**Case Number: 2302552/2019**

# EMPLOYMENT TRIBUNALS

| **Claimant** | **Respondent** |
|---|---|
| **v** | |
| **Miss G Cummins** | **Tracy Robins (Sociable Canines)** |

# PRELIMINARY HEARING

**Via CVP**

**Heard at:** **London South Employment Tribunal by CVP**

**On:** **1-2 October 2020**

**Before:** **EJ Webster**

**Appearances**
**For the Claimant:** **Mr A Korn (Counsel)**
**For the Respondent:** **Mr A Johnston (Counsel)**

# RESERVED JUDGMENT

1. The Claimant was not an employee of the Respondent within the meaning of section 230(1) of the Employment Rights Act 1996 ("ERA").
2. The Claimant was not a worker of the Respondent within the meaning of section 230(3) of the ERA.
3. The claimant did not undertake employment within the extended definition contained within section 83(2)(a) of the Equality Act ("EqA").

# REASONS

## The Hearing

4. The hearing was held via CVP. The respondent had provided digital copies of the main bundle to the Tribunal and the witnesses. I was also provided with a small supplementary bundle that was created by the claimant.

5. Although I was provided with 11 witness statements, (2 for the claimant and the remainder on behalf of the respondent), only 5 of the respondent witnesses were available to provide evidence to the tribunal. I have therefore attached less weight to the remaining witness statements as they could not be challenged by the claimant.

Issues

6. The issues had been agreed with EJ Wright at an earlier preliminary hearing.

   The issues which fall to be determined are:

   (i) whether the Claimant was an employee of the Respondent within the meaning of *section 230(1)* of the *Employment Rights Act 1996* (*"ERA"*);

   (ii) whether the Claimant was a worker of the Respondent within the meaning of *section 230(3)* of the *ERA* (and, in particular, whether she was a limb (b) worker within the meaning of *section 230(3)(b)*);

   (iii) whether the Claimant undertook employment within the extended definition contained within *section 83(2)(a)* of the *Equality Act* (*"EqA"*).

Relevant Law

7. *Section 230(1)-(3)* of the *Employment Rights Act 1996* (*"ERA"*) provide:

   *(1) In this Act "employee" means an individual who has entered into or works under (or,, where the employment has ended, 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 ended, 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.*

8. *Section 83(1)* and *(2)(a)* of the *Equality Act 2010* provides:

*(1) This section applies for the purposes of this Part.*

*(2) "Employment" means –*

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

9. The law and cases I was taken to were not in significant dispute between the parties. The claimant has pleaded that she is an employee or, in the alternative that she is a worker.

10. The starting point for determining whether someone is an employee is the decision of *Ready Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968] 2 QB 497*.

This case determined that the key tests for the existence of a contract of service (i.e. being an employee) were that:

- An agreement exists to provide the servant's own work or skill in the performance of service for the master ("**personal service**") in return for a wage or remuneration.
- In the performance of that service, the master has a sufficient degree of control over the servant ("**control**").
- The other provisions are consistent with a contract of service ("**other factors**").

11. These factors are now commonly referred to as "the irreducible minimum". That concept was first introduced in *Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612*, and subsequently endorsed by the House of Lords in *Carmichael*.

**12.** The Court of Appeal in *Carmichael v National Power Plc [1999] 1 WLR 2042* held that, in establishing the terms of agreement between the parties, the tribunal should be able to look outside the terms of the contract to the "overall factual matrix". That is particularly the case in a situation such as this case

where there is no written contract between the parties at all. The Supreme Court in *Autoclenz Ltd v Belcher and others [2011] IRLR 820 (SC)*, which confirmed that the question in every case is, what was the true agreement between the parties?

13. The Court of Appeal in *Troutbeck SA v White & Anor [2013] EWCA Civ 1171*) confirmed that the tribunal was wrong to treat the absence of day-to-day control as the determinative factor as opposed to looking at the cumulative effect of all the provisions in the employment agreement and all the surrounding circumstances.

14. The Court of Appeal distilled the approach to determining if someone is a worker in paragraph 84 of its judgment in Pimlico Plumbers.

*"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."*

15. The Equality Act 2010 protects those who are in or applying for "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work" (*section 83(2),* This covers employees, workers and some individuals who are technically self-employed. However to be protected, a self-employed individual must show that the relevant contract places them under an obligation to perform the work personally (*Jivraj v Hashwani [2011] IRLR 827*).

16. *Halawi v WDFG UK Ltd (t/a World Duty Free) [2014] EWCA Civ 1387* found that subordination and personal service were key ingredients of an employment relationship under EU law (and therefore under *section 83(2)*, as it is derived from the *Equal Treatment Framework Directive (2000/78/EC)*). Subordination means more than a relationship of economic dependency; it means that the individual must be generally bound to act on the employer's instructions.

Facts

## Background

17. The claimant has brought claims for unfair dismissal, unauthorised deduction from wages and maternity discrimination. The respondent has denied all the claims maintaining that she is self-employed and does not have the relevant status to bring any of these claims.

18. There are a group of dog walkers who, at the relevant time, worked under the name of Sociable Canines. That name has since changed. Sociable Canines and its predecessor were set up by Tracy Robins and her then friend Louise Rawlinson. There was no written contract between the claimant and the respondent or Sociable Canines. The only written contract provided was made between Sociable Canines and the dog owners whose dogs were walked. This means that I have had to make a series of factual findings to determine the contractual relationship between the parties.

