EMPLOYMENT TRIBUNALS

Claimant: Ms E Tincu Straton

Respondent: The Network (Field Marketing and Promotions) Company Ltd t/a JYL Hand to Hand

Heard at: Croydon Employment Tribunal by cloud video platform
On: 13 to 15 April 2021

Before: Employment Judge Nash
Ms Mitchell
Ms Leverton

Representation
Claimant: In person
Respondent: Mr Caiden of counsel

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

REASONS

1. The claimant's claim was presented on 6 September 2019. There was a first preliminary hearing on 27 February 2020 and a second on 12 June 2020. The only substantive preliminary hearing was the third hearing which took place on 2 December 2020 in front of Employment Judge Balogun with the same representation as today.

2. Judge Balogun listed today's hearing and struck out a claim for race discrimination. She amended the claim to include a victimisation complaint and accepted that the age discrimination claim was made out in the ET1. This hearing was listed to consider liability only. The order was sent on 4 December.

3. At this hearing, in respect of witnesses, the tribunal heard from only the claimant on her own account. The claimant provided a very prolix 35-page statement with no paragraph numbers. From the respondent, the tribunal heard only from Ms Simpson, a senior HR manager.

4. The tribunal had sight of a bundle prepared by the respondent. There was also a bundle of documents prepared by the claimant. There were delays and difficulties in accessing, particularly, the claimant's documents but the parties and the tribunal were able to access all documents during the hearing.

5. There was an issue with the listing. The claimant, after about one hour on the first day, said that she wanted to leave at 1.00pm for a 2.00pm hospital appointment that she had been waiting for for over a year. She had not previously applied to alter the listing. She suggested the tribunal read on the first day and start witness evidence on the second day. She had not understood, she said, that the hearings would last all day.

6. The tribunal considered the medical letter which the claimant volunteered, following advice that this was not required but might be of assistance. According to this letter, the claimant was potentially to be subject at this appointment to oesophageal monitoring for 24 hours. She would not necessarily need to return to the hospital on the second day.

7. The respondent's position was that it did not object, but it did not agree with the claimant's application that witness evidence not start until the second day.

8. The tribunal decided that it would be contrary to the overriding objective not to adjourn early at 1.00pm on the first day. The tribunal found that the claimant had not complied with her duty to assist the tribunal in furthering the over-riding objective in that she knew of this appointment for over two weeks but had not warned either the tribunal or the respondent. This made the listing difficulties worse. However, the tribunal noted that she was not legally represented. It accepted her account of a year's wait for an appointment as plausible in the current circumstances. The claimant would be at considerable disadvantage potentially in missing such an appointment and there would, the tribunal was persuaded, a real possibility of getting the case finished in time witness evidence started on the second day. Further, the respondent did not object.

9. The adjournment was granted, and the case was completed within the listed time.

10. There was also an application by the claimant to amend her claim for a second time to include further protected acts in her victimisation claim. She sought to rely on a number of new documents in the bundle which she contended contained protected acts. These were as follows:-

    i. Page 171 which were the disciplinary hearing notes (which were already accepted as a protected act);

    ii. An email at page 164 and an email at page 137;

    iii. Three other emails at C11, C15 and C16.

    There was no reference to race or age in C11, C15 or C16 although there was at page 164 and 137.

11. The respondent objected to this application. The tribunal noted that the claimant had already applied to amend at the third preliminary hearing, and this had been granted. She had not taken the opportunity to include these additional protected acts at that point. She said that she had mentioned them before the Employment Judge but had not challenged the order sent on 4 December. She had had over four months since then to amend.

12. The Tribunal directed itself in line with the authority of *Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT*. It also considered the recent guidance of the Employment Appeal Tribunal in *Vaughan v Modality Partnership 2021 ICR 535, EAT*. The most important factor for the tribunal is the balance of injustice and hardship in allowing or refusing the application. In addition, this most recent amendment to the claim was significantly out of time and accordingly the tribunal could only consider it if it was just and equitable to do so in line with the authorities on time limits**.**

13. The tribunal considered the substance of the amendment sought. The two emails at pages 164 and 137 essentially referred to an allegation that the claimant was not offered the better paid promotional work. This was primarily the same allegation that she made at the meetings. On the claimant's case these protected acts all resulted in the same decision by the same person – her termination**.**

14. The respondent contended that it was prejudiced in that it was unable to take Ms Phillips, the decision maker's, instructions on the new protected acts. The respondent contended that it could have done so on or soon after 2 December, and so had missed the opportunity due to the claimant's failure to raise this amendment at the third preliminary hearing. However, the tribunal did not accept this contention for the following reasons. The respondent had not lost any opportunity to take Ms Phillips' instructions after 2 December on whether the claimant's allegations of race and age discrimination had any impact on her decision to dismiss. It was already able to take these instructions because this was the subject of the first set of protected acts. In effect, the respondent was in a position to take instructions on substantially the same thing. Accordingly, the tribunal could not find that the respondent was put to any material prejudice.

15. In contrast the claimant would be put to prejudice by being unable to rely on two protected acts in her victimisation claim, were the amendment refused.

16. The tribunal applied the overriding objective and considered that allowing further protected acts was unlikely to require further significant evidence or take significantly more time. The amendment, compared to the rest of the case, was a relatively small point.

17. In respect of the amendment being made out of time, the tribunal found that it would be just and equitable to extend time for the same reasons set out above.

