EMPLOYMENT TRIBUNALS

Claimant: Ms S Browne

Respondent: The Partners Practicing as the firm Hugh James

Heard at: By video **On:** 5 June 2024

Before: Employment Judge S Moore

Representation
Claimant: Mr G Pollitt, Counsel
Respondent: Mr Wyeth, Counsel

RESERVED JUDGMENT

The claimant cannot rely upon Mr Browne as a comparator for her equal pay claim as he does not fall within the definition of a comparator within the definition of s79 (3) Equality Act 2010.

REASONS

Background and Introduction

1. The claimant presented an ET1 on 14 June 2023. Her only remaining claim is an equal pay claim.

2. A preliminary hearing was listed on the above date to determine the appropriateness of two comparators; Mr Peter Browne and Mr Anthony Edwards.

3. There was an agreed bundle of 259 pages. The respondent sought to add a supplementary bundle and invoices, to which there was no objection. The claimant sought to add an image of a business card for Mr Browne, there was no objection. The Tribunal heard witness evidence from the claimant and Mr A Jones, Managing Partner of the respondent. The decision had to be reserved as there was insufficient time after hearing the evidence and submissions to reach a decision on the day.

The issues

4. The issue concerning the suitability of Mr A Edwards did not have to be determined as the respondent conceded he was an appropriate comparator as he was an employee from April 2004 – 2006. They maintain he was paid less however this is a matter for the final hearing.

5. The respondent maintained that Mr Browen could not be relied upon as a comparator as he was at all material times a self employed consultant. As such he could not be a comparator as he did not meet the definition in s79(3) EQA.

Findings of fact

6. I make the following findings of fact on the balance of probabilities.

7. The claimant was employed by the respondent as Head of Independent Financial Advisors from 28 February 2005 until 8 February 2023. Her main duties involved advising clients of the respondent as well as external clients and staff members. She also managed the IFA team, carrying out all aspects of line manager duties, including appraisals, team building and networking and was responsible for sourcing back-office systems and research software.

8. Mr Browne was the claimant's husband from 6 April 2005 to 24 July 2014. The claimant introduced him to the respondent and he began to work with the respondent on 1 September 2009 as experienced maternity cover for the claimant.

9. The claimant was a company director along with Mr Browne of Browne and Browne IFA Ltd ("Company 1") until around September 2015. Company 1 was incorporated on 30 September 2008.

10. There is another company called Browne and Brown IFA Ltd ("Company 2") which was incorporated on 14 May 2021. The claimant has never been a director of Company 2. The directors are Mr Browne and another individual called Mr D Brown.

2009 agreement

11. The respondent entered into a written agreement with Mr Browne dated 1 September 2009 in which they were described as "Parties". Mr Browne was named as a party personally rather than any company and defined as "the Consultant". The period of the agreement was for nine months unless terminated by either party giving 30 day's written notice or as provided by other terms, which included if the consultant was guilty of gross misconduct. The daily agreed rate was £600 per day for 2 days per week.

12. The contract was signed by Mr Jones on behalf of the respondent and Mr Browne. Mr Jones had struck through the printed name (Mr Tossell) and ensured he signed his own name. Mr Jones told the Tribunal the only reason he could think the contract was in Mr Browne's name personally was due to FAC regulatory reasons whereby the respondent needed a named individual registered with the FCA to provide the financial services.

13. "Services" was defined as *"the consultancy services to be provided by the Consultant more particularly described in Schedule 1."* Schedule 1 provided the definition of services as:

    "To carry out in a consultancy capacity as a directly authorised independent financial adviser, as required by the Firm, independent financial advice in relation to the Firm and its Clients and team management functions on behalf of the firm."

14. Clause 2 provided:

    Term of engagement

    2.1 The Firm shall engage the Consultant and the Consultant shall provide the Services on the terms of this Agreement.

15. Clause 3 provided:

    Duties

    3.1 During the Engagement the Consultant shall:
    (a) provide the Services with all due care, skill and ability and use his best endeavours to promote the interests of the Firm;
    (b) perform the Services under the name 'Hugh James' or such other name as the Firm may choose from time to time;
    (c) promptly give to the Firm all such information and reports as it may reasonably require in connection with matters relating to the provision of the Services; and
    (d) carry out the Services in accordance with the terms and conditions of this Agreement.

    3.2 If the Consultant is unable to provide the Services due to illness or injury it shall advise the Firm of that fact as soon as reasonably practicable.

    3.3 The Consultant shall use reasonable endeavours to ensure that he is available at all times on reasonable notice to provide such assistance or information as the Firm may require and in any event will provide the Services for a minimum of two days per week.