19. The respondent's case is that she set up a collective (my word not hers) of people who clubbed together to rent a large field where they could walk dogs that belonged to other people and were paid to do so. They were each paid by the owners of the dogs that they walked and were self-employed. The dog walkers utilising the field paid an amount of money per dog, per walk which was generally capped at a monthly total of £550. The money paid was used to pay the rent for the field and also pooled to pay for advertising and agreed improvements to the field. They operated under one name ('Sociable Canines') and were held out to customers as a team providing a certain level of service. The benefits of this arrangement to the walkers were various; a walker could walk as many dogs as they chose in the field (which is in contrast to most parks where there is a cap), there was an easy referral and cover network between the team members and there were supposed economies of scale when buying various products. However the respondent states that all its walkers are self-employed people who run their own businesses and that there was no attempt to control the claimant and how she worked, she could say 'no' to any work at any time and she could arrange a substitute to walk her dogs.

20. The claimant painted a different picture. She states that this collective was a business founded by the respondent and her then partner Louise Rawlinson. To make this business work various rules and procedures were imposed on the dog walkers that amounted to a significant level of control of the claimant's day to day work and that whilst she had previously understood herself to be self-employed she now believed that she was in fact an employee.

21. The claimant started working as a dog walker with Sociable Canines in around April 2012. She stopped on 28 January 2019. She asserts that she was expected to work 5 days per week, that she had to accept work that was given to her, that she was told what times to work and where to work and that whilst at work she was told how to perform her role. She states that she was expected to work in a certain way, with fixed pick up and drop off times, that she was disciplined if she did not work in the agreed manner and that she could not send a substitute without permission. She also states that she was paid for holidays and her maternity leave. Her position is that this factual situation, in the round,

created an employment relationship with the respondent and failing that, that she was a worker.

**The Field**

22. There were various factual disputes concerning the day to day functioning of the field. It was not in dispute that the respondent was in charge of the field in that she liaised with the landlord and paid them the rent. She also accepted that she was the person who most frequently asked people to tidy up after themselves and asked people to adhere to certain standards with respect to cleanliness and behaviour. She collected the money from the dog walkers and was responsible for keeping it and, I find, ultimately decided how it was spent. I accept the various respondent witnesses' evidence that stated that the respondent would talk to the various walkers about what needed doing to the field (e.g. fencing and waste collection). She would gather opinions and then organise the work that needed doing. However I also find that the final call lay with her as the official lessee of the field and the person who had control over the money.

23. There was no paperwork before me regarding the money that the respondent collected. There is no bank account nor do any of the dog walkers get receipts for the money they paid the respondent. The only evidence I was provided with about the money was verbal. I find that the lack of any paperwork suggests a casual relationship between the walkers and the respondent.

24. The financial aspects of the set up are important though I was provided with little evidence on this point. The claimant asserted strongly that Sociable Canines was a business run by the respondent. However I was not provided with any evidence that the respondent benefitted financially from the arrangements. The respondent clearly earned money from the dogs she walked. However I have been provided with no evidence to suggest that the respondent benefitted financially from the dogs walked by the other dog walkers.

25. The respondent benefitted from the group effort in the same way others did (see below for cover arrangements) and, after an initial period, she herself did not pay a fee per dog walk to use the field which meant that all the money paid to her by her dog owners was hers to keep. She did not contribute to the field rent. In effect, the return for the respondent 'running' the field was that she did not pay any fees towards it.

26. The other walkers generally paid a fee of £4 per dog per walk. Those fees were generally capped at a monthly amount of £550. I found it odd that the cash was just kept by the respondent and that there was no bank account or similar. However the majority of the dog walkers were also paid in cash by the dog owners and that for the relevant period the whole operation was largely cash based. That cash was then used to pay the field rent and any surplus was used to improve the field – examples given of how it was spent were fencing, gates, waste removal and paying for a Christmas party. The fact that it was capped again suggests that there was no aim by the respondent to earn a profit from the organisation.

27. I asked the other respondent witnesses whether they had ever seen evidence of how the funds were used but they said that they simply took it on trust. On occasion other long-term walkers (e.g. Ms Lake) had paid the landlord of the field directly which implies that they knew how much the rent was and did not feel 'ripped off' by the respondent. To call the operation the respondent's business therefore seems to be stretching it a little as the respondent herself did not financially benefit to any hugely greater extent than the other dog walkers.

**The structure of Sociable Canines**

28. The phrase 'umbrella organisation' was contentious during the hearing as the claimant asserted that she had never heard that term used before. Whilst I accept her evidence on this, it is still a useful term to describe the structure of Sociable Canines.

29. I accept that as the founders, the claimant and at some point Louise Rawlinson, were considered the people who 'ran' Sociable Canines. I accept the claimant's evidence and that of the other dog walkers I heard from, that the respondent ran the field and felt strongly on occasion that things ought to be done in a certain way. This was evidenced by the WhatsApp messages I was taken to and the respondent's own acceptance in evidence that she felt responsible for the field and wanted to work in a certain way. It is also clear that she took on a lot of the co-ordination for the group such as coordinating cover for people when needed, and sending out messages about new referrals.

