EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss L Thornton	v	Multi Trades Training Limited

Heard at: Reading by CVP

On: 7, 9, 10 November 2023
and in private (tribunal only)
on 12 March 2024

Before: Employment Judge Hawksworth
Mrs F Betts
Mr N Boustred

Appearances
For the claimant: represented herself
For the respondent: Mr R Jones (director)

RESERVED JUDGMENT

It is the unanimous decision of the tribunal that:

1. At the relevant times, the claimant was not:

    a. an employee or a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996;

    b. an employee of the respondent or an applicant for employment by the respondent, in the extended sense of section 83(2) of the Equality Act 2010; or

    c. a contract worker within the meaning of section 41 of the Equality Act 2010.

2. As the claimant was not an employee of the respondent, she cannot pursue complaints of automatic unfair dismissal or breach of contract in respect of notice (wrongful dismissal) or in respect of recruitment fees.

3. As the claimant was not an employee or a worker of the respondent, she cannot pursue a complaint of unauthorised deduction from wages in respect of recruitment fees.

4. As the claimant was not an employee or an applicant for employment in the extended sense, or a contract worker, she cannot pursue a complaint of pregnancy and maternity discrimination against the respondent.

5. The claimant's claim is therefore dismissed because the tribunal does not have jurisdiction to determine it.

REASONS

Claim, hearing and evidence

1. The claimant, Miss Thornton, worked with the respondent from 4 May 2021 to 31 October 2021. There is a dispute between the parties about her employment status during that time, and that is a central question for us to decide.

2. The claim form was presented on 28 January 2022. Miss Thornton claimed automatic unfair dismissal because of pregnancy and maternity, pregnancy and maternity discrimination, wrongful dismissal in respect of notice pay and breach of contract/unauthorised deduction from wages in respect of recruitment fees.

3. The respondent presented its response on 29 March 2022. The respondent defends the claim.

4. There was a preliminary hearing at which there was a discussion to clarify the complaints and the tribunal made orders for the steps the parties should take to prepare for the main hearing.

5. The final hearing took place on 7, 9, 10 November 2023. The final hearing was scheduled to take place over four days but for judicial resourcing reasons the time had to be reduced to three hearing days. The hearing took place by video (CVP).

6. At the start of the hearing, the claimant made an application for the response to be struck out on the grounds of non-compliance with the tribunal's orders. For reasons given at the hearing, we refused the application. In short, while it was clear that there had been delays and problems with getting the bundles and statements ready for the hearing, the witness statements and the bulk of the documents had been exchanged by June 2023, well in advance of the hearing. We were satisfied that in those circumstances it remained possible to have a fair trial.

7. After reading the witness statements which had been exchanged by all the witnesses, we heard evidence from the claimant on the afternoon of 7 November and on the morning of 9 November 2023. The respondent's witnesses gave evidence on the afternoon of 9 November and the morning of 10 November 2023, in the following order: Mr Barwick, Mr Jones, Mrs Evans, Mrs Kriel.

8. Both parties made closing comments at the end of the hearing.

9. There were three bundles. Bundle 1 had 48 pages and contained the tribunal documents. Bundle 2 had 139 pages and contained the claimant's documents. Bundle 3 had 48 pages and contained the respondent's documents. Page references in this judgment are references to the bundles

in the format bundle number/page number, for example 1/25 refers to bundle 1, page 25.

10. On the first day of the hearing, the respondent provided late disclosure of an invoice dated 22 October 2021. On the second day of the hearing the claimant disclosed her reply to an email from the respondent of 31 October 2021. Both documents were added to the documents before the tribunal by consent. They were short and clearly relevant to the issues for us to decide.

11. With the reduced hearing time, there was insufficient time for us to make our decision and tell the parties our judgment and reasons. We therefore reserved judgment. The tribunal had a further deliberation meeting in private on 12 March 2023. The judge apologises to the parties for the delay in promulgation of this judgment. The parties have been told the reason for the delay.

The Issues

12. The issues for us to decide were clarified at a preliminary hearing on 25 October 2022. A copy of the list of issues is attached as an appendix.

13. The first question for us to decide is Miss Thornton's employment status at the times which are relevant to the complaints she is making. If her employment status means that we have jurisdiction, we go on to consider her complaints. In summary they are:

    13.1 complaints of automatic unfair dismissal, pregnancy and maternity discrimination and in respect of notice, all relating the respondent's termination of its working relationship with Miss Thornton on 31 October 2021; and

    13.2 pay complaints relating to the non-payment of recruitment fees which were included on Miss Thornton's invoice dated 1 November 2021.

14. We made findings of fact based on the evidence we heard and read. We then applied the legal principles and reached conclusions on these issues.

Findings of fact

15. In this section, we say what happened. Where the parties disagree about what happened, we decide what we think is most likely to have happened, based on the evidence we heard and the documents we read.

<u>Miss Thornton's temporary assignment to the respondent</u>

16. Louise Thornton started working for the respondent on 4 May 2021 as a temporary Training Administrator. She had an interview with Rob Jones, one of the directors of the respondent, before the assignment began. The respondent was at the time a recently established business providing apprenticeship training.

17. Miss Thornton was assigned to the respondent by an employment agency, Reed Specialist Recruitment Limited. We make our findings about the

assignment on the basis of a letter from Reed which was provided to Miss Thornton (2/79). Neither party disagreed with what was said in that letter and we accept what is said in it.

