EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Pagan**

Respondent: **Thicket Priory Limited**

Heard at: **Leeds (via CVP)**

On: **11 January 2022**

Before: **Employment Judge Smith (sitting alone)**

Representation
For the Claimant: Mr J Guildford, Claimant's Father
For the Respondent: Miss K Nowell of Counsel

JUDGMENT

1. The Claimant's claim for a statutory redundancy payment is dismissed because she did not have the necessary two years' continuous employment as at the relevant date of 30 March 2021.

2. At the full hearing of the Claimant's automatic unfair dismissal claims the burden of proving the reason for dismissal shall be on the Claimant.

REASONS

This preliminary hearing

1. This preliminary hearing (PH) was listed by Employment Judge Lancaster on 11 October 2021 in order that the Tribunal could determine the employment status of the Claimant between 15 March and 31 October 2019, and whether she had two years' continuous employment up to the effective date of determination (EDT) of 30 March 2021.

2. The Claimant's case was that she was an employee of the Respondent at all material times within that period, and that as a result she had more than two years' continuous employment. As a result, she contends that she was entitled to be paid a statutory redundancy payment upon termination and, in relation to her automatic unfair dismissal claims brought under **ss.101A** and **104 Employment Rights Act 1996**, that the burden of proof should be on the Respondent in establishing the reason for dismissal.

3. The Respondent's case is that the Claimant was no more than a casual worker during part of the period in question, and that she was not its employee at any point up until 1 November 2019. It denies that the Claimant's engagement with the Respondent started on 15 March 2019 and was in fact later, which would also negate the necessary period of continuity. The Respondent's case is that there is therefore no jurisdiction for the Tribunal to consider a complaint relating to a statutory redundancy payment, and that the burden of proof in relation to the reason for dismissal falls entirely on the Claimant.

Evidence

4. In this PH I was presented with a bundle amounting to some 661 pages and was taken to some of the documents in that bundle during the course of the evidence. I heard live evidence from the Claimant on her own behalf and from Mr Bruce Corrie (Director) and Ms Anna Winkworth (General Manager) on behalf of the Respondent. All three witnesses had provided witness statements setting out their evidence in chief, and all three were cross-examined on issues relevant to the preliminary matter.

Findings of fact

5. The Claimant is an experienced person within the hospitality industry, having worked as a waitress, a head waitress and on bar service during the course of her career.

6. The Respondent is a limited company. It runs a country house of the same name and hosts weddings and other events at that venue. It began trading in July 2019. The Respondent's sole director is Mr Bruce Corrie and its General Manager is Ms Anna Winkworth, who was appointed into that role in December 2018.

7. The Respondent does not provide its own catering service for events. Catering services for events held at Thicket Priory are either provided by the hiring client or through the Respondent contracting any one of a number of third-party caterers. In early 2019 the Respondent had a commercial relationship for the provision of catering services with one such third party, Purple Chilli Events Catering Limited ("Purple Chilli").

8. Although it was not clear to me exactly when she commenced her employment with Purple Chilli, it was agreed that the Claimant was in the employment of that company as at early 2019 and that her contract of employment with that company only ended quite some time later, on 23 December 2019. The Claimant agreed that whilst she was employed by Purple Chilli she received regular hours, paid

holidays and that she was paid via PAYE. Indeed, following the termination of that employment she was sent a P45 and I was shown a copy of the document in the bundle (page 129).

9. The first event hosted by the Respondent at Thicket Priory was to take place on 16 March 2019, four months before the company started trading. Mr Corrie's unchallenged evidence, which I therefore accepted, was that this event was to be a *"pre-opening function for friends and family"*. In cross-examination Mr Corrie stated that he had made arrangements personally with Mr Mark Rhodes, a director of Purple Chilli, in order that the latter would provide catering services for this event. Mr Corrie's evidence was that he did not know for sure whether Purple Chilli would send the Claimant to work at Thicket Priory on 16 March, but he thought it highly likely because the Claimant's was Purple Chilli's head waitress and she had worked at other events in which Purple Chilli had been involved, in that capacity. Again, that evidence was unchallenged and I accepted it.

10. The Claimant attended at Thicket Priory on 15 March 2019 in order to help set up the following day's event. In her witness statement (paragraph 3) the Claimant stated that she had been *"approached by the Respondent to work for Thicket Prior direct around late February early March 2019"*, and (at paragraph 5) that *"After the conversation with* [Ms Winkworth] *we met again to discuss the role and plans going forward, I was offered employment and agreed, and started working direct for the Respondent on the 15 March 2019…"*. I did not accept the Claimant's assertions as being accurate. The Claimant accepted in cross-examination that it had in fact been Mr Rhodes of Purple Chill that had told her to attend at Thicket Priory on 15 March, and that she had had no prior discussion with either Mr Corrie or Ms Winkworth about attending that day. In fact, the Claimant conceded that she had never spoken to Ms Winkworth at all until 15 March 2019. The conversations referred to by the Claimant in paragraphs 3 and 5 could not have happened and, I find, did not happen.

