Case No: 3300019/2022
3303332/2022

EMPLOYMENT TRIBUNALS

Claimant: Ms M Steel

Respondent: Orchard Prep Ltd

Heard at: by CVP in Watford
On: 10th March 2023

Before: Employment Judge Codd

Appearances
For the Claimant: Mr Salter (Counsel)
For the respondent: Ms Nicholas (Counsel)

JUDGMENT

1. The claimant was an employee of the respondent (as defined by S230 of the Employment Rights Act 1996) from 01.09.2019 until the date of her dismissal on 10.12.2021.

2. Between 14.01.2019 and 30.08.2019 the claimant was a worker (as defined by S230 of the Employment Rights Act 1996).

DECISION AND REASONS

Background

1. The claimant is a qualified teacher who has issued claims for; unfair dismissal, whistleblowing, race discrimination, wrongful dismissal and unpaid wages, against the respondent.

2. The claimant was engaged as a primary school teacher, initially on a short term supply basis from January 2019. Although the claimant was absent (for various reasons) during the latter part of the 2019 Spring and summer term, her

engagement continued and from September 2019, she was consistently engaged as a class teacher.

3. The claimant subsequently applied for the position of 'Head of Early Years' and she was successful in obtaining this role in May 2021. She was also referred to in the school literature as 'Deputy Head Teacher', although there is some dispute about that particular title and role.

4. On the 8th December 2021 the claimant's engagement was terminated and she was escorted from the premises. The precise reason for this is a matter of dispute and beyond the scope of this hearing. The claimant contends that she made a protected disclosure on the 7th December and that this was the catalyst for the events on the 8th of December 2021. The letter of termination described the claimant's last working day as the 10th December 2021.

5. The respondent denied that the claimant has made any disclosure which would amount to a protected disclosure, and that the ending of her role was unrelated to this or her race. The respondent contends that the claimant was a self employed contractor and that as such she had not obtained rights within the meaning of the Equality Act 2010 or the Employment Rights Act 1996.

6. Early conciliation took place between the 8th and 15th of December 2021 and the ET1 was issues in time on 4th January 2022. A second claim form was issued by the claimant on 14.03.22 which has been consolidated with these proceedings, dealing solely with issues of unpaid holiday and notice pay.

ISSUES

7. The matter was listed before me for an open preliminary hearing, to determine the basis upon which the claimant was engaged by the respondent. The issues which I will need to determine can be broadly characterised as follows:
   a) Was the claimant self employed contracting through Steele Education Ltd?
   b) Was the claimant an Employee within the meaning of S230 of the ERA 1996?
   c) Was the claimant a Worker within the meaning of S230 of the ERA 1996?
   d) Was the claimant a Worker for the purposes of the expanded definition within S43K of the ERA 1996?
   e) Was the claimant a contract worker within the meaning of S41 of the Equality Act 2010?
   f) In respect of all of the above, if the answer is yes (to any), then at what point were those rights engaged, and for how long?

8. It follows that if I make findings that the claimant was a self employed contractor in accordance with option 6a above, throughout her engagement (and no other

provision is engaged), then the entirety of her claim would fail, and I would dismiss it accordingly for want of Jurisdiction.

9. There is no complaint of conduct or capability issues, raised by the respondent, in respect of the claimant's performance. It is clear from the evidence I have been provided, that her skills as a teacher were never in dispute.

10. There is also no dispute that there was never a formal contract between the parties. When it comes to any construction of the implied contracts which existed, it will be necessary for me to make findings based upon; the available evidence within the bundle, and the oral testimony of the witnesses I have heard from.

The Law

11. I have already set out in detail above the relevant statutory provisions in respect of the issues that I shall need to determine. I have considered those matters in full.

12. For the sake of clarity I have repeated the relevant matters from those sections, in order to aid my analysis. Where I have to resolve a matter of dispute, I have applied the ordinary balance of probabilities test.

13. In respect of the ordinary claims of unpaid wages, notice and holiday pay as well as unfair dismissal, whistleblowing and race discrimination claims, I will need to consider the following definition and whether the claimant meets it.