18. Miss Thornton was initially taken on to work 13.5 hours a week but often worked more than that. Typical agency arrangements applied. Reed charged the respondent for Miss Thornton's work, paid Miss Thornton at a lower hourly rate, and retained the difference to cover its expenses and profit. Reed invoiced the respondent weekly (page 3/42). The cost to the respondent for Miss Thornton's services was about £350 per week (page 3/42), equating to about £1,500 per month.

19. At the time Miss Thornton began the role she was pregnant. The respondent was aware that Miss Thornton was pregnant from a very early stage in their working relationship. Miss Thornton intended to take 6 weeks off from 1 October 2021 when her baby was due.

20. Mr Jones gave Miss Thornton initial guidance about the work. After that, Miss Thornton worked largely autonomously and mostly from home. For limited periods during the week, when lessons were taking place for the apprentices, Miss Thornton was expected to be available to respond to calls and emails if any issues arose such as non-attendance. Other than that, she had flexibility to complete her work as and when she liked. She often did her work outside normal business hours, because she has young children.

21. Miss Thornton got on well in her work for the respondent. She and Mr Jones discussed the possibility of Miss Thornton moving to a permanent role, that is being directly employed by the respondent. On 29 June 2021 Mr Jones spoke to Reed about this. They told him that if Miss Thornton moved to a permanent role with the respondent, a fee would be payable to Reed. Mr Jones spoke to Mr Barwick, the respondent's other director. They did not want to take the claimant on as a permanent employee if it meant paying a fee to Reed. Mr Jones spoke to Reed to see if there were other options. Reed told him that there was no way round the requirement to pay a fee (page 2/79). Reed continued to supply Miss Thornton to work with the respondent.

<u>The agreement about Miss Thornton's maternity absence</u>

22. In late August 2021 Mr Jones spoke to Miss Thornton and told her that he had explored ways round paying the fee to Reed but had not found a solution. He asked Miss Thornton if she wanted to take on the provision of administration services to the respondent on a self-employed basis, including providing staff to cover her maternity leave (due to be 6 weeks from 1 October 2021). Mr Jones made this suggestion as an alternative to offering permanent direct employment to Miss Thornton, and as an alternative to asking Reed to supply another temporary administrator to cover Miss Thornton's absence. We find that Mr Jones made the suggestion because Miss Thornton was very keen to move to a position of direct employment by the respondent and the respondent did not want to agree to that.

23. Miss Thornton felt that by the time Mr Jones put this suggestion to her, there was not enough time for her to set up her own new business before her baby was due. She texted Mr Jones to ask whether he would be open to her invoicing the respondent from her partner's construction business (page 2/5). In this text message there was no suggestion that Miss Thornton was reluctant to take on an arrangement on this basis. We find that, whilst Miss Thornton would have preferred to have been offered employment by the respondent, it was her decision to move to the new working arrangement. She was not put under pressure by the respondent to do it. It was proposed by the respondent as an alternative to direct employment by them, and Miss Thornton accepted it.

24. Miss Thornton's partner's business was known to Mr Jones because the respondent had placed an apprentice there. Mr Jones agreed with Miss Thornton's suggestion to use that business for invoicing for her services.

25. The agreement between the parties was not recorded in writing. We find, based on the evidence we heard and the contemporaneous documents, that in their discussions about the new arrangement, Miss Thornton and Mr Jones agreed that:

    25.1 Miss Thornton would take on the provision of administrative services for the respondent and would recruit staff to cover her maternity leave.

    25.2 She would supply staff to the respondent at a rate of £21.00 an hour, providing invoices from her partner's business. (The hourly rate was agreed because it was about the same as the rate the respondent was paying Reed for Miss Thornton's services.)

    25.3 Miss Thornton would have full responsibility for the individuals hired by her. They would invoice her for the hours they worked, and Miss Thornton would pay them out of the £21.00 per hour she was paid by the respondent, retaining the rest as profit for her business. Miss Thornton accepted the arrangement because she calculated that it would be financially more advantageous to her than claiming statutory maternity allowance.

    25.4 In the time remaining before her maternity leave (1 September to 1 October 2021) Miss Thornton would train up her staff. Her invoices to the respondent would include the hours she worked doing this (that is, the hours over and above her basic weekly 13.5 hours) at a rate of £21.00 an hour. Her basic weekly hours would continue to be paid via Reed.

    25.5 After her maternity leave, Miss Thornton would continue to provide the respondent with administration services through her business, using her staff. The parties agreed that after her maternity leave ended, Miss Thornton would manage the respondent's administrative services on a self-employed basis through her business. Although Miss Thornton would have preferred to be employed by the respondent directly after her maternity leave, the respondent did not agree to this because it did not want to pay the fee to Reed. It was not intended by either party

that she would return after maternity leave as an agency worker through Reed.

26. The provision of administrative services to the respondent was regarded by the parties as a 'business to business' arrangement, not as a contract for Miss Thornton to do work for the respondent personally. In her evidence to us, Miss Thornton accepted that the agreement meant she was stepping into Reed's position. She was supplying staff to the respondent to carry out administration services during her maternity absence, through her new recruitment business. The arrangement would continue after her maternity leave, with Miss Thornton managing the provision of administrative services to the respondent. (It does not appear that either Miss Thornton or the respondent considered whether the agreement they reached together was permitted under their agreements with Reed. That is not an issue before us.)

