EMPLOYMENT TRIBUNALS

Claimant: **Mr Chris Townsend**

Respondent: **Bikeworks CIC**

Heard at: **East London Hearing Centre**

On: **9 October 2020**

Before: **Employment Judge Barrowclough**

Representation

Claimant: In person

Respondent: Ms Catherine Meenan (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant was neither an employee of, nor a worker for, the Respondent, as defined by s.230 Employment Rights Act 1996, but in fact a self-employed independent contractor. Accordingly, all the Claimant's complaints are struck out, and his claim is dismissed.

REASONS

1 This was an open preliminary hearing to determine the Claimant's employment status for the purpose of a number of complaints raised by the Claimant against the Respondent in his ET1, which was presented to the Tribunal on 12 January 2020, and in particular whether he was an employee of the Respondent, or alternatively a worker for them, as defined in s.230 Employment Rights Act 1996. The face to face hearing took place on 9 October 2020, and at its conclusion I reserved my judgment due to a lack of available time. The Claimant represented himself and gave evidence in support of his claim; the Respondent was represented by Ms Meenan of counsel, who called as her only witness Mr James Blakemore, the Respondent's chief executive officer. Together with witness statements, I was provided with an agreed hearing bundle (exhibit R-1), and written closing submissions (R-3) from Ms Meenan accompanied by a file of authorities, to which I will refer later in these reasons.

Background

2 The Claimant was born on 17 January 1988 and was therefore 32 years old at the date of the hearing before me. He is a qualified cycle instructor. The Respondent is a social enterprise company which promotes cycling in the East London area. The Claimant first worked for the Respondent as a cycle instructor/mechanic between 24 May and 1 December 2016. The Claimant says that he then stopped working for the Respondent because of a pay dispute, and that he did not expect to have any further dealings with the Respondent; but that he was contacted by Ms Natalie White of the Respondent on 5 June 2019 and asked to work for it again. The Claimant agreed to do so, and commenced work on the following day, once again as a cycle instructor/mechanic. The parties' working relationship continued until 29 September 2019. The Claimant asserts that he was then constructively dismissed *'in direct response to an attempt to access my rights within the workplace'*. The Respondent denies that, and asserts that the Claimant decided to stop working for it of his own volition, and in effect resigned. On 12 January 2020, the Claimant presented an ET1 claim form to the Tribunal, comprising complaints of (a) unfair dismissal, (b) unlawful deductions from wages, (c) holiday pay and (d) breach of contract, namely notice pay up until 17 October 2019. By its ET3 response, the Respondent disputes all those complaints, asserts that the Claimant was engaged as a self-employed contractor rather than as an employee, and denies that the Claimant is owed any monies for any reason. Subsequently, the Tribunal listed the Claimant's claim for this open preliminary hearing with a one day time estimate to determine the Claimant's employment status.

The Evidence

3 The Claimant identified, verified, and adopted his witness statement (C-1) as his evidence in chief. The Claimant describes the circumstances of his initial engagement with the Respondent in 2016. He attended an interview with Mr Blakemore and Gemma Carr, where a large volume of paperwork was produced. That included the cycle instructor policy, the child protection and vulnerable adult policies, and what the Claimant describes as *'a self-employment document'.* He signed all of them, and contends that the combination of documents meant that he would be an employee of the Respondent who was self-employed for tax purposes only. The Claimant was provided with a '*Bikeworks*' branded instructor high visibility tabard, which he was expected to wear whilst working, or alternatively a similarly branded T-shirt. The Claimant says that one of the documents with which he was provided contained non-competition clauses in relation to members of the public who he trained whilst working for the Respondent. As already noted, the Claimant ceased working for the Respondent because of what he describes as a pay dispute, and rather than engage in Tribunal litigation he decided to cut his losses and move on, not expecting to have anything further to do with the Respondent.

4 After the Claimant had been contacted by Ms White on 5 June 2019, they exchanged emails on the following two days. The Claimant says that he was simply offered a job by the Respondent on specified terms, including pay, which he accepted. He wasn't asked to sign the Respondent's policy documents all over again, but simply had to produce his passport, his Disclosure Barring Service ('DBS') check and his national standards cycle instructor documentation. The Claimant was told that he would be covered whilst working by the Respondent's public liability insurance, which he considers to be consistent with his being a member of their staff; and that he would be integrated

into the Respondent's website and booking platform. Whilst he had complete freedom to set his working and break hours or periods, the reality was that the Respondent expected their instructors to undertake mandatory tasks outside their set hours.

5 The Claimant discovered on checking the Respondent's online privacy policy their commitment never to share customers' details with third parties or anyone outside their organization. Since he was regularly provided with such information, including email addresses, phone numbers and post codes, the Claimant considers that he must have been a member of the Respondent's staff. Depending on the number of training sessions the Claimant undertook, the Respondent would calculate the sums due to him by way of pay every month and email the calculation to the Claimant for agreement. For the purposes of his training sessions, the Claimant would have access to shipping containers full of bicycles and tools belonging to and provided by the Respondent, which could be loaned to customers, and he wasn't required to provide his own tools or materials.

