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EMPLOYMENT TRIBUNALS

Claimant ***Respondent***

Miss F Yaffa **AND** **Integreon Managed Solutions Limited**

PRELIMINARY HEARING

HELD AT: **London Central** **ON:** 14 June 2019

BEFORE: Employment Judge Brown (Sitting alone)

Representation:

For Claimant: **In person**
For Respondent: **Mr B Uduje, of Counsel**

JUDGMENT

The Judgment of the Tribunal is that:

1. **The Claimant was not an employee of the Respondent.**
2. **The Claimant was not a worker of the Respondent.**
3. **The Claimant did not come within the extended definition of worker in s.43K Employment Rights Act 1996.**
4. **The Employment Tribunal does not have jurisdiction to hear the Claimant's claims and they are dismissed.**

REASONS

Preliminary

1. By a claim form presented on 8 January 2019 the Claimant brought complaints of unfair dismissal, automatically unfair dismissal under *s.103A Employment Rights Act 1996*, protected disclosure detriment under *ss.47B & 48 Employment Rights Act 1996* and notice pay against the Respondent.

2. This hearing was listed to determine the Claimant's employment status; whether she was an employee or a worker of the Respondent and whether, therefore, the Employment Tribunal had jurisdiction to hear her claims.

3. I heard evidence from the Claimant and from Colin Etherington, Senior Director of Human Resources at the Respondent. There was a Bundle of documents. Both parties made written and oral submissions.

Relevant Facts

4. The Claimant is a lawyer qualified in France. She is fluent in French and English.

5. On 7 November 2017 she incorporated her own company, Fatou Yaffa Limited. This company was later called FY Legal Services Limited. The Claimant supplied and supplies legal services to various clients through that company.

6. The Respondent is a business process outsourcing company. It provides outsourcing business support functions to the legal sector, amongst other sectors. The Respondent engages three types of personnel. It employs 330 employees. It also has about 20-25 personnel engaged on worker contracts. It also engages self-employed independent contractors.

7. The Respondent engages with its legal sector clients, law firms, in two ways. Firstly, it can deliver a service and, in such a case, the Respondent manages and supervises the staff engaged on the work to ensure the project is delivered on time to the required specification. Alternatively, it supplies temporary contractors to law firms. In such a case, the law firm client tells the Respondent what skills the contractors must have and how many contractors are required. The individual contractors are then engaged by the Respondent through individual personal service companies, "PSC"s. The PSC in question will enter into a master service agreement, which is a type of umbrella contract with the Respondent which purports to govern the relationship between the Respondent and the PSC.

8. One of the Respondent's clients is a law firm K&E Limited. It entered into a contract with the Respondent on 10 August 2018 for the Respondent to supply temporary staff to K&E to work on K&E's premises. The contract, page 114, provided that K&E might ask the Respondent to make available services of Temporary Workers to it, clause 2.1. "Temporary Worker" was defined in that contract as "certain Integreon personnel to be temporarily assigned to Client as temporary personnel of Client". By clause 3.1, when requiring or requesting the introduction of Temporary Workers, K&E undertook to provide full details to the Respondent of the intended duties of the Temporary Worker, any special skills which it required the Temporary Worker to have including experience, training and qualifications and any health and safety information which needed to be passed to the Temporary Worker. The contract provided that the Respondent would then pass CVs to K&E.

9. Under the contract between K&E and the Respondent, the Respondent assumed responsibility for paying the relevant Temporary Worker and, where appropriate, the deduction and payment of national insurance contributions, clause 6.1.

10. By clause 7.1, K&E agreed to pay such hourly charges as agreed between K&E and the Respondent. The hourly charges were agreed to compromise the Temporary Worker's hourly rate and the Respondent's commission calculated as a percentage of the hourly rate and the employee's national insurance and expenses where agreed with K&E.

11. By clause 8, it was provided that K&E would supervise the Temporary Worker and that K&E would terminate the assignment if it reasonably considered that the Temporary Worker's services were unsatisfactory.

