EMPLOYMENT TRIBUNALS

Claimant: Ms M Gorman

Respondent: Terence Paul (Manchester) Limited

JUDGMENT ON A PRELIMINARY ISSUE

HELD AT: Manchester **ON:** 11 March 2020

BEFORE: Employment Judge Batten (sitting alone)

Representation
For the Claimant: Ms C Brooke-Ward, Counsel
For the Respondent: Mr T Wood, Counsel

JUDGMENT having been sent to the parties on 11 March 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

JUDGMENT

The judgment of the Tribunal is that the claimant was an employee of the respondent.

REASONS

Background

1. The claim form was presented on 12 August 2019. The claimant pursues claims of unfair dismissal, sex discrimination, for notice pay, holiday pay and redundancy pay, all complaints which she says arise from the closure of the respondent's Manchester Salon in May 2019. On 4 October 2019, the respondent presented its response. In the response, it was contended that the claimant was engaged as a self-employed hairdresser under an "independent contract for services" and therefore she was neither an employee nor a worker. In those circumstances, the respondent contended

that the Tribunal did not have jurisdiction to hear the claims and it sought a preliminary hearing to determine the issue of the claimant's status.

2. This preliminary hearing was listed, following a case management preliminary hearing on 5 December 2019, to consider the preliminary issue of whether the claimant was an employee or a worker or neither of those for the purposes of claims brought under the Employment Rights Act 1996, under the Working Time Regulations 1998 and under the Equality Act 2010.

Evidence

3. The Tribunal was provided with a bundle of documents which was agreed and witness statements: from the claimant and, for the respondent, from Mr Stuart Kirkham (a director) and Mr Robin Cain (who was formerly engaged by the respondent). All 3 witnesses gave evidence by reference to a written witness statement and each of them was subject to cross-examination.

Findings of Fact

4. The Tribunal has determined and evaluated all the relevant evidence, both the documentary evidence and oral evidence from the parties to make findings of fact relevant to the preliminary issue as follows.

5. The claimant commenced work for the respondent as an apprentice hair stylist in or around 2013 (the precise date is unclear from the documentation before the Tribunal).

6. On 6 October 2014, when the claimant qualified as a hairdresser, the respondent gave her a document to sign which had been compiled by the respondent and is headed "Independent Contract for Services". In this contract, the claimant is called the "SEHS" which the Tribunal understands to be a short-hand reference to 'self-employed hair stylist' although "SEHS" is not included in the 'Definitions' section of the document, and nowhere in the document is the notation "SEHS" specifically explained.

7. In the preamble to the contract, section (A), it states that "*the respondent operates its salon by using self-employed hair stylists*". The respondent's reasons are stated to be: because the respondent believes it would be difficult to attract and retain high quality stylists if it operated a model where stylists were employees; that stylists want to take some financial risk; that stylists want the flexibility to decide when they work and the ability to work in their own business or in other salons.

8. In section (C) of the preamble, it says that the SEHS [i.e. the claimant] confirms that she wants to operate on a self-employed basis and does not wish to be an employee of the respondent or of any other member of the respondent's group. In reality, the claimant was not offered any alternative contract nor any choice over her status. The claimant did not understand what section (C) of the preamble meant when she signed the contract.

9. There are a number of provisions and obligations set out in the contract which are relevant to the preliminary issue in this case, as follows:

"2.1 The SEHS shall render to any clients who visit the Salon, services as a hairdresser at the Salon.

2.2 The SEHS shall spend such periods at the Salon as the SEHS may in their absolute discretion choose within the normal business hours of [the respondent] or the Salon (as applicable).

2.3 Whilst the SEHS has no obligation to attend the Salon, the SEHS is required to inform [the respondent] when she will not be attending so that, if necessary, [the respondent] can arrange cover.

2.4 The SEHS shall, during periods spent at the Salon, attend to the requirements of any clients who may require their hairdressing services".

2.6 The SEHS may use a suitably qualified and experienced substitute or delegate to perform the hairdressing services. Where a substitute or delegate is used by the SEHS, [the respondent] shall have no contractual, financial or legal relationship with the substitute or delegate. …"

2.7 The SEHS agrees that she shall use the [respondent's] price list displayed in the Salon in relation to any services provided to clients and shall adhere to any promotional offers in force and as advised from time to time. …

2.8 The SEHS shall be responsible for ensuring all customers, at the end of the hairstyling, are taken to reception and the Maitre D is informed of the charges due from the customer. ….

