CASE NUMBER: 2301786/2021

EMPLOYMENT TRIBUNALS

Claimant: **Miss J Wheatley**

Respondent: **Turner Contemporary**

Heard by CVP **On: 26 April 2022**

Before: **Employment Judge Corrigan**
(Sitting Alone)

Representation
Claimant: In person
Respondent: Ms T Burton, Counsel

RESERVED JUDGMENT

1. The claimant's claim for notice pay was dismissed upon withdrawal.

2. The claimant was an employee of the respondent and entitled to redundancy pay of £742.50 to be paid by the respondent to the claimant.

REASONS

1. The Claimant brought claims for redundancy pay and notice pay.

2. There was a time limit issue in respect of the notice pay claim (the time limit was 13 May 2021 (following the end of ACAS conciliation on 13 April 2021) but the claim was submitted on 15 May 2021). The Claimant accepted this claim was out of time and did not seek to argue that time should be extended on the basis it was not reasonably practicable to submit the claim in time. During the hearing she agreed to the claim being dismissed upon withdrawal. She mentioned that she had been advised that she could still pursue this in the civil courts, and was expressly asked if she was seeking to reserve the right to do so, but confirmed

this was not her intention and she was in agreement with the matter being dismissed upon withdrawal.

3. The respondent accepts that if the claimant was an employee over the period she worked for the respondent then her redundancy entitlement was £742.50.

4. The sole issue in the claim for redundancy pay is whether or not the claimant was an employee of the respondent.

Hearing

5. I heard evidence from the claimant on her own behalf. I heard evidence from Mr Toby Parkin, Head of Visitor Experience and Engagement, on behalf of the respondent.

6. There was a 265 page bundle, a schedule of loss and a calendar of shifts worked provided by the claimant.

7. The respondent's representative provided written submissions and both sides made oral submissions.

8. Based on the evidence heard and the documents before me I found the following facts.

Facts

9. The claimant started working for the respondent, an art gallery, on 6 April 2011 as a Navigator. The gallery opened for the first time about that time.

10. The offer letter that she received is at page 32 of the bundle and states that she was offered "a zero hours contract". The letter also refers to the "offer of employment" and refers to formal terms and conditions of service to be issued. The letter said she was required to attend training on four particular dates.

11. The agreement that was then provided to the claimant is at pages 33-36. Relevant excerpts are as follows:

"…

1 Status of Agreement

1.1 This Agreement governs your engagement from time to time by the Gallery as a Navigator.

1.2 It is agreed by both parties that this Agreement is not a contract of employment and does not confer any employment rights on you other than those to which workers are entitled.

2 Discretion as to work offered

2.1 It is entirely at the Gallery's discretion whether to offer you work and it is under no obligation to provide work to you at any time.

2.2 This Agreement is not intended to create any obligation on the Gallery to provide work for you or for you to accept any offer of work from the Gallery.

3. No presumption of continuity

3.1 Each offer of work by the Gallery which you accept shall be treated as an entirely separate and severable engagement ("an Assignment"). The terms of this Agreement shall apply to each Assignment, but there shall be no relationship between the parties after the end of one Assignment and before the start of any subsequent Assignment.

3.2 The fact that the Gallery has offered you work, or offers you work more than once, shall not confer any legal rights on you and, in particular, shall not be regarded as establishing an entitlement to regular work or conferring continuity of employment.

4. Arrangements for work

4.1 If the Gallery decides to offer you work, it will inform you by email….

4.2 You are under no obligation to accept any work offered by the Gallery at any time, however if you accept an Assignment, you will be required to complete it, other than in the event of unforeseen sickness or injury.

5. Work

5.1 The Gallery may offer you work from time to time as a Navigator. If you accept any offer of work, your duties will be as detailed in the accompanying job description.

…

7. Hours of work

7.1 During each Assignment, your hours of work will vary depending on the operational requirements of the Gallery. You will be informed of required hours for each Assignment as and when necessary."

