EMPLOYMENT TRIBUNALS

Claimant: **Ms F Oyeleye**

Respondents: **Mr N Askew (1) Mr J Corre (2)**

Heard at: London Central **On: 20-24 June 2019**

Before Judge: Employment Judge Henderson; Ms J Tombs; Ms N Foster

Representation

Claimant: Mr D O'Dempsey (Counsel)

Respondent: Mr T Perry (Counsel)

JUDGMENT

It is the unanimous decision of the Tribunal that:

The claimant does not fall within the definition of "employee" in section 83 (2) (a) Equality Act 2010 and the Tribunal does not have jurisdiction to hear her claim for sexual harassment under section 26 of that Act. The claimant's claims are accordingly dismissed.

REASONS

Introduction

1. This was a claim for sexual harassment brought under section 26 of the Equality Act 2010 (EA) by an ET 1 dated 6 November 2018 (following early conciliation with ACAS from 12 September to 8 October 2018). The claim was originally brought against three respondents: however, following a case management preliminary hearing on 30 May 2019, the respondent J Corre Projects was dismissed upon withdrawal as there was no such legal entity. The claimant continued her claim against the remaining two respondents as set out above.

Issues

2. At the commencement of the hearing I agreed with the parties and their representatives that the list of issues for the Tribunal to determine was as set out in Appendix A to the Case Management Order dated 18 June 2019; namely:

Employment under the EA

-Employment: was the claimant in the employment of the second respondent within the meaning of section 83 EA? In particular, was she working under a contract of employment or a contract personally to do work? (section 83 (2) (a)). The claimant maintained that she was contracted personally to do work by the second respondent and, therefore, was an employee in the extended sense of the EA. If not, the claimant does not fall within Part 5 of the EA and the Employment Tribunal does not have jurisdiction to hear her complaint. If so,

-Was the second respondent liable for the acts of alleged harassment by the first respondent (Mr Askew) under section 109 EA? In particular was the first respondent an employee of the second respondent within the definition of section 83 (2), such that the second respondent was liable under section 109 (1)? If so,

-Was Mr Askew acting as an agent of the second respondent under section 109 (2)? This was accepted at the hearing by Mr Corre.

-The issue of whether the second respondent had taken all reasonable steps to prevent the first respondent from carrying out those acts (section 109 (4)) was subsequently withdrawn from consideration by the second respondent's counsel at the end of the second day of the hearing.

-The claimant was also running the alternative argument that even if she was self-employed and was not covered by the EA then the provisions of the European Directive 2010/41/EU (of 7 July 2010) "*on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity*" required a purposive reading of the EA to include protection for a self-employed person. The claimant was also relying on Article 21 of the European Charter of Fundamental rights.

Harassment-section 26 EA

-Did the first respondent engage in unwanted conduct related to the claimant's sex and/or of a sexual nature? The relevant alleged conduct arose on 29 June 2018 when the claimant attended at Mr Askew's flat for work and discovered him filming whilst naked.

-Did such conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? (section 26

(1) and (2)). The claimant maintained that this conduct had been intentional as Mr Askew knew the time of her arrival each day; had given her keys to the flat and would have heard her ring the outside doorbell, which she always did prior to entering;

-in assessing whether this was the case the Tribunal must take into account the claimant's perception; whether it was reasonable for the conduct to have that effect and the other circumstances of the case (section 26 (4))

-the issue of whether the second respondent failure to take adequate steps to prevent the alleged harassment by a third party amounted to harassment (section 26 & section 40 (1)) was subsequently withdrawn as above.

-Section 136 of the EA notes that the initial burden of proof is on the claimant to show facts from which the Tribunal could decide, in the absence of any other explanation, that the respondents contravened the provision concerned, in order for the Tribunal to find that such a contravention had occurred.

Conduct of the Hearing

3. The hearing was listed for 3 days. The Tribunal spent the first morning clarifying the Issues (set out above) with the parties and reading into the relevant documentation.

4. The Tribunal heard evidence from the claimant and from Thibault Nicholl (the claimant's agent) and from both respondents. The witnesses adopted their written witness statements as their evidence in chief and were duly cross-examined by the other parties. There was an agreed bundle of documents (page references in this Judgement and Reasons are to that bundle unless otherwise specified).

5. Mr Askew was not legally represented, nor had he taken any legal advice. The Employment Judge explained the process of the hearing and it was also agreed that Mr Perry would cross-examine the claimant first, so that Mr Askew could understand how the process of cross-examination worked.

6. The Tribunal commenced hearing the claimant's evidence on the afternoon of Day 1, which evidence continued concluded on Day 2, when the Tribunal heard evidence from Mr Nicholl and both respondents. As his witness statement was very brief, when Mr Askew gave his evidence the Employment Judge asked him key questions relating to the issues on harassment, the answers to which formed his evidence in chief. In doing so, the EJ referenced the provisions of the Overriding Objective in the Tribunal Procedure Rules 2013, bearing in mind that Mr Askew was a litigant in person; there were no objections to this process from either the claimant's or Mr Corre's counsel.

7. The Tribunal heard lengthy oral submissions from counsel for the claimant (just under one hour) and for Mr Corre (just under two hours in total) on the morning of Day 3 and had been given written submissions and legal authorities from both Counsel. Mr Askew read out a short prepared statement as his oral submissions.

