Case number: 2303229/2020

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH BY VIDEO**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**

BETWEEN:

Ms R Al Taweel **Claimant**

and

Stichting Female Journalists Network **Respondent**

ON: **25 July 2022**

Appearances:

For the Claimant: **Mr B Knezevic, Solicitor**

For the Respondent: **Mr P Smith, Counsel**

RESERVED LIABILITY JUDGMENT ON PRELIMINARY ISSUES

1. The claimant was an employee of the respondent for the period 1 January – 31 December 2019 only. Her claims of unfair dismissal and breach of contract are accordingly dismissed.

2. The claims of race discrimination and victimisation and the respondent's counterclaim continue.

REASONS

1. In this matter the claimant complains that she was unfairly dismissed both on ordinary and automatically unfair principles. She also says that she was unfairly dismissed due to her political beliefs. In addition she claims race discrimination, victimisation and breach of contract. The respondent has brought a counterclaim.

2. At a case management discussion in December 2021, Judge Abbott identified that the following preliminary issues should be resolved in advance of the final hearing:
    a. the employment status of the claimant; and
    b. if an employee, the claimant's length of continuous service up to the effective date of termination.

3. The respondent accepts that the claimant was at all times a worker. The parties agree that determination of whether and when she was also an employee results in various possible scenarios as to what claims she can bring as follows:
    a. if she was never an employee of the respondent she cannot bring any dismissal or breach of contract claims;
    b. if she had been an employee but was not one by the time her last contract with the respondent ended, the same outcome follows;
    c. if she was an employee throughout then:
        i. she can bring her breach of contract claim and claims of automatically unfair dismissal and unfair dismissal due to political beliefs; but
        ii. can only bring her claims of 'ordinary' unfair dismissal if she had two years continuous service at the time of her termination.

4. The respondent accepts that she has the necessary status to bring her claims of discrimination and victimisation.

Evidence & Submissions

5. In respect of those preliminary issues I heard evidence from both the claimant and Ms Asad, director and co-founder of the respondent. In addition I read an unchallenged signed witness statement from Mr Knezevic which dealt with the provenance of certain documents contained in the agreed bundle of documents.

6. Both parties made oral submissions on the conclusion of the evidence, Mr Knezevic also having provided helpful written submissions in advance.

Relevant Law

7. An extensive bundle of authorities was submitted by the claimant in advance of the hearing. Mr Smith added three cases on the day of the hearing. The relevant principles are uncontroversial and are as follows.

8. Status: The relevant definition of employee for the claims in question is at section 230 of the Employment Rights Act 1996 (the 1996 Act) which states:

    (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.'

9. The well-established starting point to determining if a person works under a contract of service is found in Ready Mixed Concrete (South East Limited) v Minister of Pensions and National Insurance ([1968] 1 QB 497) where it was stated that such a contract exists if the following three conditions are fulfilled:

'(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.

(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.

(iii) The other provisions of the contract are consistent with its being a contract of service.'

10. This approach has been approved and commented on by numerous subsequent Courts including at the highest level leading to what is now regarded as an irreducible minimum for such a contract to exist comprising mutuality of obligation, control and personal performance.

11. In this context mutuality of obligation amounts to an obligation on the employer to provide work and pay with a corresponding obligation on the employee to accept and perform that work. Control does not necessarily mean day-to-day control or exercise of control but that there is a sufficient contractual right of control i.e. the right to direct the employee if required. Personal performance amounts to an agreement by the employee to do that work him or herself with no right of substitution.

12. That irreducible minimum being present, however, is not definitive. It is necessary to then look at all the other relevant circumstances which must be consistent with the contract being one 'of service'. Those relevant circumstances will vary from case to case but particular examples include which party bears any financial risk, provision of benefits to the individual, integration of the individual into the respondent business, the intentions of the parties and custom and practice. Any statement in a written agreement between the parties as to the status of the individual is of limited relevance in determining their true status. The Supreme Court has stressed that the circumstances under which employment contracts are agreed are often very different from those under which commercial contracts are agreed, with employers largely able to dictate the terms. In Autoclenz Ltd v Belcher and ors ([2011] ICR 1157 SC*)* they held that:

'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part'

13. Whether an individual has arranged their tax affairs to be treated as self-employed or otherwise is similarly not determinative of their employment status at law. Further, an individual's employment status with one organisation may be different to their status with another with whom they have contracted simultaneously although it is not possible for an individual to be employed by two different

organisations at the same time in respect of the same work (Patel v Specsavers Optical Group Ltd (UKEAT/0286/18).

