EMPLOYMENT TRIBUNALS

Claimant: Miss Sarah Smith

Respondent: Mrs Kim Armstrong, trading as "Railway Cuttings"

PRELIMINARY HEARING

Heard at: Nottingham (in public) **On:** 6 June 2018

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimant: in person
For the respondent: Mr A Famutimi, lay representative (consultant)

RESERVED JUDGMENT

The Claimant was at all relevant times the Respondent's employee.

REASONS

1. This was a preliminary hearing to determine employment status as a preliminary issue. The claimant was engaged by the respondent doing hair and beauty in the respondent's salon in Ilkeston ("the salon") from March 2015 until November 2017. After going through early conciliation from 13 November to 27 December 2017, she presented her claim form on 27 December 2017. She is claiming unfair dismissal, unpaid wages, and holiday pay / compensation for accrued but untaken holiday. The respondent's position is that she was a worker but not an employee; and therefore that her unfair dismissal complaint should be dismissed.

2. There were one or two procedural hiccups on the way to this hearing, and a few things to be sorted out when we started. The notice of preliminary hearing was not very clearly worded; but thankfully, both parties confirmed to me [the Employment Judge] that they understood they were here for a decision as to whether or not the claimant was an employee in accordance with section 230(1) of the Employment Rights Act 1996 ("ERA"). The case management orders that had been made in relation to this hearing were also rather unclear and, unhelpfully, required the parties to do things by dates which had already passed when the orders were made. It came as no surprise to me to learn at the

start of the hearing that the claimant had not prepared a witness statement, that the respondent's two witness statements (from the respondent herself and from Kate Hunt, who worked and works as a hairdresser at the respondent's salon) had only been provided to the claimant the evening before, that proper disclosure of documents did not seem to have taken place, and that the hearing bundle put together by the respondent had been provided to the claimant only very shortly before the hearing. I had thought before the hearing got going that it might be necessary to adjourn. But neither side wanted that, and after some discussion, everyone agreed that we should go ahead: using the respondent's hearing bundle (which the claimant confirmed included all of her documents, albeit it proved necessary later during the day to add a further document at her request; it was added to the evidence by consent); using the relevant parts of the 7 page document that was attached to the claim form as the claimant's witness statement.

3. Before going further, I should like to make clear that nothing in these Reasons:

   3.1 is intended as a comment on the strength or weakness of either party's case on any issue other than employment status;

   3.2 should be taken as suggesting that any of the three women who gave evidence before me was lying – some of their evidence was not completely true and accurate, but everyone genuinely and honestly misremembers things from time to time.

4. I shall now set out the law I have applied to decide the preliminary issue.

5. ERA section 230(1) defines "*employee*" as: "*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*"

6. ERA section 230(2) states: "*In this Act 'contract of employment' means a contract of service ... whether express or implied, and (if it is express) whether oral or in writing.*"

7. There is a helpful summary of the essential law on section 230(1) in the EAT's judgment in Cotswold Developments Construction Ltd v Williams [2006] IRLR 181, at paragraphs 14 to 20; see also paragraphs 54 & 55. In it, the EAT suggests that one cannot be an employee under section 230 unless under an obligation to provide personal service, unless the employer exercises some degree of control and unless there is what is usually termed 'mutuality of obligation'. I gratefully and respectfully adopt that summary, which should be deemed to be incorporated into these Reasons.

8. In her evidence, the respondent appeared to be trying to suggest that the claimant did not have to provide personal service because (the respondent alleged) she could provide a substitute for herself. I will return to this later in these Reasons, but I note at this stage that because the respondent has conceded – realistically – that the claimant was a worker, working under a contract "*to do or perform personally any work or services*" (ERA section

230(3)), she has necessarily conceded that the claimant was under an obligation to provide personal service.

9. The central plank of the respondent's case that the claimant was not an employee rested on the so-called 'control test'. For my part – and I said this during the hearing – I don't usually find that test very useful in practice. In this context, in modern law ('Harvey on Industrial Relations and Employment Law', A1 [23]): "*'control' means not the practical ability to control but the theoretical and perhaps ultimate right to control..*". Other than in clear cases, where there is unlikely to be any dispute about employment status, there is a right to control to some degree, consistent with the individual being an employee but not inconsistent with her being an independent contractor. "*The question is not by whom day-to-day control was exercised but with whom and to what extent the ultimate right of control resided*": White v Troutbeck SA [2013] IRLR 286 (EAT) at paragraph 45.

