Case Number: 1601858/2018

EMPLOYMENT TRIBUNALS

Claimant:	**Mrs Christine Bonner**	
Respondent:	**CD Gray & Associates Ltd (First Respondent) and Mr Tony Venn (Second Respondent)**	
Heard at:	**Cardiff**	**On: 13 May 2019**
Before:	**Employment Judge R Harfield (sitting alone)**	

Representation:
Claimant: Mr B Gray (Counsel)
Respondent: Mr R Goodwin (Counsel)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that the claimant was an employee of the first respondent.

REASONS

INTRODUCTION

1. The first respondent is a civil and structural consulting engineering company based in Cardiff. The second respondent was a colleague of the claimant. By way of a claim form presented on 21 December 2018 the claimant brings claims of constructive unfair dismissal, direct sex discrimination, direct age discrimination, harassment related to sex and conduct of a sexual nature, harassment related to age, detriment on the ground that she made a protected disclosure and a notice pay claim. The claimant asserts that she was an employee of the first respondent from 30 August 2006 until her resignation on 22 October 2018. The claimant's secondary argument is that she was a worker of the first respondent within the meaning of the relevant legislation.

2. By way of a response form presented on 1 February 2019 both respondents deny the claims. Amongst other things, the respondents assert that the tribunal has no jurisdiction to hear the claimant's complaints on the basis that she was, at the relevant time, self employed. The respondent asserts that the claimant was an employee, working as a secretary and performing ad hoc PA duties for the managing director, only from 30 August 2006 until 22 June 2015 and that thereafter the claimant worked for the first respondent on a freelance self employed basis.

3. At a case management preliminary hearing on 2 April 2019 Judge Martin directed that a public preliminary hearing take place to "consider the status of the Claimant namely whether she is an employee, a worker, or self employed contractor."

THE EVIDENCE

4. I heard evidence from the claimant. The claimant also relied on a short statement from Mr Odiende. He was not called as the respondents indicated they had no questions for him. On behalf of the respondents I heard from the former managing director, Mr Christopher Gray (he was the managing director at the relevant time). Mr Gray is unwell and was only available to give evidence in the middle of the day. The claimant's evidence was therefore interrupted to allow Mr Gray to be accommodated. I have a bundle of documents extending to 302 pages. I received a short skeleton argument from the respondent's counsel and both counsel made oral submissions on the conclusion of the evidence. Both counsel referred me to case law they wished me to consider and which I have taken in to account.

FINDINGS OF FACT

5. Having considered the evidence and applying the balance of probabilities I make the following findings of fact.

6. The claimant started working for the respondent on 30 August 2005. She worked originally as a part time secretary working 16.5 hours a week at an hourly rate of £7. The respondent does not dispute that for this initial period of employment, running until June 2015, that the claimant was an employee. The claimant received ad hoc pay rises so that by March 2015 she was earning £12 an hour. Many years she also received a bonus which varied from around £450 to £700 a year. The claimant, as an employee, received paid holiday of 5 weeks a year together with paid bank holidays, paid sick pay of 13 weeks full pay inclusive of statutory sick pay and employer pension contributions at 6%.

7. At the relevant time the first respondent was owned by Mr Christopher Gray and his wife Angela Gray. They were also directors of the business along with Darren Mills and Mr Gray was also managing director. Mr Gray also owned a company called Terra Firma (Wales) Limited ("Terra Firma"). The two businesses operate from the same building. There are some shared resources on the ground floor, with Terra Firma taking the first floor, and the first respondent on the next floor up.

8. Over time the claimant's role at the first respondent expanded and alongside secretarial tasks, by June 2015, she also undertook credit control activities such as chasing payments from debtors and making payments. She also undertook PA duties such as greeting clients and organising events. Mr Gray had also asked the claimant to undertake credit control work for Terra Firma and later on also for another company, Terra Firma (South) Limited. Instructions to undertake such work for these other two companies were received by the claimant from Mr Gray in the same way that he directed the claimant's work in general and the claimant was remunerated for the work for these other companies as part of the pay and benefits she received from the first respondent. The claimant was not given a separate contract of employment for Terra Firma or Terra Firma (South) Limited. She was told by a colleague, Angela Bottomley, that Mr Gray was in turn billing Terra Firm for her credit control services but the claimant had no involvement in this invoicing arrangement at the time. By June 2015 the claimant was earning £12 an hour. Her hours of work varied. The payslips at 79o – 79r show her working between 104 and 154 hours a month. On average, the payslips would suggest the claimant was working about 16 or 17 days a month, sometimes more and sometimes less.

9. As time moved on the claimant was considering career progression. In her annual appraisals in May 2012 and September 2013 the claimant expressed the view that she was not maximising her potential. In her 2012 appraisal, in particular, she recorded that she did not feel there was much opportunity for career development and that she would like to work more hours [page 791]. By June 2015 the claimant was contemplating moving on with her career. A friend had started working as a freelance credit controller and was doing well financially. The claimant had also received some expressions of interest on Linked In as to her availability. The claimant decided to take the plunge, hand in her notice, and offer her freelance credit control services to Mr Gray. She states, and I accept, that she was not certain how Mr Gray would react but that she was hopeful that he may want to keep her services for 2 days a week and she would then try to freelance for other businesses.

