



EMPLOYMENT TRIBUNALS

Claimant: Ms D Pfeiffer
Respondent: J V Hyland t/a Sign Windows (1)
Sign Windows & Conservatories Ltd (2)
Ms S Ballard (3)
Mr C Dickman (4)
Mr I McKellican (5)
Heard at: Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
On: 20-21 January 2020
Before: Employment Judge Adkinson sitting alone
Appearances
For the claimant: In person
For the 1st to 4th respondents: Mr N Bidnell-Edwards, counsel
For the 5th respondent In person

JUDGMENT

The Tribunal concludes that between 12 March 2012 and 28 February 2019 the claimant was an employee of the first respondent.

REASONS

Background

1. Ms Pfeiffer brings before the Tribunal several claims. The details for present purposes do not matter. These can be adequately summarised as:
 - 1.1. ordinary unfair dismissal and various allegations of automatic unfair dismissal (including a claim relying on protected disclosure), unlawful deduction from wages and being subjected to a detriment because she made a protected disclosure. She relies on the various parts of the **Employment Rights Act 1996**;
 - 1.2. a failure to pay holiday pay, relying on the **Working Time Regulations 1998**; and

- 1.3. harassment because of sex and victimisation relying on the **Equality Act 2010**.
2. She alleges she was an employee of Mr Hyland. Therefore, if there has been a relevant transfer for the purposes of TUPE, the second respondent, Sign Windows & Conservatories Ltd (“the new company”), is liable for any compensatory award.
3. She alleges that her employment ended on 28 February 2019.
4. Mr Hyland sold his business with effect from 1 March 2019 to the new company. Ms Ballard and Mr Dickman are the directors of the new company. The respondents say that the sale was a relevant transfer for the purposes of the **TUPE regulations 2006**.
5. Ms Pfeiffer does not necessarily accept that there was a relevant transfer. That is not an issue for me to determine at this stage.
6. Mr McKellican was an employee of Mr Hyland but his employment ended before the transfer. He has since been employed by the new company.
7. The respondents otherwise deny the claims. The detail substance of the denial does not matter for present purposes. However, the responses do raise the preliminary issue that Ms Pfeiffer was neither a worker nor employee of Mr Hyland.

Issues

8. The issue for me to decide is whether Ms Pfeiffer:
 - 8.1. was an employee?
 - 8.2. if not, whether she was a worker for the purposes of:
 - 8.2.1. unfair dismissal and unlawful deduction from wages?
 - 8.2.2. the **Working Time Regulations 1998**?
 - 8.2.3. protected disclosures? or
 - 8.2.4. the **Equality Act 2010** (where they are defined as employees, though the principles are the same)?

Hearing

9. Ms Pfeiffer represented herself. Mr Bidnell-Edwards, a barrister, represented the 1st to 4th respondents. Mr McKellican represented himself. He absented himself from the tribunal proceedings halfway through the first day. However, he said at the beginning of the hearing he would have nothing to add above and beyond what Mr Bidnell-Edwards had to say.
10. There was a delay beginning the hearing because, unfortunately and in error, the bundles had not been prepared and sent to the tribunal. They therefore had to be fetched from the respondents’ solicitor’s office which was a short journey away.
11. The hearing began with an application by all the respondents for the Tribunal to reject the proceedings against Ms Ballard, Mr Dickman and Mr McKellican because of an alleged failure to comply with the ACAS early

conciliation procedures. I rejected that application for reasons I gave at the time.

12. In addition to the employment or worker status issues, the respondents had applied for the claimant's claims to be struck out or for her to pay deposits as a condition of continuing them. Because of the shortness of time and significance of the employment or worker status issues, I decided that we should address those issues alone first, with the proviso that if Ms Pfeiffer were either a worker or employee I would list a further preliminary hearing to give directions and consider applications for strike out or deposits.
13. It took the remaining part of the first day and the whole of the second day to hear the evidence and closing arguments. I therefore reserved my decision on the employee or worker status issues. This is that decision.
14. Ms Pfeiffer, Mr Hyland, Ms Ballard and Mr Dickman had all prepared statements. I heard oral evidence from them and they adopted their statements as their evidence. Each witness was cross-examined and asked questions by the Tribunal.
15. There was a bundle of documents that the respondents had prepared. Ms Pfeiffer had prepared a slim supplementary bundle. I have considered those documents to which we referred during the hearing.
16. Each party provided oral and written closing arguments and I have taken those into account.
17. I would like to thank Ms Pfeiffer and Mr Bidnell-Edwards for their helpful submissions.