11. In cross-examination the Claimant stated that it was Mr Rhodes who *"recommended"* she attend on 15 March but that he told her she was *"going to be contracted"* with the Respondent and that she *"would be working for both companies under one roof"*. I did not accept the Claimant's evidence as being accurate on this issue either, for two reasons. Firstly, despite its potential significance it was not mentioned in her witness statement at all. Secondly, the Claimant had not featured in the discussion Mr Corrie had had with Mr Rhodes in making the arrangements with Purple Chilli for the provision of services on 15 and 16 March 2019, referred to above. Whilst I accepted that he and she did have a conversation about her being instructed to work at Thicket Priory on those dates, I considered it unlikely that Mr Rhodes would make any reference to the Claimant working for two companies simultaneously, as she was unequivocally an employee of Purple Chilli at that time and he was not in any position to make any statements on behalf of the Respondent. This conversation – with a director of her employer – was the only conversation the Claimant had with anyone about her attending at Thicket Priory on 15 and 16 March 2019.

12. In cross-examination the Claimant initially stated that on 15 and 16 March 2019, *"the bar and the food were separate"*, and it was later suggested by Mr Guildford

in cross-examination that Purple Chilli only provide catering, not bar services. Mr Corrie's answer was that Purple Chilli does provide bar services and, on this occasion, had indeed been contracted to provide catering but also a bar service. He pointed to an invoice bearing Purple Chilli's name for that occasion (page 123B) which included catering services but also *"Bar staff x 2 x 20 hours in total"* with the sum of £240 plus VAT included next to it. In cross-examination the Claimant accepted that that amount referred to in that invoice referred to her and her colleague, Hayley, who had also worked on that occasion. In my judgment, Mr Corrie's evidence is to be preferred on this issue, corroborated as it was by the invoice and the Claimant's own concession.

13. The Claimant agreed that in relation to the 15 and 16 March 2019 engagement, she was paid by Purple Chilli and not by the Respondent. In submissions she conceded that the Respondent had had no discussion with her about who would pay her for her attendance on those dates. However, in submissions I was directed by the Claimant to a WhatsApp conversation between her and Ms Winkworth, of 24 March 2019 (page 130-A1) which, she suggested, showed that it had always been the intention that the Respondent would pay her for 15 and 16 March. Whilst this suggestion was not put in evidence, I did not accept it in any event. On any sensible reading those messages were referring to who would pay the Claimant in relation to the next period of work she would undertake at Thicket Priory (on 11 May 2019), not to a shift she had by that stage already done.

14. In my judgment, and based on my findings of fact as set out above, on 15 and 16 March 2019 the Claimant carried out work at Thicket Priory solely during the course of her employment with Purple Chilli, not through any independent or parallel engagement with the Respondent.

15. On 24 March 2019 Ms Winkworth obtained the Claimant's contact details with the purpose of arranging for the Claimant and three other people to work some hours on the bar for a ball the Respondent intended to host on the evening of 11 May 2019, for a local Parent/Teacher Association (PTA). The PTA event was not a "formal" event as such; the Respondent merely permitted the PTA to use the premises at no charge, but agreed to provide a pay bar. The PTA organised its own catering independently. The Claimant told Ms Winkworth that she was available to work on that occasion, and that she could enlist the necessary additional staff to do the same.

16. Mr Corrie stated, and I accepted, that in advance of Ms Winkworth approaching the Claimant he had a conversation with Mr Rhodes of Purple Chilli in order to obtain his consent to the Respondent engaging the Claimant from time to time, on an *ad hoc* basis and for cash, in relation to events that might be hosted by the Respondent in future. He did so out of courtesy to Mr Rhodes given the continuing commercial relationship between the Respondent and Purple Chilli. It was not suggested by either party that there was an objection from Mr Rhodes.

17. At a preliminary hearing held on 31 August 2021 the Employment Tribunal (Employment Judge Green) found that the effective date of termination (EDT) of the Claimant's employment with the Respondent was 30 March 2021. There is no reason why that date should not be treated as the "relevant date" in relation to

continuity for statutory redundancy payment purposes under **s.145(2)(a) Employment Rights Act 1996** either. I am bound by Employment Judge Green's finding and mention it in order to include within the chronology of events the date by which the Claimant's necessary qualifying period of two years began. That date is 31 March 2019.

