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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr K Tabidi		British Broadcasting Corporation

Heard at: London Central **On**: 9 and 10 November 2017

Before: Employment Judge Issacson

Representations
For the Claimant: Mr E Sheppard, FRU
For the Respondent: Mr N Caiden, Counsel

REASONS

Issues

1. The issues before the Tribunal were:

   (1) Whether the Claimant was an employee and therefore whether the Tribunal could hear his claims for constructive unfair dismissal and breach of contract.

   (2) What his contractual hours were at all material times.

2. The Respondent had already accepted the Claimant's status as a worker for his unauthorised deduction from wages claim and his claim under the Equality Act 2010 ("EqA") for sex discrimination.

3. The Tribunal indicated after reading the evidence before it that it was not convinced by the Respondent's arguments on substitution and lack of control and that the parties needed to concentrate on the issue of mutuality of obligation.

Evidence before the Tribunal

4. The Tribunal was presented with a joint bundle of documents and written statements and heard oral evidence from the Claimant himself, from Ms S E Hill who currently works as Head of Production for Vice Arabia, but was previously

a unit manager at the Respondent, and Mr A Soliman, who is an editor for radio in the Arabic Service. The Tribunal also had the benefit of written skeleton arguments from both counsel and oral submissions. The Tribunal praised both counsel for the structured and detailed skeletons and impressive oral submissions.

The Law

5. Section 230 of the Employment Rights Act 1996 ("ERA") sets out the definition of an employee:

> *"(1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
>
> *(2) In this Act 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*
>
> *…..*
>
> *(4) In this Act 'employer', in relation to an employee or worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.*
>
> *(5) In this Act 'employment' –*
>
> *(a) in relation to an employee, means (accept for the purposes of section 171) employment under a contract of employment, and*
>
> *(b) in relation to a worker, means employment under his contract;*
>
> *and "employed" shall be construed accordingly."*

6. The first place to look at, when considering whether someone is an employee, is at the contractual documentation. The Tribunal needs to consider what were the actual legal obligation of the parties, the intention of the parties and whether the contract reflects the reality of the situation.

7. There needs to be three elements which must be present in every contract of employment. These are the core, the minimum requirements to a contract of employment:

> (1) The contract must impose an obligation on the person to provide work personally.
>
> (2) There must be mutuality of obligation between the employer and the employee. In other words, some legal obligation towards each other.
>
> (3) The worker must expressly or impliedly agree to be subject to the control of the person for whom he works to a sufficient degree

> to make them master. In other words, the ultimate authority over the purported employee in the performance of their work rests with the employer.

8. If the three core elements are established, then Tribunal should then look at the whole picture to decide whether there is in fact a contract of employment.

9. In cases where there appears to be gaps between assignments there have been assertions of an umbrella or global contract. In the case of **Quashie -v- Stringfellow Restaurant Ltd [2013] IRLR** Elias LJ explained that there were circumstances where a worker worked intermittently for an employer as and when work was available, there was, in principle, no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration. Where the employee was working discreet separate engagements and needed to establish a particular period of continuous employment in order to be entitled to certain rights, it will usually be necessary to show that the contract of employment continued between engagements. In order for the contract to remain in force, it is necessary to show that there is at least what is being termed 'an irreducible minimum of obligation', either express or implied, which continues during the breaks and work engagements. Where this occurs, these contracts are often referred to as 'global' or 'umbrella' contracts because they are overarching contracts punctuated by periods of work.

10. In the case of **Pimlico Plumbers Ltd -v- Smith [2017] EWCA Civ 51** LJ Underhill stated:

> *"It is necessary to distinguish two separate circumstances in which the issue of whether a putative employee/worker is engaged on a casual basis might arise. The first is where the substantive claim directly depends on their enjoying employee/worker status in respect of their periods of work (e.g. because the claim concerns their pay or some discriminatory treatment in the workplace). In such a case the question whether the engagement is casual is indeed relevant, but only on the basis that it may shed light on the nature of the relationship while the work in question is being done. (See **Quashie -v- Stringfellows Restaurants Ltd**) at paragraphs 10-11 and **Windle** at paragraphs 22-25) But it is not only legal obligations that may shed light of that kind. If the position were that in practice the putative employee/worker was regularly offered and regularly accepted work from the same employer, so that he or she worked pretty well continuously, that might weigh in favour of a conclusion that while working he or she had (at least) worker status, even if the contract clearly (and genuinely) provided that there was no legal obligation either way in between the periods of work. The second situation is where the claim directly depends on the Claimant's status during periods of non-work, either because he or she has to establish continuity of employment or because the claim itself relates to their treatment during that period: in such a case mutuality of legal obligations is essential".*

