EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mrs A Ameri	**v**	Caroline South Associates Management Services Limited

PRELIMINARY HEARING

Heard at: Reading **On:** 21 and 22 November 2017

Before: Employment Judge S Jenkins (sitting alone)

Appearances
For the Claimant: Ms S Idelbi (of Counsel)
For the Respondent: Mr M Pascall (of Counsel)

RESERVED JUDGMENT

1. The Claimant was an employee of the Respondent.

2. The Claimant was also a worker of the Respondent.

3. The Claimant was engaged under a single contract.

REASONS

Background

1. The hearing was to deal with the issues identified in the Notice of Hearing, sent to the parties on 26 June 2017, which confirmed that the following matters were to be considered (an additional issue listed, that of the identification of the correct Respondent arising from the use of a trading name, was no longer a live issue):-

    1.1 Was the Claimant an employee of the Respondent within the meaning of section 230(1) of the Employment Rights Act 1996 ("ERA")?

    1.2 Was the Claimant a worker of the Respondent within section 230(3)(b) of the ERA and regulation 2(1) of the Working Time Regulations 1998 ("WTR")?

1.3 If so, was the Claimant a worker for the Respondent under a single contract or for a succession of separate contracts every time she did work for the Respondent?

2. I heard evidence from the Claimant on her own behalf and from Caroline South, the Respondent's owner and Managing Director, and Ruth Skinns, Exclusive Brand Manager, on behalf of the Respondent. I also considered those documents within the bundle of documents to which my attention was drawn.

Issues and law

3. As identified above, the principal issues for me to address were whether the Claimant was an employee of the Respondent during the period of her engagement with it or, alternatively, whether the Claimant was a worker of the Respondent during that period, applying the relevant legislation. The Respondent contended that the Claimant was self-employed at all times, and therefore was neither an employee nor a worker; whilst the Claimant contended that she was an employee, or alternatively, was a worker.

4. The subsidiary issue for me to address was whether, if the Claimant was a worker of the Respondent, she had been engaged under a single contract or a succession of separate contracts, but it was accepted that, if I was to conclude that the Claimant was a worker, she had been engaged under a single contract.

5. The statutory definition of an employee is set out at section 230(1) of the ERA as follows:

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

6. In that context, a contract of employment is not confined to any written document entered into between the parties, but can be concluded by implication from a number of sources. In this case, the parties had not entered into any form of written agreement with regard to the status of the Claimant.

7. There has been a considerable amount of case law on the issue of employment status, going back as far as the case of Ready Mixed Concrete (South East) Ltd v The Minister of Pensions & National Insurance [1968] 2 QB 497. That case, and several subsequent cases, including many recent ones, have made it clear that it is possible for an employment relationship to be concluded from the underlying substance of the relationship between the parties. The Ready Mixed Concrete case, and others, notably Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612, have confirmed that in order for there to be considered to be a contract of employment between two particular parties, there needs to be an "irreducible minimum" in relation to three core matters: personal service, control, and mutuality of obligation. The case law has also indicated that the other factors present within the relationship should be consistent with there being a contract of employment.

8. A significant issue in this case revolved around the Claimant's ability to provide a substitute as opposed to carrying out the work herself. The Respondent, whilst not putting this as its only contention, described this as "*the key feature of the case*" and placed particular store on the Claimant's ability to provide a substitute and contended that that, of itself, meant that an employment relationship between the Claimant and the Respondent could not be said to have arisen. The Respondent in fact referred to an earlier case with similarities to this one, in terms of the factual background, that of Halawi v WDFG UK Limited t/a World Duty Free [2014] EWCA Civ 1387, in relation to which the Respondent had been a second respondent, although it had not remained involved when the case went before the Court of Appeal. In that case, the Claimant was held not to be an employee or worker of the first respondent.