18. The Claimant and Ms Winkworth engaged in a further WhatsApp conversation on 8 April 2019 (page 130-1A). The messages appear to show arrangements being made for the two of them to meet the next day. I was not told what the meeting of 9 April was to be about, but it was apparent from those messages that the Claimant carried out some stock-related tasks on that date. Miss Nowell conceded on behalf of the Respondent (at paragraph 9 of her skeleton argument) that the Claimant performed work for the Respondent on that occasion. I was not provided with any evidence as to how much work was carried out, or whether it was paid work.

19. The Claimant and Ms Winkworth again turned to WhatsApp on 16 April 2019 (page 130-2A), principally to make arrangements for the PTA ball on 11 May. The Claimant agreed that before this time no agreement had been reached as to how many hours she would work for the Respondent on that occasion. It is also evident from those messages that it was only during this exchange that the parties reached an agreement as to the rate of pay the Claimant would receive: £10 per hour. It was agreed that the Claimant would start work at 4pm on that evening. No other terms were agreed or reduced to writing in any other form. At no point in this exchange did the Claimant suggest that she had been employed by the Respondent since March 2019, nor did she suggest that the arrangements for 11 May 2019 were a continuation of any previous agreement. In my judgment, that was unsurprising as the Claimant knew she was employed by and working for Purple Chilli whilst working at Thicket Priory on 15 and 16 March 2019.

20. The Claimant agreed in evidence that during her discussions with Ms Winkworth around this time she was aware that the Respondent's business was in its infancy and that at that stage it had few events planned. She also agreed that she understood that any work she might be asked to do some work for the Respondent as and when it became available.

21. Crucially, the Claimant agreed in cross-examination that she knew the agreement she had made with Ms Winkworth, on behalf of the Respondent, meant she had no obligation to accept any work she might be offered by the Respondent, and also that she knew that the Respondent was not under any obligation to offer her any work at all.

22. On 17 April 2019 Ms Winkworth sent the Claimant a list of dates showing future events to be hosted by the Respondent (page 215) up to 3 August 2019. There was nothing in that email which suggested that the Claimant was being required to work these events by the Respondent, or that any agreement that may have existed between the parties prior to this was being changed. Properly read, that document appeared to be nothing more than Ms Winkworth informing the Claimant of future events and the likely staffing numbers that would be required to service them.

23. Miss Nowell, in her skeleton argument, conceded on behalf of the Respondent that the Claimant had performed some work for the Respondent on 23 April 2019, when she met with Ms Winkworth. I was not told how much work had been carried out, what it was, whether it was paid or in what amount.

24. The Claimant attended at Thicket Priory to work an event hosted by the Respondent on 10 and 11 May 2019. The event in question involved the filming of "Made in Chelsea" by Channel 4. The Claimant agreed in evidence that Purple Chilli had been hired by the Respondent to provide catering services on that occasion, that she attended as a Purple Chilli employee in relation to that event, and that she worked as a waitress rather than on the bar. She did not contend that she was employed by the Respondent in relation to that event.

25. On the evening of 11 May 2019 the Claimant worked the PTA ball, as planned and agreed with Ms Winkworth. She was paid £10 per hour, in cash, by the Respondent. It was agreed between the parties that the Claimant also performed work for the Respondent on 16 and 17 May 2019.

26. Upon my request for clarification over the lunch adjournment the Claimant also contended that she performed work for the Respondent on 24 April, 3 and 8 June, and 2 August 2019. On behalf of the Respondent Miss Nowell could neither confirm nor deny that she had. In their statements none of the witnesses had referred to those dates as having been worked by the Claimant. I was not shown any documentary evidence that may have corroborated the Claimant's assertion, such as arrangements being made via WhatsApp between the Claimant and Ms Winkworth. For these reasons I found on the balance of probabilities that the Claimant did not work for the Respondent on those additional occasions.

27. On 29 May 2019 Ms Winkworth messaged the Claimant on WhatsApp, enquiring as to her availability for work at 1pm on 12 June (page 220). The Claimant indicated that she *"should"* be available for work on that occasion. However, on 11 June the Claimant messaged Ms Winkworth informing her that because of a childcare issue she would no longer be available for work the next day. They both agreed that the work could be rearranged for a later date. The Claimant was not disciplined or dismissed in relation to this cancellation, nor (she told me) did she ever expect to be.

