EMPLOYMENT TRIBUNALS

Claimant: **Mrs Gemma Long**

Respondent: **Brain in Hand Ltd**

Heard: by way of a hybrid hearing, with the claimant and her husband attending in person in Nottingham, and the respondent's representative and witness attending remotely via Cloud Video Platform

On: **6th January 2022**

Before: Employment Judge Ayre sitting alone

Representatives:
Claimant: In person, accompanied by her husband
Respondent: Mr A George, solicitor

JUDGMENT FOLLOWING OPEN PRELIMINARY HEARING

The clamant was an employee of the respondent within the meaning of section 203 of the Employment Rights Act 1996 and worked under a contract of employment falling within section 83 of the Equality Act 2010.

REASONS

Background

1. The claimant presented a claim in the Employment Tribunal on 31 March 2021, following a period of Early Conciliation which started and finished on 25 March 2021. The claim includes complaints of disability discrimination, that she suffered detriments for having made protected disclosures, for unlawful deductions from wages and for holiday pay.

2. The respondent defends the claims. It says that the Tribunal does not have jurisdiction to hear them, as the claimant was a self-employed contractor, and was neither a worker nor an employee.

3. Having presented her initial claim to the Tribunal, the claimant then resigned from her position with the respondent and sought leave to amend her claim.

The Proceedings

4. A closed preliminary hearing took place before Regional Employment Judge Swann on 23 June 2021. The claimant was given leave to amend her claim, and the respondent to file an amended response. At that hearing it was also ordered that there should be an open preliminary hearing to determine whether the claimant was at all material times an employee or a worker.

5. I heard evidence today from the claimant and, on behalf of the respondent, from Ms Sarah Todd, Service Delivery Director. There was an agreed bundle of documents which initially ran to 606 pages. Additional pages 607 to 625 were, by consent, added to the bundle at the start of the hearing.

6. Mr George had, in advance of the hearing (and in line with the Orders made by REJ Swann on 23rd June 2021) submitted a written list of the questions he proposed to ask the claimant by way of cross-examination. He also submitted a written skeleton argument, for which the Tribunal is grateful.

7. After the hearing the claimant wrote to the Tribunal with a list of documents that she wanted the Tribunal to read. As this list was submitted after the end of the hearing, and the respondent has not had the opportunity to comment on it, I have not taken it into account in reaching my decision.

The Issues

8. The issues that fell to be determined at the open preliminary hearing were as follows:

    a. Was the claimant an employee or worker within the meaning of section 203 of the Employment Rights Act 1996?

    b. Does the claimant fall within the definition of 'employment' set out in section 83 of the Equality Act 2010?

Findings of Fact

9. The respondent is a technology company which provides services to people with autism, mental health difficulties and neurological conditions. It has contracts with a number of organisations, including the Department for Education and the Department for Work and Pensions, to provide technology solutions and training to individuals who have been assessed as needing support. In summary, the respondent provides individual

service users with an App, training in using that App, and access to a website, which are designed to provide support and practical solutions to everyday challenges. The respondent is paid by its clients for providing the App and training to service users.

10. The respondent is subject to strict requirements, including Key Performance Indicators, in the contracts it has entered into with its clients. The respondent's clients can carry out audits to ensure that the respondent is meeting its contractual obligations and the respondent needs to keep evidence to show that it is compliant. Many of the obligations that the respondent placed on the claimant and others were designed to assist the respondent to comply with its own contractual obligations.

11. In June 2020 the respondent advertised for 'Specialists' to work with its service users. The advertisement [pp.442-445] contained the following statements:

"***Contract terms***
Self employed, hourly rate…

Job Description
A Brain in Hand Specialist's primary role is to provide solution-focussed and strength-based support to Brain in Hand service users and their supporters, to enable them to thrive using Brain in Hand…
Sessions may be delivered remotely, in users' own home or at their place or work, education, or support.

Becoming a Brain in Hand specialist
Achieving an Approved Brain in Hand Specialist status will involve:
-The successful completion of the Specialist induction modules…made up of a precourse self-study pack and three-day course…
-Demonstrating previous CPD-accredited training…
-Shadowing of a Regional Engagement Manager for at least 1 session.
-Successful demonstration of learning outcomes in a role-play scenario.
-Observation by a Regional Engagement Manager for at least two session(s) and successful demonstration of the learning outcomes in practice.

