EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms H O'Neill	**v**	**The Health and Safety Group Limited**

Heard at: London Central
On: 15 – 17 September 2021

Before: EJ Judge Hodgson
Ms Susan Samek
Ms Kate Harr

Representation

For the Claimant: in person
For the Respondent: Mr E Oarith, counsel

The unanimous judgment of the tribunal is –

1. **The breach of contract claim is dismissed on withdrawal.**
2. **The unlawful deduction from wages claim is dismissed on withdrawal.**
3. **The claim of unfair dismissal pursuant to section 57A Employment Rights Act 1996 and section 94 Employment Rights Act 1996 fails and is dismissed.**
4. **The application to add claims of failure to make reasonable adjustments is refused.**
5. **There is no claim pursuant to the Equality Act 2010 before the tribunal.**

REASONS

Introduction

1. By a claim form received 2 June 2020 the claimant brought various claims; the nature of those claims was unclear. There was an attempt by EJ Wisby to clarify those claims during a case management discussion on 24

November 2020. For the reasons we will come to, we are not satisfied that the claims brought were accurately identified in those issues, and we did not adopt them.

2. There had been a dispute as to whether the claimant was disabled. The respondent admitted she was disabled by virtue of PTSD. There was also a dispute as to whether she was an employee. At the hearing, we clarified that the respondent accepted the claimant was an employee for the purposes of section 83 Equality Act 2010, as it was accepted that she was employed under a contract to do work personally. However, it was not admitted that the claimant was an employee under the narrower definition in section 230 Employment Rights Act 1996.

3. We noted that any claim of unfair dismissal could not succeed if the claimant was not an employee for the purpose of the Employment Rights Act 1996. We agreed that whether the claimant was an employee pursuant to section 230 should be dealt with as a preliminary issue. If the claimant could not establish she was an employee, no claim of unfair dismissal could proceed.

The claims

4. At the case management hearing on 24 November 2020, EJ Wisby recorded that there were claims of unfair dismissal, failure to make reasonable adjustments, and breach of contract and/or unlawful deduction from wages.

5. It was common ground the claimant did not have two years' service. At the case management hearing, EJ Wisby recorded that the claimant wished to pursue a claim of automatic unfair dismissal contrary to section 99 Employment Rights Act 1996, it being her case that the reason or principal reason for dismissal was the dismissal took place in prescribed circumstances. The prescribed circumstances relied on were taking time off for dependents pursuant to section 57A Employment Rights Act 1996.

6. It is not clear to us that the claim identified in those issues is set out adequately, or at all, in the claim form. However, that is not a matter we need to consider further for the reasons we will come to.

7. During the hearing, we considered the breach of contract/deduction from wages claim. Initially, this was put as a failure to pay sums due in the notice period. However, the claimant's evidence to us was that her scheduled work was cancelled when notice was given. Thereafter, the scheduled work was reinstated, but the claimant refused to undertake the work. In any event, despite the claimant refusing to undertake the work, she was paid for the work allocated. There was no separate claim for wages. In the circumstances, and in the context of considering whether the breach of contract case could have any reasonable prospect of success, the claimant conceded that there was no payment due and

withdrew her claim. It follows that the breach of contract and unlawful deduction from wages claims were dismissed on withdrawal.

8. It was agreed, at the start of the hearing, that the only Equality Act 2010 claim being pursued was a breach of the duty to make reasonable adjustments. We noted that the claim form did not appear to contain any claim of failure to make reasonable adjustments. The claim for did refer to harassment, but no harassment claim was pursued. It was agreed that there had been no amendment to the claim form.

9. We considered the way in which EJ Wisby had sought to identify the reasonable adjustments claim which was as follows:

> **Reasonable adjustments: EQA, sections 20 & 21**
> **…**
> **(v) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):**
>
> **a. contract termination without discussion?**
>
> **(vi) Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time? In that, [claimant to identify specific disadvantage suffered]?**
>
> **(vii) If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?**
>
> **(viii) If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified by the claimant as follows:**
>
> **a. Invited non hostile and meditated conversation with a friend / counsellor / pastoral support for claimant;**
> **b. Given a warning period (in which to source childcare or the like);**
> **c. Trying to work with the claimant to resolve the issue rather than ignore me causing acute anxiety;**
> **d. A flexibility when approaching dismissal including considering sanctions;**
> **e. Frank and open conversations about consequences;**
> **f. Commencing the disciplinary procedure instead of dismissal;**
> **g. A more humane approach i.e. a phone call or zoom meeting rather than stark emails; and**
> **h. Not ignoring requests (pleas) for a meeting or to try and find a resolution and overt requests not to sack the claimant.**
>
> **(ix) If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?**

10. We noted that the claim form contained no such reasonable adjustments claim. The claim form does make reference to PTSD. However, it does

not identify, or hint at, any PCP as set out by EJ Wisby, or otherwise. It does not identify any alleged substantial disadvantage.[1] It does not refer to any request for reasonable adjustments. It does not identify any proposed reasonable adjustments. It short, it does not set out the basis for any reasonable adjustments claim.