Findings of fact

18. Firstly, I want comment about the witnesses generally.
19. Ms Pfeiffer came across to me as a witness doing her best to tell the truth as she believed it to be and to assist the Tribunal.
20. Mr Hyland also came across as doing his best to tell the truth and to assist the Tribunal. However, he struck me at times as having a poor understanding of what had been going on in his business. My lasting impression is that he had stepped back from the business and had left the day-to-day tasks to others. For example, he paid out only what he was told to pay out by others when he was told to do so. He seemed to leave others to run the business and to grow it. I was left with the distinct impression he left the sales to Mr Dickman and administration to Ms Ballard.
21. My view of Mr Hyland is supported by something that Mr Dickman said in a conversation on 15 February 2019 with Ms Pfeiffer. Ms Pfeiffer had recorded the conversation and prepared a transcript of it. Mr Dickman said "and an awful lot of this also [Ms Pfeiffer] – and again this is probably something that I don't need to discuss but I feel that I should because – out of respect for how long you've have been here – when you actually sit down and look at the numbers of this company, I cannot believe it's kept going for as long as it has. And I do not mean that with anything other than love and respect for [Mr Hyland]."

22. Furthermore, in evidence Mr Dickman explained that he believed that the business was not running at full capacity and it was his aim with the new company to get it back on track. This supports my view of Mr Hyland.
23. Mr Dickman struck me as a witness doing the best to assist the Tribunal and to tell the truth. Much of his evidence relates to his own arrangements between him and Mr Hyland however.
24. I also believed that Ms Ballard did her best to tell me what she believed to be the truth. That said, Ms Ballard's evidence caused me concerns. A key part of her evidence was that that Mr Hyland would pay Ms Pfeiffer for hours worked at his discretion and as a goodwill payment. She maintained that position when I asked her about it. I reject her evidence on that. Not even Mr Hyland seemed to suggest he paid Ms Pfeiffer for hours worked out of goodwill rather than because of a legal obligation. In fact, Ms Pfeiffer was paid only £5 for leads and 2.5% commission of the net contract value of any resulting sales, and an hourly rate for hours worked. Ms Ballard's suggestion would lead a legal entitlement to a very low rate of pay and would be unrealistic. It is implausible that Mr Hyland, who no matter how relaxed he might have been otherwise was still a businessman, would make payments routinely to someone for hours worked on the basis of goodwill alone. Ms Ballard's evidence therefore is tainted in my mind by significant implausibility on a key issue.
25. There is no written contract between Ms Pfeiffer and Mr Hyland or with the new company and nothing else in writing, for example letters or emails, that evidences any contractual terms between 12 March 2012 and 28 February 2019. There is only one document that provides some evidence for a period of work ending in 2009. I refer below to what in my opinion are the only relevant documents.
26. I now set out my relevant findings of fact.
27. Prior to 2009, Mr Hyland traded through a limited company called "Sign Windows Limited" ("the old company"). He was the sole director. In July 2009 the old company ceased trading and Mr Hyland carried on what was the old company's business as a sole trader.
28. Between 1995 and 2009 Ms Pfeiffer worked with the old company. Mr Hyland describes her role as being a telesales operative. Ms Pfeiffer did not substantially dispute that. I conclude he is correct therefore.
29. There is no suggestion she worked from anywhere other than the old company's office, which happens to be the office of Mr Hyland's business when he was a sole trader and is now the office of the new company. There is no suggestion that she used anything but the old company's telephone to make calls and that the old company paid the telephone bill.
30. The evidence of Ms Ballard and Mr Hyland is that Ms Pfeiffer was paid by the old company on a per hour basis.
31. Ms Ballard said that Ms Pfeiffer submitted invoices to secure payment and she was paid gross of tax.
32. Ms Pfeiffer says the old company paid her net of tax and did not have to submit invoices.