18. The tribunal granted the application to amend in respect of only the emails at pages 137 and 164. The other emails were not capable, on their face, of amounting to protected acts in respect of race and age. Therefore, there could be little, if any, prejudice to the claimant in refusing the application.

The Claims

19. The claims were as settled by Employment Judge Balogun at the third preliminary hearing. They were:-

    a. unfair dismissal,
    b. direct age discrimination and
    c. victimisation.

The Issues

20. These were as set out by Employment Judge Balogun in her Order of 4 December, which is attached to this judgment, with the following amendments.

21. In respect of employment status, the tribunal also considered whether the claimant had continuity of employment at the effective date of termination.

22. In respect of the issues of unfair dismissal, the respondent only relied on conduct as a potentially fair reason. In addition to the unfair dismissal liability issues, the tribunal would at this hearing consider some issues going to remedy which it was proportionate to consider, such as Polkey.

23. In respect of the direct age discrimination claim, the respondent did not rely on the justification defence.

24. In respect of the victimisation complaint, the respondent accepted the comments in the disciplinary and appeal hearings amounted to protected acts. In addition, the tribunal considered both the dismissal and the decision to uphold the dismissal.

25. There were no other amendments to the list of issues.

The Facts

26. The respondent is a logistics company which provides distribution, delivery and promotional activity.

27. The claimant started work for the respondent on 1 January 2011. At the time of her termination, she was a distributor of Time Out magazines for fifteen hours per week at Brixton Station. She had been in this particular placement for five years working at the same time and at the same place save for when she had to travel to her native Romania for family reasons.

28. The tribunal had sight of a casual employee agreement between claimant and respondent. The relevant terms were as follows. At page 95 it said the following, ‘That (the respondent) might terminate the agreement at any time for any reason without notice’. The contract stated in terms that it was not an employment contract. It did not confer employment rights. There was no obligation on the claimant to accept work. Nothing in the contract would constitute a contract of employment. The claimant accepted that she was not subject to any global or umbrella contract of employment. There was no presumption of continuity. Each offer of work was entirely separate and

severable engagements. There was no relationship between the parties after the end of each assignment and before the start of another.

29. The tribunal also had sight of an un-dated document as to guidelines on late cancellations and no-shows. The respondent operated a three-strike rule on no-shows. If a worker, (and we do not use that as a technical description of the claimant's employment status) failed to show up on three booked shifts, if they had no regular pattern of work, they would be subject to an investigation. The tribunal interpreted this document as showing that there was a distinction in treatment between those with and without a regular work pattern.

30. The claimant herself worked at the same time for other organisations of a similar kind and she did not have to tell the respondent that she had other jobs.

31. Working for the respondent, a few years before the events material to this claim, the claimant had a regular shift at Crystal Place distributing the NME for a few hours a week. She left the UK and came back to find that another British person had taken over her shift.

32. At the time of termination, she worked every Tuesday evening at Brixton handing out Time Out. She also had some distributing work on a Tuesday morning at Herne Hill. She had various other occasional distribution work.

33. The claimant had also done some promotional work. This work was somewhat different. As opposed to handing out a known product, for instance the Evening Standard, a promoter tries to persuade passers-by to take free samples of what was often a new product. Nevertheless, both roles involved standing at busy places attempting to persuade the public to take things.

34. Unlike the Time Out work which was paid at the national minimum wage, the promotional work paid considerably more.

35. The tribunal had sight of documents relating to the claimant doing promotional work from 2012 to 2017, although there she was given relatively little after 2014.

36. The respondent said that the claimant was no longer being given this work because it had changed its practice and no longer contracted with people to work on both distribution and promotion. It did this because it had become a larger organisation and so had more choice of workers. The respondent was not able to provide any explanations to the thinking or reasons behind this practice. There was a suggestion, although it was no more than this, that the respondent operated two separate lists of workers, (again not used as a technical term), for this purpose.

37. In 2013 when the claimant started doing promotional work, she was in her early fifties. By 2019 the claimant said that she had been told by a manager on a confidential basis that she would not be provided with promotional work because she was not young and attractive enough.

38. In November 2018, the respondent sent a Time Out Brief to all hands including the claimant. It said, in terms, that their job involved hand distributing copies. They were not permitted to leave their post without the permission of the team leader and there should be no "dumping", i.e., leaving copies of magazines in places, including shops and cafes. This was not an exhaustive list of places where magazines should not be left. Any failure could lead to a disciplinary hearing which could result in instant dismissal. There were various other examples of this Brief in January and in July 2019. However, it was unclear if the two later Briefs in the bundle were complete.

39. During 2018, if not before, the claimant sometimes travelled to her native Romania, where she had family and did not work. However, in or around January 2019 her father fell seriously ill. She left the United Kingdom in January to care for him and only came back to do a couple of shifts for the respondent in April. She said that she did this so that she did not lose her place on the respondent's database.

40. On 3 April 2019 she emailed the respondent to say that she had to go abroad because her father was ill and could not do the shift on which she had been booked. The respondent emailed back to say that that was not a problem; it confirmed that she had told them about this previously and she would be removed from shifts until she got back in contact.

41. On 30 April, the respondent mistakenly included the claimant in an 'all hands' email offering shifts. It apologised and said that she would be removed from the system, and she should quote her staff ID when she became available. Another email stated that the respondent would be sure to book her in at requested locations when she got back.