9. Several cases have dealt with the issue of substitution, notably Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667, Express and Echo Publications Ltd v Tanton [1999] ICR 693, MacFarlane v Glasgow City Council [2001] IRLR 7, Catamaran Cruises Ltd v Williams [1994] IRLR 386, Weightwatchers (UK) Ltd v The Commissioners for Her Majesty's Revenue and Customs (FTC/57-59/2010), and very recently the decision of the Central Arbitration Committee in the case of Independent Workers Union of Great Britain v RooFoods Limited t/a Deliveroo (TUR1/985 (2016)). I was mindful of my need to take on board the assistance and direction provided by those cases in relation to the issue of personal service as part of my assessment of employment status.

10. A further issue for me to address was whether the ostensible relationship between the Respondent and the Claimant's limited company should be considered to be a "sham", i.e. in this context, did not represent the true intention of the parties, both at the time of the inception of the relationship and subsequently, applying the Supreme Court decision of Autoclenz v Belcher [2011] UKSC 41, and the earlier Court of Appeal decision in Firthglow Ltd (t/a Protectacoat v Szilagyi [2009] ICR 835.

11. With regard to the issue of worker status, that is defined in section 230(3) ERA, and identically in regulation 2(1) WTR. It includes an individual who works under a contract of employment, but goes further and includes, at sub-paragraph (b):

> "an individual…who works under any other contract [i.e. other than a contract of employment] 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 carried on by the individual."

12. There have also been a number of recent cases on the issue of worker status, notably Pimlico Plumbers Ltd v Smith [2017] ICR 657 and Uber BV v Aslam (UKEAT/0056/17), and I would need to consider those cases in forming my conclusions on the issue of worker status.

Findings

13. Much of the factual background to this case was evidenced within the documents and was not in dispute. I set out my findings relevant to the issues

below, resolving any areas of dispute on the balance of probabilities. Bearing in mind the nature of the issues I had to decide, the findings do not follow a direct chronological order at all times, as would perhaps be expected where a series of events were being assessed, for example in an unfair dismissal claim. Whilst I have followed a broadly chronological approach, I have also, on occasions, focused on particular areas of relevance to the issue of employment or worker status.

14. The Respondent is a company which provides sales and merchandising services to a number of cosmetic and perfume companies. It primarily does that at duty free concessions at airports throughout the UK, and this particular case revolved around events at London Heathrow. Specifically, insofar as it involved the Claimant, the Respondent has a contract with Beauté Prestige International (BPI), a French company, to provide staff to sell its products at a number of UK airports, including Heathrow. The Claimant was engaged as part of the Respondent's fulfilment of its obligations to BPI under that contract. Relevant provisions of the contract between the Respondent and BPI were as follows:

> "3.1 CSA [i.e. the Respondent] shall:
>
> 3.1.1 procure that all Sales Staff are engaged full time in the provision of the Services at the location specified in respect of those Sales Staff in Schedule 4.
>
> 3.1.2 manage and train the Sales Staff in accordance with the guidelines issued by BPI from time to time;
>
> 3.1.5 assume full responsibility for the actions of Sales Staff at the Locations and/or in connection with this Agreement, and shall be solely responsible for their supervision, health and safety, daily management and control, payment and all matters relating to their employment;
>
> 3.1.8 ensure that the Sales Staff shall be composed of persons who are skilled, qualified and experienced in the performance and delivery of the Services and are properly and adequately trained in respect thereof and that the Sales Staff shall exercise reasonable due diligence in accordance with reasonably achievable standards of due care applicable to the provision of the Services;
>
> 3.3 All persons engaged in the fulfilment of CSA's obligations under this Agreement (including the Sales Staff) shall be and remain at all times employees of CSA."

For the purposes of the agreement with BPI, "Sales Staff" were named in a Schedule. The initial contract was entered into in 2003 and the Claimant was obviously not included within that as she did not do any work for the Respondent at that time. However, over the years various riders to the agreement were concluded, all of which stated that, apart from the terms changed by the specific rider, the other terms and conditions of the initial agreement remained unchanged. In the fourth such rider, entered into in June 2012, the Claimant was listed amongst the Sales Staff, the particular entry being, "*T5 Elie Saab Atefeh Ameri*".