33. However, I have seen none of those alleged invoices, though I have seen documents relating to the more recent arrangements when Ms Pfeiffer worked with Mr Hyland while he was a sole trader. There is no suggestion that there was any material difference between the records created when Ms Pfeiffer worked with the old company and when Ms Pfeiffer worked with Mr Hyland in his capacity as a sole trader. I conclude they were in all material respects the same. There is no evidence about the actual process followed in the old company. I again conclude they are in all material respects the same.
34. The only relevant document that dates from that period is a letter dated 22 July 2003. Ms LS Brant, who was the old company's company secretary, wrote the letter to Ms Pfeiffer. It reads:
"as recently requested, this is to confirm that you are indeed a permanent member of our staff and that your salary is paid on a per-hour basis nett of income tax."
35. There is disagreement about why it was written. It does not matter why it was written in my opinion: Its contents are what are important.
36. I accept Ms Pfeiffer's evidence that in this period before 2009 she was paid net of tax and so reject the evidence of Mr Hyland and Ms Ballard. There is no contemporaneous document to support their assertions. However, there is the contemporaneous letter from the company secretary, Ms Brant, which is consistent with Ms Pfeiffer's evidence. I do not see how realistically the reason for which it was written could undermine its relevance. The position of company secretary is a responsible and onerous one. She is a representative and agent of the old company. I do not accept that she would have written it or signed it if its contents were not true. I have no reason to doubt its authenticity.
37. Because Ms Pfeiffer is correct about how she was paid, and because of the documentation created when working with Mr Hyland (about which I talk below) is materially the same as that in the old company, I conclude Ms Pfeiffer did not have to submit invoices for payment.
38. There is a dispute about how that work came to an end but I do not believe I need to resolve it because the answer would not assist me on the issues I must decide.
39. Shortly prior to 12 March 2012 Ms Pfeiffer was working at the Odeon cinema in Leicester. Mr Hyland was there. Ms Pfeiffer and Mr Hyland started talking about whether she would come back to work for Mr Hyland. The parties disagree about the requirements of the role to which Mr Hyland recruited Ms Pfeiffer. I prefer the evidence of Ms Ballard and Mr Hyland on this point, that is that Ms Pfeiffer was recruited primarily to the role of telesales. Whatever the concerns about Mr Hyland's recollection of what was happening in his business, I am quite satisfied that he would be clear in his mind why he wanted Ms Pfeiffer to work with him. His evidence is also consistent with Ms Ballard's evidence about a subsequent meeting in the office shortly before Ms Pfeiffer started work and is consistent with Ms Pfeiffer's own evidence about the main task that she was carrying out.

