# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Law

**Respondent:** Wirral Golf Club Limited

**Held at:** Liverpool **On:** 20 April 2017

**Before:** Employment Judge Holbrook

**Representation:**
Claimant Mr S Flynn, Counsel
Respondent Mr K Ali, Counsel

# RESERVED JUDGMENT ON PRELIMINARY HEARING

**The judgment of the Tribunal is that:**

**A. The claimant was not an "employee" (within the meaning of section 230(1) of the Employment Rights Act 1996). His claim for unfair dismissal therefore fails and is dismissed.**

**B. Nevertheless, the claimant was employed by the respondent for the purposes of section 83(2) of the Equality Act 2010. His claim for unlawful age discrimination may therefore proceed to a final hearing.**

# REASONS

## INTRODUCTION AND ISSUES

1. This case concerns claims for unfair dismissal and age discrimination. The claims are made by Mr Angus Law, who is a PGA professional golfer, against Wirral Golf Club Limited ("the Club"). The Club is a company limited by guarantee. Until recently, it was called Wirral Ladies Golf Club Limited.

2. Following a case management discussion held on 8 February 2017, a preliminary hearing was listed to determine:

   - whether the claimant was an employee (so that he had the right not to be unfairly dismissed) and/or

   - whether he was employed by the Club (so that he could make a claim for unlawful discrimination).

3. The preliminary hearing was held on 20 April 2017. The claimant gave oral evidence, as did one witness for the Club: Mr Paul Asher (a director of the Club and chair of its Course Management Committee). Each witness also provided a written statement of their evidence and the Tribunal was referred to selected pages in a bundle of documents and authorities.

4. At the beginning of the hearing, I was asked to rule on the admissibility of a document the Club wished to include in the hearing bundle but which the claimant objected to. The document in question was an unsworn witness statement of a Mr David Evans (who used to work at the Club as an assistant professional golfer). I refused to admit the document into evidence as it was apparent that the Club wished to rely on it as evidence of facts asserted therein. However, the Club had not called Mr Evans to give oral evidence (nor had a witness order been sought) and so his evidence could not be tested by cross-examination.

5. Counsel for both parties made written and oral submissions in relation to the preliminary issues and judgment was reserved at the conclusion of the hearing.

**FACTS**

6. The principal facts which are relevant to the preliminary issues appear to me to be as follows. However, for ease of presentation, I will also refer to some additional facts in the "discussion and conclusions" section of these reasons.

<u>Express contractual terms</u>

7. Mr Law was the resident PGA professional golfer at the Club from 1995 until the Club terminated its contractual relationship with him with effect from 31 October 2016. Initially, the basis of that relationship had been documented in a Terms of Retainer agreement dated 1 November 1995. However, this was superseded by a revised Terms of Retainer agreement, signed by the parties on 30 September 2015 ("the Retainer").

8. The Retainer agreement stated that it related to the job of "PGA Professional", which it defined in the following terms (in clause 2):

> "The position of PGA Professional requires an individual who is capable of exercising independent judgement and who possess[sic] the personal disposition and qualities generally required of people who work well with the public, Club members and Club employees. As the Professional Shop is usually the first port of call for members and

visitors, the Professional and his staff will assume an ambassadorial role and provide a welcoming service. The Professional is responsible for the immediate supervision of his employees. The Professional is also responsible for assisting in the efficient operation and management of golf at the Club, the promotion of the sport and use of the golf course at the Club through golf instruction clinics and coaching. The Professional shall work under the immediate supervision of the Club Manager."