12. By clause 9, the agreement provided that Temporary Workers supplied by the Respondent were engaged under contracts for services; they were not employees of the Respondent, but were deemed to be under the supervision, direction and control of K&E from the time that they reported to take up their duties and for the duration of any relevant assignment, page 116.

13. On 13 August 2018 K&E informed the Respondent that it was looking for four French-speaking qualified contract lawyers to review documents in French in a bribery and corruption investigation. The Respondent agreed to send appropriate CVs to K&E and contacted an acquaintance of the Claimant to ask whether that acquaintance was interested in the potential work, page 119. The Claimant was told of the potential work and contacted the Respondent, sending her CV, which the Respondent sent to K &E along with other CVs, page 122. Initially, K&E wanted to interview the candidates, but then decided that interviews were not required, page 135 and 138.

14. K&E thereafter confirmed the selection of four candidates and that those candidates should start work from 21 August and should work for 3 - 4 weeks, page 137. K&E also confirmed direct to the Claimant that its office hours were 9.30am-5.30pm and that overtime would be paid after office hours, that is after 5.30pm, page 192.

15. In order to carry out work at client offices, the Respondent required the workers whom it supplied to clients to supply their services through personal service companies and to sign a master services agreement, an "MSA", with the Respondent.

16. On 21 August 2018 the Claimant's company, FY Legal Services Limited, signed a Master Services Agreement with the Respondent. Under the MSA, page 157, FY Legal Services Limited was the "Provider" and it agreed to make the Claimant available to provide services. The agreement said that the Respondent was under no obligation to issue any work order, or to offer work, to the Provider or the individual. The MSA provided that the Provider would be paid fees in accordance with each work order and would be responsible for the remuneration of individuals including their tax, clause 8, page 160, and clause 1(e), page 157.

17. The MSA provided that the relationship of the Provider and of the individual to the Respondent would be that of independent contractor. The

MSA constituted a "contract for the provision of services" according to its terms, page 162 and 163.

18. Annexed to the MSA was a work order. The work order provided that the consultant provided would be the Claimant, the duration of the work order would be 21 August to 11 September 2018, the location of the work was client K&E's premises and that the provider FY Legal Services would be paid a fee of £32 per hour for services performed, page 165.

19. The Respondent required that FY Legal Services Limited have a contractor insurance policy in place and recommended a provider to the Claimant.

20. When the Claimant started to work for K&E she completed a vendor set up form, so that her details could be entered in the Respondent's payroll and computer systems. She stated on that form that the relevant vendor was FY Legal Services, a legal company; that the vendor was a temporary vendor and the relationship was that of "contractor", page 190.

21. During the work that the Claimant performed in this case, the Claimant worked at all time at the offices of K&E and for K&E. She did not attend the Respondent's offices, nor did she ever speak to, or see, the Respondent's employees, face to face. She worked under the direction and control of K&E employees; the work was reviewing French documents and she did the work along with other personnel supplied by the Respondent.

22. The Claimant did not tell me in evidence that she was integrated into K&E staff, or that she worked alongside K&E staff doing the same work. It appeared, from the evidence that I heard, that she worked closely with other personnel supplied by the Respondent, performing a specific document review task, subject to the supervision of K & E partners/senior employees.

23. On the day the Claimant started work at K&E, she emailed the Respondent, saying that she had some questions. She said that the K&E were asking her fellow Respondent personnel and her to take a one-hour break. The Claimant said, "legally after six hours we are only required to take 30 minutes of break and this only concerns employees which we are not". She asked the Respondent to ensure that she and the other Respondent personnel could only take 30 minutes break. She also said, "… can you please see that we are allowed to come in at 8am since the office is opened 24/7. We saw with Andrew Butel the partner who is ok with that". Page 197.

24. The Respondent replied that day, saying that K&E had confirmed that it was content with an 8am start and a 30 minutes break, page 196.