230Employees, workers etc.

(1)In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2)In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3)In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a)a contract of employment, or

(b)any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

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

14. In the event that the claimant is not a worker or employee within the definition of S230, it will be necessary to consider whether she meets the expanded definition of worker in S43K, for the purpose of any protected disclosure she alleges to have made.

43K Extension of meaning of "worker" etc. for Part IVA.

(1)For the purposes of this Part " worker " includes an individual who is not a worker as defined by section 230(3) but who—

(a)works or worked for a person in circumstances in which—

(i)he is or was introduced or supplied to do that work by a third person, and

(ii)the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

(b)contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for "personally" in that provision there were substituted "(whether personally or otherwise)",

15. Finally in respect of the claims of discrimination, in the event that the claimant fails to satisfy the above definitions, I must consider whether the claimant meets the definition of a contract worker, within S41 of the Equality Act 2010

41Contract workers

(1)A principal must not discriminate against a contract worker—

(a)as to the terms on which the principal allows the worker to do the work;

(b)by not allowing the worker to do, or to continue to do, the work;

(c)in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

(d)by subjecting the worker to any other detriment.

…..

5)A "principal" is a person who makes work available for an individual who is—

(a)employed by another person, and

(b)supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(6)"Contract work" is work such as is mentioned in subsection (5).

(7)A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

16. In respect of whether a contract for services existed, guidance has been set out in: ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515C***, per Mackenna J at paragraph 11:

"A contract of service exists if these 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. … Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be."

17. More recent guidance has been provided by the Supreme Court in the matter of ***Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC***. That case is concerned the construction of a written contract for services. In the matter before me there is of course no written contract. The actual terms of engagement are a matter for me to make findings about and interpret based upon the evidence I was provided with.

18. The approach to such a fact finding exercise is summarised by Clarke LJ at paragraphs 17 - 35 of **Autoclenz,** which I have considered in full. In summary it will be necessary to examine, what the agreement was, in the context of the whole

arrangement, how the parties conducted themselves and whether this changed over time. The rights conferred on the parties and their relative bargaining power are also relevant considerations. In respect of those rights, any right conferred by a contract (such as a right of substitution) is not to be diminished in its legality, simply upon the basis that such a right was never exercised. It is necessary therefore to explore the true rights and responsibilities conferred by the contract, and whether those differed from the circumstances which might have represented the 'true agreement'.

19. Finally in ***Pimlico Plumbers Ltd and another (Appellants) v Smith (Respondent) [2018] UKSC 29*** the Supreme Court has further considered the obligations of personal performance (in order to satisfy S230(3) (b) of the ERA 1996), and whether this is the dominant feature of a contract, or whether there existed an effective right of substitution. At Paragraphs 37 – 41 the Supreme Court determined that it was necessary to examine the wording of the contract in order to determine whether a 'client customer relationship existed.' In short, in balancing the nature of the arrangements it is necessary to weigh up those matters which speak to a commercial arrangements and those which militate against it.

20. The advocates have helpfully referred me to various matters in the course of their submissions. It is agreed between the parties that it will be necessary for me to consider findings of fact in order to resolve the following:
    a) Whether the engagement required the personal performance of the claimant?
    b) Whether there was control exercised by the respondent sufficient to create an employment relationship?
    c) Whether the claimant was integrated into the respondent's business?
    d) Whether there was mutuality of obligation?
    e) What the economic reality of the situation was?
    f) Whether there is evidence of a client customer relationship or contract?
    g) When and how did (if at all) any of the above arise?

Evidence

21. During the course of the preliminary hearing I had the opportunity of hearing evidence from five witnesses. Namely the claimant, Anne Burton (Head Teacher), Louise Burton (Head of School / EYFS), Doon Williamson (Bursar) and Tim Burton (Business Manager – from September 2021).

22. I shall discuss the evidence of the various parties in more detail in due course. However, the evidence of the respondent's four witnesses was consistent, that the claimant was always a self employed contractor, and paid as such. The evidence of Tim Burton will afford limited weight within my analysis, as he was only present for the last three months of the claimant's role and given the lack of any written

arrangements, he offers little insight into the arrangements that had evolved since 2019.