40. Her work was mainly to be in the evenings. To enable her to work in the evenings, Ms Pfeiffer was given the alarm code to the office and given keys so she could lock up at the end of her work. While I do not accept that she was responsible for keeping the showroom open in the evenings to the general public because that was not the showroom's normal opening hours and is inconsistent with the main purpose for which she was recruited, I do accept her evidence that from time to time she would in the evenings deal with some customers in the showroom by prior arrangement, and that she may from time to time provide cover for others. Such a conclusion is inherently plausible and fits best with what I heard from both parties.
41. Ms Pfeiffer went to work for Mr Hyland because she was seeking a stable and reliable income. She did things outside of her work, but these were with charities and only one of those resulted in any form of payment.
42. Mr Hyland told Ms Pfeiffer that she would have to work for him on a self-employed basis. Ms Pfeiffer registered as self-employed and over the years completed the relevant self-assessment tax returns and paid tax as a self-employed person.
43. Mr Hyland's sales team consisted of people like Mr Dickman who would go out to the houses of potential customers, demonstrate the product and, hopefully, secure a sale. These potential customers had already been in contact with Mr Hyland's business: he did not undertake cold-calling.
44. Mr Dickman accepts he worked on a self-employed basis. In addition he had his own separate business. He was paid purely by commission. The process for payment that applied to him and other salespeople like him was this: The order they had won would be vetted by Mr Hyland. Mr Hyland would price the order, and if satisfied that there had not been a sale at an undervalue, Mr Hyland would pay a percentage commission to the salesperson. Mr Hyland suggested the percentage commission was in the order of 10% of profit. He would tell the salesperson what commission they were entitled to. That salesperson would then create and submit an invoice for the commission, which Mr Hyland would pay. The bundle contained numerous invoices for various salespeople showing this scheme at work. If the salespeople did not sell anything, they were not paid anything.
45. The process for Ms Pfeiffer was radically different. Ms Pfeiffer would have to clock in and then clock out using a clock card machine in the office. Because of the faint printing on the clock card she often wrote in hand the hours she had worked. On the back of the clock card, for the benefit of the bookkeeper, she would write the total number of hours worked, leads she had secured and any sales that she had secured. She would then submit these to Mr Hyland through Ms Ballard. The claimant did not submit an invoice for payment. Ms Ballard took the information provided by Ms Pfeiffer and filled in a form headed "Sign Windows" and sub-headed "commission claim form" in which she set out the commission, the number of leads generated, the number of hours worked and the hourly rate. She would then be paid for the hours worked and any commissions due. She was paid for hours worked whether or not she generated leads or secured any sales. Therefore, Ms Pfeiffer carried little – if any – financial risk because she

would be paid for hours worked regardless of the outcome of that work for the business.

46. Therefore the only document relating to Ms Pfeiffer's work that looks anything like an invoice was generated on Mr Hyland's behalf by Ms Ballard. I conclude therefore Ms Pfeiffer did not invoice for the work she did.
47. Her hourly rate mirrored that provided for under the National Minimum Wage legislation and regulations.
48. Mr Hyland's business did not undertake cold-calling. The telephone numbers therefore that Ms Pfeiffer telephoned came from Mr Hyland's own records. They consisted of previous customers or potential customers who had already made enquiries, and previous leads that the salespeople had generated. She was free to choose whom to call from within that pre-defined group. There was some suggestion that Ms Pfeiffer could use her own leads. I reject the suggestion that was a representation of the real situation. Ms Pfeiffer did not visit customers, did not run the showroom except occasionally and beyond her telesales role, did no significant work in connection with the trade in which Mr Hyland's business traded.
49. The respondents made the point that Ms Pfeiffer used a computer that she herself had supplied when she was working. However, they conceded that that a computer was not in fact necessary for her to discharge her role in telesales. Ms Pfeiffer also used pens and a notebook that she had supplied herself.
50. However, the key piece of equipment for telesales, a telephone connected to a live telephone line, was provided by Mr Hyland to the claimant in his office from which she conducted her telesales role. The telephone company invoiced his business and he paid the resulting telephone bill. He provided also the workplace from which she worked.
51. Mr Hyland and Ms Ballard suggested Ms Pfeiffer could have worked from home using her own mobile, but that she wanted to avoid the expenses. I reject that suggestion. At no point has any respondent explained how she would work from home when the customer details were in the office and a computer (which is the most obvious way of accessing data remotely) was not required. In any case, the fact is Mr Hyland provided a workplace and the essential equipment at his expense.
52. Ms Pfeiffer suggested in evidence that there was an agreed number of annual hours for which she would work for Mr Hyland. In the 1st year this is 400 hours, increasing in subsequent years to 500 hours. Mr Hyland denies this. There is no contemporaneous evidence one way or the other. However, I do not believe it is necessary for me to resolve this factual dispute. Ms Pfeiffer analysed her own working hours and has prepared a spreadsheet for the Tribunal. They show that she worked in the year 2012/13 a total of 416 hours, followed by 606 hours in the following year, then 576 hours per year, 861 hours per year, 776 hours per year, 772 hours per year and in the final year, 2018/2019, she worked a total of 538 hours. The figures are not in any real way disputed. The proportion of those hours between daytime and evening is disputed but, in my opinion, sheds no light on the issue I must decide.