9. The Retainer went on to provide that the Professional would work at the Club premises, and (by clause 4) that he would perform the following "essential functions":

"4.1 To assist in the management and operation of the playing of golf at the Club so that the course and facilities are available for play and to have regular dialogue with the Club Manager and Head Greenkeeper to facilitate that.
4.2 To work with the Head Greenkeeper and his staff to coordinate course closures, tournament set-ups etc.
4.3 To collect green fees on behalf of the Club and to utilise the BRS system to maximise such income.
4.4 To maintain a well stocked shop which meets the needs of the modern golfer and to keep all display areas clean.
4.5 To maintain a current and accurate Inventory of members' shop accounts.
4.6 To open and close the Pro shop daily in accordance with times agreed with the Club.
4.7 To supervise all employees in the Pro shop.
4.8 To assist in conducting special tournaments and events whether they be Club events (except for Matches) or those run by outside bodies.
4.9 To provide and maintain a good stock of pull and electric trolleys of good quality and condition. The Professional will keep all income from the hire of this equipment.
4.10 To conduct individual and group coaching/clinics for members and visitors at reasonable charges.
4.11 To supply occasional clothing for representative teams at reasonable prices.
4.12 To have a good working knowledge and understanding of the Club's rules and history.
4.13 To attend committee meetings if requested to assist in the well running if[sic] the Club, in particular to assist the Captain's Committee as required in developing new membership.
4.14 To provide a golf repair service within the limitations of the working area of the Pro shop."

10. In addition, clause 5.1 of the Retainer provided that Mr Law would "take on the normal duties of a Club Professional" including, but not limited to, the following:

"5.1.1 staffing the Pro shop
5.1.2 organising and training assistants in accordance with the PGA Manual
5.1.3 teaching and organising teaching for assistants
5.1.4 representing the Club as its Head Professional
5.1.5 developing relationships with local schools
5.1.6 assist in the collection of green fees on behalf of the Club, utilising the BRS system for the purpose
5.1.7 assist with visiting societies and all Club competitions and with all rules queries.
5.1.8 provide appropriate cover for any absences, including, for example only, absence on holiday or sickness, to ensure his duties are fulfilled.
5.1.9 not to be involved in any other golf shop directly or indirectly whether as principle[sic] or agent nor take up any position as a Professional at any other course

> or Club.
> 5.1.10 not to undertake any other form of employment or paid remuneration unless the Club shall first have given consent.
> 5.1.11 ensure that the Pro shop is open from 8am to 6pm in spring and summer and from 8am to 4pm in autumn and winter.
> 5.1.12 staff employed by the Professional must be smartly dressed and tidy at all times, must pay for their own food and drink, must not consume food and drink on Club premises (but may purchase items to be consumed in the Pro shop) and not use the Clubhouse bar or lounge whilst on duty."

11. Clause 5.2 of the Retainer dealt with accounting matters and cash handling. It included an obligation for Mr Law to ensure that all accounts with suppliers were in his name and not in the name of the Club.

12. Clause 5.3 contained an obligation for Mr Law "to ensure that neither he nor his staff at any time represent that he is or they are employed by or are agents of the Club".

13. Clause 6.10 of the Retainer stated that Mr Law was entitled to enter a maximum of 12 professional tournaments each year provided he gave at least seven days' notice and arranged cover for the Pro shop.

14. Clause 6 also set out details of the remuneration which Mr Law was entitled to receive in return for the provision of services under the agreement. First, he was entitled to an "annual retainer" of £15,176 plus VAT (if applicable). This was payable monthly in arrear, on receipt of an invoice. Second, he was entitled to a fixed sum of £402 per month as a contribution towards the cost of employing an assistant. Third, a fixed sum of £93 per month for opening the clubhouse every day. Fourth, Mr Law was entitled to payment of £1 per player form "Society bookings", and, fifth, he was entitled to retain 10% of all green fees he collected.

15. In addition, Mr Law was entitled to retain all income from the Pro shop, trolley hire, club cleaning and from golf lessons (which he was entitled to give at any time, even when the course was closed). Mr Law was also entitled to operate the Pro shop free of rent, rates and utility charges.

16. Clause 7 of the Retainer dealt with the termination of the agreement: the Club was entitled to terminate it without notice if Mr Law was "guilty of misconduct" or in breach of any term of the agreement. Alternatively, either party could terminate the agreement by giving not less than three months' written notice.