11. The reference to reasonable adjustments came out of a conversation with the claimant at the hearing. Even then, the nature of the reasonable adjustments remained obscure. EJ Wisby notes the claimant failed to identify the substantial disadvantage and indicates that she must clarify. At no time did the claimant give that clarification prior to the hearing or before us.

12. It is clear that in order to proceed with the reasonable adjustments claim, as partly set out by EJ Wisby, it will be necessary to amend the claim, and to clarify the basis on which it is said there was a substantial disadvantage.

13. We considered the claimant's statement. Unfortunately, that did not deal with the reasonable adjustments claim at all. Therefore, the position was that reasonable adjustments claim pleaded. To the extent that EJ Wisby had tried to identify the claim based on oral representations, the claim remained incomplete and required amendment. In any event, the claimant did not appear to pursue the claim of failure to make reasonable adjustments in her statement.

14. We spent some time on the first day explaining to the claimant the nature of a reasonable adjustments claim and inviting her to clarify. Thereafter, she filed a document which purported to give further information but provided no clarification. Following further discussion, we gave the claimant until the following morning to clarify her claim and to seek amendment. We explained what was needed. We asked the claimant to set out the proposed amendment to include the PCP, the substantial disadvantage, when and if she requested an adjustment, how the adjustment would have assisted her in her work, and when and how she told the respondent about her disability. The claimant filed an application on the morning of the second day. The application still lacked relevant detail. We asked the claimant to clarify the application, particularly to confirm when she had raised any difficulty with the respondent or sought any form of adjustment. She was unable to offer any detail. We confirmed that we would consider the application to amend as part of our deliberations.

The hearing

15. We heard evidence from the claimant. We heard from Mr Adrian Simpson on behalf of the respondent. We received a bundle of documents.

[1] No substantial disadvantage was identified before EJ Wisby. The claimant was invited to clarify, and she failed to do so.

16. It was noted on the first day that the claimant had failed to disclose substantial documentation, particularly concerning her accounts, tax returns, and service company. On the evening of day one, the claimant disclosed further limited documentation.

17. We received written submissions from the respondent. Both parties gave oral submissions.

Background

18. The respondent is a provider of health care safety training. Part of its operation provides classroom-based courses. Clients are typically NHS trusts and private sector care institutions. It employs some trainers directly. It also maintains a bank of freelance trainers to whom work is allocated. It is the respondent's case that the freelance trainers are not employees. It is agreed the claimant was a freelance trainer.

19. On or around December 2018, the parties agreed a contract. Although we have not seen the exact contract, there is no dispute that the contract was signed. The terms are not in dispute.

20. The claimant negotiated a daily fee of £200. In the discussion below, we will consider the relevant clauses of the contract.

21. The claimant delivered courses on only 14 days during the 2019 – 2020 tax year. She received £3600 plus travel expenses.

22. The contract was terminated on 30 days' notice, given on 21 January 2020.

The law

23. McKenna J in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 2 QB 497, [1968] 1 All ER 433, said as follows:

> **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 …**

24. There is no single definitive test for employment though tests have been proposed. **Hall (Inspector of Taxes) v Lormier [1999] IRLR 171** confirmed the object of the exercise is to paint a picture from the accumulation of detail. It is a matter of the evaluation of the overall effect

of the detail which is not necessary the same as the sum of the individual situation

25. It is still necessary to consider what factors or approaches a tribunal or court will take into account.

26. 'Control' is a factor. In a complex case, a nuanced approach is needed.

27. It may be necessary to have regard to policy considerations. Sham transactions can cause difficulty. This is often involves considering personal service, the particular problem of substitution, and the use of delegation clauses.

28. Consideration of more dynamic factors may be needed: the organisation of the work, the individual's position in the enterprise, and the economic realities of the arrangement.

29. The general approach tends to be to weigh up all the factors (the 'multiple test').

30. The parties description of the relationship may sway a tribunal, but categorisation is an objective test. It has always been clear that the parties cannot establish a particular relationship by express assertion.

31. Certain factors are often taken into account.

    a. The degree of control: the greater the scope for individual judgment on the part of the worker, the more likely he or she will be an independent contractor, but this may not assist where the nature of the work is the exercise of professional expertise.

    b. What was the amount of the remuneration and how was it paid? A regular wage or salary may suggest a contract of employment; profit sharing or the submission of invoices for set amounts of work done, may suggest self-employment.

    c. How far, if at all, did the worker invest in his or her own future: who provided the capital and who risked the loss?

    d. Who provided the tools and equipment?

    e. Was the worker tied to one employer, or was he or she free to work for others? Conversely, how strong or otherwise is the obligation on the worker to work for that particular employer, if and when called on to do so?

    f. What were the arrangements for the payment of income tax and National Insurance?

g. How was the arrangement terminable? A power of dismissal may suggest employment.

h. The terms of the contract may assist. A genuine contract for services would not normally be expected to provide for sick pay or contractual holiday or pension entitlements.

i. The obligation to give personal service is important; it is not conclusive. There is nothing to prevent an independent contractor from undertaking to perform the relevant tasks personally.