10. The claimant therefore gave Mr Gray a letter of resignation on 22 June 2015 [p80] stating:

> "Unfortunately I have decided to leave to become a freelance credit controller. Having had lots of interest from other companies, it is an opportunity I would like to take.
>
> I have enjoyed working for you over the years and would be able to offer you 2 days a week as a credit controller if you are interested. I also have an office set up at home which will enable me to be flexible."

11. The claimant met with Mr Gray. He had lost some employees to a competitor. In my view, Mr Gray did not want to lose the claimant's services and, even more so,

did not want to lose them to a competitor. He asked the claimant what rate she was thinking of charging and she quoted £150 a day as this is the amount her friend was charging. Mr Gray suggested that the claimant could work for the first respondent 5 days a week undertaking a mix of credit control and picking up some additional PA duties for Mr Gray. The claimant indicated she only really wanted to work 4 days a week and they agreed she would initially work 4 to 5 days a week and they would see how it went. The claimant states that Mr Gray told her that she would not work for other companies at all. Mr Gray states in his statement that there were no restrictions whatsoever on what the claimant could do and that she could have worked for the competitors if she had wanted to. I find it likely that Mr Gray did seek a commitment from the claimant that she would not work for the particular competitors he was concerned about as opposed to not working for any other companies at all. As Mr Gray acknowledged in evidence, such an agreement may be hard to enforce, particularly as it was not recorded in writing. However, the parties had a long working relationship and I find that Mr Gray trusted the claimant's commitment not to work for competitors and he would have been reassured, in any event, that his companies would take up the bulk of the claimant's working time.

12. Mr Gray asked the claimant to set out her proposal in writing by producing a list of her current duties, those additional PA duties she considered that she could also undertake and those she could not. This can be found at p80a and 80b. The claimant concluded her proposal by stating:

> "My freelance rate would be £150 per day (if you felt you would like to consider this) – benefits I guess no holidays/sick for you. As for salary I would look for a minimum of £30k"

13. The claimant therefore floated the idea of either remaining as an employee on a salary or moving to be freelance. Whichever way she was achieving her aims of some career progression and a higher rate of pay. Mr Gray decided to take the freelance option put to him. Mr Gray was questioned at length in cross examination about this, and Mr Gray's comment in his witness statement that the claimant's decision to move to freelance working was unilateral and instigated by her, and he was happy with the status quo, when in fact at 80b she had alternatively offered to stay on a salary. I bear in mind, however, the claimant first presented Mr Gray with the idea of her working freelance in her letter of resignation and in that letter the claimant had presented herself as having already decided to become freelance. I therefore find that Mr Gray may well have legitimately recalled it that way and also accept that until the proposal was made by the claimant it is correct to say that he was happy with status quo. In any event, Mr Gray saw there were advantages to the freelance option. For example, at paragraph 12 of his statement he talks about cautioning the clamant that she would no longer have paid sick leave or ad hoc paid time off to attend appointments or pick her children up and again at paragraph 14 notes that there were benefits to the business. It was therefore agreed between Mr Gray and the claimant that she would move to work

freelance on the 1 July 2015 and would submit monthly invoices for her work at the daily rate of £150.

14. The invoices are at p81 to p159. The claimant submitted them under a trading name of "Indigo." There is a summary of the invoices at appendix 2 attached to the claimant's witness statement. For most months there are separate invoices submitted to the first respondent and Terra Firma. The claimant's working pattern varied from month to month. Very occasionally she would work less than 10 days a month. Occasionally she also had busier months working 19.5 or 21.5 days which would equate roughly to working a 5 day week. The invoices set out the days of the week worked, sometimes with adjustments for half days, or a late start or early finish, and occasionally for overtime worked (for example, p88).

15. Both the claimant and Mr Gray were asked in evidence about, in the invoices, how the time and therefore the cost was split between the first respondent and Terra Firma. The claimant's recollection is that Mr Gray told her to keep the invoices for the first respondent at around £1200 a month, give or take, and to bill any remainder to Terra Firma irrespective of the actual work undertaken. However, there are various invoices where the first respondent was billed under £1200 and yet Terra Firma still received sizeable bills (for example July 2015, December 2015, and April 2017). Mr Gray's evidence was that the invoices should have largely matched the work that was undertaken and that the claimant was predominantly providing her services to Terra Firma as it had the greater level of unpaid date. However, examples were also put to him in evidence where the invoice did not match the work being undertaken referred to elsewhere in the bundle of documents. The claimant's evidence was that the work for the two companies on a daily basis was intermingled and she would often do a mixture of both. The position is not clear and is conflicting but in my view the invoices represent a rough and ready allocation of the claimant's overall time spent between the two companies which may not be entirely accurate at a granular level. No PAYE deductions were made by the first respondent and the claimant self assessed for tax purposes. The claimant would leave the invoices on Mr Gray's desk each month. Initially they were paid by two separate cheques and later by BACS transfer.

16. The claimant states, and I accept, that she did not in fact take up credit control work for any other third party companies other than a one-off small piece of work undertaken for a former partner of the claimant for half a day on 21 August 2015 (p81).