23. In respect of the claimant's evidence, she was consistent in her evidence that she had become an employee of the claimant, and that the invoicing arrangement for her payments was at the instigation of the respondent, which was of some mutually beneficial monetary purpose to both parties.

Findings and analysis

24. The claimant was supplied on or around the 7th of January 2019 by a supply teacher agency. She was paid via that agency for the first 7 days which she worked. It is not contested by the claimant that she was a self employed contractor during this first week of employment.

25. It is common ground that that deployment went well. So much so that Anne Burton asked the claimant to continue the following week, with one notable exception. The deployment would cut out the agency. This situation was effective from the 14th of January 2019.

26. The question then arises; on what basis was she engaged thereafter? The claimant has a limited company – Steele Education Ltd. It would appear that her supply work was funded via that company. The claimant is also a registered child minder and has also conducted work billed through that company. No doubt this arrangement was beneficial for both parties from a tax and national insurance perspective (compared to a direct employee or worker relationship). The direct engagement also removed the supply agency also, reducing the respondent's overheads.

27. The claimant then invoiced the respondent for the days that she had completed on a weekly basis (although this later changed to monthly). There was as I have said no written contract around this.

28. The claimant took an unexpected leave of absence during the early part of 2019 due to her personal circumstances. She was chased throughout this time by the respondent as to when she would be returning to work. It is clear and accepted that the claimant was good at her job. The claimant provided continuity and stability for the children. This quality was highly sought after, in particular by Anne Burton, as she confirmed in her evidence.

29. During the claimant's absence an alternative supply teacher was not sourced and the role was covered internally by other staff. It appears to me (and I find) that the respondent was holding the position open to the claimant. Once she returned to

the school, the claimant then took 2 weeks holiday in term time, for a pre-planned family trip. Again this absence was covered internally by the school staff.

30. By the end of the academic year, Anne Burton had offered the claimant to return the following year which she accepted. There is no dispute that during the absence periods discussed above, the claimant was not paid, and did not invoice the respondent. During academic holiday's the claimant was not paid and did not invoice. There was in effect no holiday or sick pay provided, or sought. I accept that the claimant's only other period of absence was in November 2021 when she had to isolate due to covid and again she was not paid for this period and did not seek pay.

31. I shall now move to consider the specific operation of the arrangement:

Whether the engagement required the personal performance of the claimant.

32. It was argued repeatedly before me, by all of the respondent's witnesses, that the contract that existed was between the respondent and Steele Education Ltd. I was told by all, that the respondent was capable of substituting an alternative in the arrangement that existed. I am not persuaded by this argument for a number of reasons.

33. Firstly, I have not been provided with any contract which explains this. No written evidence at all has been produced to support that this was the arrangement. Given that a school has statutory obligations regarding who can and can't work with children, it is implicit that there would need to have been a detailed agreement as to how such an arrangement would work and who would be responsible for vetting the alternative. Whilst the requirements of a teacher, might well be obvious, they still needed to be spelt out.

34. Secondly, the ability for Steele Education Ltd to provide a substitute is at best a hypothetical. It was well known that the claimant did not operate other individuals from her company. It was well known that she was the sole director, shareholder and employee. Even if substitution was hypothetically possible, its basis in fact was flawed.

35. Third, it was overwhelmingly clear that the issue which Anne Burton prided above all was consistency for the children. In her oral evidence she explained the difficulties they had had with turnover of staff in the past for this particular year group. I find it was her priority to stabilise the consistency of personnel teaching the children. I find that personal performance by the claimant was the linchpin of her engagement. Other substitutes were not deployed when the claimant was absent, which re-enforces this point.

36. Fourth, from May 2021 the claimant was appointed to 'Head of EYFS'. There is some debate as to whether she was also appointed to the 'Deputy Head' role as well. The claimant was clearly advertised as 'Deputy Head' on the respondent's website. Whatever the label, the role that she occupied held two important functions, head of EYFS and deputy safeguarding lead.

