EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Brennan**

Respondent: **Fresh Transformations Limited trading as Fresh Doors**

Heard at: Birmingham **On:** **26 January 2023 (and in chambers on 26 April 2023)**

Before: Employment Judge Flood (sitting alone)

Appearances
For the claimant: Mr McBride (friend/lay representative)
For the respondent: Mr Duggal (Director)

RESERVED JUDGMENT ON PRELIMINARY HEARING

The claimant was an employee of the respondent within the meaning of section 230 Employment Rights Act 1996 with continuous employment from 3 January 2017 until 4 November 2020.

REASONS

Background

1. The claimant presented a claim form on 16 January 2021 making complaints of unfair dismissal, breach of contract (notice pay), unpaid wages and unpaid holiday pay. The respondent presented a response alleging that the claimant had not been employed by the respondent until January 2020, having been previously engaged on a self employed basis, and therefore did not have sufficient length of continuous employment to bring an unfair dismissal complaint. It also denied that the claimant had been dismissed. The claimant's other complaints were also denied.

2. The matter was listed for a preliminary hearing in public to determine the following issues:

    a. Prior to 20 January 2020, was the claimant an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996, and if so from what date?

b. Prior to 20 January 2020, was the claimant a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996 and if so from what date?

c. Does the claimant therefore have sufficient continuous service with the respondent to bring a claim for unfair dismissal?

3. The matter came before me today. I had before me a bundle of documents prepared by the respondent together with some additional documents supplied by the claimant by e mail via her representative Mr McBride on 23 January 2023 (copied to the respondent) including a newly filled in ET1 claim form although this was not presented as a new claim.

4. Unfortunately it was not possible for the Tribunal to continue its deliberations and prepare the written judgment and reasons until now due to pressures on the list and availability of the Judge. The Tribunal sends its fulsome apologies for the long delay in the provision of the outcome in this matter.

The Issues

a. Prior to 20 January 2020, was the claimant an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996, and if so from what date?

b. Prior to 20 January 2020, was the claimant a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996 and if so from what date?

c. Does the claimant therefore have sufficient continuous service with the respondent to bring a claim for unfair dismissal?

The Relevant Law

5. The relevant sections of the Employment Rights Act 1996 ('ERA') applicable to this claim are as follows:

> *230 Employees, 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.

6. The following relevant authorities were also considered:

Ready Mixed Concrete (SE) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433 defined a contract of service as involving these components:

"*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."*

Carmichael v National Power plc 1999 ICR 1226 endorsed this view stating that certain elements formed part of an irreducible minimum – control, mutuality of obligation and personal performance.

In Autoclenz Ltd v Belcher [2011] IRLR 820 the Supreme Court held that the 'true intention of the parties' was not represented by the express declarations of self-employment in the written contracts of car valeters engaged by the Respondent. They supported the findings of the EJ that the true nature of the relationship was one of employment. The clauses stating otherwise were in effect sham provisions.

Richards v Waterfield Homes Ltd and another [2022] EAT 148 the EAT (on appeal to the CA) ruled that even where the worker had required to be paid under the Construction Industry Scheme, which applies only to the self-employed with associated tax benefits, a contract of employment could nonetheless be inferred from all the circumstances of the case.

Uber BV v Aslam [2021] UKSC 5 - the question of whether a person is an employee, self-employed or a worker is determined by assessing whether that person falls within the relevant statutory provisions *"irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation"*. This suggests a purposive approach.

Sejpal v Rodericks Dental Limited [2022] EAT 92 the Employment Appeal Tribunal reminded Tribunals that when determining whether an individual is a worker pursuant to s.230(3)(b) ERA, it is the statutory test that needs to be applied: "*Concepts such as "mutuality of obligation", "irreducible minimum", "umbrella contracts", "substitution", "predominant purpose", "subordination", "control", and "integration" are tools that can sometimes help in applying the statutory test, but are not themselves tests. Some of the concepts will be irrelevant in particular cases, or relevant only to a component of the statutory test. It is not a question of assessing all the*

concepts, putting the results in a pot, and hoping that the answer will emerge; the statutory test must be applied, according to its purpose."