30. The respondent accepted in evidence that she arranged any work that needed doing to the field, arranged the insurance for the group, paid vets bills when dogs were injured and in general took responsibility for all administrative aspects that arose. I conclude that to all intents and purposes she effectively organised any collective aspect of what the group did. That did not mean that everyone was bound by all aspects of what she organised and I deal with those issues further – however I believe it is clear that she ran what was known as Sociable Canines.

31. I do not accept that Ms Lake and Ms Oakley were supervisors though. I accept that they had been working with the respondent for the longest and were asked to take on the responsibility of paying the rent when the respondent was away. I also accept that the amount that they had to pay towards the field rent was reduced over time to reflect how long they had been there. However I was provided with no other evidence to suggest that they formed part of a management structure or that there was a hierarchy at Sociable Canines. I was taken to no evidence to suggest that these two made any management decisions and more importantly that they ever told the claimant how to work or had any control over her.

32. The only evidence to suggest that they were 'senior' to the claimant was the picture on the leaflet where they featured higher up the page. This was explained as being organized according to the length of time they had worked with the organisation which I accept as it appears to reflect the reality of the situation. The other evidence provided was an email from Ms Lake about cover

arrangements. I find that this email and the attached spreadsheet was clearly an email about cover arrangements she had put in place for her own dogs when she went on leave. Several people's names were on the cover arrangements including Ms Robins.

**The service and customers**

33. The general timings for pick up and drop offs of the dogs and the services generally were advertised in such a way that the customer felt that they were dealing with an organisation not just an individual dog walker.

34. Once they agreed to use Sociable Canines, all dog owners had to sign a contract with Sociable Canines. That contract set out the service to be provided and that payment must be made directly to the dog walker who walked the dog. It was agreed by the parties at the hearing, that a dog became the responsibility of one dog walker and from then on 'belonged' from a business point of view, to that dog walker. Payments for the dog walks were made directly to the individual dog walker. This only changed when someone was on leave which I deal with below.

35. Ms Bryant gave evidence that she had been paid by Louise Rawlinson and was not paid directly by dog owners. In general, Ms Byrant's evidence was not particularly helpful for me in determining the claimant's status as she had a separate and different arrangement directly with Ms Rawlinson. Ms Bryant started by working directly for Ms Rawlinson and initially walked the dogs that Ms Rawlinson had previously been responsible for walking. Ms Rawlinson was stepping back from dog walking because she had founded a café. Ms Bryant was therefore paid directly by Ms Rawlinson for those dogs. This is very different from the claimant who always had her own set of dogs for whom she was responsible. Therefore Ms Bryant's evidence regarding her own working arrangements were not helpful to me as they were evidently very different from the claimant's.

36. The customers came to the organisation in various ways. They would either come through word of mouth directly to a dog walker, or they might come to the respondent through a referral from Louise Rawlinson who, at the relevant time, ran a dog walking café and advertised the services of Sociable Canines. However the customers came, in they would generally be distributed according to geographical 'patches'. The claimant stated that this meant that if a dog came from her geographical area she had no choice but to accept the dog and take it on. I do not find that plausible. I accept that dogs were generally shared out between the group along geographical lines because it made drop offs and pick ups more efficient but I do not accept that they were imposed.

37. The WhatsApp evidence I was taken to did not reflect the tone that the claimant suggested it did. Pg 505 sets out an exchange where the claimant takes exception to a message from Ms Rawlinson that was about what time people left the field in the afternoons. The claimant sets out why she does not want to take dogs from Twickenham because it adds to her journey time. She clearly feels that the approach being taken by the respondent and Ms Rawlinson is unfair and that the pressure to do more work did not fit in with the work/life balance she needed. The response from the Respondent is that she does not

need to take the dogs from Twickenham and that she will try to find other dogs that do fit into the area that the claimant is happy to pick up from. The claimant's response on p506 is to set out the areas she is happy to cover. There is no mandate from the respondent that she must take the dogs in Twickenham.

38. Other than the claimant and Ms Bryant's evidence, all the witnesses said that they could accept dogs or not. I accept that the respondent wanted to be able to say yes because it kept the Sociable Canines brand 'alive' and led to more referrals. However, the evidence given by the witnesses confirmed that there were dog walkers who only worked certain days a week, or who only walked small numbers of dogs. They must therefore have said no to the referral of dogs who did not fit their personal working pattern. As stated above the claimant is clearly saying no on p505 and p506. There must also have been a point where the individual dog walkers could not physically have accepted more dogs due to their van capacity or ability to control the dogs. They must therefore have been able to say no. Further I was provided with no evidence that there was any tangible benefit to the respondent for the dog walkers to take on more dogs unless she took them on personally. The benefit to the respondent was as to the other dog walkers – it kept the brand alive in the area and led to a better pipeline of work.

39. The leaflets and written contract with the customers set out the timing window for pick-ups and drop-offs and stated that the organisation provided a 5 days per week service. These timing and service parameters meant that there was a certain level of service that the dog walkers working under the Sociable Canines umbrella were expected to provide. This was not in dispute. The claimant's case is that this therefore meant that there was a level of control by the respondent over her work because the respondent ran Sociable Canines. I accept that the parameters of service that were expected of dog walkers who worked under the Sociable Canines 'umbrella' were used by the respondent to remind other dog walkers, including the claimant, of the level of service that they were expected to provide and that this took the form of verbal comments and WhatsApp messages if they were not working to these times.

