THE EMPLOYMENT TRIBUNAL

SITTING AT: **BY CVP VIDEO CONFERENCE**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

BETWEEN:

Ms B Gosden

Claimant

And

Mrs E Coulson

Respondent

ON: **3 & 4 November 2021**

Appearances:

For the Claimant: Mr R Ross, Counsel
For the Respondent: Mr D Black, Counsel

RESERVED JUDGMENT ON PRELIMINARY ISSUE

1. The claimant was an employee of the respondent within the meaning of section 230(1) and (2) of the Employment Rights Act 1996.

2. The claimant's claims of unfair dismissal; automatic unfair dismissal; wrongful dismissal; failure to provide a written statement of employment particulars and unpaid notice and holiday pay can proceed.

REASONS

1. By a claim form presented on 23 January 2020, the claimant claims unfair dismissal, breach of contract (Notice Pay) and unlawful deduction of wages (Holiday Pay) and a failure to provide a written statement of employment particulars. All claims are resisted by the respondent, who contends that the claimant was neither an employee or worker of the respondent, rather, she was self-employed and the respondent was her client or customer.

2. All of the claimant's claim require her to have been a worker pursuant to section 230 Employment Rights Act 1996 (ERA) and the purpose of this hearing was to determine the claimant's employment status and in turn, whether the Tribunal has jurisdiction to deal with all or any of the substantive claims.

The Issues

3. The agreed issues for determination were:

    a. whether or not the claimant was employed by the respondent as an employee under a contract of employment within the meaning of section 230(1) and (2) ERA.

    b. Whether or not the Claimant was employed by the Respondent as a worker within the meaning of section 230(3) ERA and regulation 2(1) of the Working Time Regulations 1998 (WTR). (*As the definition for worker under the WTR is identical to that under the ERA, I shall refer only to section 230(3) but with any conclusions reached in relation to that provision reading across to the WTR*)

Evidence

4. I heard evidence from the claimant on her own account, and on her behalf from Hannah Gosden (Daughter) and David Shaw Marshall (Husband). I also heard from the respondent and on her behalf from Jill Foster, Denise Scrase and Charlotte Clarke. The parties provided an electronic joint bundle. References in square brackets in the judgment are to the pdf page numbers of the bundle rather than the internal page numbering, which is different.

The Law

5. Section 230 ERA provides:

    (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; (a "Limb b worker")

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

Findings of Fact

6. On 2 January 2013, the claimant responded to an advert posted by the respondent on Gumtree seeking a "mother's help" (the role subsequently was re-titled Housekeeper) The role involved a wide range of domestic tasks including cleaning, childminding, walking the dog. The claimant also took in deliveries if they arrived when she was at work though this was incidental to her role rather than a specific task. The hourly rate was initially £8.50, rising to £9 in 2014 and then again to £10 in 2017.

Intention of the Parties

7. On 4 January 2013, the claimant and respondent met in person to discuss the role. The contents of that meeting are in dispute. The respondent contends that the claimant made clear to her that she was self-employed and that was therefore the basis upon which she was engaged. The claimant's evidence was that it was the respondent who said that as she was domestic staff, she would more likely be self-employed and that she accepted this as she wanted the job. Whatever the truth of the matter, it seems to me that both parties proceeded on the understanding that the claimant would be self-employed and that understanding was not challenged by the claimant until shortly before her relationship with the respondent ended. However, whilst the intention of the parties and how they described themselves at the outset is a factor to be taken into account, it is not conclusive. It is the reality of the relationship on the ground that is determinative.

Other work carried out by the claimant before and after engaged by Respondent

8. Prior to commencing work for the respondent, the claimant had a self-employed business. The claimant says that this was a Painting business, called PinkLady Painter rather than a cleaning business. However, the respondent says that it was a cleaning business and at paragraph 19 of her statement, says that she believes the description of the business was changed from PinkLady Cleaners to Pink Lady Painters on 6 October 2019, after the claimant had consulted solicitors in relation to a decorating bill. However there is no evidence to support that assertion and I accept the claimant's evidence that this was not the case.

9. The claimant said in evidence that the last time she did domestic tasks and cleaning was as an employee of Bretts, 20 years prior to her engagement with the respondent. However she went on to contradict this by confirming that she provided domestic and cleaning tasks for one of her referees, a Mrs Russell. Indeed, Mrs Russell confirmed in her reference (which is undated but would have been provided sometime in January 2013) that the claimant had been her personal cleaner for just over a year [54] The claimant also confirmed that she did domestic and outdoor gardening tasks for another one of her referees who she refers to in correspondence as "*My clients and subsequent friend*s…" [57] Incidentally, the respondent has expressed doubt over the genuineness of the references. This appears to be pure speculation on her part and in the absence of supporting evidence, I accept them on face value.