32. Mutuality of obligation is now often seen as a pre-requisite for any contract to exist, and therefore necessary for both the 'employee' and 'worker' definitions. See, for example, Elias J in **Stephenson v Delphi Diesel Systems Ltd** [2003] ICR 471 and **James v London Borough of Greenwich [2007] IRLR 168.**

33. Despite the various attempts to codify the test, the approach does remain nuanced, and we should treat alleged absolute tests with some caution. Each case must be considered on its merits and due regard must be had to the accumulation of detail**.**

Discussion

34. It is the claimant's case that she was an employee. It is the respondent's case that she was not. It is convenient to set out, in broad terms, the parties' submissions; thereafter, we will consider the relevant evidence.

The respondent's submissions

35. The respondent accepts that the contract required the claimant to perform the training personally. However, it is alleged there was not "enough control for there to be a relationship of employer and employee." It is said there was limited control over the work performed. The respondent states –

- **There was no control over the amount of work that the claimant was required to do. However, she was free to choose her availability and 'orchestrate' her working diary …**
- **The claimant had freedom in choosing the locations and the venues that she wanted to work.**
- **There was no set shift pattern for working, and she was free to set her unavailability...**
- **The claimant was paid at a daily rate for the sessions delivered.**
- **She negotiated the daily rate, and the respondent could not unilaterally change that daily rate.**
- **She described that the daily rate allowed her to be "ad hoc and non-substantive".**
- **She was paid through a service company and invoiced for each session that she worked.**
- **She set the terms and conditions of trading within her invoice and altered them unilaterally (compare invoices in 219 and 222).**

- **She was given lesson plans and training material, but she could deliver the sessions with a freedom which she says led to positive feedback.**
- **The claimant was free to have other work, and she admittedly had another job (clause 5.1).**
- **The claimant used her resources to set herself up with equipment for the position…**
- **Despite the previous request from her to have a set schedule of work, this was not agreed upon by the respondents due to the particular nature of the work (page 218).**

36. As to mutuality of obligation, the respondent's position is clause 2.3 of the contract made it clear there was no obligation for the respondent to offer work, and neither was the claimant under any obligation to accept work. It is accepted there was an obligation on the subcontractor to keep an electronic calendar updated showing 'availability' for work, but there was no obligation to accept the work offered within that period.

37. As to personal performance, it is accepted that personal performance was a requirement, but it is alleged the obligation was triggered by acceptance of the training course. In any event, both parties could cancel the agreement for any training course. The effect would be that another trainer could potentially do the training.

The claimant's submissions

38. It is the claimant's case that the respondent exercised significant control over her. She relies on requirement to provide diary dates approximately twelve weeks in advance. The respondent provided relevant training materials, other than a laptop and projector. She was required to use those training materials. She was required to follow the training format. The respondent provided and dictated the venues.

39. The claimant alleges that the handbook was prescriptive and demonstrated control. She was required to undertake training. She was required to comply with the respondent's standard operation procedures. She was restricted from soliciting or working for the respondent's customers. She was required to give written notice. Whilst the contract referred to her as being a subcontractor, the handbook referred to all trainers as employees. It is agreed the handbook was not expressly incorporated into the contract.

Analysis

40. We should consider first the contract. This is not a case where it is alleged that the contract did not reflect the actual practice adopted between the parties. It is necessary to look at the contract in a little more detail. We have considered each of the clauses. It is not necessary for the purpose of this decision to set them out in detail, but it is necessary to record the effect of several clauses.

41. The contract defines confidential information and includes the following: trade secrets; training materials; other matters relating to business processes; any list of business partners, customers, and potential customers; and marketing plans. We do not need to set out the detail. In broad terms, it refers to the way in which the respondent operates.

42. The contract defines customers of the respondent. It sets out the nature of the intellectual property rights. It defines those companies that introduce customers as “introducers.” It defines “restricted customers” in a limited way referring to any company firm or organisation which in the twelve months prior to the termination date was in the habit of dealing with the respondent. This, importantly, is limited to only those "with whom the subcontractor had material dealings in the course of carrying out work during the twelve months immediately preceding the termination date."

43. Training materials are defined.

44. The nature of the work is defined to include "the work and activities set out in schedule 1 to be undertaken by the subcontractor as agreed from time to time or such other work or activities as the parties may from time to time agree."

45. Schedule one details courses. This definition of work is limited. Anything outside the agreed training courses cannot constitute work that the claimant can be asked to do without her agreement.

46. Paragraph 2 sets out the subcontractor's obligations which are primarily to "undertake the work with all due care, skill and diligence..." She must maintain an electronic calendar showing 10 weeks’ availability. Any commitments to the work are entered on the calendar. There are directions to obtain confirmation of attendance of delegates at any course. There are general provisions about not misusing training material. She is required to wear a HSG trainer ID badge. She must adhere to policies and procedures notified by HSG in its trainers’ code of conduct including any sickness protocol. There are provisions concerning submission of information about courses taught.

47. Paragraph 2.3 states "HSG is under no obligation to offer and the subcontractor is under no obligation to accept any work…"

48. Paragraph 3 provides for payment of the subcontractor at the daily rate for any course that lasted at least three hours. It provides for the payment of travel mileage expenses and reasonable and necessary accommodation. Such sums are payable within ten days. Pursuant to clause 3.3, the payment is subject to the provision by "the subcontractor" providing "a valid invoice on the last working day of the month." In addition, it is conditional on the customer paying for a project and the subcontractor having performed all obligations within the agreement.

