**Case Number: 2300883/2018**

# THE EMPLOYMENT TRIBUNAL

**SITTING AT:** **LONDON SOUTH**

**BEFORE:** **EMPLOYMENT JUDGE MJ Downs**
**Ms JM King**
**Ms V Stansfield**

**BETWEEN:**

**Claimant**

**Ms Stephanie Wheeler**

-and-

**Respondent**

**Peter Berry, Kathy Berry and Stephen Berry**
**Trading as CJ Berry & Son**

**ON: 29th & 30th November 2018**

**APPEARANCES:**

**For the Claimant:** **Mr Simon Wheeler (Father)**

**For the Respondent:** **Mr Adam Griffiths (Counsel)**

## JUDGMENT

UPON Hearing Mr Wheeler for the Claimant and Counsel for the Respondent

AND UPON having read an agreed bundle of material

AND UPON hearing the Claimant, Ms Berry and Ms Gannon

IT IS THE UNANIMOUS JUDGMENT OF THE TRIBUNAL that:

(1) The claim for unfair dismissal is not well founded

(2) The claim for unlawful direct discrimination because of the Claimant's sex is not well-founded

# REASONS

Introduction

1. This is a claim for unfair dismissal and sex discrimination brought by way of an originating application received by the London South Employment Tribunal on 12th March 2018.

2. The Tribunal had the benefit of an agreed bundle of documents and heard from the Claimant.

3. We heard from Ms Jo Berry who, although not a partner of the business, nevertheless managed the workplace for the relevant period and Ms Holly Gannon a co-worker

4. The Tribunal made reasonable adjustments to accommodate learning issues drawn to our attention.

Identification of the issues

5. At the Preliminary Hearing on 15th June 2018, EJ Morton, with the assistance and agreement of the parties, identified the following questions for the Tribunal to answer

    (1) was the Claimant dismissed?
    (2) if so, what was the date of the dismissal?
    (3) was the Claimant at the effective date of termination:
        (i) an employee within the meaning of section 230 Employment Rights Act 1996?
        (ii) in employment within the meaning of section 83 (2) Equality Act 2010?
    (4) Was the Claimant unfairly dismissed pursuant to ss 94 and 98 ERA 1996?
        (i) Did the Claimant have two years' service at the date of dismissal?
        (ii) what was the reason for dismissal (if the Claimant was dismissed)?
        (iii) was the reason for dismissal a potentially fair one?
        (iv) Did the Respondent act reasonably in treating the reason relied upon as a reason to dismiss the Claimant?
        (v) Did the Respondent adopt a procedure that was fair and compliant with any applicable ACAS code?
    (5) Was the Claimant the subject of direct discrimination because of her sex by her dismissal?
    (6) Remedy

If she was unfairly dismissed what, compensation is the Claimant entitled to taking into account any potential reduction:

(i) In accordance with *Polkey v AE Dayton Services*

(ii) In respect of any conduct on the part of the Claimant that contributed to the dismissal

(iii) Any unreasonable failure by the Claimant to mitigate her loss

(7) If the Tribunal finds that the Claimant was the subject of unlawful sex discrimination

(i) What compensation is she entitled to?

(ii) Should the tribunal make an award for injury to feeling?

**Relevant Facts**

6. The Tribunal has sought to keep to the identified issues as that is what is required to undertake a fair hearing. This was not entirely straightforward as half way through her evidence the Claimant put forward a case that she had been dismissed because the Respondent wanted to thwart her gaining statutory protection by way of two years continuous service. Additionally, it became apparent that she now relied upon a particular remark by another member of the Respondent family in support of her sex discrimination claim. We can seek to take the former into account as it largely concerns the same factual matrix. The allegation directed against another family member at this late stage is however unfair as it would have needed to be raised at or about the time of the preliminary hearing so it could have been established whether they needed to be a witness (they were not and therefore it was unfair to take this matter into account).

7. The Respondent are a family business who operate as a partnership. The Claimant worked in various capacities for the business over the years but principally as an assistant butcher.

8. In her originating application, the Claimant says that she was employed by the Respondent from 19th August 2014 to 9th November 2017. However, the Claimant readily conceded that the history of her employment status was more complex than that.

9. In fact, the Claimant was engaged to work by the Respondents from 19th August 2014 until 9th November 2017 but the Claimant says herself that she was retained (on a self-employed basis) for part of that period. An acknowledged complication is the fact that the Claimant signed a letter bringing her employment to an end on 17th October and began as a self-employed worker from that day until 9th November 2017. It seems likely that there was some “bookending” of her time as an employee when she was working on her own account.

10. The Claimant complains that she was dismissed on grounds of her sex according to her originating application because, approximately three times in the preceding couple of week (before her employment came to an end), Ms Bendall has asked if the Claimant would be starting a family anytime shortly.

11. The ET1 states that it was Ms Bendall who told her the Claimant that she must *go* self-employed and that she was issued with a new contract and told that if she did not sign it, she could not return to work (she was absent from work at that point, having cut herself at work). The originating application implies that the Claimant was singled out.

12. Establishing precisely what has transpired here is likely to be almost impossible. The Claimant framed her case as being very much about decisions taken and remarks made by Ms Bendall in the course of her work for the Respondent. Against that background, it is perhaps unsurprising that the Respondent principally relied upon the evidence of Ms Bendall with support from another worker, Ms Gannon. The Claimant's witness statement, however, made much wider assertions about conversations with others and ancillary matters. The Claimant also made reference to a key conversation taking place in the presence of her partner, who was not a witness in these proceedings. Additionally, there was virtually no documentation. For example, the Claimant told us in evidence that she had originally had a contract of employment (albeit she had never read it) which was at home.

