Case Number: 3303794/2019

EMPLOYMENT TRIBUNALS

Claimant	**Respondents**
	v
Miss T Isted	1. Silvana Daci 2. Fortune Hair & Beauty Ltd

RECORD OF AN OPEN PRELIMINARY HEARING

Heard at: Watford **On**: 13 November 2019

Before: Employment Judge Alliott

Appearances
For the Claimant: In person
For the Respondents: Ms E Godwins, Employment Consultant

JUDGMENT

1. The claimant was potentially to be employed under a contract personally to do work, within the meaning of section 83(2)(a) of the Equality Act 2010.

REASONS

1. This open preliminary hearing was ordered by Employment Judge Manley on 23 June 2019 to determine the following issues:

   1.1 Whether the claimant was an employee/worker or employed under the Equality Act 2010.

   1.2 Other case management matters.

2. As will be seen from the wording of the determination I have made in this judgment, the facts as they have come out before me have involved me slightly amendng the basis of the issue to be determined, as it seems to me that this case involves an allegation of a failure to offer the claimant employment, hence the determination that the employment she was

potentially seeking was a contract personally to do work within the meaning of section 83(2)(a) of the Equality Act 2010.

The evidence

3. I have been provided with a 77-page bundle which includes the witness statements. I heard oral evidence from the claimant and Ms Silvana Daci, Mr Arben Daci and Ms Ermira Gjeta.

The law

4. Section 39 of the Equality Act 2010 provides as follows:

> "39 – Employees and Applicants
> (1) An employer (A) must not discriminate against a person (B) –
> ……
> (c) by not offering B employment."

5. Section 83 of the Equality Act 2010 provides as follows:

> "83 – Interpretation and exceptions
> ……. (2) "Employment" means:-
> (a) Employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;"

6. The first point to be considered is that a contractual relationship is required.

7. When considering whether there was a contract, in my judgment this case stands to be considered as to whether or not the claimant potentially came within the definition of employment under a contract personally to do work. This is because the claimant readily accepted that whilst in 2016 she had been an employee of the second respondent pursuant to a contract of employment, her more recent employment during the course of January 2017-July 2018 had been characterised as self-employment. As per the IDS Employment Law Handbook "Discrimination at Work" at paragraph 23.71:

> "The third category, often referred to as "employees in the extended sense", is where the Equality Act departs from the ERA, bringing within the scope of discrimination protected those individuals who contract on a personal basis, including some who are self-employed for tax purposes."

8. In that section of the IDS Employment Law Handbook, various considerations are set out for the purposes of determining this issue. Dominant purpose, subordination, mutuality of obligation, delegation and substitute clauses are all dealt with. I do not set them out here but recite that I have taken those sections into account.

9. In her closing submissions, Ms Godwins cited to me two specific cases, namely Jivraj v Haswani 2011UKSC40 and the Secretary for State for Justice v Windle and Pasand Arada 2016 EWCA Civ459. The Jivraj v

Haswani case is dealt with extensively in the IDS Employment Law Handbook and is distilled down as follows, at 23.75:

> "When the case progressed to the Supreme Court, Lord Clarke ….. was of the view that ECJ in Allonby had identified the essential question for determining whether a person is in "employment" for the purposes of the discrimination legislation – namely whether:
>
> - On the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration; or
> - On the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services."
>
> He considered these to be broad questions, the answers to which depend on the circumstances of the particular case and a detailed consideration of the relationship between the parties. Having reviewed both the ECJ case law and the domestic case law on the dominant purpose test ….. he concluded that the dominant purpose of the contract, though it may be relevant, cannot be the sole test. This was because there could be circumstances where the dominant purpose of a contract is personal work but not personal work under the direction of the other party to the contract"

10. At 23.77 dealing with Halawi v WDFG UK Ltd t/a World Duty Free 2015 IRLR 50, CA, the following is quoted:

> "It turned on whether the relationship met the criteria laid down by the EU Law: a requirement that the putative employee agreed personally to perform services and a requirement that the putative employee was subordinate to the employer in the sense of being generally bound to act on the employer's instructions."

11. As far as the Windle V Arada case is concerned, that makes the point that, in the context of mutuality of obligation, a series of interspersed assignment by assignment engagements may point to a degree of independence and lack of subordination.

The facts

12. This case involves the potential return of the claimant to work for second respondent in October 2018.

13. It is clear from what I have read that the respondents make two basic preliminary arguments, namely:

    13.1 That the first respondent did not have actual or ostensible authority to act on behalf of the second respondent;

    13.2 That Mr Arban Daci made the decision not to re-engage the services of the claimant before he was aware that the claimant was pregnant and that the reason for not re-engaging her services was unrelated to her pregnancy and related to her reliability.

14. I make clear that I am making no findings in this determination on those issues.

15. The potential re-engagement of the claimant by the second respondent was dealt with largely in a series of text messages, although there were interspersed telephone calls.

16. On 15 October, the first respondent texted the claimant stating “I miss you too, hurry up and come back to work”.

17. On 16 October 2018, the claimant texted the first respondent saying “Can’t wait to come back”.

18. On 24 October the claimant texted the first respondent and stated “I’m available to work Thursday and Friday if you need me …. need a job – get back to me when you can”.

19. Later on 24 October the first respondent texted the claimant saying “Did you want to start from tomorrow?”

20. The claimant responded “I am available to start from next week”.

21. The first respondent replied “ok but no messing around please (10-7)”, (I take this to be a reference to the working hours of the salon).