42. The claimant stayed in Romania until her father died. On 22 May the claimant emailed the respondent explaining that her father had died and asked to start work again on 5 June. On 25 May the respondent replied, 'if you feel like you are ready to work, we are happy to book you in at your regular station'. To which she replied, 'yes please, if you could'.

43. The claimant's evidence was that in June or July, the respondent booked her on promotional work twice but cancelled her both times at the last minute by text. The claimant's evidence was that she was told by someone in the respondent's office that this was because of her age.

44. There were conversations between the claimant and respondent when the claimant complained about these cancellations. The tribunal had sight of an email on 13 June from the respondent's employee Nika, who worked in Bookings. Nika stated in this email that the claimant had put the phone down on her twice and had done this before. On 14 June, the claimant emailed the respondent to say that there was insufficient credit on her phone, so it was difficult to speak. There was no mention of Ms Phillips, the dismissing officer.

45. In oral evidence the claimant said that she spoke to Ms Phillips at that time and Ms Phillips was angry with her. However, on the balance of probabilities, the tribunal found that the claimant did not speak to Ms Phillips on this occasion because there was no mention of her in what was a noticeably frank email from the claimant to the respondent. Further in the email to Nika the

claimant said "I told you" which the tribunal decided was most likely to refer to the claimant speaking to Nika rather than anyone else.

46. The tribunal then turned to the events material to the termination. The tribunal accepted the claimant's unchallenged evidence that she had an unblemished record prior to termination.

47. Following her return to the UK, the claimant returned to working her shifts at Brixton Station distributing Time Out.

48. On 10 July 2019, the respondent received an email from a man called Peter who worked for Time Out, the respondent's customer. He had been monitoring the team working at Brixton. He said that he had seen the claimant leave the station and, in his words, "offload" copies of Time Out at Brixton Library and other places. He said a distributor left the station and went to the library, offloaded magazines and seemed to have done this before. He provided photographs of the claimant at Brixton Library and in the market wearing her Time Out distributor uniform. He asked the respondent to investigate saying that it felt like she was artificially inflating figures for the Station, and this would be bad for the team.

49. The tribunal saw a letter from the respondent's investigating officer to the claimant on 11 July 2019 inviting her to an investigatory meeting on 12 July to fact find on the allegation that she had left her position without permission. The claimant replied that she was currently in Romania and could not attend. She said she could only attend during her shifts.

50. The investigating officer re-scheduled the meeting to the 17 July when the claimant would be on shift and explained that she would be paid for her shift. He warned that the meeting would go ahead in her absence. The claimant replied that day saying that she had decided not to come. She sent another email saying that she had no more to add.

51. The meeting duly went ahead without the claimant. There was a note on the file saying the investigation officer thought the claimant was a rude person because she kept shouting on the phone.

52. On 23 July 2019 Ms Phillips, an account manager, wrote to the claimant inviting her to a disciplinary meeting on 26 July 2019 in respect of the charge that she left her position, and added an additional charge of dumping magazines. She was warned of the possibility of dismissal. The claimant emailed Ms Phillips on 26 July with her version of events. Contrary to the claimant's evidence, the tribunal saw no evidence that she had set out her version of events prior to this date. The tribunal accordingly found that this was the first time the claimant provided her side of the story.

53. In her email of 26 July, the claimant admitted that she had put loose copies at Brixton Library every week. Another team leader had done this. She said that she made sure not to be too long away from her post. She did not think that her team leader knew. She said that she would not attend the meeting. She said the investigation reminded her of living in a dictatorship and she dreaded coming to the respondent's office. She said that she was physically

sick. She denied shouting at the investigating officer and blamed the phone connection. She said that it was written on her profile that she would not be given a promotion due to her age. (The tribunal saw no evidence that the claimant's profile was marked in this way.)

54. Ms Phillips replied that there had to be a meeting. She offered another meeting date or that the meeting would go ahead in the claimant's absence.

55. On 29 July, the claimant emailed that she would not attend as it would cause her distress and health problems. She was anxious leaving the house because she believed that she might be filmed covertly. She said that she knew the rules, but it was very hard to distribute that amount of Time Out in an unpleasant working location.

56. The respondent sent a final invitation to a disciplinary hearing on 30 July by way of an email on 19 July.

57. The claimant attended the final disciplinary hearing on 30 July chaired by Ms Phillips. The respondent's minutes provided the following account of the hearing. The claimant said that she left the station to go to the library when it was quiet, and she had put loose copies in the library. She said that the respondent could not expect her to hand out the number of magazines provided; she could only hand out one-fifth of this amount. She said that she did not know how many magazines she received. She did not agree to stop putting the magazines in the Library and leaving her post unless the number of magazines was reduced by four-fifths.

58. When she was told twice to stay at the station, she said twice, "just give me four-fifths supply". She said that she was exhausted. Ms Phillips asked her if she would continue to go to the library or would she stay in post? The claimant said again, "just give me a fifth supply".

59. Ms Phillips asked the claimant if she would like to be moved to a less busy place and the claimant said that she was not going back to Brixton. The claimant said that she had lost money coming to the disciplinary meeting but that she did not want any money. She also said that she was not allowed to do promotional work because of her age. Ms Phillips denied this saying she could not do distribution and promotion at the same time, and that the previous booking was a mistake. The claimant then said that when she previously returned to the UK, she lost her shifts distributing NME to a British worker, which was racist.

