Case No: 2601266/2021
2601643/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms E Nunn	**v**	G. & M.J. Crouch & Son Ltd

Heard: Via Cloud Video Platform in the Midlands (East) Region

On: 12 May 2022

Before: Employment Judge Ayre

Representatives:

Claimant: Mr M Doughty, the claimant's partner.
Respondent: Mr R Dennis, counsel

RESERVED JUDGMENT AT PRELIMINARY HEARING

The claimant was an employee of the respondent between May 2018 and February 2020 and therefore has sufficient service to pursue a complaint of unfair dismissal.

REASONS

Background

1. On 27 May 2021 the claimant issued a claim in the Employment Tribunal for sex discrimination and constructive unfair dismissal ("**the First Claim**"). On 10 June 2021 the claimant wrote to the Tribunal seeking to add a complaint of whistleblowing detriment.

2. On 30 July 2021 the claimant issued a second claim ("**the Second Claim**") incorporating the claims brought in the First Claim, and additional ones. In the List of Claims that she submitted with the second claim form she included complaints of constructive unfair

dismissal, direct sex discrimination, sexual harassment, harassment related to sex and whistleblowing detriment.

3. The respondent defends the claims. It says that the claimant was self-employed prior to the 6 February 2020, and therefore does not have sufficient service as an employee to be able to pursue a complaint of constructive unfair dismissal.

4. The case was listed for a Preliminary Hearing before Employment Judge M Butler on 31 August 2021. At that hearing the respondent was given leave to file an amended response to the First Claim, which it subsequently did.

5. A second Preliminary Hearing took place before Employment Judge Ahmed on 19 October 2021. Employment Judge Ahmed decided to list the case for today's Preliminary Hearing to decide whether the claimant was an employee in the period before 6 February 2020, and therefore whether she has sufficient service to pursue a complaint of constructive dismissal.

The Proceedings

6. I heard evidence from the claimant and, on her behalf from Mark Doughty, her partner and representative. The claimant also produced a witness statement for her father, Chris Nunn. Mr Nunn was not present at the Tribunal to give evidence, so no weight has been placed on that statement, which in any event, does not appear to be relevant to the issue that I have to determine. I also heard evidence on behalf of the respondent from Adam Crouch, Managing Director.

7. There was before me a bundle of documents running to 286 pages, and a bundle of authorities running to 309 pages. Both representatives also produced written skeleton arguments for which I am grateful.

The Issue

8. The issue for determination at today's hearing was whether the claimant was an 'employee' within the meaning of section 230(1) of the Employment Rights Act 1996 ("**the ERA**") from May 2018 until 5 February 2020.

9. The respondent admits that the claimant was an employee from 6 February 2020.

10. The parties agreed that it was not necessary for me to decide whether the claimant was an employee within the meaning of section 83(2) of the Equality Act 2010 because all of the allegations of discrimination made by the claimant relate to the period of time after 6 February 2020, when the respondent accepts that the claimant was an employee.

Findings of Fact

11. The respondent is a business that provides vehicle recovery services, and which is owned and run by the Crouch family. The claimant was a longstanding family friend of Mr Crouch and his family. She worked for the respondent as an administrator for approximately 12 months in 2012. During that time, she was an employee of the company and was provided with a contract of employment.

12. Her employment ended in December 2012 when she secured another role, closer to her home. The claimant stayed in contact with Mr Crouch and in March 2018, following the birth of the claimant's second child in December 2017, the claimant and her father visited Mr Crouch and his father at the respondent's offices in Leicester.

13. There was a discussion between the claimant and Mr Crouch about the claimant doing some work for the respondent to help them with invoicing, as the respondent had a backlog of invoices to issue. The claimant took some time to reflect and met with Mr Crouch again in May 2018. Following that meeting the claimant and Mr Crouch agreed that the claimant would begin working for the respondent. It was agreed that the claimant would be self-employed rather than an employee.

14. The claimant and Mr Crouch were long standing friends, and as such the discussions about the claimant working for the respondent took place between two people who liked and respected each other. There was no obvious imbalance of power between the two of them at the start of the working relationship. Mr Crouch wanted the claimant to work for the respondent, and the claimant wanted to work on terms which suited her, and which fitted in with her childcare commitments.

15. It was agreed that the claimant would be paid an hourly rate of £20 an hour for the hours that she worked, that she would submit invoices for the work that she carried out, and that the respondent would pay her gross and she would be responsible for paying tax and national insurance on her earnings.