6 The Claimant says that after he resumed work for the Respondent he was required to attend a CPD training day on 26 July 2019, at which his attendance was compulsory and for which he was paid. Thereafter Ms White circulated copies of the training notes, which reminded instructors like the Claimant of what was expected of them, including contacting customers prior to training sessions, compiling and handing in risk assessments, and of changes made to the incident reporting procedure. The Claimant goes on to say that his notified availability and freedom to choose his assignments was a sham, and that he was frequently told that he must undertake training sessions at particular times, usually orally but also by email.

7 The Claimant further contends that the Respondent had an extensive degree of control over his work, including to whom he delivered training, the type of training provided, how he contacted customers and how he interacted with them, before, during and after training sessions. The Claimant participated in the Respondent's grievance procedure in presenting a grievance, and says that he was held out as a member of the Respondent's staff to other staff, the general public and the relevant local authority. Finally, it was not unusual for the Claimant to have little idea of the particular training which was to be included in a training session beforehand, that being determined by the Respondent.

8 In cross-examination, the Claimant was referred to his 'LinkedIn' profile at page 204 in the bundle, which dates from February 2020. There the Claimant identifies himself as a 'freelance self-employed cycle instructor', and as undertaking work for Cycle Experience Ltd. The Claimant agreed that he was an experienced cycle instructor, and that he knows other cycle instructors and training providers. A lot of them are self employed for tax purposes, although exercising a good deal of control over what work they undertake. The Claimant said that he was regularly referred to as a member of the Respondent's staff, as were all cycle instructors in relation to any event organized by the Respondent.

9 The Claimant was referred to the Respondent's child protection policy and code of conduct at pages 205 and 206, and agreed that they are generic, and that other training providers for whom he has undertaken work have similar policies which he would usually sign. Other such policies cover children, the vulnerable or disabled, and HGV drivers. There tended to be standardised rules applicable to working with such groups, for

example vulnerable adults. The Claimant had provided his own DBS check, and confirmed that he was not a first aider with the Respondent. In relation to the Respondent's cycle instructor policy at page 219, the Claimant accepted that there was a written requirement for him to wear a branded 'Hi-Viz' tabard or T-shirt, identifying him as an instructor, which he said that he was provided with and told to wear, either by Mr Blakemore or Alexander Spring, a cycle training co-ordinator. The Claimant had never provided his own Hi-Viz tabard, and said that unbranded versions were provided to customers. Whilst the cycle instructor policy provides for performance assessments of instructors (at page 220), the Claimant had not participated in any during his three months with the Respondent. The Claimant stated that he had signed all the policies produced by the Respondent when he had worked for them in 2016, that he hadn't been provided with or asked to sign any additional or replacement documents in 2019, and that they governed how he worked for the Respondent and what he did within the workplace.

10 With respect to the Respondent's 'non-compete' provisions, which the Claimant refers to at paragraph 12 of his statement, the Claimant agreed that similar restrictions were stipulated by other training providers. The Claimant understood that he could quote customers for further training sessions if they wished, but that would be on the Respondent's behalf and in accordance with their rates, rather than on his own account. The Claimant's position was that he was free to undertake work and training sessions on his own behalf in his own time, but that for any customer who came to him via the Respondent he was bound by their terms and conditions, and could not provide his training services privately. The Claimant undertook numerous different training assignments for a range of different providers.

11 The 'self-employment document' provided by the Respondent which the Claimant signed on 24 May 2016 is at page 74. The Claimant said that he had not in fact declared his earnings from the Respondent to HMRC, and had not paid National Insurance contributions on them. The other training providers for whom he had worked had deducted both tax and such contributions on his behalf, although for some at least of those providers the Claimant regarded himself as being self-employed. One such provider called Cycle Experience Ltd paid the Claimant gross and without deductions, and they provide similar services to the Respondent. He had undertaken work for them as a qualified cycle instructor, albeit the training provided was not quite the same.

12 The Claimant confirmed that he had stopped working for the Respondent in 2016 as a result of a pay dispute; he couldn't remember whether he had then given the Respondent any notice. The details of the engagement being offered by the Respondent to the Claimant in 2019 are at page 82 of the bundle and thereafter. At that time, virtually all the cycle instruction work the Claimant was undertaking was for the Respondent, having previously been with Cycle Experience Ltd as a worker, rather than an employee. The Claimant agreed that the agreement between himself and the Respondent in 2019 makes no mention of holiday pay, nor pension entitlement or provisions for the giving of notice, and does not refer to any disciplinary or grievance policies or procedures. Whilst the agreement states that the Claimant was able to take whatever breaks or holidays he wished, the Claimant said that had not been the position in practice, and that he was asked if he would work during the week commencing 23 September 2019, which he had proposed to take off. In particular, the Claimant had then had to turn down a number of offers of other work because of his pre-existing commitments with the Respondent. The Claimant however accepted that he had been able to block out the month of November as

being unavailable.