The contract and riders also confirmed, *inter alia*, that BPI would make a 100% contribution towards the cost of staff working on Burberry counters.

15. The duty free area within London Heathrow is operated by a company called World Duty Free (UK) Limited ("WDF"), which allows various cosmetic and perfume companies to operate within the duty free area. It is apparent that sales of the duty free products are effected with WDF with payment then ultimately indirectly ending up with the cosmetic and perfume companies. With regard to staff working in the duty free area, WDF provide store approval, leading to the provision of an airside pass, following an application process which includes confirmation from the sponsoring store, which enables individuals to work in that area.

16. The Claimant joined the Respondent in 2010 as a beauty consultant, having previously worked at Heathrow for a different company, having been engaged by that company via an agency. She initially worked on the sales of a small range of products, but changed in around 2014 to selling only Burberry products.

17. An area of significant difference between the parties revolved around the inception of their relationship. As with any case, a tribunal, when faced with conflicting evidence, is required to assess its quality and to measure the evidence received against other evidence which might corroborate or undermine the evidence being provided, including documentary evidence, particularly that which is contemporaneous with the events that are at issue. Assistance can also sometimes be sought from the absence of evidence which might otherwise be expected to be present.

18. The Claimant's evidence, which was not challenged, was that, having worked near to counters run by the Respondent at Heathrow for several months, she was contacted by a member of the Respondent's staff in March 2010 and asked if she would be interested in working for the Respondent in Terminal 5. She was told to send a copy of her CV to Michelle Heal, one of the Respondent's retail supervisors and all discussions about the engagement of the Claimant then took place with Ms Heal.

19. Ms Heal has since left the Respondent and was not called as a witness before me. Mrs South and Mrs Skinns had no involvement in the engagement of the Claimant and were therefore themselves only able to give evidence of what they understood had happened or, perhaps more accurately, what they anticipated should have happened with regard to the recruitment of the Claimant. That was that the Claimant had been given the choice of being engaged either as an employee or as a self-employed contractor, in the latter case then via a separate limited company which she would have to set up.

20. It is clear that that latter method was the way in which the relationship was arranged as the Claimant set up in April 2010, via an accountant, a separate limited company, owned by her, and of which she was the sole director, which was named Shahin Services Limited, after her son. The Claimant then proceeded at all times to submit invoices to the Respondent for her services and was paid on a gross basis. However, in terms of that being a choice which

was open to her at the outset of her relationship with the Respondent, her contention was that she simply did what she was told to do by Ms Heal.

21. As I have noted, the evidence from Mrs South and Mrs Skinns was confined to what they anticipated would usually happen with regard to any new recruit to the Respondent, which was that new recruits would be given a choice of being taken on as employees or on a self-employed basis, via their own limited company. The two witnesses confirmed that the Respondent has a mix of employees and self-employed contractors. There was also some documentary evidence of some differences in the position of employees and self-employed contractors in that certain sections of the Respondent's handbook were stated not to apply to employees engaged via limited companies, and there was also a different method for booking holidays. However, that evidence did not assist me in relation to whether there had been an actual choice on the part of the Claimant at the time of her engagement.

22. The documentary evidence before me was not at all helpful on this point, as there was no mention of the method by which the Claimant would be engaged, and I was concerned at the lack of any indication from the contemporary documentation that a choice was involved. Had that been the case, I would have expected that Ms Heal would have outlined that in an email or at least have referred to it in the context of her email discussions with the Claimant. However, no mention of the nature of the engagement was made in any of the emails which passed between the Claimant and Ms Heal and I considered that there would have been some mention of the choice open to the Claimant if that had indeed been the case. On balance therefore, I preferred the evidence of the Claimant that there was no clear choice provided to her.