16. There were no fixed hours of work and the claimant was not obliged to work any particular hours. She could work when and where she wanted. There was no written contract put in place.

17. The claimant was not entitled to paid holiday, sick pay, pension or any other benefits, although the claimant was on one occasion allowed to get her car serviced at the local garage on the respondent's account so that she could receive the employee discount. There was no restriction on her working for other employers, and she was free to do so if she wished. In practice however she worked only for the respondent.

18. The claimant was free to work either at home or in the office, at her choice. She often worked from home, in contrast with the respondent's employees who, prior to the Covid 19 pandemic, were required to work in the respondent's offices.

19. The claimant could also choose when she worked and was not required to work set hours. She often worked weekends or evenings, to fit around her childcare commitments.

20. When she worked the claimant was required to use equipment provided by the respondent and to use the respondent's software system, Apex, to produce invoices. The respondent provided the claimant with a desktop computer, two screens and a laptop. There was no evidence to suggest that the claimant provided any of her own equipment, or that she took any financial risk when working for the respondent.

21. The claimant had a desk in the respondent's office that she could use when she wanted to. She had an "@crouchrecovery.co.uk" email address that she used when working for the respondent. It would not have been obvious to those external to the respondent, such as customers, that the claimant was not an employee. She was held out as being part of the business.

22. In her first month working for the respondent, June 2018, the claimant worked 113.5 hours. She invoiced for the work she carried out in this and other months using the trading name "Virtus". Virtus was a company used by the claimant's partner, which she used to bill the respondent. Her partner also used the trading name.

23. The number of hours that the claimant worked increased substantially and remained high until she resigned in May 2020. She was effectively working full time for the respondent for most of the period through to February 2020. The respondent did not deduct tax or national insurance from the payments it made to the claimant, but paid her gross and she was then responsible for accounting to HMRC for tax and national insurance.

24. In November 2018 Mr Crouch made a number of changes to the invoicing team. The claimant was not consulted about these changes and had no input to them.

25. In March 2019 the claimant became the respondent's 'Accounts Manager'. She publicised her appointment on LinkedIn and the post was liked by Mr Crouch. The claimant was issued with an ID card which stated, "Emma Nunn Accounts Manager Crough Recovery".

26. The claimant reported directly to Mr Crouch, with whom she had a close working relationship. In June 2019 she told him that she was too busy and feeling overwhelmed. Mr Crouch said that he wanted to get someone to help her. The claimant was not able to directly recruit someone to work for her – that was Mr Crouch's responsibility.

27. The claimant was not able to arrange for anyone else to carry out her work, because her work could only be done on the respondent's IT equipment, using her own personal log in details. The respondent had contracts with the police and was therefore very security conscious. In practice therefore the claimant was not able to send a substitute to

perform her services, although there was no express restriction on her doing so.

28. It is clear that Mr Crouch respected and valued the claimant and that for most of the period between May 2018 and February 2020 she was effectively working full time for the respondent, albeit on days and hours that suited her. The claimant was not obliged to complete work at a particular time and suffered no adverse consequences when she told Mr Crouch she could not deal with a particular issue because she was not working.

29. On one occasion in January 2020 Mr Crouch diverted his mobile telephone to the claimant, when he was uncontactable for personal reasons, so that she could answer his telephone' calls. Mr Crouch also allowed the claimant to use the company credit card for purchases for the respondent's business. She was given the security code to his personal office.

30. The claimant wore the respondent's branded clothing when in the office although this was her choice, rather than a requirement imposed by the respondent. She was photographed with colleagues in the office wearing a branded T-shirt.

31. The claimant was asked to work in the operations control room on occasion where she would answer the telephones on behalf of the respondent. She was also asked to train colleagues on the Apex and invoicing systems, to contact customers and to carry out a range of other tasks when in the office. These tasks included occasionally making tea for meetings and opening the door to visitors.

32. Although the claimant had freedom as to when and where to work, she was given instructions by Mr Crouch and by the respondent's Finance Director, which included telling her the amounts to be invoiced.

33. In November 2019 discussions took place about the claimant becoming an employee. Mr Crouch wanted to have more control over the hours that the claimant worked. The claimant was concerned about the implications for her of IR35 and sought advice from HMRC.