7. I also considered the following relevant provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) ("TUPE") contain the following relevant provisions:

3 A relevant transfer

(1) These Regulations apply to—

(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity…"

and

(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

4 Effect of relevant transfer on contracts of employment

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

Findings of fact

8. The claimant gave evidence and Mr K Duggal ('KD') and Mr S Tuggey ('ST') gave evidence on behalf of the respondent. KD and ST had prepared written statements with additional attachments and the claimant's previous claim form and the additional form submitted referred to at para 3 above stood as a written statement. The witnesses were subject to cross examination from the other party and answered questions from the Tribunal. I make the following findings of fact:

   8.1. The respondent operates a small family run kitchen design and renovation business from a showroom in Upton upon Severn in Worcestershire. The business trades under the name 'Fresh Doors' and was originally set up and run by ST and his wife in 2013. In 2014 ST (who at the time operated the business from the company, Fresh Doors Ltd) employed a part-time administrator on what he described as being a "*self-employed*" basis. ST explained that this arrangement suited the previous occupant of the role, as she was a part-time hairdresser and had young children. This employee worked well and went to work for another kitchen company in 2016. ST advertised for a replacement administrator on her departure. It had three applications, one of which was from the claimant who was interviewed and subsequently offered the position.

   8.2. ST admitted that the claimant was originally offered employment with Fresh Doors Ltd. The claimant was issued with a letter of appointment dated 29 December 2016 and a copy of this was provided to the Tribunal. It contained the following terms:

   "I am delighted to confirm your appointment as Studio Sales Administrator with Fresh Doors Ltd.

   This document gives an overview of the main terms and conditions of your employment. It also outlines, in the attached Staff Handbook, what you can expect from us as your employer and what we expect from you."

   and

   "Your start date: the start date of your employment in this job is 3 January 2017. The start date of your interrupted continuous service with the company is 3 January 2017"

   8.3. This document also contained provisions providing for a probationary period of three months. It also confirmed that the claimant's employment was "permanent"; it included a notice period provision; provided that the claimant would work from the premises of Fresh Doors Ltd; provided for hours of work of 12 per week; stated an hourly rate of pay of £10.50 (expressly stating that this was subject to appropriate deductions for income tax and national insurance); included an entitlement to holiday of the equivalent of 28 days per year inclusive of public holidays prorated to the hours worked; provided for arrangements in the event of sickness including the payment of statutory sick pay; and included a clause on the provision of an auto enrolled pension. Attached to this document was a document headed Staff Handbook containing further information "*relating to your employment with*

Fresh Doors Ltd". This included provisions on dress code duties, performance management company property maternity and family leave provisions etc.

8.4. The claimant accepted this offer of employment (which was signed by ST on behalf of Fresh Doors Ltd) and signed the letter to confirm her acceptance on 11 January 2017.

8.5. ST told the tribunal that when he reviewed the level of the claimant's income he noted that it was below the threshold for PAYE and NIC and as his company had no other employed staff (as the kitchen fitters working in the business were self-employed) ST *"did not want to take on the additional administrative burden of running a PAYE payroll when there would be no tax and NIC payable".* ST told the tribunal that this was discussed with the claimant who agreed to be paid on a self-employed basis subject to the other terms of the original offer being honoured. ST told us this suited the claimant as she again had other businesses including a cleaning business and a buying and selling online business which she had to prepare accounts and annual tax returns for. The claimant gave evidence to the tribunal that she did not recall any conversation about her status, but this was a discussion about how she would be paid only and as far as she was concerned she was employed by Fresh Doors Ltd throughout.

8.6. No written confirmation of any such discussion was provided to the claimant. When asked why the arrangement was not put into writing ST told the Tribunal that he was happy that a verbal agreement was in place which everyone was content with and that he believed the original offer had been superseded. I find that there was a verbal discussion about the method of paying the claimant around this time. However I also find that it was not made clear to the claimant that her contract of employment would be changed in any way. I find that the verbal agreement between the parties at this time solely related to the method by which the claimant would be paid i.e not via PAYE payroll.

8.7. The claimant worked for Fresh Doors Ltd flexibly for an average of 12 hours a week covering the duties she was asked to carry out by ST. Her duties were to run the office, answer the telephone, make appointments, update calendars, prepare quotes, deal with customer enquiries, clean the showroom and office for customers and other administrative duties as they arose. She generally worked between 10 AM and 2 PM every day on Tuesday Wednesday and Thursday and some Saturdays if required. The claimant agreed that this arrangement suited her as she had other cleaning jobs which she could fit around her duties with Fresh Doors Ltd. The claimant was paid for holiday taken and she was paid when any sickness absence took place, although was not required to produce a sickness certificate. The parties agreed that there was an expectation that the claimant would attend work as agreed. The claimant was provided with equipment to carry out her duties for example a desk, chair and telephone, although occasionally she would divert telephone calls to her mobile phone if she was nothing the showroom for some reason. ST gave the claimant instructions as to how to carry out her role but latterly the claimant became

the "*public face of the business*" and was in the studio if clients came in and she would deal with them as required and generally look after the office.