49. Clause 3.5 provides that any sums paid are inclusive of all taxes, including VAT, if applicable.

50. Clause 3.7 provides that the subcontractor indemnify the respondent, but only in limited circumstances. The indemnity is conditional on one of three matters: first the customer refuses to pay for work; second, the customer claims back money in relation to work; and third, the customer requires any of the work to be for be performed again. Indemnity is for all costs incurred by HSG associated with such action by the customer. However, the indemnity cannot apply unless work has taken place.

51. Clause 3.8 applies if any circumstances under 3.7 apply. The respondent may require the subcontractor to return any payment or withhold payment. This is in addition to the indemnity.

52. Clause 5 refers to other activities. It says "Nothing in this agreement shall prevent the subcontractor from being engaged, concerned having any financial interest in any capacity in any other business, trade, profession or occupation during this term of this agreement…" It is subject to the proviso that the subcontractor must not breach the obligations under the agreement and must not provide training or health and safety services to a customer.

53. Clause 5.2 prohibits soliciting of customers.

54. Clause 6 prevents the use of confidential information by the subcontractor.

55. Clause 7 maintains ownership of intellectual property.

56. Clause 8 provides for the term and termination.

57. Clause 8.1 reserves to the respondent the right to cancel the training course at such notice as "is reasonably practicable."

58. There is right to terminate for breach. Clause 8.2 allows termination by notice (30 days for the respondent and 90 days the subcontractor).

59. Clause 9 provides for the return of documents and materials on termination of the agreement. The subcontractor is required to delete confidential information.

60. Clause 10 provides for post termination obligations for a period of up to twelve months. These refer to restricted customers and the prohibition from soliciting. Having business dealings with restricted customers and introducers is restricted. There is prohibition from soliciting employees and others who are engaged.

61. Paragraph 11 provides an obligation to take out professional indemnity insurance and any other such policy or policies of insurance as may be required from time to time.

62. Paragraph 12 is a prohibition against assignment. This effectively requires personal service.

63. We do not need to consider any of the remaining clauses specifically.

64. The contract is drafted as a commercial contract. No party has suggested that the contract did not reflect the reality of the way in which the business dealings were conducted. There is no suggestion that any clause did not reflect the way in which the parties conducted their business relationship.

65. At no time did the respondent invoke its right to an indemnity or clawback. However, there is no evidence to suggest that the claimant's delivery of training ever led to any complaint or difficulty. It follows there was no loss for which indemnity could have been sought. There was no ground for invoking the indemnity, as indemnity was conditional on work being undertaken. There was no basis for clawback.

66. In or around 2016 the claimant had set up service company, BEA Health Prof Limited. She used that limited company to claim fees for some work and also used it as a vehicle to claim expenses, particularly for charitable work. At no time did the respondent require the claimant to set up a service company.

67. The contract required the claimant to provide an invoice. At no time did the claimant provide an invoice to the respondent for any work undertaken. Instead, she, unilaterally, raised all invoices through her service company. To the extent the claimant has suggested that this was at the request of the respondent, we reject that evidence. The claimant chose to operate through a service company. This was a fundamental change in the terms of the contract, which was imposed by the claimant. The respondent, by paying the company, agreed to the unilateral variation. Moreover, the claimant introduced into her company's invoice a further term whereby the respondent must pay for courses cancelled on short notice. The respondent complied with that clause on at least one occasion. It follows the claimant sought, and received, variations of the contract.

68. We have seen the claimant's P60 for the year ending 5 April 2020. This demonstrates that she was an employee of her own service company. She received money from the respondent into her service company and thereafter extracted it as wages as an employee of her own service company. The claimant has not disclosed the accounts for the service company. The claimant has not disclosed her tax return. It is unclear to us what further income she received into the service company at the material time, if any. In any event, when she started employment, she had another job and she continued that for a period.

69. The earnings received from the respondent for her total of 14 days work are £3,600 plus expenses. The earnings revealed by her P60 are £8,628.

It would appear the claimant did have other sources of income during the relevant tax year. However, she has not disclosed the detail. It is clear the sums were paid to her service company. The use of that service company, and her being an employee of that service company, was her choice and in no sense whatsoever was it a requirement of the respondent.

70. The payments by the respondent were not paid through the PAYE system.

71. The claimant provided some equipment. She provided a laptop and projector. She also chose to provide other materials which supplemented those provided by the respondent.

72. We do not accept the claimant's contention that she had no economic risk. First, there was no guarantee that she would receive any work. Second, if she did undertake work, and there was complaint by the customer, or a failure to pay, there were potential financial consequences in the form of indemnity and clawback. The indemnity was not limited and referred to all expenses incurred by the respondent. Third, the claimant was required to maintain her own professional indemnity insurance and public liability insurance.

73. We have considered above some of the most important aspects of the relationship which are often considered when assessing whether the relationship is one of employee and employer. There is no single test. Generally, it is necessary to consider a multiple approach.