28. It was agreed between the parties that the Claimant also performed work for the Respondent on 3, 5 and 6 July and 3 August 2019, and that she was paid £10 per hour in cash for her time. It was apparent from the WhatsApp messages I was shown that arrangements for the Claimant to work for the Respondent on those occasions were made in the usual way between Ms Winkworth and the Claimant. There was no suggestion by either side that the basis of the Claimant working for the Respondent had changed in any way.

29. In order to be paid by the Respondent the Claimant submitted "time sheets" which set out the dates she worked and the amount of hours worked on each occasion. I was shown one such time sheet, for the July dates (page 222). She was then paid in cash.

30. On 8 August 2019 Ms Winkworth approached the Claimant about becoming a permanent employee of the Respondent, initially in a telephone call but then supplemented by WhatsApp messages around the same time (page 130-8A). The Claimant informed Ms Winkworth of her interest and her salary expectations. She made no suggestion that she already considered herself to be an employee of the Respondent. Ms Winkworth mentioned the proposal to Mr Corrie, and on 10 August indicated to the Claimant that he was in agreement with it, in principle.

31. Between 3 August and 12 September 2019 the Claimant performed no work for the Respondent at all. However, she was asked if she could work on 7 September 2019, but she declined. Ms Winkworth organised for some casual bar staff to attend on that occasion instead, through an organisation called Syft. As with 12 June 2019, there were no actual or anticipated adverse consequences for the Claimant as a result of her refusal to work on 7 September.

32. On 29 August 2019 Ms Winkworth formally made an offer of employment to the Claimant, on behalf of the Respondent, via email (page 125). The role offered was of Bar Manager. The hours were to be 40 per week with some flexibility depending on business need, the salary was to be £28,000, and there were to be 30 days' holiday per year with one additional day for each year worked, capped at a maximum of 35 days. The intended start date was given as 6 January 2020. The Claimant replied to Ms Winkworth that same day, communicating her acceptance of the offer.

33. In her email making the offer of employment Ms Winkworth also took care to state that *"Any work we do between now and January 6th will be paid using time sheets signed off at £10 per hour as discussed. We may look at some bar admin work which I think would be useful for you to be involved with during the transition to new tills and a new bar set-up ☺"*. In her reply accepting the Bar Manager post, the Claimant made no reference to this stipulation. In my judgment, Ms Winkworth's inclusion of this passage was intended to make it clear to the Claimant that any work she may do for the Respondent between that time and starting her employment as Bar Manager in January 2020 would be done according to the existing casual arrangement that had been known and understood by both sides from 16 April 2019. In other words, Ms Winkworth was preserving that arrangement on behalf of the Respondent and making it clear to the Claimant that in the meantime, nothing had changed.

34. Despite being invited to ask questions if she felt she needed to, in her reply the Claimant indicated no displeasure or protest in relation to this particular passage (or indeed any of the contents of Ms Winkworth's email). The Claimant did ask Ms Winkworth if there were any particular dates she might be asked to work, which was consistent with an understanding – as I find the Claimant did have – that the existing casual arrangement would continue in the meantime. In response (page 124) Ms Winkworth indicated that she would be *"in touch"* about dates. That too was consistent with an understanding that the existing casual arrangement was being preserved. In my judgment, that understanding was shared by both the Claimant and the Respondent.

35. Between 12 September and 31 October 2019 the Claimant was asked to work shifts by the Respondent on a more regular basis, and she did so on 14 occasions. It is not necessary for me to record the precise dates, save that the last interval of one week or longer occurred between the shifts worked on 19 September and 8 October 2019. The only difference in the arrangements was that the Claimant would no longer be paid in cash but via BACS, direct into her bank account. In cross-examination Ms Winkworth explained that this was done because at that stage the Respondent now had the Claimant's bank details, in anticipation of her starting as a permanent employee in the near future. She said that other than in respect of the method of payment, no changes to the casual arrangement had been made. Mr Guildford did not suggest this was wrong. I accepted Ms Winkworth's explanation and found that the nature of the parties' agreement had not changed.

36. At some point (although precisely when is unclear) the parties agreed that the Claimant's start date for the Bar Manager post would be brought forward, to 1 November 2019, and that the job title would change to Operations Manager. From that date until 30 March 2020 there is no dispute that the Claimant was an employee of the Respondent. I was shown a statement of particulars dated 30 June 2020, which was signed by the Claimant and by someone on behalf of the Respondent (page 118) which confirmed that status.