10. The claimant set up a gardening business shortly before commencing work for the respondent but it did not get off the ground and therefore did not generate much of an income. In any event, a gardening business is irrelevant to whether the claimant had a cleaning business.

11. During her time with the respondent, the claimant did cleaning jobs for others, though these additional jobs did not interfere with her role with the respondent. It was the respondent's case that the claimant was running a cleaning business which she advertised to the world at large. However, there is no evidence of such advertising. All the evidence points to the claimant obtaining additional cleaning work through personal referrals. Indeed, the respondent referred the claimant to some of her friends and the claimant also cleaned the respondent's grandmother's house.

12. The claimant also carried out painting jobs for the respondent but these were done on a self employed basis and paid for separately by the respondent.

Control/Mutuality of Obligation

13. The claimant says that her core hours of work were determined by the respondent and were Mondays, Wednesdays and Fridays, 9am to 1pm. She said that she was required to work a minimum of 12 hours a week for the respondent but averaged 20 hours per week and was not able to work for others during these hours. The respondent on the other hand contends that the claimant had no set hours and was free not to turn up to work as she saw fit.

14. In support of her contention, the claimant has provided a schedule purporting to set out her hours from commencement of her employment to its conclusion [197-203] However the earnings figures contained in that schedule are inconsistent with the figures in the claimant's tax return.

15. Both prior and during her work for the respondent, the submitted tax returns, with the assistance of professional accountants. In her tax returns, she declared that she was not an employee and that she was self-employed. She described her business as "CARER & PROMOTIONS." In the tax year April 2014 to April 2015, she declared a turnover of £2762 and profit from self-employment before tax as £1419. [116,123, 124,127]. [Income before tax for 2015/16 was £6993 [144] for 2016/17, £4678 [156] for 2017/18, £5637 [178] and for 2018/19, £3,660 (excluding income from Property [195]. By contrast, the gross income recorded on the claimant's schedule from the respondent in the corresponding tax years, was: Tax year 14/15 - £5316; 15/16 - £6257; 16/17 - £4348; 17/18 - £6240 [203]

16. The claimant was paid by the respondent in cash and by bank transfer and she provided details of all of her earnings from the respondent to her accountant. These were included in her tax return within the income figures for Carer. Also included in the tax return would have been income received from other odd jobs she carried out while engaged by the respondent which means the total income cited in the returns was not wholly attributable to work with the respondent.

17. As the Tax Returns are official records of the claimant's income, I place more reliance on these than on the schedule, which was not supported by any source documents.

18. The tax returns do not support the claimant's contention that she worked the hours on the schedule. The claimant sought to explain the discrepancy by blaming her accountants and said that she changed accountants on realising this. I do not accept that the Accountants made an error. The claimant had previously told the Tribunal that she changed Accountants because her previous accountant had died, not because of errors in the accounts. Besides, the claimant has not provided the Tribunal with any corrected accounts.

19. It is clear from the returns that the claimant's income fluctuated, which in itself is not significant. What is significant is that her overall income for her total period of employment was less than the income that would have been generated by a minimum requirement of 12 hours per week.

20. In the circumstances, I do not accept the claimant's contention that she was obliged to work a minimum number of hours per week for the respondent. I accept that the claimant ordinarily worked on Mondays, Wednesdays and Fridays, but that was for the mutual convenience of both parties rather than obligatory. The same applied to the hours of work, which were sometimes more than 12 hours a week but also sometimes less.

21. The respondent did not control how the claimant carried out her work. Whilst the respondent would tell the claimant if she needed something in particular doing, she did not direct her on how it should be done. The claimant was after all an experienced domestic worker, which is why the respondent was comfortable giving her a key to her house and allowing her to get on with the job in her absence.

22. The claimant would notify the respondent if she needed to change her normal working pattern but this, to me, signified common courtesy rather than the claimant seeking express permission. Also, the respondent would sometimes ask the claimant to attend at different times, which the claimant would do if convenient to her. From a number of text exchanges in the bundle, I am satisfied that there was mutual flexibility as to when the work was done.