74. The parties have referred to **Autoclenz**.[2] That case is not of particular help. It concerned a situation when the contract was said not to reflect the reality of the way the business was conducted. In particular, it was concerned with the reality of controlling time and providing a substitute worker. It was concerned with the approach to a contract which did not readily fall into the traditional definition of sham, but where one party drafted it in a way that did not reflect the reality of the relationship.

75. The claimant was required to perform the service personally, and there is no suggestion that the contract did not reflect the reality of the relationship.

76. We will approach the analysis by considering three matters. Was there an irreducible minimum of obligation? What was the nature of control? What are the other relevant factors?

77. Was there an irreducible minimum of obligation? This is a case where there is an overarching contract. Under that contract there is no obligation at all for the respondent to offer work, or the claimant to accept it. This is entirely consistent with the way the relationship worked in practice. The claimant only accepted 14 days' work in a period of over a year. During that time she took off several months. The fact that accepting a project

[2] *Autoclenz Ltd v Belcher and others [2011] ICR 1167 SC.*

creates obligations does not detract from the fact that there is no obligation to offer or accept.

78. The claimant has asserted that at some point she was asked to confirm that she would accept appointments. It is correct that in January, when she cancelled at short notice a particular project, she was asked to commit to a number of days. However, we find that this simply reflects a commercial reality. It was clear that the respondent needed reliable individuals. If the claimant was neither reliable, nor willing to commit to work, there is little point in the relationship continuing; however, that does not mean that the respondent had a right to require any commitment. It did not.

79. The overarching contract allowed for individual projects to be assigned and agreed to, but did not require the claimant to undertake any work. Once work was accepted, even then, the claimant could withdraw from the contract without necessarily being in breach, at least if reasonable notice was given.

80. In all the circumstances, whilst there was a contract, we are not satisfied that this is one where there was a minimum obligation consistent with employment.

81. It is the claimant's contention that the respondent exercised control over her which was consistent with the relationship of employer and employee. We do not accept that contention. The respondent had designed courses that it sold to customers, and must be delivered by trainers. The purpose of the agreement was for the subcontractor to deliver those courses. The nature of the agreement is not one whereby the claimant was required to design the course.

82. The claimant was free to choose whether to accept the engagement on the basis offered, and she chose to accept. We accept that to some degree the respondent was prescriptive as to the content of the course. The standard operating procedures were quite detailed. However, they revolved around quality assurance and ensuring appropriate supervision of delegates and reporting back on the course.

83. As to the actual delivery of the course, it is common ground that the claimant had significant autonomy in the way that this was undertaken. The claimant suggested that she was required to follow strictly the respondent's format, including referring to specific slides. However, it is clear from the policy that that is not the case. Whilst the claimant was required to deliver the course, she did have some discretion.

84. The nature of the work is defined by the contract. The work is limited to specific courses. The content of those courses is expanded on by the employee handbook. There is no indication that any time the claimant sought to suggest that the direction given in the handbook was not acceptable. Viewed one way, this can be seen as control. However, what

is being controlled is the course delivered to the customer. The control is to ensure that the course paid for by the customer is the course delivered by the trainer.

85. All contracts will have obligations. Those obligations may involve some form of control. However, it is not any control that will demonstrate an employment relationship. For there to be the relationship of employer and employee, the essence is that that there must be some discretion for the employer to require the employee to undertake any task within general duties. This contract is not of that nature. What is described as work is a product. The control is simply to ensure that the product is delivered. That is defined strictly by the contract, and by implication the additional agreement in relation to the standard operation procedures, which is voluntarily accepted. However, the respondent has no right to direct the claimant to undertake any other work. No other work may be assigned without agreement.

86. This contrasts with the position of the employees who may be required to do anything within general duties. For example, an employee could be assigned to undertake any training course, at any venue, at any time. The respondent had no right to exercise such control over the claimant. Moreover, either party could simply terminate a project at any time without being in breach of the contract, at least if reasonable notice were given.

87. We do not accept that the respondent exercised control consistent with an employment relationship. The control exercised revolved around ensuring that the specific product bought by the customer, namely the training, was delivered in a consistent manner. The fact that the delivery of the course was heavily prescribed serves to demonstrate the nature of the bargain reached between the claimant and the respondent. The claimant agreed to deliver the respondent's courses carefully and precisely. In return, the respondent limited the claimant's obligations to the delivery of those courses, and not work more generally.

88. The nature of control in an employee/employer relationship is much more fluid and revolves around the employee promising to give service and the respondent being able to direct in a more broad and general manner. The specific control exercised here, which was designed to ensure delivery of specific courses, is the antithesis of the control exercised in the employee/employer relationship.

89. We should consider whether there were other factors which may be relevant.

90. Remuneration was paid at a daily rate. That daily rate applied if the course lasted more than three hours. It was not a regular wage or salary. The claimant was not paid by the hour. Moreover, if there were a complaint by the customer, there was provision both for an indemnity and clawback. This is inconsistent with the claimant being an employee.