2.9 The SEHS shall maintain their own accounting books and records in addition to those maintained by [the respondent]. …

2.10 The SEHS shall be responsible for their own taxation affairs including VAT (if the SEHS is registered for VAT) ….

2.11 The SEHS shall retain any profits from working at the Salon and shall be responsible for any losses.

2.12 The SEHS shall conform to the general codes and standards of dress and behaviour expected of self-employed hair stylists working in the Salon.

2.15 The SEHS shall have personal liability for any loss, liability, costs, damages or expenses arising from any negligent or reckless act in the provision of the services and shall accordingly maintain … liability insurance covering the risk of a claim by any client.

2.16 The SEHS shall not during the [contract] set up nor work in any business which competes with the business carried on by [the respondent] … and which is within a half mile radius of the Salon or

of any [respondent's] salon in which the SEHS has worked within the last 12 months.

10. Clause 2.6 above is a substitution clause. It conflicts with clause 10 of the contract, which says:

"10 For the avoidance of doubt, the SEHS shall not be entitled to any payment from [the respondent] in respect of any period where the SEHS does not perform services at the Salon regardless of the reason for the non-performance of services."

In practice, what happened was that if the claimant did not attend the Salon for work (and even if she had sent a substitute which she never did) then the claimant would not be paid any of the gross fees earned. Instead, another hairdresser from the Salon would be given the work and paid by the respondent. Therefore, if the claimant did not provide hairdressing services herself personally, she did not get paid.

11. Section 5 of the contract relates to "Fees, commission and charges for facilities". The contract states that the claimant shall receive remuneration of 100% of the gross fees paid by customers for the work performed by the claimant. This was to be paid by the respondent to the claimant every 4 weeks in arrears. However, the claimant did not receive 100% of the gross fees; instead she received monies net of a deduction by the respondent of 67% of the fees per week. The respondent decided the amount of this deduction which the contract stated was for use of the respondent's chair, washbasin, "surrounding fittings", hot water, consumable stock and other services. There was no negotiation.

12. In the Salon, the respondent sells hair products to clients and customers. If the claimant sold any of those products she was paid commission of 10% of the sale price net of VAT, of the products she sold. There was no negotiation.

13. Section 12 of the contract is headed "Restrictive covenants" and these cover a period of 12 months from the end of the contract. By these covenants, the claimant could not carry on, or be engaged, concerned or interested in any business which competes with the respondent within 0.5 miles of the Salon or any other of the respondent's salons at which she had worked in the 12 months prior to termination. She could not negotiate with, solicit business from or endeavour to entice away from the respondent any client of it with whom she had direct dealings or personal contact, nor deal with or accept the custom or business of any person who is or had been a client of the respondent. Further, the claimant could not interfere with, solicit or endeavour to entice away from the respondent any other self-employed hair stylist or employed hairstylist or other personnel of the respondent.

14. The contract did not reflect the reality of the claimant's day-to-day working arrangements or her relationship with the respondent. In practice, the respondent decided and controlled the claimant's working arrangements and practices.

15. There are no specified working hours in the contract. However, despite what is stated in clause 2.2, the respondent in fact decided the hours the claimant worked and the days on which she worked – the claimant was required to attend the Salon between 8.45am and 6.00pm (The hours on Thursdays were 10.00am to 8.00pm). If the claimant wanted to take a holiday, she had to notify the respondent of her intended time off and her holidays, and the respondent gave permission to take time off which depended (to an extent) on the availability of others to cover the work in the Salon. The respondent kept records of the hours which the claimant worked and it recorded whether she was late or she finished early on any day, and it also recorded her holidays.

16. The respondent maintained lists of all the clients and customers who used the Salon and it considered them to be clients of the Salon or of the respondent. The respondent guarded the client lists and information carefully. Access to these lists, and the information gathered, was restricted. Whilst clients were described as being "the claimant's clients" by the respondent's witnesses, the claimant did not have access to the information about those clients. If the claimant needed any client information, she had to go to the manager of the Salon and ask for the information she needed. The claimant was not able to access the client lists herself and indeed was prevented from having access. When the claimant asked for client information, which was stored electronically on a computer, the Salon manager would access the lists by use of a PIN number which was not given to the claimant. On at least one occasion, the manager's PIN was discovered by the hair stylists, and the PIN was then changed by the respondent specifically to prevent the stylists including the claimant having access to the client information.

17. The respondent decided the clients upon whom the claimant would attend to style their hair; the respondent handled the bookings/diary and gave the claimant a list of her bookings on a computer sheet together with additional tasks that the claimant had to do. The respondent decided which product range would be used in the Salon to wash, dye and style the clients' hair and the respondent determined which products from the range would be stocked, used and sold.