10. Control cannot, though, be ignored completely: see Bunce v Postworth Ltd t/a Skyblue [2005] IRLR 557 and Consistent Group v Kawlak [2007] IRLR 560 (EAT).

11. A number of other 'tests' have been put forward for use in determining employment status, including the organisational test (see Stevenson Jordan and Harrison Ltd v MacDonald and Evans [1952] 1 TLR 101, CA) and the economic reality test (see the well-known passage from the Privy Employer's Judgment in Lee v Chung and Shun Shing Construction and Engineering Co Ltd [1990] IRLR 236, [1990] ICR 409, beginning, "*What then is the standard to apply?*" and ending "*…how far he has an opportunity of profiting from sound management in the performance of his task*").

12. The modern approach is, of course, is, "*to weigh all the factors in the particular case and ask whether it is appropriate to call the individual an 'employee'*" (Harvey, A1 [38]) and to do as recommended by Mummery J (as he then was) in Hall (Inspector of Taxes) v Lorimer [1992] ICR 739, 744-745, recommendations approved by the Court of Appeal in the same case ([1994] ICR 218 per Nolan LJ at 226).

13. Finally: 'mutuality of obligation' – what does this mean in this context? There are a number of statements in judgments of the EAT and Court of Appeal that suggest otherwise, but in my respectful view, mutuality of obligation must mean more than that there is/was a contract with both parties being under obligations to each other; if it meant no more than this then the necessary mutuality of obligation would exist in every case where there was a contract of any kind.

14. As I understand it, the employee's part of mutuality of obligation is a contractual obligation to carry out the alleged employer's work, i.e. there must be: 14.1 a legally binding contract between the [alleged] employer and employee;

    14.2 a contractual obligation to do at least some work for the [alleged] employer;

14.3 a contractual obligation to do the work personally, e.g. no unlimited right to subcontract the work to someone else.

15. There can be no serious argument about whether the claimant 'ticked' all three 'boxes': she obviously did. At one point in her oral evidence, the respondent seemed to be wanting to argue that the claimant was under no obligation to do any work. (I'll explain more about this below). However, if this is what she is really arguing: I reject the argument on the facts; having accepted the claimant was a worker, she can't argue this anyway – if the claimant was under no obligation to do any work, she wouldn't even be a worker.

16. The employer's part of mutuality of obligation consists of an ongoing obligation on the [alleged] employer to provide at least some paid work and/or to pay a retainer or salary or similar to the [alleged] employee in respect of periods when no work is being provided. As I shall explain in a moment, the respondent was clearly under such an obligation to the claimant.

17. I turn to the facts, as I find them to be, and to why, on the basis of those facts, I have decided the claimant was an employee and not just a worker.

18. The claimant worked: for around two and half years; in the same job; in the same place – that place being a business owned by the respondent; doing work earning money for the respondent's business; almost exclusively using equipment / products paid for by the respondent; doing (possibly other than very rarely) the same number of hours in the salon each week; being paid the same amount of money each week by the respondent regardless of how many clients she dealt with; and with the amount paid being calculated on the basis of the number of hours multiplied by an hourly rate – until the final month, £165, being 20 hours at £8.25 per hour. I'll refer to these as the "basic facts".

19. In my experience, it is very unusual indeed for employment status to be disputed in such circumstances. And when I challenged the respondent's representative, during closing submissions, for an example or precedent of a case on those kinds of facts where the individual was not an employee, the best he could do was to refer to a hypothetical person doing casual work in the hospitality industry at an hourly rate. It seems to me that even if such a person (whatever label was given to them) were not an employee when actually carrying out work, that is not a comparable situation. Although I don't shut my mind to the possibility that on those basic facts someone could be merely a worker and not an employee, and although it is for the claimant to prove herself to be an employee and is not for the respondent to disprove this, it seems to me that given the basic facts, the respondent started on the back foot.

20. On what basis, then, does the respondent dispute that the claimant was an employee? I shall now consider in turn each of the respondent's main points.

