EMPLOYMENT TRIBUNALS

Claimant: Ms J Varnish

Respondents: 1. British Cycling Federation t/a British Cycling
2. United Kingdom Sports Council t/a UK Sport

Heard at: Manchester **On:** 10, 11, 12, 13, 14 December 2018
17 December 2018
(in Chambers)

Before: Employment Judge Ross

REPRESENTATION:

Claimant: Mr D Reade QC
Miss L Banerjee (Counsel)
1st Respondent: Mr T Linden QC
2nd Respondent: Ms J Mulcahy QC

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was not employed as an employee under a contract of employment within the meaning of section 230(1) and (2) of the Employment Rights Act 1996 by the first respondent.

2. The claimant was not employed as an employee under a contract of employment within the meaning of section 230(1) and (2) of the Employment Rights Act 1996 by the second respondent.

3. The claimant was not employed as an employee under a contract of employment within the meaning of section 230(1) and (2) of the Employment Rights Act 1996 by the first and second respondents under a tripartite arrangement.

4. The claimant was not employed as a worker within the meaning of section 230(3) of the Employment Rights Act 1996 by the first respondent.

5. The claimant was not employed as a worker within the meaning of section 230(3) of the Employment Rights Act 1996 by the second respondent.

6. The claimant was not employed as a worker within the meaning of section 230(3) Employment Rights Act 1996 by the first and second respondents under a tripartite arrangement.

7. The claimant was not employed as an employee under a contract of employment, a contract of apprenticeship or a contract personally to do work within the meaning of section 83(2)(a) of the Equality Act 2010 by the first respondent.

8. The claimant was not employed as an employee under a contract of employment, a contract of apprenticeship or a contract personally to do work within the meaning of section 83(2)(a) of the Equality Act 2010 by the second respondent.

9. The claimant was not employed as an employee under a contract of employment, a contract of apprenticeship or a contract personally to do work within the meaning of section 83(2)(a) of the Equality Act 2010 by the first and second respondents under a tripartite arrangement.

REASONS

1. The claimant brings claims of unfair dismissal pursuant to section 98 Employment Rights Act 1996, direct sex discrimination pursuant to section 13 Equality Act 2010 and victimisation pursuant to section 27 of the Equality Act 2010, and unlawful detriment for having made protected disclosures pursuant to section 47B Employment Rights Act 1996.

2. The claimant's claims centre on the termination and non renewal of her Podium Performance Agreement when she was a professional cyclist with the GB Cycling Team.

3. This preliminary hearing was to determine the following issues:-

   (1) whether or not the claimant was an employee who worked under a contract of employment within the meaning of section 230(1) and (2) Employment Rights Act 1996 by the first or second respondent;

   (2) whether she was employed as a worker within the meaning of section 230(3) Employment Rights Act 1996 by the first or the second respondent; and

   (3) whether the claimant was employed as an employee under a contract of employment, a contract of apprenticeship or a contract to do work personally within the meaning of section 83(2)(a) of the Equality Act 2010 by the first or second respondent.

4. These issues were identified by Regional Employment Judge Parkin at a case management hearing on 6 November 2017 (pages 78-79).

5. It is the claimant's case that she was employed by the first respondent or second respondent as an employee or that she was a worker as defined by section 230(3) ERA 1996 for the first or second respondent or that she is eligible to bring her claim under the definition of s83(2)(a) Equality Act 2010.

6. At the submissions stage the claimant's representative also presented a submission that there was a tripartite arrangement whereby different elements of the employer's role were fulfilled by each respondent. In the alternative it was submitted that UK Sport was the employer but it delegated the running of the World Class Programme, including the exercise of control, to British Cycling whilst retaining ultimate oversight and final power to monitor and intervene on who was on the programme and levels of funding. The third alternative presented on behalf of the claimant at that stage was that British Cycling alone was the employer and UK Sport acted under their direction in providing the Athlete Performance Award, performing a largely administrative function.

7. Both the first and second respondent disputed that the claimant was employed by them. Both respondents disputed the claimant was a worker as defined by section 230(3) ERA 1996 for the first or second respondent. Both respondents disputed she was eligible to bring her claim under the definition of section 83(2)(a) Equality Act 2010.

8. In addition, Mr Linden for the first respondent and Ms Mulcahy for the second respondent objected to the way the claimant's case was formulated at the submissions stage. They objected because that they had not had the opportunity to question witnesses on this basis as they had not understood it was the way the case was being put, given the issues were identified at the case management hearing and confirmed at the outset of this hearing. The issues identified at the case management hearing refer to either the first respondent or the second respondent being the employer or the respondent for whom the claimant worked. The list of issues does not refer to an alternative scenario of a tripartite or agency arrangement.

9. I reminded the parties that the issues were as determined at the outset of the hearing and at the case management hearing. Although a List of Issues is not to be followed slavishly, nevertheless in the interests of fairness it is crucial that all parties, including the Employment Judge, are clearly aware of the basis on which a case is being put.

10. However in the interests of justice and given the level of interest in this case, I have considered the submission made by the claimant's representative and made findings upon it.

Witnesses

11. I heard from the claimant, her partner Liam Phillips, also a professional cyclist, and the claimant's agent, Mr Harper. Although the claimant had supplied an unsigned statement from Dr Freeman who was the team doctor for British Cycling at

Team Sky from 2010 to 2017, I attached no weight to it because Dr Freeman did not attend the hearing and accordingly there was no opportunity for him to be questioned.

12. For the first respondent I heard from Mr Barnes (Head of Legal and the In-house counsel for British Cycling); Mr Dyer (Head Coach of British Cycling) and Mr Harrison (Programme Director of British Cycling).

13. For the second respondent I heard from Ms Nicholl, CBE, Chief Executive Officer.

14. Accordingly, this hearing was to determine whether or not the Tribunal had jurisdiction to hear the claimant's substantive claims.

The Facts

I find the following facts:

15. The claimant is a very talented professional cyclist. She started racing when she was about seven years old. When she was a 12-year-old schoolgirl she was selected for the British Talent Team Programme which had been established by British Cycling.

16. In 2006, whilst she was still at school the claimant was selected to join the World Class Programme ("WCP") as a junior sprinter, aged 15. She was later promoted to the Olympic Academy Programme when she was aged 17. From this programme the claimant was selected for the Olympic Podium Programme.

17. In the early part of her career when she was a schoolgirl the claimant was living at home with her parents in Worcestershire. They drove her to training sessions and race camps in Newport, Wales, and in Manchester. When the claimant had completed her A levels she moved to Manchester to continue her development as a sprint cyclist. She lived in accommodation subsidised by British Cycling.

18. British Cycling runs the World Class Programme for cycling. I find the World Class Programme is an overarching programme designed for success at international competitions. The programme includes a Junior Academy for athletes who are typically 16-18, a Senior Academy for athletes with the potential to be world class athletes, typically aged 18-23, and the Podium Programme for elite world class cyclists.

19. British Cycling is the trading name of the British Cycling Federation, a private company limited by guarantee. It is a not for profit organisation but, unlike UK Sport, it is not a public body.

20. The objectives of British Cycling are to promote and control the sport of cycling in the UK. British Cycling is a membership organisation. It supports the interests of its members through local clubs and privately organised racing meetings, through promotions and insurance policies. It issues race licences. Individuals who wish to participate in competition must obtain a race licence from it in order to compete. It is the national governing body for cycle sport. It oversees sporting

competitions in the disciplines of road, track, BMX, mountain biking, cyclo-cross and cycle speedway. It administers most competitive cycling in Great Britain.

21. I find that anyone can become a member of British Cycling and since the early 2000s British Cycling has experienced tremendous growth in membership. In 2006 its membership was only 15,000 members whereas now it is in the region of 145,000 members, each of whom pays an annual subscription. The majority of British Cycling's expenditure is used in connection with furthering public participation in cycling.

22. In its most high profile role, British Cycling selects national teams, including the GB cycling team for races in Great Britain and for international competitions. It is responsible for overseeing the UK's international cycling interests.

23. British Cycling is funded through several revenue streams. Approximately 45% of the organisation's funding on current figures is comprised of grants and awards from public bodies such as UK Sport and Sport England. British Cycling generates approximately 55% of its funds from private sources including membership fees, event levies and sponsorships from commercial parties.

24. I find that as a not for profit organisation all of British Cycling's funding is reinvested in the sport and used to achieve its objectives.

25. I find British Cycling's most important commercial relationship is with their lead partner, currently HSBC and previously Sky.

26. The second respondent, UK Sport, is an executive non departmental public body sponsored by the Government through the Department for Digital Culture, Media and Sport ("DCMS"). It is responsible for high performance sport at a UK level, supporting major sporting event bidding and hosting in the UK and developing and maintaining a strong and respected voice for the UK in the international sporting community.

27. UK Sport is responsible for investing HM Treasury and National Lottery funding into a number of different sports and partner organisations in order to drive and showcase Olympic and Paralympic medal success.

28. I find the ambition of UK Sport is to inspire the nation through Olympic and Paralympic success by driving and showcasing British medal success on the world stage. One measure of UK's sport success is the number of Olympic and Paralympic medals won. I find each sport agrees a medal target range with UK Sport (and annual milestone performance targets).

29. The present UK budget for investment is £550 million over four years. Of this funding 55% is Lottery funding and 45% is Government funding.

30. I find UK Sport is investing in future potential. It strives to invest in athletes to provide them with financial support so that they can perform their best for the nation.

31. From when she joined the development programme in 2006 until the relationship came to an end, the claimant entered into an Athlete Agreement with

British Cycling. The terms were essentially the same over the years although they evolved. By being a member of the development programme, the claimant was eligible to apply to UK Sport for a means tested grant, which she did.

32. I find perhaps the greatest resource and service provided to the athletes on the development programme by British Cycling is the provision of world class coaching. The claimant agreed with Mr Dyer that British Cycling has numerous internationally renowned coaches who provide their services to the individual athletes. They provide bespoke training programmes which are developed in conjunction with the athletes to maximise their potential for success. This includes training around other cycling commitments such as professional road racing, season and individual skills, personal traits and expertise. Every cyclist has a separate carefully drafted training regime prepared with their coaches.

33. The quality and intensity of the services and benefits provided to the cyclists are second to none internationally. It is intended that the cyclists are supported in such a way that there are no gaps in their development and nothing will obstruct their achievement. In addition to the coaching and bespoke training plans cyclists across all of the World Class Programmes, whether podium or academies, are provided with top quality clothing and equipment. This includes bike frames, wheels, tyres, innertubes, helmets, full nutritional support and supplements, power tabs and power meters.

34. Alongside the training and equipment available to cyclists, British Cycling has a dedicated support team to assist the cyclists off the track. This includes dedicated bike mechanics available for the cyclists during training. British Cycling also provides onsite physiotherapy, massage and doctor services to the cyclists as and when required. That is only one part of the physiological services that the first respondent provides to the cyclists. Nutritionists, biomechanical experts, psychologists and lifestyle management experts are also provided to supplement the coaching, training and on track services. Cyclists are provided with personal accident insurance and travel insurance for training camps and events, with all foreign travel and accommodation paid for. A summary of the support services is at page 725(a).