12. The agreement also contained terms in respect of pay and pay arrangements and entitlement to holiday pay, which was to be taken between assignments. The claimant did not receive sick pay.

13. The claimant accepted in evidence that the respondent was not under an obligation to provide her with work and that there was no intention to create any obligation between herself and the gallery. She said she accepted that even if

work was offered there was no obligation on herself to accept it. She was asked if the contractual terms showing no obligation on either party to offer or accept work were accurate in reality, and agreed they were.

14. The claimant had a badge, uniform and security pass that she retained between shifts. She did not return these at the end of a shift. She had a staff discount.

15. She was provided with a Turner Contemporary email address (p44). Initially there was no obligation to use this, but from May 2018 she was required to do so. The email at page 123 also said that this was the email address that would be used for all future correspondence and "we expect that you will check it regularly". I find that language to suggest more than an "expectation" but an "instruction" to check that email address regularly.

16. The claimant's role of navigator was to assist in the delivery of the learning programme, which closely aligned with the changing exhibitions. There would be a new exhibition every few months and the navigators delivered associated workshops, exhibition tours and school sessions and facilitating group conversations within the context of the main exhibition. Navigators were also involved in planning and preparation for upcoming exhibitions and worked with the "philosopher-in-residence. There was also other work not specific to exhibitions. I accept the claimant's evidence that the nature of the work was not one off isolated shifts but part of a connected series of work over the course of an exhibition and beyond, and built on their experience over time. There were times when she undertook leadership/facilitative roles or represented the organization at external meetings and fed back to the respondent.

17. She was booked for shifts on particular projects/exhibitions. Some of these shifts were booked months in advance. She agreed there were some instances when Navigators were told that if they wanted to they could "step back" from a particular exhibition ie take "a whole exhibition away" (see eg p60). However the claimant never did this and she worked on every exhibition. She was also involved in long running projects like the Youth Navigators that ran over a number of years across different exhibitions. She was very involved in that particular project including in its design and it suited her particular skillset. Some of the work involved outreach projects which from 2014 were booked directly between the learning team and the Navigators (p78). These were also booked in advance as far as possible.

18. In addition a standard email was sent to Navigators and Gallery Assistants every two weeks seeking availability. A deadline was provided for a response. The claimant was free to provide availability or no availability in response to those emails, although p 63 suggests Navigators were chased if they did not reply. The rota would then be produced based on these replies. This was a separate process to those shifts separately booked in on particular projects (see p 78) and there were occasions where the claimant said she was not available, but already had some shifts booked in the relevant period for particular projects. The aim was to allocate work fairly, taking into account experience and availability, but if a particular person offered availability the respondent would seek to offer work. Once a rota was sent out it was regarded as

"final" but if a Navigator was no longer available for a particular shift it would be offered to another Navigator in the first instance.

19. I note that on an occasion when a tour was done by a Gallery Assistant rather than a Navigator a reassuring email was sent to the Navigators to explain that none of them had been available and it was a "needs must" situation but would not normally happen. It referred to there currently being a team of 9 navigators, 4 less than required and they were short staffed (p93).

20. Early on in her employment, when she realized that there would be insufficient income from her role with the respondent, the claimant obtained permanent work at the Visitor Information Centre in Margate. However, as the respondent is an attraction in Margate, her new employer was supportive of her role with the respondent and she was able to remain working for both. This limited her availability and times that were busier in the Visitor Centre impacted the claimant's availability for the respondent. The emails evidence her keeping the respondent informed at these times. They also suggest that whilst her availability reduced she sought to compensate by being flexible and made offers to assist the respondent at short notice. She had a reputation for taking shifts at short notice and unpopular shifts.

21. The claimant provided her work record throughout the time she worked for the respondent. It can be seen that she worked more earlier in the relationship than towards the end, but she worked at least once in most months, throughout the relationship. Some months she worked as many as 12-16 times, though in the latter years busier months were more like 5-8 times. Over the relationship there were just three months prior to the pandemic closure (April 2016, June 2019 and August 2019) when the claimant did not work at all in that month.