40. Once someone took on a dog I accept that Social Canines offered a 5 days per week service and that the dogs would be out of the house for a usual period of time. However I also accept that the agreement was ultimately between the dog walker and the customer. I heard evidence that some dogs were only signed up for a few days a week. The claimant herself states that the dog owners only booked in their required walks a week or so in advance and they did so directly with her - which meant that there was clearly a degree of flexibility on how many dogs were walked when. The claimant was in a position where provision of work came from the dog owners directly, not from the respondent.

41. I also heard that the dog walkers would make agreements with others to walk dogs who required a 5 day a week service if they did not want to provide that level of service. For example Ms Lake did not work Fridays for some time. She asked different people to walk her dogs on her 'off' day. Different people walked her dogs depending on their availability and location. She would then pay them directly out of the money that she collected from the owners.

42. The advertised rate paid by dog owners per day was agreed by the group. I accept that the respondent may have led on this discussion as she led on the field but I also accept that she would have discussed it with the other walkers before making the final decision. I also accept from the respondent's witnesses that they frequently deviated from this rate with customers as and when they wanted to. I heard evidence that some dogs were walked for free because the owner couldn't afford it. Or rates were reduced when dogs were not walked for as long as the full rate applied to. I accept that these changes were not agreed with the respondent in advance.

43. The claimant's evidence to support that the respondent controlled her rates included her statement that she was told to reduce rates where she had brought dogs back early or where she had provided dog boarding. I do not accept from the evidence I was provided that the respondent was telling the claimant what she had to charge. The claimant had clearly asked her what rate she would charge if it was her and the respondent answered. This is very different from a mandate to offer reductions or pay a certain amount.

44. I accept that the respondent often took it upon herself to tell the claimant what she would do in the circumstances. I think that the respondent has strong views about how people ought to work and she was not shy in giving her opinions. The respondent witnesses confirmed as much in their verbal evidence. However frequently voicing her opinion to the claimant is very different from exerting actual control. Given the sheer number of dogs and walkers, the fact that payment was direct to the dog walkers from the owners and that the amount provided by the claimant per dog walk in the field remained the same, it is not plausible that the respondent would seek to control the claimant's decision to offer any reductions. She had nothing to gain from that and it seems that it would be impossible to police in any event.

45. It was not in dispute that the claimant was asked to keep a sheet of how many dogs she walked at the field each week so that the amount she contributed to the field funds was correctly calculated. However this is different from the respondent mandating that the claimant charge particular amounts for particular dogs. The respondent would have no way of checking that this occurred beyond the claimant voluntarily telling her.

**Hours and methods of work**

46. The claimant also stated that she had to work certain hours. It was agreed that generally the dogs and their walkers were at the field together and that they all tried to get there at approximately the same time. It was also agreed that the service advertised to the customers was that the dogs were out for a certain period of time (normally 3-4 hours) before being dropped back home.

47. The reason given by the respondent for the arrival times was that it was safer to have all the vans through the gates before the dogs were let out. The same applied if they could all leave at around the same time.

48. The claimant stated that there was a large amount of pressure to be there at the same time and that she was disciplined if she did not attend at the correct times. She relied on a WhatsApp conversation as showing that the respondent

was angry with the claimant for getting to the field early one day. She says that after that exchange she was told that she needed to take on more dogs and she was told off by the respondent in the field that day. The respondent conceded that this had occurred and that she did prefer people to get there at the same time and that on this occasion she had been frustrated and angered by the claimant's request for coffee. I was taken to several places where the respondent was expressing anger or frustration in WhatsApp messages over how others were behaving or not pulling their weight. She was organizing systems and cover and clean ups and others were not necessarily sticking to those arrangements.

49. I find that it was generally preferred practice, led by the respondent, that the walkers attended the field around the same times. I accept that this was partly due to safety. I was also taken to a separate WhatsApp conversation where Louise Rawlinson criticised walkers for having mostly left early one day. This reinforces that it was generally expected that the dogs were walked for the agreed 3-4 hours per day.

50. However it is also confirms that people often left earlier and there were no repercussions from the respondent for doing so. The dog owners may have been unhappy that their pets were returned earlier than expected but it was not something that the respondent enforced or was really able to enforce.

51. Both the above examples reinforce, that beyond sending an angry text message, there was little repercussion for the walkers if the rules were not adhered to and that they were not always stuck to. The claimant was not given any type of 'formal' warning for her time keeping and I was provided with no evidence of anyone who had been or who had been told they could not continue working with Sociable Canines because of their time keeping. I do not accept the claimant's evidence that she feared disciplinary action for any of her misdemeanours. None of the 'telling offs' were reinforced by any actual action that could have resulted in the claimant losing her work.

52. Once at the field, I was provided with no evidence that suggested that the claimant was told how to do her job. It was accepted by the respondent that she was often approached by other walkers for advice and that she gave the claimant advice. I do not accept that the claimant was told how and where to perform her job nor that she was subjected to disciplinary action or

53. It was suggested that walkers were told which parts of the field to use, how long to keep their dogs in the vans and whether their dogs ought to wear muzzles or be kept on leads.

54. I accept that at times it was necessary for people to keep their dogs apart due to safety amongst the animals and that some animals would need to be controlled in a certain way to preserve the safety of others. I accept that on occasion the claimant was asked to control certain dogs by the respondent.