25. The Claimant was required to log in and log out when she started work. I accepted Mr Etherington's evidence that this was the way in which the Respondent recorded the hours which had been worked by its personnel on client sites. The Claimant sent records of the times that she worked to the Respondent. These were confirmed by K&E as correct, as appropriate, and

the Respondent would then invoice K&E and pay FY Legal Services Limited the applicable payment, calculated on the basis of the number of hours worked by the Claimant. On the timesheets, the Claimant was referred to by her name.

26. K&E asked for the Claimant's work to be extended after the initial work order came to an end and the Claimant agreed to a new work order covering the period 12-28 September 2018, page 244. On 26 September 2018 the Respondent wrote to the Claimant, saying that K&E had requested to extend her contract until 5 October; the Respondent asked if the Claimant was happy with the extension so that the Respondent could send the contract over. The Claimant agreed that she would be happy to extend the contract for another week, page 358.

27. Tensions arose between the Claimant and her colleagues also supplied by the Respondent at K&E about the allocation of work to them. It appears that they were allocated batches of work by K&E partners and managers. However, the Claimant and her colleagues sought guidance from K&E about what work they were required to do and whether they could take on each other's work if they had completed their own, page 427 and 426. When K&E confirmed that the workers should take on work that others had outstanding once they had completed their own document reviews, the Claimant objected to K&E and said that it would reduce their available hours, page 426.

28. The Claimant also alleged that one of her Respondent colleagues was not legally qualified. K&E reported this to the Respondent. Mr Klich, the Respondent's legal services manager, asked to speak to the Claimant and to other Respondent personnel at K&E. The Claimant did not speak to him on the telephone as had been requested. Mr Klich emailed the Claimant on 9 October 2018 saying, "As your superior in this organisation, I'm asking you to contact me. No excuses". Page 451. The Claimant replied, "I'm a contractor running my own company you are my client".

29. The Respondent took exception to the Claimant's response and decided to terminate its relationship with her. This was reported to K&E in the following terms, "As Fatou [the Claimant] refused to engage in a similar conversation we have decided to withdraw this candidate from your project … unless you would like us to take a different approach?" Page 468. The partner at K&E who was supervising the Claimant and her colleagues said that he was content with that approach, page 468. A K & E manager confirmed this with the partner saying "Ok … Just wanted to check in case you wanted her to stay to finish the project", page 467.

30. The Claimant was not required to work exclusively for the Respondent while she was engaged on the MSA; she was free to work for other companies when not working at K&E's offices.

31. The Claimant does not seek to argue that she was an employee or a worker of K&E.

32. The Claimant was paid hourly by way of payment for invoices raised.

Relevant Law

Employee

33. By *s230(1) Employment Rights Act 1996* it is provided, "In this Act "employee" means the individual who had entered into or works under (or, where the employment has ceased, worked under) a contract of employment."

34. In deciding whether a contract of employment existed between an employee and an employer, four essential elements must be fulfilled for a contract of employment to exist. These are: that a contract exists between the worker and the alleged employer; that an obligation exists on the worker to provide work personally (*Express & Echo Publications Ltd v Tanton* ("*Tanton")* [1999] ICR 693), that there is mutuality of obligation (*Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612, 623), and there is an element of control over the work by the employer consistent with the contract being one of employment.

35. With regard to mutuality of obligation, this does not require the employer to provide work on all occasions, *Wilson v Circular Distributors Limited* [2006] IRLR 38. In that case, the EAT said that mutuality of obligation exists on behalf of an employer, if when work was available it must be offered and also, on behalf of the employee, where an employee was required to undertake work when it was offered, unless he had a very good reason not to, such as being ill.

36. Regarding personal service, a limited power to appoint substitutes (or delegate) is not inconsistent with an obligation of personal service (*Ready Mixed Concrete Ltd v Minister of Pensions and National Insurance(* [1968] 2 QB 497, 515C).