After achieving this status we will refer Brain in Hand users to you to build your own caseload…and may also invite you to support project work…

…you will be mentored by a Regional Engagement Manager and we will:
-Run free quarterly to bimonthly skills updates…and provide a library of pre-recorded resources to ensure continuing professional development...
- Provide regular feedback…

New Approved Specialists will be audited against Key Performance indicators (KPIs)…monthly for the first 3-6 months, and then quarterly on an ongoing basis. Failure to meet KPIs will result in a supported improvement plan in the first instance, but the potential removal of the Approved Specialist status if not rectified…

Additional Information

…This is a self-employed role and you will be responsible for your own income tax, national insurance contributions and any necessary disclosures and annual assessments to HMRC…"

12. The claimant applied for the role of Specialist and was successful in her application. She then attended the three-day training course, for which she was not paid. She began working for the respondent as a 'Specialist' on 30 July 2020 and worked regularly two days a week (Thursday and Friday) until she resigned with effect from 26 April 2021. Her role was to provide training and support to the respondent's service users.

13. The claimant signed a "Self-Employed Specialist – Independent Contractor Agreement" [pp.49-64] and a Service Level Agreement [pp.65-117]. The Independent Contractor Agreement included the following relevant provisions:

    a. An indefinite period of engagement, subject to one months' written notice on either side;

    b. Detailed termination provisions, which gave the respondent the right to terminate the arrangements on a number of grounds, including if the claimant was unable to carry out her duties "*through incapacity or any other cause for a number of weeks exceeding a total of 2 weeks in any 8 week period*";

    c. A requirement for the claimant to provide services in accordance with the Service Level Agreement;

    d. A statement that services were being provided on a freelance basis, that the respondent was not obliged to provide the claimant with any work, and the claimant was not obliged to perform work, unless she had agreed to do so;

    e. An obligation on the claimant to provide her services in accordance with any brief or specification provided by the respondent;

    f. The right for the respondent to review the claimant's performance and effectiveness;

    g. A section headed "Substitution / Cancellation" which states that: "*If the Contractor is unable to carry out work that has previously been agreed a minimum of 48 hours' notice (excluding weekends) must be given to the Company…"* but which does not contain any provision for the Contractor to send a substitute to perform the work in their place;

    h. A requirement for the claimant to submit monthly invoices for her work, using a template supplied by the respondent;

    i. A statement that the intention of the parties is for the claimant to be self-employed in accordance with HMRC off -payroll working rules (IR35), and that the claimant is not considered to be an employee, agent or partner of the respondent;

j. No provision for benefits such as paid holidays, pension, sick pay etc; and

k. A statement that the claimant shall be solely responsible for the payment of tax on any payments made to her by the respondent.

14. Schedule 2 to the Independent Contractor Agreement contains a long list of mandatory policies that the contractor is required to have in place.

15. The Service Level Agreement set out a number of detailed provisions, including-

a. A requirement that the claimant be available to offer a service all year around, both during core weekday hours and at all other times;

b. Mentoring of the claimant by a Regional Engagement Manager;

c. A requirement that any changes to the claimant's availability should be agreed with her Regional Engagement Manager;

d. Details of how jobs are allocated by the respondent and accepted by contractors;

e. Specific requirements on the claimant as to how she was to provide the services, including time frames for contacting service users, a requirement to keep the respondent informed of key contact with the service users, and reporting obligations;

f. A long list of matters that the claimant had to cover during support sessions with service users;

g. Details of how to deal with non-responsive service users;

h. Provisions dealing with the method, duration, frequency and quantity of support; and

i. Very detailed Key Performance Metrics / Service Levels.

16. The terms of both the Independent Contractor Agreement and the Service Level Agreement were set by the respondent, and there was no evidence before me to suggest that the claimant had any opportunity to input to or negotiate their terms.

17. Whilst working for the respondent the claimant worked entirely from home, although this was due largely to the Covid 19 pandemic. She provided her own laptop, internet access and telephone, but used the respondent's App and software, with the respondent granting her a licence to use that software. If a service user wanted a face to face meeting, the claimant had to get approval from the respondent before such a meeting could take place.