21. The claimant and the respondent had an informal arrangement which was not recorded in writing and from the beginning, until just before the arrangement broke down, they labelled the claimant as self-employed. (I'll refer to it, neutrally, as the "arrangement" from this point onwards). But the informality of the arrangement is – in this case at least – irrelevant to employment status, and the labels given to the arrangement by the parties is just one, relatively minor, factor to be taken into account. If the case is finely balanced

once all the other factors are taken into account, the parties' label can tip the scales one way or the other. It isn't finely balanced here.

22. In many cases where employment status is in dispute, evidence is put forward by the respondent to the effect that the parties chose deliberately to label their arrangement "self-employment" because of the tax benefits to both of them: the respondent would not have to pay employers' national insurance contributions; the claimant could more easily offset expenses against tax and would pay less in national insurance contributions. In such cases, it is usually argued by the respondent that the claimant should not be permitted to enjoy both the tax advantages of self-employment and the rights of an employee; and that if the tribunal decides that the claimant was an employee, she would effectively be being allowed to get away with a fraud on the Revenue.

23. The evidence in the present case is insufficient to enable the respondent to put those kind of arguments forward. I don't even know how either party accounted for the payments made by the respondent to the claimant; no one was cross-examined about this or put forward any substantial documentary evidence about it. The most that can be said on the respondent's behalf is that the claimant was paid gross, without deduction for tax and national insurance, and was expected by the respondent to deal with HMRC for herself.

24. The claimant was not, I find, presented with a choice between employment and selfemployment; she was effectively told by the respondent that she would be self-employed. She may not, before the very end of her employment at least, have questioned this is any concerted way or resisted it. On the evidence before me, though, no particular thought was given by the claimant to the possible tax or other advantages of [supposed] selfemployment; she just went along with what the respondent proposed.

25. The fact – and it is a fact – that in WhatsApp messages of 1 November 2017 the claimant stated things like, "*Im self employed for a reason*" and "*I don't want employment I am self employed there for you have to buy me out as it is my business*" does not alter my view, neither does a message a few days earlier in which the claimant stated, "*Being self employed I can't be sacked or dismissed her only option is to buy me out*". If there was adequate evidence of these kinds of messages or discussions taking place near the start of the arrangement and/or throughout it, the position might be different. But: the only time these kinds of messages appear to have been sent was over a few days in late October / early November 2017; this was at the very end of the arrangement, when it had broken down (the 1 November messages end with, "*I will be seeing you in court you have my*

word"); they were sent late at night or early in the morning and, on the face of them, in the heat of the moment while the claimant was angry; they were sent in circumstances where the claimant had consistently been told and had understood for the previous 2 ½ years or so that she was self-employed; they were sent as part of a not-at-all-carefully considered attempt by the claimant to negotiate for herself a financially advantageous outcome. As such, I don't think these messages provide me with significant assistance in deciding what the claimant's employment status was from May 2015 onwards.

26. I do not accept the respondent's evidence, in her witness statement, that "*I offered her employment on multiple occasions to which she refused stating "*she liked being her own boss*".*" Such an offer may have been made on more than one occasion, but only at the very end of the arrangement; and I am not satisfied there were any exchanges between the parties about employment status significantly different in timing and content to those of the claimant's messages of 1 November 2017. On the evidence, no one in the salon was deemed an employee by the respondent during the claimant's time there. And if the respondent wanted or was happy for the claimant to be a conventional employee, on PAYE and so on, she would surely have put that forward at the start, but didn't.

27. A large part of the respondent's case on employment status is based on a broad allegation to the effect that the claimant was an independent businesswoman, who was permitted by the respondent to come up with and implement her own ideas to take her business forward. There a number of strands to this.

27.1 When the claimant started, she suggested to the respondent that an area at the back of the salon could become a 'beauty room' where the claimant could do nails and make make-up and similar things in addition to hairdressing. The respondent agreed and the claimant did provide non-hairdressing services to clients in the beauty room.

This does not significantly help the respondent's position. The beauty room may have been the claimant's suggestion, but the furniture and equipment in it were – a handful of things to one side – the respondent's and any money it generated went to the respondent; it was, in other words, just another part of the respondent's business, albeit a new part that no one other than the claimant did much or any work in. That an employer is receptive to ideas from her employees that might bolster the employer's business does not make her any less an employer.