13 The Claimant's resignation email dated 25 September 2019 is at page 147 of the bundle. Whilst he there says that he wasn't entitled to holidays or holiday pay as a freelancer, that was because the Respondent had booked him for work continuously since June 2019. The Claimant accepted that he was able to undertake other work, whether on his own account or for third parties, during his engagement with the Respondent, and that he had then been on the books of other providers, although in fact undertaking very little such work.

14 The Claimant agreed that it was possible for him to call on colleagues to provide 'last minute' cover for training sessions if he became unavailable by contacting the Respondent's office, but said that such a situation did not arise during his three months with the Respondent. The Respondent would send him and other instructors availability requests, for example for the three months from July to September 2019 (page 86), to which they would respond, as in the Claimant's reply at page 87. Additionally, from time to time the Claimant and other instructors would be contacted at short notice by the Respondent and asked whether they could cover gaps and undertake training sessions; they would not be penalised if they did not do so. The Claimant said that he would accept some such requests, so long as they didn't clash with his other commitments: an example is at page 157. Page 158 in the bundle is the Respondent's summary of the training sessions which were cancelled by the Claimant within the preceding 24 hours: the Claimant accepted that he might well have cancelled those sessions, although he couldn't remember precisely. The Claimant agreed that they had not been cancelled by the client or customer, and that he hadn't been penalised for any sessions which he had cancelled. Page 142 records a session which the Claimant did cancel, because he considered the prevailing daylight conditions to be unsafe, using his own judgment and experience as a cycle instructor. The Claimant agreed that he hadn't been penalised or sanctioned for doing so, or for any other cancellations; and also that it was for the Respondent to decide how many or few training sessions to offer the Claimant, which he was free to accept or refuse as he wished.

15 The Claimant was asked about whether he had provided a photograph of himself to be included on the Respondent's website. He agreed that the point of doing so would be to try to maximise his own earnings through obtaining more work. He was also asked about page 188 in the bundle. That records an oral booking, where he is identified as a freelancer who has agreed to cover a training session caused by sickness absence. The Claimant was asked about his email to Mr Spring dated 7 August 2019 at page 102, and responded that the views he there stated reflected his professional judgment as a cycle instructor, using his own skills and experience, and that it was important that he projected as a professional. The 'Hi-Viz' tabard and the branded T-shirt with which he was provided by the Respondent both had their name and telephone number on them.

16 The Claimant agreed that he was paid by the Respondent for the sessions he undertook, rather than a regular salary payment; and that he was paid gross and for the hours he worked. He would submit a monthly invoice to the Respondent setting out the hours and sessions he had worked, examples of which are at pages 181 and 182; and the Respondent would prepare and send him a monthly report setting out the relevant payments due, which he was invited to agree (page 91).The Claimant agreed that he was supposed to submit his monthly invoice by the fifth day of the following month, but that

due (he said) to overwork and pressure of time, he had submitted only one invoice to cover sessions he had undertaken in July, August and September 2019 (page 182). The Claimant had not been penalised for late submission of that invoice, and agreed that he had been paid by the Respondent, although there was a disagreement about the number of hours and sessions he had undertaken. Pages 105 and 128 are the Respondent's calculations of the sums due to the Claimant for July and August 2019, and at page 135 he was reminded that invoices for those months were still awaited from him.

17 Page 111 is an email from the Claimant to the Respondent in which he set out his views about the proposed itinerary and the time estimated for a particular training session, as a result of which he was paid for an additional 30 minutes. On page 156 (15 October) the Claimant told the Respondent that he wouldn't be able to undertake a session for which he had been booked, and suggested that it would be easier and better if they arranged for another instructor to cover for him. Sometimes the Claimant provided and used his own bike for training sessions; but bikes were made available by the Respondent for him to use if he wished.

18 The Claimant was asked about the suggestion in paragraph 27 of his witness statement that he had been compelled by the Respondent to undertake training sessions, as set out at pages 99 to 101. He confirmed that the Respondent had in fact asked him to change his role within a joint training session to the role of leader, for which he would be paid an extra 30 minutes, and that he had agreed to do so. Finally, the Claimant agreed that there had been no response to his emails of 2 July at page 88: he said that he wasn't booking training sessions privately and then adding them to the Respondent's diary.