60. At the end of the meeting, the parties started to read the minutes. The claimant stormed out of the meeting shouting, "this is bullshit".

61. The claimant gave a different account of the meeting. She said that it was Ms Phillips who became angry, and red in the face. Ms Philips shouted so unbearably that the claimant had to cover her ears. They had to leave the building because they were out of time. The claimant denied saying, 'bullshit'. She denied saying 'give me a fifth' (of the number of magazines) but she did not deny that she did not agree to stop leaving her post and leaving magazines in libraries and the like.

62. The tribunal considered on the balance of probabilities what had happened or what was most likely to have happened at the meeting. The tribunal reminded itself that Ms Phillips was not before them and the claimant gave the only first-hand account of the meeting.

63. The tribunal noted that on at least four occasions the documents recorded, or the claimant admitted, that she became upset and/or agitated. The investigating officer alleged that she shouted at him. Nika (in Bookings) alleged that the claimant was rude. Ms Phillips alleged that the claimant shouted 'bullshit' and walked out of the meeting. The claimant herself agreed that she walked out of the appeal meeting. This indicated that the claimant was on something of a "short fuse" at this period.

64. The claimant told the tribunal that at this time, following the death of her father, she was in what she called, "a dark place", she had concerns about saving her job and with hindsight she could have handled the situation differently.

65. Before the tribunal, the claimant became frustrated many times with the difficulties of running her case, in a stressful and unfamiliar environment, and doing so in a foreign language.

66. Taking this evidence into account, the tribunal found that it was more likely than not that the claimant did walk out and shout 'bullshit' at the disciplinary meeting, because this was consistent with her conduct on other occasions. Further, the claimant agreed that she was very angry at being called to the meeting. She told the tribunal that she did not want to go to the meeting and she did not see why she had to go. She was aggrieved at being forced to a meeting as illustrating by her refusing to go to every investigatory meeting and her delays in attending the disciplinary meeting.

67. The respondent stated that whilst the minutes were not a verbatim account of the meeting, they accurately recorded the important points. Upon receipt of the minutes, the claimant emailed the respondent on 7 August to say that the minutes were not accurate and that she was calm during the meeting. She repeated this during her appeal meeting.

68. The tribunal accepted that overall, the minutes reflected the tenor of the meeting, recording the case the claimant put, and what the claimant said. This was because the claimant's conduct recorded in the minutes was consistent with other documents recording similar conduct and the claimant's own account of her behaviour in the appeal meeting.

69. In particular, the tribunal found that when the claimant was told she must not leave her post and place copies in the library or anywhere else, she did not agree to stop doing this unless she was given far fewer copies.

70. The minutes recorded that the claimant had said that she had been discriminated against on the grounds of age in having her promotion shifts cancelled and was discrimination against on the grounds of her nationality in losing her NME shifts. These were brief comments made at the end of the meeting. There was no record in the minutes that the claimant had said that Ms Phillips was responsible for either of these decisions.

71. Following the meeting, Ms Phillips determined that the claimant had committed gross misconduct and terminated the working engagement by way of a letter dated 6 August 2019.

72. The letter stated that the claimant was found guilty of being away from her position and "dumping" magazines, that is leaving them in libraries etc. The claimant had failed to understand the rules and had refused to change her behaviour unless she was given far fewer magazines. The claimant's contract was summarily terminated with effect from 5 August 2019. She lost her entitlement to notice or pay in lieu. A P45 would be provided. She had a right of appeal.

73. On 7 August 2019, the claimant appealed stating that the meeting minutes were mostly inaccurate. She said that it was Ms Phillips who was responsible for cancelling her promotional work and replacing her on the NME shifts.

74. The claimant attended an appeal hearing in front of an independent appeals officer on 8 August 2019. When she was asked what was wrong with the minutes of the termination meeting, she did not deny that she had told Ms Phillips that she would continue with her behaviour unless given far fewer copies. The claimant walked out of the appeal meeting when she discovered that the respondent's minutes of the appeal hearing would not be verbatim.

75. The tribunal had sight of a P60 dated 5 April 2019. It was agreed that the claimant was provided with payslips. No tax and NI was deducted. Both parties thought that the claimant's wages were too low to be liable to tax and NI.

The Law

76. The law is found at sections 230, 212 and section 98 of the Employment Rights Act as follows:-

230 Employees, workers etc.

(1)In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2)In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

212 Weeks counting in computing period.

(1)Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.

. . .

(3)Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is—

(a)incapable of work in consequence of sickness or injury,

(b)absent from work on account of a temporary cessation of work,

(c)absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose, . . .

counts in computing the employee's period of employment.

98 General

(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—

…

(b)relates to the conduct of the employee,

…

(4)Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b)shall be determined in accordance with equity and the substantial merits of the case.

77. The law as to discrimination is found at sections 13, 27 and 136 Equality Act as follows:-

s.13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

136 Burden of proof

(1)This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

s.27 Victimisation

(1)A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act…

(2)Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Submissions

78. The tribunal, and claimant, had sight of a written skeleton from the respondent. The claimant provided lengthy submissions, in effect, in her witness statement. In addition, the parties made reasonably short oral submissions.

Applying the Law to the Facts

79. When finding facts which were not agreed, the standard of proof was on the balance of probabilities.

80. The respondent's case was notable in that there was almost no direct oral evidence of the events material to the claim. The reason given for this was that there was almost no one left in the business due to lockdown and Covid. The respondent's only witness was Ms Simpson, a high-level HR manager, who had little, if any, direct knowledge of the events. Accordingly, the tribunal found itself particularly reliant on the contemporary documents.