13. What little documentary evidence we have has been largely generated by Ms Bendall who sought to bring organisation and some formality to the work place where there had previously been a web of informal arrangements. Much of the impulse to have better record-keeping was associated with documentation for the purposes of food safety.

14. A particular complication is that the Respondent produced a self-employed contractor agreement and gave it to the Claimant but she did not agree its contents. It might then be sensible to turn to how the parties acted in the working days between 18th October and 9th November 2017. That period was further foreshortened by an accident that the Claimant had whilst at work which meant that she was largely absent from work for the critical period.

15. There was a pretty high order of factual disagreement between the parties. The Claimant's evidence was imprecise. Ms Bendall's evidence was pellucid in comparison but her involvement was largely confined to

the last few months of the narrative arc (from May 2017 onwards for only about 10 hours a week).

16. The consequence is that the Tribunal can only do its best to establish the key facts and, in particular, try and establish whether the principal contentions that are made in the Claimant's claim form are well founded. These are that:

    (i) The Claimant was the subject of a high-handed attempt to make her self-employed in the latter half of 2017;
    (ii) That she was not allowed to return to work when she started to query a contract for services drawn up by the Respondent; and
    (iii) Ms Bendall asked her a number of times towards the end of her engagement with the Respondent as to whether she was starting a family any time soon, thereby revealing that her dismissal was because of her sex.

17. There is agreement that the Claimant was initially engaged as a trainee butchery assistant on a self-employed basis. The Claimant had a fairly high degree of autonomy as to the hours that she worked – and indeed as to the tasks that she undertook. The Claimant worked on this basis for over a year. We accept the evidence of Ms Gannon that the Claimant engaged substitutes to cover for the work when she was not able/did not wish to undertake it. It can be concluded from this that the Claimant had a pretty good understanding of what was involved in being self-employed.

18. It is perhaps worth adding at this point that the Respondent engaged both employed and self-employed workers. There is no evidence before us that, at any particular stage, there was a push for everybody to become either employed or self-employed.

19. The Claimant concedes that she was not employed under a contract of employment until a day she cannot specify in November 2015 (probably 2nd or 3rd November). The Respondent contends that the Claimant was employed from 2nd November 2015 and we are content to adopt that date.

20. The Claimant was probably engaged to work for 24 hours a week. However this was varied downwards at the request of the Claimant so that for most of the time that she was working for the Respondent she was working 24 hours one week and 16 the next (an average of 20 hours a week). The Claimant volunteered that she had a lot going on – as for some of the time she was a single mother and was building her own home.

21. The Claimant gave an account in her witness statement which appeared to set out a reasonably clear narrative but her oral evidence was quite confusing and generally hard to follow. It was even difficult to get a clear account of the chronology from 17th October 2017 onwards. It is striking that Ms Bendall also confessed that she did not understand the stance of the Claimant at key moments while she was in the business. The Tribunal find that this is likely to be the case. This finding is based, in part, of the Tribunal's own experience of hearing her evidence. By contrast, Ms Bendall was somewhat clearer and more convincing as a witness. As a consequence we do not find that Ms Bendall had started to insist from the time that she became involved in the business (i.e. May 2017) that the Claimant worked 25 hours a week (we believe her when she said that the business did not actually require the Claimant to work more hours). However, Ms Bendall did want clarity about when the Claimant would and would not be working.

22. The Claimant was very comfortable in the work place. She felt she was working in a family environment. She entered into a relationship with a work colleague who became her direct manager at one point. She shared many details of her personal and family life – including that concerning her son and her own mother in discussions at work. These were matters that were private. That she would disclose such is borne of openness. Even from the way that the Claimant gave her evidence and the questions that she asked be put to witnesses, it was apparent that for the Claimant, her family arrangements were an integral part of her work/life balance and she believed that of others also. Family news, thoughts and plans were all shared with her co-workers and the owners of the farm.

23. Ms Bendall stood very slightly outside that structure but, even so, there would have been conversations – initiated, in the main, by the Claimant about family matters. In conversation, Ms Bendall would have been somewhat more reticent to share details of her private and family life or ask that of others. This conclusion is, in part, based on observation of her in Tribunal and a judgement about her temperament and personality and also the fact that she was conscious of the fact that she was the manager. She stressed in evidence that she had a *work relationship* with the Claimant. As Ms Wheeler perceived matters, they were all members of the same team.

24. The Tribunal accept the evidence of Ms Bendall and finds that she did not ask the Claimant if she was starting a family any time soon. She is likely to have been drawn into conversations about family issues at times

by the Claimant. However, they had no bearing on the employment/worker/contractor arrangement in any way whatsoever.

25. The Claimant's core work had been the making of burgers but her tasks expanded as time progressed. She was reasonably versatile and enthusiastic. Ms Bendall proposed that the business use a kitchen to cook food for guests/visitors/customers. She arranged for a kitchen to be built/designed and adapted and used her own until it was ready and received the relevant food safety clearance. The Claimant contributed to the business by offering the Respondent suggestions and ideas and would help out as requested. The Farm kitchen as a business idea was many months in the gestation. It is likely to have its origin with Ms Bendall's arrival as a leading force in the business in May 2017.