8. The hearing concluded at 3 pm on Day 3. Judgment was reserved and it was agreed that the Tribunal members had set aside 6 August 2019 as a day in Chambers to reach their decision.

Findings of Fact

9. The Tribunal heard extensive evidence from the witnesses but will only make such findings of fact as are necessary to determine the issues identified above.

The “Agreed” Transcript

10. The claimant said that following the alleged incident on 29 June 2018, when she had walked into Mr Askew’s flat to discover him filming naked, and after he had put some clothes on, they commenced their work for the day and she had made a recording of their conversation on her mobile phone. The claimant said in her oral evidence that the recording lasted for 49 minutes and 12 seconds.

11. At the end of the hearing, as requested by the Tribunal, the claimant produced copies of the meta-data from her mobile phone which showed that the recording had been “created” at 10: 49 on 29 June 2018. The claimant maintained in submissions that the time shown was the end of the relevant recording. Mr Perry and Mr Askew did not accept that the information provided was conclusive on that point. Mr Askew also maintained that the recording could have been edited by the claimant though there was no evidence presented to the Tribunal to support this assertion.

12. The Tribunal was not presented with any expert evidence to verify the position as regards the timing of the recording. However, the Tribunal accepts the claimant’s evidence and notes that on the basis of her own evidence (as regards the length of the recording (49 minutes and 12 seconds) and when it concluded (10:49)), the recording must have commenced at 9: 59:48 on 29 June 2018.

13. The claimant initially produced her own transcript of the recording in April 2019 (page 189). The respondents had not been aware of the existence of the recording until that time. The content of this transcript was subsequently challenged by both respondents.

14. Given the disputes, it was agreed between the parties that an independent company, McGowan Transcription would prepare a transcript of the recording, which was done in May 2019. The

parties then made further amendments to McGowan's transcript, which are shown in manuscript on the transcript which is at page 116-116gg. The differences between the claimant's original transcript and the McGowan's version are shown in table form at pages 204-214.

15. All three parties told the Tribunal at the commencement of the hearing, that they accepted that the McGowan transcript (with their various manuscript amendments) was "agreed". However, during the course of their oral evidence at the hearing, each of the claimant and Mr Askew stated that parts of the transcript were incorrect, and Mr Askew reiterated his concern that the recording may have been edited by the claimant. The Tribunal notes the above with regards to the level of evidential weight it is able to place on the "agreed" Transcript.

Employment Status

16. The claimant referred to herself at the hearing as "self-employed". She had been an employee previously with the BBC under various contracts and she understood how PAYE worked and understood the difference between an employee and someone who was self-employed.

17. However, when questioned about her current employment and tax status she professed not to know about such matters and said that she totally relied on her accountant. She said that her agent (Mr Nicholl) and her accountant had advised her to set up a company Synergy Films Ltd (Synergy), but she did not understand why this was. The claimant said that she was the sole director; sole shareholder and an employee of Synergy, but accepted that she had no written contract of employment with that company, nor had she received any salary from that company and there were no payslips evidencing any payment to her as an employee. The Tribunal does not accept the claimant's evidence that she was an employee of Synergy.

18. Mr Nicholl said in his evidence that he had explained to the claimant in some detail how setting up her own company would benefit her financially (in that there would be no deductions for holiday pay from the fees) and also for tax purposes. Given his evidence, the Tribunal did not find credible, the claimant's evidence that she had been unaware of the reasons to set up Synergy.

19. The Tribunal also notes that the claimant has a law degree from London University (page 145), where she signs her emails as such and it is unlikely (on a balance of probabilities) that she would be totally unaware of such matters. The claimant's counsel said in submissions that there was no reason why having a law degree would mean that the claimant would understand such specialist legal matters. However, given the basic nature of the concepts, such as the difference between receiving a dividend as a shareholder and receiving a salary as an employee, the Tribunal do not agree with that submission. The Tribunal finds that the claimant was aware of the financial benefits to her of running

her business and providing her services, through a limited company and appreciated the relevant distinctions.

20. The claimant was engaged by Mr Corre (via her agent and via a freelance producer, Fleur Bell-Hendricks) to edit the film "Burn Punk"; the duration of the contract was for three weeks, with a possibility of a short extension if needed. Mr Askew was also engaged by Mr Corre as director of that film. The claimant was interviewed by Mr Askew as regards her suitability for the role but she accepted that she was not employed by him. The claimant had met Mr Corre only once during the first week of her contract when he visited Mr Askew's flat where the editing work was being done.

21. There was no written agreement between the parties relating to the work on "Burn Punk". There was an NDA (page 93) between J Corre Projects (which Mr Corre said did not exist as a legal entity and an unnamed party ("the recipient"). The claimant said that she had signed this document as the "recipient", but had done so as an individual and not on behalf of Synergy; the claimant also said that this was the first time that she had signed such an agreement. Given her previous evidence that she had worked on "hundreds of projects", the Tribunal does not accept the claimant's evidence on this matter as credible. Further, Mr Nicholl said in his evidence that signing NDA's as an individual was common practice, which is not consistent with the claimant's evidence.

22. Invoices (pages 181-184) were submitted by Screen Talent Agency to Mr Corre on behalf of Synergy. Payment was made to the agency who deducted the commission due (10%) and then paid the balance to Synergy's bank account. The invoices show that VAT is charged at 20%; however, there is no VAT code or reference for Synergy stated on the invoice, nor is it shown that Synergy is registered for VAT. The Tribunal notes that if the VAT is being charged by Screen Talent Agency, this would not appear to be appropriate as the agency was not supplying the services to Mr Corre, but to the claimant.