17. The claimant continued largely working from the first respondent's offices. I accept that she only occasionally worked from home as that appears to have been noted on the invoices when it happened (for example p152). The claimant explained that homeworking could be difficult as she could not access all the company resources and that Mr Gray had spoken about setting up a VPN which never materialised. On the days that she was working the claimant would

generally work standard office hours and when she worked half days or came in late or left early this again was recorded on the invoices to explain the adjusted sum being charged. The claimant states, and I accept, in terms of practical day to day office life, there was no difference between when she was an "employee" on 30 June 2015 and when she came in to work on the 1 July as "freelance." She would participate in the office "bacon roll run", in staff text groups, the coffee chart on the wall, secret Santa at Christmas time, and staff cakes on birthdays. She would attend staff meetings. She would attend social events such as leaving dos and celebrations such as Beaujolais Day. The claimant continued to be sat at the same desk. Mr Gray stated this was simply for convenience.

18. There is a dispute about an event at the Celtic Manor which the claimant attended. The respondent states it was as a guest of the first respondent and not as staff. The claimant states she attended as staff and that Mr Gray paid for her accommodation and for an outfit. Mr Gray denied accommodation was provided but confirmed he promised the claimant some new shoes if she brought a debt in. In general, other than the Celtic Manor event, Mr Gray accepted that the claimant was included in these kinds of events and office practices. His explanation was that as the only consultant it would be unkind to not include the claimant because she was no longer an employee. I return to this in my conclusions below. I do not need to decide whether paid accommodation was provided. I am satisfied that in relation to such events and practices the claimant was treated in the same way as the first respondent's staff in general, which is the point in question.

18. The claimant helped organise and attended a promotional visit to a primary school in respect of a fundraising effort to fund a Minibus for a community in Africa. The claimant was included in the promotional staff photograph for a local newspaper. Mr Gray stated in cross examination that the claimant was included, not because she was an employee, but because she was good looking and it helped to have good looking people in those kinds of promotional material.

19. The claimant would generally take 1 day off a week and there was some flexibility on the day she could take but she states that it would be agreed in advance with Mr Gray. Mr Gray states he did not set a minimum or maximum number of days or hours and did not specify the days on which the claimant would work. He says there were no guarantees as to what would be offered or provided to the claimant The claimant states that if she was going to be late, for example, for a doctors appointment she would agree it with Mr Gray and that she would always tell him where she was and if she was going to be late. She states that on the occasions she worked from home she would run it past Mr Gray to check it was ok. Mr Gray states the claimant did not need these permissions. I return to this point in my conclusions below.

20. The claimant states that she would ask Mr Gray if her proposed holiday dates were ok. Mr Gray states that the claimant did not need authorisation and that the claimant would simply notify him of her unavailability. She was not paid for holiday.

There was no express limit on the unpaid holiday she could take and she took nearly all of August 2017 off for wedding arrangements. Her holiday was recorded in the reception diary, sometimes by the claimant herself. Mr Gray's evidence was that there was no requirement for the claimant to do that; it was a matter of her own choice. Mr Gray's account is that if the claimant was unwell, or was not available to work for some other reason, then she would send him a text message to let him know. He saw this as the claimant informing him of what she would or would not be doing, rather than the claimant being required to seek approval from him and that the claimant would adjust her invoices accordingly. Again I return to this dispute in my findings below.

21. As the claimant needed to deal with her own tax affairs she went to see an accountant, Roblins. The claimant cannot recall the date but she recalls being told by an accountant there that if she was effectively doing the same thing in the same way as she had always been then she was likely to still be classed as an employee for tax purposes. The claimant spoke with Mr Gray. He offered to pay for the claimant to take some brief advice from his own accountant, Claire Nicholson, at Lewis Ballard. Mr Gray emailed Ms Nicholson on 29 July 2015 (p294 -302) stating that the claimant was looking to change from permanent staff to a self employed basis and that she needed a bit of help in terms of tax advice, NI etc. He stated that to help the claimant out, as they had a good working relationship, he would pay for an hour of Ms Nicholson's time. Ms Nicholson replied to say she was happy to help but expressed concerns about whether the claimant would only be working for Mr Gray as she had concerns about the position it would put Mr Gray in as an employer. Mr Gray responded to say the claimant "would be splitting her time between CG Gray, Terra Firma and a couple of other smaller clients so that side should be ok." It was put to Mr Gray in cross examination that this was not a genuine summary of the true position as he understood it. However, I find it does accord with Mr Gray's understanding that the claimant would be undertaking work both for the first respondent and Terra Firma which would take up most of her working time but that she may also have the opportunity to undertake a small amount of work for third parties, albeit he was anticipating the claimant honouring her commitment not to work for the competitors in question. Ms Nicholson responded again to suggest that Mr Gray undertake a HMRC online employment status indicator as there were other factors to consider such as "do you dictate when and where she works, does she use her own tools, could she send someone in her place to complete the work." She warned him that it was getting harder to distinguish between employment and self employed. Mr Gray stated in an email response that he would take a look at the link.

