Case Number: 3325880/2017

EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
v	
Ms K Game	**Unique Associates limited (Trading as Threshold Surveyors)**

Heard at: London South Employment Tribunal

On: 1st March 2019

Before: EJ Webster

Appearances
For the Claimant: Mr Otchie (Counsel)
For the Respondent: Mr Spiro (Lay representative and owner of respondent)

PRELIMINARY HEARING JUDGMENT

1. The claimant is an employee in accordance with s230 Employment Rights Act 1996.

The claims

2. The respondent is a surveyor. The claimant provided PA/secretarial services to him until the respondent informed the claimant, with no notice, that he no longer needed her services. There was no written contract between them. The respondent asserts that the claimant was a self-employed contractor. The claimant asserts that she was an employee.

3. By an ET1 dated 8 August 2017 the claimant brought claims for disability discrimination, unfair dismissal, wrongful dismissal, unlawful deduction from wages/breach of contract and failure to pay accrued but untaken annual leave. The respondent filed an ET3 dated 15 September 2017 and refuted all the claims. The claimant has since withdrawn her disability discrimination claims and they were accordingly dismissed.

The hearing

4. This preliminary hearing was ordered to determine the claimant's employment status. She states that she was an employee and therefore has the protection of the Employment Rights Act 1996 and can bring a claim for unfair dismissal. In the alternative she states that she was a worker and ought to have been paid annual leave in accordance with the Working Time Regulations 1998. The respondent states that the claimant was a self-employed contractor and therefore cannot bring an unfair dismissal claim and had no right to annual leave.

5. The claimant and Mr Spiro, owner of the respondent, gave evidence. The claimant provided a small bundle numbering 94 pages. The respondent provided two lever arch bundles totaling 838 pages. I was taken to very few of those pages during the hearing.

6. The claimant stated that there had been significant amounts of correspondence between the parties regarding preparation of the bundles and that the respondent had behaved unreasonably during the process. They referred me to EJ Baron's comments on disclosure and proportionality – though both parties interpreted those comments differently. I agreed to consider both sets of bundles but made it clear that I would only look at the documents I was taken to by the parties in their witness statements, cross examination or submissions.

Factual findings

7. It was not in dispute that the claimant started her working relationship with the respondent in or around 1992. It was also not in dispute that the claimant's relationship with the respondent became more regular in or around September 2009 when the respondent's previous secretary/PA was unwell and subsequently decided to stop work. None of the contractual arrangements between the parties was recorded in writing.

Work done

8. It was agreed that the claimant carried out general PA and secretarial duties for the respondent. She worked primarily in the respondent's office, though there was a dispute as to whether she had to attend the office or not which I address below. It was however agreed that she generally worked 3 days per week with the other 2 days per week being covered by another PA who worked in a similar way to the claimant. Those three days were generally Monday, Tuesday and Thursday.

Place of work and substitutes

9. If the claimant was not able to come into the office on her agreed days she would try to arrange for the other PA (Ms White) to cover for her. The claimant stated that she was only allowed to ask Ms White to come into the office to cover for her. Mr Spiro also accepted that the claimant could not have sent someone of her choosing to carry out the work. There was some

discussion about the possibility of arranging for one of the remote typists to do some of her work which I discuss further below.

10. Mr Spiro played no role in arranging the cover between the claimant and Ms White – the arrangements as to who came in and did the work on any particular day was the responsibility of the claimant and her colleague. However these arrangements were made within the parameters of there being normal working days for each person and I find that any changes were not part of the normal working pattern. They occurred if someone was sick or if somebody wanted to take time off. I base this on the claimant's evidence which was largely unchallenged on this point. Further the documents show that the claimant made efforts to arrange cover at times of ill health or due to normal situations when people might want time off such as holidays, to care for family or to attend social events. I find that on those occasions Mr Spiro was duly notified of any changes and expected to be told about any changes.

11. Mr Spiro stated that the claimant could also have arranged for the remote typists could have done the work for her. The claimant stated that she was not aware of that. She knew that Mr Spiro did sometimes use remote typists and knew the names of some of them but she stated that she was not aware that they could be brought in to cover her office-based work. This was to an extent confirmed by Mr Spiro who said that he agreed that the remote typists would not have been able to come into the office.