91. The tax treatment is significant. The contract envisaged that a gross sum would be paid to include all taxes. The way in which the freelancer organised his or her business was not dictated by the respondent. In this case, the claimant, entirely of her own volition, chose to operate a service company. The service company received payment from different sources and the claimant defined herself as an employee of that company. As the setting up of the service company was not a requirement of the respondent, this strongly points away from there being a relationship of employer and employee. This is not a case when the claimant was forced into a particular position by the policy adopted by the respondent. This is a case of the claimant actively treating the respondent as a client of her own service company.

92. Most of the capital was provided by the respondent. However, the claimant was required to supply some equipment, including the laptop and projector. The claimant also had the right to supplement the teaching products supplied by the respondent. The respondent paid for the venue. The respondent found customers for the course. It follows that most the capital was put in by the respondent. However, that is consistent with the nature of the relationship and the requirements of the contract. In this case it does not points strongly to an employee/employer relationship.

93. The claimant was not tied to one employer. She was free to work for others. However, the contract was not without restraint. She was not permitted to solicit customers, or work privately for those customers that she had worked for. It is possible to find these types of non-solicitation clauses in an employee contract. In an employment contract there are implied terms of good faith which may prevent direct competition or solicitation during employment. However, the restraints applied in this contract envisaged there being no relationship of employer and employee, as there is no reliance on any implied terms, instead, all restraints are made explicit.

94. Whilst restraints such as non-solicitation may be found in employment contracts, that does not mean to say they do not appear in other commercial contracts. Here, the respondent is providing a product to customers, which is largely the provision of training. The content of that training course is, essentially, intellectual property. The client base is the respondent's most valuable asset. It is not surprising that the respondent would seek to maintain control over that intellectual property, and prevent trainers from simply offering to provide the respondent's own course to customers at a cheaper price.

95. Non-solicitation is the most effective way of achieving that control; we do not find it inconsistent with the commercial contract. This is not a fact which points strongly to there being an employment relationship in the circumstances of this case.

96. The respondent maintained a small number of employed trainers who were designed to provide for a degree of flexibility. There was a bank of

freelancers who could be called on from time to time. They could be directed more generally. This provided flexibility for the respondent. There was obligation on the freelancers to be flexible. The arrangements are not inconsistent with some form of self-employment for the freelancers.

97. The method of terminating the contract does not point strongly towards an employer/employee relationship. It is not unusual for a commercial contract to have notice periods. Commercial contracts can be terminated. There was no obligation during any notice period to either offer work or to accept work. The fact that the notice should be in writing is not inconsistent with any form of commercial contract. These provisions do not point towards this being an employment contract.

98. We have considered the handbook. The handbook refers to all, including contractors, as employees. We accept Mr Simpson's evidence that this was a poor attempt to provide a single point of reference for both employees and freelancers. We do not find that it was contractual in nature. In practice, it did not lead to any confusion. The fact that it referred to everybody as employees is unfortunate in the context of this litigation, but it is not indicative of an employment relationship or probative of its nature.

99. The fact that the claimant was required to wear a badge with the respondent's logo when delivering the respondent's courses does not assist with the nature of the relationship. It simply reflects the respondent's wish to project a corporate identity. The contract makes it clear that neither party may, in relation to third parties, bind the other. At no time was the claimant prevented from explaining to customers that she worked on a freelance basis. The use of corporate identity was an administrative convenience, no more.

100. It is necessary for us to stand back and look at all the factors.

101. When we consider the nature of the obligation to offer and to accept work, the nature of the control, and the other relevant factors, each is inconsistent with an employment relationship.

102. In all the circumstances we find the claimant is not an employee.

Unfair dismissal

103. It follows that the claimant is not an employee within the meaning of section 230, the claim of unfair dismissal cannot proceed. It is not necessary, therefore, for us to consider the extent to which the specific claim based on section 57A appeared in the claim form. No claim of unfair dismissal may proceed.

The discrimination claim

104. For the reasons we have already set out, we find there is no claim of failure to make reasonable adjustments in the claim form. This has now been recognised by the claimant who has not sought to persuade us that any claim of failure to make reasonable adjustments was set out in the claim form. She has accepted that it is necessary to make an application to amend, if a reasonable adjustments claim is to be brought. If we do not grant that application to amend, there is no discrimination claim before the tribunal.

The application to amend

105. The relevant legal principles to be applied, when considering amendment, are well known. The leading authority is **Selkent Bus Company Limited v Moore 1996 ICR 836**.

106. The tribunal must carry out a careful balancing exercise of all the relevant circumstances. It must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

107. When considering the balance of injustice and hardship, **Selkent** states that all the relevant circumstances must be considered, and those circumstances include the following: the nature of the amendment (is it minor or substantial); the applicability of time limits; and the timing and manner of the application.

108. **Selkent** states minor amendments include the following: the correction of clerical errors; the addition of incidental factual details to support existing allegations; and the relabelling of existing factual allegations as a different cause of action. Substantial amendments may include pleading new factual allegations, whether as a fresh cause of action or new allegations for an existing cause of action.

109. **Selkent** confirms substantial amendment will require a consideration of the applicable time limit.

110. If a claimant wishes to amend the claim, there is considerable onus placed on that party to make the application clear. The Court of Appeal's decision in **Housing Corporation v Bryant** 1999 ICR 123 emphasises the importance of clarity of pleading. It stresses the need for clarity and accuracy on the part of the claimant in pleading the case.