35. The value of these services was estimated by Mr Harrison at £85,000 over four years for a Junior Academy member, £350,000 over four years for a Senior Academy member and a value of £600,000-£700,000 over a four-year period for a podium rider.

36. I find the National Cycling Centre at Manchester was designed to be a hub where all facilities and support services are provided at the same time and place as training. Athletes can use the track or the gym for training before analysing data with coaches and sport scientists to monitor their performance and tailor any training or performance needs. I find the role of British Cycling in relation to the elite cyclists is to facilitate the cyclists' success.

37. The claimant's relationship with British Cycling is reflected in the "Athlete Agreement". The first Athlete Agreement is dated 2005 (page 98A-98L). Although it is not signed the claimant refers extensively to it in her statement. It was for the Olympic Development Programme. The next Agreement within the bundle is dated 1

April 2007 (pages 153-172), the Olympic Podium Programme. It is not signed. The next Agreement is 2008. It is for the Olympic Academy Programme. It is signed by the claimant and her father in October 2008 (Agreement 201A-Q). There is a further Agreement in 2009, again for the Academy Programme (see pages 297A-X). This was signed by the claimant and a witness in November 2009 (297S). It is for the Olympic Academy Programme.

38. By November 2010 the claimant had graduated to the Olympic Podium Programme. The Agreement is at pages 372-394. This version is not signed. The Agreement for 2011 (pages 399-421) is unsigned. The Agreement for 2012, again for the Podium Programme (pages 498-520) is unsigned. The next Agreement is 2014 (pages 662-688) and is unsigned. The final Athlete Agreement and the one in force at the relevant time is dated 1 November 2015 (pages 698-725). It was signed by the claimant on 16 November 2015 (page 718).

39. It is agreed that the claimant had the benefit of an Athlete Agreement continuously from 2005 until the relationship came to an end when the claimant was informed she was no longer part of the Podium Programme from 31 March 2016, by a letter dated 14 March 2016 (page 1562).

40. Although the claimant received the benefit of services under the Athlete Agreement from British Cycling (see clause 5.1.5), there was no entitlement to sums of money under that Agreement.

41. The claimant received funding via an Athlete Performance Award ("APA") from the second respondent. I find an APA is a means tested contribution towards an athlete's living and sporting costs to enable the athlete to train full or part-time with the support of the sport and its World Class Programme. I rely on the evidence of Ms Nicholl of UK Sport to find that the award enables athletes to dedicate a significant amount of their time and energy to maintain a high level of competitiveness in their chosen sport. I rely on her comment that an athlete's commitment, especially for those aiming for the highest level, leaves only a limited amount of time for them to earn a living, and a lack of sufficient resource can have a negative impact on their ability to train and perform to achieve their potential.

42. I find a pre-requisite condition for applying for an APA is membership of a sport's World Class Programme.

43. I rely on the evidence of Ms Nicholl to find that athletes are only to be nominated by their sport if they have reached the agreed standard and are considered by the sport to be progressing towards or continuing to achieve World Championship or Olympic/Paralympic medal level performances.

44. I rely on the evidence of Ms Nicholl that UK Sport is investing in "future potential". UK Sport invests on a four year cycle.

45. The process is that the individual sport, namely British Cycling in this case, nominates the individual. Ms Nicholl stated:

> "It is rare we reject a nomination. We may challenge the band. We have dialogue with the sport. If the sport said it wanted to fund the athlete we would say fine."

46. Ms Nicholl was asked if in principle UK Sport could decline a nomination for an APA. She replied:

> "In principle we could, although we have never had to."

47. APAs are awarded on a sliding scale. I rely on Ms Nicholl's evidence that the value of the award ranges from £3,500 to £28,000 per annum depending upon the athlete's projected potential performance and a means test. She explained the purpose of the award is to give athletes a financial platform to be able to focus on their chosen sport without worrying too much about basic outgoings. However, as APAs are means tested some very successful athletes who benefit from sponsorship or prize money and therefore have an income above the means testing threshold will not receive an APA.

48. There is no dispute that the claimant received an APA in varying amounts between the years of 2007 and 2016.

49. At the time the claimant made her applications for APA awards there were three categories at Podium level:

- Band A – this Band was applicable to athletes who had previously been medallists at Olympic Games/Senior World Championships or gold medallists at Paralympic Games/Senior World Championships (and who were deemed capable of repeating or improving this performance at the World/Olympic or Paralympic Games). The maximum level of funding for Band A athletes was up to £28,000 per annum subject to means testing.

- Band B – this Band was applicable to athletes who had previously achieve a minimum of a top 8 finish at Olympic Games/Senior World Championship or medallist at Paralympic Games/Senior World Championships, and who were deemed capable of repeating or improving this performance at the World/Olympic or Paralympic Games. The maximum level of funding for Band B athletes was up to £21,500 per annum subject to means testing.

- Band C – this Band was applicable to athletes who were considered likely to be major championship performers and those athletes who had demonstrated the ability to achieve a medal result at World or Olympic level within four years. The maximum level of funding for Band C athletes was up to £15,000 per annum subject to means testing.

50. Other levels of funding, D and E, were applicable to athletes not on the Podium Programme.

51. The claimant's first APA was issued on 31 January 2007 at level E (see pages 151-152). Her application is at pages 144-150. The claimant was still at “full-time school” and her application is countersigned by her father. There was a further offer of an APA on 20 November 2007 for the period November 2007 to 31 October 2008 (see page 175). A further award was made on 31 October 2008 (see page 200). On the review form the claimant declared a car and prize money. On 12 November 2009 the claimant was offered a level D award for the period November 2009 to 31 October 2010 (see pages 301-302).

52. In May 2010 (see page 356) the claimant was awarded a level A award for the period 1 April 2010 to 31 October 2010, and the award included living costs (pages 356-357).

53. By 1 November 2010, the claimant had been recommended for level B funding (see page 302D). She was notified she needed to look at making arrangements out of the Academy accommodation. (The claimant had moved to Manchester in 2008).

54. From 2 November 2010 to 31 March 2011 the claimant was awarded a level B award (see pages 396-397). On 13 November 2011 the claimant was awarded level A for the period 1 April 2011 to 31 March 2012 (see pages 427-428).

55. The claimant was offered level A APA for 1 March 2012 to 30 April 2012 and for 1 May – 30 September 2012. The claimant's application for an APA at this stage shows the net annual profit for her company at £32,514.98 (see page 458).

56. From 1 October 2012 to 31 October 2012 the claimant was awarded level A (see pages 495-496).

57. On 13 November 2012 the claimant was offered an APA at reduced level “B” for 1 November 2012 to 31 March 2013 (see page 522). On 26 March 2013 the claimant was awarded a level B award for April to October of that year (pages 566-567). On 4 March 2014 the claimant's funding was increased to level A for the period 4 January 2014 to 31 March 2015.

58. On 15 April 2015 the claimant was offered an APA reduced to level B for the period 1 March 2015 to 31 March 2016 (see page 697).

59. The claimant received a letter dated 14 March 2016 from British Cycling ending the Podium Agreement (see page 1562). She received a letter from UK Sport stating she was leaving the World Class Programme for Cycling and giving details of transitional athlete performance award for three months (see pages 728, 729-731). The final payment was at grade B level for the period 1 April 2016 to 30 June 2016.

60. Although in her witness statement the claimant said she considered the APA a wage and relied on the fact that email chasers were sent from her coaches to apply for the award as evidence she was obliged to apply for it, the Tribunal is not satisfied that this perception was correct. The Tribunal refers to the Guide to Athlete Personal Awards for Sports (2011) (see page 398(a)-(d)). It states:

> "The Athlete Personal Award ("APA") is an integral part of the World Class Performance Programmes (WCP) that have been in operation since 1997. The APA is a lottery funded grant to support progression through the podium at an Olympic/Paralympic Games. The maximum A level award is based on an estimate of the full cost of living and training as an elite athlete and the levels below are based on progression towards that maximum.
>
> Individuals cannot apply directly to UK Sport. The pre-requisite condition before applying for an APA is membership of a National Governing Body (NGB) World Class Performance Programme (WCP). Irrespective of previous performance athletes should only be nominated for funding if they are considered to be progressing towards or continuing to achieve World or Olympic/Paralympic medal level performances."

61. This confirms the evidence of Ms Nicholl that the award is a grant based on an assessment of future performance and can be withdrawn. The award is means tested.

62. The claimant's application forms for an APA show that she did include details of her means and she was very clear in her evidence that although she did not read the Athlete Agreement carefully and simply signed it, she did complete very carefully the section relating to her means in the Athlete Performance Award application.

63. There is an interrelationship between British Cycling and UK Sport in terms of funding. That relationship is helpfully set out in the Appendix diagram attached to Ms Nicholl's statement.

64. The claimant is only eligible for an APA if she is a member of her Governing Body's World Class Programme. Whether or not the athlete is invited to join that programme is a matter of internal assessment by her sport's governing body-in this case British Cycling.

65. I find, based on the evidence of Mr Harrison, that the individual who assessed who was entitled to join the World Class Programme and thus offered an Athlete Agreement was ultimately the Performance Manager of British Cycling in conjunction with the Rider Development Team. I find that Mr Sutton was the performance manager during the latter stage of the claimant's time at British Cycling.

66. Mr Harrison confirmed that nomination to UK Sport for an APA was made by the Senior Leadership Team i.e. the Performance Director, the Programme Director and the Head of Legal. He said the Performance Director, Mr Sutton, relied on recommendations from the relevant coach and support team. (I rely on the evidence of Mr Harrison that there was a change in Mr Sutton's title from Performance Manager around Jan 2015 to Director until April 2016.)

67. In terms of the Athlete Agreement, Mr Dyer agreed in cross examination that there was an annual review for that Agreement and that an athlete was always at least "364 days away from possible deselection".

68. In terms of the Athlete Agreement, there was an opportunity for the claimant to seek advice on the terms. She confirmed she had advice from her accountant and in the latter stages she had advice from an agent. Her agent, Mr Harper, said he did attempt to negotiate the Athlete Agreement but without success.

69. Ms Nicholl explained that the Athlete Agreement was an agreement between each sport and the athletes of that sport. UK Sport produces a template which it shares with the British Athletic Commission which represents athletes. She stated that Commission reviews the template agreement and feeds back for any adjustment from year to year.

70. This is essentially the same template across 43 other sports which UK Sport funds.

71. Ms Nicoll said that in relation to cycling there are minor variations on the template for each cycling discipline, such as track, road, endurance, BMX, etc.

