EMPLOYMENT TRIBUNALS

Claimant: **A**

Respondent: **Crossbreed Records Limited**

Heard at: **East London Hearing Centre**

On: **4 May 2023 and 2 June 2023**

Before: **Employment Judge Reid**

Representation

Claimant: Mr Devlin, Counsel
Respondent: Ms Bayliss, Counsel

The existing temporary restricted reporting order made under s11 Employment Tribunals Act 1996 made by AREJ Russell remains in place until the next preliminary hearing.

JUDGMENT having been sent to the parties on 12 June 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Background and preliminary hearing issue

1. The Claimant presented their claim on 18 November 2022 in which they claimed disability discrimination, harassment and victimisation under the Equality Act 2010 and detrimental treatment for asserting health and safety rights and detriment for making a protected disclosure under the Employment Rights Act 1996.

2. The issue identified for this preliminary hearing was set out in the Tribunal's letter dated 9 January 2023, namely whether the Claimant was a worker for the purposes of the Equality Act 2010 and the Employment Rights Act 1996; the Respondent's case was that the Claimant was self-employed (ET3 paras 13 and 20).

3. The remit of this hearing was discussed at the beginning of this hearing and it was identified that I would only decide the worker status issue for the purposes of establishing if there was jurisdiction to hear the claims (see Claimant skeleton para 16); it was identified that I would not also decide whether there was an 'umbrella'

contract to 'join up' the particular occasions on which the Claimant worked. I therefore do not make any findings about any obligations between the parties between the shifts the Claimant worked.

4. The Claimant attended the first day represented by Counsel, Mr Devlin who was instructed very last minute, the application for a postponement due to previous Counsel's illness having been refused. Mr Devlin provided a skeleton argument. The Claimant also brought a friend.

5. Mx Warren of the Respondent attended the first day represented by Ms Bayliss of Counsel who provided three authorities.

6. I appreciated the degree of co-operation between Counsel in this sensitive case.

7. A further witness T also attended on behalf of the Respondent.

8. I was provided with a 224 page bundle (page 224 being added on the first day of the hearing) and heard oral evidence from the Claimant, from Mx Warren and from T.

9. The evidence was completed by the end of the first day but there was no time to hear submissions and I according agreed with the parties that the hearing would continue on 2 June 2023 (this time by CVP to limits costs and as more convenient to the parties) and that by 27 May 2023 each party would send in written submissions, to be supplemented with oral submissions as required. I identified that if the claim then proceeded, I would list a case management hearing as the next step. I was then provided with written submissions from both parties.

10. I have identified the Respondent's extra witness as T in these reasons. As T was about to give evidence she said that she was concerned to protect her private life and the work she did with the Respondent, in the light of T's other day job in a managerial role; the Claimant did not object to this even though only raised at this late stage at 4.40pm. I identified that her particular identity was not relevant to the evidence she was giving and that there was no need to identify her by name - I decided that she can be referred to by her first initial.

11. A temporary Restricted Reporting Order under S11 Employment Tribunal's Act 1996 was already in place – that Order remained in place until at least this hearing was completed as it went part heard.

12. I checked at the beginning of the hearing on the first day with the Claimant and Mx Warren any adjustments they would each need for the hearing in the light of the Claimant's disabilities set out in their claim form and in the light of the health issues identified by Mx Warren in the ET3 and in the letter from their GP (page 208). The Claimant identified that they would need regular breaks; Mx Warren identified that they would also need regular breaks and due to what was described as mild dyslexia might need parts of documents to be read to them if being asked to comment on something. Mx Warren also identified that they were on medication which might make giving answers a bit slower. All these adjustments were put in place.

13. Later in the hearing Mx Warren also referred to having a mild hearing impairment in the context of the noisy air conditioning unit in the adjacent room. I therefore turned it down and they said that was better.

14. In error in the early part of the afternoon of the first day I referred to the Claimant as 'she'; I immediately apologised and explained I had lost concentration due to the excessively high temperature in the hearing room and because I was tired; I suggested a break as the Claimant was upset and tearful. On their return I repeated my apology and said it had not been my intention to upset or offend the Claimant.

