EMPLOYMENT TRIBUNALS

Claimant: Miss Shahehna Begum

Respondent: Om Erin Ltd t/a Bromptons Opticians

JUDGMENT WITH FULL WRITTEN REASONS

Heard at: London Central Employment Tribunal

In person Hearing

Before: Employment Judge Gidney

On: 3rd, 4th, 5th & 6th September 2024

Appearances

For the Claimant: Miss Shahehna Begum (In person)

For the Respondent: Miss Karen Hanlon (In Person)

JUDGMENT

1. It is the Judgment of the Tribunal that:

   1.1 The Claimant's claim unfair dismissal is dismissed.

   1.2 The Claimant's claim of wrongful dismissal (notice pay) is dismissed.

   1.3 The Claimant's claim for breach of contract (notice pay) is dismissed.

   1.4 The Claimant's claim for holiday pay is dismissed.

REASONS

Introduction & Procedural History

2. On 29th April 2022 the Claimant notified ACAS of a dispute with Bromptons Opticians, the Respondent. She received her Early Conciliation Certificate on the same day, 29th April 2022. By a Claim Form dated 30th May 2022 **[3]**[1] (over 1 month after the Early Conciliation certificate) the Claimant presented the following claims:

    2.1 Unfair Dismissal pursuant to s98(4) **Employment Rights Act 1996** (**ERA**);
    2.2 Wrongful Dismissal / Notice Pay;
    2.3 Breach of Contract / Notice Pay;
    2.4 Holiday pay pursuant to **Working Time Regulations 1998** ('**WTR**')
    2.5 Discrimination arising from disability, pursuant to s15 **Equality Act 2010** (**EqA**).
    2.6 Indirect disability discrimination, pursuant to s19 **EqA**.

3. The Respondent's Grounds of Resistance denied the Claimant's claims **[21]**.

4. The procedural history of the case was as follows:

    4.1 It was first case managed by Employment Judge Glennie on 27th January 2023 **[33]**. He ordered the Claimant to provide better particulars of her disability discrimination claims by 17th February 2023, and to provide an impact statement, GP records and medical reports to establish her disability by 24th February 2023. He noted that it was agreed that the relationship between the parties ended on 1st February 2022 and that a key issue in the case was whether the Claimant, at that time, was an

[1] Numbers refer to page numbers within the Hearing Trial Bundle.

employee, worker or independent contractor. He also noted that, applying s207B(3) **ERA**, it appeared that the time for presenting the Claimant's claims expired on 1st May 2022, and that the Claim Form was in fact presented on 30th May 2022. Finally he recorded the disability relied by the Claimant as the mental impairment of depression and anxiety.

4.2 The matter was next case managed by Employment Judge Khan on 22nd March 2023 **[38]**. The Claimant emailed the Tribunal at 8.25am to state that she would not attend the hearing due to her ill health. She did not provide any supporting medical evidence. The hearing proceeded in her absence. The Judge issued an Unless Order requiring the Claimant to provide the further information ordered by Judge Glennie relating to her claims, by no later than 19th April 2023. On 28th June 2023, following an application by the Claimant, the deadline for compliance with Judge Glennie's Order for further particulars was extended until 13th July 2023.

4.3 On 14th July 2023 the Claimant provided further information of her claims **[41]**. Although outside of the time limit set by Judge Khan's Order, the Tribunal allowed the late submission of the Further Particulars.

4.4 The Case was next case managed by Employment Judge Goodman on 2nd April 2024 **[44]**. She listed the final hearing for this week, 3rd to 6th September 2024. The Judge ordered the parties to produce their witness statements by 9th August 2024. She identified and set out the List of Issues, including the issue of whether the Claimant was disabled. At paragraph 16 of her Orders **[47]** she noted that the Claimant remained in breach of the Order to provide an Impact Statement, GP records and medical reports necessary to establish her disability. The Judge issued the 2nd Unless Order in this case, this time requiring production of the necessary medical evidence by 10th May 2024 failing which the Claimant's disability claims would be struck out without further order.

4.5 On 29th August 2024 (3 working days prior to the start of the hearing) the Claimant applied to adjourn the final hearing on the grounds of her ill health. It was supported by a GP's letter dated 21st August 2024 which referred to a deterioration in her symptoms of anxiety and depression but made no reference to whether or not the Claimant was fit enough to attend and engage in the final hearing. The Respondent wrote on 30th August objecting to the postponement application.