    3.4 Unless it has been specifically authorised to do so by the Firm in writing, the Consultant shall not:
    (a) have any authority to incur any expenditure in the name of or for the account of the Firm; or
    (b) hold himself out as having authority to bind the Firm.

16. Clause 6.3 provided a two year restrictive covenant should the agreement be terminated.

17. Clause 10 provided that M Browne would be insured under the respondent's professional indemnity insurance policies for the provision of the services and was required to comply with all terms and conditions of the policies.

18. Clause 13 provided:

Consultant status

13.1 The relationship of the Consultant to the Firm will be that of independent contractor and nothing in this Agreement shall render him an employee, agent or partner of the Firm.

This Agreement constitutes a contract for the provision of services and not a contract of employment and accordingly the Consultant shall be fully responsible for and shall indemnify the Firm for and in respect of any income tax, National Insurance and Social Security contributions and any other liability, deduction, contribution, assessment or claim arising from or made in connection with the performance of the Services, where such recovery is not prohibited by law. The Consultant shall further indemnify the Firm against all reasonable costs, expenses and any penalty, fine or interest incurred or payable by the Firm in connection with or in consequence of any such liability, deduction, contribution, assessment or claim.

13.3 The Firm may at its option satisfy such indemnity (in whole or in part) by way of deduction from any payments due to the Consultant.

19. Clause 14 provided:

    14.1 The Consultant shall not assign or sub-contract any of his obligations or responsibilities pursuant to this Agreement without the prior written consent of the Firm.

    2017 agreement

20. There was a further agreement entered into a further agreement on 2 September 2017. This was described as a Locum Agreement. This time the parties to the agreement were Company 1 and the respondent and it was for the respondent to provide locum services to Mr Browne. This contract does not bear any relevance to the issues in this claim.

    IR35

21. In 2021 the respondent carried out an IR35 review of the arrangements with Company 1. Mr Jones says the CEST checker showed the arrangement fell outside of IR35 but they have been unable to locate the document. In any event Mr Jones told the Tribunal he did not stand by the contents as he agreed there were some errors with the form.

    Pay and tax arrangements

22. Mr Browne submitted invoices on a month by month basis. He was paid gross with no deductions for tax or national insurance. A summary of the payments was in the bundle in the form of a spreadsheet prepared by the respondent from their financial records. The payments generally were for between £4200 and £4800 per month depending on how many weeks had fallen in that month, with the odd higher or lower amount. I also had sight of some actual invoices. These had the same heading:

Re: Invoice for work carried out by Peter Browne of Browne & Browne IFA Ltd

Please take this letter as an invoice for work carried out in September 2017 for Hugh James Financial Services.

23. The payment was required to be made int to the bank account of Company 1, rather than a personal account of Mr Browne.

Other work carried out by Mr Browne

24. Mr Browne did not work exclusively for the respondent and carried out other IFA work for his own company. In 2017 Mr Browne received dividends of £145,000 and earned £54,500 with the respondent. The claimant agreed that it could not be said Company 1 was a "shell" company set up for the purpose of working solely with the respondent/.

Practical working arrangements

25. Mr Browne was not obliged to work on any given day and managed his own diary. He was free to select the dates and times he worked which would coincide with client demands and what best suited his diary with Company 1. He rarely used the respondent's clerical staff.

26. The respondent provided business cards with Mr Browne's name on and described as Independent Financial Adviser. In another business card he was called a Consultant and then underneath it stated his IFA status. It contained an email address using the respondent's credentials and one mobile telephone number which the claimant told the Tribunal was his only number.

27. Mr Browne attended social events organised by the respondent and golf days

28. In an undated document authored by the claimant (this must have been after 2018 as it references financial figures from that year) the claimant stated:

"*Pete's[1] position within the HJIFA team*

At present Pete generally works two days a week for HJIFA as a Consultant IFA and bills £600 daily for this commitment. He selects the dates and times that he works and these coincide with client demands and what best suits his diary given his other commitments with BABIFA. As a daily rate, this has not changed since he commenced his contract and is a competitively priced contract rate for an IFA. As I am sure you are aware, he has a close relationship with Andrew Harding in his role as Deputy and I have strategically given him this work to do, for the benefit of HJIFA. If I had wanted my personal figures to look better I would have kept this work, however my view has always been that it is what benefits the team and profitability."

29. I also had sight of an email exchange between Mr Browne and a Ms Cromwell of the respondent dated 11 September 2019. The respondent appears to have raised a concern with Mr Browne that he was not using his

[1] Reference to Mr Browne

Hugh James email address when dealing with clients / employees and partners of the respondent. In response Mr Browne states:

So to confirm I have been a consultant at HJ for coming up to 10 years, I also run my own business. I have continuously highlighted that the IT solution (at HJ) for me personally, does not work. The result of which is that I use this email address as opposed to my HJ one.