14. Length of Service: in summary an employee's period of continuous service is calculated as beginning on the day he/she starts work and ending on the effective date of termination (as calculated by section 97 of the 1996 Act) with any week in that period counting in accordance with the provisions of Chapter 1 of Part XIV of the 1996 Act.

15. Those provisions include where:
    a. his/her relationship with the employer is governed by a contract of employment (section 212(1)); or
    b. he/she is absent on account of a temporary cessation of work (section 212(3)(b)); or
    c. he/she is absent in circumstances that by arrangement or custom, he/she is regarded as continuing in employment (section 212(3)(c)).

16. Breach of contract claim: an employee may only bring specified contractual claims in the Employment Tribunal which arose or were outstanding on the termination of their employment (Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994).

Findings of Fact

17. Having assessed all the evidence, both oral and written, and the submissions made by the parties I find on the balance of probabilities the following to be the relevant facts.

18. The respondent is a small, not for profit organisation founded in 2013 and based in the Netherlands. Ms Asad's description of the organisation's mission is that:

    > 'It works with the media and the Syrian women's movement to enhance and empower both females and males working in media, empower female journalists to take leading positions in their institutions, and raise social awareness concerning gender equality and women's issues in the media. The Respondent also works on improving the representation of women in the media to achieve a Syrian society that is fair to all its citizens, and to realise a positive social change in thinking and behaviour with respect to matters surrounding gender justice and equality.'

    Its work is always dependent upon sufficient funding being acquired from its donors and has been done by a fluctuating number of employees and consultants from time to time. Funding is often obtained only on an annual basis. It has also used volunteers from time to time. In particular a volunteer provided non-specialist assistance to it in the drafting of its contracts for consultants. Consequently at least on occasion the respondent used terms in contracts not knowing what they meant.

19. The claimant has impressive academic qualifications in disciplines relevant to the work of the respondent and also has extensive practical and international experience in development, human rights, youth and women's programmes. She first met Ms Asad in 2010 and since then they had worked together on a voluntary and occasional basis on a number of initiatives in which they had common interests. The claimant has worked on related issues for a variety of organisations on a project/research consultant basis over a number of years and she continued

to so work in 2018 and 2019. She confirmed in her evidence that she regarded herself as working freelance in 2018.

20. <u>2018 contract</u>

21. The claimant was engaged by the respondent on a fixed term contract from 1 March 2018 to 31 August 2018. She signed a written agreement that was headed 'Consultancy Agreement' and described her as a Consultant working on a project to strengthen and support emerging Syrian media in their efforts towards more gender sensitive discourse and gender responsive behaviour as a pilot for eventual future expansion. The terms were that the claimant was entitled to an annual amount of compensation paid monthly plus reasonable expenses. Payment of her own taxes and social security and related expenses were expressed to be her responsibility. The contract set out in detail her duties and responsibilities which included training and leading the analysers/coders team. It also provided for a written performance appraisal by the end of the project (although there was no evidence of this being completed).

22. The claimant's description of her working practice, which I accept, is that she was given 'space' to carry out her role on the pilot project as she saw fit but that ultimately the final decisions were always made by Ms Asad for the respondent. Her communication was mainly with Ms Asad. She did not during this contract have fixed working hours as it was 'task-based' and she used her personal email address for communication. No deductions were made from her compensation package in the event that she took any holiday or sick leave.

23. The claimant and all other members of the team (which was spread across various countries) were required to complete a spreadsheet that recorded their availability (e.g. when they would be absent for holiday or planned sick leave).

24. On conclusion of the 2018 contract the underlying pilot project also concluded. Although there was a hope, and perhaps even an expectation, that it would lead to a follow up, larger project, that was not a certainty and was dependent upon funding being secured. The claimant accepted in her evidence that at that stage there was no obligation on the respondent to provide further work to her.

25. On 10 September 2018 the claimant emailed to the respondent an action plan that could be used by them in their proposal to the funder for the future project. She said in that email:

   'With regards to logistics related to my job I expect to have breaks during the national holidays… and the two-week summer holiday with a monthly wage of not less than 4000 Euro.'

   She accepted that she was not paid by the respondent for producing this action plan. I find that this email, whilst potentially useful for the respondent in seeking funding, was predominantly sent by the claimant as a proposal for securing further work for herself.

26. In October/November 2018 there was a detailed exchange of emails between the parties and the claimant clearly at this stage did assist the respondent in scoping the hoped for follow up project. She sent the final product to the respondent on 28 November. On 23 November the respondent paid a lump sum to the claimant.