19 Mr James Blakemore of Lee Valley Velodrome, Queen Elizabeth Olympic Park, identified, verified, and confirmed his witness statement (R-2). He is one of the founders of the Respondent undertaking and its' chief executive officer. He has worked in the cycle industry since the age of 14, and he too is a trained cycle instructor, although he no longer provides training sessions. The Respondent was set up as a social enterprise in 2006 to offer communities in East London access to cycling for health and well-being, regardless of ability, as well as opportunities for employment and skills enhancement in cycle training and maintenance. The business depends on trading income as well as trust and foundation grants, and is a not for profit organisation, any surplus funds being re-invested in the undertaking. The Respondent's core team comprises seven managers, working either full or part time, together with an active pool of about forty self-employed cycle instructors, mechanics, and tutors. Mr Blakemore line manages all senior managers within the operations, finance, business development and 'all ability' departments, and his key responsibility is to keep the business developing in all areas.

20 Mr Blakemore confirmed the Claimant's initial engagement under the Respondent's 'Self-Employment document' at page 74 between 24 May and 1 December 2016, and that he was approached by Ms White on 5 June 2019, since the Respondent was then looking for new instructors/mechanics to join its freelance team. In the email exchange of 6/7 June, it was made clear that the Claimant would have full control of his availability to work via the Respondent's booking platform, and that he could choose to undertake whichever training sessions he wished. The Claimant replied that he was then working for a number of clients, and was open to all types of work. The Claimant was not asked to sign a further 'Self-Employment Document', but Mr Blakemore contends that it was clearly the parties' intention to continue on that basis.

21 Mr Blakemore says that there was no obligation on the Respondent to provide the Claimant with any training session work at all, or even a minimum level; and that it is clear from the training session spreadsheets in the bundle that the Claimant chose his working days and hours, which themselves varied, to suit himself. Additionally, he could and did both accept and decline training sessions offered to him at short notice, as well as cancel sessions which he had already booked and agreed. Finally, there was no requirement for the Claimant to undertake booked training sessions himself, and self-employed cycle instructors like him were able to send another instructor as a substitute if they wished. Whilst this power was only rarely exercised, it existed.

22 The Claimant provided training sessions autonomously, and it was up to him to decide where and how they should take place. The Respondent exercised no direct supervision or control of such sessions: all the Claimant had to do was contact the customer on the day of the booking to confirm the time and place of the session, wear a Hi-Viz tabard so that he could be easily identified as a cycle instructor, and complete an incident report form if anything untoward occurred. The Respondent would pay the Claimant the gross fees due upon production of a monthly invoice, the Claimant being responsible for his own tax and national insurance contributions, after the Respondent had sent him (and other instructors) summary reports of services provided in the previous month for agreement.

23 Mr Blakemore draws attention to three emails which the Claimant sent to or received from the Respondent. In the first, sent on 19 July 2019, he describes himself as *'a freelancer'*; in the second, dated 5 October, the Claimant characterises himself as someone providing goods or services; and in the last, dated 7 October, Ms White describes him one again as *'a freelancer'.* The Claimant was not entitled to sickness pay or paid holiday under the Self-Employment Document, as he appeared to accept in another email to the Respondent dated 23 September; and could take holidays whenever he wished and without objection from the Respondent by simply making himself unavailable on the Respondent's booking system.

24 Mr Blakemore further contends that the Claimant was able to, and did in fact, work for other cycle organisations during his time with the Respondent; that he was not entitled to any benefits such as pension contributions from the Respondent; and that he was not subject to the Respondent's disciplinary, sickness absence, or performance policies. When the Claimant requested a copy of the grievance policy that was provided, since the Respondent's practice is to allow anyone working for it to raise issues or concerns about the working environment, regardless of their status. The child protection, vulnerable adult and cycle instructor policies which the Claimant signed at the start of his initial engagement with the Respondent in 2016 are designed to promote good practice in the provision of training sessions, which is important for a community organisation such as the Respondent; and Mr Blakemore does not accept that because the Claimant and other instructors signed it that would change or alter their status as self-employed contractors.

25 In brief supplementary questions from Ms Meenan, Mr Blakemore said that in his experience, cycle training providers use freelance cycle instructors to deliver training on the local authority contracts which many of them undertake. The mechanism for payment is that such instructors are paid gross on an hourly basis and are responsible for their own tax and NI contributions; whereas the Respondent's employees are paid monthly salaries subject to statutory deductions, and are entitled to holiday and sick pay.

26 In cross-examination, Mr Blakemore said that the Respondent had an active pool of self-employed cycle instructors, to whom they offered work on a sessional basis. There were no 'umbrella' contracts of employment with any of those instructors. Each session of cycle training was separate and self-sufficient, and there were no overarching contracts with any instructor. The Respondent set an hourly rate of pay for instructors, which continued until altered by the Respondent; and it was for instructors to decide whether or not to accept that. The Self-Employment document at page 74 had been generated by the Respondent for it's own protection, and their public liability insurance covered all employees and independent contractors who were undertaking work for the Respondent. Mr Blakemore was not aware of any refusal to provide the Claimant with a copy of the policy.

