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EMPLOYMENT TRIBUNALS

Claimant: **Miss C Ruff**

Respondent: **Aimee Hair**

Heard at: **East London Hearing Centre**

On: **Thursday 10 January 2019**

Before: **Employment Judge Jones**

Representation

Claimant: Mrs S Matthews (Solicitor)

Respondent: Mr J Watson (Director)

JUDGMENT

The judgment of the Employment Tribunal is that: -

1. **The Claimant was an employee with the Respondent within the definition in section 83(2)(A) of the Equality Act 2010.**

2. **The Tribunal has jurisdiction to hear the complaint of pregnancy discrimination.**

REASONS

1 The Claimant brought a complaint of pregnancy discrimination. The Respondent defended the case by stating that the Claimant had not been its employee but had been self-employed. It was the Respondent's case that the Tribunal had no jurisdiction to hear the case.

2 The Tribunal listed today's preliminary hearing to determine the sole issue of whether the Claimant is an employee for the purposes of section 83 Equality Act 2010 so as to give the Tribunal jurisdiction to determine her claim.

Evidence

3 The Tribunal heard evidence from the Claimant and from the Respondent, the Tribunal had evidence from Ms Aimee Watson (nee Matthews). Both parties made submissions on the law and facts of the case.

4 The Tribunal came to the following findings of fact from the evidence. The Tribunal only made findings of fact on the issue of the Claimant's status with the Respondent.

Findings of Fact

5 The Tribunal found that sometime before the Claimant came to work at Aimee Hair, she had been a self-employed hairdresser but this was not immediately before she came to the Respondent. She was working as a consultant just before coming to the Respondent.

6 The Claimant's reason for coming to work at Aimee Hair was to service her existing clientele of around 22 and to get more clients and service the Respondent's clients.

7 The Tribunal finds that the Respondent operates a hair salon in Leigh on Sea. The Respondent's evidence today was that it has some stylists who are believed to be sub-contractors or -self-employed persons and some who are employees.

8 There are also junior staff in the salon.

9 The Tribunal finds that the Claimant operates a Facebook page in which she advertises her work and informs her friends where they can find her. The page is called *'Hair by Charlotte Ruff*'. When she worked at the Respondent, the Facebook page was named '*Hair by Charlotte Ruff at Aimee Hair'* and referred visitors to the page to '*Please hit the call button on my page to call Aimee Hair'* if they wished to book an appointment with her. The pages from Facebook that were in the bundle of documents for the hearing, did not have the Claimant's personal mobile number for contact, on the pages that related to the time that she was working at Aimee Hair. Visitors to her Facebook page who wanted to book the Claimant to do their hair would telephone the Respondent's reception to do so. The evidence showed that the Claimant did not book those clients herself.

10 We had copies of Facebook pages from the period after the Claimant stopped working at the Respondent. Those Facebook pages referred anyone who visited her page to contact her at the new salon when she worked. The Tribunal finds that it is commonplace for hair stylists to have a Facebook page where they can upload photos of their work to get clients. The idea is to showcase your work and build your client list even if you are employed. Ms Matthews' evidence was that she was aware of the Claimant's Facebook page and had checked it to see her work before they agreed to

have the Claimant work at her salon. She also confirmed in her evidence that the other stylists had Facebook pages.

11 The Tribunal found the Claimant's evidence to be credible. She was not challenged in the hearing on her evidence that the set days she worked were Wednesday through to Saturday. When Mrs Watson wrote a text to the Claimant and her other pregnant colleague on 22 January about how things would be different on their return from maternity leave she referred to them making a request from them to come back part-time. The Tribunal found it highly likely that this was a reference to them asking whether they could return to work for less than the time they had worked before, which was likely to be set days. There is a text message from the Claimant on 17 January doing just that - asking to come back from maternity leave in December to work three days a week with Thursday and late Fridays and Saturdays. Because of those factors – this Tribunal concludes that the Claimant worked set days for the Respondent rather than working as and when she wanted to.

12 I find that the Claimant filled in the days on the Respondent's computer, when she was at work, to say when she would be away from the salon, whether it was because she was on a doctor's appointment or on holiday. For example, the Tribunal saw, an entry she wrote in the diary on a day that she was supposed to work that she would be at a wedding and other such entries. It is unlikely that she would have done so if she was not working for the Respondent as well as for herself. I find that the Claimant filled in the days on the Respondent's computer, when she was at work, to say when she would be away from the salon, whether it was because she was on a doctor's appointment or on holiday. She did not just not attend the salon to work on any day that she chose.