72. Mr Barnes confirmed that in terms of the Athlete Agreement he could not recall any situation where an individual athlete had asked for a change to the Agreement and it had been permitted. However, he stated that over time, pressure and feedback from athletes who wanted additional flexibility in relation to commercial sponsorship had been taken into account and accordingly changes were made the following year to clause 6.2.4.

73. He confirmed the reason athletes were encouraged to take advice on the Agreement was to make sure they understood the terms they were entering into. They were able to feed back in relation to a further Agreement the following year. He accepted there would be no guarantee that the athlete might be on the Programme the following year.

74. The Tribunal relies on the statement of Mr Barnes to find that over the last half century there has been a gradual shift away from the days of “amateurism” in sport, but that has not changed the fact that with a limited number of exceptions most Olympic sports offer limited opportunities to athletes to earn significant prize money or obtain sponsorship save for a handful of world stars in some of the bigger Olympic sports such as athletics or swimming.

75. The Tribunal finds that there are limited opportunities for track cyclists to earn an independent living outside the Programme. The Tribunal relies on the evidence of Mr Dyer and Mr Barnes that there are trade teams. There is a professional Keirin racing circuit in Japan which can be extremely lucrative depending on a rider’s success and the events that they enter. However, access to that circuit is by invitation only.

76. There is no dispute that the claimant set up her own business in 2010, Jess Varnish Management Limited (see page 534A). She was successful in obtaining agreements with sponsors such as Boots (see page 448A-450) and Adidas (see page 534(a)). She agreed in cross examination that during the period 2013 to 2016 her business made approximately £35,000 annually. She agreed that the business had been set up for tax purposes and that she was an employee of her business,

Jess Varnish Management Limited. The receipts for the business in terms of sponsorship deals are at pages 458, 497, 571 and 692. An invoice for a radio appearance appears at page 638A.

77. I find that the Athlete Agreements in the bundle culminating in the 2015 Agreement accurately reflect the relationship between the parties.

78. There are clauses in the Athlete Agreement which states that the claimant was not an employee (see clauses 2.1.2 and 2.2.4 at pages 699-700).

79. The claimant said in cross examination that sometimes she delayed in signing the Athlete Agreement because she was concerned about losing a sponsorship agreement where she was unsure whether the Agreement proscribed her being involved in certain "deals": "I actively put off signing it" and "Our agency did not always agree". Although the claimant said she did not look in detail at the Agreement, this suggests that she was at least aware of the conflict clauses in relation to commercial sponsorship.

Control

80. I find the claimant agreed to a high level of control under the Athlete Agreement. The purpose of the Agreement was "to recognise the ultimate goal of everyone involved in the Podium Programme to win medals for the British Team at international competitions" (see page 2.1.1).

81. The claimant's responsibilities under the Agreement are set out at paragraph 6. Her primary responsibility was the individual rider plan. She agreed to "develop and agree an individual rider plan in close consultation with an individual identified by us". The claimant was obliged to "inform us in advance of any private commitments which might impact your participation in the Podium Programme and permission for such absence will be in the absolute discretion of the Senior Management Team".

82. The Tribunal was provided with very detailed entries from the claimant's diaries which showed how she worked closely and collaboratively with her coach, in particular Mr Dyer, who was her key coach between the point when she started working on the Programme in or around 2005 until 2014. Two other coaches, Mr Grace and Mr Van Eijden were also involved. The Tribunal accepts the evidence that a particular coach was allocated to a particular type of cycling, e.g. sprint cycling.

83. The Tribunal accepts the evidence of the claimant that nutritionists advised the claimant exactly what to eat and when to eat it (see paragraph 29). The claimant went to have skinfold tests done on a monthly basis to measure body fat.

84. The claimant suggested that the coaches were in complete control and relied on a number of particular examples in relation to that.

85. I find that some of the early examples she relied upon were not illustrative of extreme control. Rather, they were illustrative of coaches behaving in a way commensurate with their duties in loco parentis where the athletes were under 18. For example, an email in 2008 (see page 1033) castigating team members for having a dirty bike. The claimant also relied on an example of someone staying up

too late at a training camp and being sent home, and the coach listening through the door to see if the athlete was still awake, and if they were they were sent home.

86. Mr Dyer could not remember any specific examples of this but the Tribunal finds that the claimant was referring to a period of time when she was a young athlete and this type of behaviour by a coach is no different to a parent.

87. The claimant relied on an example of behaviour by Mr Dyer which suggested extreme control. The example dated from when she first joined the Programme as a schoolgirl when she was still living at home. Her parents drove her up from Worcestershire to Manchester on a weekday. This was her first training season with the senior team. There were roadworks and as a result she was late. The claimant said her coach, Mr Dyer, "made me ride around the velodrome for 30 laps as a punishment for being late. He made me stick out like a sore thumb when everyone else was just warming up. I had to do it at the very top of the banking".

88. In cross examination Mr Dyer explained that it is essential cyclists warm up and they do so at different speeds. He said a warm up starts at speeds up to 30km per hour and progresses up to speeds of up to 60km per hour. Because the claimant had arrived late it would not be safe for her to warm up with the cyclists who were already well into their warm up session, and for safety reasons he asked the claimant to warm up at the top of the banking. He was also mindful that as they were further into the warm up they would repeatedly overtake the claimant which might be discouraging. He said it was not unusual for sprint cyclists to cycle at the top of the banking.

89. The claimant was a little inconsistent in her evidence. When first questioned she gave the version in her statement which accorded with the evidence of Mr Dyer that the warm up for the other cyclists was still ongoing when she was asked to cycle at the top of the banking. Under re- examination she said that the warm up for the other cyclists had finished when she was asked to warm up at the top of the banking. I prefer the claimant's original recollection in her statement, which accords with the recollection of Mr Dyer that the warm up for the other cyclists was ongoing when she was asked to warm up.

90. I find that it is understandable the claimant perceived being asked to warm up on her own at the top of the banking as a punishment given she was a young woman who was still at school, relatively new to the programme and understandably in awe of some of the experienced and famous cyclists taking part in the warm up. However, I find she was not told it was a punishment and Mr Dyer did not intend it to be such. I find the reason for the instruction to the claimant was for the reasons as described by Mr Dyer. I am not satisfied this is an example of extreme control.

91. The Athlete Agreement requires the claimant to inform British Cycling in advance of private commitments which might impact on her participation in the Programme (see clause 6.1.1 page 703).

92. The claimant relied on an email exchange at pages 1193-1197.

93. I find that the claimant had arranged some days off with family and friends in Wales over Christmas 2012.

94. I find that as part of the benefits available to her she was offered the opportunity to go to a training camp in Perth, Australia in 2012. The claimant requested flexibility in changing her training days in Manchester, over Christmas 2012.

95. At the Tribunal Mr Dyer explained that the Manchester velodrome had pre-booked training sessions for athletes and there were limited training slots available to British Cycling because the velodrome was closed otherwise over the Christmas period. He said it was for that reason he was unhappy with a suggestion from the claimant that she rearrange her training session. I find Mr Dyer did not communicate to the claimant at the time the reason why he was unhappy with the claimant's request to rearrange her training schedule namely the limited availability of training slots over the Christmas period.

96. Instead he appears to have escalated the matter to his manager, Mr Shane Sutton, who was at that time the Performance Manager. Mr Sutton appeared to threaten the claimant with not travelling to the training camp in Perth, Australia if she did not change her arrangements, "As of now I see you not travelling to Perth" (see page 1193). The claimant backed down. She said she was not refusing to train, "I don't want to miss out on training. I have never done and would never cheat myself like that". Ultimately she backed down; she was willing to change her arrangements "if the consequence of not doing so is not going to Perth. That is obviously still if I'm allowed to go" (page 1195).

97. I find that although the relationship between the claimant and her coach Mr Dyer was collaborative and generally positive and cordial as illustrated by the many emails in the bundle between Ms Varnish and Mr Dyer, there was an occasional element of tension as shown here where Mr Dyer has referred a conflict about training times to the senior manager Mr Sutton.

98. There is no dispute that both coaches and athletes were working towards the goal set out in the Agreement, namely qualification for international competition and the claimant accepted a high degree of control in achieving that goal.

99. However, I find the example of Mr Sutton's rather abrasive manner dealing with the training at Christmas 2012 is an isolated example. The claimant's usual communications about coaching were with Mr Dyer and appear to be overwhelmingly collaborative, positive and cordial.

100. When considering the nature of the control British Cycling had over the claimant, I have taken into account the fact the claimant was not obliged to use the coach supplied by British Cycling. According to the terms of the Athlete Agreement the claimant was entitled to have her own coach (see paragraph 6.1.3 page 703): "Where you engage the services of a personal coach who is not provided by us ('a personal coach') you will ensure that the personal coach complies with your obligations in this clause 6 and that the personal coach uses his or her best attempts to work with the Senior Management Team to further your interests as well as the

interests of the Podium Programme as a whole". (See also Mr Barnes at paragraph 62 of his statement).

Clothing and Equipment

101. Under the terms of the Athlete Agreement at paragraph 6.3 (see page 704) the claimant agreed "to wear team clothing and use team equipment as required by us whilst on British Cycling duty, and British Cycling duty shall mean when you are attending (including in each case travel to and from and including travel to and from home) all of the following events: British Team/Podium Programme, training camps, race events, championships, training sessions, contractual appearances, British Team/Podium Programme organised media and press interviews, other British Team/Podium Programme functions/events and any other attendances relating to your obligations under this Agreement".

102. The claimant relied on an email at page 1209 from 2013 where Mr Sutton stated:

> "Just recently there have been quite a few athletes walking around within the velodrome and also travelling whilst part of the GB squad wearing non GB clothing. Please note that you are part of the GB cycling team and you must wear GB issued kit at all of these times regardless of who your personal sponsor is. There are no exceptions."

103. The claimant also relied on an email from 2009 see page 1037, "If anyone has a non branded blue pullover please can you put your name on it and return it to the store as you will receive a new Sky branded pullover. You will then get your original top branded so you have two". It appears to accord with what is in the Athlete Agreement in terms of the requirement to wear team clothing.

104. The claimant also relied on an email from Dave Parsons about the new Gatorade branding (see page 1144). Mr Dyer explained in relation to this email that the precise clothing designs for cyclists are lodged with the UCI for front, back and sides. That is the team's registered design for that year. When competing the team is only permitted to wear the exact design which has been registered. It was explained the team had to present the clothing against the PDF they had submitted of the design.

105. The Tribunal finds there was a very precise email at pages 1404-1405 about kit changeover.

106. The Tribunal accepts the evidence of Mr Dyer that there is team clothing, leisure kit and skinsuits. If on track with the GB team then the athlete must wear the GB team skinsuit. Mr Dyer could not recall any team member suffering any consequences for not wearing the required clothing and explained that most athletes were proud to wear the GB kit.