18. The claimant was provided with a corporate email address which she was required to use when delivering the services. The claimant's email address was GemmaLong@braininhand.co.uk and her email 'signature'

was "Gemma Long, Brain in Hand Approved Specialist" followed by the respondent's logo. Anyone receiving an email from the claimant could quite reasonably have assumed that she was integrated into its business.

19. The respondent provided the claimant with a licence to use its software and required her to use its video conference facilities to deliver the training, rather than her own. She used the respondent's Microsoft Teams account and was told that, if that didn't work, she should use the respondent's corporate Zoom account. She was told not to use Skype.

20. The respondent provided the claimant and other Specialists with technical support, including out of hours support, and with access to an internal website.

21. The respondent provided detailed materials for the claimant to use in delivering the services, including template emails. There was a set process that the claimant was required to follow, which included her sending emails to service users at particular stages of the training process and within timeframes that were set by the respondent. Although she did not have to use the template emails, the claimant needed the respondent's agreement to depart from the standard wording, and one of the measures of performance was use of the template emails. She could send emails other than the template ones, but emails had to be copied into the respondent.

22. The claimant was required to deliver the training and support using documents and software designed and provided by the respondent. She had to work through training materials provided by the respondent during her sessions. During each training session there was a list of subjects that the claimant had to cover. She also had to provide evidence to the respondent that she had covered all the required subjects, and to keep a record of all contact with service users.

23. The respondent recommended the length of time that sessions with service users should last. If the claimant wanted to change the length of the session, she had to seek approval to do so, for reasons linked to the way in which the respondent's services were funded. In practice the claimant had little autonomy as to how she delivered the service, and the work that she carried out was subject to substantial direction and control by the respondent.

24. The respondent also monitored the claimant's performance and her compliance with the requirements set down in the Service Level Agreement. Detailed 'Key Performance Metrics' were set out in that agreement [p.103] together with a summary of how they would be measured. For example, one of the Key Performance Metrics was "*100% of sessions booked using the Service user's preferred contact plus the correct email template*". Another was "*100% of sessions confirmed using the Service User's preferred contact plus the correct email template."* This suggests that use of the respondent's email templates was mandatory rather than voluntary. The claimant was however able to personalise emails, provided that they contained the mandatory wording.

25. The claimant's performance against the Key Performance Metrics was measured by Key Metrics reports, Job Allocation Records and Specialist Support Records and through observation of the claimant delivering the services. Many of the emails that she sent to service users had to be copied to the respondent so that the respondent had a record of the communication. If the claimant did not meet the respondent's standards, she could be put on a Performance Improvement Plan, although in practice this did not happen and there was no evidence before me of any criticism being made of the claimant's work.

26. The Regional Engagement Manager acted as the claimant's de facto line manager. She had the power to approve the claimant's appointment as a Specialist and could ask for updates on the claimant's service users, which the claimant provided. The claimant had monthly reviews with her Regional Engagement Manager [p.596]. The Regional Engagement Manager decided what type of work would be allocated to the claimant, which at the start of the claimant's engagement was Higher Education students only.

27. The claimant was provided with a regular stream of work by the respondent and, by the time she resigned, had 146 service users. She and others were told that if they went on holiday, they should inform the respondent. The claimant was also required to agree any changes to her availability with her Regional Engagement Manager.

28. The volume of work for Specialists did vary throughout the year, and the respondent acknowledged this in an email that it sent to Specialists informing them when the quieter months would be. Throughout the period that the claimant worked for the respondent she was consistently provided with work. There were no periods when work was not provided.

29. There was an obligation on the claimant to work, and the respondent had the right to terminate the contract if the claimant was unavailable for work for more then two weeks in an eight-week period. Although the written contract did not specifically oblige the respondent to provide work for the claimant, the reality of the working relationship between the parties was that the respondent did provide work for the claimant every week and there was a clear expectation that it would do so.

30. The claimant was required to follow the respondent's policies on safeguarding, as some of the service users she worked with were vulnerable adults. She was required to have an enhanced DBS check before she could start work, and the respondent arranged for this to be carried out.