13 The Tribunal also find it likely that the Claimant did not simply work on the heads of the clients she brought with her to the salon. I find it likely that she also worked on walk-in clients and clients referred to her by the business. The appointments were all made by the Respondent's reception, whether for the clients that the Claimant brought with her or the ones referred to her by the salon.

14 Mrs Watson asked the Claimant to undergo training to be able to do extensions so that she could offer that service to clients at the salon. The Claimant had not done that for her existing clients. The Claimant paid for that training herself.

15 I find that the Claimant was given some training at the beginning of working for the Respondent as the Respondent considered that her skills in putting hair up and blow drying were not up to the Respondent's standard. That training took place on Tuesdays at the Respondent's salon.

16 The Tribunal also finds it highly unlikely that either the Claimant or Mrs Watson would have entered into an arrangement where she just did hair for the 22 clients she brought with her and paid 45% of the takings from those clients to the Respondent. She could have done that from home or anywhere else. Instead, it is more likely that the intention on both sides was that the Claimant would work at Aimee Hair, help to build the business by doing walk-in and other clients while at the same time, building her own client list as she got new clients who became committed to her and depended on her to do their hair.

17 I find also that the Claimant purchased her own tools and that she reimbursed the Respondent for the price of the colour products that she used. However, she did not choose what type or brand of product was used but used whatever products the salon purchased. Also, she would use other incidental products such as shampoo, as and when needed and those were not reimbursed.

18 I find that the Claimant considered herself self-employed when she worked with the Respondent. She did not have a written agreement and did not get any legal advice on the situation at the time. She had previously worked at salons while self-employed and had also in the past been an employee at a salon.

19 I find on balance that the Respondent set the prices that the Claimant charged the people whose heads she worked on. I find that it would not have been possible to have widely different prices for the same job between stylists in the same salon. It is highly likely that any variation between stylists i.e. to allow for the skill and experience of the stylist or for the complexity of the job would be within a margin agreed between the parties. The prices were benchmarked by the Respondent and it is likely that the Claimant knew what she was expected to charge. The Tribunal finds it likely that the student discount and the others referred to on the Claimant's Facebook page are ones that the Respondent decided on.

20 The evidence was that the jobs would need to be priced by the stylist once they had seen the client's head and discussed what needed to be done. The Tribunal finds that the Claimant was benchmarked as a senior stylist, so it is likely that the work was priced within the margin set by the Respondent for senior stylists.

21 The Claimant had hardly any prices on her Facebook page apart from the price for a colour treatment called '*Balayage'*. The Tribunal also finds that although the Claimant referred on the Facebook page to discounts, anyone visiting the page was always referred to the Respondent's reception to book an appointment. It is therefore likely that the Respondent would either tell the client the price or would give them a ball park figure for the job which the receptionist would know from the benchmarking that had been done.

22 In the same way, the Tribunal found it likely that the Claimant did not offer discounts unless she had told the Respondent that she was going to do this or it was discussed and agreed with the Respondent. A discount to a client would affect both the Claimant's and the Respondent's income. I find it highly unlikely that the Respondent would let her charge whatever she wanted, when that meant that the chair would not be bringing in as much income as it would do with another person who did not offer lots of discounts.

23 The Claimant had to agree with Ms Watson how long she was going to be off on maternity leave. I find it unlikely that she would have to do so if she did what she wanted and came in when she wanted as was the Respondent's case.

24 I find also that it is highly unlikely that she could send a substitute in to do her work for her. I find that it was not something that was done in this salon. The Respondent was particular in the standard to which it wanted stylists to blow dry and

style hair in its salon. It understandably wanted the work to be done to a high standard. It made sure that the Claimant was trained to do so to the Respondent's standards before she was booked to do blow drying and styling (putting hair up) for the Respondent's clients. She was not challenged on her evidence that she had to be trained to do the styling to the Respondent's standard. The Respondent confirmed today that the Claimant's Facebook page was checked before she began working there. They wanted her personal expertise in the salon. Because of all those facts I find it highly unlikely that she would have been able to send anyone else to do her work on the days when she could not attend work. The Claimant was engaged because of her skills and her ability to bring her clients with her and contribute to the growth of the business.

25 The Claimant was paid 55% of the takings from the work she did. She also paid the Respondent for the colour products she used. She was mainly a colourist. I find that she was responsible for her own tax and national insurance.

26 I find that if there was a client who was unsatisfied with her work, she would work to put it right and would usually do that at her own expense, unless it was a situation where the client had changed their mind or if the problem was not her fault. I find that as far as the Respondent's employees are concerned, the Respondent would also take a financial loss if they made a mistake as the Respondent would expect them to rectify the mistake without charging the client again. The Respondent would lose out in the scenario with the Claimant as she would not be making money during the time she spends rectifying the error with the client.