37. The Claimant's employment with Purple Chilli terminated on 23 December 2019, as recorded in her P45 (page 129).

The law

Employment status

38. **Section 230 Employment Rights Act 1996** provides the statutory definitions of "employee" and "contract of employment" for unfair dismissal purposes. It is reproduced as follows:

> ***230 Employees, workers etc.***
>
> *(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
>
> *(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*

39. In relation to casual staff like the Claimant, on the question of who meets the definition of *"employee"* there is no single legal test or exhaustive list of factors that are determinative, but the case of **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433** (High Court, Queen's Bench Division) remains the starting point. Whilst describing a contract of employment ("contract of service") and its parties ("master" and

"servant") in the language of the period, McKenna J set out three key considerations that have withstood the test of time:

> *"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."*

40. In **Montgomery v Johnson Underwood Ltd [2001] IRLR 269** the Court of Appeal explained the **Ready Mixed Concrete** test and emphasised the Employment Tribunal's first task:

> *"23. Clearly as society and the nature and manner of carrying out employment continues to develop, so will the court's view of the nature and extent of 'mutual obligations' concerning the work in question and 'control' of the individual carrying it out. In the nature of things the lead in this process will be taken by employment tribunals and the EAT. They have been carefully set up and constituted to be well suited to the task. However, since the concept of the contract of employment remains central to so much legislation which sets out to adjust the rights of employers and workers, including employees, it must be desirable that a clear framework or principle is identified and kept in mind. It is inevitable that different tribunals will, from time to time, reach different conclusions on very similar facts. But unless the objectives of clarity and predictability in law are to be abandoned altogether, the principles upon which they base their decisions should be as clear as possible and adhered to. For my part, I regard the quoted passage from* **Ready Mixed Concrete** *as still the best guide and as containing the irreducible minimum by way of legal requirement for a contract of employment to exist. It permits tribunals appropriate latitude in considering the nature and extent of 'mutual obligations' in respect of the work in question and the 'control' an employer has over the individual. It does not permit those concepts to be dispensed with altogether. As several recent cases have illustrated, it directs tribunals to consider the whole picture to see whether a contract of employment emerges.* ***It is though important that 'mutual obligation' and 'control' to a sufficient extent are first identified before looking at the whole****."*
>
> (emphasis added)

41. In the case of casual employees the determination of their employment status generally focuses on the first of the essential features of an employer-employee relationship as identified in **Ready Mixed Concrete** and **Montgomery**: that of mutuality of obligation. The Claimant's case is one of those cases. The leading authority on mutuality of obligation in the context of casual workers remains **Carmichael v National Power plc [2000] IRLR 43** (House of Lords), which was referred to by Mr Guildford as well as Miss Nowell. In **Carmichael**, mutuality of obligation was described by Lord Irvine of Lairg, the then Lord Chancellor, as

being the *"irreducible minimum"* quality which must be present for there to be an employment relationship (at [18]). The critical point of **Carmichael** is that if there is no mutuality of obligation, there can be no contract of employment at all.

42. Most of the authoritative cases concerning casual situations are heavily fact-specific, but there are typically two ways in which casual staff may establish their status as that of employee. The first is where a global, or "umbrella", contract exists between the parties. The essence of an umbrella contract is whether there exists an obligation on the employer to provide work, and an obligation on the employee to perform any work which becomes available, and whether those mutual obligations continue during the times in between periods of work (**Stringfellow Restaurants Ltd v Quashie [2013] IRLR 99**, Court of Appeal).

43. Examples of cases where umbrella contracts have been in issue include:

    3.1 **Wilson v Boston Deep Sea Fisheries Ltd [1987] IRLR 232**, in which the Court of Appeal found there was no mutuality of obligation in the case of trawlermen engaged by the same hirer on a voyage-by-voyage basis;

    3.2 **O'Kelly & ors v Trusthouse Forte plc [1983] IRLR 369**, in which the Court of Appeal found there was no mutuality in the case of casual wine butlers who were engaged regularly and given a preferential treatment on the rota in comparison to other casual staff; and,

    3.3 **Clark v Oxfordshire Health Authority [1998] IRLR 125**, in which the Court of Appeal found there was no umbrella contract in the case of a bank nurse who regularly undertook work but in respect of whom there was no mutuality of obligation in between her individual assignments.

44. The second avenue through which casual workers may establish employee status is where there is no umbrella contract but sufficient mutuality exists within each individual engagement. An example of this is to be found in the case of **Cornwall County Council v Prater [2006] IRLR 362**, where the Court of Appeal found there was sufficient mutuality in a situation where a children's home tutor would accept assignments that would last for several months or even years, during which time there was an understanding between her and the Council that she would complete those assignments. That understanding amounted to sufficient mutuality of obligation and, for the periods of her assignments, the individual enjoyed the status of employee.