22. Mr Gray did not attend the meeting with Lewis Ballard and did not receive a written report about the meeting from them, or indeed an invoice for their charges. Ms Nicholson met with the claimant on 3 August 2015. Lewis Ballard's note is at p291. The note reflects the tensions that were developing between the original freelance proposal and the reality of day to day working life. For example, on the one hand

it refers to: "-She has decided to do freelance. -Getting offered a lot of work on top of her own work. -Built up a network ready to go freelance. -CD Gray to retain Chris for a few days. – Daily rate provided. – She owns her own laptop, works at home, replacement of staff would all indicate self employment." On the other hand it says: "Set days – 5 days at C D Gray – maybe restricted – between both would imply employment" and "Can work evenings and work from home? If she has this flexibility it would support her claim that she has the freedom to perform work for CD Gray at her discretion as opposed to when directed to by CD Gray." The overall advice given was that there were no black and white hard and fast rules that could be applied, and that the wording of the contract needed to be correct. A warning was given as to the potential penalties that could by applied by HMRC.

23. I accept that the claimant probably spoke to Mr Gray about Lewis Ballard's advice and that he indicated he was not overly concerned as he thought it unlikely the claimant would ever be looked at by HMRC. I find he was content to accept the risk. In November 2016 the claimant sought further tax advice from Mr Jonathan Rees from Baldwins (p288-289). That recorded that the claimant was working pre-agreed days and within set working hours with all equipment and consumables being provided by the first respondent. The record noted the claimant stating that the first respondent was the only company for whom she worked. It records Mr Rees raising the query of whether it was appropriate for the claimant to operate on a self employed basis and that on the limited information gathered she may not meet the criteria of self employed status in accordance with HMRC Guidance.

24. In May 2016 Mr Gray increased the claimant's daily rate of pay to £175. The claimant states that was decided by Mr Gray, and was not in response to a request from her. She thought it was probably because around this time she absorbed more PA duties for Mr Gray and he also remained concerned about staff being poached.

25. The claimant did at times ask Mr Gray for assistance from other members of staff with completing her work. On one occasion she asked if Helen Eddy, the office manager for Terra Firma, could help chase debtors in the claimant's absence and on another whether she could train Natasha Hill, a temporary worker at Terra Firma, so that again she could cover for the claimant's absence. The claimant states she suggested to Mr Gray that she could employ Natasha herself and pay Natasha when the claimant was on holiday or on sick leave. Mr Gray cannot recall these exchanges and states that in any event the individuals would not be suitable. I accept that some discussion did take place, although it may be Mr Gray cannot recall it, and that Mr Gray refused these proposals for cover or assistance for the claimant. Mr Gray in his evidence does comment that there were many occasions on which the claimant was unwell or otherwise was unable to provide her services. I accept that Mr Gray is likely to have made a comment to the claimant to the effect that if she did not take so many holidays and sickness absences then she would not need anyone to cover.

26. Therefore, when the claimant was absent from work, generally no one covered her work, although that had always been the case even prior to the disputed change in status. She would clear as much as she could before she went and often when she came back she would return to a backlog. I accept that the claimant providing a substitute, particularly a third party unknown to Mr Gray, would not be countenanced by him as he valued the work the claimant, and her attributes, knowledge, and experience, did for him. It is, however, also clear that sometimes there were attempts by the first respondent to cover some of the claimant's work in her absence. For example, the claimant in the substantive proceedings complains that when she was not in work the second respondent would take actions on the ledger or on her files or in emailing debtors which the claimant did not agree with, and which she states could cause difficulties, and which she felt did not fit in with the second respondent's job as Office Manager for the first respondent. Mr Gray similarly states in his witness statement that he would on occasion ask Mr Venn to help out in the claimant's absence.

27. The claimant had a company email address for both the first respondent and Terra Firma (pp 64 -66). She did not have appraisals once the purported change in status took effect.

28. The daily tasks that the claimant undertook were largely dictated by Mr Gray which included, as well as the credit control duties, PA duties such as organising holidays and other arrangements for Mr Gray's private life, and when he was unwell, attending at his home to drop things off or to go and pick up things or take instructions from him. When the claimant was in work she would meet with Mr Gray most mornings and would regularly interact with him as the working day went on. Mr Gray states that he only set the general remit of what the claimant was required to do and that the claimant had a free reign and would generally only contact him with an update (for example), if a large debt was paid or if there was a problem. Otherwise, according to Mr Gray, the claimant, within the remit of her instructions, could decide what to do or how to do it. I return to this below.

29. A written contract was not drawn up. The claimant broached this with Mr Gray on several occasions, in particular, because she did not have documentary evidence of her financial arrangements that would be needed for things like renting a property or taking out a mortgage. In January 2016 she spoke with him because she needed some proof in order to be able to rent a property. She states, and I accept, that Mr Gray responded to the effect that she had decided to go freelance and that she had to live with the consequences of that. However, he clearly likewise did appreciate the claimant and was prepared to help her. He therefore wrote a letter (p160) to Davis & Sons stating "I have known Christine Odeinde as an employee of this company for over 10 years. We now engage Christine in her freelance capacity for 5 days per week at a daily rate of £150 per day – which equates to £750 per week on a permanent basis. I can confirm that she is completely honest and trustworthy and totally reliable and she will make an excellent tenant." Mr Gray comments that the claimant had in fact worked 5 days

that particular week but this was not the norm and that he now regretted exaggerating the arrangement.