27 There was an instance where the Claimant made an error with a client that had been referred to her by the Respondent. The client was not treated as one of her clients as another stylist rectified the error and the Claimant was not told about this until sometime later.

28 The Respondent provided insurance cover for the Claimant. That means that if she burnt a client with hair dye or cause other personal injury, the Respondent would deal with any insurance claim that was made, on her behalf.

29 The Tribunal finds that if the Claimant had ever called in sick, the Respondent's Receptionist would telephone those who were booked to see her that day to see whether they wanted to rebook with her on another day or whether they wanted to come in and see other stylists in the salon.

30 Although the Respondent's case is that the Claimant's 22 clients that she brought with her were hers and nothing to do with it; the Tribunal finds that those clients were put into the Respondent's database and they would call the Respondent's reception to book appointments with her. The Claimant could not access the database from home and did not usually book appointments with them from home. When she was about to stop working for the Respondent, she was not allowed to take those contact numbers with her. Text messages in the bundle show that she was not allowed to have access to the contact numbers of those clients that she had brought with her. The Respondent relied on the data protection legislation to refuse her access to those numbers. It also did not print them off and give them to her. The Respondent considered that those clients now belonged to it.

31 The Claimant had to reconstruct her client list and many of her old clients were upset with her as they considered that she had abandoned them.

Law

32 The Claimant brings a complaint of pregnancy discrimination under the Equality Act 2010. In order for her to be able to pursue such a complaint she must be considered to have been in employment according to the definition in section 83(2)(a) of the Equality Act 2010 (EA).

33 That section states that employment means *'employment under a contract of employment, a contract of apprenticeship or a contract personally to do work'.*

34 The Respondent submitted that the Claimant was engaged as a subcontractor and that they had followed HMRC guidelines in their relationship with her.

35 Mr Watson also submitted that as she was capable of suffering profit and loss, bought her own products and paid her own tax that meant that she was not an employee under any definition.

36 He submitted that she was an independent subcontractor within the salon.

37 Ms Matthews for the Claimant referred the Tribunal to two cases. Firstly, *Autoclenz v Belcher* [2011] IRLR 820 in which the court held that where there is a dispute as to the genuineness of a written term in an employment contract, the focus of the enquiry in the court must be to discover the actual legal obligations of the parties. All the relevant evidence must be examined, including: the written term itself, read in the context of the whole agreement; how the parties conducted themselves in practice; and their expectations of each other. Evidence of how the parties conduct themselves in practice maybe so persuasive that an inference can be drawn that the practice reflects the true obligations of the parties. Although, the mere fact that the parties conduct themselves in a particular way does not, of itself, mean that the conduct accurately reflects the legal rights and obligations.

38 The Claimant also referred in her submissions to the case of *Pimlico Plumbers v Smith* [2018] IRLR 872 in which, on the particular facts of the case, it was held that a person who had considered himself to be working as a self-employed person was actually an employee when applying the wider definition in section 83 of the Equality Act 2010, as set out above. In that case the workers wore a company uniform, drove its marked van and were represented to the customers as part of its workforce. They were also referred to as contractors. Customers were directed to plumbers by the company who invoiced for the work. In the written agreement the plumbers were referred to as self-employed. They were responsible for the quality of their work and had to get their own insurance. There was no obligation on either side to give or perform work and although there was some flexibility in who did what work, there was no formal substitution provision. The claimant in that case considered that he was self-employed. He was responsible for his own tax affairs and was registered for VAT. The outcome of the case was that he was held to be an employee for the purposes of the Equality Act 2010 by the Employment Tribunal. This was confirmed by the Court of

Appeal and House of Lords. The House of Lords confirmed that the case turned on its particular facts and warned that parties in future cases should be careful when interpreting it. The Court distilled 2 essential questions: (1) was the contract one for the claimant to provide work personally? And (2) was the business a client or customer of the claimant?

39 The Claimant submitted that in this case although there was no written contract between the parties, the Tribunal should consider whether the actual way the arrangement between the parties worked shows that the oral contract between them was more akin to that of an employer/employee than a client/self-employed person. She submitted that in this case the reality was that the Claimant had a contract to provide services personally to the Respondent. She had to have training, the Respondent organised insurance which covered her and she had to be there on the days clients were booked.

Decision

40 The law requires the Tribunal to look not only at the agreement that the parties made at the beginning but also, how the arrangement actually worked in practice. In this case there is no written agreement between the parties.

41 It is this Tribunal's decision that the Claimant considered that she would be self-employed when she first started at the Respondent. The Respondent has always considered her to be a self-employed person.

42 However, that is not where the Tribunal's analysis ends.

43 The Tribunal has next to consider the evidence put before it today to decide what was the actual arrangement between the parties? How did they actually work together in practice?