34. Over the course of the next few months, there were discussions between the claimant and the respondent about her becoming an employee and it was agreed that with effect from 6 February 2020 the claimant would be an employee of the respondent, on an annual salary of £60,000 from which the respondent deducted tax and national insurance contributions. The claimant was, from then on, provided with pay slips, holiday (which she took) and was enrolled in the respondent's pension scheme. She was required to work regular hours and, until the country went into lockdown, was expected to work in the office rather than at home.

35. A contract of employment was drafted for the claimant but was never agreed.

The Law

36. Section 230 of the ERA contains the following definitions of employee, employment and worker:

"(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…"

37. 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*.

38. These principles were approved by the Supreme Court in ***Autoclenz Ltd v Belcher [2011] ICR 1157*** in which the Court also stated that "*There must be an irreducible minimum of obligation on each side to create a contract of service…If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status…If a contractual right, as for example, a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement.*

39. 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. Whether the other terms of the contract are consistent with there being an employment relationship?

40. 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.

Submissions

Claimant

41. Mr Doughty submitted that the claimant had worked for the respondent as an employee for three years. The nature of the relationship between Adam Crouch and the claimant showed that she was an employee throughout. There was no evidence, in Mr Doughty's submission, that the claimant was either a subcontractor or self-employed before February 2020.

42. When the claimant rejoined the respondent in May 2018, she was invited back to work for them because she was well known and trusted by the family that owned the business. She was, Mr Doughty submits, directed and controlled in her work by Mr Crouch. She had conversations with Mr Crouch in October 2018 about going onto the payroll and Mr Crouch agreed to that.

43. The claimant was provided with an email address which she used in the course of her work. She was never referred to as a contractor or a

temporary member of staff. She wore the respondent's uniform and was a key, integral part of the respondent's business.

44. There was no evidence, in Mr Doughty's submission, to support the respondent's suggestion that the claimant was self-employed. Her work was not a project nor was it for a fixed period of time.

45. The claimant's work increased substantially from a small amount in the first month of employment. She became very busy and asked for help in July 2019. If she had been a sole trader or self-employed, she could have brought in her own support. The fact that she did not was an indication that she was an employee.

46. Mr Doughty also submitted that Mr Crouch asked the claimant to work in different parts of the building including in the control room. The claimant was regularly involved in meetings both with clients and with colleagues. The claimant was told to wear the respondent's uniform and did so on a regular basis. She was central to the respondent's operation and Adam Crouch controlled and directed her work. She was obliged to accept the work that was offered to her.

47. The claimant wanted, he said, throughout the course of her time working with the respondent to be an employee.

48. In Mr Doughty's submission, much of Adam Crouch's witness statement is different and contradictory to the amended grounds of resistance.

49. There was, he submits, mutuality of obligation between the claimant and the respondent from the start of the working relationship. There was an agreement in early May 2018 that the claimant would work for the respondent. Following that agreement, Mr Crouch directed the claimant to take on more work and in October 2018 he asked her to become an employee.

50. Mr Doughty says that a new contract was in effect entered into when Mr Crouch appointed the claimant to the Account Manager role. As the respondent failed to provide the claimant with a contract of employment however, she had no choice but to submit invoices in order to get paid.

51. It was, in Mr Doughty's view, implausible to suggest that the respondent had no control over who had access to the respondent's system and that therefore the claimant had the right of substitution. Adam Crouch admitted that he told other members of staff that he had worked with the claimant for three years rather than 18 months.

52. The claimant was, in Mr Doughty's submission, an employee, albeit a disguised employee. The reason she was not taken on initially on an employment contract was because the respondent didn't want to pay tax or national insurance contributions. There was no material benefit to the claimant when she became an employee.

53. In his written skeleton argument Mr Doughty referred me to a number of cases including **Uber *BV and others v Aslam and others [2021] ICR 657***, ***Ready Mixed Concrete***, ***Autoclenz Ltd v Belcher and others [2011] IRLR 820***, ***Hall (Inspector of Taxes) v Lorimer [1994] ICR 218, O'Kelly & others v Trusthouse Forte plc [1983] ICR 728, Windle & anor v Secretary of State for Justice [2016] ICR 721*****,*** *and* ***Pimlico Plumbers Ltd and anor v Smith [2018] ICR 1511***.