30. The second respondent started working for the first respondent in 2017. It is a matter for determination in the substantive proceedings, but in short, the claimant complains about the conduct of the second respondent towards her. The claimant complained about the second respondent to Darren Mills, director of the first respondent and to a lesser extent Mr Gray who by this point had become unwell. On 8 October 2018 the claimant raised a grievance about the second respondent. The events following this are to be determined in the substantive proceedings. On 17 October Mr Gray responded to state that the second respondent had refuted most of the allegations against him and therefore the claimant was invited in for a meeting to discuss the points she had made in more detail. On 22 October 2018 the claimant resigned without notice stating that she considered there had been a breach of the implied term of trust and confidence. Mr Gray wrote to the claimant on 7 November 2018 stating that she was a subcontractor on an ad hoc basis for the first respondent and Terra Firma "and presumably other organisations as well." He also said "Your working hours, which have again changed recently, have been very much to suit your own other activities."

31. After the termination of the claimant's employment she submitted her final invoice for payment. Mr Gray questioned why it was addressed to the first respondent as the work was predominantly for Terra Firma. The claimant responded to state that "as it was only a small amount & under the £1200 cap that you instruct me for CDG I thought it would be ok." (p268). In the absence of a response the claimant changed it to Terra Firma (p270).

32. On 6 November 2018 the claimant chased payment and Mr Gray stated it would be paid in accordance with the first respondent's "standard 60 day payment terms." The claimant states that this shows that if she had been truly a contractor then this is how she should have been paid all along, and she was not. Mr Gray explained, and I accept, that emotions were running high at this point following the claimant's resignation and he was, in effect, responding to the claimant's emails in a somewhat obstructive way out of a fit of pique. The invoice was subsequently paid. Mr Gray stated that generally he paid the claimant's invoices promptly.

33. On 14 November 2018 the claimant was sent the written outcome to her grievance which was not upheld. The response stated that "Although the company grievance procedure does not, strictly speaking, apply to you (given your status as a self-employed contractor), reference was made to it, and its format was adopted for these purposes."

34. Mr Gray states that the claimant had been overheard to tell people in the office that she "did not work for CD Gray" which was in keeping with the self employed contractor arrangement.

THE LEGAL FRAMEWORK

35. Under section 230(1) of the Employment Rights Act 1996 ("ERA"), 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".

Under section 230(2) of ERA, 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".

36. A worker is defined under section 230(3) of ERA as:

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

The latter category is often referred to as a "limb (b) worker."

37. Under section 83(2) of the Equality Act 2010 ("EA") employment means:

> "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work."

38. The extended definition of employment under the EA to cover a "contract personally to do work" is worded differently to the limb (b) worker definition under ERA, but the two are treated as meaning essentially the same thing (*Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, at paragraphs 31 and 32). It follows that case law on the one can be relevant to cases on the other.

39. The classic description of a contract of employment or a contract of service is set out within the judgment of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497. In short, 3 conditions were set out:

(a) the employee agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for the employer;

(b) The employee agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other "master";

(c) The other provisions of the contract are consistent with it being a contract of service.

40. In *Autoclenz v Belcher* [2011] IRLR 823 Lord Clarke added the propositions that:

(d) there must be an irreducible minimum of obligation on each side to create a contract of service;

(e) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status;

(f) If a contractual right, such as for example a right to substitute, exists, it does not matter that it is not used. However, he also endorsed the proposition that if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of that relationship. But if the clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless;

(g) the question in every case, is what was the true agreement between the parties. The relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed. The true agreement will often have to be gleaned from all the circumstances of the case.

SUBMISSIONS

41. The claimant submitted despite the purported agreement that the claimant had become freelance, that she had in reality remained an employee throughout. It was submitted that the changes were to the content of the claimant's role and her pay and not ultimately her status as her job was not restructured in such a way to shift it to be one of self employed status.

42. The claimant argued that the intention of the parties was not relevant, and that the tribunal had to look at how the relationship worked in practice. The claimant pointed to the references on the invoices to the claimant being paid overtime, to late finishes, adjustments for medical appointments, late and early starts and the claimant accounting for her whereabouts when working, in particular when it was home working. The claimant argued that the language of the claimant in the text messages between her and Mr Gray in the bundle were supplicatory in tone, indicating that the claimant need permission to adjust her hours of work and that Mr Gray's responses did not indicate otherwise in not stating, for example, that the hours/days worked were entirely up to the claimant. It is submitted that there was a clear expectation that the claimant would have a set working pattern and hours of work and that she either had to give advance notice or obtain permission if she was unavailable. It is said that the claimant's integration into the business was

substantial. She noted her holidays in the diary, she used the same computer as before, she was integrated into substantial work related events and was part of the first respondent's image and brand. It is argued that the control, mutuality of obligation, and integration in reality carried on as before.