27. There was a dispute between the parties about another element of their agreement. Miss Thornton said that her agreement with the respondent included an agreement that she would be paid £750 for each member of staff she referred or recruited to the business. The respondent denied that there was any such agreement. The respondent said that while there was an agreement between the respondent and its staff to pay a referral fee of £150 to anyone who referred a business lead (that is, a person who took on an apprentice role), there was no similar agreement in respect of staff, either generally or with Miss Thornton.

28. We find that the agreement between Miss Thornton and the respondent did not include an agreement to pay a referral or recruitment services fee in respect of staff. We think it is implausible that the respondent would have agreed this, because:

    28.1 the agreement between Miss Thornton and the respondent was that she would recruit the staff and supply them, not that she would refer them to the respondent for them to recruit;

    28.2 the arrangements the respondent made with Miss Thornton were intended to be in line with what they would have paid Reed if they had decided to ask them to supply another temporary administrator. That was reflected in the £21.00 hourly payment to Miss Thornton for staff she supplied. It is unlikely that the respondent would have agreed to pay a referral fee for each member of staff supplied by Miss Thornton as well as the hourly rate, because that would have been in excess of what they would have paid Reed.

29. In September 2021 the respondent changed Miss Thornton's title to Enrolment and Compliance Manager (page 2/7).

<u>The new staff</u>

30. Miss Thornton put adverts on Facebook for a data entry role and an administrator role (page 2/2 and 2/3), initially to help catch up on back log, cover handover and maternity leave and then for both roles to continue part-

time. The roles were home working roles. The advert gave the respondent's apprenticeship email address for applicants to respond to. This could be accessed by Mr Jones, Mr Barwick and Miss Thornton. This email address was used for convenience, not because Miss Thornton was recruiting staff on behalf of the respondent.

31. Miss Thornton recruited Michelle Evans, a personal friend. Mrs Evans started working in the administrator role on 6 September 2021. Miss Thornton agreed that she would pay Mrs Evans £11.00 an hour.

32. Mrs Evans recommended Sandra Kriel who was a former colleague of hers, and Mrs Kriel started in the data entry role on 12 September 2021. Miss Thornton agreed that she would pay Mrs Kriel £10.00 an hour.

33. Both Mrs Evans and Mrs Kriel worked from home. The respondent provided mobile phones for them to use. Miss Thornton bought laptops for Mrs Evans and Mrs Kriel to use (page 2/4 and 2/8). The laptop accounts were set up using an email address which started 'LTbusinessservices'. That name and email was not used for anything else.

The new working arrangement

34. On 26 September 2021 Miss Thornton sent the respondent the first invoice, for work in September (page 2/122). It was for £3,263.25 plus VAT. The invoice was on the headed paper of the claimant's partner's business, and had the title 'Business Consultancy Services Delivered'. It included the hours worked by Mrs Evans, and the hours above 13.5 per week worked by Miss Thornton training the new staff. All the hours were invoiced at a rate of £21.00 per hour.

35. The cost to the respondent of administrative staff through the arrangement with Miss Thornton was considerably more than they had been paying to Reed. At the end of September, Mr Barwick called Miss Thornton. The call was prompted by the respondent's concern at the level of the first invoice. Miss Thornton understood that Mr Barwick was asking her to record every task her staff performed and how long each took. Miss Thornton was unhappy about this and she spoke to Mr Jones as she felt it was not workable. Mr Jones reassured her that what was required was a breakdown of hours per day worked by Miss Thornton and her staff. The respondent paid the first invoice.

36. Miss Thornton's maternity leave started on 1 October 2021. She chose not to apply for statutory maternity allowance because her income under her agreement with the respondent was higher.

37. Reed recorded Miss Thornton's assignment with the respondent as ending on 15 October 2021. They presumed that Miss Thornton would come back to them once she was ready to return to work, but Miss Thornton did not do that because she and the respondent had agreed their separate arrangement. Neither Miss Thornton nor the respondent considered Miss Thornton's return as an agency worker through Reed as an option.

38. On 22 October 2021 Miss Thornton sent the respondent the second invoice, for work in October (page 3/49). It was for £4,885.50 plus VAT. Again the invoice was on the headed paper of the claimant's partner's business and had the title 'Business Consultancy Services Delivered'. The invoice included the hours worked by Mrs Evans and Mrs Kriel. It also included hours over 13.5 worked by Miss Thornton in the week of 26 September 2021. In total for that week, including the hours paid to Reed and the hours on Miss Thornton's first and second invoices, Miss Thornton had worked for 71 hours (13.5 + 28.5 + 29).

39. The second invoice was considerably higher than the first invoice which had caused the respondent concerns. The respondent paid the second invoice.

40. Miss Thornton's baby was born on 28 October 2021.

<u>The termination of the arrangement</u>

41. On 31 October 2021 Mr Barwick emailed Miss Thornton (page 2/17). The email was headed 'Compliance and Enrolment Officer'. It said that the respondent had decided that it no longer required the services of the claimant's business, with immediate effect. We find that the respondent took this decision because of the cost of the arrangement to the respondent.

42. The respondent took on Mrs Evans and Mrs Kriel as employees. They had approached Mr Jones to ask if they could be employees of the respondent rather than working through Miss Thornton. It was cheaper for the respondent to engage Mrs Evans and Mrs Kriel in this way.

43. Miss Thornton's partner collected the laptops which she had bought.

44. On 1 November 2021 Miss Thornton sent the respondent the third invoice (page 2/124). It was for £2,927.70. Like the other invoices it was on the claimant's partner's headed paper and had the title 'Business Consultancy Services Delivered'. The invoice included costs for hours worked by Mrs Evans and Mrs Kriel in the week ending 29 October 2021.