26. The Claimant approached the Respondent in or around July 2017 to discuss the possibility of amending her hours – this included the possibility of taking the summer off. The Claimant's aim was to have more of the holidays off – and her principal focus was the Autumn half term and onwards (she was due to move into her self-build home). The Tribunal heard that there was some tension about the farm open-day as the Claimant wanted her partner and herself to be absent but the Respondent did not believe that was practicable. The Respondent was particularly exercised about the necessity for the Claimant's partner to attend as he was required as Butcher for the event. This caused some tension. The Claimant could only see the problem of her own interests. In this and the way that she gave her evidence she demonstrated solipsistic tendencies. This is a further reason why her evidence is not as reliable as that of Ms Bendall.

27. Ms Bendall considered the options and even contacted ACAS. She concluded that a move to a zero-hours contract would not meet the business needs of the Respondent. The Claimant was familiar with being a self-employed worker. However, the Tribunal accepted Ms Bendall's evidence when she said it took her "ages" to sort out. The parties returned to this discussion in September and provisional agreement was reached that a return to self-employed status was the most likely answer to both their needs. It is most likely that this was the culmination of six weeks of discussion.

28. It was agreed that the change would take effect on or before the October half term which commenced on 20th October 2017.

29. On 17th October the Respondent confirmed the termination of the Claimant's contract of employment in writing. This says that the decision was mutual and the letter was counter-signed by the Claimant, The

Respondent provided a copy of the terms of self-employment which was taken from a template that had been found online. A P45 was also generated the same day. The Claimant's consent was freely given albeit she is unlikely to have given the matter deep thought.

30. The Claimant already had a fair amount of autonomy. This increased slightly as a result of this move. The rate of remuneration was such (she was paid by the hour) as to allow her to make her own arrangements about such matters as tax and insurance. It was an integral part of the arrangement that the Claimant provide substitute workers when she wasn't able to work herself. The Claimant assured Ms Bendall that she had two substitute workers prepared to work in her stead.

31. There were some unsatisfactory aspects to the cases of both parties. The impetus for a change in employment status came from the Claimant. She was the persuader for change. She may not have been wedded to a particular solution – but the Respondents were not initially either. The Claimant had experience of what it was to be self-employed while providing her services to the Respondent. Similarly, the Claimant knew what it was like to be an employed person under a conventional contract of employment. The Claimant decided that she wanted to move away from the latter.

32. It is likely that when the Claimant worked as a self-employed person on the first occasion that there was little by way of paper work. In her oral evidence, Ms Bendall volunteered that the farm was very relaxed about paperwork. However, Ms Bendall, herself, had an organised style and some experience of being in business on her own account. She undertook research and concluded that a zero hours contract did not have much to offer the business. She therefor proposed that the Claimant became self-employed – a proposal with which the Claimant concurred.

33. The problem was that in parallel with this, Ms Bendall sought to bring clarity and organisation to this process by utilising material that she found to create a "self-employed contractor agreement." The Tribunal believes Ms Bendall when she said that she expected the Claimant to come back to her and discuss anything she didn't like.

34. What actually happened is that the Claimant was given a letter on 17th October 2017 notifying her that her contract of employment was now terminated (note the use of that word). The Claimant was asked to – and did – sign this letter by way of confirming her agreement. It is particularly significant that this (short) letter referred to this step as following a discussion that day and having been "mutually agreed." The Claimant

was uncomplaining. In fact, she was enthusiastic about being self-employed. We accept the evidence of Ms Gannon that the Claimant had formed the view that the new arrangement was superior from the perspective of child care arrangements and she was "excited" by the new status.

35. There appears to have been a discussion about the pool of people that the Claimant would call upon when she did not work for the Respondents herself. This included Ms Gannon (who was self-employed) and another. The choice of who it would be and when was in the hands of the Claimant (even if it might sometimes be communicated/arranged by her husband – according to Ms Gannon)

36. The Claimant was also given two copies of the self-employed Contractor Agreement – that had already been signed by Mr Peter Berry. This was a closely typed eight page document. It did have some gaps in it for the Claimant to fill in.

37. It is worth noting that the Claimant's P45 recorded 17th October as her last day of work.

38. The Claimant now alleges that she was pressurised into agreeing the move to a self-employed status and that she had only agreed it as she did not want to lose her job. The Tribunal concludes that this was a theory that the Claimant developed later when she became concerned to receive an invoice to cover the cost of hiring a substitute worker.

39. The Claimant's own records denoting the hours that she worked appeared to indicate that 18th October was the last day of the Claimant's employment – with "now self-employed" being written next to it. In the following week – the week commencing Monday 23rd October the hours that the Claimant performed (at her election) fell radically – so that she just worked five hours. It is in keeping with the chaotic documents that the Claimant relied on that there is also a self-employed invoice claiming for 7.5 hours for the period after 17th October claiming for 7.5 hours for 19th and 20th October and 13.5 hours for the week commencing 24th October 207. Even so, this represents a fall in the hours of work of the Claimant.

40. On 2nd November 2017, the Claimant suffered an injury at work. This was, as a result, the Claimant's last actual day of work on the Farm. The Respondent say that the claimant provided a substitute to provide a service in her absence until 9th November i.e. the following week. Ms Wheeler received an invoice for work performed by a substitute worker

for 2 hours, 15 minutes work on 2nd and 3rd November 2017. That invoice prompted the Claimant to talk to her father about the agreement.