15. Around an hour later I noticed that the Claimant appeared unwell, slumped forward on the table and asked if they were ok – the Claimant said they felt unwell and so we had a further break. On their return I checked if they were ok to continue and they said that they were, although still feeling unwell. I checked at the end of the first day that the Claimant was ok to get home and they said that they would get a taxi.

16. I was provided with written submissions on both sides prior to the resumed hearing on 2 June 2023 and each side also made oral submissions. The Claimant and Mx Warren also attended on the second day with Mx Warren's father Mr Warren as notetaker.

Relevant law

17. The definition of a worker in the Employment Rights Act 1996 is set out in 230(3) ERA 1996. The Claimant's case was that they were a 'limb b' worker within s230(3)(b).

18. The definition of a worker in the Equality Act is set out in s83(2)(a) Equality Act namely a contract personally to do work.

19. I refer to the relevant authorities as I go along in the Reasons at the end of these reasons including Uber BV v Aslam in the Supreme Court ([2021] UKSC 5) and Johnson v Transopco UK Limited [2022] ICR 691) (referred to in submissions).

20. The type of working arrangement apparently being offered, in the way described at the time to the Claimant by the Respondent, does not determine its legal nature.

21. What the parties and others doing the same role labelled the arrangement or operated it as as regards payment or tax, does not determine its legal nature.

22. What the parties and others doing the same role may genuinely have thought the arrangement was does not determine its legal nature.

Findings of fact relevant to the preliminary issue

23. The Respondent organises legal adult sex parties; the aim as articulated by Mx Warren in their oral evidence is to provide queer raves to explore sexuality and gender in a safe environment. These raves were the part of the business in which

the Claimant worked. The Respondent's other business activities are the provision of educational events and workshops to support the queer community (page 66).

24. At these events the Respondent needed people to ensure these events were safe and inclusive and engaged Arm Band Wearers (ABWs) to in effect act as a hybrid of an event marshall and event host, in particular to ensure that the Respondent's behaviour Rules (page 172) were complied with by those attending the parties and to promote the Respondent's positive message of inclusivity and sexual safety. I find that positive message and environment of safety and inclusivity was particularly key to the Respondent who wanted guests to feel and be safe; the Respondent also wanted ABWs to feel safe and included as part of that ethos. I find based on Mx Warren's oral evidence that the ABWs were a particular necessity in large parties for safety reasons.

25. Everyone attending whether as a guest or to work had to abide by these important Rules because that was key to the safe enjoyment of the guests. It was also key to the safety of the ABWs because compliance went both ways; the Rules had to apply to everyone, or the event would not work and deliver an inclusive safe event within the Respondent's ethos.

26. It was in this context that the behaviour rules applying to guests and to those working substantially overlapped. The fact that these behaviour rules also applied to guests did not mean that they were not relevant to the overall assessment of the status of the ABWs; it was a false premise in that context to argue that the existence of basically the same behaviour rules for ABWs (subject to some differences because of their ABW role) was not relevant, just because they also applied to guests.

27. Likewise, the application of a dress code to both guests and the ABWs merely reflected the Respondent's inclusive aim – and to have ABWs bound by the same dress code (subject to the wearing of the armband for guests to identify them by) was simply the way to deliver that feeling of welcome and inclusivity (AW WS para 8).

28. The Claimant initially contacted the Respondent (page 83) offering performances to the Respondent of burlesque and fire walking/circus performance which they had already been doing. Prior to this they had also worked in two employed roles (moderator for Tiktok and a cabaret role) and other roles including some wellness/safeguarding roles (for Mint Events and Lez Events). The Claimant was not offering at this stage any safeguarding services to the Respondent or saying that was what they wanted to do at the Respondent – they were contacting the Respondent about performing. The Respondent (Mx Warren) replied that they did not want an entertainer (because that is what the Claimant was offering) because the Respondent didn't do performances but the Claimant replied that they would like to be involved in the events anyway if they needed 'an extra hand' and so was put in touch with Mx Vecchio. Even at this stage the Claimant did not say that a safeguarding role was what they were after – the Claimant was offering themself as an extra hand which was non- specific and the Respondent was not taking the Claimant up on the performance/entertainer services they had offered (which could therefore be said to be the business they were promoting at that point of contact, even if there was such an identifiable business). If the Claimant had to date

promoted themselves as a self-employed entertainer that was not what the Respondent went on to suggest the Claimant get involved in; the Respondent was not hiring the Claimant as an entertainer.