18. The respondent trained those people who worked as stylists in its salons and it controlled the appearance of the claimant and others, to the extent that the claimant was required to wear black clothing whilst at work. The respondent considered this to be important in order to provide a professional appearance in the Salon.

19. The respondent decided and maintained a price list for the hair styling and other services which the Salon offered. The claimant had to tell the respondent what she had done by way of hair dressing for a client so that the respondent could then charge the prices which were set by the respondent for the claimant's work. From time to time, the respondent offered clients and customers a discount(s), the amount and nature of which was decided by the respondent. This affected how much money the

claimant was paid but the claimant and all other stylists had no say in the application of any discount.

20. In practice, the claimant worked on clients which were said to be her clients and also on others. She received only a third of the money that was charged for her work, and the respondent retained two thirds for its operations and overheads.

21. In reality, the claimant was not able to send a substitute of her own choosing and so she never did so. Any substitute would in any event have had to have been suitably qualitied and experienced, to the respondent's standards. When the claimant had time off, her absences were covered by the other hair stylists who worked at the Salon and they were paid directly by the respondent and not via the claimant in contradiction of clause 2.6. and more in accordance with clause 10, to the effect that if the claimant did not do the work personally, she would not be paid. In addition, the claimant could not book out and go and work somewhere else because as the respondent's witness, Mr Kirkham, candidly said, that would be "a conflict".

22. The restrictive covenants sought to control the claimant's activities after the relationship between the parties had ended and for a further 12 months thereafter, and that was because the respondent sought to protect its clients and customers from being poached by the claimant.

The Law

23. The relevant law on what constitutes an employee, a contract of employment and a worker is found in the Employment Rights Act 1996, the Working Time Regulations 1998 and the Equality Act 2010.

Employee status

24. The Employment Rights Act 1996 section 230(1) defines an 'employee' as:

"*an individual who has entered into or works under … a contract of employment*".

25. Section 230(2) of the Employment Rights Act 1996 provides that a 'contract of employment' means:

"*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing"*.

26. In the Equality Act 2010, a definition of 'employment' is found in section 83(2) as:

"Employment means:

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

Worker status

27. The Employment Rights Act 1996 Section 233(3) provides:

"*A worker is defined as an individual who has entered into or works under either a contract of employment or, 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 professional business undertaking carried out by the individual.*"

28. Regulation 2(1) of the Working Time Regulations 1998 has the same definition of a worker as found in the Employment Rights Act 1996 above.

29. The definition of a worker can therefore be broken down into 3 elements:

29.1 there must be a contract;

29.2 there must be a requirement to carry out personal services; and

29.3 the work done must be for another party to the contract who is not a client or customer of the individual's profession or business undertaking.

30. In O'Kelly & others v Trusthouse Forte plc [1983] ICR 728 CA Sir John Donaldson confirmed that, in approaching the question of whether a claimant was an employee and also the question of whether a claimant is a worker in the alternative, a Tribunal must "*consider all aspects of the relationship, no single factor being in itself decisive and each of which may vary in weight and direction, and having given such balance to the factors as seems appropriate, to determine whether the person was carrying on business on his own account*".

31. The Tribunal must therefore consider all relevant factors in the relationship between the parties, including the degree of control exercised by the respondent over the claimant (for example: whether the claimant was under a duty to obey orders; who had control over working hours; supervision; the mode of working; and who provided any equipment). However, the Tribunal should take note of the fact that many employees, by virtue of their skill and expertise, may be subject to very little control. The Tribunal must also take account of organisational matters, such as the degree to which an individual is integrated into the employer's organisation, whether there is an existing disciplinary procedure which is applicable to the individual and whether the individual is included in any schemes such as for occupational benefits. The Tribunal must also have regard to the economic reality of the relationship between the parties and whether the claimant can be said to be in business on her own account or whether she worked for another who takes the ultimate risk of loss or profit.

32. Other factors to be considered by the Tribunal include: whether there was a requirement for personal performance or whether the claimant could send a substitute or sub-contract the work; whether there was mutuality of obligation between the parties such as an obligation on the employer to provide work and on the employee to do it; and the Tribunal must also consider whether there were any other factors consistent with the existence of an employment relationship.

33. In Autoclenz Ltd v Belcher [2011] UKSC 41, [2011] ICR 1157 the Supreme Court held that the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in fact represent what was agreed. The true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.