45. The third invoice also included a flat rate 'recruitment services' cost of £750 each in respect of the recruitment of Mrs Evans and Mrs Kriel. It said this was 'to cover sourcing, interviewing, training, and ad hoc support for the new recruits'.

46. The respondent paid the part of the third invoice which related to hours worked, but not the £1,500 in recruitment services fees.

47. We have explained above our finding that there was no agreement between Miss Thornton and the respondent that the respondent would pay a referral or recruitment fee. There was no agreement to cover sourcing, interviewing, training and ad hoc support of new recruits.

48. We also find that there was no agreement between Miss Thornton and the respondent that, if the respondent took on as a permanent member of its staff a person who was initially supplied as a temporary worker by Miss Thornton, a fee would become payable to Miss Thornton by the respondent.

Although that was part of the agreement between Reed and the respondent, we find that there was no similar agreement to that effect reached between Miss Thornton and the respondent.

The claimant's claim in the small claims court

49. The claimant brought a claim in the small claims court in relation to the unpaid part of the invoice dated 1 November 2021 (£1,500 plus VAT). Those proceedings were struck out on 16 November 2022 for non-compliance with an order to complete a directions questionnaire and have not been reinstated (page 2/126).

The Law

50. In this section we set out the legal principles which apply to the claims the claimant is making.

Agency workers and employment status

51. Agency workers are assigned by an employment agency to work for a client of the agency, often known as the end user. The courts have considered circumstances in which the agency worker is properly regarded as (or becomes) the employee of the end user. This arises in situations where it is necessary to imply that there is an employment contract between the agency worker and end user in order to give business reality to the situation.

52. In James v Greenwich London Borough Council 2007 ICR 577, the EAT gave guidance for tribunals considering the question of whether to imply an employment contract between an agency worker and an end user. The decision of the EAT was approved by the Court of Appeal. The issues to consider are as follows:

    52.1 whether the way in which the contract is performed is consistent with the agency arrangements, or whether it is only consistent with an implied contract of employment between the worker and the end-user;
    52.2 the key feature in agency arrangements is not just the fact that the end-user is not paying the wages, but that it cannot insist on the agency providing the particular worker at all;
    52.3 it will not be necessary to imply a contract between the worker and the end-user when agency arrangements are genuine and accurately represent the relationship between the parties, even if an employment contract would also not be inconsistent with the relationship;
    52.4 where agency arrangements are genuine and accurately represent the actual relationship between the parties, it will be rare for an employment contract to be implied between the worker and the end user. If any such contract is to be inferred, there must have been, subsequent to the relationship commencing, some words or conduct that entitle the tribunal to conclude that the agency arrangements no longer adequately reflect how the work is actually being performed;
    52.5 the passage of time does not in itself justify the implication of an employment contract.

Employment status under the Employment Rights Act 1996

53. In James v Redcats (Brands) Ltd [2007] ICR 1006, Elias J summarised the distinction between employees, workers and the self-employed:

> *'in a general sense the degree of dependence is in large part what one is seeking to identify – if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached ...'*

54. The statutory definition of an employee in section 230(1) of the Employment Rights Act says that an employee is:

> *"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".*

55. Section 230(2) defines a contract of employment as:

> *"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".*

56. This requires consideration of whether a person is working under a contract of employment (also known as a contract of service). In the case of Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 it was held that three conditions must be met for a contract of employment to exist:

    56.1 the employee agrees, in consideration for a wage or other remuneration, to provide their own work and skill in the performance of some service for the employer;
    56.2 the employee agrees, expressly or impliedly, to be subject, in the way they perform that service, to a sufficient degree of control by the employer for the relationship to be one of employer and employee; and
    56.3 the other provisions of the contract are consistent with it being a contract of employment.

57. In Autoclenz v Belcher [2011] IRLR 823, the Supreme Court confirmed that the summary in Ready Mixed Concrete remains *'the classic description of a contract of employment'.* In Autoclenz v Belcher, the Supreme Court also emphasised the importance of considering the 'true agreement between the parties', which might mean looking beyond what is set out in a written contract: '*the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.'*

58. A range of other factors may be relevant to the question of whether a contract of employment exists, but the courts have cautioned against a 'checklist approach'. What is required is consideration of all the factors that are relevant, and an evaluation of the whole.

59. Some people who are not employees may qualify as workers. Workers do not have all the employment rights that employees do, but they have some

employment protections. A worker is defined under section 230(3) of the Employment Rights Act as:

> *"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".*

60. Sub-section 230(3)(a) includes all employees in the definition; all employees are workers. However, sub-section 230(b) widens the definition of worker so that it includes some people who are not employees. Someone who is not an employee but who is a worker because they fall within the definition in sub-section 230(3)(b) is sometimes referred to as a "limb (b) worker."

61. Lady Hale in Bates van Winkelhof v Clyde & Co LLP 2014 ICR 730, SC said that when considering whether someone is a limb (b) worker, *'there can be no substitute for applying the words of the statute to the facts of the individual case'*. The wording of the statue includes the following factors which are necessary for an individual to fall within the definition of 'worker':

    61.1 there must be a contract, whether express or implied, and, if express, whether written or oral;
    61.2 that contract must provide for the individual to carry out personal services; and
    61.3 those services must be for another party to the contract who must not be a client or customer of the individual's profession or business undertaking.