55. The claimant was not subjected to performance reviews or disciplinary action. At most, the claimant was reminded of the rules that were in place at the field. The respondent accepts that there were occasions when she may have told the claimant off when frustrated. However there was no threat to the claimant's work or ability to work and no formal action was taken. She also accepts that she would give people the

benefit of her experience when asked.

**Cover arrangements and pay**

56. When another dog walker agreed to walk a dog 'belonging' to someone else under Sociable Canines' umbrella, they were paid directly by the walker who normally walked the dog. At the time that the claimant worked with the respondent, it was agreed that anyone covering someone else's dog would get half the fee paid by the owner. The rest of the money remained with the walker primarily responsible for the dog. This applied if the cover was given on a regular basis (e.g. covering someone's dogs every Friday) or if they were unwell or for up to 4 weeks' holiday. It did not apply if someone just decided not to walk their dogs one day. On those occasions it was unlikely that cover would be provided and therefore there would be no pay to split.

57. It was agreed that the respondent never paid the claimant or any of the dog walkers unless they were covering her dogs. On those occasions she paid them the agreed share of her fee.

58. At the time that the claimant was working, the group had an agreement in place that when someone took leave, they would all cover each other for up to 4 weeks a year. This meant that everyone continued to get paid something during those 4 weeks' leave. It was a reciprocal arrangement that people agreed to though I find that it was the expected norm as opposed to a truly voluntary arrangement.

59. The claimant asserted that this meant that she could not take holiday without approval and that it sometimes meant she could not take leave when she wanted to. She said that it also meant she was not allowed to take any additional leave beyond the 4 weeks per year. The respondent stated that the arrangement was to try and help each other out. That if cover could not be provided within the group then the individual could still take leave it just meant that they would not be guaranteed cover by someone else in the team and they would therefore not necessarily paid.

60. I conclude that if the claimant wanted to get paid during any period of leave she had to go on leave at a time when cover could be arranged for her dogs. However there was nothing to stop her personally arranging for her dogs to either be cancelled for a period of time, or pay someone else to walk the dogs for any period of time that she wanted off at a rate to be agreed with them.

61. This type of arrangement clearly existed with, for example, Louise Rawlinson asking Ms Bryant to exclusively walk her dogs and keep the service going for her. That arrangement appeared to be long term whilst Ms Rawlinson set up a separate café business.

62. I also heard from the respondent witnesses that they entered into different arrangements with people to cover their dogs. Sometimes they paid full them the full rate if someone regularly walked their dogs because they worked part time.

63. The claimant also stated that she had organized Ms Bryant to cover her first

period of maternity leave. She therefore expected to and did, organise cover, as and when she needed it.

64. The WhatsApp evidence I was taken to where Ms Lake was arranging leave and sending spreadsheets clearly referred to a period when she herself was going to be away and recording the cover arrangements for the dogs on the various days. I was not persuaded that this showed that the respondent organized how people could take leave and obliged people to do handover notes. This was one dog walker documenting who was looking after her dogs and when.

65. I accept that there was pressure to reciprocate and look after other people's dogs when they went on leave and to co-ordinate that leave if possible. The WhatsApp message where the respondent is clearly exasperated at trying to co-ordinate the effort supports this. She threatens to abolish the cover arrangements but is not, as asserted by the claimant, threatening to withdraw people's holidays. She is threatening to stop coordinating cover for others. That is a different matter altogether.

66. I accept that the respondent often took on responsibility for providing cover or asking people to help out. Her role within Sociable Canines was clearly that of organiser and she saw it as her role that she was responsible for the co-ordination of all matters that required joint working be that the field or cover arrangements. I find that this would have entailed her asking others to help cover for people who were taking leave.

67. However there were no prescribed systems in place, I was taken to no evidence of the claimant being told she could not take leave and I was not provided with any evidence that she was forced to cover for other people however I accept she was certainly asked to do so and that there was a general level of expectation within the group that they would cover each other if at all possible That expectation was largely created by the respondent.

68. On occasions where the claimant covered other people she would be paid the 'cover' fee for each dog walk she did. That payment would come directly from the person she was covering not from the respondent. Similarly when others agreed to cover her dogs, she paid them directly, not via the respondent.

**Substitutes**

69. The claimant stated that she was not allowed to send a substitute of her choosing. I do not accept her evidence on this point. It was clear that some of the witnesses who gave evidence to me, had become dog walkers through covering friends' or acquaintances' dogs during a period of leave and decided that they liked the work and wanted to continue it. Equally people they had asked to cover their dogs (for example during their maternity leave) had gone on to then become dog walkers themselves. Whilst the respondent said that she would like to be introduced to the individuals so that she recognized them when they used the field, she did not mind who walked the dogs.

70. I was provided with no evidence that challenged this. The claimant's and Ms Bryant's evidence on this point was non-specific save for the issue around the claimant's second maternity leave. They did not provide me with any examples

of them trying to arrange a substitute that they were refused whereas the respondent witnesses clearly gave evidence that they had arranged substitutes as and when they chose to do so. Whilst they normally did use someone from within the team, this was out of ease, and so that they could get paid.