41. On or shortly after 7th November, the Claimant met with the Respondent and requested clarification about the invoice she had received for the substitute worker. The Respondent explained that in accordance with the agreement that had been arrived at it was for the Claimant to pay the substitute and invoice the Respondent accordingly. The way that the Claimant gave her evidence left a sense of unease that even by the time of trial she didn't seem to understand that pay for the substitutes was still going to come from the respondent – albeit indirectly.

42. On 9th November, the Claimant informed the Respondent over the phone that she would no longer be providing her services. The ostensible reason that she gave was that she did not believe that it was her responsibility to insure herself whilst working. Again, even though attempts were made to explore this in the hearing, the Tribunal was still left with the uneasy feeling that the Claimant had – even by the time of trial – not identified what sort of insurance was being talked about (e.g. national insurance or food hygiene insurance).

43. The Tribunal was given an annotated version of the contract by the Claimant. So far as it could be established, the notes were written by the Claimant's father. They contain a whole series of intelligent points which could have formed the basis of a discussion between the parties at the time. It would appear from those notes that it was the Claimant's father who was the origin of the concern about whether or not the Claimant should be insured for the potential negligence of the substitute workers she was to hire. However, evidence was not advanced that this document was given to the Respondent. As the Tribunal has commented before, it was left feeling unsure that the Claimant understood the points that her father had raised on her behalf.

44. The Claimant says that the Respondent would have known that she would have found the documents difficult to understand. In fact, this was not an area that Ms Bendall felt that confident with either but she had set aside time to study and reflect on them. It is not apparent that the Claimant had done this. The Respondent would have had no reason to believe that the Claimant had particular difficulty in understanding written material. She had not raised this before – for example when food safety documentation was being processed.

45. On the basis that the Claimant's father probably raised with the Claimant various questions about the draft, the Tribunal conclude that it was on 9th November 2017 that the Claimant communicated the clear view to Ms

Bendall over the telephone that the newly created self-employed working relationship would involve her having to insure herself and she was not prepared to do that and would no longer attend work or provide her services to the Respondent and that she would not be coming back to work for them.

46. It was very difficult to get a clear idea precisely what working arrangements had been put in place between 17th October and 9th November but, on balance, the Tribunal finds that the Claimant invoiced the Respondent for the hours that she worked, that the Claimant selected the hours she wanted to work, that the Claimant had a high degree of autonomy provided the food was produced and conformed to safety standards, the Claimant was able to provide a substitute when she was unavailable to work, she was responsible for her own tax and national insurance and it was a matter of choice that she was no longer an employee.

47. Returning then to the three factual contentions identified by the Tribunal and relied upon by the Claimant in support of her claim:
    (i) The Claimant was the subject of a high-handed attempt to make her self-employed in the latter half of 2017;
    (ii) That she was not allowed to return to work when she started to query a contract for services drawn up by the Respondent; and
    (iii) Ms Bendall asked her a number of times towards the end of her engagement with the Respondent as to whether she was starting a family any time soon, thereby revealing that her dismissal was because of her sex.

48. The answers are that, it was the Claimant who wanted to move away from being a conventional employee. She wanted more freedom. The Claimant was not wedded to a particular solution – she might have agreed to be a zero hours worker but, having been self-employed before, she was content with the notion of returning to that status in October 2017.

49. It was the Claimant who decided that she no longer wished to offer her services on 9th November 2017. This was because she has become concerned – having spoken to her father – about some of the detailed implications of being self-employed.

50. The Tribunal has already (above) arrived at the conclusion that Ms Bendall did not ask the Claimant if she was starting a family any time soon. She is likely to have been drawn into conversations about family issues at times by the Claimant. However, they had no bearing on the employment/worker/contractor arrangement in any way whatsoever.

## Relevant Law

51. Employment Judge Morton directed us to the principal statutory provisions – starting with issues of status –

The Employment Rights Act 1996 section 230 which provides:

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting 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 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;

and any reference to a worker's contract shall be construed accordingly.

Equality Act 2010 section 83

(1) This section applies for the purposes of this Part.

(2) "Employment" means—

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

(b) Crown employment;

(c) employment as a relevant member of the House of Commons staff;

(d) employment as a relevant member of the House of Lords staff.

(3) This Part applies to service in the armed forces as it applies to employment by a private person; and for that purpose—

(a) references to terms of employment, or to a contract of employment, are to be read as including references to terms of service;

(b) references to associated employers are to be ignored.

52. Employment Rights Act 1996, section 94 provides:

(1) An employee has the right not to be unfairly dismissed by his employer.

53. The Tribunal also had regard to section 95, Employment Rights Act 1996, as to the circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

…

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

54. Section 97 (as concerns the effective date of termination)

(1) Subject to the following provisions of this section, in this Part "the effective date of termination"—

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

*(c) in relation to an employee who is employed under a contract for a fixed term which expires without being renewed under the same contract, means the date on which the term expires*

[(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect].

(2) Where—

(a) the contract of employment is terminated by the employer, and

(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),

for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(3) In subsection (2)(b) "the material date" means—

(a) the date when notice of termination was given by the employer, or

(b) where no notice was given, the date when the contract of employment was terminated by the employer.

(4) Where—

(a) the contract of employment is terminated by the employee,

(b) the material date does not fall during a period of notice given by the employer to terminate that contract, and

(c) had the contract been terminated not by the employee but by notice given on the material date by the employer, that notice would have been required by section 86 to expire on a date later than the effective date of termination (as defined by subsection (1)),

for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(5) In subsection (4) "the material date" means—

(a) the date when notice of termination was given by the employee, or

(b) where no notice was given, the date when the contract of employment was terminated by the employee.

