EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106543/2020

Held via Cloud Video Platform (CVP) on 13 January 2021

Employment Judge: J McCluskey

Miss Clare Burrows	**Claimant** **Represented by:** **Hazel Burrows**
Michelle Boyle t/a The Beauty Academy	**Respondent** **Represented by:** **Elizabeth Doyle**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

(1) The respondent's name in the proceedings is amended to Michelle Boyle t/a The Beauty Academy.

(2) The Claimant does not have standing to bring claims of the types she seeks to bring as she is not an employee in terms of Section 230 (1) of the Employment Rights Act 1996 or a worker in terms of Section 230 (3) of the Employment Rights Act 1996.

(3) The claims for unlawful deductions from wages and unpaid holiday pay under section 13 of the Employment Rights Act 1996 are dismissed.

REASONS

Introduction

1. A claim was presented by the claimant on 21 October 2020 in which the claimant sought payment of outstanding wages and holiday pay from the respondent. The respondent was noted as Michelle Boyle / Black.

2. A response form was received by the Tribunal office on 24 November 2020. The response form recorded the respondent as 'The Beauty Academy' and 'Michelle Boyle' as the contact. The respondent denied that the claimant was an employee of the respondent and denied any liability for wages or holiday pay.

3. A standard letter was issued to the parties on 18 December 2020 stating 'Where the name given by the respondent on the Response differs from that given on the claim, we shall assume unless we hear from you to the contrary, in writing within 7 days of the date of this letter, that the name given by the respondent is correct.' No response was received indicating that the name of the respondent was incorrect.

4. The claimant was represented by her mother. The respondent, Michelle Boyle, was represented by a friend.

5. Both parties gave evidence on their own behalf. No witnesses were called by either party. Neither party lodged a set of productions nor provided the Tribunal with copies of any documentation.

Issues

6. The claimant asserted that throughout the period of her working relationship with the respondent she had been an employee working under a contract of employment with the respondent and was entitled to the protection of section 13 Employment Rights Act 1996 ("ERA") in respect of her claims for failure to pay wages and holiday pay.

7. The respondent asserted that the claimant had not been an employee of the respondent working under a contract of employment at any time and had been

engaged by the respondent on a self- employed basis as an independent contractor. Accordingly the respondent asserted that the claimant was not entitled to the protection of section 13 ERA and denied that any payment was due for any failure to pay wages or holiday pay.

8. The burden of proof is on the claimant to show that she was either an employee or a worker of the respondent and, if so, whether there has been a deduction from her wages in breach of section 13 ERA and, if so, how much is due to her.

9. A further issue arose during the course of the hearing as to the correct identity of the respondent.

Findings in fact

Based on the information provided the Tribunal makes the following findings in fact which are relevant to the matters to be decided -

10. The Beauty Academy is not a legal entity. The Beauty Academy is the name of the beauty salon owned and operated by Michelle Boyle.

11. The claimant is a hairdresser.

12. There was no written contract of employment or any other written documentation between the claimant and the respondent setting out their working relationship.

13. The claimant was told by the respondent that she could work on Thursdays, Fridays and Saturdays if clients booked an appointment with the claimant on those days.

14. She worked on Thursdays, Fridays and Saturdays during the times when appointments were booked with her. She did not work to the shop opening hours but only when she had appointments booked. She had no fixed hours of work.

15. The respondent operated a computerised diary for client appointments. If the claimant was not available for work at any time on Thursdays, Fridays or

Saturdays she could block herself out as unavailable on the computerised diary. She did so on occasions though not frequently. This tended to be at Christmas or bank holidays or if she was out partying. No suggesting of disciplining her arose if she had blocked herself out as unavailable.

16. She had access to the computerised diary and could see when clients had appointments with her. Latterly the respondent also operated an app and clients could book appointments via an app on their phone. The claimant was able to access the app to see when she had appointments booked with her.

17. She was not guaranteed that any work would be available as this depended on whether clients had booked appointments with her. In practice, appointments were usually booked for at least some of the time on Thursdays, Fridays and Saturdays.