53. Taken with the clock cards, Ms Pfeiffer's evidence and the evidence of the respondents' witnesses, it is clear however that Ms Pfeiffer regularly undertook short shifts of work for Mr Hyland. I accept Mr Hyland's evidence that there are no set hours however because it is consistent with his approach to the business.
54. I do not accept Mr Hyland's case that he was indifferent whether Ms Pfeiffer turned up for work or not. Whether or not the telesales is a key part of Mr Hyland's business, it is clear he wanted a telesales function. If it were otherwise he would either not have recruited Ms Pfeiffer or he would have ended her services sooner as being surplus to requirements. He did neither. It is implausible therefore that he would have not have been concerned if Ms Pfeiffer simply stopped turning up for work or did not turn up for a long time without explanation.
55. I accept Ms Pfeiffer's evidence that she had taken over the last 2 years 10 weeks away from work. I accept her evidence that she told either Mr Hyland or Ms Ballard about that. There was one incident when Ms Pfeiffer was stuck overseas after a problem with the charity that she was working with. She telephoned the office and said that she would not be able to come in. I accept that the office again allowed her time unplanned off without protest or problem. I conclude that is because Mr Hyland was relaxed about the conduct of business. I do not accept it is because Mr Hyland did not expect or require Ms Pfeiffer to come in because it was entirely her own free will as to whether she did or did not do so.
56. Ms Pfeiffer said that she was not allowed to work for competitors. However, it seems this is based on what she perceived as a moral obligation rather than any term of contract between the parties. It is my conclusion that there were in fact no express restraint of trade clauses.
57. Ms Pfeiffer did not work in telesales for anyone else and did not hold herself out to others as an independent telesales operative.
58. Ms Pfeiffer could not freely substitute anyone else to do her role. Mr Hyland was never called on to make the decision on substitution for Ms Pfeiffer so the evidence relates to a hypothetical scenario. I bear in mind that a witness's evidence may be tainted by the fact that the parties are in a legal dispute with each other.
59. Mr Hyland's evidence was that he would not have objected but might have done if, for example, the proposed substitute were a former employee.
60. Context is everything. If Ms Pfeiffer had been freely able to substitute someone else then she would have been freely able to give to that substitute the keys to the office and the alarm code. The substitute would have access to all the confidential information in the office including personal data necessary for a telesales role. This would have exposed Mr Hyland's business to the risk of theft and data protection issues at least. On the phone, Ms Pfeiffer or the substitute would have been the "face" of Mr Hyland's business. As laid back as he may have been, I do not believe Mr Hyland would not have been concerned about this. He suggested he could just change the locks. I do not accept he would do with such casual

indifference that he would let Ms Pfeiffer substitute anyone of her own free choice and give to them the keys and alarm code.

61. The fact he says he might have objected, has identified a group that may cause him to do so and coupled with his attitude towards the business leads me to conclude that the true situation was that he retained an absolute discretion to refuse to allow a proposed substitute, but was unlikely in practice to do so. This explains how Mr Dickman on one occasion was allowed to substitute another salesperson to affect a sale when he was not available. It is also more consistent with Mr Hyland's recollection of the initial meeting shortly before 12 March, i.e. that he proposed Ms Pfeiffer to come back to work in telesales, not that Ms Pfeiffer arranged to provide a telesales service whether by her or a third party. It is also more consistent with the fact it was Ms Pfeiffer personally who was recruited rather than her business.
62. She was not paid for holidays or other time away from the business.
63. Her rates of commission, which I set out earlier, were appreciably lower than the commissions that a salesperson could earn.
64. Ms Pfeiffer suggests that in the conversation with Mr Dickman on 15 February 2019 that Mr Dickman conceded she was an employee, or at least ought to have been seen as one by Mr Hyland. Ms Pfeiffer prepared the transcript. The relevant part reads:
"Mr Dickman: Going forward, again I'm probably speaking out of turn... But telesales people should be PAYE. If you're working from an office and you're working in the same environment, you should be PAYE. If you should be PAYE then you should be given a contract of employment. Anybody that works in this business in an office environment or a factor [sic.] environment [see you, Shirley][sic.] will be PAYE not self-employed."
65. It is quite clear from the context of the conversation that Mr Dickman is talking about the future and how he would choose to run the business when the new company takes over. He is not expressing a view on whether or not Ms Pfeiffer was an employee of Mr Hyland. The conversation does not assist me to determine that issue.