37. When I asked Anne Burton about the specifics of the role of deputy safeguarding lead, she told me that this role was assigned to EYFS head. When I asked if Steele Education Ltd could substitute this role (of safeguarding), she confirmed that this was not the case and that in the claimant's absence, another individual, such as the Head Teacher would have stepped in. It seems to me certainly from May 2021 this potential to substitute a 'hypothetical' alternative teacher, had disappeared.

38. This was a role which the claimant had applied for and had been appointed to. I have not been provided with any information to suggest the role was in any way temporary cover. Nor has there been any disclosure of any other candidates who may have applied. The respondent's failure to provide such disclosure is to their detriment. I am of the view that they wanted the claimant to personally step up to this role. I find they wanted to personally retain the services of the claimant on an ongoing basis and indefinitely.

39. Fifthly, I formed the overall impression that the respondent had endeavoured to create a 'family atmosphere' regarding the staff relationships. It was clear they wanted to empower their staff and keep continuity. I find that it was a fantasy to suggest that the claimant could have substituted any other suitably qualified teacher. Given that this is a fee paying school which survives on reputation, I am in no doubt that Anne or Louise Burton would have vetted and vetoed any alternative that was not of their liking or ethos. Even if a hypothetical substitute had existed, it was the claimant they wanted, and I find they would have exercised control over the identity of any substitute or replacement. This is clear by the way they covered the gaps in 2019 internally, waiting for the claimant to return.

40. Sixthly, it was said a number of times that the claimant had been repeatedly asked to become and employee. By that I mean with a contract and the label. This can only have been the case if they wished to retain the personal performance of the claimant. Unfortunately the 'family atmosphere' which has been espoused by the respondent has led to a blinkered loyalty in my view, regarding the belief that the claimant was employed by Steele Education Ltd. That was evident form all the witnesses I heard from.

41. It is clear that a number of the respondent's staff are on employment contracts. There are also a number of teachers who are self employed. I find that it was

ingrained within the business model to have this distinction. Unfortunately, what I have described as "blinkered loyalty" has extended to the perception that; simply because it has been said that services were "contracted to Steele Education Ltd", that this meant no employment relationship could be established. That has unfortunately developed as the party line. I find there was a wholesale ignorance of any desire by the respondent to properly examine the true nature of the dealings and whether rights already flowed from that relationship. It was not for the claimant to decide to become an employee, if that was already the practical implication of the relationship. I suspect that the timing of when an individual became a formally contracted 'on the books' employee, was in part dictated by the respondent and there was a likelihood that they had exercised some bargaining power in this regard, given their established business model.

42. I have been provided with an example employment contract, so as to demonstrate what would have changed, in the relationship. In his statement Tim Burton has attempted to explain the operation of these terms. I attach no weight to this argument. The claimant was never provided with this contract and its relevance is immaterial in my view.

Whether there was control exercised by the respondent.

43. I have addressed many aspects above which also have a relevance to control. It was suggested to me that Steele Education Ltd had control to work elsewhere. Again this is a hypothetical. The reality is that the claimant provided personal service and in the main did not work elsewhere.

44. It was suggested to me that the claimant worked as a childminder for Steel Education Ltd. I accept the claimant's evidence in this regard. I accept that she completed some childminding in the summer of 2019 and there may have been a further period in a half term in the Autumn of 2019.

45. The reality was that even if she were working elsewhere, this was in a fundamentally different role for a minimal period of time. It was also at a time which did not conflict with the role she herself had with the respondent.

46. I also accept that the claimant asserted that teachers tend to accept deployments which las the academic year. There is an understandable logic to that. Again the reality is that from September 2019 onwards she was expecting to work the whole academic year. The evidence of Anne Burton again was that she wanted consistency and that the claimant was a good teacher. I find that in absence of a written contract that I construe that had the claimant taken a role at an alternative school which conflicted with her duties to the respondent, then this would have brought her role with the respondent to an end. The expectation was that the

claimant would work for the respondent at the times required by them. That is the reality of what happened.