<u>The Professional's role in practice</u>

17. Mr Law provided a range of services as the Professional at the Club. Although those services were as described in the Retainer, some activities were clearly more prominent than others in practice. In particular, much of Mr Law's time was spent operating and managing the Club's Pro shop and in giving golf lessons. He also had administrative responsibilities for running Club competitions and collecting green fees. In addition, Mr Law ran his own "pro competitions" for male members and was permitted to retain all competition fees collected in that regard.

18. Mr Law was solely responsible for the selection and purchase of stock for the Pro shop (all of which he purchased using his own funds) and for its staffing arrangements. He retained all income from the shop. Mr Law decided how much to charge for golf lessons and he retained the proceeds thereof. Mr Law said that, in recent years, his net income from work at the Club had been in the region of £26,000 - £27,000 (including the annual retainer paid by the Club). Given that the amount of the annual retainer was £15,176, a significant proportion of Mr Law's net income was evidently generated by Pro shop sales and golf lessons.

19. Mr Law invoiced the Club monthly for payment of the "annual retainer" and staff contribution payment. Invoices were presented in the name of "Angus Law PGA Professional". They bore a VAT registration number and included a charge for VAT on the principal amount claimed.

20. The Club paid these invoices in full. It made no deductions in respect of income tax or National Insurance contributions. In this regard I note that, in 2012, HMRC carried out an "employer compliance check" on the Club. As part of that process, HMRC expressed the view that Mr Law's status was that of a self-employed person.

21. Mr Law did not receive holiday pay or sick pay from the Club. He had no contractual pension entitlement.

22. In terms of his day to day activities, Mr Law's supervision by the Club's management appears to have been minimal. Although Mr Law asserted that management would have noticed any unusual absences on his part, it seems that, in practice, he was able to come and go from the Club as he pleased, without seeking permission and without recording the hours he worked. He was not required to seek the Club's permission when he took holidays.

23. It seems that this flexible arrangement worked in practice because Mr Law ensured that the Pro shop was kept open and adequately staffed at all times, and because the Club relied on him to do so. It was for Mr Law to decide who to employ in the shop, and decisions about staff recruitment (including decisions about terms of employment) were taken by him without input from the Club's management. Although Mr Law only employed one assistant at any one time, he would have been able to employ more than one person if he had wanted to do so. Nevertheless, the amount of the staff contribution payable by the Club was a fixed sum, regardless of the number of people actually employed by Mr Law.

24. In 2013, Mr Law suffered a serious injury which resulted in him being unable to work – and thus absent from the Club – for almost three months. During the period of his absence, Mr Law arranged for the Pro shop to remain open by utilising the services of a former assistant (who was a fellow PGA professional), and also by arranging for his son to work in the shop. Mr Law bore the additional staff costs which arose from this arrangement. Whilst members of the Club's management did enquire after Mr Law's health following his injury, they did not discuss with him the temporary arrangements for staffing the Pro shop.

25. In practice, Mr Law only participated in two or three external tournaments each year and so the upper limit referred to in clause 6.10 of the Retainer agreement never became an issue. Mr Law said that there had been just one occasion when he had been unable to participate in a tournament because of a clash with his responsibilities at the Club.

26. Mr Law never worked at another golf club or golf shop. Nor did he ever ask the Club's permission to do so. However, he did undertake paid work teaching golf at local schools. In part, this was done with a view to introducing junior members to the Club. However, at least some of this tuition was carried out for personal financial gain and without obtaining the Club's consent.

**LAW**

27. Section 94(1) of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed by his employer. The expression "employee" is defined for this purpose by section 230(1) of the 1996 Act as:

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

28. The expression "contract of employment" is defined in turn in section 230(2) of the Act as:

> "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."

29. The established view is that a contract of employment will necessarily have the following characteristics:

- In return for a wage or other remuneration, the employee agrees to perform work personally for the employer.

- The employee also agrees that, in performing that work, he will be subject to the other's control to a sufficient degree to make that other his employer.

- The other provisions of the contract will be consistent with its being an employment contract. In particular, there will be the "irreducible minimum of obligation" on each side which is an essential feature of the employment relationship.