12. It was not clear whether the respondent agreed that a significant part of the claimant's normal day to day work required her to be in the office. However I find that it was generally expected that the claimant would come into the office on her normal working days unless there was a good reason not to such as ill health or similar. I reach this conclusion based on the oral evidence provided by the claimant and the respondent.

13. The claimant managed the respondent's diary which until relatively recently had been a hard copy document. She answered the phones and liaised with clients and the way in which work was given to her and prioritized by Mr Spiro was by way of a physical method referred to as 'follow the chair'. This is discussed in more detail below. Based on these facts, I conclude that generally the claimant was expected to physically attend the office on her working days and therefore the remote typists could not have been a genuine substitute for her entire role. Further I find that the claimant was not aware that she could have asked them to cover for her were she not able to perform her role for any reason. Her understanding, which I accept, was that she could only ask Ms White to cover for her.

14. I accept that the claimant did not ask Mr Spiro's permission to take time off. However she was expected to notify Mr Spiro if she did take time off and she was expected to organize her cover though this cover was limited to Ms White.

Control of day to day work

15. I conclude that the claimant did the work that the respondent asked her to do. There was a scheme known as 'Follow the chair' and Mr Spiro would leave

the work he expected to get done out in a certain order. Presumably this meant that there was paper work and/or paper files that had to be worked on. Mr Spiro was often not in the office but he would dictate what needed doing. Those dictations were available digitally and the claimant did sometimes pick them up from home if she wanted to work overtime.

16. I conclude the claimant was not free to choose what work she did and how she did it. That was almost entirely dictated by the respondent. The claimant was not in a position to create her own work or, to a large extent, choose what order she did her work in even if on occasion she did choose to complete preferred tasks before undertaking other work.

17. Mr Spiro accepted in cross examination that on occasion he became frustrated and had perhaps banged the desk when the claimant had not done the work he wanted her to do or in the way that he wanted it done. This supports my finding that he expected the claimant to work in a certain way and to do the work he wanted and needed doing.

Work for other clients

18. Mr Spiro said that the claimant chose to conduct her own business with other clients from his workspace and he was aware of her meeting other clients at the offices. He therefore asserted that she did not work exclusively for him either during her 'normal' work days for him, or overall and that this pointed to someone who was self-employed. He asserted that this meant that he did not tell her what to do and how and said that he had wished that she had followed his requests more often.

19. The claimant agreed that she had done small amounts of work for other clients but not whilst she was actually at work for the respondent. She did not accept that another client, who was someone who also worked with the respondent from time to time, had come to the offices to give her work. She stated that the had attended the offices to see the respondent and at the same time had discussed work he was giving her.

20. I find that the claimant did have other clients in addition to her work for the respondent. Having reviewed the accounts that she produced which set out her income and have been produced by her accountant, I accept that the volume of work she did for others was small. The respondent sought to cast doubt on the veracity of the figures that the claimant had produced because a lot of the details were redacted. I do not agree. I accept the claimant's accountant's statement which analysed the data and set out the percentage of income from the respondent as opposed to the other clients. I have no reason to doubt the truthfulness of the accountant's statement as it is supported by the figures attached. I do not agree that I or the respondent, need to see the names or account details of the parties who paid those invoices to able to rely on this data.

21. I find that it is quite likely that the claimant's other client, who had been referred to her by the respondent, did attend the respondent's offices and possibly combined his visit with asking the client to undertake various tasks.

The respondent did not assert that this was a regular occurrence although he suggested it might have been because he was often out of the office. However, beyond this one meeting, he could provide no evidence of the claimant regularly undertaking work for others during the hours the claimant was working for him. The visit to the office by another client does not undermine the overall purpose and work of the claimant whilst she was at the respondent's offices. Generally speaking she exclusively performed the work she was asked to do by the respondent.

22. I do not find it plausible that the respondent would continue to pay the claimant's full invoices if the claimant was, to a significant extent, not doing the work that he expected to be done or if he, as he now asserts, believed that she was spending a large proportion of her time doing work for others.