Multiple employers

45. For reasons of public policy there is a general rule that an employee cannot be employed by two employers at the same time, in relation to the same work. That rule was strongly emphasised by the Employment Appeal Tribunal (EAT) in the cases of **Cairns v Visteon UK Ltd [2007] IRLR 175** and, more recently, **Patel v Specsavers Optical Group Ltd UKEAT/0286/18** (13 September 2019, unreported). Whilst this was not a point that either party had raised, its potential application in this case prompted me to draw the parties' attention to it and both

Mr Guildford and Miss Nowell were given a full opportunity to make submissions in relation to it.

46. In **Patel** Her Honour Judge Stacey (as she then was) set out the reasons behind the prohibition:

> *"40. Unlike in the theatre, it is a well-established principle of employment law that in general terms one employee cannot simultaneously have two employers (***Laugher v Pointer (1826) 5 B & C 547***). The reason why the concept of dual employment has such theatrical comedic potential derives from the confusion and farcical consequences that can arise from competing and contradictory instructions being given by two employers to one employee. It was also a seam mined by Laurel and Hardy, so slapstick potential too.*
>
> *43. In* **Cairns** *Judge Peter Clark went on to explore some of the practical complications that would flow from a finding of dual employment given the structure of* **ERA 1996***. Which employer would be responsible for conducting the disciplinary hearing? In a redundancy situation upon whom would the consultation obligations fall? How would any unfair dismissal compensation be apportioned as between dual employers? Not insurmountable he concluded, but all requiring further consideration."*

47. That said, there is no public policy rule against a person having separate employers in relation to separate jobs, nor indeed against separate contracts being entered into with the same employer. That was made clear in the case of **Land v West Yorkshire Metropolitan County Council [1981] ICR 334** (Court of Appeal) and was reaffirmed in both **Cairns** and **Patel**.

Burden of proof in unfair dismissal claims

48. Where an employee has the necessary two years' continuity of employment the burden of proof in establishing the sole or principal reason for dismissal falls on the employer (**s.98(1) Employment Rights Act 1996**). However, where the employee lacks sufficient continuity the burden of proof is on the employee to establish the automatically unfair reason as being the sole or principal reason for dismissal (**Kuzel v Roche Products Ltd [2008] IRLR 530**; **Maund v Penwith Distric Council [1984] IRLR 24**, both Court of Appeal).

Continuity of service

49. Continuity of service is a statutory concept: it is not something the parties can agree upon (**Collison v BBC [1998] IRLR 238**, EAT). The period of continuity begins when the employee starts work (**s.211(1)(a) Employment Rights Act 1996**), which is the date where the employee begins work under the contract of employment (**General of the Salvation Army v Dewsbury [1984] IRLR 222**, EAT). That date is a question of fact for the Tribunal, but as Langstaff P (as he then was) emphasised in **Koenig v The Mind Gym UKEAT/0201/12** (8 March 2013, unreported), it is work *under the contract of employment* that is essential; work being done for the employer is not enough. The rule in **Koenig** was recently

reaffirmed in **O'Sullivan v DSM Demolition Ltd [2020] IRLR 840**, where the EAT determined that the key distinction is between work done under the contract relied upon and work not done under that contract.

50. A period of continuity is presumed to last unbroken from start to finish, unless the contrary be shown (**s.210(5)**). The burden is on the employer to show the contrary. However, a period of one week not *"governed by a contract of employment"* (**ss.210(4)** and **212(1)**) will serve to break continuity unless an exception applies. Those exceptions rarely arise in practice and they are weeks where the employee is sick or injured (**s.212(3)(a)**, absent because of a temporary cessation of work (**s.212(3)(b)**, or absent but in circumstances where, by arrangement or custom, the employee is regarded as continuing in the employment (**s.212(3)(c)**).

51. For statutory redundancy payment purposes, *"an employee does not have any right to a redundancy payment unless he has been continuously employed for a period of not less than two years ending with the relevant date"* (**s.155**). In the case of an employee dismissed with at least the appropriate statutory notice – as this Claimant was – the *"relevant date"* is the date the notice expired (**s.145(2)(a)**; **Thompson v GEC Avionics Ltd [1991] IRLR 488**, EAT.

The parties' submissions

52. For the Claimant, Mr Guildford put the matter of employment status in straightforward terms: his daughter worked shifts for the Respondent and was paid by it. Those agreed facts, he submitted, were enough to create an employment relationship between them and bring the Claimant within the statutory definition of "employee" as provided for under **s.230(1) Employment Rights Act 1996**, at all times since 15 March 2019. Going further, Mr Guildford submitted that the sheer number of shifts the Claimant worked (43, he said) and WhatsApp messages she received (600, he said), was confirmatory of employment status.