30. No single factor is determinative of employee status. Instead, the Tribunal must examine a range of relevant factors in order to make a considered evaluation of the overall effect of the detail. The relevant factors will include the degree of control to which the putative employee is subject; the extent to which he is integrated into the organisation; and the economic reality of the arrangement between the parties.

31. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee in certain respects. The concept of

"employment" is defined for this purpose in section 83(2) of the 2010 Act. It means:

> "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work."

32. It is thus possible for a person to be "employed" for the purposes of the Equality Act 2010 even though he is not an "employee" within the meaning of section 230 of the Employment Rights Act 1996. This is because the definition of employment in the 2010 Act includes, but is not limited to, employment under a contract of employment: it also extends to a person who is, in fact, self-employed, provided that he contracts to personally perform work. An important factor in determining this – but not the only relevant factor – is whether the execution of personal work is the dominant purpose of the contract in question. However, the relationship between the parties (particularly the degree of subordination) should also be considered. In addition, the fact that an individual does not actually perform all of the work personally will not necessarily mean that the dominant purpose test will not be met: provided that the individual performs the essential part of the work, he is free to delegate other aspects to another person. Moreover, the presence of a substitution clause is not necessarily inconsistent with there being a contract to perform work personally. Where there is a conditional right to appoint a substitute, the question whether this is consistent with personal performance will depend upon the extent to which the right is limited or occasional. Nevertheless, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally.

**DISCUSSION AND CONCLUSIONS**

Status of the Retainer agreement

33. My attention was drawn to the fact that there are a number of differences between the terms of the Retainer agreement (described above) and the previous "Terms of Retainer" (i.e., the agreement dated 1 November 1995). In particular, it was noted that the following provisions in the original terms were not carried forward into the revised Retainer agreement:

- "The Professional will be expected to attend the Club on six days every week but he shall be entitled to four weeks' annual holiday in each year." (clause 2.10.1)
- "During his attendance he shall be on site, whether on the course, in the shop or in the Clubhouse." (clause 2.10.2)
- "The Professional's attendance shall be for at least of[sic] forty five hours every week." (clause 2.10.3)
- "During his absence and at any time after 6.30pm when the Professional is not present the shop must be staffed by a fully trained assistant who must be made fully aware of the Club's requirements." (clause 2.10.5)

34. On behalf of Mr Law, Mr Flynn submitted that the original terms (including the ones set out above) remained relevant to the contractual relationship between the parties throughout. He argued that, whilst the revised Retainer was signed in 2015, this did not impact on the practicalities of how matters operated. In Mr

Flynn's submission, the revised Retainer amounted to an attempt by the Club to change Mr Law's employment status. This assertion was in stark contrast to the Club's position which was, essentially, that it was because the original terms did not accurately reflect the actual arrangements between the parties that the new Retainer agreement was drawn up.

35. I consider that the Club's view is to be preferred in this regard. Not only do the terms of the revised Retainer agreement appear to be wholly consistent with the arrangements on the ground (both before and after it was signed), but the revised agreement was freely entered into by Mr Law, after he had taken legal advice, some two months after the draft document had been sent to him. I was not persuaded by Mr Law's assertion that he had signed the Retainer without having any real appreciation of its provisions concerning his employment status: there is a clear statement of intent in that regard at clause 5.3 (carrying forward a similar clause from the original terms). Although it is not wholly determinative of the contractual relationship between the parties, I find that the revised Retainer agreement should be relied on as the primary source of the contractual terms, to the exclusion of the earlier agreement.

Mutuality of obligation and personal service

36. The Retainer agreement clearly created mutual obligations between the parties to provide services on the one hand and to pay for them on the other. Mr Law was a party to the agreement in his personal capacity and it was Mr Law, personally, who was appointed as the Club's "PGA Professional". As such, Mr Law was obliged to perform the duties mentioned in clause 5.1 of the Retainer. He was also required to perform the "essential functions" listed in clause 4.1 – 4.14.

37. The description of the role in clause 2 of the Retainer mentions that the Professional needed to possess certain personal qualities, and Mr Asher's evidence on behalf of the Club was that it was important for the individual performing the role to be a PGA accredited professional golfer, as the Club would gain some kudos from such an association and it would be good for the Club's business generally. However, to what extent was Mr Law required to perform the work required under the Retainer personally?

