EMPLOYMENT TRIBUNALS

Claimant: **Ms C Father**

Respondent: **Lewisham Counselling and Counsellor Training Associates**

Before: **Employment Judge Cheetham QC**

Representation

Claimant: Mr Adenekan (counsel)
Respondent: Mr Otchie (counsel)

Preliminary Hearing held on 28 November 2019 at London South Employment Tribunal

JUDGMENT

1. The Claimant was at all times self-employed and working under a contract for services with the Respondent.

2. Her claim to the Employment Tribunal is dismissed.

REASONS

1. This Preliminary Hearing was listed to determine whether the Claimant was an employee, worker or self-employed when working with the Respondent.

2. I heard evidence from the Claimant and, for the Respondent, from Christine Brown and Juanita Harriot, who are both partners in the Respondent LLP and were its founders.

The Law

3. In order to bring a claim of both "ordinary" unfair dismissal and automatically unfair dismissal, a claimant needs to have the status of an "employee" under the Employment Rights Act 1996 s.230(1):

   (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.

4. In order to bring a claim of discrimination, a claimant needs to have the status of an "employee" under the Equality Act 2010 s.83:

   (2) "Employment" means—
   (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

5. To bring a claim under the Working Time Regulations 1998 or – for instance - of being subjected to detriments by reason of making protected disclosures, a claimant needs to have the status of a "worker" under WTR Reg. 2(1)/ERA s.230(3).

   (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.

6. The most recent leading authority is ***Uber BV v Aslam*** [2019] ICR 845, CA, which contains a helpful, although not definitive, review of the case law. From the ***Uber*** case and from the well-established authorities, the following propositions can be drawn.

7. First, in ***Bates van Winkelhof v Clyde & Co LLP*** [2014] ICR 740 SC, Lady Hale referred to the judgment of Maurice Kay LJ in ***Hospital Medical Group Ltd v Westwood*** [2013] ICR 415 CA, as to which, she said this:

   I agree with Maurice Kay LJ that there is "not a single key to unlock the words of the statute in every case". There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do … The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves. (§39)

8. Secondly, the tribunal has to determine what was the true agreement between the parties. In so doing, it is important for it to have regard to the reality of the mutual obligations and the reality of the situation: ***Autoclenz v Belcher*** [2011] ICR 1157. As Lord Clarke said in that case (at §29), "*The question in every case is … what was the true agreement between the parties*".

9. Thirdly, there is no single determining factor, rather a "multiple test". The usual judicial starting point for the multiple test is a passage from the judgment of MacKenna J in ***Ready Mixed Concrete Ltd v Minister of Pensions and National Insurance*** [1968] 1 All ER 433. He stated:

   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.

10. The relevance of this passage was confirmed by the Supreme Court in ***Autoclenz***, where Lord Clarke called it the '*the classic description of a contract of employment*'. In essence, the ***Ready Mixed*** formulation of the multiple test can be boiled down to three questions:

    (i) did the worker agree to provide his or her own work and skill in return for remuneration?
    (ii) did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?
    (iii) were the other provisions of the contract consistent with its being a contract of service?

11. Fourthly, in ***Hall (Inspector of Taxes) v Lorimer*** [1984] ICR 218, the Court of Appeal warned against using a checklist approach in which the court runs through a list of factors (the other provisions of the contract) and ticks off those pointing one way and those pointing the other and then totals up the ticks on each side to reach a decision. It upheld the decision of Mummery J. in the High Court, who stated that:

    '… this is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail… Not all details are of equal weight or importance in any given situation.'

Findings of fact

12. The Respondent delivers accredited courses for counselling bodies, namely the CPCAB (Counselling and Psychotherapy Central Awarding Body) and

BACP (British Association for Counselling and Psychotherapy). The courses are at different levels, but all must meet the standards and criteria set by the regulating body. Ms Brown described the Respondent as a contractor that brought in tutors as sub-contractors in order to fulfil the contracts with the accrediting bodies. At any one time, she said, there were about 8 to 10 sub-contractors and also between 10 and 20 volunteers.

13. The Claimant is an accredited counsellor and psychotherapist, who has for many years been engaged in providing training on those courses. From September 2007 until September 2018, she provided training on courses run by the Respondent.

14. The contract between the Claimant and the Respondent – signed by both parties - was headed "Self-Employed Associate/Consultant Contract", referred to the Claimant as being self-employed and contained terms consistent with that status. The Claimant did not take issue with this description of her status at any time during her working relationship with the Respondent.

15. The Claimant submitted invoices and was paid a gross sum for her hours. In fact, her pay was then spread across the year, but that was only to make sure tutors had an income every month. However, she did not receive any pay in respect of the holidays, nor, if she was absent, any sick pay. She was responsible for her own tax and National insurance.

16. The Claimant worked regular hours when working on a course. These were: Monday from 9.30 to 5.30; Tuesday, 4 hours in total; Wednesday and Thursday, 2.5 to 3 hours in total each day. She said she also worked occasional Saturdays. She worked – and was paid for – about 36 weeks over the year.