Employment status

81. As the respondent pointed out in its skeleton, section 230 does not define a contract of employment so a tribunal must look to the case law.

82. The tribunal directed itself in line with the recent decision of the Supreme Court in *Uber v Aslam* [2021] UKSC 5 at paragraph 118 as follows (emphasis added):-

> It is firmly established that, where the relationship has to be determined by an investigation and evaluation of the factual circumstances in which the work is performed, the question of whether work is performed by an individual as an *employee* (or a worker in the extended sense) or as an independent contractor is to be regarded as a question of fact to be determined by the first level tribunal.

83. Further, the Supreme Court stated at paragraph 68:-

> The judgment of this court in the *Autoclenz* case made it clear that whether a contract is a "worker's contract" within the meaning of the legislation designed to protect employees and other "workers" is not to be determined by applying ordinary principles of contract law…

84. At paragraph 87 the Court stated

> In determining whether an individual is a "worker", there can, as Baroness Hale said in the *Bates van Winkelhof* case at para 39, "be no substitute for applying the words of the statute to the facts of the individual case." At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done.

85. The Supreme Court explained at paragraph 71 that the purpose of the employment legislation relied upon is to protect vulnerable workers. The Court referred to the judgment of the Employment Appeal Tribunal in *Byrne Brothers (Formwork) Ltd v Baird & others (2002) IRLR 96* as elucidating the purpose of including workers within the employment legislation

> … The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are substantively and economically, in the same position. 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.

86. Accordingly, in the view of the tribunal, the approach in the *Uber* decision logically applies to employees, in the same way that it does to workers, when determining employment status.

87. The only ground on which the respondent contended that the claimant was not an employee was mutuality of obligation. The Court in *Uber v Aslam* stated:-

> The fact, however, that an individual has the right to turn down work is not fatal to a finding that the individual is an employee or a worker and, by the same token, does not preclude a finding that the individual is employed under a worker's contract. What is necessary for such a finding is that there should be what has been described as "an irreducible minimum of obligation.

88. According to the EAT in *Dakin v Brighton Marina Residential Management Co Ltd EAT 0380/12,* a Tribunal should ask whether the history of the relationship showed that it had been agreed there was an obligation on the claimant to do at least some work and a correlative obligation on the employer to pay for it.

89. In submissions both parties made reference to the cases of *Airfix Footwear Ltd v Cope 1978 ICR 1210, EAT* and *Nethermere (St Neots) Ltd v Gardiner and anor*. Essentially, where a working arrangement has settled into an

informal but regular pattern over a period of time, it may be possible for an individual to argue that a contract of service exists.

90. This claimant, it was agreed, was a casual worker and it is trite law that a casual worker may be classified as an employee if they can point to the existence of a so-called global or umbrella contract which continues to exist during periods when they are not working. Waite LJ discussed this issue in *McMeechan v Secretary of State for Employment* and pointed to the distinction between what could be termed the general engagement under which sporadic tasks are performed by a claimant at the behest of a respondent and the specific engagement which begins and ends with the performance of any one task. Each engagement is capable, according to its context, of giving rise to a contract of employment.

91. The tribunal had regard to the case of *Carmichael and anor v National Power plc 1999 ICR 1226, HL* where the Court found that casual tour guides had no contract at all when not working because, 'the parties incurred no obligations to provide or accept work, but at best assumed moral obligations of loyalty in a context where both recognised that the best interests of each lay in being accommodating to the other'. The Tribunal accordingly reminded itself that it should not confuse the parties acting according to what might be convenient, as opposed to what they understood to be their obligations to each other.

92. The tribunal did not accept the respondent's submission that when determining if someone is employed under a global contract, as opposed to an individual contract, it might only disregard written documents if they amount to a sham. Essentially, the respondent was arguing that when determining a global contract, the approach is different from what might be termed the modern *Uber* and *Autoclenz* approach. It is clear from both *Uber* and *Autoclenz* that that a sham is not required when considering the status of written documents.

93. With respect to the respondent's carefully argued submission, the tribunal could see no basis for this distinction. The Supreme Court in *Uber* tells tribunals that they should take a purposive approach to protect those who are potentially vulnerable and who are in a dependent situation. In the view of the tribunal, this will often include casual workers who are seeking to rely on a global contract. The tribunal would find it inconsistent with the Supreme Court approach in *Uber* to treat global and individual contracts differently.

94. The tribunal did accept the respondent's submission that the tribunal must be careful not to be distracted by any other factor going to employment status save mutuality of obligation. The tribunal nevertheless found that the fact that the respondent had afforded the claimant, in effect, a disciplinary procedure prior to termination was relevant because it constituted evidence going as to what the respondent thought it owed the claimant. Although the contract permitted the respondent to terminate the claimant at will, the evidence indicated that the respondent did not feel it should do this. It put the claimant through a careful and unexceptional disciplinary process and went to considerable trouble to arrange the claimant's attendance at three meetings. This is not consistent with the respondent having no sense of obligation to the claimant. Whilst this is not the same as an obligation to provide work, it is more consistent with an obligation to provide work than not.

95. Further, there was some evidence pointing to the claimant needing to book her holiday with the respondent. Again, this was not inconsistent with the claimant having some obligation to the respondent as regards work.