8.8. The claimant was aware that others working in the business i.e. the kitchen fitters were engaged on a self-employed basis but always regarded herself as an employee. ST confirmed that the business used several subcontractors to carry out the kitchen renovations. For the engagement of these kitchen fitters in general a rate was agreed, usually a daily rate but occasionally a price for a particular job. He explained that such fitters would be pre-booked; that they generally had their own equipment but occasionally he would provide them from his own supply of tools. He explained that some subcontractors invoiced the business but some didn't.

8.9. No invoices or timesheets were ever submitted by the claimant as the same amount was paid to her every week. The claimant was paid weekly by bank transfer. The claimant asked for wage slips on several occasions but was informed by ST that this was not required. She explained that on a couple of occasions she had to prove her earnings and so asked ST a letter confirming these. The claimant produced a copy of a letter dated 1 August 2017 from ST which stated:

"This is to confirm that Mrs Brennan is employed by ourselves on a part-time basis, she works 12 hours per week at a rate of £10.50 per hour.

Her weekly earnings are therefore £126."

The Tribunal also saw a copy of a letter (undated) confirming that weekly payments of £126 were paid to the claimant from 3 September 2018 until 1 March 2019 and stated that the claimant was paid holiday pay of £325.

8.10. The claimant said that she completed tax returns in respect of all her earnings and in doing so she declared her earnings with Fresh Doors Ltd as earnings from employment and her other earnings as a cleaner as earnings from self-employment. The Tribunal was not provided with any copies of such tax returns. She had some assistance from an accountant completing her tax returns and said that this accountant informed her that she would be losing national insurance contributions because she was not receiving wage slips in respect of her earnings. The claimant raised the matter with ST in 2018 and asked if she could be put on to the payroll. ST told the Tribunal that he downloaded software to calculate how much tax and national insurance contributions would be due if the claimant was paid via PAYE. He explained that as the claimant would be treated as being on week 1 month 1 employee, there would have been a liability for tax and national insurance and so the claimant agreed that the arrangement would stay as it was. I accepted this evidence.

8.11. In October 2019 ST decided to sell the business of Fresh Doors Ltd. He entered into an agreement with KD for him to purchase the business of Fresh Doors Ltd as a going concern to include the goodwill, the equipment, the benefit of the contracts entered into by Fresh Doors Ltd and the exclusive right to use the business name. The tribunal saw a copy of the business sale agreement between ST (and his wife), Fresh Doors Ltd and KD dated 9 August 2019 ('Business Sale Agreement'). The Business Sale

Agreement contained various provisions effecting the transfer of the business on 30 September 2019, including a clause providing as follows:

"23. Employees of the Business

23.1 There are no employees of the Business"

The Business Sale Agreement also contained provisions on subcontractors. At Schedule 1 was contained the following provision:

"The three people are engaged by the business as at the date of this agreement under subcontract arrangements."

KD told the Tribunal that he believed this referred to the claimant and to kitchen fitters. I accepted that this was his understanding at the time. The Business Sale Agreement also provided for a transition period of three months whereby ST would give reasonable support to KD to assist in a smooth handover or the business.

8.12. ST informed the claimant of the impending sale of his business and told the tribunal that he told the claimant that "*because she was not employed*" she would need to build a good relationship with the new owner so he would want to continue engaging her services. The claimant was not involved in negotiations for the sale of the business and had not seen a copy of the Business Sale Agreement at the time. The claimant agreed that ST told her that she would need to build a relationship with the new owner. She said ST also informed her that he did not know what was going to happen and that the claimant and the new owner would have to get to know each other and see how it worked out but as far as he was concerned there was no reason to believe the new owner would not keep the claimant on. I prefer the claimant's account of this conversation in that ST did not make reference to the claimant not being employed as the reason why she would need to build a relationship with ST. Rather he told the claimant that he was unsure what the new owner's plans were for the business and so the claimant should try to build a new relationship.

8.13. KD gave evidence that he was informed by ST that the claimant was paid £126 per week on a self-employed basis for 12 hours work. I accepted this evidence and find that KD was under the understanding that the claimant was engaged on a self-employed basis. KD was not given any national insurance number or P45 by either the claimant or ST on commencing as the owner of the business. He also did not see a copy of the claimant's offer letter and handbook at this time.