47. I also note that the role was dictated by the respondent. It assigned her which classes to teach and when. From May 2021 there were additional management responsibilities assigned to the claimant in her capacity of EYFS, Deputy Head, and deputy safeguarding lead. These were specific roles required for compliance and they were regulated and controlled by the respondent.

48. I find that from September 2019 the claimant had engaged with a view to completing the academic year (and beyond). At this point she complied with the holiday dates and there is no suggestion she took competing work, during the school hours, to the detriment of her role with the respondent. Had she done so, I find that this would have soured the relationship and the respondent would have broken the trust and confidence that had clearly been developed. By September 2019, I find the mutual obligations of trust and confidence (implicit in all employment contracts) had been created as an implied term of the engagement.

Whether the claimant was integrated into the respondent's business.

49. The simple answer to this question is certainly yes, although I qualify that from September 2019 onwards.

50. It was suggested to me in evidence that the claimant did not have her own email address and therefore was not integrated. However, the evidence of Tim Burton is clear that most of the staff were using independent email addresses prior to his appointment in September 2021. A practice which he brought to an end for GDPR compliance. I place little weight on the absence of a school email address. Mr Salter in his cross examination adeptly showed the consistency to which other permanent members of staff (who had employment contracts) were also using personal email addresses.

51. I was advised that the claimant had a laptop allocated to her by the respondent. In mitigation of this I was told that this was the classroom laptop. It matters not in my view. It was clearly the accepted practice for the claimant to use this laptop throughout her deployment. Any equipment she provided was not uncommon amongst the other teachers.

52. I was also told that the claimant had not been inducted or given the staff handbook. This was held out in some way to distinguish her from permanent colleagues. I place little weight upon this assertion. It is to the respondent's failure that they did not properly induct the claimant with policies and procedures which would no doubt have been relevant irrespective of her status.

53. In terms of advertisement the respondent's website advertised the claimant as "Deputy Head", alongside other permanent members of staff. To the public perception, she was integrated. Teachers who were said to be self employed, were separated out on the website as "specialist teachers". The claimant's profile was integrated with the permanent staff.

54. The only area which was not integrated was that of payments. The payments continued to be issued either weekly or monthly for the entirety of her engagement.

55. I accept the claimant's evidence that she had altered little in these invoices and it was in effect a 'cut and paste' exercise. The precise wording perhaps is immaterial. I attach limited weight to the use of the phrase "supply teacher assignments" within the invoice. It is perhaps notable that following her dismissal letter dated the 8th December the invoice for December 2021 is changed to "Employment at Orchard School & Nursery." This perhaps was the first point that the claimant had paid any attention to the wording of the invoice, or the vulnerability of her position.

56. It seems to me as I have already commented, that the business model has deliberately operated an invoicing system. There is as I have observed a potential economic benefit to both parties of doing so. I do not consider that the continued invoicing was fatal to the claimants case that she had obtained employee status (at some point). As I have said there was a blinkered approach to the situation on the ground. The fact that holiday and sick pay was not provided, is again, not fatal to the claimant's case. The only relevant period of time for this really was in November 2021 when a number of staff had covid. I accept that the claimant's evidence in this regard that the parties were trying to muddle through and she dis some work from home. Whether or not she invoiced for this period is immaterial in my view. It may well be that only upon reflection that the claimant had realised the disadvantage that she had been put to in this arrangement.

Whether there was mutuality of obligation.

57. There has been a conflict of evidence before me as to whether the claimant had been requested to be an employee (repeatedly) or not. It was said that there was an issue with the claimant's level of remuneration and that there would have been an issue employing her at the rate she requested. Anne Burton, in her evidence insisted that she had repeatedly asked the claimant to become an employee.

58. The claimant conversely argues that she was told that the EYFS contract was for 3 years, and that she could rely on a reference from the respondent for a mortgage if required. She argues she was told to continue invoicing. I have also seen an email dated 8th December 2021 (the same date as her dismissal) sent to Doon

Williamson, which sought to suggest that the respondent had previously agreed that the invoicing could continue. It is implicit from this email that the claimant was suggesting that this was alongside her employment status.

59. I am told that some of the supply teachers engaged initially as contractors had progressed to become employees. However, I was not provided with any written evidence of this.

60. I am left in little doubt that the respondent wanted the claimant to stay. Continuity and stability were issues obviously prized by the respondent. However, I am less convinced about the suggestion that the claimant was asked to become an employee. I am certainly convinced that the respondent wanted assurances that the claimant would stay for as long as possible. Equally I am unconvinced with the claimants suggestion that she was offered a role for a 3 year period.

61. I find that there was an element of mutuality of obligation. It was expected that the claimant would remain working solely for the respondent and be remunerated accordingly for such exclusive work. In 2021, the invoicing was changed to a monthly basis and I agree with the claimant's contention that in effect she was submitting invoices of an agreed annual payment of £32,500 divided by 12. This is reflected in the invoicing. The value of which was not disputed

62. At 107 of the bundle is the application form made for the role of assistant headteacher. Under the heading the claimant describes her current employer as Steele education Limited. Under salary £32,400 approximately. Further down her employer is described as Anne Burton in the reference section. The salary reflects the reality of the payments made. I do not think the inclusion of Steel Education Ltd as employer on the form is determinative. It is overwhelmingly mitigated by the other matters I have described in this Judgment.

63. Having looked at what occurred over the summer holidays, I am not assisted by this. The claimant operated the school holiday club at a lower rate and then did not charge for other weeks.

64. In the early part of September and October 2021, the invoices are more complicated applying different rates, dependent upon the task. I note that I may not have been provided with a complete chronology of all the invoices submitted.

65. Having said all of this, it is clear to me that whatever the rate being applied there was a mutuality of obligation that the claimant would teach the classes specified, and perform the duties she was asked to do for an agreed level of remuneration. Looking across the span of her engagement with the respondent there only

appears to be one period of time when this was not the case. That was during the absence periods in the first half of 2019. Certainly from September 2019 there is no suggestion that there was anything other than a mutual obligation. The claimant's work elsewhere as a childminder had all but come to an end by this point as well. There is no suggestion that (save for when she was forced to isolate with covid) that the claimant had declined work.

66. If there was work available as a class 2 teacher, it would be offered to the claimant. No one else was employed as the class two teacher and therefore it was inevitable that the claimant would fulfil that role on an ongoing basis and be paid accordingly. I do not think that the absence of pay during holiday periods was sufficient to sever any mutuality of obligation. The claimant knew that no teaching work would be offered during that time but the arrangement would continue unaltered during term time, where work would be offered and the claimant would be expected to take it. The absence of any written terms in my view, adversely affects the weight that can be afforded to the respondent's submissions.

What the economic reality of the situation was.

67. In many ways the answer to this question is similar to that of mutuality of obligation. Even though there has been a steadfast party line adopted by the respondent, that the claimant was not an employee and was never paid as such, that is the reality on the ground.

68. Whilst the payments were made to Steele Education Ltd, there was as I have observed, no written contract. The payments were for personal services. Had the claimant not attended then she would not have been paid. However there was an exception to this contention. On the 8th December a letter of termination was sent to the claimant amongst other matters, it stated:

"we are mindful that there is no formal contract in place between Steele Education Ltd and the school, but nevertheless, we will pay you to the end of the month, albeit that your last day with us will be the 10th December 2021. "

69. This provisions obviously begs the question, why would the respondent do this, if the reality of the arrangement was that pay would only be forthcoming if services were provided? There was no suggestion that in early 2019 that she would be paid when the claimant was on holiday, or was unexpectedly absent. The respondent has sought to maintain the party line that this was a services contract with Steele Education Ltd, providing the claimant on an agency type basis, that payments and hours are inconsistent. Yet this payment flies in the face of that purported relationship.

70. The role ended on the 10th December 2021. Paying the claimant to the end of the month would have been something akin to 2 to 3 weeks additional pay – to the end of term. This looks and feels very much like a 'payment in lieu of notice'. Absent any written agreement, I find that this was intended by way of statutory notice pay. The claimant would have been entitled to 2 weeks notice pay, on a statutory basis and this is akin to the payment provided. I therefore find the respondent was treating the claimant as an employee in making this payment. I also find that the period that the respondent had calculated by way of notice (based on the term time invoicing arrangements) was two weeks. Making the equivalent of notice for 2 years service. This would take the claimant's start date back to 2019, which is analogous with other observations I have made about the timing of when the relationship developed mutuality of obligation.