71. When the claimant took maternity leave on the first occasion she organised who would cover her dogs and returned and took them back. On the second occasion she had originally organized for Ms Bryant to cover her. However, this fell through when Ms Bryant fell out with Ms Rawlinson. There was clearly an unpleasant physical rgument that did not involve either party to these proceedings which meant that Ms Bryant stopped working with Ms Rawlinson and Sociable Canines. Ms Bryant and the claimant state that she was dismissed. This is not a point I can determine as I have not heard sufficient evidence on it – however it is clear that it was not possible for Ms Bryant to provide the cover for the claimant's maternity leave.

72. At this point the respondent offered to arrange cover for the claimant because there was no sufficient time for the claimant to find someone else. I accept that the claimant had little choice at this stage because she was about to go on leave and did not have time to organise someone else. However I do not accept that the respondent would have refused her had she organised someone else to cover for her in the short time available. She had organised her previous leave and the other respondent witnesses who had taken maternity leave gave me clear evidence that they had arranged their cover themselves including bringing in friends from outside the existing group.

**73.** On her return the claimant claims that she was refused part time working and that this meant it was impossible for her to return. The evidence she relied upon shows that she wanted cover for Fridays but that the respondent says that there were not enough people around to provide cover for her dogs on Fridays. This is different from the respondent saying that the claimant could not work part time, she was simply reflecting the fact that it was the claimant's responsibility to organise how her dogs were walked and there were not sufficient people that the respondent knew of to cover them. Instead of suggesting control by the respondent I find that this confirms the opposite – it confirms that the claimant had a group of dogs that she was responsible for walking, that Mr Robins was giving her back and that she needed to resume responsibility for.

**Equipment**

74. It was not contested that there were T-shirts with a logo on that walkers could buy but that they were not forced to wear. Several witnesses said that they only wore them occasionally or for the team photo. It was also not contested that some people could get their vans branded but that there was no mandate to do so. I therefore conclude that there was no compulsory branding or uniform for dog walkers.

75. The claimant stated that she was compelled to buy various bits of equipment – leads, cooling mats for the van and dried chicken treats as gifts for her dog owners. I do not accept that she was compelled to buy either.

76. I find that the dog walkers had agreed, on recommendation from Louise Rawlinson, to buy certain cooling mats. It transpired that those mats were not

particularly good value and that they had not saved any money. However I was not taken to any evidence to suggest that this bit of equipment was compulsory. The claimant in evidence said that the leads were good for the role and that they were not easy to find elsewhere.

77. I was provided with no evidence that buying the dog treats was compulsory either. The other witnesses who were also dog walkers stated that they had not bought them in the past and chose to present their own gifts to their dog owners.

**General observations**

78. Overall, I find that the claimant has stated, throughout her witness statement and evidence to the tribunal, that anything that was done collectively was effectively done 'to' her. The claimant relied, throughout the hearing, that she did not know any better because this was her first proper job and she had not worked elsewhere. That may have been the case to a certain extent, but I do not accept that this means she felt she had to do exactly what the respondent told her to do and how. She worked with the respondent for a long time. She became experienced and confidant and clearly stood her ground when she disagreed with the respondent. She could see that the other dog walkers worked differently in terms of the days they worked, when they arrived and left the field and how many dogs they agreed to take on. She did object to taking on dogs from new areas and there were no repercussions. She left the field early when she wanted to do so and she arranged cover for her dogs if she needed to do so. She benefitted from the joint working arrangements that were in place such as use of the field, cover during leave, joint insurance and a referral system. The WhatsApp messages she relied upon did not usually have the meaning which she inferred them to have and on closer reading often expressly stated the opposite meaning that she has set out in her witness statement.

79. The respondent in contrast, has accepted that she ran the field and the administration (insurance etc.) and had certain standards that she expected to be adhered to by those working under the Sociable Canines umbrella. She accepted, as did her witnesses, that she took a key role in coordinating how they worked together.

Conclusions

80. Without a written contract, I have to determine the working status of the claimant based on what I have found to be the reality of the contractual working relationship between the parties. (*Carmichael v National Power Plc [1999] 1 WLR 2042* and *Autoclenz Ltd v Belcher and others [2011] IRLR 820 (SC) ).*

81. The claimant and the respondent both believed that the claimant was self-employed. The other dog walkers who I heard from who worked in a similar way to the claimant (i.e. not Ms Bryant who worked directly for Ms Rawlinson) also viewed themselves as self- employed. Whilst this is not necessarily determinative it is a starting point.

82. I find that almost all of the three aspects of the irreducible minimum of an employment relationship are lacking (Ready Mixed Concrete and Carmichael) .

83. There was no need for the claimant to provide a personal service to the respondent in return for a wage. The claimant was paid directly by the dog owners. She could refuse work offered by the respondent in respect of taking on a new dog and the dog owners were the people who asked her to work on a weekly basis. I accept that there may have been occasions when the claimant was strongly asked to cover other people's dogs when they were on leave – but this was so that she could benefit from reciprocal leave arrangements. Had she been unable to provide that cover for any reason I do not conclude that it would have affected her ability to continue walking the dogs she was responsible for. It was not a mandatory part of the contract.

84. The fact that the claimant could turn down work is key. In the case of *Mingeley* v Pennock & Ivory (trading as Amber Cars) [2004] EWCA Civ 328 a driver paid a weekly fee to the taxi firm in order for them to refer clients to him, which he could accept or decline. In this case the payment by the claimant of a fee to use a field and share in referrals through joint advertising did not create a mutuality of obligation.