A further key point for me in relation to this is that it was evidently the respondent's decision to set up or not to set up a beauty room and had she decided that she didn't want to, the claimant would have had to have gone along with that decision.

27.2 It is said that the claimant used some of her own equipment in the salon; but the extent of this was, on the evidence, almost *de minimis*. I would be surprised if a professional hairdresser and beautician did not choose to use some of her own equipment and products in the course of a 2 ½ year arrangement. She didn't have to, as (in the respondent's own words, in her statement), "*equipment were already available for her to use*". And I think (and find as a fact) that had the respondent

wanted to compel the claimant to use only the equipment provided by the respondent, she would have been entitled to do so.

27.3 The respondent states that she purchased the equipment and materials the claimant asked her to in order to give her a head-start, in part because the claimant complained of cash-flow problems. Similarly, she told me that the agreement was

for the claimant to be paid an hourly rate rather than for the claimant to pay a "*rent fee*" because of the time it takes to build up a client-base.

As arguments in support of the proposition that the claimant was not an employee, these things would have rather more force if (which was not the case): there was any suggestion that the money for the equipment and materials was a loan; or there had ever been any suggestion that the claimant might move from being paid what was effectively a wage to some other arrangement at some particular time and/or if particular conditions were satisfied; or there was any solid evidence that equipment and materials brought by the respondent at the claimant's request were ever used by the claimant to generate money for herself rather than for the respondent.

On the evidence, the respondent brought equipment and materials for the claimant in much the same way she might have done for any employee and paid her a wage as she would any employee. The only relevant difference between the claimant's position and that of any employee was the existence of a vague hope that at some unspecified and unascertainable future date the arrangement might change into something more closely resembling conventional self-employment. That hope never materialised, but if the arrangement had changed, then I suspect what I would have been looking at would have been a change in employment status when the arrangement changed, rather than it being self-employment from the start.

27.4 One of the main threads of the respondent's argument was the allegation that the claimant had her own hair and beauty business, called "Ahead of perfection", which she operated throughout her time with the respondent. The respondent's statement includes this: "*The claimant would regularly cut clients' hair or sell products on her business Facebook page.*" The evidence to support that allegation is, I am afraid, threadbare and I do not accept it.

27.4.1 It was evident that the respondent and/or her representatives had, in preparation for this hearing, trawled the internet, gone through their records and the text and WhatsApp messages on the respondent's and her witness's phones and suchlike, and had generally tried hard to find ammunition to support the respondent's case on employment status. (I don't, I should make clear, criticise them at all for doing this; it's a perfectly normal part of litigation). It was not suggested by the respondent or on her behalf that the claimant had taken any steps to hide or delete any relevant material. And it was clear that the respondent had not included in the hearing bundle all relevant material, leading to a concern I might not be being given the full picture – that, potentially, what I was being presented with was only

that which it was thought helped the respondent's case and not anything hindering her case. All of this had to be borne in mind when assessing the documentary evidence the respondent had provided.

27.4.2 A further thing to be borne in mind when considering the respondent's evidence, in particular the witness evidence, was that for much – more than half

– of the duration of the arrangement, the claimant worked by herself in the salon. This necessarily limits the respondent's and her witness's ability to give accurate evidence about what the claimant did and how she worked day-to-day.

27.4.3 The claimant did indeed control a Facebook account in the name of "Ahead of perfection". The claimant's case was that this was a personal Facebook account, on which, amongst other things, she occasionally posted images, or allowed others to post images, highlighting her skills as a hairdresser and beautician as a kind of portfolio; that Ahead of perfection was not a business but simply a name she used on social media; and that this was a Facebook account for friends and family, not clients (other than clients who were also friends or family). There was nothing of substance in the evidence to cast doubt on this part of her case; quite the opposite.

27.4.4 It appeared that in November 2016, the claimant did have a Facebook account in her own name instead of or in addition to her Ahead of perfection account. But it doesn't remotely follow from this that what she said about the latter account was incorrect. If Ahead of perfection on Facebook were a business, I would expect this to be obvious from its Facebook account. It would normally, for example, identify itself as a business on its Homepage and/or in the "*About*" section relating to it. Absent from the material provided by the respondent is anything from or relating to the Ahead of perfection Facebook account other than five posts (and two single sentence posts dating from December 2017, after the arrangement ended, which are purely personal in nature).