4.6 The Claimant's postponement application was considered and rejected by Judge Glennie on 2nd September 2024 (the day before the hearing). He also noted that the Claimant's claims of disability discrimination had been struck out following the Claimant's non-compliance with the Unless Order of Judge Goodman. Accordingly he kept the hearing in the list but converted it to Judge Sitting Alone, as Tribunal members were no longer required following the dismissal of the discrimination claims.

4.7 On the morning of day 1 of the hearing before me the Claimant renewed her application to adjourn the hearing. She did not have additional or updated medical evidence that spoke to her ability to attend the hearing. For reasons given orally at the start of the hearing I refused the Claimant's application to adjourn. In summary form only my reasons for doing so were as follows:

4.7.1 The Claimant did not produce medical evidence on the issue of whether she was too unwell to attend and engage in the hearing;

4.7.2 Following the dismissal of the disability discrimination claims the remaining claims were far more straightforward and thus allowed for additional adjustments to be made to the hearing to accommodate the Claimant's anxiety without adversely affecting the hearing window;

4.7.3 If the 4 day hearing was postponed it could not be relisted until January 2025 by which time the index events would be three years old;

4.7.4 The Respondent is a small independent Opticians practise that is, and has been, required to close on each day that a Court hearing has been listed;

4.7.5 There was no reassurance that the postponement would improve the Claimant's prospects of being able to attend on the next occasion;

4.7.6 Two and a half years have passed since the Claimant's relationship with the Respondent ended, and both parties are entitled to a fair trail within a reasonable period of time: **Hall v Transport for London** [2024] EAT 26 and **Andreou v Lord Chancellor's Department** [2002] IRLR 728.

4.7.7 Whilst the Claimant attended with inadequate medical evidence, in my judgment she demonstrated an ability to attend and conduct her claim: **Kotecha v Insurety Plc** [2010] All ER (D) 94

The Issues

5. The liability issues to be determined in this case were set out by Judge Goodman **[51]** (excluding the now struck out disability issues) as follows:

Employment status

5.1 As of 1st February 2022, was the Claimant an employee of the Respondent within the meaning of s230 **ERA**? (Unfair dismissal claim, the breach of contract claim and notice pay claim).

5.2 As of 1 February 2022, was the Claimant a worker of the Respondent within the meaning of s230 **ERA** and the **WTR**? (Holiday pay claim).

Unfair dismissal (if an employee)

5.3 Was the Claimant dismissed?

5.4 If the Claimant was dismissed, what was the reason or principal reason for dismissal?

5.5 Was it a potentially fair reason?

5.6 Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

5.7 If the reason was capability, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

Wrongful dismissal / Notice pay (if an employee)

5.8 What was the Claimant's notice period?

5.9 Was the Claimant paid for that notice period?

Holiday Pay (Working Time Regulations 1998)

5.10 Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when her employment or worker status ended?

5.11 How much of the leave year had passed when the Claimant's employment ended?

5.12 How much leave had accrued for the year by that date?

5.13 How much paid leave had the Claimant taken in the year?

Breach of Contract

5.14 Was the Claimant employed as of 1 February 2022?

5.15 If yes, for how long?

5.16 If employed, to what notice was she entitled?

5.17 Did this claim arise or was it outstanding when the Claimant's employment ended?

5.18 Did the Respondent do the following: terminate employment without giving notice?

5.19 Was that a breach of contract?

5.20 How much should the Claimant be awarded as damages?

Reasonable Adjustments to the Hearing

6. Whilst the Claimant was able to engage in the hearing (she gave her own evidence, cross examined the Respondent's witnesses and presented her final submissions) it is clear that she found the hearing stressful. Upon her application and/or of my own motion, I made the following adjustments to the hearing process in order to remove any disadvantage posed by the Claimant's anxiety:

   6.1 The Claimant was allowed to attend the CVP hearing by audio only (not video) for the purposes of cross examining the Respondents witnesses and making her final submissions;

   6.2 On every occasion that the Claimant asked for an adjournment it was granted, for as long as the Claimant had asked for, or for longer;

   6.3 The order in which evidence was given was reversed enabling the Claimant to give evidence last, after the Respondent had given its evidence, in a reversal of the normal running order;

   6.4 The Claimant was given additional time to consider the questions put to her in cross examination;

   6.5 The Claimant was allowed to produce a written witness statement for the first time on the morning of her evidence, despite having not complied with the Order to provide one by 9th August 2024.

   6.6 The Claimant was allowed to produce additional documentation for the first time with her witness statement.

   6.7 The Claimant was allowed to produce additional documentation (a schedule of days worked) after the evidence had closed but prior to her final submissions.