11. In the case of **Postworth Ltd t/a Sky Blue -v- Ashworth UK EAT/0183/08/LA** Mr Elias made it clear that it was not possible to have any

umbrella/global contract inferred where there was no obligation on the worker to accept the work offered:

> *"there may exceptionally be circumstances where the pattern of work is such that it may be possible to infer an obligation to work simply from the continual repetition of work being offered and accepted. But I do not see how any such inference can be drawn in circumstances where both parties, including the employee himself, considers that he has the freedom whether to accept an assignment or not".*

12. In the EAT case of **St Ives Plymouth Ltd -v- Mrs D Haggerty UK EAT/01/07/A/MAA ("Haggerty")**Elias J stated:

> *"We recognise that in part it may be said that the Tribunal's reasoning is finding the legal obligation arising out of the practical commercial consequences of not providing work on the one hand or performing it on the other. But we do not see why such commercial imperatives may not over time crystallise into legal obligations … Furthermore, there were other factors which were taken into account, including the lengthy period of employment, the fact that the work was important to the employers, and the work was regular even if the hours varied. One might also readily infer, although it was not spelt out, that the employers felt under an obligation to distribute the casual work fairly, rather as did the allocator in the Nethermere case".*

Findings of Fact

13. After lodging his CV, passing an internal assessment, undertaking mandatory training and shadowing, the Claimant started working as a freelancer for the BBC as a Broadcast Journalist/Producer for the Arabic Service.

14. A day before signing his contract on 31 October, the Claimant, and a group of freelancers, attended an introductory briefing, which included a briefing on being part of a pool of casual workers. The Tribunal finds that Ms Hill could not remember exactly what was said at that particular briefing but, as per her usual script, and as accepted by the Claimant, she did start by saying that there was no obligation on the BBC to offer shifts and there was no obligation on the Claimant to accept a shift as a member of the pool of casual workers.

15. Later, in response to questions asked, Ms Hill said something to the effect that the casual pool was a need based system and based on the current need the average shifts being offered per week were two shifts per week.

16. The Tribunal finds that the Claimant heard this mention of two shifts per week and took it to mean that there would be a minimum of two shifts per week offered to those in the casual pool. The Tribunal does not find that this was an offer that was then accepted with consideration that became a binding contract between the parties. Ms Hill merely indicated that the likelihood would

be that workers on the casual pool would be offered at least two shifts per week because of the level of work currently available.

17. The Claimant then went on to sign a contract. The terms of his contract are set out in the Worker's Overarching Terms and Conditions commencing at page 56 ("terms and conditions"). Under the heading "Overarching Terms and Conditions and "Arrangements for work" it states:

> *"These Worker Overarching Terms & Conditions apply to any worker booking you may have with the BBC in future (unless they are varied in accordance with these terms)……*
>
> *It is entirely the BBC's discretion to offer you work and there is no obligation upon the BBC to provide work. In addition, you are under no obligation to accept any work offered by the BBC at any time. The BBC is under no obligation to give any reasons for decisions not to provide work.*
>
> *Once you have been offered work and you have accepted it, a contract is in place between you and the BBC for the time period and/services (as applicable) specified in the booking. Each offer of work shall be treated as an entirely separate booking and there shall be no relationship between you and the BBC during the time you're not booked by the BBC.*
>
> *Nothing in these terms or the terms of any of your bookings shall be deemed to constitute an employment relationship and at no time will an employment contract exists between you and the BBC. These terms and the terms of any of your bookings do not confer any employment rights on you (other than those to which workers are entitled under statute).*
>
> *In the event that BBC engages you more than once, they shall not confer any legal rights on you and, in particular, will not establish an entitlement to further or regular work or an intention of creating continuity of employment. Each booking with the BBC which you accept shall be treated as an entirely separate and severable contract. You will not be an employee of the BBC and as such the collective agreements governing employment the BBC will not apply to you."*

Booking Terms

18. "Each booking will be governed by these terms and any special terms specified in the relevant booking documentation. In the event of any inconsistency between these terms and any booking terms, these terms prevail to the extent of inconsistency unless specifically stated otherwise."