27.4.5 The five Facebook posts are spread out over more than 2 years. There is one from 2015, three from 2016, and one from 2017. If this was a business, it was one barely ticking over.

27.4.6 There was no real evidence of sales activity through Facebook at all, whether of products or services. There was nothing from Facebook "*Marketplace*" in the hearing bundle, for example.

27.4.7 Of the five Facebook posts, all of which contain photographs, three of them are of clients of the respondent's salon who the claimant had provided services to on the respondent's behalf, in return for money that was paid to the respondent. It is a very peculiar type of business that consists of providing services on behalf of someone else in return for money that is paid to someone else, who then pays you a fixed weekly sum that does not vary depending on the quantity or quality of

services provided. Of the photographs or sets of photographs attached to the posts, at least two sets were actually taken in the salon.

27.4.8 One of the five Facebook posts is from 25 November 2017, after the arrangement between the parties had ended.

27.4.9 Apart from the Facebook posts, there was no documentary evidence whatsoever of the existence of anything tied to the claimant called Ahead of perfection, let alone a business.

27.5 The respondent relied on the fact that the claimant did sometimes do people's hair and make-up in her own time, outside of the salon, and was paid money directly for this. But on the claimant's evidence, which in this respect I substantially accept (having no good reason to do otherwise given that the respondent was not in a position to challenge it), all she was doing was occasionally providing services to friends and family, for which she didn't charge as such but for which they might well give her money. This was very low scale, non-business activity. I also accept the claimant's evidence to the effect that ill health prevented her from working in any real sense for more than the 20 hours a week she worked for the respondent.

27.6 The high point of the respondent's case about the claimant's supposed business is possibly the part of the case concerning the selling of soap.

One of the five Facebook posts consists of photographs of some soaps that had been hand-made by the claimant, posted under the heading "*Sassy soaps *soaps by Sarah smith**". The claimant accepts that in the beauty room in the salon, she would from time to time display a basket of her hand-made soaps. Her case was that she never sold them and that she had them as Christmas gifts for the salon's clients.

This was the one part of her evidence where I felt she was not being entirely honest with me – although I think she had convinced herself that she was. She appeared at one point in her evidence to accept that she might sometimes have been given money for soaps, and to be drawing a distinction between receiving money for soaps or giving soaps to someone who offered money for them and actually setting out to sell them. Further, Ms Hunt gave clear and detailed evidence about a few particular occasions where she had been asked by the claimant to provide soaps to people for money or had witnessed the claimant providing soaps to people for money.

However, on the evidence, this was at most another very low scale activity. I accept that actually selling soaps, as opposed to giving them away to clients in the hope and expectation of an extra tip in return, was very rare. I also accept that the provision of hand-made soaps was complimentary to the work the claimant did for the respondent's salon, in that getting one might well make a client's trip to the salon even more pleasant and so encourage repeat custom; there is certainly no evidence of it ever interfering with the claimant's work. Crucially, had the respondent decided that she wanted to start selling soaps from the salon or for any other reason wanted

the claimant to stop providing her soaps to clients through the salon, she could and would have instructed the claimant to stop and the claimant would have been obliged to stop.

A conversation about the soaps recorded in paragraph 17 of Ms Hunt's witness statement is interesting in this respect. Ms Hunt stated that she asked the claimant whether she had told the respondent about the soaps and that the claimant had said no and something like, "*it's no skin off her nose*" or *"won't make any difference to* [the respondent]". I understood the point the respondent was trying to make by this evidence – that the claimant did her own thing without consulting the respondent, her supposed employer, as an employee might be expected to. But I think the implication of the claimant's remarks, as recorded by Ms Hunt, is that the reason the claimant didn't tell the respondent was her belief that the respondent wouldn't mind and that the claimant wouldn't be able to do it if the respondent did mind. The recorded remarks are not, "*she can't stop me*", or "*it's none of her business*", or anything like that.