107. There is no dispute that the athletes were expected to wear specific helmets which were provided. However, the Tribunal relies on the evidence of Mr Dyer that the sponsor, Laser, did not produce helmets at all for some types of rider, e.g. BMX,

and that although the default position was that an athlete was expected to wear the helmet provided, if there were special circumstances then they would not be required to do so. For example, some riders used a different helmet because of issues with fit. He explained that most kit provided was generally state-of-the-art and athletes wanted to wear it because it was to their advantage to do so.

Behaviour requirements

108. There is no dispute that the athletes, in accordance with the Athlete Agreement, were subject to detailed behavioural standards (see paragraph 6.5) including provisions in relation to anti-doping and betting.

Media requirements

109. The athlete agreed detailed provisions in relation to personal media work and general media (see paragraphs 6.16-6.18 and 6.20-6.23). The athlete agreed to "obtain the prior consent of the senior management team before entering into any agreements which would involve you working in any media capacity in any period leading up to, during or after a competition (whether as a print journalist, on the radio, television, online including being a tweeter, blogger or other commercial social media contributor), or by providing exclusive interviews, diaries, columns, tweets or blogs or other social media contributions or before engaging any media or press activity designed to (or having effect of) promoting a personal sponsor." There are further requirements of, when undertaking personal media work, "not displaying or promoting a logo, emblem, badge, symbol or promotional wording of a third party which conflicts or competes with any product or services of a commercial partner contracted to British Cycling" (see paragraph 6.17). There were also media guidelines (see pages 823-852). Examples of encouraging or controlling what the cyclists said to the media are found at pages 1066-1067, and in the remarks made by Mr Harrison at page 1583(a) and (b), although he swiftly corrected his remarks.

Sponsorship and Personal Commercial Work

110. The claimant was restricted in terms of obtaining private sponsorship. She agreed at clause 6.24(a):

> "You shall not individually or with a third party enter into any sponsorship, advertising, marketing, promotional or other endorsement commitment for or undertake any activity for or otherwise be associated with any brand, product or service or undertake any press or media activity in relation to any of the same without first obtaining the prior written consent of British Cycling to enable British Cycling to verify if in its opinion the same is in respect of:
>
> (i) A competitor of British Cycling and/or any of its commercial partners; or
>
> (ii) Any produce or services which are in the same product/service categories as those of British Cycling's commercial partners, such consent not to be unreasonably withheld by British Cycling."

It goes on to state:

> "It is further acknowledged and agreed that you will under no circumstances enter into any sponsorship, marketing, promotional or other endorsement commitment with a competitor of British Cycling's principal partner which shall include any business or brand which operates in the same product category as the principal partner (for the avoidance of doubt you should clarify before entering into any commitment which you consider may so conflict with the principal partner with a member of senior management team)."

111. The Tribunal finds that this clause was fully applied. The claimant relies on the example with Virgin Trains (see page 1120) which led to a "cease and desist" letter. The first respondent considered that the Virgin brand in its widest sense was a competitor to their then sponsor, Sky.

112. Commercial guidelines were produced in 2014 (see pages 3018-3032).

Contractual Appearances

113. There is no dispute that the claimant agreed a maximum of ten contractual appearances which shall include "three National Lottery appearances to be allocated as determined by UK Sport for the acknowledgement and recognition of the National Lottery. The seven other contractual appearances shall be used for British Cycling promotional purposes of whatever nature in its absolute discretion, including contractual appearances in connection with commercial partners" (see clause 61.2).

114. In terms of the National Lottery appearances, Ms Nicholl explained that there were 1,164 athletes and 3,500 days of allocation of lottery days and so they were not all used, in fact in the claimant's case she could not recall ever actually attending a National Lottery appearance although there was no dispute she was contracted to do so (see pages1288 and 1390).

Control over Image Rights

115. There is no dispute that British Cycling had use of image rights (see clauses 6.11 to 6.11.16).

Other Equipment

116. There is no dispute that under the Agreement state-of-the-art equipment was provided to the athlete, including the claimant, for her use.

Policies

117. As part of the Athlete Agreement the claimant was required to be a member of British Cycling, the British Cycling Membership Organisation. The claimant relies on disciplinary policies (pages 806-808, 961-980), a Code of Conduct (pages 809-812, 983-986), social media guidelines (pages 823-853) and an equality policy (pages 796-796, 981-982).

118. The Tribunal finds, and British Cycling accepts, that the disciplinary policy at pages 806-808 was for athletes only. It also refers to a grievance procedure (see

page 808). There was also a Code of Conduct for athletes on the podium programme (see pages 809-811).

119. The Tribunal finds the other policies were applicable to all members of British Cycling which include members of the public, not just athletes.

Termination of Athlete Agreement (see page 715-716)

120. There is no dispute that British Cycling had the power to terminate the Athlete Agreement and in fact eventually did so.

121. Clause 10 states:

> "In addition to any other right of termination or remedy granted to us under this Agreement or under our rider disciplinary policy and grievance procedure, we may at our absolute discretion terminate of suspend this Agreement and your membership of the podium programme at any time and with immediate effect by written notice to you if –
>
> (1) You no longer meet the eligibility criteria set out at clause 3;
>
> (2) You in accepting membership of the podium programme have made a declaration whether to us or UK Sport that is untrue;
>
> (3) It is proved that you have misled UK Sport or us in applying for any programme award such as the National Lottery Athlete Performance Award;
>
> (4) You breach the anti-doping rules which is a breach of clause 6.6 and/or you breach clause 6.9;
>
> (5) You breach clause 6.5 (world class conduct standards of behaviour and attitude) including if you are charged with or found guilty of (before or during the term of the Agreement) a criminal offence or breaking rules relating to betting, manipulating of results, corrupt conduct, insider information in any sport including your own sport."

122. Clause 10.2 goes on to say membership on the podium programme may be suspended or terminated as a consequence of a disciplinary process for performance related reasons.

123. The claimant received a letter terminating her agreement for performance reasons (see page 1562).

Tax

124. Clauses 6.25 and 6.26 under the Athlete Agreement deal with tax. They note that British Cycling have not made any deduction for income tax or national insurance from any amounts paid or any services benefits or other support made available to the claimant under the Athlete Agreement. However, they point out the

claimant may be liable to income tax and national insurance on payments, services, benefits or other support in accordance with current tax legislation (see page 714).

125. The Tribunal's attention was also drawn to HMRC guidelines. There is no dispute that the claimant did not pay any tax on the award she receive from UK Sport.

126. Where an athlete's sole income is the Athlete Performance Award the stance of HMRC at present is that it will not be taxable as employment income (see BIM 50606).

Selection for Competition

127. Under the World Class Programme riders are automatically considered for selection for international competition. It is possible to be considered for international competition if an athlete is not a member of the Programme, but Mr Dyer struggled to identify anyone who had been so selected in track cycling in his time as a coach.

The Law

128. The relevant law is found at section 230(1) and (2) Employment Rights Act 1996, section 230(3) Employment Rights Act 1996 and section 83(2)(a) Equality Act 2010.

129. I had the benefit of a lever arch file of authorities referred to me by counsel in this case, as follows:

- **Ready Mixed Concrete (South East) Ltd v Minister of Pensions [1968] 2 QB 497**
- **Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173**
- **Daley v Allied Suppliers Ltd [1983] ICR 90**
- **Mirror Group Newspapers Ltd v Gunning [1986] ICR 145 CA**
- **Deborah Lawrie-Blum v Land Barden-Wurttenberg [1987] ICR 483**
- **Hall v Lorimer [1994] WLR 209**
- **Carmichael & Anor v National Power PLC [1999] 1 WLR 2042**
- **South Lanarkshire Council v Smith & others UKEAT/873.99**
- **Montgomery v Johnson Underwood Ltd & Anor [2001] EWCA Civ 318, [2001] ICR 819**
- **Everson v British Cycling Federation, Case No. 2405213/99, 12 June 2001 (ET)**
- **Byrne Brothers (Farmwork) Ltd v Baird & Ors [2002] ICR 667, EAT**

- **Redrow Homes (Yorkshire) Ltd v Wright & Roberts [2004] ICR 1126 CA**
- **Allonby v Rossendale & Accrington College [2004] ICR 1328**
- **Percy v Board of National Mission of the Church of Scotland [2006] 2 AC 28**
- **Cotswold Developments Construction Ltd v Williams [2006] IRLR 181 EAT**
- **James v Redcats (Brands) Ltd [2007] ICR 1006**
- **Firthglow Ltd (t/a Protectacoat) v Szilagyi [2009] ICR 835**
- **Weight Watchers (UK) Ltd & Ord v HMRC [2012] STC 265**
- **Enfield Technical Services Ltd v Payne; BF Components Ltd v Grace [2008] ICR 1423, CA**
- **Autoclenz Ltd v Belcher & Ord [2011] ICR 1157 UKSCZ**
- **Jivraj v Hashwani [2011] UKSC 40, [2011] ICR 1004**
- **Quashie v Stringfellow Restaurants Ltd [2013] IRLR 99 CA**
- **Hospital Medical Group Ltd v Westwood [2013] ICR 415**
- **White & Anor v Troutbeck SA [2013] IRLR 949 CA**
- **X v Mid Sussex CAB & Anor [2013] ICR 249 UKSC**
- **Halawi v WDFG UK Ltd [2015] 3 All ER 543**
- **Bates van Winkelhof v Clyde & Co LLP & Anor [2014] ICR 730 UKSC**
- **FNV Kunsten Informatie en Media v Staat der Nederlanden [2015] All ER (EC) 387**
- **Uber BV & Ors v Aslam & Ors [2018] ICR 453 EAT**
- **Addison Lee Ltd v Gascoigne UKEAT/0289/17**
- **Addison Lee v Lange & Ors UKEAT/0037/18**
- **Pimlico Plumbers Ltd & Anor v Smith [2018] ICR 1511 UKSC**
- **Professional Game Match Officials Ltd v HMRC [2018] UKFTT 528 (TC)**

The Issues

130. The issues were identified by Regional Employment Judge Parkin as set out at the start of this Judgment.

Applying the law to the facts

Was the claimant an employee of British Cycling?

131. I turn to the first issue: whether the claimant was employed as an employee under a contract of employment within the meaning of section 230(1) and (2) of the Employment Rights Act 1996 by the first respondent. The section states:

> "(1) In this Act 'employee' means an individual who has entered into or works under (or where the employed has ceased, worked under) a contract of employment.
>
> (2) In this Act 'contact of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."

132. The courts have rejected the concept that there is one single factor that can be determinative of employment status.

133. I must approach the matter by looking at a range of relevant factors. This is a multifactorial approach.

134. I turn to **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497**. In that case Mr Justice McKenna stated:

> "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."

135. In other words:

> (1) Did the worker agree to provide his own or her own work and skill in return for remuneration?
>
> (2) Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?

(3) Were the other provisions of the contract consistent with it being a contract of service?

136. This case law reminds me that there is a "irreducible minimum of mutual obligation necessary to create a contract of service" (see Lord Irvine of Lairg **Carmichael v National Power PLC [1999] 1 WLR 2042**):

> "There would therefore be an absence of that irreducible minimum of mutual obligation necessary to create a contract of service."