23. As I have already mentioned, even in the context of the engagement with a limited company, there was no documentary evidence of any form of written agreement between the Respondent and that company. There were therefore no express written terms which governed the ostensible relationship between the Respondent and the Claimant's company. As noted already, the Claimant did indeed set up such a company having engaged an accountant to do that. The Claimant contended that the company was only set up for the purpose of invoicing for her services to the Respondent and receiving payment from the Respondent, and I accepted that evidence as the accounts for that company within the bundle gave no suggestion that the Claimant was in receipt of any extra income. The Claimant also appeared to have worked for the Respondent on a largely full-time basis such that there was little time for her to do anything else and no evidence that she had ever done anything else.

24. In terms of the Claimant's day to day work, she worked on a variable shift basis, rostered by the Respondent, to cover the needs of WDF and the Respondent to provide sales services when passengers were using the particular terminal. The initial shift pattern was on a "4 on, 2 off" basis, with two early shifts, starting at 5.30am, followed by two late shifts, starting at 12.30pm, and then two days off. The Claimant does not seem ever to have been keen to work early shifts and regularly requested that she be rostered to work later hours, later supporting her request with medical evidence about difficulties she underwent in working the early shifts. The Claimant ultimately was transferred between terminals to facilitate that.

25. The Claimant moved to work at the Burberry concession at the end of 2013 or beginning of 2014, following a request by her, and she then worked in that concession until her dismissal in October 2016. With regard to her shifts whilst working at the Burberry counter, the Claimant received an email, in February 2014, from Becka O'Flanagan, one of the Respondent's employees, indicating that, after reviewing data from WDF, her hours were to be adjusted to meet business needs and to cover the best times for Burberry sales. The Claimant was given two options with regard to her rota and she chose the one most convenient for her. The Claimant's hours were changed further in November 2014, when she received an email from Mrs Skinns informing her that, in light of information from Burberry and "*to optimise the best trading periods*", she was required to change her hours, to include 7.00am starts on Fridays and Saturdays, although after some discussion those were changed to 8.00am starts.

26. At the Burberry counter, the Claimant's duties involved the selling of Burberry perfumery products to customers passing through the duty free area. No individual sales targets were provided to her but team targets were always in force in relation to the expectations of the sales to be achieved by the team. The Claimant received a bonus in respect of her work in her first year with the Respondent (the year ending 31 December 2010) but did not receive any form of bonus thereafter. The bonus calculation referred to the Claimant by name and made no mention of her limited company. The Claimant did subsequently receive some occasional additional benefits by way of incentives provided by the individual companies in the form of products.

27. Supervision of the sales staff at the particular locations where the Claimant worked was undertaken by the Respondent's travel retail supervisors. These did not work regularly in one location but operated on a peripatetic basis between various sites. This meant that the supervisors were not in daily contact with individuals working at particular locations, unless there were specific product promotions where daily attendance might take place; usually the supervisors attended at the locations where the Claimant worked on a weekly basis.

28. The Respondent's witnesses indicated that there was a distinction in terms of supervision between employees, who were regularly formally appraised, and individuals providing their services via their own limited companies, such as the Claimant, who was not appraised at all. However, no evidence was put before me of the appraisal system asserted to be carried out in relation to employees. In the Claimant's case, the only reference to any form of appraisal occurred when the Claimant sought an increase in her pay in May 2016. Email correspondence with the Respondent's managers at the time indicated that a review would be held with a view to assessing whether the Claimant should be awarded a pay increase, although no such review took place. I was satisfied that that review, had it taken place, would have been an isolated one to deal with the Claimant's request for a pay increase, and that the Claimant did not experience any form of regular review of her performance. However, there was no evidence before me as to whether any of the individuals considered to be the Respondent's employees were treated any differently.