96. The claimant's evidence, which the tribunal accepted as plausible and detailed, was that one had to show oneself as being a good worker in order to get a desirable regular slot from the respondent. It made business sense that the respondent would seek to retain those with a good record and to provide them with more desirable work.

97. The tribunal also noted that the respondent drew a distinction between 'regulars', as the respondent described them, and the rest of its workforce.

98. Further, the respondent's treatment of the claimant was not consistent as to whether she kept her "regular slot" after going away. She lost her New Musical Express slot, but she kept her Brixton slot upon returning to the UK.

99. The tribunal accepted that the claimant stayed at all times on the respondent's database because she was never sent a new contract in order to re-enter her onto the database.

100. The Tribunal considered if there was at least some relationship between the parties at all times. In the tribunal's view, the most important factor was that the claimant had attended Brixton Station every Tuesday at the same time to do the same thing for over five years, save when she was out of the country. She had also been working for the respondent for seven years. Accordingly, in the view of the tribunal, the parties had done more than simply settling into a regular pattern over a period of time. The pattern had become fixed, unless and until the claimant took a specific step. She told the respondent in effect, 'I have to take a break because I have family responsibilities'. Before she went away in April 2019, the emails showed that she told the respondent she was going. This is consistent with an irreducible minimum of mutuality of obligation between the parties.

101. The practical effect of what the respondent and the claimant understood from each other was that both parties expected the claimant to cover the Brixton Tuesday Time Out shift unless other specific arrangements were made in advance.

102. In the view of the tribunal, this amounted to an irreducible minimum of mutuality of obligation. In making this finding, the tribunal bore in mind the

    guidance of the Supreme Court in the *Uber* case that it should apply a purposive interpretation of the statute.

103. Accordingly, the tribunal found that the claimant was an employee of the respondent under a so-called global or umbrella contract of employment.

<u>Continuity of Service</u>

104. The tribunal went on to consider if the claimant had the necessary two years' continuity of employment. The respondent essentially contended that the claimant lost continuity when she was in Romania from January to April 2019

and further or in the alternative from April 2019 onwards. (The claimant worked a couple of shifts for the respondent in April 2019).

105. The tribunal reminded that according to section 210(5) Employment Rights Act there is an assumption of continuity. However, the case law shows that a tribunal cannot simply rely on this but must consider the evidence. Nevertheless, it is for an employer to show that continuity is broken. This respondent was at something of a disadvantage because it led no direct evidence or oral evidence as to what it thought it was doing or what it understood the agreement to be or what was the contractual position whilst the claimant was in Romania in 2019.

106. The tribunal considered the evidence before it.

107. The claimant informed the respondent before she left in April. The contemporary documents showed that the respondent sent the claimant emails whilst she was in Romania. She said she did not always read these emails because of specific circumstances - she was in a state of distress because of her father's illness. The claimant said that she kept in contact with her team leader whilst she was away which. All of this was not inconsistent with the parties continuing to be bound by a contract of employment while the claimant was in Romania. There was no evidence that the contract came to an end.

108. There was no evidence that when the claimant came back either in April or later that there was a change of working conditions. She had the same staff number. The respondent took her back immediately without demure in the same role in the same place at the same time. At all times she remained on the respondent's database.

109. The tribunal was also influenced by the fact that the claimant was in Romania, from what appeared to be the respondent's point of view, for a good and rational reason. She did not go home for instance for a change of scene. She felt an absolute requirement to go home to care for her extremely sick father. In the view of the tribunal, there was an analogy with compassionate unpaid leave for a long-standing employee.

110. The tribunal accordingly concluded based on this evidence that the respondent had not discharged the burden upon it of showing that the claimant's contract was broken and/or that she was not governed by a contract of employment whilst she was in Romania.

111. Accordingly, the tribunal found that it had jurisdiction to consider the claimant's unfair dismissal complaint.

<u>Unfair Dismissal</u>

112. The tribunal firstly considered if the respondent had shown that misconduct was the reason for dismissal. According to the Court of Appeal in *Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA* the reason for dismissal is 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'.

113. Further, in *Gilham and ors v Kent County Council (No.2) 1985 ICR 233, CA*: the Court explained, 'The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [S.98(4)], and the question of reasonableness.'

114. The tribunal noted that the employer received a complaint from a customer. It investigated or sought to investigate. It was not satisfied with the claimant's explanation, in that she provided no explanation. It proceeded to a disciplinary procedure and dismissed when the claimant failed to amend her conduct in line with the respondent's requirements.

115. The tribunal deals with the claimant's contention that the protected acts were the reason for dismissal below, under Victimisation.

116. Accordingly, the tribunal found that the respondent discharged the burden upon it of showing that misconduct was the reason for dismissal. The tribunal went onto consider reasonableness.

117. In line with the list of issues it applied what is known as the *Burchell* test with the caveat that the burden of proof is now neutral. The tribunal must decide if the respondent had a genuine and reasonable belief in the claimant's culpability based on a reasonable investigation. It is important to understand that a tribunal may not substitute its view of what amounts to reasonable in the circumstances for that of the employer. The tribunal's task is to decide if the investigation or belief came within a range of investigations and beliefs available to a reasonable employer in the circumstances. This is often referred to as the range of reasonable responses test.