Working hours

23. Mr Spiro made much in his cross examination and submissions of the flexibility of the claimant's hours. He said that her time keeping was bad and she was frequently late. It was agreed that she was expected to work 91 hours a month but which hours were her choice. Mr Spiro asserted that the claimant was therefore free to choose how and when she worked and that this demonstrated a lack of control or mutuality of obligation. The respondent stated that she frequently arrived at the office after 11am and, he says, she was often dishonest about what time she arrived. If she arrived after 11am Mr Spiro said that he was disappointed but did not discipline the claimant or express unhappiness because she was not his employee.

24. The claimant said that Mr Spiro would roll his eyes if she was late but that there were no other repercussions. Mr Spiro also stated in evidence that the claimant could not stay at the office beyond 7pm so whilst he was flexible on the starting time, the claimant was expected to work 7 hours on the days she came to the office and she could not start work after midday.

25. Mr Spiro gave examples of the claimant leaving early without notifying him beforehand. The claimant accepted that this did happen – either to attend a medical appointment or, on other occasions, to go to the theatre. I accept that the claimant did not seek the respondent's permission to do this but she did notify him of her intentions albeit sometimes at the last minute. It was after one of these such incidents that the respondent dismissed the claimant.

26. I conclude that the claimant did leave the respondent when she chose and that her hours were relatively flexible. However there was also a general expectation from the respondent that she attend on the days that were her normal working days, that whilst her hours were relatively flexible, particularly her start times, he expected her to work approximately 7 hours each day and that when she did not do that it frustrated and annoyed him. He therefore had the expectation that she would work in a certain way. I believe, given that he appears to have dismissed her, at least partly, for leaving early without prior notification, that had she made a habit of being entirely unreliable and not generally working the hours he expected her to – he would not have continued working with her for so long.

27. The claimant did sometimes work overtime from home. This was clearly evidenced in the bundle. She was not required to work overtime but when there was a particularly busy period she would sometimes pick up typing tasks from the digital dictation store that the respondent used. I accept that working this overtime was entirely voluntary and the respondent did not require the claimant to do this work at any time. She chose to do it.

Pay

28. The claimant invoiced the respondent for her hours worked at the end of each month. There was an agreement that regardless of how many hours she had worked, she would be paid for 91 hours. This was reflected in all the invoices that I saw and was not disputed by the respondent.

29. Any hours worked over the cap of 91 hours would go towards her 'bank'. It was accepted by the claimant that this bank was her idea. She operated it so that she could take time off either on sick leave (her health was not good) or on holiday and ensure that she would still get paid in full across a month when she had to take time off for these purposes.

30. When the claimant worked fewer than 91 hours for whatever reason (sickness, appointments, holidays), then she would deduct hours from the bank but still get paid 91 hours.

31. At the bottom of each invoice was a record of the hours 'banked'. This number could go up or down depending on whether she used bank hours to take time off or accrued more hours by working overtime or covering her colleague's sick leave or holidays.

32. On one occasion, several years ago, the respondent 'cleared' the bank of hours that the claimant had agreed. Other than on that occasion and then again after he had dismissed the claimant, I find that the respondent did not query the bank hours system nor did he query the number of hours accrued in the bank at the bottom of each invoice. He says that he had no system by which he could keep track of the bank hours. However I do not accept this. He could have asked the claimant to account for her hours at any time and he was fully aware of the purpose and system behind the claimant's bank hours. The relationship existed over many years and I do not find it plausible that if he had mistrusted the claimant to the extent that he did not believe how many hours she was working, the relationship would not have continued for so long.

33. It was not in dispute that this bank system was put in place by the claimant. There was some dispute as to who chose to cap the hours at 91 but I find that this is not relevant. In evidence before me the claimant said that she had created the system as 'insurance' in case she became unwell and so that she could afford to take holiday. She has various health conditions and family situations which have meant she has required time off and that she knew she would need time off and wanted to protect herself against not being paid during those times.