44 This Tribunal has been able to distil 5 essential contractual terms that were agreed/in practice between the parties: (1) that the Claimant would perform hairdressing services at the salon to the clients she brought with her and to clients referred to her by the salon, to the salon's standards (2) that she would reimburse the Respondent for colouring products used out of its stock. She did not choose what products were purchased and would use other products such as shampoo and conditioner without having to pay for it; (3) that she was obliged personally to do the work and could not substitute anyone else to do it for her; (4) that she was paying the Respondent 45% of the takings from the work that she did; and (5) that she would be in the salon on set 4 days a week and would let the Respondent know when she is not coming in on those days.

45 In this Tribunal's judgment, the Claimant did not just work on her clients, did work set days, and could not send in a substitute. Clients were booked through reception and not by herself; her clients were subsumed into the Respondent's database and she was not allowed to take the information on how to contact them off the database when she was leaving. She was covered by the Respondent's insurance.

46 In this Tribunal's judgment, the Claimant did not come in when she wanted, charge what she wanted, or do what she wanted.

47 The facts are that she worked set days, had been given a margin within which she set her charges and was told what to do, i.e. you will do styling this way and you should start doing extensions.

48 The facts show that this was a contract for the Claimant to provide the work personally. It is this Tribunal's judgment that the Respondent was not a client or customer of the Claimant. If it were so she would not have had to get her maternity leave agreed with Mrs Watson or get Mrs Watson's agreement on the says she would work on her return.

49 In this Tribunal's judgment, the Claimant was on a contract personally to do work. That brings her under the remit of section 83 of the Equality Act 2010.

50 The Tribunal does have jurisdiction to hear the claim of pregnancy discrimination. The hearing to determine the Claimant's complaint of pregnancy discrimination will be set down as soon as possible and dates will be sent to the parties.

Case management

51 Once the Tribunal gave its judgment on the Claimant's employee status, the parties and the Tribunal discussed the next steps in the case.

52 The Respondent has simply filed a defence denying that the Tribunal has jurisdiction to hear the case. It had not addressed the allegations of pregnancy discrimination in the claim form.

53 In the circumstances, it is appropriate to give the Respondent an opportunity to respond to the substance of the claim.

54 It was determined after discussion between the parties and the Tribunal that the case can be heard over 2 days.

55 The following orders were made after discussion between the parties and the Tribunal.

ORDERS

Employment Tribunal rules of procedure 2013

1 The Claimant is to file an updated list of issues within 7 days of today's hearing and by **17 January 2019**.

2 The Claimant confirmed that she has already sent answers to the questions asked in the document produced by EJ Gilbert after the preliminary hearing held on

10 September 2018. She will now put them into a separate document and serve it on the Respondent by **17 January 2019**.

3 The Respondent is given leave to file its amended defence to the claim. An amended response must be filed with the Tribunal by **7 February 2019**.

4 On before **7 March 2019**, each party shall send to the other party a list of the documents in their possession or control relevant to the claims and to the Respondent's case. The Claimant's list of documents should include any documents relevant to the schedule of loss already produced. Both parties will attach copies of all the documents to their lists and disclose to the other side.

5 For the hearing, the parties are to agree a bundle of documents limited to those documents that are relevant to the decisions that the Tribunal needs to make in the case.

6 As the Respondent is unrepresented the Claimant will prepare an index in the bundle and send to the Respondent for agreement.

7 By or before **30 April 2019**, the Claimant will prepare a copy of the bundle of documents and send it to the Respondent. The Respondent will then prepare two further copies for the hearing. The Claimant will also prepare two further copies for the hearing. The copies for the Tribunal and the witness table will be brought to the Tribunal on the morning of the hearing, and not before.

8 By or before **28 May 2019** the Claimant and the Respondent shall prepare full written witness statements of the evidence that they and their witnesses intend to give at the hearing. No additional witness evidence may be allowed at the hearing without permission of the Tribunal. The Claimant and the Respondent shall send the written statements of their witnesses to each other. Four copies of each written statement shall be provided to the Tribunal by 9:30am on the morning of the hearing and not before. The Claimant's statement should contain evidence relevant to the schedule of loss.

9 The Tribunal will notify the parties of the dates set down for the hearing. If the dates are inconvenient, the parties are to write to the Tribunal saying why and enclosing copies of evidence of the inconvenience; within 7 days of receiving the notice of hearing.

10 **Other matters**

10.1 Public access to employment tribunal decisions
All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

10.2 Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

10.3 Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

10.4 You may apply under rule 29 for this Order to be varied, suspended or set aside.

Employment Judge Jones

16 March 2019