22. Although the gallery closes when exhibitions change, there is some work that continues, either because parts of the gallery remain open, or there is school outreach work, meetings or training. The claimant's work record shows that she did have some shifts in those closure periods.

23. The claimant was involved in the school prints project in February 2020 which involved about 11 sessions that were pre booked through to July 2020 (though in the event were interrupted by the pandemic.

24. In addition to shifts there were training sessions and meetings/briefings. Some of these were described as mandatory. These included Navigator training and some mandatory training for front of house staff. See for example p115 where training was described as compulsory and the email dated 26 April 2019 which stated "Please make sure that you're able to attend the full team brief".

25. Others were regarded as important for a Navigator to undertake particular work. For example Navigators were expected to attend training to be able to work on a particular exhibition. There were all staff briefings every time there was a new exhibition, usually the day before. All staff would have a run through of the

exhibition and each department would deliver their plans for example the learning team would provide information on workshops and events. Attendance was expected to be prepared for the exhibition and if a Navigator did not attend it would limit them in the role and they would not be able to deliver certain things with respect to that exhibition. There would be 2-3 training sessions across the duration of an exhibition.

26. Some training was voluntary see for example p37 and p 79. Nevertheless the language used still strongly encouraged attendance eg referring to the training as "important" (p37) or stating "it will be really useful if everyone can attend both…."(p79), "please do try to make yourself available [for training opportunities] as possible" (p195), "you should attend both days" (p57), " you will need to attend all day" (p58). Other training sessions were voluntary to attend but staff were required to read the material or catch up on briefings another way eg (p110). On 18 November 2013 Navigators were informed "we would like all navigators to be trained advisers for Arts Award Discover – Silver" (p68).

27. There is at least one reference in the bundle to the possibility of ceasing to work as a Navigator if the training was not attended (p 60) "the navigator training days are **not optional** and should only be missed in the event of your having other work or a project that cannot be moved….if you routinely cannot make them it may not be appropriate for you to continue to work as a navigator….it is essential to attend both days of [P4C] training to receive accreditation. As such, if you can only make one of the days I'd like to ask you not to attend the other. I will arrange for navigators who cannot make both days to attend a course locally….however…it must be only if you already have set in stone plans that you cannot change". Mr Parkin gave evidence that this did not reflect reality and that he was not aware of any agreement with a Navigator coming to an end for this reason. However, even if it never happened, I do not accept Mr Parkin's evidence that it did not reflect the reality. The wording is there in the email to the claimant and her colleagues in strong terms including bold letters.

28. The email at page 37 dated 31 May 2011 from the Schools Officer also mentioned holding informal one to ones. She proposed to observe a Navigator doing a session and then there was a chance to review and discuss, the intention being to see if there was anything else that could be done to support the Navigators in their role. On 22 July 2011 (page 38) she also mentioned she would be accompanying Navigators to review their role so far to give mutual personalized feedback rather than "a formal observation". She offered to work with each Navigator on a forward plan for their professional development but it would not be mandatory. Again on 15 August 2011 she again said she would be having one to ones for feedback "over the coming term".

29. On 22 Feburary 2012 she said she would be observing the claimant on 15 March to see how she was doing and identify training needs. After the observations she was to organize further one to ones (p47).

30. On 25 July 2012 there was a suggestion that a more direct system of observations would be put in place (52).

31. The language and tone used by the Schools Officer (see for example pg 46) is like that of a manager. On 2 June 2014 when she was going on maternity leave the Schools Officer wrote to the Navigators saying part of the role of her maternity cover was to “line manage the navigators”. She proposed one to ones with herself and then again with her maternity cover.