29. Mx Vecchio promptly got in touch and invited the Claimant to the next ABW training on Zoom to take place on 19 August 2021. This training was compulsory for anyone wishing to work at an event as an ABW; whilst others from other queer organisations may also have attended to observe the training they were just observers and given the highly specialist nature of the workplace and the training, it is not surprising that other organisations were interested in how it was delivered given the Respondent's wider interest in also providing educational events and workshops. Just because observers did not go on to work as ABWs merely reflected the reason they had attended.

30. The training (which for the Claimant took place on 20 August 2021) was delivered in line with the training document at page 165 (this was effectively read out as a presentation and was not a document given to attendees). I find that if delivered in person the role plays might be done and if delivered online the role plays might act more as discussion points. The Respondent's case was that this training delivered by the Respondent contained the terms (ET3 para 6 and 7) ie was the terms as read out to attendees.

31. The training document made no reference as to what the working status was going to be, even assuming it was in effect read out. Mx Warren said (WS para 7) that attendees were also told verbally at the training event that they were self-employed, could chose when to work, would have to submit their own invoices and that although having to give as much notice as possible if they needed to cancel a booked shift, that the Respondent would always be able to make exceptions and help find cover.

32. This is not a case where there were written terms between the parties setting out each sides' obligations.

33. I find based on Mx Warren's oral evidence that if an ABW having accepted a shift then had to cancel either through illness or because they no longer wanted to work that event, the Respondent itself usually went to its list of approved ABWs to find cover. Mx Warren also said that the ABW could also in effect nominate another ABW on the approved list, which is something T said she had done.

34. This was also not a Respondent claiming that there was a contractual right for the individual to send a substitute which the Respondent had to accept (even if limited to another ABW); Mx Warren's witness statement para 7 did not claim that ABWs were told there was such a right although it refers being understanding about finding cover so could have mentioned such a right if it was being claimed to exist. The 'substitution' issue in this claim was slightly different: para 13 of the ET3 referred to the ABW offering their shift to another ABW but also referred to the Respondent being able to find cover which the Respondent was able to organise without reference to the individual who was cancelling; claiming there was such a contractual right conflated a right given to the individual to send a substitute with the practical relaxed way the Respondent dealt with cancellations by itself usually willingly finding the cover from its pool of ABWs and not requiring the cancelling

ABW to do anything in particular to help that process or feeling bound to accept the cancelling ABW's nominated cover if they had suggested one. Mx Warren was clear in their oral evidence that the Respondent was in a good position to find replacement as it had the pool of approved ABWs and could find the replacement person; that cancellation practice was inconsistent with an implied contractual right to send a substitute (even if it was just an option rather than a requirement to send one). The Respondent's approach to cancellation and what happened in practice was consistent with it being an easy flexible cancellation arrangement both ways and not one involving an implied contractual right to send a substitute taking into account there were no written terms at all. If an ABW did themselves find a replacement this was much more akin to swapping a shift with a colleague.

35. I therefore find that there was no implied right to substitute by the individual. The practice as described by Mx Warren was simply a way the Respondent handled cancellations by itself finding the alternative ABW from its pool of ABWs, or being happy with a nominated other ABW if the individual suggested one, (AW WS para 9 and oral evidence); as Mx Warren said in their oral evidence it was easier if the Respondent sorted out the cover for the cancelling ABW and their attitude was 'let us know and we'll find a replacement'. Likewise T said that Mx Capolei's approach was 'don't worry we have cover' and T had not needed to organise her own replacement because the Respondent had sorted it out for her; again a relaxed arrangement inconsistent with an implied right to send a substitute, even if that claimed right to substitute was a choice, rather than an obligation.