55. The Tribunal had regard to Equality Act 2010 section 13 regarding direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

56. The burden of proof is dealt with at section 136

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal

57. The Tribunal had regard to the EHRC COP on employment at 3.13 which states (with the example below),
"In other cases, the link between the protected characteristic and the treatment will be less clear and it will be necessary to look at why the employer treated the worker less favourably to determine whether this was because of a protected characteristic.

**Example:** During an interview, a job applicant informs the employer that he has multiple sclerosis. The applicant is unsuccessful and the employer offers the job to someone who does not have a disability. In this case, it will be necessary to look at why the employer did not offer the job to the unsuccessful applicant with multiple sclerosis to determine whether the less favourable treatment was because of his disability."

58. The Respondents invited the Tribunal to consider *Birch & Humber v University Liverpool* 1985 IRLR 165 where the Court of Appeal was concerned with *Employment Protection (Consolidation) Act 1978 s 83(2)* – but the provision made by section 95 of its successor 1996 Act is, in this case, the same and only defines as "dismissal" the unilateral termination of a contact of employment by the employer, with or without the employee's consent. The Court of Appeal determined that, on its true construction, that definition did not include the termination of the contract of employment by the mutual agreement of both parties. Additionally the Court of Appeal noted that in considering whether there had been such a dismissal, the court should look at the substance rather than the form of the transactions between the parties. This authority has survived subsequent review – albeit subsequent Courts have been very alive to the possibility of abuse and the general consequences of an unequal relationship between employer and employee.

59. The status of the Claimant is in issue here. These problems are notoriously difficult. The significance of the dispute is apparent from the EHRC COP Para 10.4, "The definition of employment in the Act is wider than under many other employment law provisions. So, for example, it covers a wider group of workers than are covered by the unfair dismissal provisions in the Employment Rights Act 1996."

60. Classically a contract of employment can be identified by the presence of

three factors (see Tolley's Employment Handbook 2018 paragraph 16.3):

i. A contract of employment must impose an obligation on a person to provide work personally;
ii. There must be mutuality of obligation between employer and employee; and
iii. The worker must expressly or impliedly agree to be subject to the control of the person for whom he works to a sufficient degree

61. The Claimant invited us to read and consider the significance of *Pimlico Plumbers Ltd and another v Smith* [2018] UKSC 29, [2018] ICR 1511. This considers the relevant provisions of the Equality Act 2010 and is relevant. However, we remind ourselves that the Claimant's case is put on an alternative basis and involves us asking was the Claimant at the effective date of termination:

    (i) an employee within the meaning of section 230 Employment Rights Act 1996?
    (ii) in employment within the meaning of section 83 (2) Equality Act 2010?

62. In *Pimlico Plumbers Ltd and another v Smith,* the Supreme Court was concerned with the distinction between being self-employed and being a worker, so it does not provide a comprehensive survey of all problems connected with employment status. Harvey provides quite a good introduction at A1 [6] when the authors say,

    "workers may generally (though there are exceptions) be divided into two classes: employees and independent contractors. The employee undertakes to serve; the contractor does not. The employee sells his or her labour; the contractor sells the end product of that labour. In the one case the employer buys the individual; in the other it buys the job. The law expresses that by saying that the employee enters a contract *of employment*; the contractor enters a contract *for services"*

63. The starting point for the treatment of this problem in case law might be considered to be the Judgment of McKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497*, *[1968] 1 All ER 433*, where he said as follows:

    "A contract of service exists if these three conditions are fulfilled. (i) The servant 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 his master. (ii) He 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. (iii) The other provisions of the contract are consistent with its being a contract of service …'.'

64. Again, the authors of Harvey caution against a simple reductionist approach and stresses the utility of surveying a number of factors from self-description/the label the parties choose and contractual interpretation (with caution required because of the dangers of abuse), the badges of employment, the application of policy considerations and what control does the principal exercise over the person performing the work – this may be closely related to how integrated he might be in the business – see *Stevenson Jordan and Harrison Ltd v MacDonald and Evans [1952] 1 TLR 101, CA*.' The inverse of this is to ask how independent the individual is of the business.

65. The ability to allow for substitution may be inconsistent with being an employee. Although this topic was considered by the Supreme Court in Pimlico Plumbers, the following passage from the Etherton MR in the Court of Appeal and undisturbed by the Supreme Court is of assistance when in *Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51*, *[2017] IRLR 323* he summed up the case law on substitution clauses as follows:

"[84] … In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

66. The case law and the relevant texts would tend to encourage a multi-factoral test in determining whether an individual is self-employed.

67. Recalling that the Tribunal had been asked to determine whether the Claimant has been in employment within the meaning of section 83 (2) Equality Act 2010, it was necessary to establish that it was safe to rely on authorities that interpret analogous provisions. This was considered

by the Supreme Court in *Pimlico Plumbers Ltd and another v Smith* [2018] UKSC 29 where Lord Wilson, giving the Judgment of the Court, said at [13] -

"On its face section 83(2)(a) of the Equality Act 2010 defines "employment" in terms different from those descriptive of the concept of a "worker" under section 230(3) of the 1996 Act and under regulation 2(1) of the 1998 Regulations. For it defines it as being either under a contract of employment or of apprenticeship or under "a contract personally to do work". Comparison of the quoted words with the definition of a limb (b) "worker" in section 230(3) of the 1996 Act demonstrates that, while the obligation to do the work personally is common to both, the Equality Act does not expressly exclude from the concept a contract in which the other party has the status of a client or customer.