37. Even if all those requirements are fulfilled, the contract may be one of employment, rather than must be one of employment. The Courts have stated the Court of Tribunal will weigh up all the relevant factors and decide whether, on balance, the relationship between the parties is governed by a contract of employment, *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968], QBD 497, *Carmichael and Another v National Power Plc* [1999] ICR 1226 HL, *Express and Echo Publications Limited v Tanton* [1999] IRLR 367 and *Hewitt Packard Limited v O'Murphy* [2002] IRLR 4.

38. The factors that can be taken into account include: whether the person doing the work provides his or her own equipment, the degree of financial risk taken by the individual doing the work, the intentions of the parties, a prohibition on working for other companies and individuals, remuneration by way of wages or salary, payment during absence for illness, paid holidays and membership of a company pension scheme. Those are not exhaustive

factors, but are an indication of the relevant factors which can be taken into account.

39. Where one party alleges that the written terms of an employment contract do not reflect the true agreement between the parties, and thus are a sham, "the question the court has to answer is: what contractual terms did the parties actually agree?" Lord Clarke in *Autoclenz v Belcher* [2011] UKSC 41, at paras 21 and 29.

40. When deciding what was the true agreement between the parties, a Tribunal should recognise," "that while employment is a matter of contract, the factual matrix in which the contract is cast is not ordinarily the same as that of an arm's length commercial contract… the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed… frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept…so 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 and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part," Lord Clarke, at paras 33 -35.

Worker

41. By *s230 Employment Rights Act 1996* "worker" means 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 perform work personally any work or services for another person 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.

42. In order to be a worker, there must be a contract and it must be intended that there is an obligation on the worker to perform the work personally pursuant to that contract, *Wright v Redrow Homes (Yorkshire) Ltd* [2004] ICR 1126. If the element of personal service is missing and that is not a sham, the individual is not a worker, *Community Dental Services Limited v Sultan-darmon* [2010] IRKR 1024, EAT.

43. In order for a person to be working as a worker, the employer must also not be the client or customer of a profession or business undertaking carried on by the worker. *Bacica v Muir [2006] IRLR 35* and *Cotswold Development Construction v Williams [2006] IRLR 181* gave guidance on the meaning of this "business customer" exception.

44. In *Cotswold Development* the EAT said at paragraph [53] –"It is clear that the statute recognises that there will be workers who are not employees,

but who do undertake to do work personally for another in circumstances in which that "other" is neither a client nor customer of theirs - and thus that the definition of who is a "client" or "customer" cannot depend upon the fact that the contract is being made with someone who provides personal services but not as an employee. The distinction is not that between employee and independent contractor… It seems plain that a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal or as an integral part of the principal's operations will in most cases demonstrate on which side of the line a given person falls."

45. The statutory test in s230(1)(b) ERA does not require that there is an "umbrella" contract; there may, instead, be a series of contracts arising as and when work is undertaken, see *Carmichael v National Power plc* [1999] 1 WLR 2042, HL and *James v Redcats (Brands) Ltd* [2007] ICR 1006 EAT. There does, however, have to be a contract between putative worker and putative employer, even if purely assignment based, and the determination of the nature of the relationship may be informed (as part of the overall factual matrix) by the fact that there are gaps between assignments, *Windle v SoS for Justice* [2016] ICR 721 CA at paragraphs 22 to 25, and *Pimlico Plumbers Ltd v Smith* [2017] ICR 657 CA at paragraph 145).
46.

Incorporation of Limited Company

47. In *Catamaran Cruises Limited v Williams* [1994] IRLR 386, the EAT held that there was no rule of law that the incorporation of a limited company into a relationship prevented the continuation of a contract of employment or the establishment of a contract of employment. If the true relationship is that of employer and employee, it cannot be changed by putting a different label on it. Whether or not the contract in question is one of service, or one for services, is a question of fact. The formation of a company may be strong evidence of a change in status, but that fact has to be evaluated in the context of all the other facts found.

Extended Definition of Worker – *s43K ERA 1996*

48. By *s43K(1) ERA 1996*, "(1) For the purposes of this Part "worker" includes an individual who was not a worker as defined by section 230(3) but who - (a) works or worked for a person in circumstances in which - (i) he is or was introduced or supplied to do that work by a third person, and; (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third party person or by both of them...".