27 The Claimant's last session during his first engagement with the Respondent had been on 1 December 2016. In relation to paragraph 12 of his statement, Mr Blakemore said that all the Respondent's cycle instructors were self-employed independent contractors, apart from two individuals who were contracted employees. That was because the Respondent is a community and social enterprise undertaking, and had considered that the personal circumstances of those two particular individuals, in terms of their housing, rent and related matters, would be jeopardised if they were not employees. Both were on fixed term contracts which were renewed from time to time, and they had been with the Respondent for about six or seven years.

28 Any substitute provided by an instructor would have to have been interviewed and approved by the Respondent, and would be paid direct by the Respondent for any session which he or she undertook. Most of the training which the Claimant had undertaken had been for adults on a one to one basis, although there had been 'bespoke' sessions, involving a group of young people being taken round Silvertown. The customer or client was the Respondent's, and they would provide a cycle instructor that they had chosen, based upon his/her availability. It was possible for the customer to choose a particular instructor, as pages 56/57 demonstrate: the instructor would upload his/her availability onto the Respondent's website, and a member of the public could select that instructor, who would then be notified by the Respondent.

29 In relation to the Respondent's privacy policy at page 227, Mr Blakemore said that the Respondent did not share or disclose customers' details or email addresses to those outside their organization; and that instructors were part of the organization for those purposes, since otherwise communication concerning practicalities would be impossible. The cycle instructors are the Respondent's delivery team for the purposes of that instruction work. The cycle instructors were not subject to the Respondent's supervision and control. Where two or more instructors were engaged on the same session, for example with a large group of customers, one would have to lead and make decisions about the form and location etc of the training session, and whilst the Respondent expected a degree of cooperation between instructors, any other instructor(s) would not be under the supervision of the leader, who would be paid at a slightly higher rate for assuming that role.

30 With respect to paragraph 18 of his witness statement, Mr Blakemore said that the Respondent's bike ability syllabus and manual had been updated in 2019, and that there had then been a CPD training session for their cycle instructors, all of whom had been invited to attend, for which they were paid. The Respondent had a core of about twenty

regular instructors (including the Claimant), all of whom were required to attend the CPD training session; there were a further twenty or so irregular instructors, not all of whom attended. Page 109 was a round robin document summarising the training session, which was sent by the Respondent to all those who had attended it.

31 Pages 377/378 are advertisements for cycle instructors placed on the Respondent's behalf. The Respondent is a partner of the London Borough of Tower Hamlets, who refer customers to them, and it provides some free cycle training sessions to members of the public who are residents there. The photograph at page 371 is of one of the Respondent's training sessions, featuring the Claimant as instructor. The Respondent delivers training in accordance with the national standard; Mr Blakemore did not know whether that was a legal requirement for instructors. The Respondent's two instructor employees are paid regular salaries and entitled to benefits such as holiday and sick pay. Mr Blakemore repeated that the provision of a substitute instructor, who had to be deemed suitable by the Respondent, sometimes happened, but was infrequent. The Cycle Instructor Policy prepared by Mr Blakemore and dated 16 March 2015 at page 225 had not been signed by the Claimant, although he was an in-house instructor; the Claimant wasn't included in other forms because he wasn't an employee. Finally, where two or more instructors were taking a session together, the lead instructor couldn't performance manage or discipline the other instructor(s).

Submissions

32 Ms Meenan produced and spoke to written closing submissions. First of all, she helpfully sets out the applicable legal principles and cites a number of well-known authorities, which I summarise as follows.

33 For the Claimant to rank as an employee, he must have entered into or worked under a contract of employment. That will exist where '*the servant*' agrees that, in consideration of a wage or other remuneration, he will provide his own work or skill in the performance of some service for his '*master*'; secondly, where he agrees that in the performance of that service he will be subject to the master's control; and lastly where the other provisions of the contract are consistent with its' being a contract of service (**Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497**).

34 In determining the terms of the agreement between the parties, the Tribunal must decide whether any contractual document(s) was/were intended by the parties to be the exclusive record of those terms, which is a question of fact for the Tribunal. If that was indeed the case, then the Tribunal will generally be restricted to consideration of any such document(s). Conversely, if the Tribunal determines that the parties did not intend such document(s) to be the exclusive record of the terms of their agreement, the Tribunal will look at other relevant materials to determine the terms of the contract. Accordingly, the first task is to determine what were the parties' intentions, objectively ascertained.