23. The Tribunal notes that the financial and contractual arrangements with regard to engagement and payment on this project are far from clear. There is little documentary evidence and the oral evidence from the claimant and both respondents did not assist in confirming the situation. Further the only document produced, namely the NDA, could not be a valid document as J Corre Projects is not a legal entity.

24. The claimant's evidence was that she was the sole signatory to Synergy's bank account. She eventually accepted that she had never received a salary from Synergy as an employee. When cross-examined about how she withdrew money from the company; whether by way of salary or dividend as the sole shareholder, she initially professed

ignorance of the difference. Again, bearing in mind that the claimant has a law degree, her evidence would appear to be disingenuous.

25. The claimant initially said that she withdrew money from the Synergy bank account as and when she needed it, but when she was asked how she regarded that money for tax purposes, she changed her evidence to say that she did not touch the money in the Synergy bank account- other than for expenses such as stationery and phone bills. Given the inconsistencies and the lack of clarity from the claimant the Tribunal did not find her evidence on this matter to be credible. As regards her tax status the appellant's own evidence was that she was regarded as self- employed.

26. It was accepted by all the witnesses that the claimant's role as editor was as a professional and that she did not take instructions from either of the respondents. The second respondent had only met the claimant on one occasion and had no control over her working hours or practices. That evidence was not challenged by the claimant's counsel in cross examination. The witnesses were not specifically asked about substitution of the claimant's services but it was accepted by both respondents that she had been selected because of her personal skills and ability. The Tribunal infers that substitution would not have been accepted by the respondent.

27. The claimant said that she did no other work for the duration of the film project (i.e. during the three weeks). However, the claimant said that in addition to her work as an editor she also did some teaching work, which she used to fund her day to day living expenses. She said that she may at a later stage draw upon the money in the Synergy bank account, but was unclear on what basis this would be done.

28. On the basis of the evidence before the Tribunal, it finds that the claimant is running a business as an editor (for which she engages Mr Nicholl to find her work). Mr Corre was a client of that business. Mr Askew was also engaged by Mr Corre to work alongside the claimant. Mr Corre has accepted that Mr Askew should be regarded as his agent.

29. The payment for the provision of the claimant's services was made by Mr Corre via her agent to Synergy but it is not clear from the claimant's evidence whether she is running her business via that company or as a sole trader. The claimant's evidence was vague and unhelpful on these matters and the Tribunal did not accept as credible her statements that she did not understand how the business and financial matters were dealt with. Even though the claimant instructs an accountant she would nevertheless have to approve and sign any tax returns filed on her behalf and so she has to take legal responsibility for her financial affairs. The Tribunal also notes that the claimant has been working professionally in the film and television industry for more than 20 years and so should have been familiar with how those industries operated as regards the business arrangements.

Harassment

The Tribunal will summarise the two versions of the incident on 29 June 2018.

Claimant's version

30. The claimant said that she had been working in Mr Askew's flat for about 2 weeks already. There was a main front door from the street; the flat was up a flight of stairs, where there was another door into the flat. The claimant would arrive at 10.00am, ring the front door bell and Mr Askew would "buzz" her in and then open the flat door to let her in. The claimant said she often had to wait on the street as Mr Askew was not in.

31. The claimant said that on 15 June (Friday) Mr Askew gave her the keys to the front door and the flat as he knew he would be arriving late on Monday 18th June. He then told her to keep the keys and she said she used them to enter the flat on four occasions after that date. The claimant said she offered to return the keys to Mr Askew but he said she should retain them. The claimant said that she told Mr Askew that she would always ring the doorbell at the street main door first. If he was there he would answer and let her in; if there was no reply she would let herself in and go up to the flat, but she would always pause for a few seconds at the flat door to listen in case Mr Askew was in the flat, before letting herself into the flat.

32. The claimant said that on 22 June 2018 she had arrived at 10am and rung the bell but Mr Askew had not buzzed her in, but when she let herself into the flat, he was already in there in his pyjamas.

33. On 29 June the claimant arrived at the flat at 9.55 am, she buzzed the main front door bell 3-4 times but there was no response so she went in and let herself into the flat using the keys in her possession. As she walked into the flat she stopped in the hallway and about 2 metres in front of her she saw Mr Askew standing fully naked filming through a camera on a tripod in the main living room of the flat. He was sideways on to her.

34. The claimant's evidence was that there was no door between the hallway and main living room. The Tribunal were taken to photographs of the flat (pages 40-42) which showed the door in place. The claimant said the door had been installed subsequently after the incident but was not there at the relevant time.

35. The claimant began to walk backwards out of the flat but Mr Askew turned toward her so that he was now facing her and then took the camera off the tripod and ran towards her (still filming) making a strange noise.

36. She backed out into the hallway and he ran past her into the bedroom where he put on some clothes. The claimant then re-entered the flat and she and Mr Askew continued to work there together for the rest of the day. The claimant says that she texted her agent when Mr Askew went to the toilet to tell him about the incident. This text is at page 115 and was at 9.58 it read "I have just walked in after rhyming (sic) the bell to a full naked director. A little too much of an eyeful in the morning. Just thought I'd let you know". Mr Nicholl replied that she should call him back and the claimant then said, "Will do. Don't want to make too much of it. Will call over lunch".