34. I conclude that the claimant was paid regular monthly amounts by agreement between the parties. The system allowed the claimant to have a regular

income and manage her finances. It was at her behest but the respondent agreed to this arrangement and paid her in this way for the duration of her time with him. He did not challenge the amount of time in the bank at any point until after the claimant's employment terminated.

Understanding of the parties

35. It was not in dispute that during the claimant's working period for the respondent both parties believed that she was self-employed. The dispute between the parties only arose when the respondent dismissed the claimant and then refused to pay all the outstanding 'bank' hours. At that point the claimant sought legal advice and was advised by her solicitors that she may have been an employee.

The law

36. S230(1) of the Employment Rights Act 1996 (ERA 1996) an employee is defined as "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".

37. Section 230(2) of ERA 1996, a contract of employment means "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

38. The terms "contract of service" and "contract for services" carry no statutory definition. In summary, under a contract of service a person agrees to serve another, whereas under a contract for services they agree to provide certain services to the other.

39. A worker is defined under *section 230(3)* of ERA 1996 as an individual who has entered into or works under (or, where the employment has ceased, worked under):
    (i) A contract of employment; or
    (ii) Any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

40. Ready-Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968] 2 QB 497 determined that the key tests for a contract of service were:

(i) An agreement exists to provide the servant's own work or skill in the performance of service for the master ('personal service') in return for a wage or remuneration.
(ii) There is control of the servant by the master ('control').
(iii) The other provisions are consistent with a contract of service ('other factors').

Subsequent cases have established that personal service, mutuality of obligation and control are "the irreducible minimum".

Conclusions

41. There was no written contract between the parties which defined the relationship between them. Therefore all conclusions must be based on the reality of the working relationship between them.

Personal service

42. Personal service has been considered largely in respect to whether the individual has to perform the work themselves of whether they can organize a substitute. I find that the claimant did not have an unfettered right to send a substitute. On occasion she could organize for the other PA to cover her work or to a limited extent she could have asked a remote typist to cover limited aspects of her role though this never actually occurred during her time with the respondent. I accept the claimant's evidence that she did not know it was open to her to arrange for one of the remote typists to cover some of her work.

43. In *Autoclenz Ltd v Belcher and others [2011] IRLR 820 (SC)*, the Supreme Court held that the tribunal at first instance was entitled to rely on evidence that the valeters were expected to turn up for work unless they had given appropriate notice as an indicator of mutuality of obligation. Further, the tribunal could legitimately infer from evidence that the valeters did not even know about the right of substitution that the parties did not realistically expect that right to be exercised.

44. I find that as a general rule the claimant was expected to be the person who turned up to work on her agreed days. Mr Spiro accepted that she could not have asked a friend to carry out the work on her behalf or in fact asked anybody apart from her colleague Ms White. The fact that he was not involved in the conversations about who covered the office or the work that day does not detract from the fact that the claimant was required to perform the work herself. Any decision to send a substitute was limited to the other PA and occurred on a limited basis generally to allow annual leave or sick leave and the claimant had to inform Mr Spiro of any such change.

45. The limited duties that could have been delegated to a remote typist has led me to consider the case of *Green v St Nicholas Parochial Church Council [2005] UKEAT/0904/04,. T*he EAT found that the fact that Mr Green was allowed to delegate some minor duties under the agreement did not mean he was an employee as the main duties under the agreement could still be delegated. Here the claimant may have been able to delegate some of the typing to the typists but her office presence to answer the phone was a key part of her role as was diary management and other administrative work which the remote typists could not have undertaken. Further I accept the claimant's evidence that she did not know she would have been allowed to ask one of the typists to cover her work in any event. She believed, and I accept, that the only meaningful substitute she could arrange was the other PA already used by the respondent.

46. In any event I find that the ability to cover her work was within very limited parameters and did not amount to the ability to send a substitute. Therefore the claimant was required to provide personal service.

Mutuality of obligation

47. The claimant was generally expected to come to the office to work other than when she did voluntary overtime. She was expected to attend and perform the work that the respondent needed doing on her agreed days unless something else had been organized and the respondent had been notified of those changes. The changes are discussed above under personal service.