36. In a similarly flexible way (page 135 22/9/2021 at 12.05) an ABW could ask to only do half a shift and the Respondent would agree as part of the flexibility it offered (12.41).

37. In any event even if the individual had had such a right, the substitute had to be an approved ABW ie someone who had done the Respondent's training which is highly specialist and specific. It is not like a general training requirement which can be obtained elsewhere like a first aid certificate or driver qualification. The operation of its events depended on those working to have done that specific training in line with the overall safeguarding policy and ethos and purpose of the event and the Respondent's need to keep control of that environment to deliver safe and inclusive parties for the guests.

38. I therefore conclude that the Respondent was flexible about shift changes and cancellations which in practice it usually sorted out itself; the requirement of personal service was met – the ABW did not have the right to send a substitute and even if they did it was heavily fettered.

39. All attendees were bound by the Rules (page 172 updated version put in place after the Claimant started, when events started at the Colour Factory, page 138). All who attended, whether guests or ABWs, were governed by these Rules save for the section explaining the role of ABWs to guests; that paragraph also referred to the ABWs as 'our staff'. While I accept Mx Warren's oral evidence that they were not aware of the implications of using that term, not being familiar with employment law, it nonetheless reflected a degree of integration of the ABWs and responsibility for them in line with saying that abuse to ABWs would not be tolerated and that they should be listened to and supported in their work.

40. The Rules allowed flexibility (page 166) but I find that was no more than giving someone tasked with a responsibility some degree of discretion and margin of appreciation as to how to implement the Rules, using their judgment of the situation. ABWs were expected to call in a medic where appropriate and not intervene in those situations (or call venue staff if physical intervention was needed) but that was simply a delineation between the roles and an understanding that medics were the ones qualified to deal with medical situations – it is common in a workplace to have e.g. specialist first aiders. The reference to venue staff did not mean the Claimant was not a worker, it was a distinction as to who did what role, what they were responsible for and who they worked for.

41. The Respondent's dress policy was in line with its ethos. The policy as described in the Rules was 'if you get on the bus and not have everyone turn their head in shock you probably won't get in'. It applied to both guests and ABWs but again it had to, to ensure the event was delivered successfully and inclusively; ABWs could not have done their very particular and sensitive job in an inclusive manner unless they were dressed equivalently to the guests because they needed to be seen to be part of the community (and promote the party spirit by joining in with the dress code) albeit also in a monitoring and safeguarding role. It might seriously have damaged the mood and undermined the ethos to have ABWs dressed differently. Mx Warren accepted in their oral evidence that although the Respondent would first have a conversation with an ABW who came to work in clothes which did not meet the dress code (for example in a very boring tracksuit) to see if that resolved things, but that if things were not resolved the ABW might be sent home for the rest of the shift. Mx Warren also accepted that had the Claimant arrived at work with the hairstyle they had been seen with outside work which was felt to be culturally appropriative, Mx Warren would have sent the Claimant home as it would have offended others (in fact when the Claimant arrived they had changed their hairstyle so it was not in the end an issue).

42. The rules on alcohol were however different as between guests and the ABWs, namely the ABWs were subject to the two drinks rule (Claimant WS para 21) whereas guests could be more intoxicated (although if incapable might be moved to the wellness room).

43. The Claimant was asked on at least one occasion to deliver the beginning of the shift briefing to the ABWs (page 131). That was consistent with a degree of integration – the training document at page 167 said that ABWs would be told at the pre-shift briefing important information for that shift (ie be the passive recipient of information provided by the Respondent), yet on this occasion at least it was the Claimant being tasked with this responsibility.

44. The Respondent used photos of events in its marketing material, subject to consent of the subject. Pages 173-178 include the Claimant. The Claimant disputed that they had consented to all the photos being used but, in any event, even if they did in several of these photos an arm band is visible marking them out as an ABW. On page 173 there is an 'armband wearer team photo' and on page 178 the Claimant is also in the photo used to advertise a 'staff' event, again reflecting a degree of integration (see also page 118 regarding 'staff drinks', page 89 regarding staffing questions, page 119, page 123 and page 96 regarding staff tickets to events).