38. It is apparent from both the form and substance of the arrangements between the parties that Mr Law was entitled to delegate at least some of his work to an assistant and that he also had the ability to appoint a substitute. Mr Asher's opinion was that all of the Professional's duties could be performed by someone else, and that this did happen on occasion – such as when Mr Law was absent due to injury in 2013. He said that, from the Club's perspective, all that mattered was that the key elements of the Professional's role were being performed by an individual who was a PGA professional.

39. Mr Law disputed this. Whilst he acknowledged that some of the essential functions of the role did not need to be performed by him personally, others did. In particular, Mr Law said that the activities listed in clauses 4.2, 4.10, 4.12 and 4.13 could only be undertaken by him.

40. Although Mr Asher did not share Mr Law's view, he did accept that it would be important for Mr Law to be present personally at the Club reasonably often and for him to be visible and available to the Club's members. This is consistent with the description of the role in clause 2 of the Retainer and I have no doubt that the Club did expect that Mr Law would, in practice, perform much of the work of the Professional's role personally: this is inherent from his personal appointment to the role; from the "ambassadorial" and other responsibilities which came with it; and from the restrictions on Mr Law's other activities which were set out in the agreement. Nevertheless, Mr Law also enjoyed extensive powers of delegation. In addition, clause 5.1.8 of the Retainer agreement evidences a broad power to appoint a substitute, and Mr Law exercised this power during his 2013 absence.

41. Mr Flynn argued that Mr Law's powers of delegation and substitution were restricted to those times when he was absent from the Club and that they were subject to the attendance obligations set out in clause 2.10 of the original terms or retainer. I am not persuaded by this argument: the obligations in question were not carried forward into the revised Retainer agreement and are inconsistent with the way in which Mr Law actually performed his role. Nevertheless, nor do I consider that clause 5.1.8 should properly be construed as an unfettered right to appoint a substitute: such a right would be inconsistent with Mr Law's personal appointment as the Club's Professional, and thus the reference to providing "appropriate cover for absences" should, in my view, be limited to providing appropriate cover for those absences which would be in the reasonable contemplation of the parties given the nature of their agreement.

Control and subordination

42. Clause 2 of the Retainer agreement stipulates that the Professional shall work under the immediate supervision of the Club Manager. Mr Law asserted that this term was observed in practice and that his work was indeed subject to a significant degree of supervision. He pointed out that Mr Asher was not the Club Manager and argued that, as a volunteer committee member who attended the Club three or four times a week, Mr Asher was not well placed to comment on the degree of supervision to which Mr Law was subject.

43. Whilst noting the limits of Mr Asher's involvement with the Club, I found that he did have adequate knowledge and insight to give relevant evidence in this regard, which I found to be credible and consistent with the documentary evidence provided. The picture which emerged indicated that Mr Law performed his role with very little supervision, or control, by the Club. Provided he ensured that the Pro shop was staffed and open at the relevant times, he was free to come and go without accounting for his movements. He did not need to seek permission to take holidays and had the freedom to employ whoever he wanted as an assistant professional. He could choose what merchandise to sell in the Pro shop. He also had a great deal of control over the manner in which golf lessons were provided. It is therefore difficult to say that, in the performance of his contractual obligations, Mr Law was under the control of, or subordinate to, the Club in any material respect.

44. It was argued that contractual terms obliging Mr Law to be present at the Club premises on six days every week and for a minimum of 45 hours show that he was subject to a significant degree of control. Once again, however, it has to be noted that the express terms in question were not carried forward from the original terms of retainer into the revised Retainer agreement. Nor do I consider the express restrictions on Mr Law's rights to enter professional tournaments or to undertake other work to be sufficient, in themselves, to indicate that he was an employee. The upper limit on entering tournaments never became an issue and, as far as undertaking other paid work was concerned, it is clear that Mr Law did undertake such work from time to time – for example, providing golf lessons at a local school – without obtaining the Club's permission.