23. The claimant claims that she was required to get approval from the respondent if she wanted to book holiday. The respondent denies this. In fact, the respondent says that the claimant never took holiday. The claimant has not identified any occasion when she took holiday and I accept the respondent's evidence that the claimant was not expected to work Christmas Day or Boxing Day and that on other Bank Holidays she had the option of working or changing the day. There is no evidence that the claimant took any other holiday from work though I imagine that if she did, she would notify the respondent of this consistent with the approach adopted when there were changes to the normal working pattern.

24. I do not accept the claimant's assertion that the respondent would reprimand her for any errors and mistakes. The respondent denies this and the claimant has given no examples of such occasions. In any event, this would be a feature of any relationship where services were provided at an unsatisfactory level, whether to an employer or a customer.

Substitution

25. The claimant contends that she was expected to personally perform the work for the respondent. The respondent says at paragraph 22 of her statement that the claimant was free to substitute her services to someone else and did so on occasion. Having considered this conflict, I prefer the claimant's evidence for the following reasons:

26. At the time of the claimant's appointment, the respondent's husband had a very high profile position. He was once a national newspaper editor and then went to work in Downing Street in a role which brought him in close day to day contact with the then Prime Minister, David Cameron. He became even more prominent thereafter due to criminal charges and a term of imprisonment as a consequence of the phone hacking scandal. In light of these matters and the inevitable press interest in the public (and no doubt private) life of the respondent's husband, the respondent would only have allowed people into her home who she could trust, especially as she had 3 children, then aged 13, 12 and 4. The claimant was provided with a key to the respondent's property and often carried out her tasks when the respondent was not there. In the circumstances, I consider it inconceivable that the claimant would have had free reign to allow anybody to enter the respondent's home and carry out housekeeper duties in her place.

27. An example given by the respondent of the claimant using a substitute was her daughter, Hannah stepped in to do some baby-sitting. However, from the text exchanges at the time, it is clear that this was at the request of the respondent to assist her on a day that the claimant would not normally work and was otherwise engaged, rather than the claimant deciding to send along a substitute [88]. The other example cited was when the claimant offered her partner or daughter to be at the respondent's house to receive an Ocado delivery [80] As already mentioned, accepting deliveries was incidental to the claimant's role. In offering her family members to do this did not amount to a substitution of her tasks, rather it was a favour to the respondent, who knew and trusted the claimant's family. Similarly, when the claimant was feeling too ill to attend work, she offered to send her partner round simply to let the dogs out [86] Again, that is more akin to a favour than a substitution of tasks. There was no evidence to suggest that the claimant's family members carried out any cleaning duties. The respondent accepts that none of the claimant's work was carried out by others outside the claimant's family unit.

28. In all the circumstances, I find that the claimant was required to carry out her role personally.

Other Matters

29. The claimant did not submit invoices for her work as a Mother's help.

30. Apart from on a couple of exceptional occasions, the materials and tools necessary for the claimant to undertake her role were provided by the respondent.

31. The claimant was not required to provide professional indemnity insurance in relation to her role and bore no financial risks in relation to the engagement.

Termination

32. On 8 October 2019, the respondent terminated the claimant's services with immediate effect. I make no findings of fact on the reasons for termination as they are not relevant to the preliminary issue and I consider it more appropriate for these to be determined at the full merits hearing.

Submissions

33. The parties presented written submissions which they spoke to. I refer to these but do not repeat them. Relevant authorities referred to have been taken into account, even if not referred to specifically below.

Conclusions

34. Having considered my findings of fact, the parties' submissions and the relevant law, I have reached the following conclusions on the issues:

Was there a contract of service?

35. The celebrated case of Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, provides that a contract of service exists if 3 conditions are fulfilled:

    a. The servant agrees that, in consideration of a wage or other remuneration, they will provide their own work and skill in the performance of some service for his master

    b. They agree, expressly or impliedly, that in the performance of that service they will be subject to the other's control in a sufficient degree to make that other master

    c. The other provisions of the contract are consistent with its being a contract of service

36. Subsequent authorities have interpreted this as requiring an irreducible minimum of personal service, mutuality of obligation and control. Without these, there can be no contract of service. Applying these factors to the current case:

Personal Service

37. To be an employee, an individual must be obliged to perform their work personally for the employer. Autoclenz v Belcher [2011] UKSC 41; Pimlico Plumbers Ltd v Smith [2017] ICR 657. It was submitted on behalf of the respondent that the claimant did not have to perform her role personally as she had an unlimited right of substitution, which she chose to limit to members of her family. I disagree. For the reasons set out in my findings at paragraphs 25 to 28, I am satisfied that the claimant did not have a right of substitution and was required to provide her services personally.