34. In the course of submissions, the Tribunal was referred to case law by Counsel for the respondent, as follows:

    Stringfellow Restaurants Ltd v Quashie [2012] EWCA Civ 1735
    Cotswold developments Construction Limited v Williams UKEAT/0457/05

    The Tribunal took these cases as guidance but not in substitution for the statutory provisions.

Conclusion (including where appropriate any additional findings of fact)

35. The Tribunal has applied its relevant findings of fact and the applicable law to determine the preliminary issue in the following way.

36. The Tribunal considered the provisions of the contract which the respondent gave to the claimant upon completion of her apprenticeship and also took into account the evidence of the factual circumstances in which the claimant performed work for the respondent. The nature of the relationship between the parties in this case does not depend solely on the written contract and, as Counsel for the respondent accepted in his submissions, the contract is not the best guide to the relationship between the parties in this case. From the evidence before it, the Tribunal considered that the document entitled "Independent contract for services" simply does not reflect the working arrangements which the respondent in fact required the claimant to adhere to and the obligations and restrictions placed upon the claimant by the respondent.

37. It was apparent to the Tribunal that the claimant's day-to-day work and working arrangements were controlled by Ms Clark, the manager of the respondent's Salon. Ms Clark was not called by the respondent to give evidence today and the respondent's witnesses have been unable to rebut the claimant's evidence on a number of important matters. In those circumstances, the Tribunal accepted the claimant's evidence on the day-to-day working relationship, which was largely unchallenged.

38. The Tribunal considered that there was mutuality of obligation. The contract provides, at clause 2.1, that the claimant shall render to any clients who visit the Salon services as a hairdresser and at clause 2.4 it says that the claimant shall during periods spent at the Salon attend to the requirements of any clients who may use her hairdressing services. There was no evidence that the claimant could pick and choose to whom she would provide hair dressing services or when, nor could she only deal with certain clients. Bookings were handled by the respondent and the claimant was given a list of appointments that she was expected to undertake.

39. The Tribunal considered that, on a balance of probabilities, if the claimant had become choosy about whose hair she styled or which bookings she would undertake, the arrangements between the parties would have been terminated, by the respondent pretty swiftly. The claimant was obliged to work on any clients booked for her and the respondent then was obliged to pay her for the work done.

40. In addition, the respondent determined the claimant's hours of work, being when the Salon was open and, if the claimant wanted time off, she had to book such and give the respondent notice. Permission to take time off did depend (to an extent) on the availability of others to cover the work of the Salon. The claimant's hours were recorded by the respondent. There were set hours when the Salon was open and an expectation by the respondent that the claimant would undertake a certain level of attendance otherwise bookings would not be fulfilled and the respondent's records include totalling up the hours the claimant spent away from the business and the Tribunal concluded that the respondent monitored the claimant's working time for purposes of its own. The documents before the Tribunal included the respondent's records of the claimant's hours and these included a record of whether she was late or she finished early and also her holidays. The Tribunal considered that a truly self-employed individual, using the respondent's Salon for their own business purposes, would not expect that to be done.

41. The evidence of the witnesses was that, in any period of a day when there were no bookings to attend to, the claimant was able to go out. However, the claimant could not come and go as she pleased. When the claimant went out, she had to tell the respondent's manager what she was doing. The Tribunal found that if the claimant wanted to go out during the working day, and there were no bookings, the claimant was required to take her phone with her and keep it on. This was in case a client came to the Salon without a booked appointment, whereupon the respondent would telephone the claimant who would be expected to return to deal with the client.

42. Likewise, the Tribunal found from the evidence that the claimant could not just book out from or leave the Salon and go to work somewhere else during the working day because, as Mr Kirkham candidly said in cross examination, "that would be a conflict" and so would not be allowed.

43. The Tribunal concluded that this was not a case of the respondent permitting the claimant to use its Salon and/or facilities to operate a

business on her own account. The respondent exercised a significant degree of control over everything the claimant did during the Salon's opening hours. The claimant was required to provide personal service: she had served an apprenticeship and had been trained in the respondent's ways of working, and she had to perform the work personally in the manner in which she had been trained. The claimant had to dress in black. She had to attend between 8.45am and 6.00pm (Thursdays 10.00am to 8.00pm). She had to charge the prices set by the respondent, apply the discounts decided by the respondent, work on clients at the respondent's direction/booking.

44. At clause 2.8, the contract provides that the claimant shall ensure all customers at the end of the hairdressing are taken to the reception, and the Maitre d' shall be informed of the charges due from the customer. In practice, the Tribunal found from the evidence that this amounted to the claimant telling the manager what she had done by way of hairdressing and then the charges which were applied were those determined by the respondent. There was no scope for the claimant to decide how much to charge or what for and her work was also subject to whatever discount the respondent decided from time to time.