111. It is important for a claimant to identify with clarity the amendments because, if the claimant fails to do so, the tribunal cannot determine whether the amendment is minor or substantial. Further, it is necessary for the amendment to be clear to identify whether there is any issue with time at all.

112. The timing and the manner of the application must also be considered. It is necessary to consider all of the relevant circumstances. Those circumstances may include those taken into account in **General Workers**

Union v Safeway Stores Limited 2007 UK EAT 92: how closely related are the new and old claims; are all the relevant facts already in issue and must be proved; was the claim omitted by mistake on the part of the lawyers; should the respondent be surprised that the new claim has been brought; and how promptly has the application been made. These examples are merely illustrative. All the relevant circumstances must be considered.

113. As part of the balancing exercise, it is important to identify to what extent the amendment will lead to a different factual enquiry. In **Evershed v New Star Asset Management** EAT 0249/09, Underhill P, as he was then, found it was necessary to consider with some care the areas of factual enquiry raised by the proposed amendment and whether they were already raised in the previous pleading. This approach was approved by the Court of Appeal in **Evershed V New Star Asset Management Holding Limited** [2010] EWCA Civ 870 at paragraph 50 were Rimer LJ stated:

> **...A comparison of the allegations in the amendment… shows that the amendment raises no materially new factual allegations... the thrust of the complaints in both is essentially the same...**

114. In summary, the following propositions can be distilled:

a. First, the overarching consideration is the balance of injustice of hardship of allowing the amendment against the injustice and hardship of refusing it.

b. Second, it is necessary to identify whether the amendment is minor or substantial; does it involve a substantial addition of fact and a new cause of action.

c. Third, the timing of the application may be relevant. If the amendment involves a substantial alteration, it is necessary to consider whether the claim would be out of time at the date of the amendment. This is a factor to be considered in the general exercise of discretion.

d. Fourth, the balance of hardship is not an abstract concept. The tribunal should consider whether there is evidence of real hardship, and it must give supporting reasons having regard to all the relevant circumstances.

115. Further, it may be appropriate to consider, as part of the balance of hardship exercise, whether there is any prospect of the proposed amended claim succeeding. If a claim has no prospect of success, there can be no hardship in refusing it. However, it would be an error of law to consider the potential merits of a proposed claim, unless the parties have been able to address the matter and make submissions. In this case, we made it plain that we would be considering the potential merits of each application and invited submissions.

116. We next consider each of the applications to amend. It is first necessary to consider the nature of each amendment and consider whether it is a minor or a substantial amendment.

117. For the reasons we have already given, there is no claim of failure to make reasonable adjustments set out in the claim form. The claimant's application proposes to rely on five PCPs as follows:

    a. The requirement to have a discussion of my dismissal with the Training Manager, Catherine Tansley, over email.

    b. The requirement to work in unfamiliar / unvetted venues for training assignments.

    c. Travelling to venues alone.

    d. The need to travel and work alone (lone worker) and also isolation of the dismissal process.

    e. (The lack of) Safeguarding review / management reviews.

118. None of these PCPs is identified in the claim form.

119. The PCP as suggested by EJ Wisby has similarities to PCP one. Each PCP is a new claim based on new facts. To pursue any of these claims, it would be necessary for there to be disclosure and fresh witness statements. In essence, if the amendments were allowed, they would constitute new claims, and they would require considerable new fresh evidence.

120. It is appropriate to consider whether any of the proposed claims have any prospect of success. Specific submissions were requested on the merits.

121. This is not a case where we can wholly ignore the evidence that has been given. Normally when considering reasonable prospect of success, it is appropriate to take the claimant's case at its highest, subject to any clear and obvious documentary evidence to the contrary. However, in this case the claimant has given evidence, and we have to take that into account.

122. It is necessary for the claimant to allege that any PCP placed her at a disadvantage compared with others who do not have a disability. It is far from clear that the claimant has advanced any arguable case in relation to this. In relation to PCP one, she focuses on the effect of distressing news. However, the potential for termination of contract would also be distressing to someone without a disability. It is far from clear why communication, other than by email, would be less distressing. Moreover, in no sense whatsoever did she tell the respondent, at any time, that the mode of communication was inappropriate or caused her distress because of her PTSD.

123. We have considered the documentation leading up to a dismissal. There is no indication in any email that the claimant ever suggested that consideration by email was inappropriate. Moreover, the claimant's evidence on this matter has been poor and inconclusive. She has at times confirmed that there had been specific conversations concerning the ongoing nature of the relationship. She failed to set out the detail of those conversations adequately at all. It is clear, however, that the claimant cannot argue that the discussions only took place over email. On the contrary, her evidence is that there were significant oral discussions.

124. We have reviewed the relevant emails. There is no suggestion at all that the claimant required a face-to-face meeting. In any event, given that she was offered a zoom meeting, it is difficult to see how any distress would have been specifically lessened by the potential extra anxiety of travelling to a venue and having a face-to-face meeting.