Law

66. As well as the cases below I have also considered the commentary in **IDS Employment Law Handbook Vol 3 Chapter 2** on employees and workers and **Harvey on Industrial Relations and Employment Law Div A** on employees and workers.

Statute and regulations

67. The **Employment Rights Act 1996 section 230** provides so far as relevant:
“(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.

“(4) In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

“(5) In this Act “employment”—

“(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

“(b) in relation to a worker, means employment under his contract;

“and “employed” shall be construed accordingly.

“...”

68. The definition above is mirrored in the **Working Time Regulations 1998 regulation 2** for the purposes of those regulations.

69. For the purposes of public interest disclosure, the **Employment Rights Act 1996 section 43K** provides so far as relevant:

“(1) For the purposes of this Part “worker” includes an individual who is not a worker as defined by section 230(3) but who—

“... ”

“(b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for “personally” in that provision there were substituted “(whether personally or otherwise)”,

“... ”

“and any reference to a worker's contract, to employment or to a worker being “employed” shall be construed accordingly.

“... ”

70. The **Equality Act 2010 section 83(2)** says so far as relevant:

“(2) “Employment” means—

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

“...”

71. The category “contract personally to do work” covers the same group of people who fall in the **Employment Rights Act 1996 section 230(3)(b): Secretary of State for Justice v Windle and another [2016] ICR 721, CA.**

Meaning of employee

72. There is no complete and unchanging list of criteria to determine if a contract is one of employment or one for services. Each case must be considered on its own facts.: **Warner Holidays Ltd v Secretary of State for Social Services [1983] ICR 440 QB.**

73. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433 QBD**, McKenna J provided this guidance:

“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.”

74. The passage was approved in **Autoclenz Ltd v Belcher and others [2011] ICR 1157 UKSC.**

75. The obligation on one party to provide work and on the other to accept work are the irreducible minimum of mutual obligation necessary to create a contract of employment: **Carmichael and another v National Power plc [1999] ICR 1226 UKHL.**

76. When looking at the facts, a Tribunal should ask itself if history of the relationship showed that it had been agreed there was an obligation on the claimant to do at least some work and a correlative obligation on the employer to pay for it: **Dakin v Brighton Marina Residential Management Co Ltd UKEAT/0380/12 EAT.**

77. The mere fact a putative employee can arrange their own hours, holidays and amounts of work does not prevent a contract from being one of employment: **Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612 CA.**

78. The ability of a putative employee to substitute someone to do the work they otherwise would do is a relevant factor. In **Pimlico Plumbers Ltd v Smith [2017] IRLR 323 CA** the Court of Appeal said that

“[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.”

79. The Supreme Court, on appeal, did not comment on these observations. However, the Employment Appeal Tribunal has applied them in **Chatfield-Roberts v Phillips UKEAT/0049/18 EAT**.

Meaning of worker

80. The key elements are:
- 80.1. there must be a contract, whether express or implied, and, if express, whether written or oral,
 - 80.2. that contract must provide for the individual to carry out personal services, and
 - 80.3. those services must be for the benefit of another party to the contract who must not be a client or customer of the individual's profession or business undertaking
81. There is also the extended definition in relation to protected disclosures quoted above.
82. When determining the contractual relationship and whether the putative worker is able to substitute someone else or not, the Tribunal should focus on the real relationship of the parties. Tribunals should be “realistic and worldly wise”, “sensible and robust” in their approach to diving the true contractual relationship: **Autoclenz Ltd v Belcher; Uber BV v Aslam [2019] ICR 845 CA** (not questioned by the Supreme Court on appeal). I see no reason why the Court of Appeal's guidance in **Pimlico Plumbers** would not be of relevance to this issue in the context of a worker. I also see no reason why the need for realism, sensibility and robustness do not apply to the question of determining if a person is an employee.