32. The respondent’s evidence is that she was not in a management level role and that was just that particular person’s manner. Nevertheless there is no suggestion that she was advised not to speak that way to the Navigators. Moreover she was not the only person to speak in terms of “management” of Navigators and 1-2-1 meetings, see for example the email from the then Head of Learning and Visitor Experience (p90). I accept the claimant’s evidence that she was line managed and had one to ones, and these continued after that particular member of staff left.

33. The claimant also said that once a month on Monday morning Navigators were included in an all staff meeting. Although these were not mandatory it was only once or twice that she missed these. They were very important to keep up to date on what was happening, staff issues, future exhibitions and important speakers.

34. I accept the claimant worked under the respondent’s control as evidenced by the emails about distribution of shifts and work on particular projects, the briefings and training required to be able to work on particular exhibitions, and the one to ones. Where the claimant did exercise initiative she reported back what she had done to the organization.

35. The claimant accepted her role was distinct from fixed term contracts that were also offered for example the email on p125 which invited interest in a particular one year fixed term contract. That opportunity was however only available to “current Navigators” ie those in the claimant’s role.

36. The claimant was sent an email about autoenrollment into the pension scheme but as she did not earn enough to contribute she did not join (p91). She was paid through the pay roll though her pay slips were marked casual (p45). She received P60s and there was a reference to receiving a P45 when she left.

37. Although Navigators were known as casual staff they were nevertheless well integrated into the organization. They were named under “Our staff” on the website (p265). Navigators were part of the staff forum (p49), social events etc such as an All Staff BBQ on the beach (p39), Christmas events (p70, 73, 104) and a leaving event (p100). They were invited to participate in events consulting staff, staff away days and events considering organisational development (p72). The claimant was a facilitator at one such event (p97). With reference to a branding meeting an email stated: "you should all be signed up to either the morning or afternoon session”. They were also given the opportunity to go on staff trips eg to Poland and France (p 77 and 92). During furlough the claimant was told she had access to the Employee Assistance Programme.

38. On 17 March 2020 the gallery was closed suddenly until further notice due to the pandemic. Navigators were amongst those that were informed there would be no shifts until further notice but that they would be paid for all shifts already agreed on the rota or with line managers up to 5 April 2020 (from the Director).

39. The claimant was placed on Furlough from 7 April 2020 and was warned that the gallery could not confirm whether work would be available when that was due to end on 31 May 2020 (p227). In the event on 15 May 2020 staff were told they remained on furlough until 31 July 2020 (p230) with their pay topped up by the gallery. Although the gallery re-opened on 22 July 2020 the navigators remained on furlough, which ended for all staff on 6 September 2020. There were some opportunities for navigators when the gallery re-opened (see p 235) but the claimant did not apply/express interest as she felt she did not need the income as much as some of her colleagues.

40. The gallery then closed, as planned, for a schedule of works from 7 September 2020 and was not due to re-open until end of January 2021 (p223).

41. During that time the gallery decided to change its staff structure and remove the Gallery Assistant and Navigator roles and replace them with part-time permanent contracts ranging from 11 -35 hours a week. The letter to the claimant explaining this stated: "Currently the majority of Gallery Assistants and Navigators are employed on a casual basis and I am writing to you as you fall into this category…As a casual worker we will keep you informed about the proposed changes and the outcomes of the consultation". They were not included in the consultation process although they were invited to a webinar where they could ask questions. Notes were made available for those who could not attend. At that webinar staff were informed that part of the motivation was that Turner Contemporary had a large number of casual staff on its books that it would like to transfer onto permanent contracts. The new opportunities were only open to current Gallery Assistants and Navigators. Staff were expressly told the new roles were "ring-fenced for current [gallery assistants] and Navigators". Staff were to be guaranteed an interview.