28. Other matters the respondent relies on that are part of its argument to the effect that the claimant was an independent businesswoman include:

28.1 the respondent's assertion (witness statement, paragraph 22) that it was not true the claimant's only opportunity to profit came from tips. In support of this assertion, the respondent mentions the soaps, which I have just dealt with, and the (I think undisputed) fact that on one occasion, the respondent told the claimant and Ms Hunt to take more money than normal as their pay because "*we had an exceptional day*". This fact doesn't help the respondent:

28.1.1 it happened only once, in 2 ½ years;

28.1.2 there is no question of the claimant being legally entitled to the extra money;

28.1.3 essentially, what happened was that the claimant's boss, entirely on her own initiative and at her own discretion, decided to give her staff a one-off bonus as a reward for working especially hard for the benefit of the respondent's business;

28.1.4 (I note that the respondent's approach to this issue is an illustration of her tendency to 'overplay her hand' by taking something that happened once or only a few times in 2 ½ years and trying to present it as typical of the kind of thing that happened during the arrangement. There were numerous other examples of the respondent doing this, e.g. the suggestion that the claimant would take selfies at work and post them on social media, something that on the evidence happened once, in November 2016. I am afraid that much of the respondent's evidence had to be taken with a pinch of salt);

28.2 the fact that the claimant did not have to wear a uniform and that (allegedly) the claimant put forward a proposal in summer 2017 that she and Ms Hunt should wear a uniform to look more professional. In relation to this:

28.2.1 in the absence of suggestions and/or evidence to the contrary from either party, although I would accept that a requirement for a hairdresser to wear a uniform would be more consistent with employment than self-employment, I am not satisfied that the reverse is the case, i.e. not satisfied that hairdressers without uniforms tend to be self-employed;

28.2.2 as with the beauty room issue (see above), the fact that the respondent was happy to adopt one of the claimant's suggestions is in and of itself neutral so far as employment status is concerned. What I think is potentially more significant is that (according to Ms Hunt) the claimant felt the need to ask the respondent's permission to wear a uniform and that the respondent paid for the uniforms;

28.3 "*It was … common knowledge that … all staff could substitute another stylist or hairdresser in their place*" (respondent's witness statement, paragraph 21).

28.3.1 Whether other staff thought they could provide a substitute or not, I do not accept that the claimant thought or knew that she could. The respondent could not recall when giving her oral evidence any discussion ever between her and the claimant about the claimant's supposed ability to provide a substitute and the claimant never provided or sought to provide one. There was, I find, no right to provide a substitute agreed (expressly or by implication) between the parties.

28.3.2 I reject as fanciful the respondent's suggestion, in her oral evidence, that the claimant could have provided anyone at all of the claimant's own choosing as a substitute without the respondent's prior permission. This was at all times the respondent's business and it is highly unlikely she would risk its reputation by letting people she might know nothing about cut her clients' hair.

28.3.3 As already mentioned, the respondent has anyway conceded that the claimant was a worker. It necessarily follows it is also conceded that any right to provide a substitute was limited;

28.4 the claimant's threats in November 2017 to poach the salon's clients; the lack of a restrictive covenant between her and the claimant; an allegation that the claimant kept records of client details and took "*her clients*" with her when the arrangement ended. I think that – even if I were wholly to accept the respondent's evidence about the claimant taking clients and client records – these things are broadly neutral in relation to the question of employment status. I would expect any hairdressing

business that was in the habit of entering into written contracts with its workers (which the respondent clearly wasn't) to include restrictive covenants in those contracts, whether they were contracts of employment or not. The reason is that there is always a risk of those workers, whatever their employment status, taking clients and/or setting up in competition.

29. What the respondent's analysis of employment status completely fails to take into account is the fact that whatever the claimant was doing while working in the salon in terms of promotional or similar activity, it was to the benefit of the respondent's business; and cannot be said to be to the benefit of any business of the claimant as she earned the same however successful that kind of activity was. When this is taken into account, many of the points put forward on the respondent's behalf that at flush blush appear to be good ones prove to be otherwise and some of what is said by her is almost ridiculous. For example, the following is from paragraph 15 of the respondent's witness statement: "*It is my assertion that the Claimant would only come to the salon when she believed it is profitable for herself.*" Putting to one side the respondent's allegation that the claimant chose her own working hours, which I shall consider later in these Reasons, no hours were more or less "*profitable*" for the claimant, because she earned the same whatever hours she worked. She could hope significantly to increase her earnings by getting tips, but in this respect was no different from any other employee working in a service industry where tipping is customary.