37. The claimant began her recording (see above) soon after that message to Mr Nicholl. She said that she did this because she it was only her and Mr Askew into the flat.

<u>Mr Askew's version</u>

38. Mr Askew accepts that he had been filming naked in the flat on the morning on 29 June. It had been a very warm night and he had slept naked. He said that the claimant had been late (arriving at around 10.15) over the last few days and so he thought he would be able to finish his filming and be dressed before she arrived. The claimant had always rung bell on the main front door and had never let herself into the flat before.

39. That morning the claimant arrived that the door of the flat at 9.55 when Mr Askew heard the sound of the key in the lock. He screamed in horror, told her not to come in and ran behind the door of the living room. He said that he had tried to hide and so did not believe that the claimant had seen him fully naked. The claimant moved back into the hallway outside the flat and he ran to his bedroom and got dressed.

40. Mr Askew said that he had not given the claimant the keys to the flat. There was a spare set of keys in a tin in the hall cupboard for emergencies but he did not believe she knew about these keys. He did not hear the claimant ringing the front main door bell.

<u>Tribunal's findings</u>

41. There are some significant differences in the two versions and the Tribunal must therefore decide which version it prefers. However, the following facts are agreed between the parties:
-Mr Askew was filming naked in the flat when the claimant arrived;
-The claimant opened the front door of the flat at 9.55 am;
-Mr Askew screamed/made a noise when she arrived;
-The claimant backed out of the flat and into the hallway and Mr Askew went to get dressed;
-The whole incident lasted a matter of seconds and less than one minute;
-There was no physical contact or any element of sexual assault;

-After the incident the claimant and Mr Askew worked together in the flat for the rest of the day.
-Other than on 29 June, the claimant would normally ring the main front door bell before entering the flat.

<u>The Keys</u>

42. The Tribunal finds on a balance of probabilities that Mr Askew did give the claimant the keys to the flat on 15 June to allow her to let herself in on 18 June, when he knew he would be late. It is likely that he may well have subsequently forgotten that the claimant still had the keys. The Tribunal do not accept the only other explanation, namely that the claimant had taken the keys without authorisation from Mr Askew and had deliberately kept them. The Tribunal note that this was not specifically put to her in cross examination. The Tribunal accepts the claimant’s version on this point.

<u>The Doorbell</u>

43. Mr Askew said that the bell was loud and could be heard from every part of the flat. He confirmed that he had not been wearing headphones at the relevant time. The claimant said she rang the bell several times and there was no evidence that the bell was out of order. The parties accepted that it was normal practice for the claimant to ring the bell before entering and so the Tribunal finds (on a balance of probabilities) that the claimant did ring the bell. Mr Askew may or may not have heard it, but if he did hear it he may have thought that he had enough time to finish his filming and get dressed before letting her into the flat as he had not realised/had forgotten that she had a key to the front door. The Tribunal accepts the claimant’s version on this point.

<u>The door to the main room</u>

44. The Tribunal were shown photographs of the flat and the relevant door. These show that there is a fire door (with a self-closing mechanism) between the hallway of the flat and the main living room. The photos show that this is a well-worn door and so it is unlikely that it was installed after 29 June 2018 (as maintained by the claimant). Mr Corre noted in his evidence that on visits to Mr Askew’s flat this door was often propped open with filming equipment and this may well have been the case on the day. The Tribunal accepts Mr Askew’s version on this point.

<u>The Incident itself</u>

45. The parties agreed that the claimant arrived at the flat door at 9.55 and that she had texted her agent at 9.58, after the incident and after she had re-entered the flat following Mr Askew getting dressed. This supports the evidence that the incident was a fleeting and short-lived one. The Tribunal prefers Mr Askew’s evidence that he attempted to hide behind the living room door and that on a balance of probabilities it is unlikely that the claimant saw him fully (and full frontally) naked or if that did occur it was for a very short period.

<u>Content of the "Agreed" Transcript</u>

46. The Tribunal notes the following significant matters in the Agreed Transcript as they reflect upon the subsequent conduct of both the claimant and Mr Askew. The transcript notes that there is a video playing throughout the recording, which is presumably the footage on which the claimant and Mr Askew are working. The transcript opens with the claimant insisting that she rang the bell and Mr Askew saying he did not hear it.

47. At page 116d-e (9.5 minutes into the recording) they are having a cup of tea and Mr Askew refers to the shock of being caught naked while working. The claimant responded that he knew what time she arrived so he need not have been naked. Mr Askew repeats that he had not heard the bell and did not do it on purpose. The claimant then said "Who knows? You might have wanted me to see your tackle". The claimant then says that Mr Askew could tell his friends about the incident, but he replies that he will not be telling anyone as "it's not something to boast about, they're just going to laugh at me". The Tribunal notes that this is inconsistent with the claimant's statement to the Police (page 124-127) where she says that Mr Askew says how hilarious it would be to tell his friends what had happened.

48. At page 116e Mr Askew mentions that he is going to a party that night and asks the claimant to come with him. The claimant then replies "Oh, and, where is it? I'm free tonight…Just give me the address and I'll turn up". When Mr Askew identifies the pub, the claimant says she knows it and says, " Are we going to go together when we finish work?". The claimant did not attempt to shut down this line of conversation with Mr Askew or tell him that it was not appropriate. In fact, the claimant then said, "This is a real progression. You show me your willy and now you invite me to a party! What next - are we going to get engaged?". The Tribunal finds that the transcript does not demonstrate that the claimant was offended or intimidated by Mr Askew's invitation to the party.