43. The claimant submitted that the change in label and other changes relied upon by the respondent such as the claimant submitting invoices, and no provision for sick pay or pension or holiday pay amounted to window dressing. It was argued that the splitting of the cost between the invoices for the first respondent and Terra Firma was just to create the appearance of the claimant working for different companies when in reality the work undertaken did not match the invoices. It was submitted that Mr Gray had not put the arrangement in writing because he was aware of the risk, including that identified by his accountant, and that he had decided to try to fly under the radar.

44. The claimant states that it was implicit within the claimant's role as a PA that it was a contract personally for the claimant to do work, that there was no right to provide a substitute, that the claimant was a subordinate and that the role had a high degree of integration in to the business. It is argued that this was not an arms length independent contractor arrangement.

45. The claimant submitted that even where the parties choose to apply a different label the relationship can still be one of employment.

46. The respondent accepted that whilst the parties' intentions were not determinative and the relationship did have to be looked at in the round. That included considering the evidence of the way in which the parties understood their relationship and the way they conducted themselves in practice.

47. The respondent argued that it was clear that the relationship had converted to one of self employment on 1 July 2015 bearing in mind her letter of resignation and the conversion in many of the procedures relating to her. The respondent submits that the question in fact is whether that converted back to one of employment in the following three years. The respondent argues that it did not.

48. The respondent pointed to the fact that the claimant as a previous employee knew what an employee working for the first respondent got and she herself wanted to avoid that formulisation. The claimant had thought the change in status out. She had undertaken the groundwork and she had resigned stating she had decided to go freelance. She was actively seeking out alternative work. The change was not imposed on her, she wanted it as she benefitted by doubling her income. By 25 August 2016 the claimant (without Mr Gray's presence) was still telling Lewis Ballard that she had decided to go freelance, was being offered a lot of work on top of that for the first respondent and was being retained by the first respondent for a few days a week. Likewise Mr Gray's comments at p297 were based on what the claimant had told him her working arrangements would be.

49. The respondent submits that the claimant benefitted from greater flexibility. She completed self assessment to HMRC and indeed claimed expenses in her tax returns. She was never denied holiday.

50. The respondent argues that the control was not at the level of an employment relationship. The respondent further argues that even if personal service, mutuality of obligation and sufficient control could be established then that is not conclusive. If the whole picture is looked at including lack of holiday pay, sick pay, the lack of disciplinary and grievance procedures, the tax position, and the pension position this points against employee status.

51. The respondent states that the claimant is trying to "have her cake and eat it." She enjoyed the increased wage and flexibility of being an independent contractor and it was only when the difficulties arose that she fell back to arguing that she was an employee.

52. The respondent further submitted that if the factors are evenly balanced then the intention of the parties/ the label applied by the parties will be decisive, referring to *Dacas v Brook Street Bureau (UK) Ltd [2003] IRLR 190, 2004 EWCA Civ 217 (on appeal).*

53. The claimant's primary argument was she was an employee. The secondary argument was that she was a limb (b) worker or fell within the extended definition of employee in the EA. The respondent submitted that the claimant was neither and that she was a self-employed independent contractor. Both parties primarily addressed me on the employee/independent contractor divide but commented that their arguments applied equally to the worker status dispute.

DECISION

54. I have to consider whether there was a contract between the parties, and if so, the terms of that contract. It is clear that that was a contract in place; agreement was reached between the claimant and Mr Gray that she would provide credit control services for the first respondent and Terra Firma and some expanded PA duties for Mr Gray. The claimant was to work 4 to 5 days a week and would be paid an agreed daily rate. As there are no contractual documents setting out an exclusive record of the specific arrangements I have to look at all of the circumstances of the relationship, including, what was said when the agreement was reached and how the parties conducted themselves at the time and subsequently, to establish the true nature of the contractual relationship between the parties.

55. It is also clear that the agreement that was reached between the claimant and Mr Gray was that the claimant would cease to be an employee and would be working freelance. However, that freelance label agreed between the parties is not determinative of the claimant's status. This is irrespective of the fact that the change was initiated by the claimant, who had her eyes wide open to the situation. That is confirmed by the decision I was referred to by the claimant: *Young & Woods*

Ltd v West [1980] IRLR 201. The court considered a situation with some similarities to that here and considered the employer's argument that a claimant cannot "have their cake and eat it." Stephenson LJ found that the claimant and his work had to be classified not by appearance but by reality and that parties can resile from the position they have deliberately and openly chosen to take up. The tribunal has to see whether the label of self employed is a true description or not by looking beneath it to the reality of the facts and must decide on all the evidence whether the true legal relationship accords with the label or is contradicted by it. Nonetheless that intention of the parties is still a relevant factor for me to take into account.

56. In *Hall v Lorimer* [1993] EWCA Civ 25 the Court of Appeal reminded the tribunal to be cautious of using a checklist approach in which it runs through a list of factors. Rather, the object of the exercise is to paint a picture from the accumulation of detail. It was said the overall affect can only be appreciated by standing back from the detailed picture and it is a matter of evaluation of the overall affect of the detail. Not all details are of equal weight or importance.