   6.8 I informed the parties at the outset of my oral judgment that I would provide written reasons, to alleviate the stress involved in writing out a note of the judgment as it was delivered.

The Evidence

7. I was provided with the following evidence:

   7.1 an agreed trial bundle prepared by the Respondent which ran to 122 pages, provided in an electronic format;
   7.2 an additional documentation pack from the Claimant, running to 11 pages;
   7.3 A schedule of days worked by the Claimant at the Respondent between September 2020 and January 2021, running to 4 pages.

8. In additional I had access to the Tribunal's Digital Case File which had a full record of the procedural history of the case, not all of which had been included in the Hearing bundle.

9. I provided with the following witness statements:

   9.1 The Claimant's witness statement running to 8 pages;
   9.2 Arpita Patel's witness statement running to 3 pages; and,
   9.3 Karen Hanlon's witness statement running to 2 pages.

10. Finally I was provided with written closing submissions by the Respondent and I heard and carefully noted the Claimant's oral closing submissions.

Findings of Fact

11. I have not recited every fact in this case or sought to resolve every dispute between the parties. I have limited my analysis to the facts that were relevant to the Issues that I was tasked to resolve. I made the following findings of fact on the basis of the material before me, taking into account contemporaneous documents, where they exist and the conduct of those concerned at the time. I resolved such conflicts of evidence as arose on the balance of probabilities,

taking into account my assessment of the credibility of the witnesses and the consistency of their evidence with the surrounding facts.

12. The Claimant first started studying to become a Dispensing Optician with the City and Islington College in September 2015. In order to qualify as a Dispensing Optician, the Claimant was required to seek employment and gain supervision for the duration of her studies and the completion of her traineeship.

13. On 12th August 2017 the Claimant completed a Change of Practice and/or Supervisor Pre-Qualification Experience for Trainee Dispensing Opticians form, that was required by the Association of British Dispensing Opticians (ABDO). It confirmed that the Principal Practice for her supervision as a Trainee Dispensing Optician would be the Respondent, and that her Supervisor would Ms Karen Halon. It confirmed that the Claimant would start on 16th September 2017 **[C1]**[2]. Following a further notification to ABDO on 19th October 2018 Arpita Patel was added as a Supervisor.

14. The parties agree, and accordingly I find, that from 16th September 2017 the Claimant was engaged as an employee of the Respondent on a part-time basis. Her first payslip, issued by Om Erin Ltd was dated 30th September 2017 and covered the 3 days worked in the later part of September, earning £303.75 gross or £243.15 net **[61]**. This equated to a daily rate of £90.00. This arrangement continued though to October 2018. The Claimant's last payslip is dated 31st October 2018 **[70]**. It recorded a gross salary of £1,583.33 equating to a net payment of £1,300.17. The amount of days worked by the Claimant during that period varied between 7 days and 15 days each month. It appears that Bromptons did not provide the Claimant, nor I believe any of its employees with a written contract. I am told that each individual's holiday year starts from the day they join the business as an employee. I was not told how many days holiday each employee was entitled to. During this period of part-time employment with the Respondent, the Claimant commenced a short second employment with Boots from March 2018 until July 2018.

[2] **[C1]** refers to a page number in the Claimant's additional bundle of documents.

15. The Respondent's failure to issue its employees with written statements of terms and conditions (whilst not a claim in this case) is a breach of s1 of the **Employment Rights Act 1996** and unlawful. Whilst I appreciate that the Respondent is a small independent employer, the failure reflects very badly on the Respondent and is indicative of poor employment practices. I expect Ms Hanlon and Ms Patel to address this as soon as possible. The Tribunal will not take this lightly if the Respondent appears here again and written statements of terms and conditions have not been issued to all of its employees.

16. It had become clear to the Claimant by the end of October 2018 that the amount she was earning as a Trainee Dispensing Optician was falling below her salary expectations. The Respondent offered to increase her salary, which equated to a gross annual salary of £19,000.00 to a gross annual salary of £24,000.00. The Claimant refused this offer, as a gross annual salary of £24,000.00 also fell short of the Claimant's salary expectations. An impasse had been reached. I find that the Respondent wished to retain the Claimant's services and continue her supervision, so a solution was proposed by Karen Halon. She explained to the Claimant that she could be paid more (up to about £32,000.00 pa gross) if she changed her status from employee to Locum. As a locum she would no longer benefit from the PAYE tax system used by employees, but would instead submit invoices for any days that she worked and be paid gross, thereafter making her own arrangements for the payment of tax and national insurance. I find that this was the only means by which the Respondent could retain the Claimant and meet her pay expectations. The Respondent instructed its accountants, AEL Markham, to implement the necessary changes. The Claimant accepted this proposal and, accordingly her employment with the Respondent ended on 30th November 2018. The Claimant was issued with a P45 reflecting the cessation of her employment from this date **[71]**.