42. The claimant did not apply as she was concerned about her lack of gallery assistant experience. She was informed her Navigator role therefore ceased by letter dated 13 January 2021. The claimant wrote a complaint email on 2 March 2021 in which she stated that "she had always assumed worker's rights were practically non existent under these contracts…"

Relevant law

123. s 230(1) Employment Rights Act 1996 provides that an ""employee" means an individual who has entered into or works under…a contract of employment." A contract of employment is defined as "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing" (s230(2)). This is distinct from an independent contractor who has contracted to provide personal service.

124. There are three necessary elements to a contract for service: sufficient control by the employer; personal service by the employee and a minimum obligation on the employer to provide work and pay and the employee to provide her own work and skill. Even where these three factors are present it is then necessary to consider and balance all the relevant factors and determine whether, overall, an employment contract exists (or whether there are factors inconsistent with a contract of employment) (*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* 1968 1 All ER 433; *Nethermere (St Neots) Ltd v Gardiner and anor* 1984 ICR 612). The written agreement between the parties is a relevant factor but not determinative. The question is what is the true agreement between the parties (*Autoclenz Ltd v Belcher and ors* 2011 ICR 1157).

125. The respondent's representative referred me to the following passage from *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181:

"it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it….the existence and exercise of a right to refuse work on [the employee's] part was not critical, providing that there was at least an obligation to do some….the [employee] must be subject to an obligation to accept and perform some minimum, or at least reasonable, amount of work for the alleged employer".

126. I was also referred to

126.1 the following observation in *Hafal Ltd v Lane-Angell* UKEAT/0107/2017:

"It is a trite observation that an expectation that the Claimant would provide work is not the same as an obligation to do so…there may be cases where, as a result of a commercial imperative or market forces, the practice is that work is usually offered and usually accepted and that such commercial imperatives or forces may crystallise over time into legal obligations." Choudhury J went on to state that express terms negating such obligations would be of significance.

126.2 the following observation in *Stringfellows v Quashie* [2012] EWCA Civ 1735:

Where work is done intermittently, for there to be an employment contract remaining in force between work there must be an ""irreducible minimum of obligation", either express or implied which continue during the breaks in work engagements….Where this occurs, these contracts are often referred to as "global" or "umbrella" contracts because they are overarching contracts punctuated by periods of work. However, whilst the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement, the fact that a worker only works casually

and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee."

127. It is also possible to have successive employment contracts with breaks in between that nevertheless give rise to continuity of employment throughout by virtue of the operation of s 212 (3) (b) or (c) Employment Rights Act 1996.

128. The respondent's representative was invited to make submissions on the effect of s 212 (3) and argued this is not separate to the concept of a "global" or "umbrella" contract, the latter she argued being the claimant's only route to claiming redundancy pay. I do not consider that correct. The issue of whether s212 (3) applies in breaks between contracts of employment is a separate issue to the question of whether there was an employment contract in place throughout the relationship. This is made clear in *Stringfellows* at paragraph 11 of that judgment, which distinguished the concept of the global or umbrella contract from the operation of s212 (3).

129.S 212 (3) (b) and (c) only operate where there is not a contract of employment in existence in a particular week. They preserve continuity where there is not a contract of employment in place and the employee is absent on account of a temporary cessation in work or absent from work in circumstances such that, by arrangement or custom, she is regarded as continuing in the employment of her employer for any purpose.

Conclusions

130.Notwithstanding the claimant's concessions I do not find the written agreement to be an accurate reflection of the reality of the relationship between the parties. The claimant was not engaged "from time to time" as a Navigator (clause 1.1). She was engaged as a Navigator throughout the working arrangement. It was clearly an ongoing relationship.

131. In particular each occasion the claimant worked was not separate and severable (clause 3.1). Even the work on different exhibitions and projects were not separate and severable. The arrangement did not terminate after every occasion the claimant worked or at the end of an exhibition or particular arrangement or project. There was no P45 at the end of each. There was clearly an ongoing working relationship throughout and I agree with the claimant that the work was not discrete on a shift basis or project basis but developed over time, building on the Navigators' training and experience. They were an integral part of the organization and it's output.