57. I find that there was mutuality of obligation between the parties which also continued when the claimant was not working. Both parties expected that the claimant would fulfil the credit control and PA duties given by Mr Gray to the claimant following on from their discussions about the claimant's expanded role in light of the document she prepared at p80a and 80b. Whilst there was some flexibility in the hours and days the claimant would work, there was no suggestion that the claimant did or could reject tasks that Mr Gray asked her to do. As the claimant said, if she was not there or did not finish the work, then largely the work would build up until she could do it. Mr Gray would sometimes ask her whether she had done something (see for example p212 and 213) and there is nothing to show the claimant refusing to actually take the work on. Likewise there was an obligation on the first respondent, acting through Mr Gray, to provide the claimant with work that would fill at least 4 days a week and to pay the claimant at the agreed rate. Further, as I set out below, the claimant was under a general expectation to attend for work on the days she had notified Mr Gray that she would.

58. The claimant was also providing her own work and skill; she was providing personal service. Mr Gray reached the agreement with the claimant precisely because he wanted *her* to continue to work for him and to undertake the credit control and PA work. For the same reason, the reality of the situation was also that neither party seriously expected the claimant to be able to provide a substitute.

59. Looking at the question of integration, the claimant carried on in much the same way as she had when she was an employee. She put her holiday and other appointments in the work diary. Mr Gray said that the claimant did not have to do this but that she chose to. Likewise it was put to him in cross examination that he never told the claimant to stop doing it when her status changed. The reality of the situation was that a discussion about this kind of detail never happened because

once the claimant and Mr Gray had reached their basic agreement they just got on with things. It is in my view likely that the claimant carried on out of habit and Mr Gray, as a busy individual, did not address his mind to that level of detail. Therefore the old system just continued, in effect, by default. The claimant participated in work related social events and niceties. Mr Gray stated this was because it seemed unfair to leave her out as the only contractor. He may indeed have thought that but it did not prevent, in reality, the claimant being integrated into the daily office way of life to a considerable degree. Further, sometimes that integration was part of the claimant's job; for example Mr Gray asking her to organise the secret Santa for the team. The claimant used the first respondent's resources in work. She had a work email address. She attended staff meetings and Mr Gray conceded in evidence that it was helpful to have her there bearing in mind her roles. The claimant also participated in promotion events such as the minibus fundraiser. Mr Gray explained his reason for inviting the claimant to be in the photograph. However, again the point is ultimately one that whatever his personal analysis, on a practical level the claimant was participating in and integrated into these kind of events.

60. Turning to the question of control, this is a case where, applying *Catholic Child Welfare Society and others v Various Claimants and others* [2013] IRLR 219 SC, the claimant had specialist knowledge and skill and there was accordingly a necessary degree of independence in how she carried out her work. It was said in *Catholic Child* that in such circumstances "Thus, the significance of control … is that this employer can direct what the employee does, if not how he does it." I am satisfied that the claimant was working to Mr Gray's orders in terms of the work that she was carrying out. When the claimant was in work she met daily with Mr Gray where they would update each other and she took instructions from him. It is inevitable given the nature of PA work in particular that Mr Gray would be regularly asking the claimant to undertake particular tasks. For example, p227 shows a request to sort things such as a minibus and a rail card.

61. It is a point of contention whether the claimant needed Mr Gray's approval of her working pattern and any change to it or whether she just needed to notify him of what she was working or any changes or whether she just chose to of her own volition. This is relevant to control, the degree of the claimant's independence and also her integration. The text messages disclosed show a mixture of the claimant informing Mr Gray she would not be in or would be late (for example, p210g) and those which are addressed more as a question for approval, "hope that's ok" (for example, p210c). I am cautious in reading too much into the language and tone of the text messages as they are between two individuals who clearly at the time were close, had a good working relationship and worked together a long time. On the one hand, the claimant, particularly in her PA duties was naturally in a subordinate position to Mr Gray. On the other hand given such a long, close relationship it is feasible one might say "hope that's ok" to a colleague in circumstances in which approval is not actually needed and you are just letting the

other person know. The claimant was recording changes to her working patterns, short days, long days, and home working on the invoices i.e. she was flagging up and explaining where the time spent deviated from the norm. However, it could be said that was because either the claimant chose to present the invoices that way, or that it was simply done as a means to explain the charges on the invoices.

62. Overall, I am satisfied that there was an expectation that the claimant would let Mr Gray know in advance the days that she was likely to be working and that on those days there was a general expectation on both sides that if the claimant was in the office the standard day would be 9am to 5pm. If that was to be altered because the claimant was going to home work or because there was an emergency or a medical appointment then the claimant would let Mr Gray know and adjust the amount charged appropriately. Given the nature of the work the claimant was undertaking it is inevitable that Mr Gray would have that expectation. There is nothing to show the first respondent or Mr Gray insisting that she work certain days or refusing the claimant to be absent. Indeed, the claimant did, for example, take a long period of time off for her wedding and the overall general impression from Mr Gray was that he would actually have wanted the claimant to be in work more than she was, which does not suggest he had the power to require her to be. I therefore accept that the claimant did have some control of the days and hours that she was working, albeit set within the overall expectation that she would work on average at least 4 days a week and that she would let Mr Gray know her plans. This is a factor which points away from employee status. However, I also bear in mind the claimant already had some flexibility in this regard when she was an employee before the alleged change in status, as her hours of work already varied. Although I accept the claimant's control was greater after the change.