54. He also submitted that:

a. The question of control is not determined solely by whether the worker has day-to-day control over her own work, but by addressing the cumulative effect of the provisions in the agreement and all the circumstances.

b. The Tribunal should also consider factors such as:

i. The degree of investment, capital and risk taken by the individual;
ii. Who provided the tools and equipment;
iii. Whether the individual is tied to one employer or free to work for others;
iv. How the parties viewed the relationship;
v. How the arrangement was terminable; and
vi. The length and nature of the relationship.

c. A four fold approach could be taken:

i. Was there one contract or a succession of shorter ones?
ii. If one contract, did the individua agree to undertake a minimum amount of work in return for pay?
iii. If so, was there such control to make it a contract of employment;
iv. If there was insufficient control was the claimant nevertheless obliged to do some minimum?

d. There are three broader tests to consider also:

i. Whether the worker falls within IR35;
ii. The 'practical reality test'; and
iii. The 'ACAS Employee v Self Employed test'.

Respondent

55. Mr Dennis submitted, on behalf of the respondent, that between May 2018 and February 2020 the claimant provided services as a self-employed contractor. She invoiced the respondent using the trading name "Virtus", the respondent was under no obligation to offer her work, and she was under no obligation to accept any work offered. She was paid without deduction of tax and national insurance, and only became an employee on 6 February 2020 when the respondent wanted to gain more control over the services that she provided.

56. There is, he says, no single test for employee status, but there are three minimum conditions that must be fulfilled, following the Supreme Court's decision in ***Autoclenz Ltd v Belcher [2011] ICR 1157***:

    a. Mutuality of obligations of the necessary kind;
    b. Personal service; and
    c. Sufficient control.

57. If these three conditions are met, the Tribunal should then consider whether the other provisions of the contract are consistent with it being a contract of employment. In Mr Dennis' submission, none of the three minimum conditions for employment status is satisfied in this case.

58. There was, he said, no mutuality of obligation. The respondent was not obliged to provide the claimant with any work, and the claimant was not obliged to accept work that was offered. The claimant could work the hours that she wanted and when she worked those hours. This flexibility was at the claimant's request and there were times when she would tell the respondent she was not working on a particular day and therefore could not do a task that was asked of her. The claimant had not asserted that the respondent was obliged to offer her work, nor that such an obligation was implied by conduct over time.

59. In Mr Dennis' submission, there was no defined period of engagement, and the claimant did not know how long she would be needed for. She could help out as long as she was willing to and as long as she was offered work. She accepted that no one told her she had to log on and work particular hours. No one told her she had to work. All that changed in February 2020 when she became an employee.

60. The claimant had described herself as self-employed in her ET1. She and Adam Crouch had reached an agreement through mutual understanding and respect. There was no hierarchical situation or imbalance of power. It was up to the claimant when she worked.

61. Mutuality of obligation cannot, in Mr Dennis' submission, be implied through conduct over time. The only thing that changed over time was that the claimant worked and billed more hours. There was more work to be done and she chose to do it.

62. Mr Dennis also argues that there was no obligation on the claimant to provide the services personally and she had the right of substitution, even if she never exercised that right. Mr Crouch didn't mind who did the work and was not controlling how the services were provided.

63. In relation to control, Mr Dennis referred me to the words of McKenna J in ***Ready Mixed Concrete***:

    "*Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient*

degree to make one party the master and the other his servant. The right need not be unrestricted."

64. The respondent did not, in Mr Dennis' submission, exercise sufficient control over the claimant during the relevant period, and that was why Mr Crouch eventually suggested that the claimant become an employee. The claimant chose what jobs to invoice and could and did refuse work offered by Mr Crouch. The respondent did not control the way in which the claimant provided her services, the means to be used in doing so, the time when she provided her services or the place where she did so.

65. Mr Dennis also submitted that the other provisions of the contract were inconsistent with it being a contract of employment:

    a. In May 2018 the claimant told Mr Crouch she was a sole trader, worked for other businesses and would charge £20 an hour;

    b. The claimant agreed to provide her services as a self-employed contractor, knowing the distinction between employment and self-employment as she had previously worked for the respondent as an employee;

    c. The other provisions of the contract were inconsistent with employment status – she accounted for her own tax and NIC, and was not entitled to holiday or sick pay.

66. He referred me also to the judgment of Elias LJ in ***Quashie v Stringfellow Restaurants Ltd [2013] IRLR 99*** as authority for the proposition that the way in which the parties characterise the relationship, whilst not conclusive, is a relevant fact and in some cases may be decisive.

67. There is, Mr Dennis says, no unfairness to the claimant in finding that she was self-employed. She wanted flexibility and to be in control of when and how much she worked.