62. There is a distinction between self-employed people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them (who are neither workers nor employees), and self-employed people who provide their services as part of a profession or business undertaking carried on by someone else (who are limb (b) workers under the Employment Rights Act and employees in the extended sense under the Equality Act) (Bates van Winkelhof v Clyde and Co LLP 2014 ICR 730, and Pimlico Plumbers Ltd v Smith [2018] ICR 1511).

Employment in the extended sense under the Equality Act 2010

63. A different statutory definition of employment is contained in section 83(2) of the Equality Act 2010 which says that employment means:

> "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work".

64. This is referred to as 'employment in the extended sense'.

65. Section 83(2) of the Equality Act 2010 is worded differently to section 230(3) of the Employment Rights Act, but the case law indicates that in practical terms, the extended definition under the Equality Act means the same as the worker definition in section 230(3). A person who is a limb (b) worker for the purposes of the Employment Rights Act will also be an 'employee in the extended sense' for the purposes of the Equality Act (Bates van Winkelhof v Clyde & Co LLP 2014 ICR 730 and Pimlico Plumbers Ltd v Smith [2018] ICR 1511).

66. The tribunal must consider the circumstances of the case, and the relationship between the parties. The dominant (or immediate) purpose or dominant feature of the contract, a test derived from domestic law, may be a relevant factor. The subordination test, derived from case law in the Court of Justice of the European Union, may also be relevant.

67. In the case of Jivraj v Hashwani [2011] ICR 1004 the Supreme Court considered these tests and concluded that the essential questions for determining whether a person is in 'employment' for the purposes of the discrimination legislation are whether:

    67.1 on the one hand, the person concerned performs services for and under the direction of another person in return for which she receives remuneration; or,
    67.2 on the other hand, she is an independent provider of services who is not in a relationship of subordination with the person who receives the services.

68. For someone who is not an employee or an apprentice, the question under section 83(2)(a) is whether they are working under 'a contract personally to do work'. The obligation to work personally means that the extent to which the individual can substitute someone else to do their work is often a key factor for consideration. As the task for the tribunal is primarily statutory interpretation, not contractual interpretation, the tribunal should consider the reality of the relationship between the parties (Autoclenz Ltd v Belcher and ors 2011 ICR 1157 and Uber BV and ors v Aslam and ors 2021 ICR 657).

69. The Equality Act 2010 prohibits discrimination against employees (in the extended sense) and also against applicants for employment. Section 39(1) provides that an employer (A) must not discriminate against a person (B):

    69.1 in the arrangements A makes for deciding to whom to offer employment;
    69.2 as to the terms on which A offers B employment;
    69.3 by not offering B employment.

70. The act also prohibits discrimination by an end user against an agency worker. Agency workers are called contract workers in the Equality Act. Section 41 says (as far as relevant to the claimant's claim):-

> "*Contract 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)."*

Automatic unfair dismissal

71. Dismissal for a reason relating to pregnancy, childbirth or maternity is unfair. Section 99 of the Employment Rights Act 1996 says

> *"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—*
>
> *(a) the reason or principal reason for the dismissal is of a prescribed kind, or*
> *(b) the dismissal takes place in prescribed circumstances.*
>
> *(2) In this section "prescribed " means prescribed by regulations made by the Secretary of State.*
>
> *(3) A reason or set of circumstances prescribed under this section must relate to—*
>
> *(a) pregnancy, childbirth or maternity…"*

Wrongful dismissal and breach of contract

72. An employment tribunal can consider complaints of breach of contract by employees in some circumstances. Article 3 of the Extension of Jurisdiction (England and Wales) Order 1994 says:

> *"Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—*
>
> *(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*
>
> *(b) the claim is not one to which article 5 applies; and*
>
> *(c) the claim arises or is outstanding on the termination of the employee's employment."*

Unauthorised deductions from wages

73. Employees and workers have the right not to suffer unauthorised deductions from wages by their employer. Section 13 of the Employment Rights Act 1996 says:

> *"(1) An employer shall not make a deduction from wages of a worker employed by him unless-*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."*

Pregnancy and maternity discrimination

74. Section 18 of the Equality Act 2010 prohibits unfavourable treatment because of pregnancy in some circumstances. Section 18 says:

> *(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.*
>
> *(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —*
>
> *(a) because of the pregnancy, or*
>
> *(b) because of illness suffered by her as a result of it.*
>
> *(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.*

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

(b) it is for a reason mentioned in subsection (3) or (4).

Conclusions

75. We have applied these legal principles to the facts as we have found them, to reach our conclusions on the issues we have to decide. We have started by considering Miss Thornton's employment status.

<u>The claimant's employment status during the period 4 May 2021 to 15 October 2021</u>

76. During this period Miss Thornton worked for the respondent as an agency worker assigned by Reed. The working relationship was consistent with agency arrangements. The respondent paid Reed for the services Miss Thornton provided. That payment included Reed's expenses and profit from assigning Miss Thornton to work at the respondents. Miss Thornton was paid by Reed. The features Miss Thornton relied on as suggesting that she was employed, such as Mr Jones having carried out an interview with her, were consistent with that agency arrangement and do not require an employment contract to be implied between Miss Thornton and the respondent.