18. She could choose when to arrive at the salon and when to leave the salon. She was not required to be present in the salon if she did not have clients.

19. At the start of the working relationship the claimant was the only hairdresser in the salon. The salon operated mainly as a beauty salon rather than hairdressing salon. There were usually a number of beauty therapists present in the salon when the claimant was there.

20. Latterly there was another hairdresser who sometimes worked in the salon. The claimant did not have appointments with the clients of the other hairdresser.

21. If she was unable to come into the salon on days when clients had already booked appointments with her, she phoned to let the respondent know. This only happened occasionally, for example if she was feeling unwell. On such occasions there was no suggestion she was obliged to provide a substitute.

22. If she was off work unwell she did not receive any sick pay.

23. There was one occasion when she had tickets to go to a music concert. She had clients booked into the salon on the same day as the concert. She had not blocked herself out in the computerised diary. She told the respondent at

the last minute that she was unable to work. She did not attend the salon. The respondent had to cancel the client appointments at short notice. There was no suggestion that the claimant was obliged to provide a substitute. There was no suggestion that the claimant was disciplined for not attending at the salon.

24. She worked for other people in addition to the respondent providing hairstyling services in individuals' homes.

25. The respondent instructed her not to do 'homers' for clients who came into the salon.

26. She did not take holidays and did not receive holiday pay.

27. The claimant was not subject to direction by the respondent in relation to how she carried out her work.

28. From time to time clients complained to the respondent about the standard of service they received from the claimant. There was no suggestion that the claimant was disciplined by the respondent as a result of such complaints. There was no suggestion that instructions were issued to the claimant by the respondent about improving standards of service.

29. Having had their hair cut, the clients paid the respondent. The claimant then received 40% of the price paid by the clients. The remaining 60% was retained by the respondent.

30. She used her own scissors and straighteners. Other equipment such as brushes and hairdryers together with shampoo and other products were provided by the respondent. Initially the claimant had provided shampoo and other products herself and the parties each took 50% of the price paid by the client. This changed to 60 / 40% at the request of the claimant who, for financial reasons, wished to be able to use the respondent's shampoo and other products rather than provide her own.

31. She was paid in cash except in March 2020 when the respondent was out of the country. On that occasion she was paid by bank transfer into the bank account of her partner.

32. It was the claimant's preference to be paid in cash as she did not have a bank account. The respondent would have made payments to her into a bank account if the claimant had wished and did so for other individuals.

33. She did not receive wage slips or a P60 from the respondent. She made no enquiry of the respondent about receiving wage slips or a P60. She knew about the nature of a P60 document as she had received one when she worked elsewhere.

34. The salon closed after Friday 20 March 2020 due to the UK government national lockdown in response to Covid-19.

35. When the salon reopened on 16 July 2020 after the national lockdown the claimant decided not to return to the salon.

36. She did not receive any payment from the respondent during the period when the salon was closed due to the national lockdown.

37. The respondent contacted her accountant to enquire whether the claimant was eligible to be furloughed during the national lockdown. The accountant advised the respondent that the claimant was not eligible. The respondent told the claimant that, on the advice of her accountant, she was not eligible to be furloughed.

Observations

The Tribunal makes the following observations on the evidence –

38. There was no written contract of employment or other written document produced to the Tribunal setting out the intended arrangements between the parties. Nor was the Tribunal referred to any oral agreement between the parties setting out the intended arrangements between the parties. The Tribunal heard oral evidence about the conduct of the parties over the period of their working relationship from which findings in fact were made.

Relevant law

39. An employee means an individual who has entered into or works under a contract of employment (section 230(1) ERA). 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 (section 230(2) ERA).

40. A worker means an individual who has entered into or works under a contract of employment (section 230(3)(a) ERA) or any other contract whereby the individual undertakes to 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 (section 230(3)(b) ERA). Such individuals are commonly known as "limb (b) workers".

41. The claimant has the protection of section 13 ERA if she has entered into or works under a contract with the respondent in accordance with section 230(1) ERA or in accordance with section 230(3) ERA.

42. Section 13 ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision in the worker's contract advised in writing, or by the worker's prior written consent.

Status of the claimant as an employee

43. In determining if there is a contract of service the multiple or mixed test set out in **Ready Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968] 2 QB 497** remains good law. At 515C-G McKenna J says *"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. I need say little*

about (i) and (ii). As to (i). […..] The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be […]. As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted."

44. In determining whether there is mutuality of obligation between the parties, which is also an essential component in determining a contract of service **Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471** remains good law, per Elias J "10. *For the purpose of analysing this decision it is not necessary to set out an exegesis of the law in this area. It is perhaps sufficient to start with an observation of Longmore LJJ in the case of Montgomery v Johnson Underwood Ltd & Another [2001] EWCA Civil 318, [2001] ICR 819 at paragraph 46 he said this: "Whatever other developments this branch of the law may have seen over the years, mutuality of obligation and the requirement of control on the part of the potential employer are the irreducible minimum for the existence of a contract employment: see Nethermere (St Neots) Ltd v Gardener [1984] ICR 612 , 623 per Stevenson LJ approved in Carmichael v National Power Plc [1999] ICR 1226 , 1230 per Lord Irvine of Lairg LC.11. The significance of mutuality is that it determines whether there is a contract in existence at all. The significance of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract.."*

45. **Cotswold Developments Construction Ltd v Williams UKEAT/0457/05 EAT** also provides guidance in determining the question of mutuality of obligation per Langstaff J "*19. The nature of the irreducible minimum of obligation resting upon the employer has been variously stated in different cases. The judgments in Ready Mixed Concrete and Nethermere, Carmichael, (though there are parts of the judgment of Dillon LJ in the former*

(at 634G)) and Lord Irvine in the latter (see 1230G) which suggest the employers' obligation is to provide work) contemplate the obligation on the employer as being that of providing pay. In Stevedoring & Haulage Services Ltd v Fuller [2001] IRLR 627 , the "mutual obligations" recognised by the Court of Appeal appear to have been to offer work, on the employer's side, and to accept it, on the employee's (see paragraph 6). 20. It is unnecessary, however, to approach the definition of the obligation which is required on the employer's side upon too narrow a basis […]"

46. For a more recent discussion on control in **White & Anor v Troutbeck SA [2013] UKEAT 0177/12** HHJ Richardson in the EAT set out an extended discussion of the law in this area holding "40.*Firstly, the key question is whether there is, to a sufficient degree, a contractual right of control over the worker. The key question is not whether in practice the worker has day to day control of his own work."*

47. Further guidance on control can be found by the Court of Appeal in **Troutbeck SA v White & Anor [2013] [2013] EWCA Civ 1171** per Sir John Mummery *"38. The legal error in this case [by the Tribunal] was in treating the absence of actual day-to-day control as the determinative factor rather than addressing the cumulative effect of the totality of the provisions in the Agreement and all the circumstances of the relationship created by it."*

Status of the claimant as a worker

48. Turning to section 230(3)(b) ERA, in **Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32** Lady Hale said "*Our law draws a clear distinction between those who are […] employed and those who are self-employed but enter into contracts to perform work or services for others. […] Within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. […] The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else*."

49. In **Byrne Brothers (Formwork) Ltd v Baird and others [2002] IRLR 96** the EAT lays down guidelines for consideration of the second part of the statutory definition: "*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*" Mr Recorder Underhill QC says "17. (4) […] *It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b). That can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees […]The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-á-vis their employers […] Thus 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 in the relevant respects. (5) Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services — but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers."*

50. In **Hospital Medical Group Ltd v Westwood [2012] EWCA Civ 1005** the Court of Appeal considered both the integration and dominant feature tests developed from the case law on 'limb (b) workers, Kay LJ saying *"18. The striking thing about the judgments in Cotswold Developments Construction Ltd v Williams UKEAT/0457/05 and Redcats is that neither propounds a test of universal application. Langstaff J's "integration" test was considered by him to be demonstrative "in most cases" and Elias J said that the "dominant purpose" test "may help" tribunals "in some cases" (paragraph 68). In my*

judgment, both were wise to eschew a more prescriptive approach which would gloss the words of the statute. […] 20. I do not consider that there is a single key with which to unlock the words of the statute in every case. On the other hand, I agree with Langstaff J that his "integration" test will often be appropriate, as it is here."

51. In **Jivraj v Hashwani [2011] IRLR 827** the Supreme Court held per Lord Clarke *"39. After all, if the dominant purpose of the contract is the execution of personal work, it seems likely that the relationship will be […] a case in which the person concerned performs services for and under the direction of the other party to the contract in return for remuneration as opposed to an independent provider of services who is not in a relationship of subordination with him or it. This may not be so however because, although the dominant purpose of the contract may be personal work, it may not be personal work under the direction of the other party to the contract."*

52. In **Windle v Secretary of State for Justice [2016] EWCA Civ 459**,the Court of Appeal per Lord Justice Underhill held that mutuality of obligation is also relevant to the consideration of worker status.

Submissions

53. The parties made brief submissions.

54. The claimant's representative suggested that the claimant could not be a self-employed mobile hairdresser as she did not have a car. She also suggested that the claimant had been naïve in relation to the tax arrangements between the parties.

55. The respondent's representative indicated that if the respondent had been able to furlough the claimant she would have done so. However the advice of her accountant was that the claimant was not eligible to be furloughed which pointed to the claimant being neither an employee nor a worker.

Discussion and decision

Identity of the respondent

56. The Tribunal concluded that there was no evidence linking the claimant to The Motherwell Beauty Academy Limited, the legal entity whom Michelle Boyle said in her evidence was the correct respondent. The identity of the respondent was raised by Michelle Boyle for the first time during her evidence in chief. Michelle Boyle had been given the opportunity to notify the Tribunal about what she considered to be the correct legal identity of the respondent during standard correspondence from the Tribunal. She had not indicated that she considered The Motherwell Beauty Academy Limited to be the correct respondent.

57. The claimant understood that she was employed by Michelle Boyle as indicated in her claim form.

58. The Beauty Academy is not a legal entity.

59. In all the circumstances, the Tribunal concluded that the correct name of the respondent is Michelle Boyle trading as The Beauty Academy and that the respondent's name in the proceedings is amended to Michelle Boyle trading as The Beauty Academy.

Status of the claimant as an employee

60. The definition in section 230(1) ERA has been explored and construed through case law. I reminded myself of the case law which states that for an employment relationship to exist between the parties there must as a minimum be personal service, control and mutuality of obligation. In addition, all other factors defining the relationship must be consistent with there being a contract of employment.

61. Case law in in relation to the first condition, personal service, as set out in **Ready Mixed Concrete (South East) Limited** above has focused on whether the inclusion of a power of substitution in a contract is sufficient of itself to make it a contract for services, rather than a contract of service, and also the extent to which the manner and extent of operation of a substitution clause affects the outcome.

62. No evidence was provided to the Tribunal about any obligation by the claimant to provide a substitute if she was unavailable. I did however hear evidence, which I accepted, that if the claimant was sick on days when clients had already booked appointments with her, she phoned to let the respondent know. There was no suggestion by either party that on such occasions she was required to provide a substitute. I also heard evidence, which I accepted, that on the occasion when the claimant had attended a music concert, despite having clients booked into the salon, she had simply advised the respondent that she would not be coming into the salon. There was no suggestion by either party that on that occasion she was required to provide a substitute. In practice what had happened was that the respondent had to cancel the clients booked in for that day. Additionally I am mindful that, at least during the times when another hairdresser also worked at the salon, customers had a choice of booking with the claimant or the other hairdresser, which is indicative in my view that at least some of the clients, on making a booking with the claimant, would have expected that the claimant personally would fulfil the appointment.

63. I am therefore satisfied that the first condition set out in **Ready Mixed Concrete** has been fulfilled, namely that on the occasions when she was carrying out appointments for the respondent she was required to provide personal service.

64. Mutuality of obligation is also an essential component in order for a contract of service to exist between the parties, as set out in **Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471** where Elias J provides guidance in relation to whether there is an "*irreducible minimum of obligation"*.

65. In this regard I am mindful that the claimant was not guaranteed that any work would be available as this depended on whether clients had booked appointments with her. The guidance in **Cotswold Developments Construction Ltd** also directs that when determining whether there was any obligation on the putative employer to offer work *"It is unnecessary, however, to approach the definition of the obligation which is required on the employer's side upon too narrow a basis […]"* It appeared to me that at the outset of the relationship between the parties there was an expectation by both parties that

work would be offered to the claimant, if it was available, on Thursdays, Fridays and Saturdays. As the claimant was the only hairdresser in the salon at that time I am of the view that the expectation of the parties was that available work would be offered to her and in that sense there was an obligation on the respondent to offer available work to the claimant. In my view this was sufficient to create an obligation on the respondent to offer work to the claimant per **Wilson v Circular Distributors Ltd [2006] IRLR 38**.

66. Turning then to the question of whether there was an obligation on the claimant to accept such work. The claimant was entitled to block herself out on the computerised diary as not available for work on the days when she knew that available work would be offered to her. She did so on occasions at Christmas, bank holidays and other times. On the occasion of the music concert she had not blocked herself out on the computerised diary as unavailable for work. Clients were already booked in for her on that day. Nevertheless she chose at short notice not to accept the offer to work.

67. I am therefore of the view that whilst there was an obligation on the respondent to offer available work to the claimant the claimant was under no obligation to accept such work from the respondent. Indeed the claimant declined to accept such work from time to time. On that basis my decision is that the arrangements between the parties did not create mutuality of obligation and therefore there cannot be a contract for service between the parties.

68. Notwithstanding my decision that there is no mutuality of obligation, such that no contract of service can exist between the parties, in the event that I am wrong on that I have also considered the second condition which must be fulfilled for a contract of service to exist in **Ready Mixed Concrete (South East) Limited** namely "*(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."* In relation to control I have also had regard to the guidance **Troutbeck SA** in the EAT and in the Court of Appeal, the latter of which reminds Tribunals that the question of control is not

determined by whether the worker has day-to-day control over their own work but rather by whether there is a contractual right of control over the worker.

69. In the regard I am mindful that the claimant had no fixed hours of work and worked only when she had clients booked in to the salon. She did not need permission from the respondent to arrive at work after the salon opened or to leave before the salon closed. She worked to her own hours and not the salon hours. She could determine her own working days and times by blocking herself out as unavailable on the respondent's computerised diary. On the occasion when she did not attend the salon, although she had client appointments booked, due to attending a music concert there was no suggestion that the claimant was or could be subject to any disciplinary procedures. The claimant was not subject to day-to-day direction or control by the respondent in relation to standards at work. From time to time clients complained to the respondent about the standard of service they received from the claimant. There was no suggestion that the claimant was or could be disciplined as a result of these complaints. There was no suggestion that instructions were issued to her by the respondent about improving standards of service as a result of these complaints.

70. Having regard to all of these matters I am of the view that the claimant did not prove that the respondent had a contractual right of control over her to sufficient degree. I am therefore unable to make a finding that the claimant was subject to the respondent's control to a sufficient degree for a contract of service to exist.

71. **Ready Mixed Concrete** also directs me to consider whether " *(iii) The other provisions of the contract are consistent with its being a contract of service".* For completeness I have done so. In this regard I am mindful that the claimant supplied her own scissors and hair straighteners and under the original financial arrangements between them, where the parties split the price paid by the customer on a 50 / 50% basis, the claimant provided the shampoo and other hair products. This later changed to a 60 / 40% split, at the claimant's request, as she did not wish to provide the shampoo and other products herself. I am mindful that there was a level of financial risk undertaken by the

claimant as she only received income when clients were booked in for an appointment with her. There was no suggestion that she was subject to any internal policies of the respondent such as discipline or standards of work. She only worked in the salon when she had clients present and did not work to what she described as 'salon hours'. She did not receive wage slips or a P60 from the respondent. She knew about the nature of a P60 document as she had received one when she worked elsewhere.