Whilst the Respondent could also include guests' photos on marketing material/on its website with their consent, the Respondent was nonetheless also using images of the Claimant at times showing them as wearing the arm band; the use of photos showing the arm band was again in line with the ethos promoted by the Respondent – that it was a safe an inclusive space which ABWs would monitor and support but that they would also to the appropriate extent promote the party spirit. In addition, the Respondent acknowledged that when wearing the arm band, the ABW was representing the Respondent (page 166) and so the photos need to be considered in that light.

45. The Claimant submitted invoices because that is what the Claimant and the other ABWs were told to do in order to get paid. I find based on the Claimant's oral evidence that the work they had done prior to the ABW work was a mixture of employed 'payroll' jobs, self-employed work and some voluntary work – this was not someone who had set themselves up entirely as a self-employed mini business. The Claimant already had a template invoice for other work so had no need to use the Respondent's one and I do not find that factor of particular significance but a matter of convenience to the Claimant. The fact they did not ask for the Respondent's template simply meant they already had a document they could use – other work they did in the past may genuinely have been self-employment or purported to be self-employment and that is why the Claimant had one already. The Claimant was being told it was self-employment for the Respondent so there was no need to ask for the Respondent's template.

46. The Respondent also reimbursed 50% of taxi fares home subject to a limit. I find based on Mx Warren's oral evidence that this was a safety issue because the ABWs were dressed up. The Respondent also paid for accommodation if the event was not in London (e.g. Manchester, page 94). The reimbursement of these sorts of travel expenses is less consistent with true self-employment where the individual is more likely to deduct these costs from their income as a deductible expense having paid for it themselves.

47. When the working relationship deteriorated, Mx Warren set out the problems the Respondent had identified (pages 139-143), a long list of issues covering the period from September 2021 to April 2022, with other undated incidents or problems. The list was prefaced by acknowledging that these were just complaints which had been made and were not necessarily true or a fair reflection (mirrored in Mx Warren's oral evidence when they said that they were not when sending this list acting as 'judge and jury' in relation to the allegations) but they are allegations nonetheless about behaviour at work going much wider than the Rules and include references to three previous 'warnings', although Mx Warren in their oral evidence could not explain why the word warning had been used.

48. While accepting, as evident from their oral evidence, that Mx Warren is the kind of person who tries to resolves problems, whether with an ABW or a guest, by talking to them first to try and resolve things amicably and not be dictatorial about problems which come up, this nonetheless looked very like a list of disciplinary allegations, even if making it clear that at this stage nothing had been decided and that they were just a list of complaints. Given the length of that list and the need for good and supportive relations between the Respondent and the ABWs and between the ABWs themselves, it is not clear why the Respondent had not simply

ceased to use the Claimant's services as a self-employed individual which is what the Respondent said the Claimant was; this approach to complaints was more in line with there being more than a relationship of self-employment, even if the Respondent did not expressly acknowledge it or even know that that was the legal reality. Mx Warren's oral evidence was that if a rule was broken then the ABW would be spoken to and then if the issue continued no more shifts would be given to them; that was clearly not the norm which had been applied to the Claimant because there is reference to repeated problems over a period of time and three warnings given and it taking a considerable period for the Respondent to take any action when the simple solution was to stop offering the shifts.

49. In addition Mx Warren said in their oral evidence that this list was not the complete picture and that there had also been problems with the Claimant's attitude (including being 'bossy' with other ABWs); again if self-employed, a contractor with a poor attitude would be dispensed with at an earlier stage given the need for a good team spirit amongst the ABWs.

50. I find that once the Claimant had accepted a shift and attended for work there was a contract in place between the Claimant and the Respondent for that occasion that they worked – the Claimant was obliged to conduct and monitor safeguarding at the event within the important Rules set down by the Respondent. The Rules may also have applied to guests, but they did not have that monitoring or safeguarding role and were there purely to enjoy the event. In return the Respondent agreed to pay the Claimant the agreed hourly rate of £12.00 per hour for attendance at that event.