77. There were discussions between Miss Thornton and the respondent about their working relationship changing to one of direct employment of Miss Thornton by the respondent. However, we have found that such a change did not take place. Although Miss Thornton would have preferred to have been taken on as a direct employee of the respondent as discussed with Mr

Jones, that did not happen. The respondent did not want to incur the fee that would have been payable to Reed had that change been made. The initial discussions did not progress to the stage where the claimant was offered employment or became an employee of the respondent.

78. There was an overlap between the services provided to the respondent by Reed, which ended on 15 October 2021 and the services provided to the respondent by Miss Thornton as a self-employed person which began on 1 September 2021. During the period from 1 September to 1 October 2021, the agreement between Miss Thornton and the respondent was that the first 13.5 hours per week worked by Miss Thornton would be worked as an agency worker supplied by Reed, and the remaining hours each week would be worked as part of Miss Thornton's self-employment arrangement (to which we return below).

79. There is nothing about the working arrangements between the parties which make it necessary to imply a contract of employment between Miss Thornton and the respondent during this time. The arrangement with Reed was a genuine agency arrangement and adequately reflected how the work was done.

80. Miss Thornton remained an agency worker supplied by Reed to the respondent throughout the period from 4 May 2021 to 15 October 2021. She was a contract worker during this time, for the purpose of section 41 of the Equality Act.

<u>The claimant's employment status during the period 1 September 2021 to 31 October 2021</u>

81. There was another working relationship between the parties, from 1 September 2021 to 31 October 2021 and, as we say, this overlapped the period when the claimant was an agency worker supplied by Reed.

82. We have considered the nature of the working relationship between Miss Thornton and the respondent during this period.

83. There was an unwritten agreement between the parties that from 1 September 2021 Miss Thornton would provide administrative services to the respondent and invoice them for these services. The invoices related to services provided by Miss Thornton after she had completed 13.5 hours per week, and to services provided by Mrs Evans and Mrs Kriel. The respondent agreed to pay Miss Thornton directly in return for these services. These were mutual obligations relating to work and pay, an essential element of an employment contract.

84. However, other elements of the relationship are not suggestive of an employment contract. Miss Thornton was not subject to the control of the respondent in the way she performed the work. The work was done by the claimant (and by Mrs Evans and Mrs Kriel) from home at whatever time they wanted. Miss Thornton only had to be available at the times when lessons were taking place, in case issues arose. When she thought that Mr Barwick was asking for details of the activities worked, Miss Thornton protested, and

Mr Jones agreed that only the hours worked would need to be recorded. That is not suggestive of the degree of control that would be expected in an employment relationship.

85. Miss Thornton used her own laptop for her work for the respondent (and she bought laptops for Mrs Evans and Mrs Kriel). Again, that is not suggestive of an employment relationship.

86. Miss Thornton was not obliged to perform the work personally. The basis of the agreement between her and the respondent was that she would supply staff to perform the work she was previously doing as an agency worker. The agreement was that she would supply other people to provide the respondent with administration services, and that is what happened in practice.

87. During this period, Miss Thornton was in the position the employment agency Reed was previously in. The work Miss Thornton did herself for which she invoiced the respondent was in pursuance of that feature of the agreement between them: she was managing Mrs Evans and Mrs Kriel in order to provide administrative services to the respondent.

88. The agreement between the parties was not one which provided for personal service by Miss Thornton. We return to this below.

89. Taking these factors into account, we have concluded that the agreement between Miss Thornton and the respondent in respect of the work she did above 13.5 hours from 1 September 2021 to 31 October 2021 was not a contract of employment, and that Miss Thornton was not an employee of the respondent during this period. She was doing this work as a self-employed person providing administrative services to the respondent, her customer.

90. We have gone on to consider whether during this period Miss Thornton was a worker of the respondent within the meaning of section 230(3) of the Employment Rights Act, by considering the three elements of the statutory test set out in the section on the law above.

    90.1 There was an express oral contract between the parties.

    90.2 The contract did not provide for the claimant to carry out personal services. As explained above, the agreement was for Miss Thornton to provide administrative services and she could (and did) supply other staff to do that. Other staff were to be supplied by Miss Thornton to do the work.

    90.3 The services Miss Thornton was providing were for the respondent as a client or customer of her business undertaking. She did not have time to set up her own company (LT business services) as she had intended, but that does not mean that she was therefore a worker of the respondent. She provided business consultancy services to the respondent through her partner's business. In doing so, Miss Thornton was operating as a business undertaking and the respondent was her client or customer. She was not acting as a worker of the respondent.

91. This means that Miss Thornton's circumstances do not fit the definition of a worker under section 230(3).

92. For the same reasons, we conclude that during this period Miss Thornton was not an employee of the respondent in the extended sense used in the Equality Act. Miss Thornton was not an employee and she was not working under a contract personally to do work. The contract between her and the respondent was a contract for Miss Thornton to provide administrative services to the respondent. It expressly anticipated that Miss Thornton would supply other staff to perform the services. It was not a term of the contract that Miss Thornton must provide any of the services personally.

93. Therefore, during the period from 1 September 2021 to 31 October 2021, in providing services for which she invoiced the respondent after she had worked 13.5 hours a week, Miss Thornton was not an employee or a worker of the respondent. She was a self-employed person providing administrative services to the respondent as part of her own business undertaking.

94. In respect of the arrangement over and above her basic hours worked through Reed, Miss Thornton was not a 'contract worker' within the meaning of section 41 of the Equality Act 2010. To meet the definition in section 41, the person doing the work must be supplied to a principal, that is a person who makes work available for an individual who is employed by another person. Miss Thornton was not, for the purposes of her business and services she provided for the respondent over 13.5 hours per week, 'employed by another person'. Rather, her own business was providing services. She fell outside the definition of contract worker under section 41 in respect of the services she provided over and above the 13.5 weekly hours she worked for Reed.