The reason for this is that, whilst I am contracted to work at HJ 2 days per week, a lot of this work involves me working remotely, working from my office, seeing clients at their homes etc etc. The reality is that I am in the HJ office a couple of times per week, but only for a few hours, generally for meetings.
…….

Due to the fact that the majority of clients / partners (at HJ) I deal with know the situation they always use this email address. So when I do get around to reading my HJ emails the bulk is junk… I am not interested if a purse has been found on the 5th floor, monies haven't been allocated to a client file, its cake day or dress down day… it's never anything relevant to me…

The fact that I missed our meeting today is a perfect example… I never do that… But if I have to read through 200 junk emails to pick up on the one that is actually relevant (been on holiday), it's time consuming to say the least. To clarify, I was in HJ for a few meetings last week, but was too busy to bother with the arduous task of checking my emails (I understand that sounds daft and normally the first thing you do after returning from a holiday is catch up on your emails, but genuinely at least 99% of my HJ emails are junk).

I believe the only resolution is to have a HJ laptop, so when I am not in the office, I have a totally separate computer to do my HJ work. I really don't want one (everything has worked fine for 10 years), but if that works for GDPR then that's fine. Jason tried earlier to set up an account on my iPhone, but HJ IT said no… I won't accept an email divert as I get enough emails relevant to BAB and don't want a 100+ per day of junk clogging up my business email account.

The Law

30. S79 (3) EQA provides:

79 Comparators

(1) This section applies for the purposes of this Chapter.

(2) If A is employed, B is a comparator if subsection [(3), (4) (4A) or (4B)] applies.

(3) This subsection applies if—

(*a*) B is employed by A's employer or by an associate of A's employer, and

(*b*) A and B work at the same establishment.

31. S83 (2) EQA provides:

Interpretation and exceptions

(2) 'Employment' means—

(*a*) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

32. The discrimination definition of employment does not contain the exclusion of the professional or business relationship as in the s230 (3) (b) ERA definition. In **Jivraj v Hashwani [2011] IRLR 827** the Supreme Court applying **Allonby v Accrington and Rossendale College [2004] ICR 1328** held that the definition does not cover independent providers of services who are not in a relationship of subordination with the parties who received the services.

33. In **Autoclenz Ltd v Belcher & Others [2011] UKSC 41** it was held that in the context of employment relationships where the written documentation might not reflect the reality of the relationship that it was necessary to determine the party's actual agreement by examining all of the circumstances and identify the parties' actual legal obligations.

34. The Supreme Court considered limb (b) workers in **Uber BV and others (appellants) v Aslam and others (respondents) [2021] IRLR 407.** Whether a contract is a 'worker's contract' within the meaning of the legislation designed to protect employees and other 'workers' is not to be determined by applying ordinary principles of contract law. The task for the tribunals and the courts was to determine whether the claimants fell within the definition of a 'worker' in the relevant statutory provisions so as to qualify for the rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation. The conduct of the parties and other evidence might show that written terms were an exclusive record of the party's rights and obligations towards each other but this was not an absolute rule.

35. In relation to the issue of subordination at paragraphs 74 and 75:

"In the *Bates van Winkelhof* case at para [39], Baroness Hale cautioned that, while 'subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker.' In that case the Supreme Court held that a solicitor who was a member of a limited liability partnership was a worker essentially for the reasons that she could not market her services as a solicitor to anyone other than the LLP and was an integral part of their business. While not necessarily connoting subordination, integration into the business of the person to whom personal services are provided and the inability to market those services to anyone else give rise to dependency on a particular relationship which may also render an individual vulnerable to exploitation.

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The correlative of the subordination and/or dependency of employees and workers in a similar position to employees is control exercised by the employer over their working conditions and remuneration. As the Supreme Court of Canada observed in *McCormick v Fasken Martineau DuMoulin LLP* 2014 SCC 39, [2014] 2 SCR 108, para [23]:

'Deciding who is in an employment relationship … means, in essence, examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker. … The more the work life of individuals is controlled, the greater their dependency and, consequently, their economic, social and psychological vulnerability in the workplace …'

36. **Pimlico Plumbers Ltd and another (appellants) v Smith (respondent) [2018] UKSC 29.** The Supreme Court held that in order to qualify as a limb (b) worker, it was necessary for Mr Smith to have undertaken to perform personally work or services for Pimlico. In that case there was no express contractual right to appoint a substitute but the Tribunal found his only right of substitution was another Pimlico operative. On the facts the Tribunal was entitled to hold that the dominant feature of the contract was an obligation of personal performance. The limitation on his right to appoint a substitute was significant as it had to come from the ranks of Pimlico operatives, also bound to Pimlico by an identical suite of heavy obligations. It was the converse of a situation where the other party is uninterested in the identity of the substitute provided the work gets done.