30. Along similar lines to the respondent's arguments based on the claimant supposedly being in business on her own account is her suggestion that the claimant enjoyed very considerable autonomy and independence in what she did, and that the respondent exercised little if any control over her. Upon analysis, what is relied on in this respect is: an exaggeration or distortion of the truth or is just wrong and/or; neutral on the question of control or in fact demonstrates the respondent's ultimate right of control.

    30.1 According to the respondent, "*the Claimant would often do such thing, that if she had been employed I would have taken disciplinary action*" (witness statement, paragraph 13). The only example given is the claimant spending lots of time on her phone. In relation to this: first, as the claimant rarely worked with the respondent, how would the respondent know?; secondly, the respondent's witness statement puts the best possible 'spin' on the respondent's case (and, in fact, as already mentioned, often puts the respondent's case higher than it can reasonably be put), and if the worst thing the claimant allegedly did that the respondent can come up with to put in her witness statement is the claimant spending a lot of time on her phone, then I simply don't believe that she would often do things she would have been disciplined for had the respondent deemed her an employee.

    30.2 "*Often the Claimant would use her initiative by giving discount to try and promote the business. She would only tell me after the event … she would choose the prices she*

would charge her clients" (respondent's statement, paragraphs 14 & 16) and "*the Respondent has set prices,* [but] *the Claimant would regularly charge different prices, or provide different services … The Claimant in the past has also decided what work she does. She can refuse what client she wanted to see*" (Kate Hunt's statement, paragraphs 13 and 19). This is a considerable exaggeration. On the evidence presented (and not even all this was put to the claimant in crossexamination; both sides were guilty of failing to put their cases properly – or, in parts, at all – despite the need to do so being explained a number of times), there were just a handful of potentially relevant specific incidents or examples.

30.2.1 In or around the first week of September 2017, the respondent was away (I think on holiday) and had asked the claimant to blow dry the hair of one of the respondent's client's without charge – see paragraph 20 of the respondent's witness statement.

Pausing there, the fact that the respondent evidently felt able to instruct the claimant to do this is consistent with the respondent having a right of control over the claimant.

The thing the respondent relies on is the fact that the claimant, on her own initiative, in circumstances where the client appeared – in the claimant's view – to think she was in need of a trim despite having had one just two weeks' earlier, decided to give her a free trim as well.

This doesn't seem to me to help the respondent at all. It is equally consistent with the claimant being an employee as her being something else. It amounts to no more than an experienced worker in a business, not working directly under the business owner's supervision, using (on one identifiable occasion in 2 ½ years) a discretion not to charge a client of the business to try and keep the client happy and thereby to help the business in the long run.

Further, I am sure that the respondent would have considered herself perfectly within her rights to order the claimant not to do such a thing again, had she wanted to; and that she would have expected the claimant to obey such an order.

30.2.2 The claimant would sometimes do more than an absolutely basic dry cut but still charge the client the dry cut price of £10.95. The view expressed by the respondent and Ms Hunt in their evidence before me was to the effect that what the claimant did at that price was effectively a cut and restyle, for which the correct price was £19.95. We spent what I felt was a rather disproportionate amount of time on this during cross-examination. The issue boiled down to a difference of professional opinion: the claimant was willing, as part of a dry cut, where necessary, to ensure a client left the salon looking at their best, to apply a little more water when dampening down clients' hair and to do a little more 'titivating' than the respondent or Ms Hunt would do; the claimant charged the correct prices for a dry cut and for a cut and restyle and would not do a full and proper cut and restyle for the dry cut price; she would just do a little more than the other two as

part of a dry cut. This was not, on any sensible view, the claimant setting her own prices. Nor was there evidence before me of the claimant refusing to comply with any particular instructions from the respondent in this respect.

30.2.3 The claimant did not get on with a particular client and told Ms Hunt (and not the respondent) something to the effect that she didn't want to, or wouldn't, do her hair again, so Ms Hunt did her hair from then onwards. There is no evidence that the claimant ever refused to do the hair of a client when told to do it by the respondent.