Miss Thornton's intended return to work after maternity leave

95. Finally on the question of employment status, we have considered Miss Thornton's position in relation to her intended return to work after maternity leave. We have found that the parties agreed that after her maternity leave, Miss Thornton would continue to provide the respondent with administration services through her business, managing the staff who performed the administrative duties during her maternity leave. The agreement was for Miss Thornton to provide a service to the respondent, and it was up to her which staff she chose to supply to the respondent to do that.

96. Although Miss Thornton would have preferred to have been employed by the respondent after her maternity leave, the respondent did not agree to this because this would have meant a fee being payable to Reed. There was no agreement between the parties that Miss Thornton would be employed directly by the respondent after her maternity leave. It was also not intended by either party that Miss Thornton would return to work at the respondent as an agency worker through Reed. This means that the respondent did not refuse to allow Miss Thornton to continue her role as an agency or contract worker.

97. Rather, the relationship which the parties had agreed would apply on Miss Thornton's return to work after maternity leave was the continuation of the provision of administrative services to the respondent through her own business, through the supply of other staff managed by her. This was not an employment contract or a contract to do work personally. This means it was not a contract under which Miss Thornton would have been, after her maternity leave, an employee or a worker of the respondent, or an employee in the extended sense under the Equality Act.

98. For reasons explained above, Miss Thornton would not after her maternity leave have been supplied to the respondent by her own business as a 'contract worker' within the meaning of section 41 of the Equality Act 2010 on her return to work after maternity leave. She was not employed by a third party, and therefore would not have met the definition of a contract worker within section 41 of the Equality Act.

Conclusion on employment status

99. In conclusion on the issue of employment status, Miss Thornton was not at any relevant time an employee or worker of the respondent, either within the meaning of section 230 of the Employment Rights Act or section 83 of the Equality Act.

100. Miss Thornton was a contract worker assigned to the respondent by Reed during the period from 4 May 2021 to 15 October 2021, but after that date she was not a contract worker (either with Reed or with her own business).

Complaints of automatic unfair dismissal and breach of contract in respect of notice (wrongful dismissal)

101. The claimant was a self-employed person at the time the respondent terminated its agreement with the claimant. She was not an employee of the respondent at that time (or any other time), so she cannot pursue complaints against the respondent of automatic unfair dismissal. The right to complain of unfair dismissal (including automatic unfair dismissal) as set out in the Employment Rights Act 1996 is a right which only applies to employees.

102. The position is the same in relation to breach of contract in respect of notice (also called wrongful dismissal). The employment tribunal can only consider complaints of breach of contract because of the provisions of the Extension of Jurisdiction (England and Wales) Order 1994. The extension in article 3 of that order only applies to claims by employees.

103. Miss Thornton was not dismissed by the respondent on 31 October 2021 because she was not an employee or worker at the time. The respondent terminated the business arrangement between them, namely the agreement to provide administrative services. It was not the termination of an employment relationship.

104. For these reasons, we do not have jurisdiction to consider the complaints of automatic unfair dismissal and breach of contract in respect of notice.

Complaint of breach of contract/unauthorised deduction from wages in relation to recruitment fees

105. The claimant also seeks to bring a claim for breach of contract or in the alternative unauthorised deduction from wages in relation to recruitment fees. As explained above, the claimant does not have the right to bring a complaint of breach of contract as she was not an employee of the respondent.

106. A complaint of unauthorised deduction from wages is brought under sections 13 and 23 of the Employment Rights Act 1996. It can be brought by an employee or a worker. As we have decided that the claimant was not an employee or a worker of the respondent at any time, she cannot pursue a complaint of unauthorised deduction from wages for recruitment fees.

107. For these reasons, we do not have jurisdiction to consider the complaint of breach of contract/unauthorised deduction from wages.

108. In any event, we have found that Miss Thornton did not have an agreement with the respondent that she would be paid recruitment fees in addition to hourly rates of pay for staff she supplied to the respondent. If we had been able to consider this complaint, we would have found that it failed for this reason.

Complaint of pregnancy and maternity discrimination

109. The Equality Act 2010 prohibits discrimination because of pregnancy or maternity. In a work context, the act applies to employees in an extended sense. This protection does not apply to the claimant because we have found that she was not an employee of the respondent in the extended sense used in section 39(2) of the Equality Act.

110. By section 41, the Equality Act also prohibits discrimination against contract workers. In her role working for the respondent through Reed, the claimant was a contract worker under section 41(5) and (7). She was supplied to the respondent (the principal) as a temporary worker by another person (Reed) in furtherance of the contract between the respondent and Reed.

111. Therefore the claimant had the right not to be discriminated against as a contract worker. However, in respect of the respondent's decision of 31 October 2021, the claimant was not a contract worker within the meaning of section 41 of the Equality Act 2010.

112. This is because, when the respondent wrote to the claimant on 31 October 2021, it terminated the agreement with Miss Thornton as a self-employed person, not the claimant's role as a contract worker through Reed. The assignment by Reed ended earlier, on 15 October 2021 and there was no new assignment of Miss Thornton to the respondent by Reed. Neither Miss Thornton nor the respondent pursued the possibility of a further assignment through Reed. The respondent did not refuse to allow Miss Thornton to continue her role with the respondent as a contract worker with Reed after her maternity leave: Miss Thornton did not seek to continue that role. The respondent ended the services provided by the claimant's business.