137. As well as mutuality of obligation, control and personal performance are also being regarded as part of the irreducible minimum (see **Nethermere (St Neots) Limited v Gardiner & Another [1984] ICR 612 CA**).

Mutuality of Obligation

138. I therefore turn to the first key element which forms part of the irreducible minimum: mutuality of obligation.

139. Usually mutuality of obligation is expressed as an obligation on the part of the employer to provide work and a corresponding obligation on the part of the employee to accept and perform the work in exchange for consideration, usually wages. The case law refers to this as the "wage/work bargain". It is of course possible for remuneration to be provided in a form other than money. The claimant's representative reminded me an employed domestic servant might receive a number of benefits in kind but no cash.

140. I must ask myself in the language used in the Ready Mixed Concrete case: "Has the servant agreed that in consideration of a wage or other remuneration she will provide her own work and skill in the performance of some service for her master?" I find the answer to this question is no. I find there was no wage/work bargain in this case. The claimant did not work in exchange for a wage. The first respondent did not provide work for the claimant to do. The first respondent did not pay her.

141. What occurred was that the claimant was selected, on the basis of her potential, to take part in the first respondent's World Class Programme (also referred to as the Podium Programme). By 2015 she was taking part at the elite level on the Olympic Podium Programme. This was reflected in the legal agreement, the Athlete Agreement. The purpose of the Agreement was "to recognise the ultimate goal of everyone involved in the Podium Programme to win medals for the British Team at international competitions" (see page 2.1.1).

142. The claimant's responsibilities under the Agreement are set out at paragraph 6. Her primary responsibility was the individual rider plan. She agreed to develop and agree an individual rider plan in close consultation with an individual identified by British Cycling. In other words, she agreed to train in the hope she would be selected to compete for the British Cycling Team.

143. To enable her to have the best chance to do this the British Cycling offered her extensive services as detailed in the findings of fact above and see paragraph

5.1.5 of the 2015 Athlete Agreement at page 701 although she was not obliged to take up those services. See the evidence of Mr Barnes referred to above. Indeed she was not required to use the coach allocated by British Cycling. The Agreement makes it clear she could use her own coach.

144. The claimant did not receive money from British Cycling, the first respondent. There is no provision within the Athlete Agreement (see pages 698-725) for any money to be paid to the claimant. Instead the claimant was eligible as an athlete who has been selected for British Cycling's Podium Programme to apply for a National Lottery funded Athlete Performance Award (APA) which I find was a non repayable means tested grant and thus a contribution towards her living and/or sporting costs as an elite athlete.

145. I find it is significant that the APA was not funded by British Cycling, the first respondent. The APA was funded by the National Lottery and the claimant had to apply to UK Sport, the second respondent, for such an award.

146. Although the claimant was only eligible for such an award if she had been selected for British Cycling's Academy or Podium Programme, there was no absolute guarantee that she would receive such an award. Ms Nicholl explained that UK Sport retained an inherent discretion to reject the application. In addition, there were athletes on the Olympic Podium Programme who did not receive an award because their means meant they were not eligible.

147. Another feature of the award from UK Sport was that it was variable. I rely on my findings of fact to show that over the ten years the claimant received an award in accordance with UK Sport's Development Programme she received different levels of award, sometimes at the highest level (A) but at other times at the lower level (B). The amount varied, not on the basis of the level of the claimant's past efforts in training and competing but on the assessment of her future potential.

148. I entirely accept the evidence of Ms Nicholl to find that unlike conventional wages, the sum was not payable on the basis of past performance or past results, or past work done. Instead the award was considered on an annual basis by considering the future potential of an athlete. Although Ms Nicholl accepted that past performance would be a factor in making that assessment, she stressed the basis of the assessment was the athlete's future potential: it was in future potential that the National Lottery Fund via UK Sport was seeking to invest.

149. In order to obtain an award from UK Sport, the claimant had to complete a detailed application form and include details of her means because the award was means tested. The claimant was quite clear in evidence that she was careful to fill in that part of the form accurately.

150. I reject the suggestion by the claimant in evidence that she was in some sense compelled by British Cycling to complete an application for the APA. I find the chasing emails in the bundle are no more than that. I find those emails show that those who coached the claimant had her best interests at heart and tried to ensure she completed the relevant paperwork so she could be considered for funding from UK Sport.

151. I rely on the fact the funding was from a third party, the fact the claimant had to submit an application for funding, the fact the award was means tested and the fact that the funding was a grant where the award was based on assessment of likely future potential, not on the basis of work done in the past as factors which mean the claimant was not providing work or skill in consideration for wages or remuneration, for the first respondent.

152. I remind myself that Mr Justice Langstaff held in **Cotswold Developments Construction Ltd v Williams 2006 IRLR 188** in relation to mutuality of obligation that it is important to know precisely what is being considered under that label. "Regard must be had to the nature of the obligations mutually entered into to determine whether a contract formed under those obligations is a contract of employment, or should be categorised differently. A contract of employment where there is no obligation to work could not be a contract of employment". Later he states; "The focus must be upon whether or not there is some obligation upon an individual to work and for the other party to provide or pay for it"

153. In this case I find that that not only did the first respondent not provide the claimant with remuneration, neither did they provide work for the claimant. I remind myself I must scrutinise the nature of the Agreement. I find the obligations of the parties under the Athlete Agreement do not amount to a mutuality of obligation. The first Respondent selected the claimant for the World Class Programme. They did not provide her with work. She agreed to train in accordance with the individual rider plan in the hope she would achieve success in international competition.

154. I find therefore the claimant's claim of employment by the first respondent fails at this point because I find there is no mutuality of obligation between the claimant and the first respondent.

155. However I turn to consider the two components of the other "irreducible minimum" necessary for a contract of employment: personal performance and control.

Personal Performance

156. Superficially, it appears the category of personal performance here is consistent with a contract of employment. There is obviously no dispute that it was the claimant who performed the rider plan as set out in her Agreement with British Cycling. It is certainly not a case where there is a power of substitution. It was inevitable it was the claimant who must train in accordance with the rider plan.

157. However, I consider more closely what exactly was the claimant's personal performance under the terms of the Athlete Agreement. Her personal performance was necessary in relation to her agreement to train in accordance with the individual rider agreement. There is no doubt the claimant put in huge amounts of personal effort to train hard. However I have already found that the first respondent was not providing the claimant with work so care must be taken with the concept of personal performance. The claimant personally performed the agreement to train under the individual rider plan-that is obvious and inevitable: she had been individually selected because of her own ability to be on the programme. However she was not personally

performing work provided by the respondent. Rather she was personally performing a commitment to train in accordance with the individual rider agreement in the hope of achieving success at international competitions. I find that does not amount to personal performance consistent with a finding of a contract of employment.

Control

158. I turn to consider how control was a feature of the relationship between the claimant and British Cycling. I consider it was a significant feature.

159. There is no dispute that the claimant's training programme was governed by her individual rider plan. Although that plan was agreed between the claimant and her coach many aspects of her life including what she ate how, when and where she trained were closely controlled by British Cycling.

160. When the claimant could have time off was sometimes restricted. The example from Christmas 2012 shows that there was very limited flexibility in terms of time off for the claimant at certain points in the training calendar.

161. The claimant agreed to control in terms of her media image and in terms of contractual appearances for the first respondent (see the sections of the Athlete Agreement where she agrees to image rights). The media guidelines are reflective of that as are the tweets in the bundle where the claimant is directed what should she say in certain situations.

162. In terms of the claimant's personal media arrangements, the claimant needed permission to British Cycling before engaging in media appearances.

163. The claimant was restricted in terms of her personal commercial work (see clause 6.24 at page 713).

164. In her evidence, the claimant gave other examples in relation to control. I find that some of the early examples she relied upon were not illustrative of extreme control. Rather, they were illustrative of coaches behaving in a way commensurate with their duties in loco parentis where the athletes were under 18. For example, an email in 2008 (see page 1033) castigating team members for having a dirty bike. I found the relationship between the claimant and her coach Mr Dyer to be a collaborative relationship.

165. In conclusion the claimant was subject to control as reflected in the clauses of the Athlete Agreement referred to above. However as I have already found there is no mutuality of obligation and no personal performance consistent with a contract of employment, there is therefore is no contract of employment. The claim the claimant was employed by the first respondent fails at this stage.

166. At the submissions stage the claimant's representative sought to argue that the benefits alone supplied to the claimant by British Cycling under clause 5.1.5 (pages 701 and 702 of the Athlete Agreement) were sufficient to amount to remuneration. These services, benefits and other support are listed at 5.1.5 as:-

(i) Training competition and Personal Development planning and Review;

(ii) Coaching Support (from a person with appropriate qualifications);

(iii) Team Clothing and Equipment;

(iv) Sport Science Support;

(v) Medical Services;

(vi) Lifestyle Management And Personal Development Support Performance Lifestyle;

(vii) Travel & Accommodation expenses at designated camps & events;

(viii) Podium Programme Information and Advice;

(ix) BOA/BPA Passport Scheme;

(x) Kit, equipment and performance clothing we reasonably consider as required by you in order to perform as an elite athlete in the sport. The kit equipment and performance clothing etc will be of high standard and delivered in good time to allow you to test and familiarise yourself with it in advance of competition;

(xi) Appropriate access to facilities;

(xii) Support from commercial partners deemed appropriate by British Cycling in its sole discretion from time to time.

167. I find that the services provided to the claimant by British Cycling are not and were not regarded by the parties at the time, as remuneration.

168. I find that the benefits provided under the contract at 5.1.5 are benefits and not remuneration. In making this finding I rely on the nature of the two most important services listed at (i) and (ii) of clause 5.1.5. The first benefit is described as “training, competition and personal development planning and review” and the second benefit is described as “coaching support”. I find those are genuinely services, not remuneration.

169. In addition there was no obligation on the claimant to accept coaching support from the coach supplied to her by British Cycling. Clause 6.1.3 makes it clear that the claimant was entitled to engage the services of a personal coach. This is reflective of a finding that these genuinely were services provided to the claimant rather than remuneration.

170. Likewise, I accept the evidence of Mr Dyer whom I found to be a clear, conscientious and careful witness. I rely on his evidence to find that the services provided under the contract are services not remuneration. He explained that one of the types of support available to athletes under the elite Podium Programme was psychological support, but some athletes chose never to avail themselves of that support. That is suggestive of a service which is open to the athlete to use or not, rather than remuneration.

171. Clause 5.1.5 states “the services are “general services benefits and other support” and they are “designed to support you in delivering your individual rider plan.” This language suggests the reality I have found-the services are available to support the claimant in her training. They are not remuneration awarded in exchange for work or skill performed.