31. The claimant could work for other companies but had to notify the respondent of any other work and complete a Conflict of Interest Declaration.

32. In order to be able to work for the respondent the claimant had to gain and retain 'Approved Specialist Status'. There were a number of requirements, which were set by the respondent, that the claimant had to meet in order to quality for Approved Specialist Status. There was a high level of supervision as part of the sign off process to become approved as

a specialist, and as part of that the claimant was subject to observation by the Regional Engagement manager.

33. Work was allocated to the claimant and other specialists based on a number of factors including location, skill set, available and capacity. When a job was allocated, the claimant had the right to accept or refuse the allocation as she wished. If she refused the job it would be allocated to someone else. The claimant was therefore able to refuse work if it was offered to her, and worked the hours that suited her, on Thursday and Friday each week. It had been agreed between the parties, at the outset of the relationship, that the claimant would work Thursdays and Fridays.

34. The claimant's practice was to send an email each Monday to the respondent setting out her availability and capacity to take on new work. She would then be sent allocations for the week.

35. The claimant's work was monitored by the respondent to ensure that the claimant was complying with the respondent's requirements and that the respondent was meeting its contractual obligations towards its clients. The claimant was required to complete a 'Student Support Record' and a 'Job Assessment Record' for each service user, in a manner specified by the respondent. If the claimant did not complete these records correctly, the respondent could withhold pay. The Student Support Record served as a time sheet, recording the time spent with the student, and as a record showing what had been covered with the student.

36. The respondent set down timeframes that the claimant had to comply with when carrying out the work, to enable the respondent to meet the terms of its contractual arrangements with its clients.

37. The claimant was free to take time off when she wanted to and did not need to ask for permission. She was in control of her own diary and free to organise her workload as she saw fit, provided that she met the strict deadlines laid down by the respondent. The respondent did ask, however, that its specialists notify the respondent in advance if they were going to be unavailable to work, so that no new work was allocated to them.

38. The claimant submitted invoices for her work using templates provided by the respondent. The hourly rate of pay was set by the respondent. The respondent had the right to withhold pay if the claimant did not comply with certain of its requirements, such as not sending the required emails or reporting correctly on the work carried out. The respondent paid the claimant 'gross' and the claimant was responsible for paying tax and national insurance contributions on the sums that she earned. She completed a self-assessment form for HMRC.

39. Although the claimant did not have to accept all of the jobs that were allocated to her, she was required to carry out the work that she was allocated personally, and could not delegate it or arrange for someone else to carry out. There was, therefore, no right of substitution.

40. The working practice was that the respondent would arrange cover if a Specialist was unable to deliver a planned session, rather than the individual specialist, although only if the respondent had sufficient time to

do so (normally 48 hours' notice). On one occasion when the claimant contacted the respondent to say that she was unable to deliver a planned session due to a childcare crisis, she was told to rearrange the session directly with the service user.

41. The claimant has ADHD and wanted to get help with performing the administrative side of her duties as a result. She approached Access to Work and they offered to provide her with a support worker. The claimant did not have the autonomy to use the support worker without the respondent's permission. She contacted the respondent and was told by her Regional Engagement Manager that she could not share her log in details with anyone else. The Manager suggested that the respondent may be able to set up an office account for the support worker but would need them to complete an enhanced DBS check and sign a contract with the respondent.

42. A 'job aide agreement' was prepared and sent to Ms Todd for comment. Ms Todd reviewed the agreement and made a number of comments on it. The job aide agreement was never implemented, and no support worker was appointed. The claimant says that the reason for this was that, once she asked for a support worker as a reasonable adjustment for her ADHD, she was not offered any more work.

43. The respondent also directly employs Specialists, who do the same work as the claimant did, but have other responsibilities as well. Approximately 50% of the time of the employed Specialists is spent doing the work that the claimant did. When these employees are delivering services to the respondent's service users, they provide the services in essentially the same way as the claimant and other 'self-employed' Specialists.

The Law

Employment status

44. Section 230 of the ERA provides the definition of employee, employment and worker as follows:

"(*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.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract; and

"employed" shall be construed accordingly…"

45. For claims under the Equality Act 2010 ("**the EQA**") the definition of employment is set out in section 83 of the EQA as follows:

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

46. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497*, McKenna J set out the conditions required for a contract of service, namely that:"(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."