131. It is right that as per the contract the respondent had no obligation to offer any particular work to the claimant and the claimant did not have to agree to attend on any particular day. She did have the option to take off a whole exhibition if she wanted to, and colleagues did so. This however is not sufficient to negate an employment contract provided there is some obligation to work, and for the employer to provide work and pay for it.

132. I note that even the agreement envisaged that once work was accepted the claimant was obliged to do it unless she was sick or injured. In reality, the respondent was more flexible and exercised give and take on occasion, seeking to have other Navigators cover if a Navigator could no longer do a shift, but I do not find this negated the underlying obligation. See the reference at paragraph 18 that once the rota was sent out this was regarded as "final".

133. I do consider there was some obligation to offer availability to do work and some obligation to offer work. Once work was booked the rota was "final" and there was mutual obligation to honour that booking. There was undoubtedly an obligation to pay for the work. I note for example that when the pandemic struck the respondent nevertheless paid for all shifts already agreed on the rota or with line managers up to 5 April 2020.

134. Firstly there was compulsory training and on at least one occasion a threat that failure to attend could lead to a termination of the engagement. I accept that in reality the parties interacted with each other with some degree of give and take, but I find there was a degree of training that was an obligation. This can be seen from the claimant's emails enquiring which training was compulsory so that she could make herself available. The give and take was exercised by the parties because that was of mutual benefit, but the underlying obligation to attend where possible was there, and applied to both compulsory and indeed other training. I do not accept that a Navigator could have continued in the position without attending some reasonable amount of training. The same applies to the briefings and staff away days. I find there was an obligation to engage with these events to a reasonable degree.

135. I also consider that there was some obligation to provide availability to work, and indeed to work, even if the amount of availability offered was very flexible to work around other commitments. The claimant was required to provide availability in two ways, one in respect of projects and the other in respect of the two weekly availability emails. Although she could choose not to offer availability over a particular exhibition; choose not to be available over a particular two weeks; and choose to decline a particular offer of work, I do not accept that it was open to her to never provide availability and never work, or never reply to those emails, or to only attend training without ever providing the subsequent work that the training envisaged. I consider it likely the engagement would have ended in those circumstances. The reality is she was obliged to keep in touch and provide her availability on a very regular basis and to offer some reasonable degree of availability.

136. I consider this can be inferred in part from the tone of the correspondence, with the claimant offering explanations when she could not offer more availability and trying to ensure she accommodated as far as she could with the limited availability she had at times; and the fact she sought to compensate for having less availability by making herself indispensable in other ways, such as offering to cover at short notice or take unpopular shifts.

136. The respondent offered work to those available, attempting to be fair, but taking into account experience and skills. The practice was to offer at least some work where possible to a Navigator if they had provided availability. I consider the reality is there was some obligation to offer work on a consistent basis to all the Navigators, and provided they had attended the necessary training and briefing offer work on each exhibition. I infer this in part from the fact that when the Navigators' work was offered to a Gallery Assistant the respondent felt the need to explain the decision.

137. I consider that once dates were booked there was mutual obligation on both sides to fulfil the booking, even if in practice there was some occasional give and take.

137. The fact that the claimant had another job is irrelevant. It is not uncommon for someone to have more than one job; or a main job and a secondary part-time/flexible job. The fact that the respondent offered opportunities on express fixed term contracts from time to time is also of little if any relevance. It is also not uncommon for an employer to use different types of employment contracts. The question is whether this agreement met the relevant tests.

138. I note the reference in *Stringfellow* that the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee. I do not infer this from the facts here. The claimant worked regularly and consistently for the respondent over a period of about 10 years in an ongoing relationship that had never been terminated. Over those 10 years she worked every month, except 3, prior to the pandemic. She worked more some months than others, but was in continuous communication about her availability, and worked every exhibition throughout her employment and on other projects including the Youth Navigators project which ran over a period of years. Her work and role was integral to the structure of the organization and the preparation and planning of it's provision of exhibitions and other projects to the public. Her skills were clearly valuable in that preparation, planning and delivery.