[14] As it happens, however, this distinction has been held to be one without a difference. Part 5 of the Equality Act, which includes section 83, primarily gives effect to European Union law. Article 157(1) of the Treaty on the Functioning of the European Union requires member states to ensure application of "the principle of equal pay for male and female workers for equal work or work of equal value". In *Allonby v Accrington and Rossendale College* (Case C-256/01) [2004] ICR 1328; [2004] ECR I-873, paras 67–68 the Court of Justice of the European Communities interpreted the word "workers" in what is now article 157(1) as persons who perform "services for and under the direction of another person in return for which [they receive] remuneration" but excluding "independent providers of services who are not in a relationship of subordination with the person who receives the services". In *Hashwani v Jivraj (London Court of International Arbitration intervening)* [2011] ICR 1004, the Supreme Court applied the concepts of direction and subordination identified in the *Allonby* case to its interpretation of a "contract personally to do … work" in the predecessor to section 83(2)(a). In *Bates van Winkelhof v Clyde & Co llp (Public Concern at Work intervening)* [2014] ICR 730, paras 31 and 32, Baroness Hale of Richmond DPSC observed that this interpretation of the section yielded a result similar to the exclusion of work for those with the status of a client or customer in section 230(3) of the 1996 Act and in regulation 2(1) of the 1998 Regulations. She added, however, at para 39 that, while the concept of subordination might assist in distinguishing workers from other self-employed people, the Court of Appeal in that case had been wrong to regard it as a universal characteristic of workers.

[16] Notwithstanding murmurs of discontent in the submissions on behalf of Mr Smith, this court is not invited to review its equation in the *Bates van Winkelhof* case of the definition of a "worker" in section 230(3) of the 1996 Act with that of "employment" in section 83(2)(a) of the Equality Act. I therefore proceed on the basis that the three decisions of the tribunal referred to at para 4 above stand or fall together; and that it is conceptually legitimate as well as convenient to treat all three of them as

having been founded upon a conclusion that Mr Smith was a limb (b) worker within the meaning of section 230(3) of the 1996 Act.

68. As the authors of Harvey point out, the decision of the Supreme Court in *Pimlico Plumbers Ltd and another v Smith* [2018] UKSC 29 has somewhat limited applicability to other cases as despite the authority of the Court, the Judgment was very much concerned with the complex and very specific facts of the problem in front of it.

69. Lord Wilson noted at [20] if [Smith], "was to qualify as a limb (b) worker, it was necessary for Mr Smith to have undertaken to "perform personally" his work or services for Pimlico. An obligation of personal performance is also a necessary constituent of a contract of service; so decisions in that field can legitimately be mined for guidance as to what, more precisely, personal performance means in the case of a limb (b) worker." The Court went to ask whether a limited or conditional right of substitution was consistent with self-employed status. It concluded that it was legitimate in certain circumstances where it is legitimate to ask whether a dominant feature of the contract was personal service. In the case of Pimlico Plumbers, the Supreme Court determined that the Tribunal was entitled to hold,

[34] "… that the dominant feature of Mr Smith's contracts with Pimlico was an obligation of personal performance. To the extent that his facility to appoint a substitute was the product of a contractual right, the limitation of it was significant: the substitute had to come from the ranks of Pimlico operatives, in other words from those bound to Pimlico by an identical suite of heavy obligations. It was the converse of a situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done. The tribunal was entitled to conclude that Mr Smith had established that he was a limb (b) worker – unless the status of Pimlico by virtue of the contract was that of a client or customer of his."

70. This latter point might be best summarised by examining the headnote to the official report of the Judgment as follows:

"in considering whether the company was a client or a customer of the claimant, the tribunal had legitimately found that there was an umbrella contract, which cast obligations on the claimant both during, and during the periods between, his work on assignments for the company; that, despite features of the contract which suggested that the company was a client or customer of the claimant, there were also features which strongly militated against such a conclusion, with the company exercising tight control over the claimant's performance of any job, severe terms as to when and how much the company was obliged to pay him and a suite of covenants restricting his working activities following termination, and the tribunal had been entitled to conclude that the company could not be regarded as a client or customer of the claimant;

and that, accordingly, the substantive claims of the claimant as a limb (b) worker could proceed to be heard in the tribunal"

71. From the above, it can be seen how preoccupied the Supreme Court had been with the factual matrix before it.

**Submissions**

72. The Respondent says that there was no unilateral termination of the contract of employment but rather a mutual decision that it should come to an end. The effective date of "termination" of employment was 17th October 2017. They concede that a claim for unfair dismissal is in time but that there is insufficient continuity of service given that the Claimant's employment began on 2nd November 2015.

73. So far as the Respondent is concerned, the reason for the Claimant's contract of employment coming to an end/"dismissal" on 17th October 2017, was as a result of the Claimant's desire to change her employment status. After the 17th October, the Contract resumed service as a self-employed person. Her engagement by the Respondent as an employee was thus "book-ended" by periods when she was a self-employed person.

74. The Claimant's employment only having lasted from 2nd November 2015 to her effective date of termination on 17th October 2017, the Claimant did not have sufficient continuity of service to bring a claim for unfair dismissal.