Other provisions of the contract

45. There are a number of features of the contract between the parties which, in my view, are inconsistent with it being a contract of employment. First, although Mr Law was entitled to receive payment of a guaranteed annual retainer, a substantial proportion of his remuneration under the contract came from profits generated by the Pro shop. He was entitled to retain the income from the shop in its entirety. Second, Mr Law was required to use his own funds to purchase stock for the Pro shop and he accepted the commercial risk associated with running it. Third, Mr Law had control over the shop's staffing. Indeed, it appears that the staff Mr Law took on were employed (and paid) by him personally, and not by the Club. Such an arrangement would be highly surprising if Mr Law had himself been an employee of the Club. Fourth, the manner in which Mr Law invoiced the Club and was paid under the Retainer agreement is consistent with his status being that of a self-employed contractor and not that of an employee. Fifth, certain terms of the Retainer agreement (such as clause 5.3) are also consistent with self-employment, as is the absence of provisions relating to matters such as holidays and sick pay.

46. Mr Law argued that other provisions of the contract indicated that it was a contract of employment. In particular, he noted that the Retainer entitled the Club to terminate the agreement if Mr Law was guilty of misconduct. In my view, the presence of this term is again insufficient to establish employee status. I note in this regard that, at a meeting between Mr Law and officials of the Club on 31 May 2016, Mr Asher mentioned the possibility of disciplinary action being taken against Mr Law. However, it is clear that the Club made no attempt thereafter to subject him to a disciplinary process, and the Retainer agreement made no provision for it to do so.

47. Mr Law also said that, whilst there was no express provision for it in the Retainer, he received a share of gratuities left by members for Club staff. He considered that he was fully integrated into the Club and did not regard himself as being self-employed. However, this view is difficult to reconcile with the way in which Mr Law invoiced the Club and with the way in which his business activities were presented to HMRC. Whilst there was clearly some degree of integration, much of what Mr Law did was conducted as a separate business.

Overall effect of the contract

48. In my judgment, an evaluation of all the above factors leads inevitably to the conclusion that Mr Law did not work for the Club under a contract of employment and that he was not an "employee" within the meaning of section 230(1) of the Employment Rights Act. The economic reality of the arrangement between the parties was that Mr Law was running his own business and providing services to the Club in a self-employed capacity. The terms of the Retainer agreement were consistent with this, as was the manner in which the services were provided.

49. It was argued on Mr Law's behalf that, even if he did run the Pro shop on a self-employed basis, he had a dual contract and was an employee of the Club for the purposes of performing the other functions of the Professional's role. I reject this argument. It is quite clear that all the services which Mr Law provided to the Club were provided under a single over-arching contract, the terms of which were set out in the Retainer agreement. This is not a case where the claimant was engaged under a number of separate contracts. Nor can the Retainer agreement be sensibly construed as creating two contracts relating to separate sets of services. It is obvious that this was not the parties' intention from the fact that provisions about the running of the Pro shop and about the other functions of the Professional's role were inter-mingled in clauses 4 and 5 of the agreement.

50. This still leaves the question of whether Mr Law worked under "a contract personally to do work" for the purposes of section 83(2) of the Equality Act. In my judgment, he did work under such a contract. The dominant purpose of the contract between the parties was the provision of the services of a PGA professional golfer. Mr Law was required to perform the essential part of the work personally, notwithstanding the fact that he could delegate some of the work to others. He had a conditional right to appoint a substitute, but this was not inconsistent with personal performance.

**DISPOSAL**

51. The findings set out above are fatal to Mr Law's claim for unfair dismissal, which must therefore be dismissed. However, they show that he has the necessary status to make a claim for unlawful age discrimination. That claim may now proceed to a final hearing before the Tribunal. In anticipation of that, the case will be listed for a short case management discussion (by telephone) to make further case management orders.

Employment Judge J Holbrook

Date: 5 May 2017

JUDGMENT SENT TO THE PARTIES ON

15 May 2017

FOR THE TRIBUNAL OFFICE