85. There was a certain element of control over the way that the claimant worked. I accept that being part of Sociable Canines meant that there was a certain level of service (hours and pay rates) expected from the claimant by her dog owners. However, as with many franchise type arrangements, having an agreed style or quality of service, does not necessarily mean that the resulting relationship amounts to control sufficient to amount to an employment relationship.

86. The pressure to provide that level of service did originate with the respondent and was in place when the claimant joined the organisation. However had the claimant wished to deviate from this type of service she could have done so and in fact did so in various ways such as the hours that she worked and when she left the field. It is also clear that she also refused dogs that were referred to her by the respondent.

87. In addition other dog walkers also worked in this way and the claimant was fully aware of that. I was provided with several examples of people working fewer days than the 5 days per week advertised, working shorter hours (including the claimant herself who said she needed to for childcare purposes) and walking various numbers of dogs on different days in accordance with the requests of the dog owners.

88. The amount of control exerted over the claimant's hours and the rules that existed once she was in the field were significantly overstated by the claimant. I conclude that the hours at the field were guidance and that the claimant by her own evidence often left early and did not seek permission from the respondent to do so.

89. The fact that there were rules when using the field do not, in my view, amount to control equivalent to that under an employment contract. The rules appear equivalent to attending and using any premises that others share. Essentially

where dogs were either out of control or violent to other dogs, the dog walkers were asked to control them accordingly. Everyone was asked to look after the field so that it remained clean and usable. This does not, in my opinion amount to sufficient levels of control over the claimant's work or how she performed her role.

90. I do not accept that there was a hierarchy of managers within Sociable Canines though I do accept, as I go on to discuss below, that the respondent was in reality in charge of coordinating the majority of the shared services provided by Sociable Canines as a group. The respondent was in charge of the field and put herself forward to coordinate cover if needed and was in charge of all group matters such as insurance, vets visits, Christmas parties and advertising events.

91. Having a person who is the central point of call or coordinator does not however mean that the claimant either obliged to provide her services personally or under significant level of control from the respondent. The other provisions of the arrangement are not generally consistent with a contract of service either.

92. The claimant's tax status and the way in which she was paid reflect that. She was paid directly by the dog owners and never paid by the respondent.

93. The claimant did not have to wear a uniform nor did she have to buy or use specific equipment.

94. The only aspect that could suggest employment is that I accept that the dog walkers were held out to customers as a team and that cover was frequently organised between them giving the impression to the dog owners that they worked together and could provide a more reliable service. However I do not believe that this is sufficient to fulfil the tests set out in Ready Mixed Concrete.

95. Looking at the entire factual situation I therefore conclude that there is a complete absence of any aspect of the irreducible minimum required to create a contract of service and employment relationship because there was no mutuality of obligation. I therefore conclude that the claimant was not an employee for the purposes of s230 ERA 1996.

96. Turning then to whether the claimant is a worker. As stated by both parties, the starting point is the legislation.

S230 ERA 1996

*(4) 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 ended, worked under) –*

*(c) 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;*

97. The respondent's submissions state that their starting point is that the claimant was running her own business. Her business consisted of the dogs that she was responsible for. Her income derived almost entirely from that and she was responsible for everything regarding her own dogs. Relying upon the analysis in paragraph 66 of Pimlico Plumbers.

*"In the context of the legislation relevant to this appeal, a distinction is to be drawn between (1) persons employed under a contract of service; (2) persons who are self-employed, carrying on a profession or a business undertaking on their own account, and who enter into contracts with clients or customers to provide work or services for them; and (3) persons who are self-employed and provide their services as part of a profession or business undertaking carried on by someone else…"*

The respondent submitted:

*"It is only persons falling within category (3) above who are potentially limb (b) workers (and, in respect of whom, the Tribunal needs to go on to consider whether the relevant definition(s) is/are satisfied and, in particular, whether there was a requirement personally to do work).*

*The primary submission on behalf of the Respondent is that this is not a case in which the need for the Tribunal to analyse the question of whether the Claimant was personally required to do work actually arises. It is respectfully submitted that the Tribunal, on the evidence, ought properly to find that the Claimant fell within category (2) above. It is respectfully submitted that the reality is that the Claimant entered into contracts with clients (whom she herself referred to as "my clients") in order to provide services for them, namely walking their dogs. The Claimant, in effect, purports to assert that the clients entered into a contract not with her but with "Sociable Canines". However, it is respectfully submitted that this is to ignore what Sociable Canines actually is. Sociable Canines is not, as the Claimant has purported to assert, a specific individual; rather, Sociable Canines is the name under which a group of individuals (including the Claimant) operated their businesses. As such, it is respectfully submitted that a contract for services with Sociable Canines is, in reality, a contract for services with the individual dog walker. It is the Claimant, not anyone else, who had responsibility for all dealings with the client. It is the Claimant who was responsible for arranging cover in circumstances where she was not personally able to undertake the service that she had agreed with her clients.*

*It is respectfully submitted that, on a proper analysis, Sociable Canines comprises, as the Respondent and its witnesses have asserted, a group of self-employed individuals each of whom run their own individual businesses, but who are able to benefit from a number of advantages that come from their association with one another, including the ability to use a field which is rented by the Respondent (which they would not individually be able to afford to do), to benefit from group insurance and from group promotional activities. The association also enabled mutually convenient*

*arrangements to be reached in respect of the individual business owners providing cover for one another."*

98. I can see some force in this argument. I have found that the claimant and the other dog walkers were primarily responsible for the dogs that they took on and that they were paid directly by the dog owners. The dog owners did, in some respects, become their customers. I accept that the claimant was responsible for the majority of her relationship with the dog owners she took on. She was responsible for collecting the money and arranging cover even though there was a huge amount of support available within the organisation if was not able to do so. Although money was paid to the respondent for use of the field and joint issues such as insurance and advertising, the respondent made no money from the other dog walkers. That would suggest a stand-alone business operated by the claimant.