53. On the multiple employers point (**Patel**/**Cairns**) Mr Guildford submitted that the fact that the Claimant was employed by Purple Chilli had no impact upon whether she was also an employee of the Respondent. He said that his daughter had only told the truth about her relationship with the Respondent and, as a result, it was clear that that was one of employer and employee.

54. Despite having received a copy of Miss Nowell's skeleton argument and given a full opportunity to comment, Mr Guildford made no submission in respect of the break of continuity point.

55. For the Respondent, Miss Nowell relied upon a skeleton argument supplemented by oral submissions. In summary, she argued that there was, on the Claimant's own admission in evidence, no mutuality of obligation (**Carmichael**) at any stage in the period 15 March to 1 November 2019. The event of 15 and 16 March 2019 was not work carried out or paid for by the Respondent, but for and by Purple Chilli. Her secondary argument was that the height of the Claimant's case could be that she carried out work and was paid by the Respondent on 11 May 2019 at

the earliest, and that as a consequence she could not establish two years' continuity as an employee from that date because it occurred less than two years prior to her EDT, of 30 March 2021.

56. On the multiple employers issue, Miss Nowell submitted that for public policy reasons the Claimant could not be deemed to be employed by the Respondent as at 15 and 16 March 2019, as she was on that occasion employed by Purple Chilli. She did, however, accept that the same point would not apply to any other shifts because in relation to those the Claimant was attending work independently and not in relation to the same work as Purple Chilli were carrying out.

57. As to continuity of service, Miss Nowell submitted that there were several examples of periods of more than one week in between shifts, throughout the Claimant's engagement but principally in the period 3 August to 12 September 2019. Unless the Claimant could prove mutuality of obligations, and thus an umbrella contract, across the whole period she would fall short of establishing two years' continuous service on account of these breaks.

Analysis

Employment status

58. In my judgment, the Claimant was not an employee of the Respondent on 15 and 16 March 2019. In relation to that event I have made a finding (at paragraph 14) that she was an employee of Purple Chilli. The Claimant knew that she was an employee of Purple Chilli at the time, and the alleged prior agreement with the Respondent she referred to within her witness statement not only did not happen but could not have happened. On the evidence before me, the conclusion that the Respondent was not her employer on that occasion was inescapable.

59. As a consequence, the circumstances surrounding the event of 15 and 16 March 2019 would fall squarely within the rule against having multiple employers, as emphasised in **Patel** and **Cairns**. The work being carried out by the Claimant on that occasion was the same work as being carried out by Purple Chilli; it was not work being carried out by the Claimant independently of that being carried out by Purple Chilli. It was different to the situation on 11 May 2019, where the Claimant did work at Thicket Priory for different entities doing different work: she worked for Purple Chilli during the "Made in Chelsea" filming but for the Respondent during the PTA ball the same evening (see paragraphs 24 and 25). There was no reason advanced as to why I should then go on to impute an employment relationship between the Claimant and the Respondent at this time.

60. For completeness, the situation in March was also not a **Land**-type situation, where multiple contracts were entered into with the same employer.

61. It was then necessary for me to determine whether the Claimant was an employee of the Respondent from any future point (i.e. from 17 March 2019) up to 1 November 2019, when she commenced what both parties agreed was her employment with the Respondent, as Operations Manager. In my judgment, the

Claimant fell well short of establishing that she was an employee across that period. I shall set out my reasons for reaching that conclusion below.

62. I considered first whether the Claimant enjoyed a **Carmichael**-type umbrella contract at any time after 17 March 2019. As I have set out above, this is the first avenue by which a casual worker may establish employment status within the meaning of **s.230 Employment Rights Act 1996**.

63. Whilst Mr Guildford did his best to put forward his daughter's case, his submission that to become an employee one simply had to perform work for someone and be paid by them could not be sustained. **Ready Mixed Concrete**, **Montgomery** and **Carmichael** (amongst many other authoritative cases) have all made it clear that the situation is not as straightforward as that. If it were correct and I accepted Mr Guildford's point, I would certainly fall into error as it would mean the question of mutuality of obligation – described as the *"irreducible minimum"* in **Carmichael** – could simply be sidestepped. It cannot be sidestepped: mutuality of obligation is fundamental, and I am bound by the House of Lords in any event.

64. In my judgment, Miss Nowell was right to submit that my focus must be on whether that *"irreducible minimum"* existed in this case. On her own admission, the Claimant knew the agreement she had made with the Respondent meant she had no obligation to accept any work she might be offered, and also that she knew that the Respondent was not under any obligation to offer her any work at all (see paragraph 21). Those candid admissions are, in my judgment, determinative. As a result of them, the Claimant had no prospect of establishing that the **Carmichael** *"irreducible minimum"* existed in the period with which I am concerned, and it follows that she had no prospect of establishing that she was an employee across the whole of that period either.