71. Finally, based upon the respondents business model, that they clearly have teachers routinely engaged as "contractors" rather than employees, that they well understand the economic obligations that would flow from employee status. I cannot ignore the fact that the invoicing arrangement may well have had its advantages to both parties, economically, but was detached from the reality of the rest of the working relationship.

Timing

72. There seem to me to be three distinct periods of time where the relationship can be analysed. The first is the time between January and July 2019. During this time the claimant had significant absences (some of which were unauthorised). The second is September 2019 onwards, when the claimant commenced a new academic year of teaching. The third being May 2021 when she received the promotion to 'Deputy Head' and 'Head of EYFS'.

73. It seems to me that the requirement for personal service has existed throughout and there has never been a right of effective substitution. The control the respondent has exercised has been embedded from September 2019, as has the mutuality of obligation. The only period of time where the mutuality of obligation and control and integration has come into question is during the absences in early 2019. It seems to me therefore that if there is a dividing line to be drawn then it is prior to September 2019, whereupon the relationship seems to have formalised and become permanent.

Conclusions

74. Having considered the findings of fact and the relevant legal framework, in particular S230, it seems that the claimant has certainly attained the status of an employee within the meaning of the Act.

75. Certainly it appears to me to be unarguable, that from the point at which the claimant was appointed 'Deputy Head' and 'Head of EYFS' – having completed a physical job application for the respondent, that she had attained the status of an employee.

76. However, considering the definition in S230(2) I find that there was an implied contract of employment from 1st September 2019, until the claimant's employment was terminated on 10th December 2021. I consider that there was in effect no ability to substitute the provision of services and these were to be personally performed by the claimant. There was clear mutuality of obligation. The claimant was integrated into the business, so far as it was necessary to be. The respondent exercised control over the claimant as to the tasks and roles she performed and what and where those tasks were to be completed, namely, teaching year 2. There was an exclusivity to the working relationship. These matters overwhelmingly mitigate any matters which point to any continuance of a commercial, customer or client relationship.

77. Whilst the economic arrangements were clearly a continuation of a mechanism which had been in place since the 14th January 2019, this in my view, was not representative of the reality of the legal arrangement. The existence of this payment arrangement was not fatal to the existence of an employment contract.

78. I have carefully considered whether a contract for services exists. I have had regard to ***Autoclenz Ltd*** and ***Pimlico Plumbers*** as well as the statutory provisions**.** Whilst the payments were made directly to Steele Education Ltd, the reality is that this was simply a conduit for the payments. The reality of the circumstances was that the claimant was not carrying on business for herself from September 2019. The level of control exercised by the respondent was sufficient to create a contract of employment. I find that the claimant became an employee of the respondent on 1st of September 2019 within the meaning of S230 of the Employment Rights Act 1996.

79. The situation that arose from September 2019 is to be distinguished from the engagement which was in place between January 2019 and the end of the academic year in July 2019. During this period, the claimant withdrew from providing her services for a number of weeks due to unforeseen circumstances. She was absent for 2 weeks to have a holiday. I consider that the essential elements of an employment contract were not established at this time.

80. However, certain elements were still in place during this time. There was as I have found, never a suggestion that the claimant could substitute another individual to perform her services. When she was absent the space was kept open for her. Whilst the arrangement was clearly temporary until the end of the academic year

there were elements of control and personal services. It seems to me that during this time the claimant satisfied the definition of a 'Worker' within S230 of the Employment Rights Act 1996.

81. Given the findings I have made above, it is not necessary for me to consider the provisions of S43K ERA 1996 or S41 of the Equality Act 2010.

82. That is my Judgment.

Employment Judge Codd

Date 5 April 2023

JUDGMENT SENT TO THE PARTIES ON

15 April 2023

FOR THE TRIBUNAL OFFICE

Naren Gotecha