49. At page 116h (about 4-5 minutes later) during a work-related discussion about filming Mr Askew says, "Sure you don't want me to do it naked?". The claimant does not appear to be distressed or annoyed by that reference.

50. At page 116o (about 22 minutes into the recording) the claimant begins to call Mr Askew, "Flasher" - which Mr Askew tries to ignore and the claimant says, "You're never going to live that down". She then refers to going to his hometown and telling everyone what had happened. They then appear to be citing more and more extreme scenarios of what the claimant may do. The impression given in this exchange, is of two people bantering and egging each other on. The Tribunal had no evidence of what would be the "norm" in the working relationship of the claimant and Mr Askew and so cannot judge whether this was usual or not. However, there do not appear to be any signs of distress from the claimant.

51. The claimant then repeatedly makes references to Mr Askew being found naked by her and calling him "Flasher", she even says (page 116bb) that this will be his new "nickname". Mr Askew initially ignores the references and tries to keep working but eventually does tell the claimant to "shut up" as he is trying to concentrate.

52. It was put to the claimant in cross-examination that she appeared to be teasing Mr Askew and that they were joking together about what had happened. The claimant said that she was in "trauma" and that this was all sarcasm and not humour. She also said that she was trying to keep the atmosphere light and to mirror Mr Askew's attitude in order to keep herself safe. There was nothing in the transcript to suggest that the claimant was (or felt herself to be) in any danger from Mr Askew.

53. The claimant chose to return to the flat following the incident in the morning and was under no coercion to do so. She could have rung her agent immediately after his text in response and told him she did not wish to return. When she did speak to him at lunchtime, Mr Nicholl said that he told her not to return to the flat and he would support her, but she chose to return and work through the rest of the day. The claimant said she wished to fulfil her obligations as a professional and the Tribunal can accept and recognise that wish.

54. However, the Agreed Transcript does not appear to support the claimant's description of being in trauma. Her responses to Mr Askew appear to be jocular and light-hearted. The transcript and its tone do not suggest that the claimant was in an intimidating, hostile, offensive or degrading environment. The Tribunal also notes that the claimant's situation was that of a free-lancer, with a short- term contract. She would be moving on to other work and was not compelled (as some claimants may be) to continue to work in such an environment in order to earn her living.

55. Further, even when they appeared to have moved on from the topic and commenced their work, it was the claimant who persisted in referring to Mr Askew as "Flasher" completely out of context when they were discussing work and it was Mr Askew who tried to change the subject and get back to work.

56. The claimant did not record the afternoon session of her working with Mr Askew. Given her evidence as to the reasons for recording the morning, this would suggest that she did not feel unsafe. The claimant did not return to work the last two days of the project, but was paid nevertheless.

<u>Police Report/statement</u>

57. The claimant went to the police to report the incident and her statement dated 8 July 2018 is at pages 124-127 and is signed by her. The claimant referred to her being the "victim of a sexual offence". The Tribunal notes that in the Tribunal proceedings, there was

no evidence of sexual assault, but essentially of indecent exposure. The claimant described Mr Askew as being “thuggish” and intimidating in her statement to the Police, but this is not supported by the content of the Agreed Transcript. In cross-examination, the claimant said that when Mr Askew did turn on her, she had already stopped the recording, but she gave no explanation as to why she had only chosen to record the first 49 minutes of their working day and not the full day.

BECTU letter

58. The claimant’s union, BECTU, raised the incident on her behalf in a letter dated 19 July 2018 (pages 135-139) sent to Mr Corre, setting out her allegations and requesting an investigation. In that letter it is recorded that Mr Askew said how hilarious it would be to tell all his friends about the incident. In fact, this is not borne out by the Agreed Transcript. Further, there is no record in the transcript of the claimant telling Mr Askew that his behaviour was inappropriate and highly unprofessional, as stated in the BECTU letter.

59. That letter also states that Mr Askew’s conduct was “premeditated and deliberate”. There was no evidence presented to the Tribunal which supported this assertion. At worst Mr Askew was careless as to the likely timing of the claimant’s arrival.

Medical evidence

60. The claimant produced at page 180a a letter from her GP’s practice dated 23 May 2019. This recorded that the claimant was a victim of “indecent assault”. The claimant said that she had not said this and the letter was incorrect on this point. The letter noted that the claimant saw a GP “not long after” the incident on 29 June 2018, but gave no dates. The claimant had complained of “stress, weight gain and sleep problems” and it was noted that “this had a significant impact on her life”. There was no evidence as regards any diagnosis, medication or treatment. The letter said these symptoms continued and that the claimant was depressed and had loss of confidence and did not trust men.

61. The claimant was asked about counselling. She said this had been offered to her by the Practice Manager at her GP’s surgery, but that there was a waiting list and no one answered when she called and so she had not pursued this. The claimant was also asked whether she had been offered victim support by the Police. Again, she said she had received an email about this, but had chosen not to pursue it as she was a “private person” and did not want to talk about it.

62. The claimant was asked why she had not asked for her detailed GP’s notes. She said that she thought this would take too long, but then said she had only done so about two weeks before the Tribunal hearing.