Therefore, in respect of the respondent's decision of 31 October 2021, the claimant was not a contract worker within the meaning of section 41 of the Equality Act 2010.

113. The protection against discrimination also applies to applicants for employment under section 39(1). We have not found that the claimant was an applicant for employment at any stage. After the period for which she was a contract worker assigned to the respondent by Reed, she moved to a self-employment arrangement. At times Miss Thornton and the respondent talked about the possibility of Miss Thornton being taken on by the respondent as an employee, but Miss Thornton was not at any stage an applicant for employment by the respondent.

114. In any event, we are satisfied that the reason for the respondent's decision in August 2021 not to offer employment to Miss Thornton was because it would have resulted in a fee being payable to Reed which the respondent did not want to pay. The evidence on this is consistent with the information Reed provided to Miss Thornton. The decision to offer Miss Thornton self-employment rather than employment was not in any way because of her pregnancy or maternity leave.

115. Where an employer who engages someone to cover the maternity leave of an employee or contract worker decides to retain the maternity cover person rather than the employee or contract worker who went on maternity leave, that may amount to pregnancy or maternity discrimination contrary to section 18 of the Equality Act. In Miss Thornton's case the staff she provided to cover her maternity leave were later directly employed by the respondent in her role, but there was a fundamental difference in that, in respect of the respondent's decision of 31 October 2021, Miss Thornton was not an employee of the respondent, or a contract worker assigned to the respondent. The respondent decided to terminate a self-employment business consultancy arrangement with Miss Thornton, not employment or contract work.

116. For these reasons we do not have jurisdiction to consider the complaint of pregnancy and maternity discrimination under section 39 or section 41 of the Equality Act 2010.

Summary

117. Our conclusions mean that the tribunal does not have jurisdiction to consider any of Miss Thornton's complaints. In essence, Miss Thornton's status as a self-employed person in respect of the treatment she complains of means that the legislative provisions she seeks to rely on did not apply to her.

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Employment Judge Hawksworth

Date: 18 March 2024

Judgment and Reasons sent to the parties on: 19 March 2024

For the Tribunal Office

Appendix - list of issues set out in the case management orders made following the preliminary hearing on 25 October 2022

1. **Employment status**

   1.1. Was the claimant an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996?

   1.2. Was the claimant an employee of the respondent within the meaning of section 83 of the Equality Act 2010?

   1.3. Was the claimant a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996?

2. **[Automatic] unfair dismissal**

   2.1. Was the claimant dismissed?

   2.2. Was the reason or principal reason for dismissal pregnancy, maternity, childbirth or maternity leave within the meaning of section 99 of the Employment Rights Act 1999?

   2.3. If so, the claimant will be regarded as unfairly dismissed.

3. **Remedy for unfair dismissal**

   3.1. Does the claimant wish to be reinstated to their previous employment?

   3.2. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

   3.3. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

   3.4. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

   3.5. What should the terms of the re-engagement order be?

   3.6. If there is a compensatory award, how much should it be? The Tribunal will decide:

      3.6.1. What financial losses has the dismissal caused the claimant?
      3.6.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
      3.6.3. If not, for what period of loss should the claimant be compensated?
      3.6.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.6.5. If so, should the claimant's compensation be reduced? By how much?
3.6.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
3.6.7. Did the respondent or the claimant unreasonably fail to comply with it?
3.6.8. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
3.6.9. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?
3.6.10. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.7. What basic award is payable to the claimant, if any?

3.8. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. **Wrongful dismissal / Notice pay**

4.1. What was the claimant's notice period?

4.2. Was the claimant paid for that notice period?

4.3. If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

5. **Pregnancy and Maternity Discrimination (Equality Act 2010 section 18)**

5.1. Did the respondent treat the claimant unfavourably by doing the following things:

5.1.1. Terminating the claimant's employment/working relationship with the respondent just after the birth of her baby and before she was due to return to work from maternity leave?

5.2. Did the unfavourable treatment take place in a protected period?

5.3. If not did it implement a decision taken in the protected period?

5.4. Was the unfavourable treatment because of the pregnancy?

5.5. Was the unfavourable treatment because of illness suffered as a result of the pregnancy?

5.6. Was the unfavourable treatment because the claimant was on compulsory maternity leave / the claimant was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave?

6. **Remedy for discrimination**

6.1. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

6.2. What financial losses has the discrimination caused the claimant?

6.3. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

6.4. If not, for what period of loss should the claimant be compensated?

6.5. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

6.6. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

6.7. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

6.8. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.9. Did the respondent or the claimant unreasonably fail to comply with it?

6.10. If so is it just and equitable to increase or decrease any award payable to the claimant?

6.11. By what proportion, up to 25%?

6.12. Should interest be awarded? How much?

7. **Breach of Contract/unauthorised deductions from wages**

7.1. The claimant claims that the respondent agreed to pay her the sum of £1800 as a 'thank you'/incentive in relation to her work in hiring two female employees. She asserts that the respondent failed to pay the agreed sum in breach of contract.

7.2. Did this claim arise or was it outstanding when the claimant's employment ended?

7.3. Was that a breach of contract?

7.4. How much should the claimant be awarded as damages?

7.5. Alternatively, did the failure to pay the said sum constitute an unauthorised deduction from the claimant's wages?