72. Having regard to all of these matters I am of the view that the third condition set out in Ready Mixed Concrete *"(iii) The other provisions of the contract are consistent with its being a contract of service*" has been not been fulfilled.

Status of the claimant as a worker

73. Having determined that the claimant is not an employee under section 230(1) ERA I have also considered whether she is worker under section 230(3) ERA. It is convenient here to set out again the essential terms of the definition, " *worker" means an individual who has entered into or worked under …(a) […] (b) any other contract … 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"*

74. Considering the first part of the statutory test in section 230(3)(b) ERA, I find that the claimant did undertake personally to perform work or services for the respondent for the reasons already given in relation to section 230(1).

75. Turning then to the second part of the statutory test in section 230(3)(b) ERA, was the status of the respondent by virtue of the contract that of a client or customer of any business undertaking carried on by the claimant? In **Byrne Brothers** The EAT gave guidance that in answering this question "*It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc."*

76. In carrying out this exercise I am mindful that the claimant did not prove that the respondent exercised control over her in relation to the arrangements between them, as set out elsewhere in this judgment. I am also mindful that the arrangement was not an exclusive one. The claimant was able to work for other people and did work for other people in their homes. I am mindful that the claimant supplied her own scissors and hair straighteners and under the original financial arrangements between them, where the parties split the price paid by the customer on a 50 / 50% basis, the claimant provided the shampoo and other hair products. This later changed to a 60 / 40% split, at the claimant's request, as she did not wish to provide the shampoo and other products herself. I am mindful that there was a level of financial risk undertaken by the claimant as she only received income when clients were booked in for an appointment with her. There was no suggestion that she was subject to any internal policies of the respondent such as discipline or standards of work. She only worked in the salon when she had clients present and did not work to what she described as 'salon hours'.

77. In further evaluating the second part of the statutory test in section 230(3)(b) ERA, I considered **Hospital Medical Group Ltd v Westwood [2012] EWCA Civ 1005** Court of Appeal per Kay J who considered both the integration test and the dominant feature test from previous case law noting that Langstaff J's integration test in **Cotswold Developments Construction Ltd** was considered by him to be demonstrative "*in most cases*" and agreeing with Langstaff J that the integration test will often be appropriate.

78. I also considered the guidance of the Supreme Court in **Jivraj v Hashwani [2011] IRLR 827** per Lord Clarke *"39.[…] although the dominant purpose of the contract may be personal work, it may not be personal work under the direction of the other party to the contract."*

79. In considering the guidance in these cases it appears to me that although the claimant was obligated to carry out the work personally she controlled the manner in which she carried out her work. She did not appear to be subject to any standards of work of the respondent or any disciplinary procedures of the respondent. She was not, in my view, in a relationship of subordination

with the respondent. When complaints were received from clients from time to time about the standard of her work there appeared to be no repercussions for the claimant. Taking all of these matters into account, my view is that the work of the claimant was not being done under the direction of the respondent or in a manner in which the claimant was integrated into the respondent's business.

80. Finally I also make reference to the case of **Windle and anor v Secretary of State for Justice 2016 ICR 721,** where the Court of Appeal held that mutuality of obligation is relevant to the status of worker. In this regard I find there was no mutuality of obligation between the parties for the reasons already given in relation to section 230(1).

81. Having considered each of these factors my decision is that the respondent's status by virtue of the contract with the claimant was that of a customer of a business undertaking carried on by the claimant. The arrangements do not fulfil the essential terms of the definition under section 230(3)(b) ERA. Therefore the claimant is not worker under 230(3)(b) ERA.

Employment Judge: Jacqueline McCluskey

Date of Judgment: 8th February 2021

Entered in Register: 16th February 2021

Copied to Parties