125. Whether the claimant requests the adjustment is important because part of her proposed case is that she specifically requested it when emails were being exchanged. However, that is not reflected in the emails which she has disclosed. In particular we have considered the email of 22 January 2020. This occurred after notice had been given. Whilst it refers to PTSD, in no sense whatsoever does the email request a face-to-face meeting. It follows that the claimant did not request the adjustment she now alleges that she did request. In the circumstances, there appears to be no prospect of the claimant establishing breach of duty.

126. The second PCP revolves around the requirement to work in unfamiliar/unvetted venues. However, the evidence the claimant has given us is that the venues were notified to her. She did visit a number of venues in order to satisfy herself that they were suitable. The venues used were repeated. On the basis of her own evidence advanced, there is no prospect of the claimant establishing that there was any requirement to work in an unfamiliar, unvetted venue, as any venue offered was one that she could inspect. Moreover, this PCP is bound to fail as the claimant was under no requirement whatsoever to work anywhere. If she had any difficulty with the venue, she could refuse the appointment.

127. The adjustment suggested does not readily arise out of the alleged PCP. It suggests that she should work only from Birmingham. However, that was not the claimant's practice and she worked in venues as far away as Aylesbury. We have considered the claimant's letter of 17 January 2019. But it is not supportive of the allegation that she made any requests for adjustments, instead, it deals with specific difficulty with sickness on one occasion.

128. If we were to allow this amendment, it would have no reasonable prospect of success.

129. The third PCP relied on is the allegation she was required to travel to venues alone. This PCP has no prospect of success. The claimant accepted that she had autonomy to organise her work as she saw fit. The reality may be that she travelled to venues alone. However, that was her choice and she could have taken a companion.

130. The question of breach must be considered. We have considered the letter of 17 January 2019. In no sense whatsoever does it suggest that she has any difficulty travelling to the venue alone. It does not request any form of adjustment. There is nothing to suggest the respondent ought to have known the claimant had a specific difficulty. It is difficult to see how the duty would engage. There is no reasonable prospect of finding it was breached.

131. The fourth PCP is about the need to travel and work alone adds nothing to the third PCP. It has the same difficulties.

132. The fifth PCP concerns the possibility of a safeguarding review. However, it is well established that a review is not an adjustment. Further, the claimant never requested a review.

133. We have considered the claimant's emails. Her email of 17 February 2019 is important and is one that she relies on as establishing the nature of PTSD. This email contains sensitive information about the claimant, which we do not need to set out in detail. It is sufficient to say that abuse led to PTSD. However, the email asserts that she is strong, resilient, and very capable. Whilst it does refer to worry about safety, that appears to be a rational reaction to her circumstances. She goes on, specifically, to explain the reason why she sets out the distressing personal history. She states, "The reason I'm telling you is that I haven't got a great network, and obviously a robust and trustworthy childcare plan is essential." The letter concerns the restraints she has because of childcare, it is in no sense whatsoever a request for adjustments because of PTSD.

134. It is necessary to consider the importance of this evidence in the context of the application to amend. This is a substantial amendment. The claimant does nothing to explain why she did not make the amendment earlier. The timing and manner of the amendment is important. The difficulty with the claim was flagged by EJ Wisby. There was a part attempt to define a claim, which did not appear in the claim form, at the case management hearing. The claimant was invited to set out the substantial disadvantage, but did not do this. The claimant did not deal with the matter in her witness statement. It follows that no substantive progress had been made prior to this hearing. At the hearing, the claimant has tried to set out the claim, it has led to an application which is inconsistent with the evidence before us. There remains no explanation for why the claimant has not addressed the difficulties previously.

135. We note that all the claims are now significantly out of time. It is possible that many of the possible claims were out of time when the claim was

initially presented. It is difficult to be certain, because the claimant does not set out sufficient detail to enable us to ascertain when any duty is alleged to have arisen, or has been breached, whether directly or by omission.

136. We need to consider the balance of hardship. The claimant now seeks to pursue claims which on the face of it have no prospect of success. There can be no hardship to the claimant in refusing an application that has no prospect of success. Even if we were to be persuaded that it had some prospect of success, however small, we must take into account the hardship caused to the respondent. The respondent has already prepared for this hearing and has incurred significant costs. The reality would be that the amendments would be a fresh claim, and further significant costs would be incurred. Moreover, as the respondent has made redundant the key individuals who could have been witnesses, there will be a real difficulty for this respondent in obtaining the relevant evidence.

137. In all the circumstances, we find the balance of hardship is against allowing this amendment. We therefore refuse the amendment.

138. For the reasons we have already given we find that there is no claim of failure to make reasonable adjustments before the tribunal. If we were wrong in that assertion, we would have to consider whether EJ Wisby had identified something which already existed. However, in support of that possible claim, the claimant has presented no evidence. The reality is, therefore, that either she has failed to pursue it at all, and this is ground for strike out, or the claim has no prospect of success because there is no evidential basis for it. In either case, we would have struck the claim out had we been wrong in our view that the claimant never been pleaded.

139. For all these reasons, any discrimination claims are now dismissed.

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Employment Judge Hodgson

Dated:24 November 2021

Sent to the parties on:

26 November 2021

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For the Tribunal Office