35 *'Mutuality of obligation*' is the first limb of the **Ready Mixed Concrete** test. There must be an irreducible minimum of obligation, either express or implied, on each party for any contract of service or employment to exist. Normally that will be for the employer to provide work and to pay a wage or salary, and for the employee to accept and perform the work offered. Lord Justice Elias had pointed out in **Quashie v Stringfellows Restaurant**

Ltd [2012] EWCA Civ 1735 that where an individual works on discrete separate engagements, it will usually be necessary to show that the contract of employment continues between such engagements in order to establish a period of continuous employment. If the irreducible minimum of mutual obligation subsists during breaks between work engagements, an overarching or '*umbrella*' contract will be established, punctuated by periods of work. If no such umbrella contract exists, the fact that an individual only works casually and intermittently for an employer may justify an inference that when he does so, he is providing services as an independent contractor, rather than as an employee. As the EAT found in **Knight v Kenwood Car Service Ltd (UKEAT/0075/12/LA)**, where a taxi driver was not contractually required to perform any minimum or reasonable amount of work, but was free to choose whether to do so or not, no mutuality of obligation existed.

36 The second limb in **Ready Mixed Concrete** is the issue of control, which includes *'the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done'*. Those aspects of control had to be considered in determining whether the right existed in a sufficient degree to make one party the master and the other his servant. What matters is lawful authority to command, and the Tribunal should look first to the express terms of the contract to establish that right. As the EAT has since held, the 'control' question is not whether the worker has day-to-day control over their own work, but rather whether there is a contractual right of control over the worker.

37 Finally, to establish the existence of a contract of employment, it is usually necessary that the individual undertake personal service of the work, rather than provide a substitute. Freedom to do so is inconsistent with such a contract, although a limited or occasional power of delegation may not be. A conditional right of substitution may or may not be inconsistent with personal performance, depending on the conditionality: a right of substitution limited only by the need to show that the substitute is as qualified as the contracted individual to do the required work will usually be inconsistent with personal performance. Lastly, if the contractual right to provide a substitute exists, it does not matter that it is not used.

38 To qualify as a worker pursuant to s.230(3) Employment Rights Act 1996, an individual must either work under or in accordance with a contract of employment, or any other contract whereby he or she personally performs work or services for another party to the contract, unless they are provided to a customer or client of any undertaking or profession carried on by that individual. That exception was helpfully illustrated by the EAT in **Byrne Brothers (Formwork) Ltd v Baird [2002] ICR 667** as the distinction between workers whose degree of dependence is essentially the same as an employee's, and contractors with a sufficiently independent and arm's-length position so as to be able to look after themselves: self-employed labour only sub-contractors in the construction industry were considered to be a good example of workers under '*limb (b)*' of the subsection. The EAT has since gone on (in **Cotswold Developments Construction Ltd v Williams (UKEAT/0457/05)** to suggest that, when assessing whether a person is a worker or a self-employed contractor, it may be helpful to look at whether the individual actively markets his services to the world in general (which might suggest independent contractor status), or whether he has been recruited by a 'principal' to work as an integrated part of the principal's operations (tending to infer worker status).

39 Against that background, Ms Meenan submitted that for the purposes of the Claimant's unfair dismissal and breach of contract claims, he had to be an employee of the Respondent; for the unlawful deductions from wages and holiday pay claims, the status of a worker was required. Overall, it was clear from the 2016 documentation agreed by the parties, which was not superseded in 2019, that their mutual intention was that the Claimant would be a self-employed cycle instructor, as the agreement at page 74 makes crystal clear. Additionally, the arrangements for payment of the Claimant for the work he undertook were consistent with that status. In June 2019, the Claimant had been invited to join the Respondent's *'freelance'* team (page 78); and had repeatedly referred to himself as a *'freelancer'* thereafter (pages 93, 101 and 147), as well someone running his own business (page 152).

40 The Respondent contends that it was not the parties' intention that the documents provided to the Claimant in 2016 exclusively recorded all the terms of the agreement between them. For example, it was an express term that the Claimant could provide a substitute instructor for booked sessions, if he wished to, for whatever reason. That was Mr Blakemore's evidence, and it is clear from the Claimant's emails of 19 August and 15 October (pages 101 & 156) that he understood and accepted that he could be asked to provide cover for other instructors who were sick, and that the Respondent should contact other instructors if and when he himself cancelled a training session, whether due to sickness or because he no longer wished or was able to attend. Accordingly, there was no requirement on the Claimant to undertake work for the Respondent personally.

41 Ms Meenan submitted that the Respondent was not obliged to offer the Claimant work on a regular or frequent basis, and that the Claimant was under no obligation to accept any work sessions that were in fact offered. The Claimant worked as and when he wanted: he would inform the Respondent of his availability, was able to cancel booked sessions (and did so), and could and did refuse sessions which the Respondent asked him to undertake. On one occasion (referred to at page 118) the Claimant had simply not turned up to cover a session which he had orally agreed to undertake, albeit that it had not been confirmed in his diary: plainly the Claimant felt under no obligation to the Respondent. None of those steps resulted in the Claimant being sanctioned or penalised, and he continued to make himself available via the Respondent's 'Simple Booking' platform. This flexible arrangement with the Respondent suited the Claimant who, as he made clear, was simultaneously undertaking work for other cycle training providers (see pages 82, 118, 146, 148 & 204). In addition, Ms Meenan submitted, the Claimant could choose when, where and how he worked. He suggested not only routes (on 7 August) and what equipment he would or could use in training sessions (page 102), but also realistic time estimates for particular sessions (page 111).