172. Furthermore the provision of the benefits is not automatic: Clause 5.1.5 states; “The level or amount by which you are entitled to enjoy any of the services benefits and other support is decided upon your individual circumstances and is at the discretion of the programme”. An inherent discretion on the part of British Cycling in allowing enjoyment of a particular benefit or service is inconsistent with a finding that these benefits amount to remuneration.

173. Finally, although how the parties are taxed is not definitive in assessing an employment relationship, it is interesting and relevant to note that the benefits received under the Athlete Agreement by the claimant, which have a very significant monetary value are not regarded as taxable by the Revenue.

174. For these reasons I find that the services and benefits provided under the Athlete Agreement are not remuneration. I find there is no mutuality of obligation between the claimant and the first respondent because she was not provided with remuneration in exchange for work. I find the first respondent did not employ the claimant.

175. The other alternative presented on behalf of the claimant at the submissions stage was that British Cycling alone was the employer and UK Sport acted under their direction in providing the APA, performing a largely administrative function.

176. There are cases where the employee has been found to be paid a wage by a third party although I was not directly referred to them e.g. **Carmie v Rodger t/a Dalneigh Post Office and Stores) UKEAT 50036/11**.

177. I was referred to **Quashie v Stringfellow Restaurants Ltd [2013] IRLR 99 CA**. In that case the case the court noted that: “There will nonetheless be an unusual case where a contract of service is found to exist where the worker takes the economic risk and is paid exclusively by third parties”

178. Of course the facts are different in this case. Here the claimant was in receipt of a grant from the second respondent. I find that there was no arrangement in this case by British Cycling to secure payment to the claimant by a third party, i.e. UK Sport. I find that with the claimant's best interests at heart her coaches at British Cycling encouraged her to apply for a grant with UK Sport but it was up to the claimant whether or not she did so and it was within UK Sport’s discretion to accept or refuse the application for an award. Indeed Ms Nicholl told us given the means tested nature of the application athletes who earned significant amounts did not receive an award.

179. This evidence is inconsistent with a finding that UK Sport acted under the direction of British Cycling to provide the APA to the claimant.

180. For all these reasons I find there is no mutuality of obligation between the claimant and British Cycling and her claim that she was employed by the first respondent fails at this point.

181. At the submissions stage the claimant's representative also argued that there was a tripartite arrangement whereby different elements of the employer role were fulfilled by each respondent. He submitted that this analysis, based on the evidence of Ms Nicholl best fitted the facts.

182. Ms Nicholl was a clear convincing and persuasive witness. However I do not find that her evidence suggests there was a tripartite arrangement whereby different elements of the employer role were fulfilled by each respondent.

183. Ms Nicholl gave evidence that there was a funding arrangement between UK Sport and British Cycling as evidenced by the funding arrangement GFA and as illustrated in the diagram attached to her statement. She explained there is a four year funding cycle in terms of UK Sport providing money to British Cycling, just as it invests in Governing Bodies for other sports.

184. As part of the GFA, British Cycling as the relevant Governing Body of that support submits a business case/strategy to UK Sport. This details how the governing body proposes to achieve Olympic or Paralympic Performance targets (as agreed with UK Sport) plus Key Performance Indicators and annual milestone targets leading up to the relevant games.

185. However, it is the responsibility of British Cycling to make all critical decisions within their own sport. It is up to British Cycling to decide to whom it will offer an Athlete Agreement.

186. UK Sport also provides a template Athlete Agreement which it provides to all sporting governing bodies.

187. Ms Nicholl also gave detailed evidence which I have referred to above that when an athlete who had the benefit of an Athlete Agreement and was eligible to apply for an athlete award, "APA", UK Sport exercised its discretion whether or not to make the award.

188. Although there was a close relationship between UK Sport and British Cycling, as there is with many other sporting Governing Bodies in terms of funding and forward planning of that funding I am satisfied there is nothing to suggest any sort of "tripartite arrangement" in the sense UK Sport and British Cycling both acted as the employer.

189. I was not taken to the cases which involve a tripartite arrangement although reference was made to Quashie which is a tripartite case, in another context.

190. When considering whether there is a contract of employment under a tripartite arrangement I must still go back to the test in **Ready Mixed Concrete:**

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

(2) Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?

(3) Were the other provisions of the contract consistent with it being a contract of service?

191. The answers to these questions remain "no".

192. The claimant was training as an athlete, an elite sprint cyclist in the hope she would be selected to represent Great Britain in international competitions. She was not *working for* either the first or the second respondent or both of them under a tripartite arrangement. She was receiving a non-repayable publicly funded grant from the second respondent to enable her to pay her living expenses so she could have the best chance of focussing on her training, without the need to take a job. She was receiving benefits and services from the first respondent to enable to have the best chance to achieve her goal of being selected to compete at the highest level.

193. I rely on my findings above that there was no contract of employment because there was no mutuality of obligation between the claimant and the first respondent, nor between the claimant and the second respondent nor between the claimant and both respondents in a tripartite arrangement.

194. Therefore for all these reasons the claimant was not an employee of the first respondent, or of both respondents under a tripartite arrangement.

195. In reaching this finding I have reminded myself of the statement of general principles in the Agreement at page 699, which states:

"(1) We both recognise that the ultimate goal of everyone involved in the Podium Programme is to win medals for the British Team at international competitions;

(2) Acknowledge that this Agreement is not a contract of employment; and

(3) Acknowledge that all the obligations and duties which we accept under this Agreement are beneficial to the effective management of the Podium Programme."

196. The claimant acknowledges that:

"The obligations and duties in relation to this Agreement are beneficial to your own professional development as a high performance athlete and to assist and enable you to win medals at international competitions."

Does the agreement between the parties reflect the reality?

197. I remind myself that the parties' stated intention as to the status of their working relationship in law may be a relevant factor, but the court will look to the substance of the matter. I remind myself of the case law in relation to sham contracts in **Consistent Group Limited v Kalwak & Others [2008] IRLR 505 CA**, and **Snook v London & West Riding Investment Limited [1967] 2 QB 786 CA**. I remind

myself of the more recent cases of **Firthglow Ltd (t/a Protectacoat) v Szilagyi [2009] ICR 835 CA**, and of course **Autoclenz v Belcher & Others [2011] ICR 1157**. I remind myself that the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in fact represent what was agreed. I remind myself that I need to examine all the relevant evidence, including the written term itself, read in the context of the whole Agreement. I must remind myself of how the parties conducted themselves in practice and what their expectations of each other were.

198. I accept that there was some inequality of bargaining power between the parties in the sense that certainly when the claimant was first was selected for the academy programme and was asked to sign the Athlete Agreements governing her relationship with the respondent, she was a schoolgirl. I find she was a young athlete hoping to complete at the highest level. I find at that stage the agreement was signed by one of her parents.

199. British Cycling is a membership organisation but also cycling's National Governing Body. It offered the claimant an opportunity to train at the highest level. It is a matter of common sense that there will always be hopeful young athletes keen to train hard and perform their best with a view to winning medals in international competitions. To that extent there is likely to be an inequality of bargaining power between the parties- a hopeful young athlete and a National Organisation for that sport.

200. However, that is the extent of my finding in relation to this matter. The claimant was always encouraged to seek advice on the terms of the Athlete Agreement. When she was under 18, as one would expect, it had to be signed by one of her parents. The claimant accepted that prior to signing the 2008 Agreement she obtained advice. She agreed that 2008 was when she moved to the Olympic Academy Programme and to Manchester where she lived in subsidised accommodation close to the velodrome after finishing her A levels.

201. As she became older and a more experienced and successful athlete, she started to attract commercial sponsorship. By 2010 she had set up her own company. The claimant also obtained the services of an agent by that stage to advise her.

202. I find by this stage she was certainly taking advice on the Athlete Agreement and listening to the advice because she described in evidence how in the later years she sometimes delayed signing the Athlete Agreement because she was concerned about losing a sponsorship agreement where she was unsure whether the agreement proscribed her being involved in certain "deals". She said, "I actively put off signing it" and "Our agency did not always agree". Although the claimant said she did not look in detail at the Agreement, this suggests that she was at least aware of the conflict clauses in relation to commercial sponsorship.

203. I find the opportunity to obtain advice on the agreement whether from her parents or an agent so the claimant was clear about its terms ameliorates the inequality of bargaining power between the claimant and the first respondent.

204. I find that the terms of the Athlete Agreement accurately reflected the true arrangements between the parties. In reaching this finding I rely on the fact I have found the relationship between the claimant and her coach, Mr Dyer, was collaborative. I find the only occasions where that was not the case was when she was a young athlete under 18, and the incident in relation to time off over Christmas 2012. I find that example, together with the example of the claimant going to watch another athlete at Strictly Come Dancing and the example given by the claimant's partner of another athlete being advised not to attend Wimbledon were no more than examples of a coach indicating why they consider a social arrangement is not in the athlete's best interests.

205. I find it is inevitable, as an athlete develops from a young person still at school living with their parents to an independent young adult, that the athlete will have stronger views of their own. In the example of the attendance at Strictly Come Dancing and the attendance at Wimbledon on each occasion the athlete went to the social engagement despite the advice of the coach. I find that on each occasion the coach was of the view that it was not in the best interests of the athlete given the journey, and in the claimant's case a forthcoming competition, and in the other athlete's case the fact that the athlete had been undergoing rehabilitation for an injury. However, in each case the athlete did as they wished. No disciplinary action was applied. I therefore find this is indicative of a working relationship as suggested under the Agreement, namely that the athlete agrees that they will agree and develop an individual rider plan in close consultation with an individual nominated by British Cycling, and "you shall inform us in advance of any private commitments which might impact on your participation in the Podium Programme and permission for such absence will be in the absolute discretion of the senior management team".

206. The claimant agreed the clauses in relation to clothing and equipment, namely that she would wear and use the clothing and equipment supplied to her and to undertake public appearances (see page 710 clause 6.12). She accepts she was subject to the requirements in relation to media image and commercial sponsorship.

207. I accept that the claimant's evidence that she did not look in detail at the Athlete Agreement when she signed it but I find she was given the opportunity to take advice, however in the latter stages of her career she did so.

208. For these reasons I find the Athlete Agreement accurately reflects the reality of the situation and accordingly is not a sham.

209. I find the clause stating there is no contract of employment at 2.1.2 of the Athlete Agreement "We both acknowledge this is not a contract of employment" and at 2.2.4 "becoming a member of the Podium Programme and your participation in podium programme activities will not create an employment relationship between us" at pages 699 and 700 is accurate.

210. However, in case I am wrong in my findings that there is no mutuality of obligation under this contract and in case I am wrong about my finding that the Athlete Agreement accurately reflects the relationship between the claimant and British Cycling and is not a sham, I go on to consider the other factors.

211. I remind myself of the guidance in **Hall (Inspector of Taxes) v Lorimer [1994] ICR 218 CA** where the Court of Appeal upheld the decision of Mr Justice Mummery in the High Court who stated that:

> "This is not a mechanical exercise of running through items on a checklist 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."