Findings as to the effect of the incident on C

63. The Tribunal do not accept as credible the claimant's evidence about the effect of the incident upon her. Her reports to her doctor and to the Police and in some respects to her Union are not consistent with her behaviour as recorded in the Agreed Transcript or consistent with her evidence given in Tribunal.

64. There was no evidence presented to support the claimant's description of being in "trauma". The Tribunal accepts and recognises that individuals respond differently to difficult and stressful situations; however, the Tribunal can only determine matters based on the evidence presented to it. The claimant may well have been shocked and surprised by the incident, but there was nothing in the Agreed Transcript or in her evidence to the Tribunal to show that she was humiliated, degraded, offended or intimidated by the incident. The claimant said that at the end of the day she sat in Russell Square shaking, which was a delayed shock reaction. However, this is not reflected in her medical notes or in her Police statement, nor is it reflected in the fact that she chose not to take support offered to her as regards counselling or victim support.

65. Following the letter from BECTU, Mr Corre said that although he did not regard either Mr Askew or the claimant as his employees, he felt that such serious allegations should be dealt with. The Tribunal accept his evidence and do not criticise him for taking the allegations seriously.

66. Mr Corre asked Mr Askew for his version of the incident, which he supplied on 24 July 2018 (pages 140-143). Given the material differences in the two versions of events, Mr Corre asked both the claimant and Mr Askew some further questions (pages 162 and 164-5). Mr Askew responded (pages 166-168) but the claimant refused to do so (via her lawyers) at pages 172 and 174 from 15 August -12 October 2018. This meant that Mr Corre was unable to reach any conclusions on the incident in June 2018. He did not pursue the claimant further on this matter, which supports his evidence that he did not regard her as an employee and did not feel obliged to conclude the investigation.

67. The claimant had already notified ACAS on 12 September and issued the ET1 on 6 November 2018.

Submissions

Summary of counsel's submissions

Claimant

68. Mr O'Dempsey submitted on the claimant's behalf that there was clearly a contract between her and Mr Corre that she would perform personal services, namely editing. He accepted that payment for those services was made to Synergy (the claimant's company) via her

agent, but says this should make no difference to the analysis of the situation. Whilst there was no express agreement, he says it was clear that it would not have been acceptable for Synergy to send anyone else to do the work. He says the dominant feature of the contract was personal service. When the claimant was working for Mr Corre she was not working for others. [evidence?]

69. He says it was clear that Mr Corre regarded himself as an employer because of his reaction to the BECTU letter by instituting an investigation. The Tribunal have accepted Mr Corre's evidence that he felt that the claimant's allegations should be taken seriously because of the subject matter, but that he did not regard the claimant as an employee.

EU Provisions

70. Mr O' Dempsey referred the Tribunal to Directive 2010/41 and to Article 21 of the EU Charter. He referred to Article 1 of the 2010 Directive namely that it covered the scope of women engaged in an activity in a self-employed capacity; he noted the definitions of harassment in Article 3 which were the same as those set out in the EA; and he submitted that section 83 EA should be construed sufficiently broadly so as to give effect to these articles in the 2010 Directive.
71. The Tribunal is mindful of the recognised principle that UK legislation implementing EU rights must, so far as possible, be construed to give effect to the objective of the relevant Directive which they were designed to implement (**Marleasing C-106/89 [1990] ECR**) and '*that national courts must as far as possible interpret national law in the light of the wording and purpose of the Directive in order to achieve the result pursued by the Directive'* and whilst '*having regard to the usual methods of interpretation in its legal system, give precedence to the method which enables it to construe the national provision concerned in a manner consistent with the Directive*.' It is accepted that this obligation applied, whether the national provisions in question were adopted before or after the Directive was issued.
72. Upon closer reading of Article 1 of the 2010 Directive it lays down the framework for equal treatment of men and women engaged in self-employed activities but goes on to say "..*as regards those aspects not covered by Directives 2006/54 and 79/7*". The 79/7 Directive dealt with social security issues but the 2006 Directive dealt with equal treatment in matters of employment and occupation and was one the main Directives affecting the implementation of the EA. This leads the Tribunal to conclude that Mr O'Dempsey's argument as regards the purpose of the 2010 Directive is not relevant to this case.
73. Mr O'Dempsey noted that if this argument was not accepted and the claimant was not covered by the EA, she would be left without a remedy. In the alternative, Mr O' Dempsey submitted that the Tribunal must disapply the provisions of section 83 EA as it conflicted with the principles of EU law and in particular Article 21 of the EU Charter. He argued by a process of analogy from the reasoning of the Court of Appeal in **Benkharbouche v SSFCA,** which was not criticised by the UKSC in their decision [**2017] UKSC 62**, that if the claimant could show that her case falls within the scope of EU law and does not extend the scope of the

EU Treaties, Article 21 of the Charter can be relied upon horizontally (see also **Kucudeveci [2010] IRLR 346**) and the general principle of non-discrimination must be given effect as a general principle of EU law.