8.14. Following completion of the sale of the business KD informed the claimant that he would continue to engage her on the same basis as previously. The claimant did not mention to KD that she considered herself to be an employee (and not self-employed). The claimant said when asked why she did not mention this at the time that as far as she was concerned business continuity continued, she was still doing 12 hours a week getting paid weekly being paid holiday and so she was under the impression there were no changes to her employment. KD from then on operated the business through the respondent with him as director.

8.15. The claimant continued to carry out broadly the same duties once KD and the respondent had taken over the running of the business. There were some changes and the claimant mentioned KD introducing a different system on the computer which meant the claimant was more involved in producing quotes and making appointments. She also explained she became more involved in marketing. The arrangements for weekly pay and the payment of holiday pay and any sickness absence continued as previously.

8.16. In January 2020 the claimant and KD had a discussion about the claimant moving to the respondent's payroll. KD told the tribunal the claimant asked about "*becoming an employee*" as her accountant had advised her of national insurance credit benefits. He explained that he had a conversation with the claimant's accountant was provided with her details and then enrolled her on a PAYE system. The claimant acknowledges that a conversation of this nature took place. The Tribunal saw a copy of an email from John Mace, the claimant's accountant, who confirmed that he had told the claimant that she "*should be treated as an employee under the PAYE system*" and in order that she did not lose any benefits or national insurance credits and to comply with HMRC's rules on defining employment as opposed to self-employment.

8.17. Both parties agree that from January 2020 onwards the claimant was paid weekly through the respondent's payroll and was from this point on an employee working under a contract of employment. The working arrangements did not change in any way at this time with the only change being introduced relating to the manner in which the claimant was paid.

Conclusion

9. There are a number of distinct periods to consider when determining whether the claimant was employed under a contract of employment before January 2020. I set out my conclusions below on each relevant period on the basis of the findings of fact above:

   Was the claimant employed under a contract of employment on between 3 January 2017 and 30 September 2019?

10. To determine whether the claimant was employed under a contract of employment, within the meaning of section 230(1) ERA, I have considered the statutory wording and the guidance from the authorities above. I started by considering the written contract in place at the time the claimant commenced work with Fresh Doors Ltd. This is clearly a contract of employment expressed as such (see paras 8.2 and 8.3 above) and its written terms were signed as accepted by both parties to that contract (see para 8.4). The respondent contends that this written contract was subsequently varied by a verbal agreement between ST on behalf of Fresh Doors Ltd and the claimant that this would be entirely superseded and she would be engaged on a self-employed basis. However I found at para 8.6 above, that the verbal agreement only related to the method of paying the claimant which was that she was to be paid as outside the PAYE system. All other terms and conditions of employment remained effective and in place at that time as nothing in writing ever

superseded those clear written terms. The claimant personally was appointed as administrator and the contract provided that she was required to work on the premises for 12 hours per week in exchange for an hourly rate of £10.50 an hour. Moreover this is also how the contract operated in practice throughout this period, irrespective of the method of payment. There was no substitution clause in the written contract by which the claimant could send a replacement in the event she was unable to attend and such an arrangement never operated in practice. The first requirement of the Ready Mixed Concrete test is therefore satisfied, there was an agreement in place in writing and in practice by which the claimant agreed to work personally as administrator for Fresh Doors Ltd in consideration for a remuneration.

11. The next requirement is for there to be a sufficient degree of control. In my view, that requirement was met throughout this period the claimant was working for Fresh Doors Ltd as supported by my findings of fact at paragraph 8.7 above. She was required to carry out such duties as ST required and although there was flexibility as to when she worked, she worked to the instructions of ST both express and implicit as she developed in her role

12. I have gone on to consider whether the other features of the relationship were consistent with there being a contract of employment. Looking at the overall picture, I was satisfied that the claimant was an employee. Findings of fact at paras 8.7 to 8.9 that support that conclusion are:

    12.1. The claimant worked broadly fixed hours each week albeit subject to flexibility on both hers and her employer's behalf. The fact that she sometimes adjusted these hours to fit around her arrangements and the requirements of her employer, does not alter the fact that she was expected to carry out a fixed number of hours in return for an agreed rate of remuneration. Both parties agreed that there was an expectation that she would attend work.

    12.2. The claimant was paid holiday pay and was paid for any sickness leave taken. This had been provided for in the written contract of employment and operated in practice.