118. The tribunal found that the respondent's investigation fell within a reasonable range for the following reasons. The respondent invited the claimant to several investigation meetings which she chose not to attend. The respondent sent the claimant the relevant photographs and ensured she knew what the allegations were – that she left her post without permission and "dumped" magazines at the Library. It gave the claimant ample opportunity to have her say. The claimant failed to tell the respondent her side of the story during the investigatory phase. She only gave her side of the story in her email on 26 July by which time the matter had proceeded to a disciplinary hearing. She also, although to a lesser extent, gave her side of the story at the disciplinary hearing itself. The crux was that she admitted that she had left her post without telling her team leader and she had left copies of Time Out in the library.

119. On this basis the tribunal found that the respondent had a reasonable and genuine belief in the culpability of the claimant because she admitted what she had done.

120. Accordingly, the respondent might be said to have "passed" the Burchell test.

121. When considering the fairness of the respondent's procedure more generally the tribunal again applied the range of reasonable responses test. That is, a tribunal may not substitute its view of what constitutes a fair procedure for that of the respondent. The question is whether the respondent's procedure came within a range of procedures available to a reasonable employer in the circumstances.

122. In the view of the tribunal then there was nothing in the respondent's procedure that took it outside of the reasonable range. The respondent told the claimant of the charges against her and provided her with its evidence. The investigation, disciplinary and appeal phases were managed by different people. The respondent warned the claimant of the possibility of dismissal and invited her to three meetings, an investigation meeting, a disciplinary meeting and an appeal meeting. Meetings were re-arranged to suit the claimant and the respondent ensured she did not lose out financially from attending meetings whilst on shift. The claimant was given the right to be accompanied. This was an unremarkable procedure.

123. Accordingly, the dismissal was procedurally fair, so the tribunal went on to consider sanction.

124. Again, it is important to understand that the range of reasonable responses test applies to the issue of sanction. A tribunal may not substitute its view of what would have been a proper sanction in the circumstances. All it must do is consider whether the decision to dismiss came within a range of responses available to a reasonable employer in the circumstances.

125. The tribunal had found that the claimant did not say, when questioned in the dismissal meeting, that she would not continue to leave her post without permission and leave copies in the Library. She only agreed to do this on the limited condition that the number of magazines were reduced by four-fifths.

126. From the respondent's point of view, it had a client, Time Out, that was sufficiently engaged with how the respondent was performing, to covertly monitor the respondent's workers. The tribunal accepted that this was a vital issue for the client, and hence for the respondent. There was a sound business reason for the client to know how the respondent was fulfilling the contract. The client needed to know how many copies of its magazine were distributed – the tribunal accepted that this would be crucial for a free magazine such as Time Out. Accordingly, there was manifestly a reputational and business risk to the respondent if a client became dissatisfied with its performance. The claimant's conduct went to the fundamentals of the respondent's business - handing out magazines and the like.

127. In the view of the members of the tribunal, the respondent's decision to dismiss was a harsh decision. It was particularly unfortunate that this occurred when the claimant was bereaved, and was, in her own phrase, in a dark place. However, were the tribunal to find the decision to dismiss fell outside of the reasonable range, this would be impermissibly substituting the tribunal's decision for that of the employer. The respondent was faced with a worker who was failing to comply with its client's business requirements, whose conduct had come to the attention of the client, and who refused to

alter her behaviour. In those circumstances, the employer's decision to dismiss lay within the reasonable range in the circumstances.

128. Accordingly, the tribunal dismissed the claim of unfair dismissal.

Age Discrimination

129. The claimant relied on one act of age discrimination - the cancellation of her two promotional shifts in June and July 2019. She was offered the work and then cancelled. This was not in dispute.

130. The tribunal adopted the approach, the so-called 'reason why' test as set out in *Shamoon v Chief Constable of Royal Ulster Constabulary [2003] UKHL 11*; [2003] IRLR 285, as the respondent suggested in its submissions as follows

> [8] No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason-why issue. The two issues are intertwined
> …
> [11] This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

131. The tribunal also directed itself in line with the authorities of *Hewage v Grampian Health Board [2012] UKSC 37, Igen v Wong [2005] EWCA Civ 142, Bahl v Law Society [2003] IRLR 640 [2005] IRLR 258, Madarassy v Nomura International [2007] EWCA Civ 33, [2007] IRLR 246*, and *Commissioner of Police of the Metropolis v Virdi*.

132. For the tribunal, the crux of the matter was, what was the reason why the respondent acted in the way it did? Was it an impermissible discriminatory reason?

133. In answering this question, the tribunal took into account the explanation proffered by the respondent. The respondent was at a disadvantage because it did not have evidence from the decision maker; on its case this was due to Covid and lockdown and the effect on its business. However, according to the respondent, its conduct was not the result of an individual decision by a one person about another, but simply the operation of a settled policy or practice.

134. The respondent's case, essentially, was that it had a practice that a worker could not do both distribution and promotion work at the time. Although historically workers had done both types of work, once the respondent grew

in size, it was able to have its workers specialise and therefore there was a division. There was a suggestion that the respondent operated two separate lists of workers but there was no direct evidence of this. Accordingly, on the respondent's case, because the claimant was a distribution worker, she could not do promotion work; when she was mistakenly allocated promotion work, this was rectified, and the shifts cancelled.

135. There was no real explanation from the respondent as to why a worker could not be on both lists, save a wish for its workers to specialise. Further, there was no explanation as to why the claimant was on the distributor rather than the promotion list.