74. Mr O'Dempsey also made (as something of an afterthought at the end of his submissions, which is not included in his written submissions) a request for the Tribunal to make a reference to the CJEU to seek clarification of the position

Second Respondent

75. Mr Perry noted that it was accepted that Mr Askew was the agent of Mr Corre and that the statutory defence was not being advanced.
76. Mr Perry noted the case of **Hashwani v Jivraj [2011] UKSC 40** in which the Supreme Court considered the compatibility of regulation 6 Employment Equality (Religion or Belief) Regulations 2003 with Council Directive 2007/78. Under Regulation 2 of the 2003 Regulations, the definition of "employment" was materially identical to section 83 (2) EA.
77. The Supreme Court held in **Jivraj** citing the ECJ's decision in **Allonby v Accrington and Rossendale College [2005] AER (EC) 289,** "*it is clear from that definition that the authors of the Treaty did not intend that the term "worker" within the meaning of Article 141 (1) EC should include independent providers of services who are not in a relationship of subordination with the person who receives the services*".
78. Therefore, when determining whether a person is employed for the purposes of the 2003 Regulations (and by extension the EA, which consolidated various discrimination legislation including the 2003 Regulations) the essential questions were whether the person concerned performs services for and under the direction of another person in return for which they received remuneration or whether they were an independent provider of such services who was not in a relationship of subordination with the person who received those services.
79. Mr Perry submitted that the claimant was clearly running the business of film editing which services she provided through her own company Synergy. The claimant considered herself to be self-employed. There was no direct contract between the claimant or Synergy and Mr Corre. Mr Corre made payments to Mr Nicholl, the claimant's agent which were then passed on to Synergy. The claimant marketed and provided services to numerous production companies. It was accepted that the claimant was engaged because of her expertise; she was not in a position of subservience nor was she controlled by either Mr Corre or Mr Askew as to how she provided her services
80. Mr Corre was clearly a client of the business carried on by the claimant and there was insufficient subordination for the claimant to be in employment for the purposes of the EA.
81. As regards Mr O'Dempsey's argument on the purposive reading of the EA, Mr Perry submitted that the 2010 Directive was designed to update and harmonise maternity rights and leave for the self-employed and their spouses (replacing the 1986 Directive on that matter) which was already covered by UK Law.
82. Having looked at the 2010 Directive in detail and in particular at:

- recital 1 which notes that Directive 86/613/EEC relating to the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and on the protection of self-employed women during pregnancy and motherhood has not been very effective and should be reconsidered, as discrimination based on sex and harassment also occur in areas outside salaried work. The 86 Directive should be replaced by the 2010 Directive;
- recital 3 which refers to the need to revise Directive 86 in order to safeguard the rights related to motherhood and fatherhood of self-employed workers and their helping spouses;
- recital 4, which refers to the European Parliament consistently calling for the review of Directive 86 so as to boost maternity protection for self-employed women and improve the situation of spouses of self-employed workers;
- recital 9 which states that this Directive should apply to self-employed workers and their spouses… In order to improve the situation for those spouses and life partners of self-employed workers;
- recital 14 which states that in the area of self-employment the application of the principle of equal treatment means there must be no discrimination on grounds of sex for instance in relation to the establishment equipment or extension of the business or the launching or extension of any other form of self-employed activity;
- recital 17 which states that in view of their participation in the activities of the family business spouses or life partners of self-employed workers should have access to system for social protection.
- recitals18, 19 and 20 which all refer to the economic and physical vulnerability of pregnant self-employed workers and pregnant spouses; their maternity benefits and the ability to supply temporary replacements owing to pregnancy or motherhood.

83. The Tribunal accepts in the light of the recitals referred to above and also in the light of the Explanatory Memorandum submitted by Mr Perry with regard to the 2010 Directive, that the purpose of the relevant directive was essentially to consolidate and update the 86 Directive which predominantly related to the situation of self-employed workers and their spouses as regards maternity leave.and pay. The definition of harassment contained in the 2010 Directive is the “standard” definition set out in the EA, but the 2010 Directive also recites the other relevant definitions of direct and indirect discrimination.

84. The Tribunal also notes that the operative sections of the 2010 Directive are not applicable to the situation in this case. Article 4 envisages equal treatment in relation to “ *the establishment equipment or extension of the business or the launching or extension of any other form of self-employed activity*”; Article 7 requires Member States to ensure “social protection” for spouses and/or life partners of self-employed workers and Article 8 deals with maternity benefits. The Tribunal re-iterates its comments regarding Article 1 of the Directive (see above).

85. The Tribunal finds that the 2010 Directive is therefore not relevant to the claimant’s situation in this case and the

Tribunal do not need to read the national legislation (the EA) purposively in the light of the 2010 Directive.

Conclusions

Employment under the EA

Was the claimant in the employment of the second respondent within the meaning of section 83 EA?