63. I also take into account other factors that might point to or against employee status. The claimant set the daily rate of pay that she was seeking which Mr Gray agreed to. However, the subsequent increase was led entirely by Mr Gray which points, certainly as time went on, to control resting with him.

64. The claimant was responsible for her tax and national insurance and she self assessed which was not disputed by HMRC. She was not paid sick pay or holiday pay or pension contributions. She did not have appraisals or participate in any bonus arrangements. These all point against employee status.

65. In respect of financial risk, the claimant appeared to run little financial risk; she would be paid for the hours she worked and the work was there.

66. However, the claimant she did invoice the respondent. The invoices came from a trading name "Indigo" and the invoices were split between the first respondent and Terra Firma. This all points against employee status and to the claimant operating as an independent contractor.

67. I accept that Mr Gray may have been under the impression that the claimant did or could carry out small amounts of work for other third parties. I also accept that

the claimant initially planned to do so but that once the arrangement was reached with Mr Gray and it was keeping her busy at a good rate of pay that she did then not do so, other than the small task for Mr Stratton. In my view, the note of the discussion with Lewis Ballard at 291 reflects what was the claimant's original intention (including that understood by Mr Gray) contrasting against the reality of the fact that the work for Mr Gray was in fact keeping her busy. That it was not an exclusive arrangement and the claimant was in principle free to work for others (other than the fact the claimant had agreed not to work for competitors) would point against employee status. However, the picture ultimately is also not of one of the claimant as a credit controller marketing and delivering her services independently to a range of clients but instead to her working for Mr Gray as an integral part of his business. Mr Gray would have been aware that in reality the claimant had limited time and scope to work for others. This is shown by Mr Gray's comment at p291 "She would be splitting her time between CD Gray, Terra Firma, and a couple of other smaller clients."

68. The claimant used the first respondent's tools and equipment other than she had her own laptop at home. However, she had limited access to work resources at home and, in particular, could not access the ledgers. She stated that Mr Gray had talked about installing a VPN to allow her to home work more but that it had never happened. Again, this is suggestive of the first respondent being responsible for resourcing the claimant and for setting up the means for her to home work which would point as a factor more towards employee status.

69. Taking all of the above factors into account and being mindful of the Court of Appeal's warnings against a tick list approach, I find that the claimant was an employee within the meaning of the ERA and EA. Stepping back and looking at the overall picture, notwithstanding those factors which point away from employee status, I am satisfied overall that they are outweighed by those in favour. I also do not find the factors to be so finely balanced that the agreement on status reached between the parties would tip the balance in favour of the claimant being self employed. It is ultimately an incorrect label.

70. Notwithstanding the respondent's secondary argument that the claimant initially became an independent contractor and moved back to being an employee over time, I am satisfied that the true nature of the relationship throughout was one of employee. I do not doubt that it was agreed that there would be a change in the claimant's status. However, weighing the factors identified above I cannot see the reality of the nature of the relationship ever sufficiently changing following that agreement to one of the claimant being self-employed and then switching back. The reality of the situation is that largely, once Mr Gray and the claimant had agreed that she would work 4 to 5 days a week, and had some agreement on the nature of her expanded PA duties, and agreed the rate of pay, they continued to function in many respects as they had done before, other than matters such as the invoicing, and pension contributions, sick pay and holiday pay. That general functioning did not change.

71. I must also address the question of the claimant's work for Terra Firma. Notwithstanding the separate invoicing, which I have found to be a broad brush reflection of the claimant's daily work, I find that the claimant was at all times an employee of the first respondent. The controlling mind here was Mr Gray and I am satisfied that he was directing the work of the claimant on behalf of the first respondent and in doing so, was in effect, directing and delegating the claimant to undertake the work for Terra Firma as part of her overall contract of employment with the first respondent. I do not accept the claimant was predominantly working for Terra Firma in circumstances in which she was clearly providing PA duties to Mr Gray and for the first respondent. I also take into account that the claimant had previously undertaken credit control work for Terra Firma during the period when it is not disputed that the claimant was an employee of the first respondent and it is not disputed that at that time the claimant was only an employee of the first respondent. In reality that arrangement did not change other than the preparation and splitting of the invoices between the first respondent and Terra Firma on the direction of Mr Gray. Weighed against all the other factors I do not find that sufficient to conclude that when the claimant was undertaking Terra Firma work she was not working within her contract of employment with the first respondent. She was therefore an employee of the first respondent throughout.

72. A telephone case management preliminary hearing will be listed to discuss future case management. The parties may also attempt to agree directions between themselves and write in with their joint proposals in advance of the case management preliminary hearing which must include an agreed time estimate for the final hearing including remedy and any unavailability dates. If the draft directions are approved by an employment judge the preliminary hearing will be cancelled.

____

Employment Judge Harfield
Dated: 24 June 2019

JUDGMENT SENT TO THE PARTIES ON
27 June 2019

For the Tribunal Office