Conclusions

68. In reaching the following conclusions I have carefully considered the evidence before me, the legal principles summarised above, and the oral and written submissions of both parties.

69. Dealing first with the question of whether there was a mutuality of obligation between the claimant and the respondent, I am satisfied on balance that there was. This was evidenced by the fact that the claimant worked consistently for the respondent for many months on a full-time basis. There was no evidence before me of the claimant refusing to carry out work for the respondent or of her turning down work, and it was clear that Mr Crouch relied heavily on the claimant and expected her to perform her duties.

70. The fact that the claimant had freedom as to when she worked and where she worked is not, in itself, inconsistent with an employment relationship. There are many employees who have flexible working arrangements. The reality of the arrangement was that the claimant was working full time for the respondent and was not working for anyone else. She did not turn down work for the respondent and did everything that was asked of her, albeit at times that suited her.

71. The respondent also provided the claimant with work regularly and consistently. There was, if anything, too much work for the claimant to do. There was no evidence of the respondent engaging anyone else to do the work that the claimant carried out and there was a clear expectation on the part of the claimant that she would continue to be provided with work on a regular basis. There was no express contractual right for the respondent not to provide the claimant with work – this was far from being a 'zero hours' contract. The reality of the arrangements between the parties was that the respondent always provided the claimant with work and relied on her to do that work.

72. The respondent also exercised control over the way in which the claimant carried out the work. She was required to use its software and its hardware and given direction by Mr Crouch and the Finance Director. She was asked to carry out other tasks, including working in the operations control room, and there was no evidence before me of her ever having refused to do so.

73. Considering the words of McKenna J in ***Ready Mixed Concrete,*** the respondent decided what should be done (ie the invoicing), the way in which it should be done and the means to be used when doing it (ie the respondent's software). The claimant had some control over the time and place at which the work was done, but not sufficient in my view as to be inconsistent with a contract of employment. When the claimant was asked by the respondent to carry out duties other than invoicing, she did so.

74. It is clear, from the evidence, that the claimant was required to perform the services for the respondent herself. She was recruited because she was known to Mr Crouch and his family, had worked for them previously and had a good relationship with them. There was no express right of substitution, as there was no written contract, and no evidence of the claimant ever having tried to send someone else to work on her behalf.

75. On the contrary, when the claimant had too much work, she spoke to Mr Crouch about it, and he told her he would try and get her additional help. Had the claimant been genuinely self-employed, she would have been able to engage contractors to carry out the excess work. This was clearly not the case here. Rather, Mr Crouch took on responsibility for finding additional resource to help the claimant.

76. In any event, the requirements imposed by the respondent that the claimant use its hardware, its software and a personal log in, for security reasons, meant that she was unable to ask someone else to

do the invoicing or other work on her behalf. She was therefore required to perform the services personally.

77. It is undoubtedly true that some of the arrangements between the parties are not consistent with an employment relationship. The claimant submitted invoices, was responsible for her own tax and national insurance, and was not given paid holiday, sick pay or a pension. It is also true that the parties labelled the relationship as being one of self employment until February 2020.

78. The majority of the contractual arrangements between the parties are, in my view, consistent with an employment relationship. The claimant was clearly integrated into the respondent's business, as a highly valued and trusted member of staff. She was held out to third parties, including customers, as an employee. She used an email address provided by the respondent and referred to herself on LinkedIn as an Accounts Manager for the respondent – a post which was liked by Mr Crouch.

79. The respondent provided all of the equipment that the claimant used to provide her services, and there was no evidence of the claimant taking any financial risk or of her providing professional indemnity insurance. The claimant was provided with a desk in the respondent's office and wore the respondent's uniform. She was not engaged on a temporary contract, to perform a specific project, or for a defined term.

80. The claimant was, in my view, integrated into the respondent's business. Mr Crouch diverted his telephone to her, trusted her with the security code to his office and the respondent's credit card, and provided a desk for her. He clearly trusted and relied heavily on her. Although there was no restriction on the claimant working for other organisations, she did not do so, and the respondent provided her with so much work that she did not have time to work for anyone else.

81. For these reasons, I find that the claimant was an employee of the respondent within the meaning of section 230(1) of the Employment Rights Act 1996 from May 2018 until 5 February 2020 and that the claimant therefore has sufficient service to pursue a complaint of constructive unfair dismissal.

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Employment Judge Ayre

8 June 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE