**Case Number:** 3305960/2021

# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| Ms K Slawik | v | Al-Shifa Trading Limited |

**Heard at**: Watford, by Cloud Video Platform on 21 June 2022 and in person on 13 October 2022

**On**: 21 June and 13 October 2022

**Before**: Employment Judge Hyams, sitting alone

**Representation:**

**For the claimant:** Ms Katarzyna Krupinska, representative (a friend of the claimant)

**For the respondent:** On 21 June 2022, Ms Arianna Barnes, of counsel, and on 13 October 2022, Mr Richard O'Keeffe, of counsel

# SECOND RESERVED JUDGMENT

1. The claimant was at the material times not employed by the respondent within the meaning of section 83(2) of the Equality Act 2010.

2. As a result, the claimant's claims of contraventions of that Act fail and are dismissed.

# REASONS

## Introduction; a procedural history

1 The claimant's claims have a slightly convoluted history. There was a preliminary hearing conducted by Employment Judge ("EJ") Manley on 6 January 2022. In paragraph 1 of her record of that hearing, EJ Manley wrote this:

> "This matter requires a preliminary hearing for jurisdictional issues. It has been listed for one day before an employment judge at Watford Employment Tribunal, Radius House, 51 Clarendon Road, Watford, WD17 1HP to start at 10am or so soon thereafter as possible on Tuesday 21 June 2022. The issues that the preliminary hearing will be, as far as is just, the following:
>
> 1) Whether the claim has been presented in time, including the question of whether it was not reasonably practicable to present the unlawful deduction of wages claim in time and whether it is just and equitable to extend time for the pregnancy/maternity discrimination claim if the claim was presented late;
>
> 2) Whether the claimant was employed by the respondent between April 2019 until November 2020 under section 83 Equality Act 2010 to allow her pregnancy/maternity discrimination claim to proceed;
>
> 3) Whether the claimant is a worker for the respondent as defined by section 230(3) Employment Rights Act 1996 to allow her unlawful deduction of wages claim to proceed;
>
> 4) Any necessary case management issues should the claim or part of it proceed."

2 I conducted the hearing of 21 June 2022. It did not finish on that day because there was insufficient time to do more than (1) hear evidence and submissions from both parties on the first of those issues and on behalf of the respondent on the second and third of those issues, and (2) start to hear oral evidence from the claimant on the second and third of those issues.

3 I therefore adjourned the hearing and subsequently issued a reserved judgment on the first issue. I determined that issue in part against the claimant and in part in her favour. I determined that it was reasonably practicable to present the unlawful deduction from wages claim in time, so that that claim could not continue (and so that the third issue fell away, in that it no longer needed to be determined), and that it was just and equitable to permit the claimant to make her claim under the Equality Act 2010 ("EqA 2010") out of time, so that that claim could continue. The reserved judgment including of course the reasons for those determinations was sent to the parties on 6 July 2022.

4 The hearing which started on 21 June 2022 was resumed on 13 October 2022. Its purpose was to determine the second issue and, if the claim survived that determination, to give directions to get the case to trial.

5 Although I had listed the resumed hearing for a day, it was still not possible to determine the issue of status on that day. That was in part because Mr O'Keeffe

was new to the case and did not at the start of the hearing have a set of notes of the cross-examination of the respondent's only witness (Mr Jogiat, to whose evidence I refer in detail below). (As a result, I gave him and the claimant my notes, made on 21 June 2022, of that cross-examination and of what the claimant said by of evidence on the second and third issues, complete with all original imperfections.) It was also because the oral evidence of the claimant and the claimant's submissions on 13 October 2022 were more extensive than I had anticipated. That is not a criticism. The matters that were the subject of more extensive cross-examination and submissions were properly raised.

## The applicable law

6 During the hearing of 21 June 2022, I raised with Ms Barnes the wording of section 83(2) and looked up the commentary in *Harvey on Industrial Relations and Employment Law* ("*Harvey*") to that section. That commentary includes this passage:

> "The width of this definition, going potentially well beyond the classic ERA 1996 definition of 'employee' (ie solely a person under a contract of employment) is derived from the previous legislation. The use of the words 'employment' and 'employee' here may in fact be confusing, because what this definition resembles is the general definition of 'worker' (eg in the ERA 1996 and TULR(C)A 1992). In *James v Redcats (Brands) Ltd* [2007] IRLR 296, EAT it was said that the case law on the discrimination definition of 'employee' can be used as guidance when construing the definition of 'worker', especially its emphasis on whether personal service was the 'dominant purpose' of the contract. There is, however, one drafting difference – the discrimination definition does not contain the express exclusion in the 'worker' definition of professional or business relationships. Does that make this definition wider (eg applying to a one-off hiring of a plumber or solicitor)? In *Jivraj v Hashwani* [2011] IRLR 827, SC (holding that an arbitrator did not come within this definition) the Supreme Court said that, as discrimination is now backed by EU directives, this definition must be considered in the light of EU case law. The case they relied on, however, emphasises that an essential part of the test is that it does not cover 'independent providers of services who are not in a relationship of subservience' *(Allonby v Accrington & Rossendale College*: C-256/01 [2004] ICR 1328, ECJ at para 68). This indirectly incorporates the exclusion of professional or business relationships which is express in the 'worker' definition, thus aligning the two definitions and meaning that cases on one are authoritative on the other: *Secretary of State for Justice v Windle & Arada* [2016] EWCA Civ 459, [2016] IRLR 628, [2016] ICR 721 *Bates van Wilkenhof v Clyde & Co* [2014] UKSC 32, [2014] IRLR 641, [2014] ICR 730; for an example, see *Alemi v Mitchell* [2021] IRLR 262, EAT. For the case law on the 'worker' definition generally, see Q [854] n 'Worker'."

7 On 13 October 2022, Mr O'Keeffe relied on the following two paragraphs in the judgment of Lord Leggatt SCJ (with which the other members of the court agreed) in *Uber BV v Aslam* [2021] UKSC 5, [2021] ICR 657, in saying that the claimant was not an employee within the meaning of section 83(2) of the EqA 2010:

> '87. In determining whether an individual is a "worker", there can, as Baroness Hale said in the *Bates van Winkelhof* case at para 39, "be no substitute for applying the words of the statute to the facts of the individual case." At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who is employed under a "worker's contract".
>
> 91. Equally, it is well established and not disputed by Uber that the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working: see eg *McMeechan v Secretary of State for Employment* [1997] ICR 549 ; *Cornwall County Council v Prater* [2006] EWCA Civ 102; [2006] ICR 731. As Elias J (President) said in *James v Redcats (Brands) Ltd* [2007] ICR 1006, para 84:
>
> > "Many casual or seasonal workers, such as waiters or fruit pickers or casual building labourers, will periodically work for the same employer but often neither party has any obligations to the other in the gaps or intervals between engagements. There is no reason in logic or justice why the lack of worker status in the gaps should have any bearing on the status when working. There may be no overarching or umbrella contract, and therefore no employment status in the gaps, but that does not preclude such a status during the period of work."
>
> I agree, subject only to the qualification that, where an individual only works intermittently or on a casual basis for another person, that may, depending on the facts, tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with worker status: see *Windle v Secretary of State for Justice* [2016] EWCA Civ 459; [2016] ICR 721, para 23 .

## My findings of fact

### Introduction

8 The claimant's evidence and that of Mr Jogiat conflicted markedly in a number of material respects. Given that fact, I refer below first to the evidence in those respects, after which I state how I resolved those conflicts of evidence.

### Mr Jogiat's evidence

9 Mr Jogiat's witness statement contained the following passage.

> "12. On 1 October 2016 the Claimant resigns from her role as a dispensing assistant by serving a formal written notice (page 88).
>
> 13. In 2017 the Claimant again asks for her old job back and once again was obliged. However, on this occasion she refused to be on a permanent contract as she was not sure of her future. Nonetheless, she was taken on full-time basis. In 2018 the Claimant fell pregnant, and her maternity period started on 1 July 2018. During this period the Claimant received statutory maternity pay (pages 100-101).
>
> 14. On 21 February 2019 I sent the Claimant a reminder message of the start date (1 April 2019) and reconfirmed terms (page 77). The Claimant, however, did not wish to return full-time to her post. A meeting was held with the Claimant and a full-time job was offered but she declined the offer."

10 That passage was in effect agreed. The document at pages 100-101 referred to statutory maternity payments made to the claimant from 7 July 2018 to 30 March 2019. The claimant did not dispute that she had been paid such payments. The document at page 77 was in these terms:

> "**Employment at Priory Pharmacy**
>
> Dear Kamila SLAVIK.
> Your maternity period end of March 2019.
> Your employment with priory pharmacy
> Will start on 1st April 2019 Full time as before on
> 42 hours per week at an Annual salary of
> £26,000 basic before Bonus and overtime.
> Please could you acknowledge and respond
> ASAP.
> Thanking you
> Mr SA JOGIAT
> BSc(Pharm).M.R.P.S."

11 There was no written response from the claimant to that text (or at least there was no such response before me).

12 Mr Jogiat's witness statement continued:

> "14. ... At that moment in time her main issue of child minding was a big issue and therefore she could not commit to any fixed full-time or part-time position.
>
> 15. The Claimant explained she could only commit to one and a half days a week when possible. Even then she was not sure. She however, promised that within a few months she would be able to commit to more days and to full days as opposed to half days, once she had arranged child minding /nursery for her son.
>
> 16. We thoroughly discussed her options and were extremely accommodating to her wishes, offering her a position that would be suitable to her despite our need for a full-time employee.
>
> 17. We concluded that the best way forward was for the Claimant to act as a self-employed locum. We encouraged her to discuss the details with her own accountant since there would be personal tax and NI matters associated with this choice.
>
> 18. The Claimant explained that she did not have an accountant. Again, to accommodate her, we provided to her the contact information of our own accountants for the option to speak to them at her own will and cost (page 85).
>
> 19. The Claimant upon speaking to the accountant confirmed that she was happy to begin her re-employment as a self-employed locum on the same hourly wage as her previous employment. As a result, we instructed our accountants to enrol her on this basis, which did not require NI, tax or pension details. Thereafter, no pay slips were issued to the Claimant, and she received gross amount for the hours that she worked. The rest of staff who were on PAYE were given monthly payslips as normal.
>
> ...
>
> 24. On days where she suddenly found herself unavailable to attend work, the Claimant would inform us at the very last minute, sometimes on the day. Reasons could vary from unavailability of childcare, her being personally unwell, shifts booked elsewhere or sometimes even that she had a holiday.

25. Throughout this time, we would regularly ask the Claimant if she could commit to any more hours, on a fixed hour basis, than she currently was. Her answer usually involved some excuse that the local day-cares were not suitable for her child or that she was in the process of enrolling her child and the paperwork was taking a long time. Many false promises were made throughout.

26. This made it very difficult for us as an employer to arrange staff rotas and even know whether the business could run if there was no staff available. There were also numerous occasions when the Claimant would leave work with last minute notice on occasion leaving messages with other members of staff and not the pharmacy manager. This continued throughout the beginning of the Covid crisis.

27. As the Covid crisis escalated, additional services were being provided in the pharmacy. This included Covid Fit to fly tests among others. As a business we became extremely busy, requiring additional commitment from the superintendent pharmacist and employing another dispenser.

...

29. Priory Pharmacy conducted several interviews throughout this time with external candidates. At the same time the Claimant was again asked when she would be available to commit to more days or at least change from a half day to a full day. The Claimant continued to make excuses.

30. At this point Claimant informed the pharmacy manager that she is pregnant (page 99).

31. In early October 2020 the pharmacy manager made it clear to the Claimant that her current haphazard way of working was beginning to seriously affect the business.

32. We explained that we needed her to work the hours that the business required, and not on the random basis that she had been doing so for the past 18 months, where days were spread out in the week. At pages 89-99 are then the Claimant's work patterns.

33. We explained that half days were now very disruptive to the business and asked if she could commit to fixed full days instead. The Claimant claimed that she could not commit to any further full days. It was made clear that she needed to follow through with her promise of finding childcare.

34. We allowed her time to decide and provide us with the days and hours she could commit to on a fixed basis.

35. At this time, she continued to work but sent a message to the superintendent pharmacists on the 30 October 2020 (page 79) in which she claimed Equality Act discrimination. She claimed that we were cutting her working hours, which was not the case at all, and so were confused by her message.

36. On 2 November 2020 the superintendent pharmacists had a meeting with the Claimant. During this meeting we clarified that her current commitment to the business was not enough to meet the increasing demands. In this meeting it was explained that we still wanted her to work, requiring her services but needed commitment on days/hours. She was under the impression her half-days were cut which wasn't the case. In fact, we asked her to work a full day instead of the half-day on a fixed day basis. At this point the Claimant still could not confirm if she could work 2 full days on a fixed basis.

37. On 11 November 2020 the pharmacy manager came to work whilst the superintendent pharmacists and the Claimant were already working. Both the Claimant and the superintendent pharmacist had brought their cars to work, occupying both the car parking spaces. As mentioned earlier, the Claimant had never been promised a car parking space. The pharmacy manager had to temporarily park in another car parking spot, at risk of parking enforcement.

38. During work, the pharmacy manager politely and simply asked that the Claimant not bring her car to work any longer as the needs of the business had changed and both car parking spaces were now going to be occupied throughout the day. One parking space would be occupied by the pharmacy manager as usual, and the other by the superintendent pharmacist.

39. The Claimant took this offensively and insisted that the car parking spot was hers and she was entitled to this. She began shouting and swearing aggressively in a pharmacy full of staff and patients, clearly being insubordinate.

40. She continued to work that day and left early at around 5pm without permission.

41. On 15 November 2020 the Claimant sent a WhatsApp message to the superintendent pharmacist (page 99, 86-87), with a sick note attached, explaining that she would not be coming into work.

42. On 18 November 2020 another sick note was received from the Claimant stating she would not be able to work until 1 December 2020.

43. We explained to the Claimant that since she was self-employed, she was not entitled to any statutory sick pay.

44. The Claimant then took this up with the HMRC by completing a self-assessment questionnaire (pages 72-75). However, she completed boxes 4, 6 and 7 with misleading information when she we had no control over her working hours whatsoever.

45. After HMRC had done their investigation, they concluded that the Claimant was not entitled to Statutory Pay as from 11 November 2020 since they also concluded that she was a self-employed person (pages 80- 82).

46. During HMRCs investigation she told them that she not aware why the employer asked her to sign the documents or that her employment status would change (page 78). The truth of the matter is that not only she had independent advice from an accountant but has been filing tax returns as a self-employed person. There is a chain of emails from the accountants to this end that confirms that the Claimant agreed to work on a self-employed basis and the fact she engaged them to complete her personal tax returns (pages 103-104 )."

13 I have quoted almost the whole of the part of Mr Jogiat's witness statement dealing with the factual issues relating to the claimant's status because the quoted part was all highly material to the issue which I had to decide. In fact, I ended up hearing oral evidence from both Mr Jogiat and the claimant on almost all aspects of the claim, which rather suggested that it was a false economy to list the hearing for the determination of preliminary points.

14 The message from the claimant at page 99 was in these terms.

> "Dear Mr. Shabbir Jogiat,
> I am writing regarding recent communication relating to my working hours.
> I have been employed with you for about 12 years now and I'm strongly disappointed with cutting my working days to 1 a week.
> We have just agreed for me to undertake extra day as my son has childcare.
> Last week I informed you that I am pregnant and suddenly my working pattern is changing.
> I honestly feel discriminated as described in Equality Act.
> I hope we can work this matter out and find a solution so I can carry on work as agreed previously
> To gain better maternity pay allowance.
> Please do not hesitate to contact me to arrange a formal grievance meeting.
> Regards

> Kamila Slawik
> 30.10.2020"

15 Thus, one of the things which Mr Jogiat did not make clear in his witness statement and which was clear only from the document at page 99 (to which he referred in paragraph 30 of that statement) was that the claimant informed the respondent of her pregnancy only "last week" before 30 October 2020, so that if I accepted paragraphs 31-34 of Mr Jogiat's witness statement then the issue of an increase in the claimant's working hours and the need for her to "commit to fixed full days instead" might have been raised before the claimant informed the respondent of her pregnancy. If it was so raised then that was of considerable significance for the claim of less favourable treatment of the claimant because she was pregnant. Unfortunately, the claimant was not asked in cross-examination what she meant by "last week" in the document at page 99. 30 October 2020 was a Friday, so the claimant might theoretically have been referring to any day from Monday 19 October 2020 onwards.

16 I add that the claim was in part about the claimed removal of a right to the use of a parking space at the pharmacy at which the claimant worked, and that removal was the subject of full oral evidence.

17 The letter at page 78 to which Mr Jogiat referred in paragraph 46 of his witness statement was dated 16 September 2021. It was a determination of the claimant's claim to be entitled to statutory sick pay. It was written to the claimant, but I was told that it was sent also to the respondent. The letter from HM Revenue & Customs ("HMRC") at page 82, dated 16 September 2021, showed that that was correct. In any event, the parties agreed that the letter at page 78 was in fact sent by HMRC. It contained these paragraphs:

> "An opinion letter was issued to you and Al-Shifa Trading Limited on 15 April 2021 advising that HMRC considered you were not entitled to SSP as you appear to be registered as self-employed whilst working for the employer.
>
> You have disagreed with our opinion on the basis that you were not aware why the employer asked you to sign the documents or that your employment status would change."

18 The email exchange at pages 103-104 to which Mr Jogiat referred in paragraph 46 of his witness statement was also capable of being important evidence (depending on whether or not I accepted Mr Jogiat's evidence that the exchange was what it purported to be). The exchange was between the respondent's solicitors and Ms Maria Rodriguez, who used the letters "FMAAT" after her name and was the "Office Manager and Client Partner" of TaxAssist Accountants' at Beaconsfield.

19 On 25 March 2022, Ms Rodriguez wrote to the respondent's solicitors (page 104; the minor textual errors in the following quotation are original):

> "Mr. Jogiat ask me to confirm with you the meeting we had with Mrs. Kamila Slavik to discuss the possibility to return to work full time, on that meeting Mrs. Slavik did confirm to Mr. Jogial and myself that due to lack of child care she could not return as a full-time employee to the company, we discussed the options and Mrs. Slavik did agree she would work as Self-employed as it was better suitable under the circumstances."

20 The respondent's solicitors replied (the text was at the top of page 104; I quote the text as it was on that page):

> "Thank you very much for your email.
>
> We have a hearing listed on 25 June to resolve the issue of whether Ms Slavik was an employee, as being claimed.
>
> Are you able to a) provide a witness statement and b) attend the hearing to give evidence?
>
> The Witness Statement have to be filed by 29th April, 2022."

21 Ms Rodriguez replied:

> "I am sorry but that would be impossible as Ms. Slavik did engage me as her accountant to complete her personal tax return, so for GDPR I cant disclose any information concerning her tax affairs."

22 At page 85 of the bundle, to which Mr Jogiat referred in paragraph 18 of his witness statement, there was an email from Ms Rodriguez to Mr Jogiat dated 14 December 2020. It enclosed three pdf files as attachments. Their file names were these:

22.1 Kamila Slawik - Statutory Pay Calculation and Schedule2.pdf

22.2 Payslips – Month Ending 31 March 2019.pdf

22.3 Payslips – Month Ending 30 April 2019.pdf

23 The email's text was this:

> "HI Jogiat,
>
> Her last paid payslip was for March 2019, this included the maternity payment, after that date March 2019 she was self-employed after your meeting with her."

**The claimant's evidence**

24 On 2 October 2022, the claimant signed a witness statement. It contained this passage (which I quote verbatim):

> "4. On the 21st February 2019 I have received email from the Respondent reconfirming terms of my return to work, as I couldn't do full time hours we agreed to work on 0 hour basis but agreed on regular days which were full hours Mondays, half day Wednesdays and half day Thursdays fortnightly.
>
> 5. I returned from my maternity leave on the 2nd April 2019 under terms agreed verbally between myself and Respondent and there was no communication regarding becoming self employed locum.
>
> 6. Within few months of my return around July 2019 Respondent asked me to his office where his accountant was present and she offered help with childcare arrangements as that could be taken off tax and she updated my address records. There was no discussion regarding self employment as within few minutes I had return to pharmacy technician responsibilities. That was first and only time I have seen her.
>
> 7. My employment carried on as normal with same duties and responsibilities as before my first maternity leave, I had uniform given by Respondent, I had my timesheets, also given parking permit, was part of workplace group chat on line, I would not be able to carry out any other work as i was doing my best to return to full time hours with the Respondent, at any time it would not come to my understanding or being advised by Respondent that my work status has changed.
>
> 8. While my working pattern stayed similar, there were occasions where I could work full week when my mother had holiday leave but there were days when i could not work as my child was unwell.
>
> 9. Unfortunately when pandemic happened I had difficulties to arrange nursery but worked as much as I was needed and always tried family members to help out. In September 2020 I found nursery that could provide full time care however that required time as my son needed to adjust and started on settling-in sessions. I informed Respondent and they seemed happy that I will be able to commit to more work.
>
> 10. On the 14th October 2020 I informed my manager of my second pregnancy.
>
> 11. Within few days on the 17th October 2020 Respondents son Mr Sohail Jogiat carried out pregnancy risk assessment and as pregnancy goes

further he would check against any new guidelines because of pandemic.

12. Suddenly on the 21st October 2020 Respondents son Sohail Jogiat informed me that he needs to reduce my hours as it suits business. He proposed for me to work on Mondays only.

13. On the 30th October 2020 I started grievance as I felt discriminated against for getting pregnant.

14. Following that Respondent on the 2nd November 2020 asked me on the side and explained it is a misunderstanding and it would be better if I worked full days instead of halves. As some nursery days I had set for half day only it created an issue however I said I can do arrangements with my family. At the time I needed to stay at work to pay nursery fees and prepare for another child.

15. Shortly after Respondents son, on the 11th November 2020 approached me and said I am not allowed to use parking on Wednesdays and I could use a bus. He began to threaten me and say impolite things such as I am nobody and I am no longer needed. That meant I would not be able to work those days as I needed to drop of my son at nursery at 8am and get to work for 9am which would make it impossible without getting late to work and after paying £10 parking charge it would also be not affordable to work on that day, and if I took a bus I would also turn up late and possibly missed pick up time for my sons nursery.

16. I got very stressed with the situation and as I was pregnant I left to my car and messaged Respondent accordingly that I am not well, I spoke to my GP shortly after as could not calm down and I was signed off sick to avoid further stress triggers.

17. On the 15th November I contacted Respondent to follow up with my grievance requesting formal procedure and also asked my representative to help me further with it to get any response.

18. On the 18th November 2020 my representative Katarzyna Krupinska visited me and told me about ACAS, as it was best way to encourage employer to respond to my grievance. My representative explained me how conciliation works and I decided to start the dispute.

19. Since the conciliation process started I was sending my sick notes to the Respondent but never had any response in any form.

20. On the 1st January 2021 I received ACAS notification where Respondent stated their position and it was first time that he said that I am self employed and he claims it started in April 2019. That was a

shock to me as I was half way through pregnancy and did not understand where his position came from.

21. On the 5th January 2021 I logged in on my personal tax account online and it showed AIShifa Trading Limited as my employer, which was confusing.

22. On the 8th January 2021 Respondents accountant emailed me asking for tax return, so I responded that I never required any such a service and did not wish to be contacted by her, as it was unsettling."

25 However, on 19 July 2022, the claimant, via Ms Krupinska, wrote to the tribunal, seeking permission to amend the claim by the addition of a claim of unfair dismissal. The application enclosed and was based on a letter from HMRC to the claimant dated 28 June 2022 which was stated to have been written "about [her] phone call of 27 June 2022, asking for [her] employment history." The letter had under the heading "Source of income for the tax year ended 5 April 2021" a box with the respondent's name on the left under the heading "Employer/Pension provider", and to the right of that box a box with a "Start date" of "04/02/2015" and a box with an "End date" of "05/04/21", with the pay for the whole of that period shown as "£0".

26 On 21 June 2022, I said that Ms Rodriguez' evidence was likely to be of considerable materiality, and I pointed out that the GDPR did not apply to speaking to a solicitor in connection with litigation or to giving evidence to a court or tribunal. On 13 October 2022, I said the same thing, but I also pointed out that the claimant could have called Ms Rodriguez to give evidence. Ms Krupinska said that she and the claimant had sought documents from Ms Rodriguez by email and that Ms Rodriguez had replied. I asked the claimant to forward me the email exchange, and she did. Initially it came without any attachments, although the email showed that it had originally had at least one attachment in the form of a file with the name "Signed Terms of Engagement Kamila Slawik.pdf".

27 I then assisted the claimant to forward to me and Mr O'Keeffe the email with the attachments actually included, and it became clear that the claimant had been sent the documents before the hearing of 21 June 2022, but she had not told the respondent about those documents at that time. She had of course also not told me about them. The email enclosing the "Signed Terms of Engagement" letter was dated 18 May 2022.

28 That letter was dated 1 June 2019. The letter was in these terms:

"Dear Kamila Slawik,

Engagement Letter

We enclose our terms of engagement that set out the terms under which we agree to act and our standard terms of business.

Please read the contents carefully. Providing that they meet with your approval, I would be grateful if you could sign our proposal. If we are required to carry out any additional work for you in the future, we will send a further proposal for you to sign outlining the additional services which will then apply to your circumstances.

If you have any queries or would like to discuss any aspects of this proposal, please do not hesitate to contact us.

**Services Provided**
3d. Personal Tax
**Recurring compliance work**

- We will prepare your self assessment tax returns together with any supplementary pages required from the information and explanations that you provide to us. After obtaining your approval and signature, we will submit your returns to HM Revenue & Customs (HMRC).

- We will calculate your income tax, national insurance contributions (NIC) and any capital gains tax liabilities and tell you how much you should pay and when. We will advise on the interest, penalty and surcharge implications if tax or NIC is paid late. We will also check HMRC's calculation of your tax and NIC liabilities and initiate repayment claims if tax or NIC has been overpaid.

- Other than as regards tax credits (see below) we will advise you as to possible tax return related claims and elections arising from information supplied by you. Where instructed by you, we will make such claims and elections in the form and manner required by HMRC.

- We will review PAYE notices of coding provided to us and advise accordingly.

| **On Completion** | **£250.00** |
|---|---|
| 3d. Personal tax | £250.00 |

**All prices are exclusive of VAT**

**Period of Engagement**

This engagement starts on 1 June, 2019 and will continue until such time as we reissue our terms, or either of us terminates the agreement. We will deal with the financial period ending 19 June, 2019 and no earlier periods unless you specifically ask us to do so and we agree.

Yours sincerely,

Maria Rodriguez”

29 Ms Rodriguez had not signed the letter physically, but her name was there in different font to show that she had signed it. The claimant had signed the letter in the same font, and the date of her signature was 2 July 2019.

30 Mr O’Keeffe reminded me that litigation privilege attached to any communications between the claimant and Ms Rodriguez in relation to any contact made about giving evidence, and I informed the claimant of the effect of that privilege. However, I understood from her that she had not asked Ms Rodriguez to give evidence.

31 The email of 18 May 2022 from Ms Rodriguez was sent in response to one from the claimant of the same day. The claimant’s was sent to TaxAssist at 09:37 and was in these terms:

> “Dear tax assist,
> I have been recently informed that I am your client where I do not believe that I have ever been. You have been using my details where sharing emails with organisation I work for but never on my behalf as alleged your client.
> My details are as follows:
> Kamila Slawik
> D.o.b. 21.01.1987
> I would kindly request you to provide all details you hold about me and your logs of when my personal account was accessed and what changes were done.
> As I am your alleged client I would like to receive any documentation regarding commencement of such a service.
> I would also request all email communication where you have used my details.
> I hope you can quickly and amicably resolve my query as I believe there is no need to involve ICO at present time.
> I would like to receive all correspondence via email please. Any information requested above between 01.01.18 and 17.05.22.
> Please do not hesitate to contact me in case you require payment for Subject Access Request.
> Kind regards,
> Kamila Slawik”.

32 Ms Rodriguez’s reply was this:

> “Dear Kamila,
>
> Hope you are well.

> Find attached the emails communications in our records, including the signed terms of engagements signed by you on the 2nd of July 2019.
>
> - Signed Terms of engagement
> - Onboarding completed email (confirming our agent authorisation was accepted by HMRC and also acknowledged by you)
> - Final Reminder Self-Assessment Tax Return
> - Disengagement email
>
> As per our disengagement email, we never completed any tax returns for you as we did not hear from you following our requests for your tax information. As we no longer act for you your accounts have been archived in our database following your contractual 21 days written notice on 9th January 2021.
>
> I hope this clarifies your position with our firm once again.
>
> Please let me know if you have any further queries."

33 The enclosed emails were indeed to the effect stated by Ms Rodriguez. The "onboarding" email dated 16 December 2019 from TaxAssist showed that TaxAssist had "applied for [the claimant's] UTR [i.e. unique tax reference] number online (on 2nd July 2019)" and that the claimant had, on 16 December 2019, sent TaxAssist a photograph of her passport for identification purposes in that regard. That email contained also this paragraph:

> "You UTR can be found on any correspondence you may have received from HMRC. They should have sent something by now as we initially registered in July 2019."

34 The claimant said in cross-examination that the Signed Terms of Engagement letter from Ms Rodriguez which I have set out in paragraph 28 above was (and this is what I recorded in my notes of the cross-examination as it continued shortly after lunch on 13 October 2022) "a generic company email". I then asked the claimant whether she had read it, and she said (as so recorded):

> "I have not read it; I have read it now. I would not be able to understand for it to be worded like this."

35 The claimant was a qualified Accuracy Checking Technician ("ACT"). In cross-examination, the claimant accepted that the role is one of some responsibility in a pharmacy. I therefore asked her at that point whether she had taken the examination in order to obtain that qualification in English. Her answer (as noted by me) was this:

> "Yes; but I did not understand tax emails. This was all very confusing to me, especially when I was not expecting something like this [by which she

meant a change in status from being an employee to being self-employed] to happen to me; and it was confusing for all of this to happen."

36 There were no documents in the bundle relating to the payments which the respondent made to the claimant after March 2019. The claimant said that she had been paid by the respondent by direct bank transfer. I pointed out that if the payments were made gross into her bank account then they were made without deductions of income tax or national insurance contributions. She did not say that such deductions were made from the payments which she received from the respondent for her work after 31 March 2019.

**The factors which affected the credibility of the evidence before me**

37 The claimant's new witness statement, dated 2 October 2022, contained in paragraph 10 (which I have set out in paragraph 24 above) evidence that she had told the respondent on 14 October 2020 of her pregnancy. That was not consistent with the document at page 99 which I have set out in paragraph 14 above.