30.3 The respondent relied heavily on allegations to the effect that the claimant worked whatever hours she pleased. These allegations were mainly made in Ms Hunt's witness statement rather than the respondent's. And there is once again considerable exaggeration here.

30.3.1 It is alleged that the claimant "*would change the days to suit her needs, and she eventually settled down into a pattern for her benefit*" (Hunt's witness statement, paragraph 15). What in fact happened was that the claimant agreed with the respondent what days she would work and, in the main, there was no tension or dispute around this.

30.3.2 The allegation that the claimant could work whatever and however many hours she chose is false. There are many references in the evidence along the lines of the claimant having to make up time if she left early. For example: "*She would leave early sometimes and make the time up later.*" (Hunt's witness statement, paragraph 15); "*The Claimant would then come in at a later time on her next working day to make up the time*" (respondent's witness statement, paragraph 15); "*The Claimant would stay late, and then come in later on other days as to compensate herself.*" (Particulars of Response, paragraph 39); "…*coming in at 1 tomorrow didnt leave today till 5.10pm and Sunday didnt leave till 4.45 xx so more than made up the hour I owed Kim..*" (WhatsApp message from claimant to Ms Hunt of September 2017); in her oral evidence, the respondent stated that if the claimant left early, she "*would make the time up*", that if she missed an hour somewhere she would "*make that hour up*", and that when she took time off for an operation, "*It is right that she was made to make the time up*".

30.3.3 What the respondent and her representatives have sought to suggest was the claimant choosing her own hours was in fact entirely conventional flexible working: subject to the needs of the business, the claimant could do more hours on one day and offset that by working fewer hours on another day, so long as she did her 20 hours a week. The respondent seems to have felt able to instruct the claimant not to work flexibly when she felt it was inappropriate: "*The Respondent told the Claimant this* [working late and coming in late] *was not cost effective as the Claimant would not be at the salon to see clients when the salon busy*" (Particulars of Response, paragraph 39; I have just written "*seems to*" [have felt able to instruct

the claimant] because this allegation was not in the respondent's witness evidence and was not put to the claimant).

30.3.4 At one point in her oral evidence, the respondent suggested that the claimant would still have been paid the same amount even if she had not come in to work. I do not accept that suggestion; and I don't think even the respondent in her heart of hearts believed it. The suggestion was not made elsewhere in the evidence; it was not in the respondent's witness statement, for example. In the rest of her oral evidence, the respondent (as mentioned above) referred to the claimant making up time. And it is inconceivable that the respondent was prepared to pay the claimant an amount that was calculated on the basis of 20 hours work however many hours she actually did work – for example, even if she did no work at all for weeks at a time.

30.4 Ms Hunt refers to a single occasion in 2016 where "*much to my horror … the Claimant persuaded me to put colour on her hair*" and stated that she had "*seen the Claimant sit down and do her own nails at work … I don't think Ms Armstrong was aware and I didn't say anything about it.*". My reading of these parts of Ms Hunt's evidence is that she felt this was unprofessional behaviour on the part of the claimant which the respondent would have disapproved of and prohibited had she known about it. At best for the respondent, it is a neutral factor in relation to employment status.

31. A few other things were mentioned in the course of evidence and submissions, but I have dealt with the respondent's main arguments and have taken all of the evidence (including the parts of the documentary evidence to which I was specifically referred) and submissions into account. Weighing everything up, I have little hesitation in concluding that at all relevant times, the claimant was the respondent's employee and is therefore entitled to continue to pursue her unfair dismissal complaint.

CASE MANAGEMENT ORDER

31. When they receive this Judgment and Reasons, the parties should do their best to reach a settlement agreement, through ACAS or otherwise. Within 28 days of the date this is sent to the parties, they must: notify the tribunal in writing whether or not they have reached a settlement agreement; if they haven't, put forward in writing their proposals for case management orders to take this case to a final hearing / trial, including a realistic time estimate and any dates of unavailability between January to September 2019.

Employment Judge Camp

17 July 2018

SENT TO THE PARTIES ON

17 July 2018

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FOR THE TRIBUNAL OFFICE