65. If I am found to be wrong about treating those admissions as determinative of the issue, I nevertheless went on to determine whether an umbrella contract could be said to have arisen through the arrangements agreed upon between the Claimant and the Respondent and in reality.

66. Whilst it is of course accurate that a contract existed between the parties during those times the Claimant was working for the Respondent – with an obligation on the Claimant to do the work and an obligation on the Respondent to pay her for doing it – that would not necessarily mean that the Claimant was an employee of the Respondent during each shift she worked. Even if she was, as both **Carmichael** and **Quashie** make clear, the critical issue is whether could be said to have been an employment relationship across the period 17 March to 1 November 2019 unless there could be said to have existed an umbrella contract, preserving an employment relationship in between periods of work.

67. Therefore, without making any express finding as to whether the Claimant was an employee of the Respondent during the individual shifts she worked (for reasons I shall provide under the *Continuity of employment* section, below), I nevertheless considered whether an umbrella contract existed on the facts of this case, working on that assumption.

68. The parties' agreement as to their relationship was only reached on 16 April 2019 (see paragraph 19), so no umbrella contract could have arisen before that point.

69. The agreement from 16 April 2019 onwards was an *ad hoc* arrangement where, in practice, an enquiry would be made as to whether the Claimant was available for work, and if she was, she could choose whether to accept that work or not. If she worked, she would be paid £10 per hour in cash for the hours worked. There were, both in June and in September 2019 (see paragraphs 27 and 31), times when the Claimant exercised her right to decline work but no adverse consequence followed for her on either occasion. Save for the method of payment (cash to BACS transfer; see paragraph 35) the arrangement did not change between 16 April and the Claimant commencing the Operations Manager role on 1 November 2019.

70. The agreement was, in my judgment, a classic example of a casual work arrangement where no mutuality of obligation arose from the agreement itself or the way the arrangement worked in practice. From 11 May 2019 the Claimant worked occasional shifts as and when required, and at first these were highly sporadic. They only became less occasional from September 2019 onwards (see paragraph 35). In my judgment, neither the 16 April agreement nor the ways the parties dealt with each other in reality gave rise to any obligations in between individual engagements.

71. Whilst I use it merely as an illustrative example, that situation was very different from the **Prater** case where the assignments were sometimes very lengthy indeed and of themselves generated sufficient mutuality. Again by way of example, even though the Claimant's situation was factually more akin to the **O'Kelly** wine butlers' case, she did not enjoy the kind of preferential treatment or regularity of shift that the wine butlers enjoyed, on the facts of that case.

72. For these reasons, in my judgment there was no umbrella contract in existence at any material time between 16 April and 1 November 2019.

73. For reasons that shall follow, it has not been necessary for me to go on to determine the second avenue available to casual workers in establishing employment status, i.e. whether the Claimant was an employee during any particular shift she worked (the **Prater** question).

Continuity of service

74. On the basis of my finding at paragraph 18, the first time the Claimant performed any work for the Respondent was 9 April 2019. Following **Dewsbury**, **Koenig** and **O'Sullivan**, and proceeding on the assumption that that shift amounted to the Claimant starting work under a contract of employment, in order to acquire the necessary qualifying period of two years' continuous employment the Claimant had to have entered into a contract of employment with the Respondent no later than 31 March 2019. 9 April 2019 would have been too late. It follows that she has not established sufficient qualifying service.

75. Even if I am wrong in my finding about the event of 15 and 16 March 2019, any continuity of service the Claimant would otherwise have enjoyed would have been broken under **s.210(4)** because of the period of greater than one week that existed between these dates and the shift of 9 April 2019. Any gap in between shifts of longer than a week would have the effect of breaking continuity. Based on my finding at paragraph 35, the Claimant's continuity of service would have been broken a week after 19 September 2019, and started again from her shift on 8 October 2019. Again proceeding on the assumption that those shifts amounted to individual periods of "employment", the result would still be that the Claimant would lack qualifying service in any event.

Conclusion

76. For all of the above reasons, the Tribunal's judgment is that the Claimant did not have the necessary two years' continuous employment in order to claim a statutory redundancy payment. That claim is therefore dismissed.

77. Furthermore, the Tribunal's judgment is that at the full hearing of this matter the burden of proof in establishing an automatically unfair reason as the sole or principal reason for dismissal shall be on the Claimant, as per the rule in **Kuzel** and **Maund**.

78. Case management orders have been made separately in relation to the surviving claims.

Employment Judge Smith

Date: 25 January 2022