42 Finally, Ms Meenan submitted that it was clear that the Claimant was running a business as a cycle instructor on his own account. He understood that the Respondent was his client (see page 82), and was concerned to preserve his own standing and image as a cycle instructor (page 102). Throughout his engagement with the Respondent, the Claimant was working for a number of other clients, as his LinkedIn profile at page 204 confirms. At page 82, the Claimant stated that providing DBS certificates for all the clients for whom he worked would be very expensive; at page 108 he discussed the different Hi-Viz requirements of other training providers for whom he was working. At page 136 the Claimant commented that everyone he worked for seemed to have a slightly different system; that expectations across various roles (not simply the Respondent) meant that he

was on call 24/7 (page 140); and that he might decide to work for another provider on the following Saturday (page 148).

43 Accordingly, Ms Meenan suggests that the Claimant was neither an employee of the Respondent, nor a 'limb (b)' worker, but rather a self-employed independent contractor, and that his various complaints must therefore be struck out.

44 The Claimant declined the Tribunal's invitation to put forward submissions in support of his case, and was content to rely on his witness statement and the evidence he had given to the Tribunal at the preliminary hearing.

Discussion and Conclusions

45 First of all, I accept that Ms Meenan has correctly identified the relevant statutory provisions and the applicable principles from the decided authorities for the purposes of determining whether the Claimant was either an employee of, or a worker engaged by, the Respondent; and also that she is correct in submitting that the Claimant must have been an employee for his complaints of unfair dismissal and breach of contract to succeed, or at least a worker in relation to the complaints of unlawful deductions from wages and holiday pay. I consider first whether or not the Claimant was in fact employed by the Respondent.

46 In relation to the evidence I heard and read, I accept that provided by Mr Blakemore, which I find to be in accordance with or supported by the contemporaneous documentation in the bundle, rather than the Claimant's evidence, which in my judgment is undermined by inconsistencies and contradictions. By way of example only, the Claimant said that he was forced by the Respondent to take training sessions irrespective of his own wishes, that he was unable to take breaks or holidays when he wanted, and that he was expected to undertake tasks for the Respondent outside his agreed working hours: but I heard and saw no evidence to substantiate any of those allegations. The Claimant goes on to say that he had little if any pre-knowledge of training sessions which he was to take, the content of which were determined by the Respondent; but that is contradicted by the documented occasions on which he commented in advance on the proposed routes and duration of training sessions, and the equipment to be used. Where their accounts clash or conflict, I accept Mr Blakemore's account in preference to that of the Claimant.

47 In my view, there are no contractual documents in this case which the parties intended to be an exclusive and comprehensive record of the terms of their agreement. There were of course the documents, including the 'self-employment document' at page 74, with which the Claimant was provided and which he signed in May 2016, relating to his first brief working relationship with the Respondent during that year. However, they were not subsequently updated, no new documents were provided for the Claimant to sign and agree in June 2019, and a simple exchange of emails was then deemed sufficient by both parties in order to resume their working relationship, more or less on the same basis as had subsisted three years earlier. That informal arrangement was obviously acceptable to both parties, neither of whom saw the need to insist on any fresh contractual agreement, and I find that the 2016 agreement formed the basis of their new working relationship, subject to later amendments, for example the applicable hourly rate of pay and the provision of a substitute cycle instructor. Accordingly I find that the Tribunal can look, if necessary, at the surrounding circumstances and evidence to determine the exact terms

of the parties' agreement.

48 In my judgment, it is very clear that there was no mutuality of obligation in the parties' working relationship in 2019, and no irreducible minimum of obligation, either express or implied, on each party whereby a contract of employment might then have existed. The simple fact is that the Respondent did not have to provide the Claimant with any work at all by way of training sessions; but that if it chose to do so, the Claimant was not bound to accept and perform any or all of the sessions so offered, and could refuse any or all of them without penalty or sanction. It suited the Respondent for the Claimant to join its team of freelance cycle instructors, which is why he was approached in June 2019; conversely, it suited the Claimant to be able to undertake training sessions for the Respondent as one of a number of training providers for whom he could work when convenient to himself. Both parties understood the nature of this mutually beneficial arrangement, which is reflected in the terms of the Respondent's 'self-employment document' and Ms White's emails to the Claimant in early June 2019, and in the Claimant's repeated references to his being a 'freelancer'. Nor was there any evidence to suggest the existence of mutual obligations between the sessions which the Claimant did actually work, for example in pleas for work from the Claimant, or demands from the Respondent that the Claimant undertake specific sessions, rather than requests for his future availability or that he cover in another colleague's absence, if he was willing to do so. In my view, the Claimant has not established the existence of any overarching or umbrella contract between himself and the Respondent.