29. With regard to the Claimant's pay, she started work at a rate of £11.67 per hour and that was increased to £12.50 per hour in July 2011 following negotiations about the Claimant's transfer from Terminal 4 to Terminal 3. The Claimant made several subsequent requests for an increase in salary which were not agreed by the Respondent. Mrs Skinns indicated that, although the Respondent's full costs of engaging the Claimant were met by BPI, the Respondent had to operate within an overall cost budget and, whilst it had been possible to increase the Claimant's salary at one point, on other occasions it was not possible. Mrs Skinns and Mrs South also indicated in their evidence that the Claimant was the highest paid of their limited company employees, although an invoice in the bundle to BPI suggested that the same hourly rate applied to others.

30. Mrs South's evidence was that it was not in the Respondent's interests to engage individuals by limited companies as it was more expensive to do so, costing approximately £3.00 per hour more; however, no evidence was put before me in respect of that differential. From a general perspective, even if the limited company employees were paid some £3.00 per hour, which would equate to approximately 30%, more, the Respondent would not, in relation to such individuals, incur various other additional costs such as employer's national insurance, pension contributions, holiday pay and sick pay. It was not therefore clear that engaging individuals via their limited companies would overall necessarily have been more expensive than engaging them as employees. There were also the indirect advantages for the Respondent of not being subject to statutory notice obligations and not being at risk of having to pay redundancy payments or be responsible for any unfair dismissal claims from such individuals. In any event, in terms of the Respondent engaging individuals to undertake the duties carried out by the Claimant, i.e. selling Burberry products, there was no overall significant cost for the Claimant as the costs of engaging staff were passed through to BPI in their entirety.

31. With regard to uniform, the Claimant contended that she was required to wear a uniform, certainly when she was working at the Burberry concession. The Respondent contended that there was no such requirement, with individuals only being required to dress smartly. However, there was evidence within the bundle in the form of emails referring to the provision of a Burberry uniform to the Claimant, albeit of the wrong size, which supported the Claimant's contention. In addition, there was an email exchange in advance of a visit from the Burberry Chief Executive which made it clear that the Respondent expected everyone to wear the Burberry uniform. Specifically, the email, from Elisabetta Pischedda, one of the Respondent's senior travel retail supervisors, stated as follows:

> "*Just to be 100% sure that we are following the current guidelines, the only uniform that we are allowed to wear on counter is: black skirt/trousers, Mr Burberry black shirt and black scarf. You can also wear a black blazer if you are cold. We are not allowed to wear different colours or accessories, not even branded/checked accessories and scarves.*"

32. Contradictory evidence to that was put forward by the Respondent in the form of a photograph of the Claimant clearly not wearing any form of uniform when

undergoing training from Burberry staff. However, I considered that that was explicable by reference to the fact that training was being undertaken at the time. In any event, I preferred the evidence of the clear content of the emails which indicated that there was a direction by the Respondent to its staff to wear a uniform.

33. An additional point with regard to supervision is that the Claimant received regular emails from the Respondent's supervisors regarding the arrangements for the work she was undertaking and the way in which she was undertaking it. Many of these were directive, and indeed critical, in nature. By way of example, there were emails sent by Mrs Skinns and various travel retail supervisors criticising the Claimant for the way the Burberry counter had been set up. There were also several emails regarding the need for the counter to be managed particularly carefully whenever any Burberry manager was likely to be in the area. The Claimant was also included in several general emails sent to the Respondent's staff regarding performance against targets and the need, on occasions, to improve sales performance. There were also several examples of emails to the Claimant from the Respondent's managers insisting that she stick to her rostered hours and criticising her for not keeping to them. Examples of these were:

    (i) An email from Becka Flanagan on 1 April 2014 in which she said, "*Going forward your hours should not be changed for any reason unless agreed and discussed with us in the office first*".

    (ii) An email from Mrs Skinns on 3 February 2015 in which she said, "*I am just authorising your invoice for January and am very disappointed to see that you have reverted back to working 11-5pm on a Friday and Saturday….Can you please start working the hours and days that we have agreed*".