47. The importance of the test set out in *Ready Mixed Concrete* was affirmed by the Supreme Court in *Autoclenz Ltd v Belcher and others [2011] ICR 1157*. The 'irreducible minimum' for a contract of employment comprises:
    a. Control;
    b. Personal performance; and
    c. Mutuality of obligation.

48. In *Bates van Winkelhof v Clyde & Co LLP and anor (Public Concern at Work intervening) 2014 ICR 730* and *Hospital Medical Group Ltd v Westwood 2013 ICR 415* it was established that the following are necessary for an individual to fall within the definition of 'worker':- i. There must be a contract, whether written or oral and whether express or implied; ii. The contract must provide for the individual to carry out personal services; and iii. Those services must be for the benefit of any

other party to the contract who must not be a client or customer of the individual's profession or business undertaking.

49. The key factors to be taken into account in determining whether an individual is an employee are:-

    a. The degree of control that the employer has over the way in which the work is performed;
    b. Whether there is mutuality of obligation between the parties – ie was the employer obliged to provide work and was the individual required to work if required;
    c. Whether the employee has to do the work personally; and
    d. Were the other terms of the contract consistent with there being an employment relationship?

50. Other relevant factors include:

    a. The intention of the parties;
    b. Custom and practice in the industry;
    c. The degree to which the individual is integrated into the employer's business;
    d. The arrangements for tax and national insurance;
    e. Whether benefits are provided; and
    f. The degree of financial risk taken by the individual.

51. When deciding questions of employment status, a Tribunal can look beyond what is written in the contract between the parties and consider how the relationship worked in practice (*Autoclenz*). The Supreme Court in *Uber BV and others v Aslam and others [2021] ICR 657* held that the written agreement is not decisive of the parties' relationship and is indeed not even the starting point when it comes to deciding employment status.

52. The definition of employment in section 83 of the Equality Act is generally considered to be a broad one covering all those who work under a contract to do work personally. It is not, however, without any limits. In *Jivraj v Hashwani [2011] ICR 1004*, the Supreme Court, referring to the European Court of Justice decision in *Allonby v Accrington and Rossendale College and others [2004] ICR 1328*, held that an arbitrator in a commercial dispute did not fall within the definition of employment because, although arbitrators provide personal service, they are not under the direction or control of the employer, but are instead independent suppliers of services.

Conclusions

Personal service

53. I have no hesitation whatsoever on the evidence before me in finding that the claimant was required to provide personal service. She had to do the work herself and was unable to delegate it or to arrange for a substitute to perform it. There was no right of substitution in the written contract, and no right of substitution in practice. On the contrary, if Specialists were

unable to work and provided sufficient notice to the respondent, the respondent would arrange for someone else to do the work or ask the claimant to do the work herself on another occasion. The respondent therefore took responsibility for finding replacements for unavailable Specialists. This is consistent, in my view, with an employment relationship in which an employer would arrange cover for an absent employee.

54. The obligation of personal service was further emphasised by the restrictions on the claimant appointing a Job Aide to help her with the administrative side of the role. She was not free to appoint one, required the permission of the respondent, and the respondent would have required the Job Aide to be DBS checked and to enter into her or his own contract with the respondent.

Control

55. The respondent exercised a very large degree of control over the way in which the claimant carried out her work. There were extremely detailed requirements that the claimant had to comply with, which were laid down by the respondent. The respondent monitored compliance with its requirements, and there were potential consequences for non-compliance. The respondent provided the training materials and required the claimant to use those materials. The claimant was given strict timescales to comply with when interacting with service users, and her communication with them, both during the sessions and by email, was largely dictated by the respondent.

56. She had very limited freedom as to how she delivered the services and had to comply with detailed reporting requirements. Emails had to be copied to the respondent, and she was regularly audited. If she wanted to make changes to the standard processes, for example the amount of time she spent with a service user, she needed the prior agreement of the respondent.

57. Although the claimant was in theory free to take time off when she wanted, in practice this right was not exercised, and she worked regularly and consistently. The respondent instructed the claimant and others to notify it of any holiday periods, and in practice limited the amount of time that she could take off through the provision in the Independent Contractor Agreement which gave the respondent the right to terminate the contract if the claimant was absent for two weeks in any eight week period.