    12.3. The claimant operated from the premises of Fresh Doors Ltd and used its equipment. This was in contrast to the self-employed kitchen fitters who used in general their own equipment and carried out jobs as agreed from time to time.

    12.4. No invoices or timesheets were ever requested or submitted by the claimant to support a self-employed status.

    12.5. Fresh Doors Ltd confirmed in writing to third parties that the claimant was an employee.

13. I have in contrast considered the key factors that point towards the claimant having some status other than that as an employee. This is largely that the claimant did not pay PAYE tax or employees' national insurance contributions as she was not on the payroll. The respondent contends that this arrangement would have been beneficial to the claimant but ultimately I conclude this is not a persuasive factor which sheds any light on the true nature of the relationship

being self-employed. Given the level of the claimant's earnings, she was unlikely to have met the threshold for the payment of income tax and it was Fresh Doors Ltd on ST's admission that wanted to avoid the burden of operating a PAYE system (see para 8.5). When the matter came up for discussion in 2018, ST and the claimant agreed that the payment arrangements would remain the same, but I take into account as pointed out by Mr McBride that there was an inequality in bargaining status between the claimant as employee and ST/Fresh Doors Ltd as her employer and she simply agreed to what was being proposed as suggested. Ultimately as was the case in the Richards v Waterfields home case above, the act that self-employed tax arrangements were agreed between the parties does not necessarily mean that a contract of employment was not in place. A purposive approach is required and I conclude that this was only one aspect of the arrangements and did not mean that a contract of employment was not in place.

14. I conclude therefore that the claimant did work under a contract of employment within the meaning of section 230(1) of ERA between 3 January 2017 and 30 September 2019.

Did the claimant's contract of employment transfer to the respondent on or around 1 October 2019?

15. Having concluded that the claimant was employed by Fresh Doors Ltd as at 30 September 2019, I must consider whether her employment then transferred to the respondent upon the sale of the business to the respondent. I refer to my findings of fact at para 8.11-8.13 above. I conclude that the sale of the business operated by Fresh Doors Ltd was clearly the transfer of an economic entity which retains its identity within the meaning of regulation 3 of TUPE. The sale of the business including the goodwill, the business name, the equipment and the benefits of contract all transferred under the Business Sale Agreement and KD operated the same business after the sale from the same premises. There was a period of transition but the business of 'Fresh Doors' continued to operate without interruption both before and after the sale.

16. I also conclude that the claimant as someone who was employed by the transferor i.e Fresh Doors Limited and was "*assigned to the organised grouping of resources*" subject to the transfer. I conclude this for the reasons set out at paragraph 2 an 3 above. The fact that KD (and to an extent ST) did not consider the claimant to be employed by Fresh Doors Ltd and that the Business Sale Agreement provided that there were no employees of the business (see para 8.11) is not determinative of whether the claimant was so assigned to the business. The claimant was not a party to the Business Sale Agreement. As a matter of fact and law the claimant was so assigned. Accordingly as a result of regulation 4 TUPE, the claimant's contract of employment with Fresh Doors Ltd transferred by operation of law to KD and ultimately to the respondent. In accordance with regulation 4 (1) (a) all the rights, powers, duties and liabilities under or in connection with the claimant's contract of employment were transferred to KD and subsequently the respondent on or around 1 October 2019.

Was the claimant employed by the respondent between 1 October 2019 and 20 January 2020?

17. The claimant's employment continued as it had previously following the sale of the business to the respondent (see para 8.15 above). There were no changes to terms and conditions and the working arrangements continued exactly as they had previously. The fact that KD was under the impression that he was engaging the claimant on a self-employed basis does not alter the contractual position as the claimant's contract of employment had transferred by operation of law on 1 October 2019.

18. The respondent acknowledges that the claimant was employed under a contract of employment from 20 January 2020 when KD placed the claimant on the respondent's PAYE system. Although the respondent may have considered this date to be the date employment commenced, the claimant was in fact already employed under a contract of employment and the changes put in place at this time were a regularisation or correction of the tax and National Insurance status of the claimant's existing employment.

19. Accordingly I conclude that the claimant has shown that she was an employee of the respondent from the commencement of her employment on 3 January 2017 until it terminated with effect on 4 November 2020. She was necessarily a "worker" during this period as well. The claimant therefore has been continuously employed for the period of two years as required by section 108 ERA to be able to bring a complaint of unfair dismissal.

20. The claim will now be listed for hearing to determine whether the complaints of unfair dismissal, breach of contract (notice pay) and unpaid holiday pay are made out.

Employment Judge Flood

26 April 2023