212. So far as equipment was concerned I find the claimant, like other cyclists on the programme, was provided with state-of-the-art equipment and the very best experts to support her.

213. However I find she was not obliged to use this equipment. I rely on the evidence of Mr Dyer that some athletes on the Programme supplied their own helmets to illustrate this. Mr Dyer gave evidence that Mr Skinner used his own helmet in the Olympics as did Phil Hines. Mr Dyer explained that overcoming air resistance is a crucial feature at elite cycling and the choice of the correct helmet is crucial.

214. I rely on the fact that Lazer who provided the helmets for most of the Podium Programme cyclists did not supply helmets for the BMX riders on the programme and so they supplied their own as evidence to illustrate that the claimant was not obliged to use the equipment offered to her.

215. For the purposes of considering employee status the fact that although equipment was made available to the claimant, she could choose her own helmet if she wished points away from employee status. Likewise in relation to other equipment, Mr Dyer explained that most athletes wished to use the state-of-the-art equipment provided to them but if there was a particular reason why a different piece of equipment was required then consideration could be given to using it.

Policies

216. There is no dispute that there was a Disciplinary and Grievance Policy at pages 806-7 and Code of Conduct policy at page 700 particularly directed at athletes which is consistent with employee status. However, British Cycling is a membership organisation and the other policies in particular the Equality Policy pages 796-7 were applicable to the members not just the athletes, which points against employee status.

Relationship between the parties

217. The first respondent had a right to termination of the Athlete Agreement. This factor is consistent with employee status.

218. I rely on the evidence of the first respondent that it was not possible for the athlete to negotiate terms of the Athlete Agreement. The requirement to take advice

was to consider the implications of the agreement, not to negotiate on the terms. This was borne out by the evidence of the claimant's agent who failed to negotiate any changes in the agreement. The inability to negotiate individual terms is a factor inconsistent with a finding of employee status.

219. British Cycling is a membership organisation. As part of the Athlete Agreement, the claimant was obliged to be a member of it. See clause 3.1.3 at page 700. This points away from employee status.

Financial Arrangements

220. I have already referred to the fact that the claimant did not receive any money from the first respondent. Indeed in the Agreement she agreed that the respondent could request "a portion of the National Lottery Athlete Performance Award to our reasonable costs of providing the services, benefits and other support available to you under the Programme" (see page 702).

221. Furthermore, the claimant was responsible for her own tax and financial affairs. Clause 2.2.5 of the Athlete Agreement states, "You are solely responsible for managing your personal financial and tax affairs, including the payment of any tax which might arise on any payments or provision of services benefits and other support available to you by us under and in connection with this agreement". Such a provision is not consistent with employee status.

222. The claimant was in business on her own account. She had her own company, Jess Varnish Management Limited. She explained in cross examination she set that company up for tax reasons and she was an employee of that business. In evidence she explained she saw herself as a brand. She accepted commercial sponsorship and there are examples of this in the bundle, especially Boots and Adidas.

223. She had concerns about signing the Athlete Agreement because of the commercial restrictions under the Agreement causing potential conflict between British Cycling and her own business and therefore her ability to earn sponsorship. Of course there are examples in the case law where an individual may be self-employed in one business relationship and an employee in another business relationship, but in the factual scenario where the individual is in business on their own account and there is a tension between commercial arrangements between that business and the working relationship she has with the first respondent points away from employee status.

Integration

224. The claimant was integrated into the first respondent's organisation, working closely with her coach and wearing the team clothing and training at the Manchester Velodrome. This points towards employee status.

Tax Arrangements

225. The cases often state that tax arrangements between the parties are not definitive in relation to the employment relationship between the parties. However it

is a factor to consider. There is no dispute that the benefits the claimant could choose to receive under the Programme were not regarded as taxable by HMRC. This points against employee status.

Media Guidelines

226. I turn to the Social Media Guidelines (pages 823-852) and the restrictions in the Athlete Agreement in relation to the claimant's contact with the General Media at clause 6.20-3 at page 712. These restrictions are reflected in the emails encouraging the claimant to speak "on message" and in the comments made by Mr Harrison at page 1583(a) and (b), although rapidly corrected. These restrictions on the claimant on how she could communicate with the media point to employee status.

Contractual requirements for appearances and Commercial restrictions

227. It is a requirement for the claimant to attend up to 10 contractual appearances, including three for the Lottery (see page 710). Like the commercial guidelines and the commercial arrangements in relation to sponsorship at pages 713-4 in the Athlete Agreement, these point to employee status as they are restrictive.

Conclusions

228. At this point I step back and look at the whole picture as advised by Mr Justice Mummery. The claimant was an athlete. She wished to perform to the best of her ability and to represent her country at international competitions. British Cycling wanted to assist athletes who could perform in international competitions at the highest level and win medals. British Cycling selected the claimant for their Podium Programme. She agreed to participate in a detailed training plan. To support her in her training they offered her state-of-the-art equipment and a range of services to which she could avail herself should she wish.

229. The cost of providing these services by British Cycling was met partly from public funds (the National Lottery) and partly from funds raised by commercial sponsorship. The claimant was restricted in terms of her own commercial sponsorship and media appearances.

230. The claimant received no money from the first respondent and could choose her own coach if she wished. She could choose her own equipment in certain circumstances if she wished. The money she did receive was from another party, UK Sport, was a non repayable grant and was not based on past "work" but rather on her future potential. It was means tested and variable.

231. I find the picture wholly inconsistent with a contract of employment with the first respondent. I find she was not employed by the first respondent.

Was the claimant a worker for the first respondent?

232. I turn to the second issue: was the claimant a worker for the first respondent? The term "worker" is more widely defined than the term employee.

233. I remind myself that section 230(3) states:

> "In this Act 'worker' (except in the phrases 'shop worker' and 'betting 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."

234. I turn to consider limb (a). Did the claimant enter into or work under a contract of employment?

235. I find the answer to that question is no. I rely on my findings above that the relationship between the claimant and the first respondent as reflected in the Athlete Agreement was not a contract of employment. I rely on my findings above that firstly there was no mutuality of obligation between the parties and secondly the personal performance on the specific facts was not consistent with a contract of employment.

236. I therefore turn to limb (b) of s230(3) ERA 1996.

237. I must ask myself two questions. Firstly, is there a contract "whereby the individual undertakes to do or perform personally any work or services for another party to the contract?" In other words, has the individual entered into a contract for/to provide services to the other party to the contract?

238. Secondly, if so, what is the nature of the relationship between the parties by virtue of the contract? Is the suggested employer "a client or customer of any profession or business undertaking carried on by the individual"?

239. I refer to mutuality of obligation. The case law is not entirely clear as to whether mutuality of obligation is required as a distinct requirement under limb (b). In **Byrne Brothers (Formwork) Ltd v Baird** the EAT said obiter that it was: "We accept that mutuality of agreement is a necessary element in a 'limb b' contract as well as in a contract of employment".

240. In **Cotswold Developments Construction Ltd v Williams 2006 IRLR 181** the EAT held the claimant need not show there is a mutuality of obligation in the sense of a requirement to provide or pay for work on the one hand and the obligation to perform it on the other in order to fall within the "limb b" definition. It stated the real question is whether there is a minimum amount of work the claimant is obliged to perform.

241. If mutuality of obligation is required as a distinct element under "limb b" I find for the reasons I have given above in this judgement in relation to whether the

claimant was an employee, that there is no mutuality of obligation and so “limb b” is not engaged.

242. Alternatively, if the real question is whether or not there is some minimum amount of work that the claimant is obliged to perform personally, I find that the answer to the question is that there was not. The claimant was not personally performing work for British Cycling. She was training in accordance with the rider plan in the hope she would be selected to compete in international competitions.

243. .

244. I also rely on my finding that the claimant was not *working for* British Cycling. She was an athlete training in accordance with the individual rider plan. She was not undertaking to do or perform personally any work or services for another party to the contract.

245. I find that this is not a contract for services. The Athlete Agreement is a contract where services are provided to the claimant, not the other way around. I find the analogy with education which has been put in this case by the first and second respondents counsel to be helpful. I rely on the principle in the old case of **Daley v Allied Suppliers [1983] ICR 90 97F-98E**, that the relationship is not one of employment where the purpose of the contract is training for the benefit of the trainee.

246. In stepping back to look at the true nature of the relationship between the parties I remind myself of the purpose of this section in the Employment Rights Act 1996. It is to give employees and workers jurisdiction to bring certain types of claim, including a claim for enforcement of wages under Part II of the Act as clearly expounded to me by the first respondent’s counsel. I rely on my findings above there were no wages paid by the first respondent under the terms of the Athlete Agreement The only remuneration available to the claimant under the contract with the first respondent was potentially benefits and services. The general nature of the services is set out in the Athlete Agreement at 5.1.5, at page 701.

247. I heard evidence that there are a wide range of benefits available including world class coaching, top quality clothing and equipment and a dedicated support team including mechanics, together with access to physiotherapy, massage, medical support, nutritionists, biomechanics, psychologists, lifestyle management experts and sports scientists. In addition, the claimant had the benefit of personal accident insurance, travel insurance, travel and accommodation for training camps and competitions, world class facilities and a passport scheme. I rely on the evidence of Mr Dyer that different athletes chose to avail themselves of different parts of this Programme. It is very difficult to understand how the mechanism of Part II in relation to wages could apply. I find this is a pointer to my original finding that the fact the claimant was availing herself of benefits offered to her, she was not providing services to the first respondent.

248. I rely again on the factors set out in the section of my judgement above dealing with employee status to find the picture is not consistent with worker status.

249. Accordingly, for these reasons the claim fails under "limb b" at that point. There is therefore no need for me to ask myself the second question and to deal with the so-called "carve out" provision, namely "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" (section 230(3)(b)).

250. Accordingly, I find that the claimant is not a worker for the purposes of the definition in ERA 1996.

251. I turn now to the third issue: is the claimant employed as an employee under a contract of employment, a contract of apprenticeship or a contract personally to do work within the meaning of section 83(2)(a) of the Equality Act 2010 by the first respondent?

252. I must of course, given the Equality Act 2010 implements rights which are enshrined in EU Directives, read this definition as far as possible compatibly with the autonomous concept of worker or employee under EU law. I remind myself of the principle in **Jivraj v Hashwani [2011] ICR 1004**. In that case the Supreme Court referred to European Court of Justice case law such as **Allonby v Accrington and Rossendale College & Others [2004] ICR 1328**, ECJ, which draws a clear distinction between "workers on the one hand and independent suppliers of services who are not in a relationship of subordination with the person who receives the services on the other". If the dominant purpose of the contract is relevant it is not the sole test for determining employment; the relationship between the parties should also be considered.

253. For present purposes all parties agree there is no relevant difference between the test under EU law and that which is applicable under UK law.

254. The claimant was not, for reasons already given, under a contract of employment. She was not under a contract of apprenticeship. I refer back to my findings of fact as to the relationship between the parties.