    (iii) An email from Tom O'Rahilly, Assistant Brand Manager, on 4 June 2015 in which he said, "*I am happy to allow the change in shift hours this time…, however we cannot continue to accommodate the continual change in hours. There have been numerous occasions in the last couple of months where you have placed cover on your shift and covered different hours. Can you please ensure that from now on you are covering your own shifts as we want the specialised Burberry cover at the times agreed*".

34. All individuals providing services for the Respondent in the duty free area appeared to work alongside each other without any distinction derived from their employment status. The Claimant's evidence was that she did not know whether her colleagues were employed or engaged via limited companies, with the evidence of Mrs South being that all those working on the Burberry counter were engaged via limited companies. Nevertheless, there appeared to be no distinction in the way that the Respondent presented its staff to the outside world and I do not consider that anyone passing through the particular area would have reached any conclusion other than that the individuals working at the particular concession were working together as part of one co-ordinated whole.

35. With regard to the right to use a substitute, as I have indicated, there was no written agreement between the parties but it is clear that the Claimant did arrange for others to work in her place, either colleagues who worked additional shifts or individuals engaged via external agencies who specialised in providing staff who both had the requisite airside pass and who were trained in selling products of this type. It is clear that the Claimant would often arrange herself for the alternative to attend, although sometimes that was arranged by the Respondent. It was clear however that any such individual would need to be drawn from a particular source with reference made during evidence to a "pool" of such individuals. Sometimes the Claimant would indicate to the Respondent her need to engage a replacement, specifying the reasons for that need, e.g. holiday, and asking permission to engage an alternative. At other times, the Claimant would present the Respondent with something of a *fait accompli*, indicating that she would be absent and that she had arranged with a certain individual to provide cover.

36. However, in no sense was a substitute ever provided as part of the Claimant's company, with payment being made by the Respondent to that company and then on to the individual who worked. On all occasions, whether arranged by the Claimant herself or by the Respondent, payment for the individual's services was made directly or via the agency from whom the individual was obtained. The Claimant effectively stepped out of the picture in those circumstances.

37. With regard to the frequency of the provision of substitutes, the Respondent provided a list of the absences of the Claimant over the six years during which she worked for it. These listed several brief illness absences over the total period, and holiday absences every year. With regard to holidays, the Claimant typically took just over 40 days each year, which was slightly more than employed staff who, although it was not entirely clear, appeared to enjoy 25 days' holiday plus bank holidays, i.e. 33 days in total. Additional absence arose in 2015 when the Claimant's father living in Iran was taken ill and she took extra time to visit him, taking 60 days overall.

38. Finally, with regard to the other aspects of the relationship, it is clear that the Claimant, via her limited company, was paid gross throughout by the Respondent on receipt of her invoices, did not receive sick pay and did not receive pay when unable to work, as happened during the period of heavy snow at the end of 2010. She also did not receive any holiday pay.

Conclusions

39. I first considered whether I should consider myself to be bound by the Halawi decision I noted above, which, as I have indicated, involved a beauty consultant supplied by the Respondent and which concluded that the claimant in that case was not an employee or worker of the Respondent or of WDF, which was the first respondent in that case, and the only remaining respondent to the appeal at the Court of Appeal stage. I considered both the judgment of the Court of Appeal and also that of the Employment Appeal Tribunal (UKEAT/0166/13/GE).

40. Ultimately, I could see that both appeal judgments upheld the initial employment tribunal decision on the basis of its factual findings. I also noted that the Employment Appeal Tribunal judgment contained an extract from the underlying tribunal judgment which indicated that a feature of the decision was the claimant's lack of evidence regarding the use of her limited company, a feature which was not present in this case. Bearing in mind that a tribunal decision is not binding on another tribunal, I did not therefore consider that I was bound to decide this case in the same way.