58. The respondent decided the terms of the contract between the parties, providing a detailed Independent Contractor Agreement and Service Level Agreement which the claimant had to comply with. The claimant was not able to negotiate any of the terms upon which she worked, with the exception of the days that she worked. The respondent dictated the rate of pay also.

59. I accept that much of the control that was exercised by the respondent over the provision of the services was for good reason, namely to enable the respondent to comply with its contractual obligations. The reason for the control is not however, in my view, relevant to the question of

employment status. The focus must be on the degree of control rather than the reasons for it, and in this case the claimant was subject to substantial control by the respondent in carrying out her work.

Mutuality of obligations

60. The nature of the relationship between the claimant and the respondent was not a casual one. The claimant was required to carry out the work that was allocated to her and the respondent provided work consistently and regularly. There was a clear expectation that it would continue to do so, particularly since it expected Specialists to tell it in advance if they were not going to be available for work because they were on holiday.

61. The written contract between the parties specified that the claimant had to be available to work all year round, and that if she were to be absent for more than two weeks in any eight-week period the respondent could terminate the contract. Although there was also a statement in the contract that the respondent was not obliged to provide work and the claimant was not obliged to carry out work, that was not how the arrangements worked in practice. The claimant had to get permission from the respondent if she wanted to change the days upon which she worked and had to notify the respondent if she was on holiday. There was in my view an obligation on the claimant to be available for work.

62. The contract imposed many obligations on the claimant including as to the way in which the services were to be provided and the reporting requirements. She had to comply with a number of obligations in order to become an accredited Specialist, and to maintain that accreditation. The contract also imposed a number of obligations on the respondent, such as a responsibility to provide technical support, including out of hours.

63. I therefore find that, on balance, there was sufficient mutuality of obligations between the parties as to make this relationship consistent with one of employment.

Other factors

64. There were some provisions of the contract and of the working arrangements that did not weigh in favour of a worker or employment relationship, but these are far outweighed by the factors in favour of an employment relationship. For example, the claimant was required to account for tax and national insurance on her earnings and submitted invoices to the respondent. The requirement to pay her own tax and national insurance was one which was imposed on the claimant by the respondent, and not one which was freely negotiated. The claimant was paid by the hour, rather than on commission or results, and the hourly rate was set by the respondent. She was required to submit invoices on forms provided by the respondent.

65. The claimant was not provided with any benefits and the contractual documents specifically stated that she was considered to be a self employed contractor. She did not however take any financial risk. She was not in business on her own account and it cannot be said that the respondent was a client of hers. The contractual terms and working

arrangements were imposed on the claimant by the respondent, and the claimant was not an independent supplier of services.

66. The claimant was, however, integrated to a not insignificant degree into the respondent's organisation. She was provided with access to the respondent's software system and intranet, with IT support and with a Brain in Hand email address. She was required to use this email address and the respondent's systems (such as its Microsoft Teams and Zoom accounts) when providing the services so was presented to the outside world as part of the respondent's organisation. She was required to undergo training provided by the respondent.

67. The claimant had a de facto manager, the Regional Engagement Manager, who had monthly meetings with her and reviewed her work and performance. She would have been subject to a performance management process had her work not been of the quality required by the respondent. Whilst she could work elsewhere, she had to inform the respondent of any other work and sign a Conflict of Interest Declaration. The work that she carried out was also carried out by individuals who the respondent considered to be employees.

68. The deciding factor in this case is, in my view, the substantial amount of control that the respondent exercised over the claimant and the way in which she carried out her work. This coupled with the requirement for the claimant to carry out the work personally, and the mutuality of obligations between the parties created the 'irreducible minimum' required for an employment relationship.

69. I therefore find that the claimant was an employee of the respondent within the meaning of section 203 of the Employment Rights Act 1996 and that her contract of employment falls within the definition contained in section 83 of the Equality Act 2010.

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Employment Judge Ayre

14th January 2022

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JUDGMENT SENT TO THE PARTIES ON

17 January 2022

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FOR THE TRIBUNAL OFFICE