255. The statutory definition does not explicitly require that there be remuneration paid for the services. I am satisfied as submitted by the first respondent's counsel that it is implicit, given statutory protection does not extend to volunteers, that the statutory definition includes remuneration. See the decision of the Supreme Court that the statutory employment protection does not extend to volunteers in **X v Mid Sussex CAB [2013] ICR 460 UKSC**.

256. The claimant was a talented athlete who agreed that her goal, like the goal of everyone involved in the Podium Programme, was to win medals for the British Team, in international competition. To that end she agreed to develop a dedicated performance plan incorporating her individual training. I rely on my finding that the dominant purpose of the Athlete Agreement was the joint "ultimate goal of everyone involved in the Podium Programme to win medals for the British Team at internal competitions". To assist the claimant to fulfil this goal British Cycling provided services, facilities and benefits.

257. At this stage it is worth repeating that the analogy of education is most helpful in this case. As was submitted by counsel for both respondents, the relationship between the claimant and the first respondent is much more akin to the relationship between an Institute of Higher Education such as a University where education including teaching, lecturing and other services, is provided to the student. Funding is nowadays provided by a loan but historically was provided by a grant. The funding provided to the claimant is analogous to a grant. I rely on the evidence of Ms Nicholl in that regard. I rely on the finding in **Daley v Allied Suppliers** that the relationship is not one of employment where the purpose is training is for the benefit of the trainee. The claimant wanted to be the best athlete she could possibly be and the dominant purpose of this contract to enable her to do so.

258. For these reasons, and relying on my findings earlier in this judgment in relation to worker status, the claimant does not fall within the definition of section 83(2)(a) Equality Act 2010.

259. In reaching that finding I remind myself that as someone having the benefit of services under the Athlete Agreement, the claimant would have been able to bring a claim against the first respondent under section 29 Equality Act in the County Court on the basis it was a service provider.

Was the claimant employed by both respondents under a tri partite arrangement?

260. Finally, I turn to the argument of the claimant's representative in closing submissions that there was a tripartite arrangement whereby different elements of the employer role are fulfilled by each respondent. In so far as this argument is being relied upon to suggest that the claimant is a worker within the meaning of the ERA 1996 or the Equality Act 2010, I rely on my finding that the claimant was not *working for* British Cycling or UK Sport or both of them under a tripartite arrangement. She was an athlete training in accordance with the individual rider plan. She was not undertaking to do or perform personally any work or services for another party to the contract, which I find was the Athlete Agreement. She was receiving services and benefits from British Cycling, not as remuneration but to enable her to have the best chance of achieving her goal of selection for international competition.

261. In addition, she received a non-repayable grant from UK Sport funded by another party the National Lottery. There was a connection between the funding arrangements in the sense UK Sport part funded British Cycling and was the organisation to which the claimant applied for a grant but this funding arrangement does not mean the claimant worked for both those organisations.

262. These findings are not consistent with a finding that the claimant was a worker under a tri partite arrangement, either under s230(3) ERA 1996 or s 83(2) Equality Act 2010.

Was the claimant an employee of UK Sport?

263. I now turn to the second respondent, UK Sport.

264. UK Sport is a public body providing funding to the British Cycling Federation as the sport's governing body, under a Grant Funding Agreement "GFA" (see page 572-631 for an example of the GFA).

265. British Cycling also provides funds to athletes via an Athlete Performance Award ("APA").

266. When an athlete has been offered an APA they are provided with a copy of the United Kingdom Sports Council World Class Performance Programme Athlete's Performance Award Terms and Conditions (see pages 527-534). The terms and conditions state:

> "The APA is a contribution towards your essential personal living and sporting costs associated with the training and competing at world class level under the WCP Podium or Podium Potential Programme and must be used solely for the purposes for which the APA is made." (Page 5.7 para 1.3).

267. The terms and conditions go on to state that the athlete and UK Sport agree that they are "independent contractors and nothing shall be taken to construe an employment contract between you, the athlete, and us, UK Sport, and the athlete acknowledges that UK Sport has not made any deduction for income tax or national insurance contributions from any amounts paid to you (the athlete) under this Agreement". The APA also reminds the athlete they are responsible solely for managing their personal financial and tax affairs (pages 533-534 paragraphs 12.1 and 12.2).

268. The claimant agreed that the APA was a non repayable,tax free grant from public funds to help her fulfil her dream of becoming an athlete. I find the second respondent was purely a funding body providing that tax free grant to the claimant, exactly as she agreed in evidence. The Funding Agreement "APA" fully reflects that.

269. The guidance from HMRC states, "The APA is voluntary grant given for nothing in return" (see page 1019A-1019C).

270. In addition the APA varied over the years that the claimant was in receipt of it, was subject to detailed means provision and was provided solely at the discretion of UK Sport. Although the claimant had to be on a World Class Academy or Podium Programme to be eligible for the award, the second respondent retained an inherent discretion to reject the application for an award. It was not purely a "rubberstamping" exercise.

271. The claimant agreed she had no day-to-day relationship with UK Sport. UK Sport does not control the athlete's training and does not provide facilities or equipment.

272. The only commitment for the athlete is found at clause 7 of the APA Terms and Conditions (pages 532-533), that the athlete in receipt of an APA grant agrees to the use of their image and to carry out a maximum of three National Lottery appearance days every year. I find this is for the benefit of the National Lottery rather

than for UK Sport. UK Sport as a distributing body is encouraged to promote and publicise the benefits that the National Lottery funding has had.

273. In fact, the claimant could not recall ever appearing for the National Lottery and the second respondent had no record of her ever doing so either. This is unsurprising given Ms Nicholl's evidence of the wide number of athletes covered by these agreements, and therefore the substantial number of potentially available days.

274. I turn to the **Ready Mixed Concrete** test. I find there was no mutuality of obligation in terms of the "wage/work" bargain between the claimant and the second respondent. The claimant was simply provided with a tax free grant to enable her to fulfil her dreams as an athlete. The second respondent did not provide her with work. I find there was no day-to-day relationship between the claimant and UK Sport. There was no personal performance in relation to them, and save for the clause in relation to the National Lottery, they had no control over her.

275. In terms of mutuality of obligation, I remind myself again that the grant was provided on an annual basis based on the assessment of future performance by British Cycling; it was not a "payment" for past performance in any sense.

276. The only other restraints on the claimant were to ensure that public money was used appropriately, for example, there were provisions about anti-doping and gambling in the Agreement.

Did the agreement reflect the reality between the parties

277. I turn to consider the issue of whether or not the claimant's agreement with the second respondent was a "sham" or whether it accurately reflected the relationship between the parties. I refer to the case law earlier in this judgment.

278. I find the APA accurately reflects the arrangement between the claimant and the second respondent, which was essentially funding arrangement. The agreement is not a "sham". To the extent there is an inequality in bargaining power, this is ameliorated by the fact claimant was encouraged to take advice before applying for the APA and indeed in the latter stages confirmed that she had received advice from her agent and her accountant.

279. I therefore find the claimant was not employed by the second respondent because there was no mutuality of obligation, she did personally perform any work for UK Sport and they had no direct control over her save in relationship to appearances for a third party, the National Lottery.

280. At the submission stage the claimant's representative argued that UK Sport was the employer and they delegated the running of the World Class Programme to British Cycling while retaining ultimate oversight and final power to intervene and monitor who is on the programme and levels of funding.

281. I find that it is factually incorrect to state the second respondent delegated the running of the World Class Programme to British Cycling. I rely on the evidence of

Ms Nicholl that British Cycling was responsible for running the Programme and for all critical decisions within the sport.

282. I rely on her evidence to find the role of UK Sport is best described as advising, guiding supporting and monitoring British Cycling, as it does with Governing Bodies of other sports.

283. I find UK Sport does not employ the claimant for the reasons I have already given.

Was the claimant a worker for the second respondent?

284. I turn to the worker test at s 230 (3) ERA 1996.

285. In relation to limb "a" I rely on my findings above that there was no contract of employment between the claimant and the second respondent. In particular there was no mutuality of obligation and no personal performance. So far as control is concerned it was exercised only in an extremely limited way in relation to potential appearances for the National Lottery. The provision about appropriate behaviour is consistent with the proper discharge of public funds and is not consistent with a finding of control in an employment relationship.

286. I turn to "limb b". Firstly, is there a contract "whereby the individual undertakes to do or perform personally any work or services for another party to the contract? In other words, has the individual entered into a contract for/to provide services to the other party to the contract?

287. The answer to these questions is no.

288. The claimant had no ongoing relationship with UK Sport. She did not perform any work for them. Her only obligations were appearances for another party, the National Lottery, for up to 3 days during the course of the agreement. The appearance was not for the second respondent, it was for the organisation from which they obtained a large part of their funds, namely the National Lottery.

289. The only other restrictions which applied to the claimant in relation to the second respondent were consistent with public funds being properly discharged, namely anti-doping and anti-gambling provisions.

290. These findings are wholly inconsistent with a finding that "the individual undertakes to do or perform personally any work or services for another party to the contract."

291. The evidence from Ms Nicholl is entirely consistent with the claimant's evidence in cross examination, namely that the nature of the relationship between the claimant and UK Sport was essentially the provision of a tax free grant to cover her living expenses in order to allow her to focus on training as an athlete and maximise her chances of competing in international competitions and winning medals.

292. I find that this is wholly inconsistent with a finding that “the individual undertakes to do or perform personally any work or services for another party to the contract”.

293. Accordingly, the claim for worker status fails at this point and there is no requirement for me to consider the second part of “limb b”.

294. Finally, I turn to consideration of whether the claimant was employed as an employee under a contract of employment, contract of apprenticeship or a contract personally to do work within the meaning of section 83(2)(a) of the Equality Act 2010 by the second respondent. I find she was not.

295. The claimant, for reasons I have outlined above, was in receipt of a grant from UK Sport, a publicly funded body, to help with her living and sporting expenses whilst she was in training. There were no restrictions in place relating to work or employment on athletes by UK Sport save for a means test. I rely on the evidence of Ms Nicholl that cyclists, for example, can be contracted to a professional road cycling team, or some athletes are employed by other employers, e.g. the Armed Forces. The relationship I find between the claimant and UK Sport is a financial arrangement which is wholly consistent with a grant, given the nature of the funding.

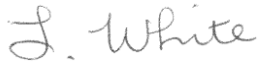
296. For these reasons the claimant's claim that she is eligible to bring a claim against the second respondent under section 83(2)(a) Equality Act fails.

297. Therefore as the claimant is not an employee or worker of either respondent, or of both of them under a tripartite arrangement, the Tribunal does not have jurisdiction to hear the claimant’s claims of unfair dismissal, public interest disclosure detriment “whistleblowing” or sex discrimination.

Employment Judge Ross

Date 16 January 2019

RESERVED JUDGMENT AND RESAONS
SENT TO THE PARTIES ON

16 January 2019 

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