45. As to the economics of the relationship, the claimant received only a third of the money that was charged for her work. The respondent retained two thirds of the money for its operations and overheads. Although clause 2.15 provides that the claimant is to have personal liability for any loss, that was contradicted by the evidence given to the Tribunal. The respondent was obliged to and did pay the claimant the balance of its charges, after the two thirds deduction, for her work. This was not affected by whether the work done made a profit or a loss. There was no negotiation over the two thirds deduction, as there was no negotiation over the charges for hair styling and the discounts. The respondent took all the economic decisions and bore the risk of profit and loss.

46. Whilst in theory the claimant could provide a substitute (clause 2.6), the Tribunal considered that clause 10 of the contract works to negate that. In practice the claimant was required to do the work personally. She was not able to and did not ever send a substitute of her own choosing. The Tribunal considered that any substitute as might have been introduced by the claimant would have had to have been suitably qualitied and experienced, to the respondent's liking. In practice, the issue of substitution never arose. Absences including holidays were covered by other hair stylists at the Salon, under bookings made by the respondent and at its direction - the decision as to who did that work would be made by the respondent. Those stylists were paid directly and not via the claimant, as might be expected if there was in fact an arrangement for substitution arrangement. The claimant only got paid for the work that she did. Clause 10 suggests, as confirmed by the evidence of Mr Kirkham, provides in effect that the stylist who covered the claimant's absence (being another stylist in the Salon) would have received payment for the work done, and therefore must have had some sort of contractual, financial or legal relationship with the respondent, in contradiction of clause 2.6.

47. The Tribunal considered that the clients which the claimant attended upon were not in any sense the property of the claimant - the respondent maintained a database and controlled the information available on clients, even when the Salon closed down – the reality was that the clients were not in any way the claimant's; otherwise, and if the claimant had been operating her own business, self-employed, it would be reasonable to expect that she would have been given a list of "her" clients list upon closure of the Salon, but she was refused any such information from the respondent. There is no suggestion in the contract that the "clients" referred to belonged to the claimant at any time and the data on clients was not available to the claimant. The Tribunal accepted the claimant's evidence, largely unchallenged, that she was not given a list of the clients when the Salon closed and she did not have access to client information.

48. Further, the Tribunal considered that the degree of control exercised by the respondent was to be extended beyond the end of the working relationship and for a period of 12 months after the claimant had left the Salon. The "restrictive covenants", in section 12 of the written contract, sought to control the claimant's activities for that period and for a defined geographical area, and there is reference within section 12 of the contract to clients of the respondent. The Tribunal considered that the fact that the restrictive covenants make reference to the respondent's clients indicates how the respondent saw the clients of the Salon, as its property, especially when there was a parting of ways and when that happened, the claimant was not given any client information to take away. If the claimant had been in business on her own account, the clients would arguably be hers and the restrictions would be unnecessary. Restrictive covenants are a feature of employment contracts and, although not conclusive of employment status, the Tribunal considered that the inclusion of such covenants in the contract in this case conflicted with the respondent's evidence that the clients were the claimant's clients or of other hair stylists. The Tribunal considered that section 12, as worded, is consistent with an employment contract and reads as if it has come from such, and is designed to protect the clients which are effectively defined as being the respondent's property.

49. In light of all the above matters, the Tribunal concluded that the respondent exercised a significant degree of control over the claimant and her work. It controlled the working hours and days, holidays – all subject to notice for time off, the prices charged, the products used and even the insurance was arranged via the respondent (in contradiction of clause 2.15), on the claimant's evidence as to insurance, which again was unchallenged. On products, there was evidence that the claimant could buy her own "crazy colours" for specialist applications but even then, the arrangement for billing of such was to the respondent's benefit as it deducted two thirds from all charges made. The client lists were entirely the respondent's, maintained by the respondent and in fact accessible only to the respondent's manager and access to client information was tightly controlled. The Tribunal considered that is was a fallacy for the respondent to suggest otherwise.

50. In all the circumstances, the Tribunal concluded that the relationship between the parties was that the claimant was an employee of the

respondent. The tests of employee status are clearly made out. The written contract does not reflect the reality of the working arrangements in practice, save in respect of the requirement for the claimant to keep her own accounts and attend to taxation, about which the claimant had no choice.

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Employment Judge Batten
Date: 18 June 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON:

16 July 2020

FOR THE TRIBUNAL OFFICE