41. I also considered the impact of the use by the Claimant of a limited company for the purposes of her arrangements with the Respondent. However, the case of Catamaran Cruisers Limited v Williams [1994] IRLR 386 made clear that the use of a limited company in this way is not fatal to an assessment of employment status and that if the true relationship is that of employer and employee it cannot be changed by putting a different label upon it. I was also conscious of the direction provided by the cases of Autoclenz and Firthglow, applied recently in the Uber case, that if the expressed relationship between the parties (in those cases, written agreements) did not reflect the underlying reality of the relationship then it would be appropriate to look behind it. I therefore did not consider that the existence of an ostensible relationship between the Respondent and the Claimant's limited company prevented me from concluding that there was an underlying employment or worker relationship with the Claimant if that is what I ultimately concluded was the case.

42. Turning to the issues identified above, and the tests for assessing whether an employment relationship had arisen, I was mindful of the touchstone case of Ready Mixed Concrete and the need for the "irreducible minimum" in relation to the three core matters of personal service, control, and mutuality of obligation,

43. With regard to mutuality, I was conscious that the Respondent contended that the Respondent wad not bound to provide work and the Claimant was not bound to undertake it, pointing to the fact that she regularly took in excess of 40 days off each year. I was, however, also conscious of the direction provided by Langstaff J in ABC News Intercontinental Inc v Gizbert (UKEAT/0160/06) that a right to refuse to attend work did not necessarily mean that mutuality of obligation did not exist. The court in that case found that there was an overarching umbrella contract under which the Claimant was employed by the Respondent even when not working on particular assignments. I also observed that, in Wilson v Circular Distributors Ltd [2006] IRLR 38, a provision in a contract for occasions when no work would be available, and therefore where the Claimant would not be paid, was again held not to be inimical to the existence of mutuality of obligation.

44. In this case, even though the Claimant had an element of freedom in being able to arrange not to work at times which suited her, it was clear from the evidence that she was expected to provide very near full-time service and that when she had committed to work, and was thus rostered to do so, she was expected to do so and indeed was criticised when she did not. That led me to conclude that the required element of mutuality of obligation had been made out.

45. Turning to control, MacKenna J in Ready Mixed Concrete noted that

> "control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done."

46. In this regard, I considered that the Respondent controlled what the Claimant was doing, where she was doing it, and very largely the times at which she did it. There was, as I have indicated, an element of freedom of choice in the form of the Claimant being able to take time off with sufficient notice, and to take more time off than would be allowed to an employee by way of holiday, but the expectation in terms of the relationship was that the Claimant would provide largely full-time service to the Respondent in ways directed by the Respondent.

47. It seemed to me that there were clear elements of control of the Claimant by the Respondent's staff in relation to her daily work, in line with the Respondent's commitments relating to its staff in its contract with its client, BPI. Whilst the Claimant was not appraised by the Respondent's managers, she nevertheless worked to their direction. The bundle contained several examples of emails which required the Claimant to work in a particular way, whilst others contained direct criticism of the Claimant when she was attempting to structure replacement individuals. On more than one occasion, the Claimant was told that she needed to ensure that her engagement of alternatives fitted in with the Respondent. Whilst that was not unreasonable in the context of the management of the Respondent's business, I did consider that that amounted to an element of control. Overall therefore, I was satisfied that the required element of control was made out.

48. Turning to personal service, and acutely the ability to provide a substitute, as I indicated above, this was a particularly important element as far as the Respondent was concerned. The decided cases in this area have gone in different directions but my interpretation of them was that a distinction is to be drawn between situations where an individual has an unfettered right to provide a substitute, and then derives benefit from doing so, which would be fatal to the required element of personal service; and situations where, whilst the individual can provide a substitute, that ability is not unfettered, in the sense that there is not complete freedom to provide an individual to undertake the work and there is no form of reward or potential reward for the individual as a result of providing the replacement.

49. An example of the former is the case of Tanton in which the claimant, a contracting driver, was entitled to provide another suitably qualified person and continued to be paid himself when he did so. A case going in the opposite direction is that of MacFarlane where the Claimant, a gymnastic instructor, was able to arrange a replacement if unable to take a particular class, but that replacement had to be from a register of coaches which was retained by the respondent and any replacement coach would be paid directly by the Respondent.