37. The 'customer or client' exception was considered in **Byrne Brothers (Formwork) Ltd v Baird and Ors [2002] ICR 667, EAT.** In this case the EAT held the structure of limb (b) in reg. 2(1) is that the definition extends prima facie to all contracts to perform personally any work or services but is then made subject to an exception relating to the carrying on of a "business undertaking". The intention behind the regulation is plainly to create an intermediate class of protected worker who, on the one hand, is not an employee but, on the other hand, cannot in some narrower sense be regarded as carrying on a business. Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services, but with the boundary pushed further in the putative worker's favour. It may be relevant, for example, to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might do so as workers.

38. I was also referred to the authorities:

    United Taxis Ltd v Comolly and another and another case [2023] EAT 93, Cotswold Developments Construction Ltd v Williams UKEAT/0457/05 and James v Redcats (Brands) Ltd [2007] ICR 1006).

    Conclusions

39. I have considered all of the facts before me in order to reach the following conclusions.

40. The 2009 agreement was between the respondent and Mr Browne as an individual person. I was invited to find that this must have denoted an

intention for Mr Browne to have provided the services personally and as such this amounted to an obligation to perform the services personally. There were undoubtedly elements of the written agreement that suggested Mr Browne was required to personal perform the services. Clause 2 provided that Mr Browne, as the Consultant shall provide the services on the terms of the agreement. He was also obliged to perform the services under the name of the respondent and insured through the respondent's insurance policy. It was accepted there was mutuality of obligation (see clause 3.3). There were other features that might be normally seen in a contract to do or perform personally any work or services such as the reference to gross misconduct which is usually language reserved for employment relationship as well as the restrictive covenant.

41. I also considered the fact that the invoices stated that the work was carried out by Mr Browne for Browne and Browne IFA Ltd.

42. I have balanced this against other factors which in my judgment must point to a conclusion that the relationship between Mr Brown and the respondent was one of an independent provider of services in a non sub servient relationship.

43. One factor is in regard to the personal naming of Mr Browne in the contract rather than Company 1. I did not hear evidence as to which FCA Regulations would require a named individual rather than a company name and I do not have judicial knowledge that assists me in this regard. I did however find the wording of clause 13 relevant. This provided that the parties had agreed that Mr Browne was an independent contractor and that the agreement constituted a contract for the provision of services.

44. It is also highly relevant in my judgment that Mr Browne continued to actively market his services as an IFA through Company 1. Mr Pollitt submitted that the fact Mr Browne could work for others was not fatal to the claimant's claim citing Pimlico. In my judgment this case differs as Mr Browne did not reject work from the respondent in favour of finding more lucrative work. Mr Browne ran a highly successful IFA company in his own right and had his own clients which provided for a significantly higher proportion of the company income than from the respondent.

45. The payments from the respondent were paid into the bank account of Company 1 and were treated at all material times as payment for services paid free of tax and national insurance. The monies received from the respondent were treated the same as other payments received for services provided to other clients as Company 1.

46. There was a right to substitute. Whilst this was not without restriction (see paragraph 19) the restriction was not in place to ensure that the claimant personally performed the service. The obvious reason for wanting to approve a substitution was to ensure that an appropriately qualified person provided the authorised services.

47. Whilst Mr Browne may have attended social events and golf days this does not in my judgment assist with the integration test. He was bound by the agreement to represent the respondent at these events and market the IFA services he could offer for the respondent not in his own business right.

48. Whilst there was mutuality of obligations for Mr Browne to work two days per week, by the claimant's own words (see paragraphs 28) he was free to select the date and times that he worked and these coincided with client demands and what best suited his diary given his other commitments with Company 1.

49. I found Mr Browne's own observations on his status as set out at paragraph 29 above to be very persuasive as to both the intention of the parties and the reality of the relationship. Mr Browne did not even want to use the respondent's email address or systems. He refers to himself as a "consultant". He confirms that whilst he is contracted to work at the respondent's two days per week "a lot of this work involves me working remotely". Mr Browne was candid; he was not interested in the day to day goings on at the office as it was not relevant to him at all. He did not want the respondent's emails clogging up his business email. This was a telling observation of the reality of the relationship between Mr Browne and the respondent. In my judgment Mr Browne was an independent provider of financial services. He was in no way in a position of subordination to the respondent.

50. For these reasons I have concluded the claimant cannot rely on Mr Browne as a comparator for her equal pay claim.

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Employment Judge S Moore

Date: 30 July 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 31 July 2024

FOR EMPLOYMENT TRIBUNALS Mr N Roche

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