48. I conclude that had the claimant refused to undertake the work offered by the respondent (other than when it was overtime), he would not have continued to ask her to work for him. He expected her to provide regular work, 3 days a week and on average for 91 hours each month. He paid her regularly over 7.5 years to do this work and it was clear that there was an expectation by him that she would work regularly for him in the pattern and manner which had been agreed from the outset of their more permanent relationship.

49. When the claimant was at work the respondent told her what work to do and what order to do it in as per the 'follow the chair' system. The claimant had some degree of the order of work that she did and the hours that she did them in but she was performing the secretarial tasks and office management tasks that the respondent asked her to do. She did not choose in any significant way, how to deliver those services. She came in and did the job that she was asked to do. When she did not do so the respondent became frustrated and told the claimant of his frustrations. The fact that he did not discipline her does not detract from the fact that he told her how to work and what he wanted done and when.

50. In *White & Anor v Troutbeck SA [2013] UKEAT 0177/12*, the EAT stated that control is not just determined by whether the worker has day to day control over their own work but by whether a contractual right of control over the worker exists. Relevant to the points that the respondent made that he was frequently out of the office and so could not tell the claimant what to do and how is the EAT finding in Troutbeck that "It does not follow that, because an absentee master has entrusted day to day control to such retainers, he has divested himself of the contractual right to give instructions to them".

51. The claimant in this case may have been left alone in the office for days at a time but that does not mean that she had control over her time or the work that she did. As concluded above, the claimant was told what work to do and although there may have been some flexibility in the order that she did it, the respondent indicated what he wanted and how via the 'follow the chair' method.

52. The claimant did have some flexibility around her hours, largely choosing when her 7 hours a day started and finished. However I do not find that this detracts from a contract of service. The flexibility did not allow her to choose not to work at all without lettingthe respondent down. The flexibility did not

extend to her being able to turn down work as and when she chose. It was on an occasion of exercising this flexibility that the respondent dismissed her – he therefore clearly felt that there were limits to the flexibility he wanted her to have and transgressions of what he wanted her to do and the hours he wanted her to perform appear to have led to her dismissal.

53. The claimant was entitled to work for other clients and did so to a limited degree as evidenced by her tax returns. Working for other clients is not necessarily indicative of a lack of control or mutuality of obligation between the parties if work was (as I have found) generally done outside the claimant's normal working hours for the respondent. However in previous cases (e.g. Hall v Lorimer [1993] EWCA Civ 25) it has been an important factor so I have considered whether it is an indicative factor in this instance.

54. The claimant always worked part time and on the understanding that she would work for other people as well as the respondent. On occasion he referred her clients. I accept Mr Spiro's evidence that she occasionally met other clients at the respondent's offices. However the respondent could only give one particular example of this happening. I do not accept that the respondent would have continued offering the claimant work over such a long period of time, if she was largely working for other people during the working hours she had agreed with him. This is simply not plausible. This was a relationship that had lasted, in this particular form, for approximately 7.5 years. The respondent clearly trusted the claimant to do his work for him and expected her to do it. The fact that during her time outside her work for him she performed work for other people, does not in my view, detract from the fact that whilst she was at work for the respondent she performed work almost exclusively for him. People are entitled to have several part time jobs.

55. The respondent always left work out for the claimant or her colleague on the chair. There was never an occasion, that I was notified of, where the respondent did not provide the claimant with work. He stated that he had told her not to come into the office when he was on annual leave himself. However he did not enforce that request and there was work to be done whilst he was away. He paid her to do that work. I do not believe that he would continue to pay the claimant when she submitted invoices, if she was not completing the work he provided.

56. The claimant reasonably expected the respondent to provide her with work. He had done so consistently for 7.5 years and never given any indication that he would reduce his need for her to work or that he would seek to work in a different way that would result in him not providing her with work. I conclude that because this position existed, without interruption, for so long, the claimant could reasonably conclude that the respondent would provide her with work. Further the respondent relied upon the claimant to perform this work personally over a certain number of hours and days each week. I therefore find that there was clear mutuality of obligation between the parties.