50. The issue was also considered in the very recent Central Arbitration Committee case of RooFoods Limited t/a Deliveroo. In that case, it was

decided that the Deliveroo riders were not able to class themselves as workers for the purposes of trade union recognition, and a significant factor in that decision was that individual riders were able to substitute other riders, whether from those already registered with Deliveroo or otherwise, going as far as, on occasions, the originally engaged rider taking a "cut", i.e. a form of commission, and not passing on the full payment received to the rider who actually undertook the work.

51. I also noted the judgment of Briggs J in the Upper Tribunal Tax and Chancery Chamber case of Weight Watchers (UK), in which he stated, at paragraph 37,:

> "*in such cases the real question is in my judgment whether the ambit of the substitution clause, purposively construed in the context of the contract as a whole, is so wide as to permit, without breach of contract, the contractor to decide never personally to turn up for work at all.*"

Clearly in this case, there was no express substitution clause, but there was an express substitution power agreed between the parties and, in my view, there was no question of that power being so broad as to allow the Claimant not personally to turn up for work at all.

52. In this case, I considered that the Claimant was much closer to the claimants in the MacFarlane case, and also the Byrne Bros case which also held that a limited power to appoint substitutes was not inconsistent with an obligation of personal service, than to the claimant in the Tanton case and the applicants in the Deliveroo case. As I have indicated above, it is clear that the Claimant could provide a substitute and indeed did so. However, she had to provide that substitute from a relatively limited pool of employees and certainly had no free hand in the provision of an alternative, both due to the fact that any replacement had to have the required airside pass and also due to the fact that they had to be appropriate for the Respondent's purposes. Crucially, there was never any question of the Claimant providing a substitute as part of her own business. At no time did she receive payment via her limited company in respect of any of the substituted work, she simply dropped out of the picture where a substitute had been arranged and the Respondent provided payment either directly to the replacement or via the agency from which that replacement was obtained. I did not consider that the ability to provide a substitute in this limited format meant that the Claimant was not able to provide personal service.

53. With regard to the other aspects of the relationship, notably those regarding payment, holiday pay and sick pay, it is clear that those elements, which would usually point towards employment rather than self-employment, were not present. However, I did not consider that these were significant elements in the context of the expressed relationship between the parties which was ostensibly that of the Claimant being a self-employed contractor providing her services via a limited company.

54. As I have noted above, the Catamaran Cruisers case made clear that the use of a limited company in this way is not fatal to an assessment of employment status and that if the true relationship is that of employer and employee it cannot be changed by putting a different label upon it. I also noted the

direction from the Firthglow case that, if the evidence establishes that the true relationship is different from that described then it is the true relationship which prevails, and the direction from the Autoclenz case that the question in every case is, "*what was the true agreement between the* parties"? In my view, the existence of these other "trappings" pointing towards self-employment was derived directly from the ostensible relationship between the parties. However, the fundamental factual relationship between the parties overrode the ostensible interposition of a limited company and in my view the relationship between the Claimant and the Respondent was an employment relationship.

55. Whilst not strictly necessary, having made the conclusions I have in relation to employment status, I would nevertheless also have concluded that the Claimant was a worker for the purposes of section 230(3)(b) ERA and regulation 2(1) WTR.

56. I was satisfied from my findings above that the Claimant had undertaken to do and perform work personally, and the key question therefore was whether she was doing that with the Respondent as a customer of her business or not. In light of my conclusions above that the Claimant was controlled by, and provided personal service to, the Respondent, I did not consider that the provision of her services to the Respondent was as part of any professional business carried on by her. Therefore, without needing to apply the authorities I had identified at paragraph 12 above, if I had not been satisfied that the Claimant was an employee I would nevertheless have been satisfied that she was a worker.

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Employment Judge S Jenkins

Date:18.12.2017

Sent to the parties on: .....