Apart from the claimant's bank statement showing receipt of that sum there was no documentation describing what that payment was for and nothing to show how it was calculated other than Ms Asad's evidence that the amount was what happened to be left over from the funding for the 2018 project. I find that the payment was for the work done by the claimant in October 2018 up to and including her email dated 28 November but that work was done on an occasional, 'as and when' basis.

27. Between 28 November and 31 December 2018 the claimant performed no paid work for the respondent (which was in any event closed for two weeks in December).

28. <u>2019 contract</u>

29. The parties signed a second contract for the period 1 January to 31 December 2019 engaging the claimant as a Research Manager on a project called 'Gender Radar: Gender Sensitivity and Understanding in Emerging Syrian Media'. It is clear that this was very much related to the work the claimant did in 2018 but was a different project, albeit one of the respondent's core projects.

30. In this agreement the claimant was referred to throughout as an employee. It contained clauses requiring her to use her best skills etc in performance of her role and to comply with the respondent's policies, procedures, rules etc and that her assignment, duties and responsibilities etc could be changed by the respondent without causing termination.

31. Remuneration arrangements and tax responsibility were set out in the same way as the 2018 agreement though with a higher base package. It also provided for a written performance appraisal in the same way as the 2018 contract although on this occasion one was performed (see below).

32. I accept the claimant's description of her working practice during this contract which was again that she had space to perform her role as she saw fit using a methodology developed by the respondent, but the final decisions were always made by Ms Asad with whom she would have frequent and regular discussions. The claimant continued to complete the whereabouts spreadsheet as she did in 2018.

33. Additional features of the working relationship in 2019 were that the claimant engaged more with the wider team whether by telephone, in person or electronically using the respondent's various platforms. She took part in weekly meetings and general discussions around end of year planning and considered herself part of a core team of six. She managed a team of researchers and represented the respondent externally both in person and on social media. In comparison to 2018, the claimant was required to work full time fixed hours and was given a respondent email address.

34. In August 2019, with Ms Asad's knowledge, the claimant set up a company called RouaT Limited on the advice of her accountant for tax purposes. It was a vehicle for her to provide research services as a consultant both to the respondent and others. The claimant was the sole director and employee of the company. The

claimant's personal tax computations submitted to HMRC show her as self-employed.

35. <u>2020 contract</u> – the Gender Radar project continued into 2020 as did the claimant's work on it. An agreement was prepared to this effect to commence 1 January 2020 but on this occasion the proposed parties to the agreement were the respondent and RouaT Ltd, referred to throughout as the service provider. Negotiations between the parties on this agreement commenced in November 2019. No final agreement had been reached by 1 January 2020 but the claimant continued to work on the project beyond that date. It is clear that both parties had an expectation that the agreement would be finalised and worked under what they expected to be those terms. This included the respondent paying the claimant's significantly increased compensation package to RouaT Ltd's bank account rather than her personal account. RouaT Ltd then paid that compensation to the claimant as its own employee.

36. There was no substantial change to the working practices from those of 2019 expect that, apart from a couple of small other projects, the claimant worked exclusively for the respondent and the availability spreadsheet was replaced with an app in early 2020 for all employees and consultants which recorded all meetings, tasks (with status) etc. In March 2020 the respondent paid for training the claimant completed in project management and had also, at an unspecified date, paid for business cards that showed the claimant as a respondent representative.

37. In March 2020 Ms Asad conducted what was called an 'employee performance evaluation' with the claimant to cover the period January - December 2019. The language used in that evaluation and the competencies assessed (which included 'planning and organisation', 'adherence to reporting to work', 'public relations' 'cooperation and team work' and 'adherence to policies & procedures & manuals') were certainly in accordance with the claimant having the status of an employee. The evaluation overall was extremely positive and in the summary section it stated:

> '[The claimant] is an employee who is 100 percent dedicated to her work. She has a high sense of responsibility, is a good team player and fits perfectly in the team. [The claimant] always encourage and respect others employees initiatives and efforts.'

38. A second draft of the 2020 agreement was produced which was more detailed than the first in terms of requirements of the claimant although on this occasion the parties were the respondent and RouaT Ltd but they were referred to throughout as employer and employee.

39. On 17 April 2020 the claimant emailed the respondent noting that she did not have the updated and signed agreement for 2020 and asked for a copy.

40. This prompted the preparation of a third draft of the 2020 contract. On this occasion the parties were again the respondent and RouaT Ltd but the contract period had been reduced from 1 January 2020 to 30 April 2020 and RouaT Ltd was now referred to as a contractor.

41. The claimant emailed Ms Asad on 20 April saying that she was sad her contract had been reduced to four months despite their previous agreement for one year.