57. The claimant was paid a regular amount each month by the respondent. The only thing that varied was the number of hours in the 'bank'. Her pay did not vary. The number of hours invoiced was always 91 hours. This is clearly

evidenced by the invoices and accounts that I have seen. I accept that tax and NI was not deducted at source and that the claimant actively invoiced the respondent each month. The claimant set the hourly rate and the respondent accepted that rate. However the number of hours did not change each month and both parties knew on a month to month basis how much the respondent would pay the claimant and it hardly varied over a long period of time.

58. Whilst I accept that this invoicing arrangement could detract from the claimant being an employee, I believe that the fact of invoicing and the claimant setting the hourly rate, does not detract from the reality that in effect the respondent paid the claimant the equivalent of a regular salary.

59. There was no financial risk taken by the claimant. She knew what she was going to be paid on a month by month basis and she took no risks. She did not provide her own equipment apart from when she worked her overtime from home. When she attended the offices she worked on the equipment there.

60. Taking all the factors together and looking at the overall picture of the relationship between the parties that had developed and lasted for approximately 7.5 years, I find that the claimant was required to provide her services personally and was an employee. I find that there was a mutuality of obligation between the parties established over time through custom and practice and I find that all other factors such as control, how work was allocated and use of equipment were in line with a contract of employment.

61. The only facts which could seriously detract from a finding of employee status was how the claimant was paid.

62. With regard to pay the claimant invoiced the respondent, was responsible for her own tax and NI and was not paid for annual leave or sick pay. However, the system of bank hours and an agreed maximum invoice mirror the payment of a regular wage. Although I accept that this system was put in place at the claimant's behest, I believe it reflects a need for stability in a relationship with no written contract and it in effect reflects the security provided by regular wage payments. The respondent agreed to this system over a long period of time and benefited from it as well as he knew what his monthly pay to the claimant would be.

63. I conclude that nothing in the reality of the overall picture working relationship between the claimant and respondent significantly detracts from the establishment of a contract of employment or a contract of service as defined in Ready Mixed Concrete. She attended the office, 3 days a week, and performed the role of a PA. Other than the flexibility of her hours which is present in many employment contracts, and the manner in which she was paid, it is hard to see how this arrangement, established over many years and relied upon by both parties, could not be an employment relationship.

64. I therefore conclude that the claimant was an employee as defined in s230 Employment Rights 1996. The tribunal therefore has jurisdiction to hear all the claimant's claims and this matter ought to proceed to a full merits hearing.

65. If I am wrong in that conclusion I find that the claimant was a worker. For all the reasons I have set out above supporting my conclusion regarding her employee status, I find that the claimant was clearly required to provide personal service to the respondent and there was clearly mutuality of obligation. This was not a situation where Mr Spiro was the claimant's client. This is clearly concluded in the Supreme Court Judgment of Pimlico Plumbers Ltd and another (Appellants) v Smith (Respondent).

46. ….
"As per the CJEU's conclusion in FNV Kunsten Informatie en Media v Staat der Nederlanden (Case C-413/13) [2015] All ER (EC) 387 "The status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that person acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work …, does not share in the employer's commercial risks … and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking"

The CJEU's examples of relevant considerations are helpful but should be applied cautiously. In Percy v Board of National Mission of the Church of Scotland [2005] UKHL 73, [2006] 2 AC 28, the question was whether Ms Percy, a former minister Page 19 of the Church of Scotland, was entitled to claim that the Church had unlawfully discriminated against her on grounds of sex. The appellate committee held that she was a worker so was entitled to present her claim. Lady Hale observed at para 146 that "[t]he fact that the worker has very considerable freedom and independence in how she performs the duties of her office does not take her outside the definition".

66. The reality of the claimant's situation was that she was not an independent contractor and the respondent was in no way a client or a customer. The claimant took no commercial risks. She had to perform the services personally, she was told how to work and what work to do and had no freedom in how that work was delivered. She attended the office, 3 days a week, and performed the role of a PA. Whilst she did on occasion carry out work for other individuals this does not detract from the fact that whilst she was at work for the respondent she was under his control and expected to work in accordance with his requirements.

67. The tribunal therefore has jurisdiction to hear all the claimant's claims and this matter ought to proceed to a full merits hearing.

_____
Employment Judge Webster
30 March 2019