22. On 27 October the claimant texted the first respondent saying: “Good afternoon Sylv, I know you’re super busy today when you are free would you let me know your decision (fingers crossed) have a nice day. Look forward to seeing your reply”.

23. On 27 October the first respondent texted the claimant stating: “Hey girl, crazy busy day today, I have discussed the situation with my brother and I think it isn’t going to work as we are really busy and the salon environment is not ideal for a pregnant girl with all the keratine treatments and chemicals around and not being able to have regular breaks. I am only thinking of you, with all of us we couldn’t work properly after the first trimester, on the other hand, I need someone who will be there for long term, you will always have a job with us after you have the baby, look after yourself and wish you good luck x”

24. The first respondent told me that, although she shares a common surname with Mr Arben Daci, they are neither related nor in any form of relationship other than employer/self-employed employee. Apparently, in Albania it is a common surname.

25. Having reviewed the text message exchanges, in my judgment there was no accepted offer of a contract of employment or a contract personally to do work concluded between the claimant and the second respondent. I find no acceptance had taken place and consequently this is not a case involving considerations as to whether the claimant was actually an employee or worker.

26. In my judgment, the text messages make it clear that the claimant and the first respondent were discussing her re-engagement by the second

respondent to provide work at the second respondent's hairdressing salon. The claimant had worked at the second respondent's salon in the past and, in my judgment, what was being discussed was the claimant returning to work at the salon on the same basis that she had formerly worked at the salon during the course of 2018.

27. Accordingly, it falls to be considered upon what basis the claimant had worked for the second respondent during the course of 2018.

28. It is true to say that during the course of 2016, the claimant had been an employee working under a contract of employment subject to PAYE and deductions of National Insurance.

29. However, the claimant told me that following the end of her employment in October 2016, she returned to work for the second respondent on a self-employed basis from 3 January 2017 until about 5 July 2018. Accordingly, in this case, in my judgment, it falls to be determined what was the basis of her engagement during the period that both parties referred to her as being self-employed.

30. Insofar as it may be relevant, I understand that in March 2018, the first respondent ceased to be a director of the second respondent and its management was conducted by Mr Arben Daci.

31. The claimant told me that as far as she was concerned, she was self-employed and responsible for making her own tax and National Insurance payments. She told me that she worked part-time, Thursday to Sunday and that the salon hours were 10am to 7pm on Thursdays and Fridays; 8:45am – 7pm on Saturdays and 11am – 5pm on Sundays. She told me that she would have some Sundays on and some Sundays off.

32. There was some confusion as to the basis upon which the claimant was paid. She thought she was paid a set amount dependent on how much she worked whereas the second respondent said that she was paid on a commission basis, namely 35% of what her clients were billed. Unfortunately, I had no documentation to establish what the true position was.

33. The claimant acknowledged that if the salon was not busy she might not come in. She stated that she would always check with the first respondent. If she asked for a day off then the first respondent would authorise it. However, there were occasions when that would not happen, basically when the claimant had clients coming in to see her. The claimant told me that on most days she would be busy between 10 and 7 during the salon opening hours with clients. She stated that if she wasn't working on a client, then she would do various other duties, such as cleaning up the shop, helping out, making coffee etc. She stated that if she was slack, she would be asked to do other duties.

34. I have to consider all the evidence that I have heard in relation to the true relationship between the claimant and the second respondent.

35. In my judgment, there was clearly a contract between the claimant and the second respondent for the provision of her services. She agreed to come in to the salon to work insofar as clients were concerned and the second respondent agreed to pay her.

36. I now consider what the dominant purpose of that contract was.

> "Was the claimant obliged under the contract to personally carryout work or labour"?

37. If ever there was industry in which personal service is important, it is in the hairdressing industry. All parties told me that clients who came to the salon would invariably request a specific individual to provide whatever procedure they were going to have done. The reality is, and I find, that the claimant was engaged to provide personal services. Put another way, the claimant was not in a position to provide a substitute if she had decided not to do the work herself. Further, I conclude that the obligation was the dominant purpose of the contract.

38. I also go on to consider the question of subordination. I have concluded the claimant performed the services she did for and under the direction of the second respondent. The claimant was required to work regular hours during the salon opening hours. She was required to do work over and above that which she provided for the clients. The second respondent provided the premises and equipment and I presume would take bookings from the clients at the salon. The claimant would have to clear it with the second respondent if she didn't want to come in to work or if she wanted to leave work early. I find that the second respondent effectively reserved the right to refuse her permission to go home if she still had clients who needed to be serviced. That makes obvious sense in terms of running the business.

39. Accordingly, I conclude that the claimant did work at the direction of the second respondent. I find that she was generally bound to act on the Second Respondents instructions That finding also runs into the mutuality of obligation, namely that the expectation was that the respondent would provide a full client list for the Thursday – Sunday working period and that the claimant would come in to service those clients. There clearly had been some dissatisfaction with the claimant in terms of her reliability due to childcare or other health issues in the past. The text at paragraph 21 suggests to me that it was being made plain that the claimant was expected to work the 10-7 shift regularly and not take time off. As regards substitution I find that the reality was that the claimant could not substitute someone else to work in her stead.

40. Accordingly, in my judgment, the nature of the work that potentially was to be offered to the claimant in October 2018 was not as a truly independent provider of services but employment under a contract personally to do work.

_____

Employment Judge Alliott

Date: ……19 November 2019 ……..

Sent to the parties on: .....

.....
For the Tribunal Office

.