Hours of Work and availability

19. "Your hours of work for any booking will vary depending on the operational requirements of the BBC and will be agreed with your booker/manager…. If you

have accepted a booking under these terms and conditions, and you are for any reason unable to provide your services, you must inform the BBC at the earliest opportunity".

20. The terms set out leave entitlement and the Claimant was paid rolled up holiday pay. The Claimant was paid under the PAYE system. The Claimant was also entitled to join the NEST pension scheme. In relation to sick leave the terms stated:

> *"You will not be entitled to receive any pay in respect of any period of sickness or injury during a booking. If you are receiving pay with deduction of national insurance, you may be entitled to Statutory Sick Pay*."

21. The terms and conditions go on to state under the heading "Substitution":

"*With the prior written approval of the BBC and subject to the following proviso, you may appoint a suitably qualified and skilled substitute to perform the services for any booking on your behalf, provided that the BBC accepts the substitute and the substitute shall be required to enter into direct undertakings with the BBC as you have under this arrangement, including with regard to confidentiality. If the BBC accepts the substitute, you will continue to be paid and be responsible for the remuneration of the substitute*".

22. There is also another document in the bundle headed: "Freelance Contracting the BBC – Policy Manual for Bookers" which has been referred to in the Tribunal as the "Freelancer's Guidance". In that document under the heading "Sub-contracting" it states that any individual cannot sub-contract any of their work to a third party.

23. The Tribunal finds that because of the level of experience and expertise required and the need for training and to follow the policies and procedures of the BBC it was not in reality a possibility for the Claimant to substitute himself if he was not able to do a shift. The normal procedure if the Claimant, for whatever reason, suddenly was not be able to do a shift, would be to contact the scheduler who would then find another substitute by first asking employees and then through the freelancers' pool. There were on occasions, when a real emergency arose, that a freelancer would directly swap with another freelancer within the BBC pool, who had undertaken all the training etc. without going through the scheduler. However, this happened only in exceptional circumstances.

24. Employees of the Respondent had capacity to cover approximately 80% of the Respondent's work. A scheduler would then offer any shifts not covered firstly to employees in case they wanted to take on extra shifts but then would offer the dates to the freelancers. A freelancer would then respond by email, saying what shifts they were willing to work. The scheduler would then email back confirming what shifts the freelancer had been accepted on. Once they had worked a shift the freelancer would have to log on to an internal portal system (page 81) to apply for payment.

25. The Tribunal accepts that on occasion the Claimant was directly contacted either by email or by text to attend at work to go on a shift usually in exceptional circumstances to cover a particular interview or there was some breaking news. However generally the Claimant was offered shifts through the scheduler.

26. The Claimant was also provided with the BBC Declaration of Personal Interest Policy which stated at paragraph 5 page 74 that:

> "*Individuals may be permitted to participate in activities for broadcasts by competitors provided they abide by the* ***BBC Editorial Policy- Conflict of Interest guidelines****."*

27. In practice the Claimant worked long intense hours for the BBC. He did do translation work for a third party at night and also for the BBC but he was regularly doing 10 hour shifts for the BBC. However, there were gaps of over a week throughout the period of his work with the BBC. On occasion the Claimant refused shifts offered to him, as evidenced in the bundle and accepted by the Claimant.