49 That finding is sufficient on its own to determine the existence, or rather lack, of any contract of employment between the parties. However, in case I am wrong in coming to that conclusion, I go on to consider the other required elements of any such relationship.

50 In relation to the issue of control, it is self-evident that the Claimant had the power to decide at least when he worked for the Respondent, since he was able to pick and choose which sessions that he was offered he wished to accept, and even thereafter to change his mind and decide not to undertake them after all, often at short notice, as the summary at page 158 makes clear, without penalty or sanction. I have already indicated that there was no evidence to which I was taken to support the Claimant's suggestion, which I do not accept, that he was on occasions forced unwillingly to accept and undertake any training sessions. As to the training sessions themselves, it seems to me that control or power was shared by the parties. Once again, it is plain that the Respondent controlled the sessions which the Claimant chose to accept and undertake, in the sense that the identity of the customer, the time and place and the duration of the assignment was fixed, and the training to be provided fell within the ambit of nationally recognised standards. But it is equally clear that the instruction actually provided to the customer during a training session was at the Claimant's discretion, based upon his own skill and experience and his assessment of the customer's skills and capabilities. Equally, there is evidence that the Claimant could and did determine or alter appropriate training routes, or the anticipated length of a training session. Taking all these matters together, I am not persuaded that the Respondent had sufficient control or power over the Claimant in relation to the work he undertook on their behalf to establish a master/servant relationship. So here too, in my judgment, the Claimant's claim that he was an employee of the Respondent fails.

51 Are the remaining provisions of the agreement between the parties consistent with its being a contract of employment? The Claimant relies on the fact that he was provided with customers' details (including their phone numbers and email addresses); that he was required to attend a CPD training session; and that he would contact customers for feedback and follow-up following training sessions, as demonstrating that he was a member of the Respondent's staff and accordingly one of their employees. However, those seem to me to be neutral facts, which are equally consistent with the Claimant being a self-employed contractor working for the Respondent as with him being their employee. As Mr Blakemore pointed out, it was essential that cycle instructors, whether they were employees or not, were given the customers' contact details for purely practical reasons – to ensure that they met the customers at the appointed time and place, or if not possible made other arrangements, so that the training sessions could go ahead. Secondly, all regular cycle trainers were required to attend the CPD training, for which they were paid, whether or not they were self-employed contractors (as most were) or employees: the important point was that all those regularly working for the Respondent in whatever capacity should be up to date with the Respondent's current training syllabus and manual. The same approach applies to post-session follow-up and feedback: what was significant was that those actually providing cycle training, in whatever capacity, should discover and report back on whether the courses provided were helpful and appropriate for the Respondent's customers. A similar point arises in relation to public liability insurance cover: it was important that all those undertaking work for the Respondent were covered, irrespective of their employment status. I accept Mr Blakemore's evidence concerning the Claimant activating the Respondent's grievance policy, which would ordinarily only be available to employees: the Respondent enabled anyone who was working for it to raise concerns about their working environment, regardless of status, and that by allowing the Claimant to do so did not imply recognition of employee capacity. All the other contractual provisions, including that the Claimant was paid gross and was responsible for his own tax and NI contributions, that he was not paid a salary but rather sums based upon the work which he had actually undertaken on the Respondent's behalf, that he was not contractually entitled to holiday or sick pay, that he could work as and when he wanted to, and that he could provide a substitute for whatever reason, thereby negating the usual requirement of personal service inherent in a contract of employment, point in the direction of the Claimant's having been a self-employed contractor, rather than one of the Respondent's employees. It follows that for these reasons as well, I find that the Claimant was not an employee of the Respondent.

52 Turning to the issue of whether the Claimant was a worker within s.230(3) of the Employment Rights Act 1996, it seems to me that Claimant falls squarely into the category of a contractor with only a very limited, if any, degree of dependency on the Respondent, and was someone who had an independent position and an arm's-length relationship with the Respondent, rather than being an integral and integrated part of the Respondent's operations. All the relevant evidence before the Tribunal leads to that conclusion, including the fact that the Claimant had an unfettered power to choose when he wanted to work for the Respondent, if at all; that he could refuse or cancel sessions offered or previously accepted at short notice without penalty; that he was undertaking similar work for other cycle training providers at the time of his engagement with the Respondent and could choose to work for them in preference to the Respondent, once again without sanction; and that he had an established occupation or livelihood as a qualified cycle instructor, with appropriate professional skills and standards, which the Respondent recognised, accepted and publicised in their literature. In my judgment, the Claimant was, perfectly properly, actively marketing his skills to the world in general as a cycle instructor,

and does not qualify as a worker within limb (b) of s.230(3).

53 For these reasons, the Claimant lacks the necessary employment status to pursue any of his complaints before the Tribunal, all of which must be struck out.

Employment Judge Barrowclough
Date: 23 November 2020