Reasons

51. I bear in mind the need to take a purposive approach to statutory interpretation and the need to bear in mind that the purpose of statutory provisions is to protect vulnerable workers from unfair treatment, made clear in Uber BV v Aslam [2021] UKSC 5 (though the issues in that case were different) para 70-71; the example of unfair treatment given in that case is victimisation due to whistleblowing and the Claimant includes a claim under s47B ERA 1997 amongst their other claims. That is the context in which the worker test has in particular to be assessed.

52. It is also important not to focus solely on one factor or area but to consider the situation in the round in all the circumstances taking into account the parties conduct (in the absence of written terms).

Was there a contract?

53. Taking into account the above findings of fact, a contract existed between the Claimant and the Respondent on the occasions on which the Claimant worked at an event. There were obligations going both ways ie mutuality of obligation and there was a contract on each occasion they worked (Quashie v Stringfellows Restaurants Limited [2013] IRLR 99).

54. The parties agreed that there was such a contract at least on the nights the Claimant worked – see Respondent submissions para 17.

55. There was therefore a contract for the purposes of s230(3)(b) ERA 1996 and a contract to do work for the purposes of s83(2) Equality Act 2010 on each occasion the Claimant worked.

56. I have not decided the issue as to whether or not there was only a contract on the days the Claimant worked (ie a series of contracts on those days) or whether there was alternatively an umbrella contract.

Was personal performance required – contractual right to substitute and if so whether fettered

57. Taking into account the above findings of fact there was no contractual right for an ABW to send a substitute.

58. In any event, even if there had been such an implied right (there being no express right claimed in any written terms between the parties and no express right being claimed by way of verbal agreement) the substitute had to be from a narrow pool of trained ABWs who were trained for this particularly specialist role; that had to be the case because of the nature of the Respondent's events and its ethos. That the replacement had to be someone who had already done the training and was therefore on the Respondent's approved list does not negate the obligation of personal service on the part of the Claimant. In Pimlico Plumbers v Smith [2018] UKSC (para 34) ,it was a significant limitation in that case because the substitute had to come from Pimlico's list of approved operatives showing that it was clearly not the case that Pimlico was uninterested in the substitute provided the work got done. In this claim the Respondent was clearly even more interested in who was the substitute and needed to be so interested because of the nature of the work. This sensitive and personal type of work was very different to the 'driver' cases to which I was referred in submissions; it really mattered to the Respondent exactly who the ABW was.

59. The ABW couldn't freely chose who was their replacement, the Respondent did – it had to be another ABW. I do not accept the point in para 21 of the Respondent's submissions that there was a genuine choice given the reality and sensitivity of the role.

60. The requirement of personal performance on the part of the Claimant to the Respondent for the purposes of s230(b) ERA 1996 and the requirement of a contract personally to do work for the Respondent in s83(2) Equality Act 2010 were therefore both met.

Did the Claimant fall within the exception – was the status of the Respondent a client/customer of the Claimant who was carrying out a profession or business undertaking / was the Claimant subordinate to the Respondent

First issue – was the Claimant carrying out a business as an ABW or safeguarder?

61. Taking into account the above findings of fact the Claimant was not in business as an armband wearer or as another kind of safeguarding role even if they had done such work before elsewhere.

62. The highly varied and ad hoc work the Claimant did makes it less amenable in any event to determining that they were in business on their own account in anything in particular, let alone in safeguarding type work.

63. The Respondent turned down the offer from the Claimant of performance services which is what the Claimant was offering (even assuming that was the Claimant's particular 'business'). The suggestion of being an ABW for the Respondent's parties came from the Respondent after the Claimant offered an extra pair of hands – the ABW suggestion came from the Respondent not the other way round.

64. The Claimant was not in business on their own account as an ABW or safeguarder; for the Respondent to be a client or customer it would have to show that that was the business. Even if the Claimant was in business in other areas e.g. as a performer the Respondent was not a client or customer of that business.

Second issue – was the Respondent a client/customer of the Claimant?