17. In greater detail, her work involved the following. First, there was her involvement in the Higher Professional Diploma, which is a 2 year course. Students would attend for an introduction in July and term would start in September. The Claimant would be one of two main classroom tutors and taught on the course during term time; during the holidays, she was not required to attend. On Mondays in term time, she would attend between 9.30 and 5.30 and take classes and tutorials. She would also have marking to do, for which she would not be paid.

18. On the rare occasions she was absent, the other tutor could cover, so the question of providing a substitute did not arise. All those involved in providing the course had to attend training and regular meetings; this was a stipulation from the regulator. Obviously, the course had to be delivered in the way that the regulator required. The Claimant was also subject to the rules of the professional bodies. For instance, the BACP does not allow tutors to enter into social or sexual relations with any of the students.

19. On Tuesdays, the Claimant ran a counselling agency on her own (about 4 hours). On Wednesday and Thursday she was course co-ordinator for an introductory or an intermediate course (2.5 – 3 hours each day). The introductory course lasted 12 weeks and the intermediate course lasted 6 months. As with the Diploma course, if these courses were not running, the Claimant did not attend the Respondent's premises.

20. There was some disagreement over the exact number of hours, but not in any material way.

21. The Saturday work was occasional involvement in workshops, where the Claimant was paid cash by Ms Brown if she helped out. I accepted Ms Brown's evidence that these were not, in fact, the Respondent's courses, but something Ms Brown arranged herself. She would pay the Claimant directly if she wanted her to help out.

22. I heard evidence about the complaints process. If a student made a complaint, then the student went first to the tutor, then to a director and, if necessary, a third party could be brought into help. The Claimant was warned once about her attitude following a complaint.

23. On the BACP Course Accreditation Scheme, the Claimant described herself as the Course Co-ordinator and stated, "*I have been teaching and counselling for over a decade with (the Respondent) in a self-employed practitioner capacity*". She also described the work she had done at a counselling service called Renaissance Horizon UK as being in a self-employed capacity. In re-examination by her counsel, she clarified her work with Renaissance as follows:

    "It just felt different to me at the Respondent – but there was no difference between being self-employed at Renaissance and working at Lewisham (i.e. the Respondent). I was just there longer."

24. This was an important piece of evidence, because it was therefore common ground that while working at Renaissance she was engaged in the same type of work, carried out in the same sort of way.

25. The Claimant contended that the Respondent paid for her use of transport, but I did not accept her evidence on this. She lived very close to the Respondent and all she was referring to was an occasion when she was given a lift to Hastings when she was helping out on a residential course.

26. The working relationship came to an end on 11 September 2018 and, unfortunately, ended acrimoniously, which explains the various claims brought by the Claimant and the need to determine her employment status.

Submissions

27. I heard submissions from both counsel, which I will summarise only briefly. Mr Otchie focused upon the written agreement and made the simple submission that it reflected the intention of the parties, so there was little need to look beyond it. However, if one did so, then the relevant factors weighed heavily towards self-employed status. He said that the Claimant was essentially relying upon the length of her association with the Respondent.

28. Mr Adenekan had helpfully provided written submissions, which he developed orally. He referred me to ***Pimlico Plumbers Ltd v Smith*** [2018] ICR 1511, SC. He argued that the Claimant was an employee or, in the alternative, a worker, pointing in particular to the Respondent's control over what the Claimant did and its ability to terminate the relationship.

Conclusions

29. In my judgment, the Claimant worked under a contract for services; in other words, she was self-employed.

30. First, that is what the contractual documentation says and it is significant that the Claimant also described herself as self-employed in the course accreditation documents. In other words, not only did she sign a document that stated she was self-employed, but she freely described herself as such. Although it was of course important to look at the substance of the agreement, nevertheless it seemed likely to me that the contract reflected the parties' true intentions, namely that the Claimant was a self-employed tutor on the Respondent's courses.

31. Secondly, she described her work for Renaissance as being on a self-employed basis and compared that with her work at the Respondent, the difference being the length of time that she had worked at the Respondent. On the evidence, that was the only difference. It was agreed that while working at Renaissance (a) she was engaged in the same type of work, carried out in the same sort of way and (b) she was self-employed.

32. Thirdly, although there was a measure of control over what she did at work, that was a necessity if the courses were going to be provided in a way that the accrediting bodies required. For example, the fact that the Claimant had to present the course content in a particular way was not as a result of the Respondent's requirements, but that of the accrediting bodies.

33. Fourthly, the Claimant was paid for the work that she did, but was not paid in respect of holidays or if she was absent through sickness. She submitted invoices, these were paid and the Claimant then sorted out her own tax and National Insurance. This was the practice followed throughout her 11 years with the Respondent.

34. I agree with Mr Otchie that what the Claimant was really pointing to was the amount of time she had worked with the Respondent. However, nothing ever changed. The Claimant started working for the Respondent on a self-employed basis and continued working in the same way throughout until her contract was terminated.

35. It follows that, in my judgment and by a considerable margin, the Claimant was self-employed and worked under a contract for services. That also means that the Tribunal has no jurisdiction to hear her claims, which are dismissed.

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Employment Judge Cheetham QC

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Date 18 December 2019