136. The respondent had not provided evidence when asked to do so by the claimant. The claimant had asked for statistics about the profile of those doing the promotion work compared to the distribution work, but the respondent failed to respond substantively. Its explanation for this was the extreme disruption caused by Covid. In the view of the tribunal this was a plausible explanation and more likely to be true, than not.

137. The claimant had done at least a reasonable amount of promotion work up to 2017, although the evidence was that this was much more regular up to 2014. All this work was done when the claimant was in her fifties. The claimant's explanation was that promotion had closed down to older people once the respondent grew in size and had a wider pool of workers from whom to choose.

138. Turning to the claimant's evidence, this was limited. She only had hearsay evidence that she had been told by a named manager that her age was why she lost the work.

139. The tribunal took the view that there was a genuine difference between the two types of work. It might well be easier to persuade a passer-by to pick up a known product with a known purpose, such as Time Out or the Evening Standard, than to persuade them to take something unknown, for instance a new energy drink. The promotional work involved more outreach to the public. The public might be expecting to pick up a magazine or paper, as part of their daily routine. They would not be expecting to pick up, say, a new energy drink. It would be necessary to interact considerably more with the public in order to hand out, say, energy drinks, than someone's regular reading matter. Both parties agreed that in recent years the respondent had expanded and had a considerably wider choice of workers. Accordingly, it was plausible that the respondent, once it had the ability to do so, might prefer some workers for promotion work.

140. In the view of the tribunal the difficulty for the claimant how the tribunal could determine that the reason why she was not preferred for promotion work was her age rather than some other factor. There were many possible explanations apart from age as to why the claimant, was not offered this work – it might be personality, whether she had the necessary skills, previous performance doing the work or a mere personal preference on the part of a respondent employee. She herself suggested other reasons, such as facility with the English language. In the circumstances, the tribunal could not find that the reason why the claimant lost the promotion work was her age. There

was insufficient evidence on this in circumstances where other explanations were equally if not more likely.

141. Accordingly, the tribunal could not find that the reason that the claimant lost the promotional shifts in June and July 2019 was her age, and the claim was dismissed.

Victimisation

142. The claimant's case was that she was victimised due to her carrying out protected acts in respect of race and age discrimination. The detriment relied upon was her termination and the refusal of her appeal.

143. The respondent accepted that the claimant had committed a protected act in the disciplinary and appeal meetings by alleging race and age discrimination. The tribunal considered if the two email also amounted to protected acts. The tribunal found that the two emails were protected acts because they were similar if not indistinguishable in content from the comments made in the meetings, which the respondent accepted were protected acts.

144. Accordingly, as there was no dispute that the claimant had been dismissed and her appeal refused, the issue was causation. Why did the respondent dismiss the claimant? Was it because of the protected acts?

145. According to the House of Lords in *Nagarajan v London Regional Transport 1999 ICR 877, HL* a claimant will succeed if the protected acts have a 'significant influence' on the decision. According to the Court of Appeal in *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931, CA*, this is 'an influence which is more than trivial.' The Equality Act Code also confirms that the protected act does not have to be the sole reason for the detriment. Recent case law makes it clear that the protected act does not have to be the primary reason.

146. The tribunal noted that the decision to terminate was reached after a lengthy investigation and disciplinary procedure which resulted directly from a client complaint. The respondent put considerable effort into arranging meetings, even when the claimant refused or failed to attend. The respondent had clear cut evidence of a problem in the form of the written and specific client complaint. The claimant had been warned about the possibility of dismissal at an early stage in the process. In fact, she was aware of the risk of termination at least from when the Time Out brief was circulated. This specifically stated that dismissal was a possibility.

147. The tribunal considered the context of the protected acts. The first acts were made by way of emails before the meetings. However, they were not lengthy references, compared to the claimant's references to the crucial matters – what the claimant had done. The respondent did not pick up on these statements in the dismissal meeting. According to the minutes of the dismissal meeting, the claimant's protected comments were made near the end of the meeting after the fundamental issues had been discussed – what the claimant had done, why and whether she would do it again. The statements took up very little time in the meeting which overwhelmingly concentrated on other issues.

148. The tribunal accepted the dismissal meeting minutes as accurate in this respect because the claimant did not contend, despite her significant attacks on the accuracy of the minutes, that they were materially inaccurate in respect of the protected acts.

149. There was nothing in the protected acts themselves which accused the decision maker Ms Phillips of any wrongdoing. As the respondent pointed out, it was only later that the claimant clarified this, after the decision to dismiss was made.

150. The tribunal turned to the appeal meeting. The protected acts occurred earlier in the appeal meeting in the context of the claimant's complaining about Ms Phillips' conduct. However, the appeal meeting did not get properly underway because the claimant walked out because she was unhappy because the minutes would not be verbatim. In the view of the tribunal, it was the claimant's walking out of the meeting which was more likely to be remembered by the appeal officer than a relatively brief reference to the claimant's losing her NME work and losing promotion work because of her age.

151. Based on this evidence, the tribunal determined that the protected acts were peripheral comments compared to the crux of the issue in the respondent's mind, the claimant's conduct on the day in question and how she would conduct herself going forward. The protected acts had no significant or effective influence on the decisions which were based on what the claimant had done and what she would do in future and her attitude in meetings.

152. For the avoidance of doubt, the same thinking applied both in respect of victimisation on race and victimisation on age.

153. Accordingly, the victimisation claim must fail and was dismissed.

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Employment Judge Nash
Date: 21 May 2021