals possible, through extremely experienced agents. This business model is entirely inconsistent with an employer/employee relationship. The Claimants were each truly self-employed and contracted with the Respondent as such. They were not employees nor workers and their claims for holiday pay ought to be dismissed accordingly.

Bobbie-Leigh Herdman
The Bar Library
17th December 2018

4

Smylie, Noleen

From: Employment Tribunals
Sent: 17 December 2018 12:41
To: 'Orla Sheils'
Subject: RE: Gerald McCabe & Kerri Quinn v NI Opera Case Ref Nos: 5982/18 5983/18

Dear Madam

I acknowledge receipt of your email to the Tribunal mailbox.

Yours faithfully

Noleen Smylie

From: Orla Sheils [mailto:osheils@donnellykinder.com]
Sent: 17 December 2018 12:29
To: Employment Tribunals <mail@employmenttribunalsni.org>
Cc: JulieAnne Clarke <JulieAnne.Clarke@edglegal.com>
Subject: Gerald McCabe & Kerri Quinn v NI Opera Case Ref Nos: 5982/18 5983/18

Dear Sir/Madam,

I refer to the above matter and the Tribunal's email of 10th December 2018.

The Claimants' position is that they are self-employed for tax purposes and have been accepted as such by HMRC. As the case concerns rights which flow from their status as workers, and all employees are, for employment purposes, workers, the Claimants have no further submissions to present in relation to the issue that they may have been employed under short term contracts of employment during the production of The Threepenny Opera.

Yours Faithfully,

Orla Sheils

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