65. In line with the guidance in Byrne Brothers v Baird [2002] ICR 667 I have taken into account the policy exclusion behind 'limb b' (and by extension in the definition of worker under the Equality Act 2010), namely was the Claimant in a subordinate and dependent position when they were at work as an ABW at an event or was the Claimant not in such a situation and therefore able in effect to look after themselves. The effect of limb b is in effect to lower the pass mark so that someone can qualify as a worker when they have not met the higher threshold of being an employee.

66. I therefore now consider the degree of control the Respondent had over the Claimant when they were at work as to how they worked, the extent to which the Claimant can be said to have been integrated into the Respondent's business when at work and whether there was a relationship of subordination or a degree of control over the Claimant by the Respondent when they were at work.

67. I am considering all the various factors to see which side of the line the Claimant falls – no one factor is determinative and it is important to look at the parties' situation in the round in all the circumstances. I am assessing this in the context of what is a limited number of days work spread out over a period and in the light of the issue raised in Johnson v Transopco UK Limited [2022] ICR 691, namely the situation where a degree of independence can be present where the income derived from the work is not the main income and where the degree of cancellation/rejection of particular jobs indicated a lack of dependence.

68. Based on the findings of fact set out above, the Claimant had to attend the training and had to wear the armband at events to show clearly that they were working and not a guest and to clearly show to guests who to seek help from if there was a problem. That was in line with the Respondent's recognition that ABWs were representing the Respondent ie its public face vis a vis the guests.

69. There was an alcohol rule; although in other workplaces that might be set at zero rather than two drinks, there was still a rule for ABWs.

70. There was a no 'play' rule (except if working in the toilet area); although in other workplaces that might not be said, the Respondent had to say it in the context of this particular work environment.

71. There was a dress code – although it applied equally to guests it applied to ABWs because demonstrating the Respondent's inclusive ethos and mood of the event was very important to the Respondent – and the ABWs still had to wear the armband.

72. The ABWs were on multiple occasions referred to as staff (including in a photo of the Claimant in relation to a staff party), consistent with a degree of integration and a recognition of integration or being part of the' team'.

73. The carrying out of the ABWs' duties was critical to the successful delivery of an event and related to sensitive issues of safeguarding, monitoring consent and general safety. On at least one occasion the Claimant did the pre-event briefing showing that what they did was central because they were being put in charge of the start of ensuring a safe and happy event.

74. The Respondent would in certain circumstances reimburse accommodation and some taxi home costs.

75. The Respondent on its own case had given the Claimant three warnings before sending the list of complaints to them. Mx Warren said in their oral evidence that if there was a disciplinary issue about a breach of the rules then they would speak to the ABW and then if the problem continued no more shifts would be offered. The Respondent had not however had not simply stopped offering shifts to the Claimant which it could have done without giving a particular reason. I accept that Mx Warren's approach is more consensual and consultative and that they prefer to explore problems in discussion with the individual rather than jump to imposing a sanction but the Respondent did not take the simple option of stopping to offer shifts much earlier, which is likely to be the way a truly self-employed worker would be dealt with. Mx W in any event considered that the Claimant was self-employed therefore that was why would not have 'performance managed' the Claimant if complaints were received over a period of time; the absence of any such steps does not tend to show they were not a worker.

76. The Claimant invoiced the Respondent as if a self -employed person but that does not make them a self-employed person. The point was made in submissions for the Respondent that the phrase 'thank you for your business' on the bottom of the Claimant's invoices was a key indicator of self-employment but I do not attribute significant weight to the Claimant using this phrase given they used their own template (so the phrase was possibly used in the past where it may have been genuine self-employment for other employers) or was simply a phrase they always used and given that it is not the label applied by the parties (even if that phrase can be said to amount to a label) which determines the legal nature of the relationship.

77. Looking at all these factors and assessing all the circumstances in the round I conclude that the Respondent was not a client/customer of the Claimant; the Claimant was subordinate to and under a degree of control by the Respondent. The Claimant did not fall within the exception.

Employment Judge Reid
Date: 22 June 2023