38 It was only after I had asked the claimant and Ms Krupinska whether or not they had asked Ms Rodriguez to give evidence, or to supply documents if only to the tribunal, that they told me that the claimant had in fact contacted Ms Rodriguez and only then did I receive a copy of the emails to which I refer in paragraphs 26-34 above.

39 It appeared to me that those emails supported the respondent's case rather than the claimant's. I found it hard to believe that the claimant, whose understanding of written English was plainly good enough for her to become a qualified ACT, did not understand what she was signing.

40 I also found it very difficult to accept that Ms Rodriguez would have been engaged to help the claimant to "help with childcare arrangements as that could be taken off tax" as claimed by the claimant in paragraph 6 of her witness statement, which I have set out in paragraph 24 above. The emails to which I refer in paragraphs 26-34 above were firmly to a different effect, and in any event it was unlikely that Mr Jogiat would have arranged for the attendance of Ms Rodriguez to help the claimant to obtain free childcare.

41 In addition, the claimant said in paragraphs 4 and 5 of her witness statement of 2 October 2022 that she had agreed to whatever she said she had agreed to with Mr Jogiat orally only. Yet she had, according to HMRC's letter of 16 September 2021 from which I have set out the relevant passage in paragraph 17 above, said to HMRC that she was asked to sign documents by the respondent. I pointed out to the claimant on 13 October 2022 that the document in which she did that was not in the bundle. She did not then say that HMRC's letter of 16 September 2021 was inaccurate in so far as it stated that she had asserted to HMRC, when disagreeing with HMRC's opinion that she was self-employed when working for

the respondent, that she had signed documents relating to her employment status.

42 The respondent had paid the claimant statutory maternity pay when she was first pregnant.

**My resolutions of the material conflicts of evidence**

43 All of the factors in paragraphs 26-42 above, taken together, undermined the reliability of the claimant's evidence.

44 Ms Krupinska laid great store in oral submissions on the fact that the respondent had not obtained documents from HMRC which supported the respondent's position, and also on the fact that (as recorded in paragraph 25 above) HMRC had recorded the claimant to have been employed by the respondent until 5 April 2021. However, those documents necessarily relied on what HMRC had been told, and in any event the content of the document to which I refer in paragraph 25 above appeared to be markedly unreliable, given that the claimant was recorded in it to have received no pay at all during the period of her employment with the respondent from 2015 to 2021 and it was the claimant's own evidence that she had been paid by the respondent at least until the end of 2020. I had, in contrast, heard and seen the claimant and Mr Jogiat give evidence and I had probably seen more of the material documentation.

45 I bore in mind the fact that while I had had the advantage of seeing and hearing both Mr Jogiat and the claimant give evidence, as Leggatt J (as he then was) pointed out with the utmost clarity and cogency in paragraphs 15-22 of his judgment in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), memories are often unreliable, and the best approach to take at least in commercial cases is as Leggatt J described it in paragraph 22 of his judgment, which was this:

> "In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

46 Having heard and seen the claimant and Mr Jogiat give evidence, I came to the firm conclusion that Mr Jogiat's evidence was to be preferred to that of the claimant in all respects. As a result, I accepted what he said in the passages of his witness statement which I have set out above. I accepted that the claimant was, in April 2019, engaged, with her express agreement, to work on a self-employed basis by the respondent, and that after then she regarded herself as being a locum contractor whose services the respondent needed. She also, I accepted, did not regard herself as being subservient to the respondent, and she acted as an independent contractor. If (as seemed likely) the claimant did not then obtain locum work elsewhere, then that was the result of the fact that she did not have time to do so.

47 I concluded in those circumstances that the claimant had agreed in April 2019 with the respondent that she would work as a locum ACT. If and to the extent that she did not subsequently do work for other employers as a locum ACT, that did not affect the fact that she had in April 2019 resumed working for the respondent as an independent contractor, who was intended to be in business on her own account and who did, in practice, not regard herself, and was not treated by the respondent, as being in a position of subordination.

**My conclusion on the issue of the claimant's status**

48 For the above reasons, I concluded that the claimant was not employed by the respondent within the meaning of section 83(2) of the EqA 2010. Accordingly, her claim of a breach of sections 18 and 39 of that Act had to be dismissed. In addition, as the parties agreed on 13 October 2022, the claimant's application to amend her claim to add a claim of unfair dismissal had to be dismissed.

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Employment Judge Hyams

Date: 17 October 2022

Sent to the parties on: 21/10/2022

N Gotecha

For Secretary of the Tribunals