86. As the Tribunal have not accepted the claimant's submissions with regards to the provisions of EU law, the Tribunal will look at the relevant UK case law to assist in determining this question.
87. The Tribunal have found that the claimant ran her own business, providing her services as an editor and that she provided those services to Mr Corre for a period of three weeks or so in June /July 2018. Mr Corre was a client of the claimant's business and not her employer in the sense of her working under a contract of employment. The claimant was under no other obligation to supply her services to Mr Corre and had not previously worked with him. Payment was made via the claimant's agent to her company, Synergy; however, the claimant's evidence was that she did not draw any money from that company.
88. Part 5 of the EA prohibits discrimination in the field of "work". Section 39 covers situations relating to "employees and applicants" and the definition of employee for the purposes of the EA is at section 83 (2) (a). The claimant maintained that she was contracted personally to do work by the second respondent (Mr Corre) and, therefore, was an employee in the extended sense of the EA. It is noted that the EA definition does not contain what is known as the "limb (b)" exclusion which is contained in section 230 of the Employment Rights Act 1996 which defines a worker for the purposes of various employment rights. The "limb (b)" exclusion specifically states that where an individual provides services as part of a profession or business undertaking they will not fall within the definition of a "worker" and so not be entitled to the specified employment protection.
89. The Tribunal notes the helpful analysis of the phrase "a contract personally to do work" in the judgment of Lady Hale in ***Bates van Winkelhof v Clyde & Co.*** **[2014] UKSC 32, [2014] 1 WLR 2047.** In that case the Supreme Court was concerned with whether the claimant was a "worker" within the meaning of section 230 (3) of the Employment Rights Act 1996, but Lady Hale, who delivered the majority judgment, considered the more general position. She distinguished between two kinds of self-employed people:
    a. *"One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in **Hashwani v Jivraj (London Court of International Arbitration intervening) [2011] 1 WLR 1872** were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else. The general medical practitioner in **Hospital Medical Group Ltd v Westwood [2012] EWCA Civ 1005; [2013] ICR 415**, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the*

public, was a person of that kind and thus a 'worker' within the meaning of section 230(3)(b) of the 1996 Act."

90. Lady Hale then went on to observe that the same distinction was recognised for the purpose of discrimination law. She said at paragraphs 31 and 32 of her judgment:
    a. "*31. As already seen, employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but do not fall within the second class. Discrimination law, on the other hand, while it includes a contract 'personally to do work' within its definition of employment (see, now, Equality Act 2010, s 83(2)) does not include an express exception for those in business on their account who work for their clients or customers. But a similar qualification has been introduced by a different route.*
    b. *32. In **Allonby v Accrington and Rossendale College (Case C-256/01) [2004] ICR 1328: [2004] ECR–I873** the European Court of Justice was concerned with whether a college lecturer who was ostensibly self-employed could nevertheless be a 'worker' for the purpose of an equal pay claim. The Court held at para. 67, following **Lawrie-Blum v Land Baden-Wurttemberg (Case C-66/85) [1987] ICR 483; [1986] ECR 2121:** that 'there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration'. However, such people were to be distinguished from 'independent providers of services who are not in a relationship of subordination with the person who receives the services' (para 68). The concept of subordination was there introduced in order to distinguish the intermediate category from people who were dealing with clients or customers on their own account. "*

91. Lady Hale's analysis was also followed by Underhill LJ in **Secretary of State for Justice v Windle & Arada [2016] EWCA Civ 459** in a case concerning interpreters working for the Ministry of Justice.

92. The Tribunal notes that Part 5 EA also covers relationships such as Partnerships, Barristers etc which may include those who are self-employed, but these are specifically mentioned as being covered by the Act.

93. As always, each case must be decided on its own facts and circumstances. In this case the Tribunal has found that the claimant was an *"independent provider of services who* [was not] *in a relationship of subordination with the person who received the services*". The Tribunal finds that the claimant is not covered by the EA and accordingly there is no jurisdiction to hear her claim for harassment against either respondent.

Article 21 Charter of Fundamental Rights of the EU

94. The Tribunal do not accept that the claimant has been deprived of her EU rights under this Article. She still has the ability to pursue civil or other proceedings against either of the respondents in

different jurisdictions to the Employment Tribunal, such as the criminal or civil courts. The Tribunal does not strike out the application of section 83 (2) (a) of the EA.

Reference to the European Court of Justice

95. There is no outstanding question which needs to be referred and the claimant's application for such a reference is refused.

Harassment-section 26 EA

96. As the Tribunal has found that the claimant is not covered by the EA, there is technically no need to go on and consider her harassment claim. However, if the Tribunal were to be wrong on that point, it will set out below its conclusions as to the claimant's harassment claim.

Did the first respondent engage in unwanted conduct related to the claimant's sex and/or of a sexual nature?

97. It is accepted that Mr Askew's conduct in filming naked in his flat when the claimant arrived was unwanted conduct. Given societal norms and attitudes relating to nudity, in can generally be said that such conduct would be perceived to be of a sexual nature.

Did such conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? (section 26 (1) and (2)).

98. The Tribunal have found that there was no evidence presented from which it could conclude that Mr Askew's conduct was premeditated, deliberate or intended. It cannot therefore be said to have such a purpose as set out above.

Did such conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? In assessing whether this was the case the Tribunal must take into account the claimant's perception and whether it was reasonable for the conduct to have that effect and the other circumstances of the case (section 26 (4))

99. The Tribunal have not accepted as credible the bulk of the claimant's evidence with regard to the effect of the incident upon her. The claimant has not shown facts from which the Tribunal could decide that such conduct has occurred. The Tribunal refers to its findings of fact as set out above. The Tribunal have taken into account the claimant's perception, but also considered (as other circumstances) the Agreed Transcript, which is essentially evidence presented by the claimant herself. Further, given the Tribunal's assessment (as above) of the incident itself, it is not reasonable that it would have the effect as alleged by the claimant.

100.If the Tribunal did have jurisdiction to consider the claim under the EA (which it has found it cannot do) the claimant's harassment claim would fail in any event.

Employment Judge- Henderson

Date 6th August 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

7th August 2019

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FOR THE TRIBUNAL OFFICE