28. The Tribunal finds that there was no obligation on the Respondent to offer the Claimant work and there was no obligation on the Claimant to accept the work. The Tribunal finds that in October 2016 the Claimant asked whether he could work for a competitor and was told that yes as he freelancer he could work for whoever he wanted to (page 330). In fact the Claimant decided that he would not work for the competitor because he felt he was working to his full capacity with the BBC at that time. However, the Tribunal does find that the Claimant was able to work for any competitor if he wished to do so.

29. The Claimant alleged that in reality he was an employee and there was mutuality of obligation between him and the BBC because of the following factors: he was on standby and was emailed or received texts directly to change shifts at short notice. In addition, that on shift he was reassigned to different posts, took on managerial responsibility while on shift and that he worked for a length of time and intensity which was not designed for a freelancer. Although this evidence is not disputed the Tribunal does not accept that these factors alone are sufficient to bridge the gaps while he was not in work and shift the Claimant's status from a casual worker/freelancer to an employee. Although the Claimant worked intense hours the Claimant could at any time refuse a shift when he needed time out and did do so whether it was to "chill" or on occasion to grieve or for whatever reason.

30. The Claimant's counsel argued that the Tribunal should infer that by the above conduct an employment contract had crystallised; that there was an umbrella contract and the only reason for the gaps between shifts were out of necessity to rest because of the intensity of his hours. However, there is not sufficient evidence before the Tribunal to reach that conclusion. The evidence before the Tribunal is that the Claimant did refuse shifts on occasion and was

absent for over a week at regular intervals and it was not always clear the reason or his breaks (page 408).

31. The Claimant did work outside the BBC as an interpreter and did consider working for competitors. He may well have felt that he was at risk of his shifts being reduced if he did not continue to work at such an intense level. However, there was no evidence before the Tribunal to conclude that in practice a consequence of him reducing his hours of work would be a reduction in shifts offered to him. Even if there was evidence that one consequence of him refusing shifts was to have a reduction in the number of shifts offered to him, that would be the very nature of being a freelancer where there is no obligation to work and no obligation on the Respondent to offer work.

32. In the freelancer's guidance (pages104-5) under PAYE it states:

> *"Work is envisaged to be very short term in nature (maximum of 12 week continuous engagement.)*
> Over the page under the heading *"Covering Employee Posts"* it states*: "Freelance worker or self-employed contract types should not be used to fill vacant, permanent employee jobs even temporarily e.g. for maternity cover. This is because if an employee has been carrying out work previously it is clearly work of a nature that should be carried out by an employee".*

It then goes on to state under *"Risks Associated with inappropriate contractual relationships"* a possible consequences of a freelancer working continuously for over 12 weeks was a claim being brought for employment status.

33. The Tribunal finds that this is merely guidance to the Respondent that they should consider their legal position and the possible consequences of having someone employed in the same role continuously for more than 12 weeks. The Claimant himself was not in fact covering one employee's role. He was doing a number of different roles and shifts for different programmes.

Legal Submissions

34. In summary the Respondent's case was that there was no contractual term that the Claimant would be offered at least two shifts per week. The terms of the written contract were clear and the Tribunal should not ignore what is clearly set out and is in fact a true reality of the situation. Any suggestion otherwise by Ms Hill was before the contract was signed so either way the terms of contract prevailed. The statement itself has very little meaning and cannot constitute having a legal effect to provide an obligation of a contractual term. There were gaps at the beginning of the Claimant's contract of a week or more and at that time he never raised the issue of a minimum two shifts per week entitlement.

35. The Claimant is not an employee because there is no mutuality of obligation to include periods when he was not at work and that there was no

overarching umbrella contract. All factors point to the relationship not being of employment.

36. The Respondent's counsel went on to argue that the Claimant cannot rely on a global umbrella contract because the Claimant had refused shifts and when the Claimant asked if he could work for competitors the response from the Respondent was absolutely clear that he was a freelancer and that he could work for any competitor. There had been a number of gaps in the weeks that he had worked. Intensity and length of time that the Claimant worked did not magically change his status. The 12 week guidance was only guidance and was relevant to when someone was covering one person's role which was not the case with the Claimant.

37. It was accepted by the Claimant's counsel at the beginning of his submission that mutuality of obligation must work in both directions. In relation to the contractual terms the Claimant's counsel argued that Ms Hill had made a promise which the Claimant could and did rely upon and later conduct from the Respondent showed a fulfilment of that promise.