38. In the alternative, any right of substitution was not unfettered but limited to the claimant's immediate family members and only to cover peripheral tasks on occasions when the claimant was unavailable, subject to the respondent's agreement. This limited right is not, in my view, inconsistent with personal service.

Mutuality of Obligation

39. This is usually expressed as an obligation on the employer to provide work and pay a wage or salary and a corresponding obligation on the employee to accept and perform the work offered.

40. It was submitted by the respondent that the claimant was not required to provide a certain number of hours of service to the respondent and the respondent was never required to provide a certain amount of work or pay. In Dakin v Brighton Marina Residential Management Co Ltd [2013] 4 WLUK 647, it was held that the essential requirement of mutuality of obligation did not have to be so precise as to impose upon the worker an obligation to perform specific hours. Instead, it is necessary to look at whether the history of the relationship showed an obligation on the claimant to do at least some work and a correlative obligation on the respondent to pay for it.

41. For over 6½ years, the claimant worked for the respondent continuously. Although the hours worked are disputed, the respondent stated that there was always work to do and that she offered the claimant some work each week. There is no evidence that the claimant ever turned work down. Indeed, on occasions when the claimant could not work on her normal days, she would seek to re-arrange. At paragraph 21 of her statement, the respondent says that there was an understanding that she was the claimant's client for up to 12 hours a

week. Leaving aside the client label for the moment, that statement points to an expectation that the claimant would provide some work for the respondent each week and that is what happened. Given this course of conduct over a prolonged period, I am satisfied on the facts of this case that there was an implied obligation upon the respondent to provide some work to the claimant each week and for the claimant to undertake it.

42. I am satisfied that there was mutuality of obligation.

Control

43. The notion of control has progressed from the "master and servant" relationship envisaged by Ready Mix Concrete It is not about actual supervision or direction. Control nowadays is about the employer having the right to direct what the employee does rather than how they do it . The issue I have to determine is whether there was enough control in this case to make the relationship one of employer and employee.

44. The claimant's work took place in the family home of the respondent, which she occupied with her husband and children. In those circumstances, it is inconceivable that the respondent would not have a contractual entitlement to control what the claimant did in her home, even if there was no practical manifestation of that control. The respondent relied on the claimant's skill and expertise in domestic work, making it unnecessary to direct her on how to carry out her tasks. That said, there was some evidence before me of instances of actual control; the respondent would tell the claimant if she needed specific tasks carried out and would direct that specific cleaning products and materials provided were used.

45. I am satisfied that there was a sufficient degree of control to establish an employer/employee relationship.

46. It follows that the irreducible minimum requirements for a contract of service are present in this case.

Other factors relevant to employment status

47. The final condition of the Ready Mix concrete test is whether the other provisions of the contract are consistent with its being a contract of service.

48. Where the irreducible minimum requirements have been satisfied, there will, prima facie, be a contract of employment unless, viewed as a whole, there is something about its terms which places it in a different category. In other words, are there factors that are inconsistent with a contract of employment existing.

49. The respondent contends that the claimant was in business on her own account, such that the respondent was her customer or client. I disagree. In doing so, I rely on the matters above as well as those at paragraphs 29-31, which are more consistent with employment than not.

50. The respondent points to the fact that the claimant organised her own tax affairs as indicative of her self-employed status. Whilst this can be a factor pointing to self-employment, in this particular case, it is not. The claimant was involved in a number of self-employed activities prior to her engagement with the respondent and for that purpose had used an accountant to deal with her tax affairs. That continued in relation to her role with the respondent, most probably because of the assumption (incorrect as it turned out) that the claimant would be self-employed and responsible for her own tax. This is not an indication of the claimant being in business on her own account but a feature of the mis-labelling of the relationship at the outset.

Conclusion

51. Standing back and looking at the reality of the relationship in the round, I am satisfied that the claimant was engaged by the respondent under a contract of service. She was therefore an employee pursuant to section 230(1) and (2) of the ERA.

52. However, if I am wrong about that, I find that the claimant was a worker pursuant to section 230(3)(b) ERA. There was a verbal contract between the parties that the claimant would work as a mother's help in exchange for payment, at an agreed hourly rate, for up to 12 hours a week. For the reasons already stated, the work was to be done personally by the claimant and the respondent was not a customer or client of a business undertaking carried on by the claimant.

Employment Judge Balogun
Date: 30 December 2021