83. In **Byrne Brothers (Formwork) Ltd v Baird and others [2002] ICR 667 EAT**, the Employment Appeal Tribunal said that the exception for clients and customers was to be interpreted as follows:

“the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm’s-length and independent position to be treated as being able to look after themselves.”

84. It seems mutuality of obligation is a relevant factor when deciding if someone is a worker: **Secretary of State for Justice v Windle and another [2016] ICR 721 CA**.

Conclusions

85. I have concluded that from 12 March 2012 to 28 February 2019, Mr Pfeiffer was an employee of Mr Hyland.

86. My reasons are as follows:

86.1. She was paid an hourly wage for work done, regardless of the productivity of that work: i.e. whether she secured sales or leads. The financial risk was borne by Mr Hyland.

86.2. She submitted clock card for hours worked. Having looked at them I conclude that, properly described, they are not invoices but records of work done. That they contained information about commission or leads does not in my opinion detract from that. I believe nothing turns on the fact Ms Ballard then wrote out a separate document that looked like an invoice before payment. Ms Ballard acted on Mr Hyland’s behalf and what the employer does behind the scenes for the purpose of its records is a matter for it.

86.3. The key piece of equipment necessary – the telephone and telephone line – was provided by Mr Hyland. The computer was not necessary and Ms Pfeiffer’s use does not take the matter any further forward. I do not believe that providing one’s own pens and notepad, when they are such mundane and routine items, undermines a conclusion that the main equipment was provided by him. There is no evidence she was required by Mr Hyland to supply them. He carried the financial burden of the use of the telephone by Ms Pfeiffer to perform that role. He also provided the workplace.

86.4. Ms Pfeiffer did not hold herself out at any time as in the business of providing telesales services.

86.5. While there was flexibility as to the hours and no set expectation of hours per week, she was expected to provide regular performance of her role in telesales. In my judgment it is a mere reflection of Mr Hyland’s laid-back approach that she arranged her own hours, holidays and the like.

- 86.6. Her role is one typically found in employment rather than self-employment. While the role of a salesperson paid purely by commission being self-employed is credible, I do not accept that the same applies to telesales. They have to attend the office to discharge their duties and do not have the same freedom to source leads and quote for jobs. This was certainly true of Ms Pfeiffer.
- 86.7. The right of substitution was subject always to Mr Hyland's absolute discretion. I accept he would almost certainly have agreed to any suggested substitution but that does not mean there was no absolute discretion.
- 86.8. In 2012 Mr Hyland asked Ms Pfeiffer if she would provide telesales, not if she would arrange the provision of a telesales service. In my judgment the focus is on her personally performing the role and not the service generally.
- 86.9. There is nothing to suggest that the role was not terminable in the same manner as any employment role would be terminable. It was not linked e.g. to one project but was of open-ended duration. There is nothing to suggest Ms Pfeiffer could not resign or that Mr Hyland could not have terminated it on notice.
- 86.10. While Ms Pfeiffer selected who to call, the potential callers were limited to those approved by Mr Hyland, i.e. former customers and leads. In my judgment this control is more consistent with employment than being in business on her own account.
- 86.11. Given the letter from the company secretary in 2003, and that she undertook a similar role then to the period 2012-2019, that letter lends some support to the fact she was properly an employee, though on its own it is not conclusive.
87. I accept that she paid tax as a self-employed person. I accept she was not paid for holidays. However, those are outweighed by the other factors.
88. Therefore, I conclude that she agreed to provide her own work and skill in return for remuneration, that she was subject to a sufficient degree of control for the relationship to be one of employer and employee and the other provisions are consistent with there being a contract of employment.
89. If I were wrong about that, then for the reasons I have set out above, I would have concluded that she were a worker within the meaning of the **Employment Rights Act 1996 section 230(2)(b)**, **section 43B**, the **Working Time Regulations 1998 regulation 2** and as an employee for the purposes of the **Equality Act 2010** because the contract is one that provides for Ms Pfeiffer to carry out personal services and they were for Mr Hyland's benefit, but not in his role as a client or customer of Ms Pfeiffer.

Employment Judge Adkinson

Date: 29 January 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Notes

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.

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