38. The pool of casuals fulfilled an essential operational need for the BBC. The Claimant was expected to be on standby for shifts at short notice, he was contacted directly in a way that would bypass the usual pool, and he could be contacted by text or email. His shift dates changed at short notice. On shift he was assigned to different shifts from what he was originally booked for. The Claimant worked for a length of time at an intensity which was not designed for freelancers, referring to 10 hour shifts which overall amounted to around 3,840 hours. This demonstrated that the Claimant was fulfilling an economic need of the Respondent. He also referred to the type of work that the Claimant was doing and that at times he was performing management roles, pulling everything together, with some discretion.

39. In relation to mutuality of obligation Claimant's counsel argued that there was a minimum of two shifts promised which formed a sufficient obligation to indicate employment. In the alternative there was a crystallisation over time in the manner articulated by Elias J in **Haggerty** and the obligation identified in **Wilson**. The Respondent had an obligation to offer work when it was available. He went on to say that although Ms Hill said that there was no obligation to offer shifts she then qualified that statement by saying that there was a minimum of two shifts per week and the Respondent's conduct over the period indicated that the second statement was the actual state of affairs.

40. He also argued that the Tribunal should infer that if the Claimant did not make himself ready and available he would not be asked to do the same number of shifts. Therefore, the Respondent was obliged to keep the Claimant in work and in turn the Claimant was obliged to keep retained in work.

41. He argued that the Claimant's contract crystallised over the extended period of work beyond the contractual documentation for a freelancer. Under the crystallised contract the Claimant made himself available last minute for shifts and alternative shifts were offered by-passing the pool in the manner that

departed from the ordinary system for allocating work. The only reason for any gaps in work was the intensity of work and was a necessity rather than a choice and pointed to the fact that on occasion the Claimant was refused shifts because he was near to breaching the Working Time Regulations.

42. The Claimant's work was more than the performance of a set of freelance obligations. It outwardly manifested what had crystallised into obligations such that the Claimant was expected to be on standby.

43. The Claimant could not accept work from others because he was at full capacity working for the Respondent and any other work that he did do, for example interpreting, was just moonlighting.

44. He argued that little weight should be given to the language to the terms and conditions. The Claimant was clearly under the control of the Respondent and fully integrated. The fact that he could not be substituted demonstrated that he was an employee.

Applying the law to the facts

45. The Tribunal finds that there was no binding agreement between the Respondent and the Claimant to provide the Claimant with a minimum of two shifts per week. There had merely been an indication by Ms Hill of the likely work that the Claimant would be offered after clearly stating that there was no obligation on the BBC to offer work and no obligation on the freelancer to accept work. The Claimant then went on to sign clear terms and conditions which set out that there was no obligation on the Claimant to accept shifts and no obligation on the Respondent to provide shifts.

46. There was no overarching umbrella contract established or crystallisation by the intensity of his hours of work, the nature of his work, the way he received communications or by him being on standby. The Claimant chose to offer himself available for many shifts. He did not have to and on occasion he did refuse shifts as demonstrated by the gaps set out in the rotas. He did work for other parties doing translation work, although most was done at night. He could have chosen to work for competitors but chose to do long hours with the Respondent instead.

47. The Tribunal does not infer mutuality of obligation on both parties or an overarching umbrella contract as there is insufficient evidence to do so. The written terms and conditions reflect the reality of the situation.

48. The Claimant was not able to establish that a consequence of not offering himself available for such intense hours would be a reduction in the shifts offered to him. In any event the Tribunal does not find that such a consequence would mean that his status had moved from freelance/ casual worker to employee status.

49. In summary the Claimant is unable to satisfy the Tribunal of one of the core, minimum requirements of a contract of employment of mutuality of obligation. Therefore, the Tribunal finds that the Claimant is not an employee of the Respondent. Consequently, the Tribunal does not have jurisdiction to hear his claims for unfair dismissal and breach of contract and therefore those claims are dismissed.

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Employment Judge Isaacson on 11th December 2017