75. The Respondent would say (in support of their contention that she was latterly self-employed) that the Claimant:
    - Invoiced for the hours that she worked;
    - Selected the hours that she worked;
    - Had autonomy over her hours;
    - Provided a substitute when she was not providing her services personally;
    - Was responsible for her own tax and National Insurance;
    - Generally had insufficient control in order to create an employment relationship

76. The Respondent would say that it was also of critical importance that it was the intention of both parties that the claimant would become self-employed for the benefit of both of them.

77. In any event her first contract of employment came to an end on 17th October 2017. They would say that there was a clear change in her work in October with the finish of the Respondent's kitchen. This was, at least

in part, the logic behind an arrangement whereby the Claimant was not required to attend to work fixed hours. The evidence shows that there was a significant reduction in the hours worked by the Claimant. The Respondent would say that it is safe to conclude that the Respondent was not seeking to impose a new status quo.

78. They would say, if required, that, in the alternative to their main contentions, that the Claimant could be said to be dismissed for some other substantial reason – namely, her request that she attend work on an irregular basis of at hours defined by anyone other than herself.

79. The Respondent states that the dismissal was within the band of reasonable responses in the
    - The Respondent considered alternatives to dismissal such as an adjustment of the Claimant's hours but this was not deemed to be possible as it was necessary for the Claimant to choose her own hour and be flexible with the same
    - The claimant agreed that she should be dismissed and it was in her own interests to provide services on her own account.

Sex Discrimination

80. The Respondent concedes that the Claimant was an employee up until 17th October 2017. Thereafter she was self-employed or a worker up until the time that she stopped working for the Respondent. They would say that the final decision to end their employment relationship in November was that of the Claimant as was the earlier decision to end their contract of service on 17th October.

81. The Respondent would say that the Claimant has not begun to advance successfully a case that the relevant decisions were because of the Claimant's sex and that as a result the Claimant has not even met the minimal requirements concerning the burden proof. Additionally, in this case the Respondent would say that there was no detriment and the Claimant was not dismissed.

**Submissions on behalf of the Claimant**

82. These were made by Mr Wheeler on behalf of the Claimant. He submitted that the Claimant's employment was terminated on 9th November. He urged the Tribunal to read *Pimlico Plumbers* as he was highly sceptical that the Claimant was truly self-employed.

83. It was exceptionally helpful for Mr Wheeler to accompany the Claimant at Tribunal. Not all of his submissions seemed clearly consistent with the case as outlined to Employment Judge Morton – in particular his assertion that it was for some unknown reason that the Respondents

needed to "get [the Claimant] out" … adding, " Was it that she asked for 2 days of her holiday in advance?" It is not clear how this lies with the claim of direct sex discrimination. It was later said that no reasons were given for her dismissal, which should arise the suspicions of the Tribunal and that the possibility that the Claimant might become pregnant was something that the Tribunal ought to consider. To this could be added the earlier identified theory that the Claimant was dismissed to thwart her accruing two years continuous service.

84. The argument was put on the Claimant's behalf that her date of dismissal was 9th November as she had never signed *the self-employed contract.* It was argued that in the absence of any other legitimate contract, the original contract survived and it was believed that she was still working under her original contract. In any event it was said that the treatment of the Claimant was chaotic as to the granting to her of holiday and sick pay.

85. It was contended that parts of the proposed agreement did not appear to be in accordance with the law (this was not expanded upon in evidence or oral argument) and that whereas she may have signed the document ending her employment, this was because she was flustered. It was argued that the speed that the matter was pursued was unjustified and generally consistent with an explanation that the treatment of the Claimant was incorrect. It was asked, "why the rush was there?"

86. It was said that this was all suspicious. The Claimant had effectively continued working despite not agreeing with the way that she was being treated.

**Conclusions: Application of Law to the facts**

87. The Tribunal, at this point, returns to the questions identified by EJ Morton and agreed as the issues to be determined at this hearing. There is an extent to which the findings of fact made above are determinative of this claim but it is important to adopt a structured approach to ensure that facts are evaluated in the light of the applicable law.

88. In her claim form, the Claimant contends that she was dismissed on 17th October 2017. At that date there is agreement between the parties that the Claimant was an employee within the meaning of section 230 Employment Rights Act 1996.

89. The Tribunal has had regard to the decision of the Court of Appeal in *Birch & Humber v University Liverpool* 1985 IRLR 165 and concluded that it was mutual agreement that brought an end to the contract of employment on 17th October 2017. The contract was terminated by the

mutual, freely given, consent of the employer and employee. This is not a dismissal. The initiative for the change actually came from the employee. She had previously been self-employed. The Respondent were not a large organisation but rather a small family business where the relevant manager had to do her best by finding advice as to how to meet the Claimant's desire for more freedom in the workplace and the business needs of the employer. This was not an unequal relationship. This was not a case of an employer suborning an employee. It was more akin to a negotiation amongst equals. This is not to say that either the employer or employee was well-advised. The whole exercise may well have been problematic but what it was not was a dismissal.

90. If we are wrong about the Claimant's contract of employment being terminated by agreement, then the Claimant has the difficulty that she has not had the benefit of two years prior continuous service. On that basis, the Tribunal does not have the jurisdiction to allow her claim of unfair dismissal.