49. By *s.43k(2), "*For the purposes of this Part "employer" includes - (a) in relation to a worker falling within paragraph (a) of sub section (1), the person who substantially determines or determined the terms on which he is or was engaged."

50. *In McTigue v University Hospital Bristol NHS Foundation Trust* [2016] ICR 1155 EAT, Mrs Justice Simler summarised the correct approach to determining whether an individual is a worker within the meaning of *s.43K(1)(a) Employment Rights Act 1996.* The Tribunal should ask the following questions in sequence: 1. For whom does or did the individual work? 2. Is the individual a worker as defined by s.230(3) in relation to a person or persons for whom the individual works or worked? 3. If the individual is not a *s203(3)* worker in relation to the Respondent for whom the individual worked or works, was the individual introduced or supplied to do the work by a third person and, if so, by whom? 4. If so, were the terms on which the individual was engaged to do their work determined by the individual? 5. If the answer to the above is no, were the terms substantially determined by the person for whom the individual works or worked, by a third person, or by both of them? In answering this question, the starting point is the contract or contacts and the terms that are being considered. There may be a contract between the individual and the agency, the individual and the end user and/or the agency and the end user that will have to be considered. In relation to all relevant contracts, terms maybe in writing, oral and may be implied. It may be necessary to consider whether written terms reflect the reality of the relationship in practice. 6. If the Respondent alone (or with another person) substantially determines or determined the terms which the individual works or worked in practice (whether alone or with another person who is not the individual) then the Respondent is the employer as defined by *s.43K(2)(a)* for the purposes of the protected disclosure provisions. There may be two employers for these purposes.

51. In *Kepple Seghers UK Limited v Hinds* [2014} ICR 110, EAT, the Respondent was the end user and not the agency. The EAT said that, given the Tribunal had found that it was the Respondent which had laid down the specification for the engagements, it was entirely consistent for it to conclude that the Respondent had also determined the initial terms of the engagement and, in doing so, the Tribunal was not restricted to looking at the terms of the contracts, but was entitled to have regard also to what happened in practice.

Discussion and Decision

52. On the facts, I found that the Claimant is a qualified lawyer and was capable of understanding the nature of the contractual terms and obligations into which she entered. I concluded that the Claimant did intend to contract with the Respondent as an independent contractor and to work at K&E's offices as an independent contractor.

53. The Claimant voluntarily asserted her independent contractor status on at least three occasions: first, when filling in the vendor set up form, page 190; second, when asking for and securing a change to working hours at K&E at the outset of her work there, page 197; and third, when required by Mr Klich of the Respondent to telephone him - she responded, "I'm a contractor running my own company you are my client". Page 451.

54. The Claimant used the flexibility available to independent contractors to negotiate the terms for her engagement at K&E on 24 August and to dictate the terms on which she interacted with the Respondent, in particular by deciding not to telephone them on 9 October 2018.

55. The Claimant was paid through raising invoices and payment was made to her company.

56. She was not required to continue work after the end of any particular work order. She was given the choice as to whether to enter into a new work order when the particular assignment came to an end. The Claimant confirmed, on the various occasions when she was given the opportunity, that she did decide to continue the arrangement.

57. The Claimant did not set up her limited company for the purposes of her work for the Respondent, or for her work for K&E. Her company was incorporated in 2017 and she had provided services to other companies through it before she worked for the Respondent.

58. Under the contract between the Claimant's company and the Respondent, there was no mutuality of obligation. The Respondent was not obliged to provide work and the Claimant was not obliged to accept it after the end of a particular assignment.

59. On the facts, I found that the Respondent did not have control over the Claimant's work. On the terms of the contract between the Respondent and K&E, and in practice, it was K&E who described the work required (in this case, to review French documents), K & E who directed and controlled the Claimant's work allocating batches of her work to her when she was there, K&E who agreed the hours of work and and chose the start and end dates of the assignments. I concluded that K&E retained the control over the termination of the Claimant's engagement. While the Respondent made the initial decision to terminate the Claimant's engagement, it was clear from the correspondence that this decision was subject to K&E's consent, p468. If K&E had wanted the Claimant to finish the assignment, on the basis of the documents that I have seen, it could and would have required the Respondent to supply the Claimant until the end of the assignment.