She asked for a signed contract covering the period January to April 2020 on the agreed terms and further discussion as to the way forward.

42. An exchange of emails followed between the claimant and Ms Asad culminating in an email to the claimant dated 29 April 2020 in which she was thanked for her efforts on behalf of the respondent but informed that the contract between the respondent and RouaT Ltd would come to an end the following day in light of 'recent developments and your performance evaluation' and that they did not see any possibility of working together in the future.

Conclusions

43. Although the exact features of the relationship between the parties varied from time to time and evolved as time progressed, it is clear that under the terms and practice of each contract entered into, there was a mutuality of obligation between the parties. Once she had agreed to each contract (whether expressly or impliedly) the claimant had an obligation to perform the services described and the respondent had an obligation to pay her at the agreed rate for those services.

44. Further, throughout all the contracts there was an amount of control exercised by the respondent (through Ms Asad) over the claimant. Given the nature of the claimant's expertise this did not amount to a detailed day to day level of control over how she performed her work, but she was required to use the respondent's methodology and ultimately Ms Asad made any final decisions. The claimant was also required to use the respondent's specified platforms for internal communication. As the relationship evolved the level of control increased. In the 2019 and 2020 contracts the claimant had an obligation to work full time and use the respondent email address allocated to her

45. Throughout all the contracts the claimant clearly also had an obligation to perform the services required of her personally. She was recruited because of her specialist knowledge in a distinct area of expertise. In its pleadings the respondent had sought to argue that there was an implied right of substitution in the various contracts. Sensibly, this argument was not pursued at the hearing.

46. Accordingly I find that there was the irreducible minimum required for the claimant to have the status of an employee during all three contracts.

47. Turning to the other circumstances of the relationship, I note in particular:

    a. The terminology used in the various contracts is of limited, if any, relevance. It varied from version to version but neither party had any particular understanding of its significance nor was using it in a considered way.

    b. Similarly the tax status of the claimant in itself does not assist in determining her status.

    c. The claimant was effectively paid for any sick and holiday absences throughout all the contracts, her expenses were paid and she assumed no financial risk throughout.

d. In 2018 the claimant operated in a way consistent with a genuine self employed consultant (task based with no required hours of work).

e. In 2019 and 2020 however the claimant progressively increased the amount of time she dedicated to the respondent and became noticeably more integrated into the organisation in comparison to the arrangements in 2018. From 2019 onwards she became a member of the core team, attended weekly meetings, was allocated a respondent email address, represented the respondent externally and attended training paid for by the respondent.

f. Although the fact that the claimant was evaluated in 2020 in respect of her performance in 2019 does not in itself indicate employee status (genuinely self employed consultants can also be evaluated), the language used in that evaluation (particularly the free text comment made Ms Asad) and the competencies being assessed do point towards an individual fully integrated into the respondent business.

48. Consequently I find that looking at the nature of the relationship overall between the parties in 2018, the contract between them was not one of service but it had become so in 2019 and 2020. The fact that the 2020 contract was with the claimant's company rather than her personally, is not in itself sufficient to dislodge that finding. It does however have implications as per the *Patel* case as set out below.

49. Further, even if I am wrong about the nature of the 2018 contract, there was a clear break in service between the end of that on 31 August 2018 and the remunerated work done under a separate agreement in October/November 2018 and then again until 1 January 2019. In all the circumstances, particularly the fact that the 2018 contract related to a self contained pilot project conditional upon specific funding and had an end date clearly specified in advance, I do not find that the gaps in September to December 2018 were temporary cessations of work notwithstanding that all the claimant's work related to the same general theme of representation of women in the media. Nor was there any umbrella contract of employment subsisting then. There were clearly separate and distinct contractual relationships for each period of the claimant's engagement by the respondent. Furthermore, I do not find that there was any form of existing arrangement or custom between the parties that would result in the claimant's engagement continuing throughout. The respondent did have its own custom of closing the office for two weeks in December, but it had not previously had a relationship with the claimant that could amount to such.

50. On that basis, the claimant could have been an employee of the respondent from 1 January 2019 to 30 April 2020. However, given the principle confirmed in *Patel* that an individual cannot be employed by two employers at the same time in respect of the same work, and the fact that the respondent paid the claimant's company in respect of her work done in 2020 and at that time the claimant was an employee of that company and paid for that work by it, she cannot have also been an employee of the respondent during the 2020 contract in respect of the same work.

51. Accordingly, the claimant was an employee of the respondent only for the period 1 January 2019 to 31 December 2019 and only her claims of race discrimination and victimisation may continue. The remaining claims are dismissed.

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Employment Judge K Andrews

Date: 30 August 2022