91. Again, with a view to being as helpful as possible, if we are wrong about the Claimant not being dismissed and not having continuous service (albeit even the Claimant's own originating application appeared to flag up this date and hence the problem), then the reason for the Claimant's dismissal was some other substantial reason, namely, the mutually agreed change of her employment status which was at the Claimant's request and was designed to give the Claimant more freedom – particularly as to the hours that she worked. This was a potentially fair reason to dismiss to which the ACAS Code did not apply.

92. The Tribunal concludes that the Claimant was self-employed between 17th October and 9th November 2017. This decision was not entirely straight forward. However, it is very clear that the Claimant was not an employee/did not have a contract of employment over that period and the previous contract of employment that she had worked under did not subsist after 17th October 2017.

93. In the last period of work (i.e. after 17th October 2019), there was no obligation on the Claimant to provide work personally. While the Claimant was an employee, others would cover her work while she was on holiday and she would have some say in which employee/worker or self-employed contractor that would be. That is a completely normal activity that is consistent with employee status. After 17th October the Claimant was permitted substitutes. There may have been some discussion about where these were to be drawn from but the choice of contractor/substitute and when they were to be used was for the Claimant. They would have a high degree of autonomy as to how they

fulfilled their task albeit it was to be performed in the work premises of the Respondent.

94. To the extent to which it is asserted that the 9th November 2017 is the relevant date for the purposes of the claim for unfair dismissal, the Tribunal finds that at that date the Claimant was not an employee. It is most likely she was self-employed. In the alternative she was a worker/worked under a contract personally to do work pursuant to Equality Act 2010, section 83. In either event she was not an employee with the right to claim unfair dismissal.

95. Again, in case it is relevant, the Tribunal finds that this engagement came to an end because the Claimant was not content with the initial detailed proposal by the Respondent about the terms and conditions of her contract for services. It is likely that if she had had a structured conversation with the Respondents she would have appreciated that most of her concerns were misconceived. In some other areas, the Respondents are likely to be open to make amendments. However, the Claimant arrived at an irrevocable decision that she no longer wished to offer her services to the Respondent. The Tribunal would comment that it was not always clear that the Claimant was listening actively when points were being made by others – this might be a product of a whole host of factors and this point is not made so as to appear unduly critical but it did make dialogue very difficult.

96. The Tribunal has already made findings about the reasons for the Claimant's employment with the Respondents coming to an end on 17th October and the subsequent ending of their working relationship in November 2017. In case it is suggested that the Claimant was really dismissed in November 2017, the Tribunal stresses that at that stage the Claimant was neither an employee nor a worker pursuant to section 83 (2) Equality Act 2010 and the relevant ACAS Code of Practice would not apply.

97. On both 17th October and 9th November the Claimant knew that her engagements were coming to an end as the initiative came from her – even if all the details of her status between 17th October and 9th November had not been worked through. The impulse for the change in the Claimant's employment conditions lay with the Claimant.

98. The Claimant now asserts that she believes there may be a connection with the termination of her employment with prior conversations that she recalls with the respondents where she was asked whether she would be starting a family anytime shortly (originating application). The findings of fact made by the Tribunal above dispose of this aspect of the claim. The

conversations as alleged did not take place. It is not even clear that there has been any less favourable treatment. The Claimant was given what she wanted – more contractual freedom.

99. In fact the Claimant had advanced on her behalf a series of theories as to how it is that her engagement with the Respondents had come to an end. They are a clue that, in reality, the Claimant has not yet herself come to any conclusion about why her work for the Respondents came to an end. It is appreciated that there can be compound motives for actions and that the stigma attached rightly to sex discrimination is such that a perpetrator might dissemble so as to cover up any unlawful discrimination. However, in this case no part of the reason for the Claimant's employment coming to an end on 17th October or her engagement with the Respondents concluding on 9th November 2017 is because of her sex.

100. In summary, the effective date of termination of the Claimant's contract of employment was 17th October 2017. However, this was not a dismissal as understood in Part X, Employment Rights 1996 in that the Claimant's employment came to an end by mutual agreement (at the conclusion of a process which had been started by the Claimant).

101. If the Tribunal is wrong about that, then the Claimant was dismissed for some other substantial reason, namely to permit the Claimant her wish to change her employment status so that she was no longer an employee and so as to allow her more freedom as to her hours of work. This is not an action for which there is an applicable ACAS Code. Even on this counterfactual finding, this does not ground a finding of unfair dismissal as the Claimant did not have the requisite qualifying service on 17th October 2017.

102. The Claimant was self-employed after 17th October until her contractual relations with the respondent came to an end at her election on 9th November 2017. In the event that the Tribunal is wrong about this, then she was a worker within the meaning of section 83 of the Equality Act 2010.

103. The Respondent did not treat the Claimant less favourably because of her sex either by the circumstances in which her contract of employment ceased to subsist after 17th October 2017 or by her election to end her contract for services/engagement with the Respondents on 9th November 2018. The circumstances in which these occurred were in no way whatsoever related to her sex. The Tribunal has found that the conversations that she believes that she recalls where she was asked if she was starting a family anytime shortly did not take place. In fact, on

the Claimant's behalf a whole series of possible explanation were put forward as to how her employment had come to an end. The Tribunal finds that none of its findings would allow it to decide, in the absence of any other explanation that the end of the Claimant's engagement with the Respondent was direct sex discrimination as understood by Equality Act 2010 sections 13 and 136.

104. The Tribunal is drawn to the ineluctable conclusion that the claims for unfair dismissal and direct discrimination because of the Claimant's sex are not well founded.

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Employment Judge MJ Downs

Date: 15.07.2019

**Note**

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.