99. However the contract that the dog owners entered into was not with the individual dog walker, it was with Sociable Canines. The claimant then provided a service to the dog owners on behalf of Sociable Canines. From the dog owners' points of view they were working with a team of walkers, cover was usually closely coordinated within the group, insurance was arranged jointly, advertising was arranged jointly and referrals were largely dealt with centrally meant that if they had any concerns or something went wrong, they believed that they were dealing with a an organisation that was more than just an individual dog walker.

100. I conclude that the reality was that they were dealing with an organisation that was more than just the claimant. The way that centralised issues were dealt with almost exclusively by the respondent herself tends to support that construction. The respondent did deal with any insurance claims, any problems with the field, any vets bills or visits and, of course, her name was on the lease and she ran the field. The respondent undertook to divide up the referrals as they came in to the organisation and appears to have been the main point of contact (though I accept not the sole point of contact) for new business. She was also the main point of contact for the dog walkers themselves if they need assistance and to a large extent she had the final say over the guidelines that made up the service offered to customers e.g. timing of walks, pricing etc. The respondent has also changed the name of the organisation twice following reputational concerns. All this tends to show that there was a stand-alone organisation called Sociable Canines which, at the relevant time, the respondent effectively ran. It was this organisation that the claimant joined.

101. There are therefore aspects of the relationship that suggest that the claimant fitted into the definition of "*self-employed, carrying on a profession or a business undertaking on their own account, and who enter into contracts with clients or customers to provide work or services for them".* However, on balance, I think that she fits more accurately to within the third definition of a person "*who [is] self-employed and provide their services as part of a profession or business undertaking carried on by someone else"*. In reaching this conclusion I have considered Lord Langstaff in the case of Cotswold Developments Construction Ltd v Williams [2006] IRLR 181

"*…a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work of that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."*

102. There was an organisation called Sociable Canines that was essentially created and maintained by the respondent. The way that the organisation was marketed, the fact that the only written contracts that were entered into were between the dog owners and Sociable Canines and the various centralized aspects of how the organisation was run by the respondent (insurance, field rental, most referrals) means that on balance, the claimant was part of Sociable Canines' operations as opposed to in operation on her own.

103. I have therefore gone on to consider whether the claimant falls within the definition of a Limb B worker. Key to that analysis is whether the claimant was personally obliged to perform the service herself or whether she could genuinely send a substitute. I find that she clearly could send a substitute and she was not personally obliged to provide the service.

104. I accept that more often than not, the dog walkers within Sociable Canines arranged cover between themselves because it was easier and they knew how to use the field and often knew the dogs themselves. The respondent also accepted that she liked to be introduced to any new walkers and that she needed their name to add them to the insurance policy. However I do not accept that the respondent had final say over the substitutes or the cover arrangements. I was persuaded by the witness evidence that it was up to the individuals to make arrangements that suited them and then to inform her of them. I was provided with several examples of people asking friends from outside the group to cover them and those friends then becoming dog walkers later once they had had experience of the work.

105. Whilst the claimant's second maternity cover arrangements had fallen through at the last minute, the respondent's husband stepping in was not an indication that the claimant could not arrange cover herself. It was a recognition that she was in a difficult position and that someone needed to take on the dogs and they could not just be shared out amongst the existing dog walkers.

106. I accept that this indicates again that the respondent took responsibility for making sure that the dogs who were walked under the brand of Sociable Canines were not just left without a walker because it would have been bad for the organisation and reinforces my conclusion above that Sociable Canines was a stand-alone organisation run by the respondent. However, the fact that the respondent took on organising the cover on this occasion does not detract from the fact that the claimant could have organised the cover had she wanted to and in fact had done so prior to the situation going wrong. The situation with Ms Bryant had not occurred because the respondent would not let Ms Bryant provide cover, it occurred because Ms Bryant was no longer able to provide cover due to her argument with Ms Rawlinson.

107. The right to substitute was therefore slightly qualified by the respondent

wanting to meet the new walker - but it did not amount to a fettered right of substitution such as that in operation in Pimlico Plumbers.

108. I therefore conclude that the claimant was not a Limb B worker within s230 ERA 1996 because she was not obliged to personally perform any work for Sociable Canines or the respondent.

109. Given the decisions in (*Jivraj v Hashwani [2011] IRLR 827*) and *Halawi v WDFG UK Ltd (t/a World Duty Free) [2014] EWCA Civ 1387* I also accept that this means that the claimant does not satisfy the definition of employee in s83 Equality Act 2010.

110. The claimant's claims for unfair dismissal, unauthorised deductions from wages and discrimination therefore cannot proceed as the claimant does not have the relevant status to gain the protection of the relevant provisions of the Employment Rights Act 1996 or the Equality Act 2010.

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Employment Judge Webster

Date: 30 October 2020