139. Despite the labels applied by the respondent her work was neither casual nor truly intermittent. It was regular part-time work.

139. It is right that the role was very flexible and could accommodate the different availability of the different navigators. That suited both sides. It meant the respondent only paid for the work needed and the Navigators could fit work around other commitments, including other jobs. But that does not negate the fact there was some reasonable obligation on each to provide and do work.

140. Both sides approached the role seeking to act with consideration and decency to the other, which is why there was a degree of mutually beneficial give and take rather than reliance on the strict obligations but I do not consider this inconsistent with an employment contract.

141. For the avoidance of doubt I do not consider the clauses at 1.2 and 2.2 of the agreement, the respondent's labelling of the contract, and of the claimant as a casual worker nor the claimant's understanding of her rights at the time, to be determinative, where the relationship otherwise meets the relevant test, which I consider it does.

141. The respondent's representative's representations focused on mutuality of obligation rather than control or personal service. Without question there was an agreement that the claimant provide her personal service. I also find there was clearly sufficient control in the form of the instructions in the email correspondence, the line management that I accept was provided, the training and regular briefings and the one to ones. Although the claimant could say when she was available it was the respondent that set the hours she was required and the work she was to do.

142. I also find that all the other factors point towards an employment contract. The Navigators were very well integrated into the organization and considered a vital aspect of the structure and the ability to fulfil the respondent's exhibitions and other projects. They had a uniform and security pass which they retained between shifts. From 2018 they were obliged to regularly check the email provided by the respondent. They had a staff discount card and were named on the website as part of the staff group. They were paid by PAYE. They were engaged in staff consultation and the staff forum, included in social events and other trips. There were a number of opportunities for existing Navigators that were only advertised internally.

143. Looking at the relationship overall, the obligations on each party, the integration into the workforce; the consistency and regularity of the work; the nature of the communication between the parties, the degree of control exercised by the respondent all point to an employment contract. The relationship was nothing like that of an independent contractor.

144. In summary I consider there was an employment contract in place throughout the claimant's relationship with the respondent. I consider this persisted during the lockdown closure and the planned closure for works and was brought to an end when the claimant was informed her role no longer existed in January 2021.

145. I also note that even if I am wrong about the contract persisting over the closure periods, s 212 (3) (b) would apply to both closures to preserve the claimant's continuity of service as both were temporary cessations in work.

146. Moreover, if I am wrong about the existence of an employment contract throughout the employment, I consider there was an employment contract in place when the claimant had work booked on the rota or on a project, as once the rota was final the parties were obliged to honour it (even if there was some occasional give and take in practice). So for example if the claimant was booked to work on an exhibition or a project I consider she had an employment contract for that work. Moreover if I am wrong about this, given the degree of control, and

the hours were set by the respondent, I consider the claimant had an employment contract on any given date that she was at work.

147. I also consider that, on either view, in the periods between such contracts s212 (3) (b) would apply where the reason for the break was that there was no work available e.g. because the gallery was closed between exhibitions. I also consider that in any event s 212 (3) (c) would apply as the claimant was regarded by both parties as "continuing in employment" within the meaning of s212 (3) (c) throughout (whether there was a contract of employment in place at the particular time or not) for a number of reasons including:

147.1 having her uniform, security pass and staff discount;

147.2 being included in all staff events, parties, overseas trips;

147.3 being given training opportunities;

147.4 being consulted as part of staff consultations;

147.5 being described as part of the staff team on the website;

147.6 being required to keep in fortnightly contact about availability and check the email account;

147.7 being offered opportunities for work that was limited or ring-fenced for current Navigators.

148. Either way I consider the claimant had the requisite continuity of service leading up to the termination of the contract to be able to claim her redundancy pay.

.....
Employment Judge Corrigan
30 June 2022