60. On the facts, furthermore, the Claimant was not integrated into, either K&E's, or the Respondent's, workplaces. The Claimant was engaged for a short term to perform a discrete task for K&E, which she and other contractors performed apparently separately from other K&E employees, only being supervised by a K&E partner or senior manager. This was a single task of relatively short duration - a matter of weeks. She was not required to keep herself available for other work and she was entitled to decline further offers of work to her.

61. Applying the law to the facts that I have found, I concluded that the Claimant understood the terms of the contract into which she was entering and that the terms of the contract genuinely represented the intentions of the

parties. I decided that she was genuinely self employed and free to work elsewhere for other clients. The contract between the Respondent and the Claimant was not a sham - the parties behaved consistently with it. This was a contract for services, not a contract of service.

62. Further, while it was envisaged under the contract that the Claimant would do the work herself, that is, perform the work personally, there was no control of the Claimant by the Respondent consistent with a contract of employment. The Respondent exercised almost no control of the Claimant's work, it genuinely supplied her to K&E, which was the end user. It did not select the Claimant. It merely supplied her CV, with which K & E was eventually satisfied. K&E retained the right to decide whether and when the assignment came to an end. K&E specified the work to be done, specified the qualifications that were required, specified the hours in which the Claimant worked and had day to day control and of supervision of her work. Accordingly, the essential element of control was missing from the contract between the Claimant and Respondent, so that the Claimant could not be an employee of the Respondent.

63. Furthermore, I concluded that the Claimant was not a worker of the Respondent under *s203(3) ERA 1996*. The contractual arrangements were genuinely for the Claimant to work as an independent contractor. Applying the guidance in *Cotswold Development,* the Claimant was not recruited as an integral part of the Respondent's business. She was supplied to a third party and was subject to the requirements of the third party, not to the Respondent's requirements. On balance, even when she was supplied to the third party contractor, she undertook a time-limited discreet task with a small group of other independent contractors and was not integrated into the K&E business.

64. With regard to *s43K ERA*, I concluded that it was K&E who substantially determined the terms on which the Claimant worked for K&E, both contractually and in practice. K&E determined what work the Claimant would do. It determined the specifications of the contractors it needed. It selected the people to do the work. It decided when the work would start and end. It determined, along with the Claimant, the daily start time and the break times. K & E supervised the work. It retained the ultimate decision as to whether the Claimant would continue to work for it. It determined the number of hours required to be worked and whether the contract was to be extended.

65. K&E had a contract with the Respondent, pursuant to which K&E agreed with the Respondent that the Claimant would be an independent contractor.

66. The terms on which the Claimant worked, in practice, were consistent with the terms of the contract into which the Respondent entered into with K&E. They were also consistent with the terms of the contract between the Respondent and the Claimant. Under K & E and the Respondent's contract it was agreed that K&E would be responsible for the supervision of the Claimant and any loss from the contract. While the Claimant and the Respondent had

an umbrella contract and the Respondent required the Claimant to have insurance and to enter into certain covenants, I concluded that, on all the facts, K&E and not the Respondent substantially determined the terms on which the Claimant worked for K&E. K&E was the appropriate employer of the Claimant under the extended definition of worker *in s.43K Employment Right Act 1996*, not the Respondent. It was not both K&E and the Respondent, it was K&E alone.

67. Accordingly, the Claimant was not a worker or an employee of the Respondent under any of the relevant contractual and statutory provisions. The Tribunal does not have jurisdiction to hear any of her claims. The Final Hearing is vacated.

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Employment Judge Brown

Dated: 03rd July 2019

Judgment and Reasons sent to the parties on:

05th July 2019

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For the Tribunal Office