17. The Claimant has invited me to conclude that the Respondent forced this arrangement on her, or made her switch from employee to Locum. I reject that submission. I find on the balance of probabilities that the Claimant had told the

Respondent that she was not earning enough and that she rejected the offered pay rise to £24,000.00. The Claimant understood that changing her status to Locum was the only way her pay expectations could be met. The Claimant was well aware and accepted that she would no longer be the Respondent's employee. Instead, the Respondent would become her client, a firm to which she would offer her Locum services.

18. Unfortunately, and once again, in further evidence of systematic failings in the Respondent's administration, the new Locum working relationship was not recorded in writing. Had a Locum agreement been drawn up, expressly setting out the status and nature of the relationship, how tax would be paid, how work would be offered and accepted or refused, etc, it is unlikely that this case would ever have been presented. The only written documentation that I have been provided with is the ABDO Training Supervision agreement, referred to earlier and produced by the Claimant **[C1]**.

19. From this point onwards the Respondent would ask the Claimant what days in any month she wished to attend the store as a Locum, and the Claimant would chose the days she wished to offer her services. At the end of each month the Claimant would submit an invoice to the Respondent, her client, for the payment of her Locum services. The first invoice was issued on 30th November 2018 for 18 days work at an increased rate of £120 a day, amounting to £2,160.00 **[74]**. Monthly invoices were then submitted throughout the remainder of 2018 and in 2019. By December 2019, one year after the Locum arrangement began, the parties agreed an increase in the daily rate from £120 to £150. This is reflected in the December 2019 Locum invoice **[84]**. Further Locum invoices were presented in 2020.

20. The Coronavirus pandemic hit the country in March 2020. I understand that the Respondent furloughed its employees. As the provision of eye care was an essential service the Respondent could continue to operate during the national lockdowns. It did so by way of Locum work. In March 2020, for example, the Claimant worked for 16 days **[87]**.

21. It is clear, and I find, that there was no mutuality of obligation between the parties. The Respondent did not stipulate or require a set or minimum amount of days worked per month. The Claimant had complete freedom to choose the dates she provided her Locum services. This is demonstrated by a text/whatsapp exchange on 15th July 2020 **[88]**:

Arpita: *Hey, hn can I have your August dates please?*

Shahehna: *Hi Arpita, I have a revision day on 29th and 30th July and in August* ***I would require*** *22nd and 29th (my emphasis added).*

22. In September 2020 the Claimant photographed a note and sent the image to Arpita. It stated that the Claimant would not work on 3rd, 4th, 5th, 7th and 26th September **[90]**. Invoices submitted for August, September, October and November 2020 claimed Locum fees for 19, 15, 14 and 15 days respectively **[91-94]**. These demonstrate that there was not set number of days stipulated by the Respondent.

23. The Claimant's invoices demonstrate that by February 2021 the parties agreed that the Claimant's Locum day rate charge would increase from £150 to £170.00. A similar booking process was then followed for 2021, in which the Claimant worked to no set pattern and submitted an invoice for her days worked at the end of each month. On 6th September 2021 Arpita asked the Claimant if she could work on 12th and 15th October **[108]**:

Arpita: *Hi Shah hope you're well Hn. Can you work in October on 12th and 15th please? Ax*

Shahehna: *Hi Arpita, I'm good thanks hope you are well. I can do 12th but not able to do 15th unfortunately.*

24. This exchange is indicative of the relationship having no mutuality of obligation, as the Claimant was free to say no. In November 2021 the Claimant the provided Locum services to Adam Simmonds, an independent Optometrist based in Regent's Park Road, on 5th, 6th and 10th November. This further

undermines mutuality of obligation as it demonstrates that the Claimant was free to offer to Locum services to other practices.

25. It was at about this time that the relationship between the parties started to become unworkable. On 22nd September 2021 the Claimant messaged the Respondent in the following terms **[109]**:

Shahehna: *Hi Arpita, I hope you are having a nice day. Regarding dates, November 29th and 30th off. I have decided I will focus on my exams and take some time for my birthday so I will not be available for the month of December.*

Arpita: *Hi Shahehna, so that I am clear, are you saying you will not be working for the whole of December?*

Shahehna: *Yes, that is my intention.*

26. This exchange is wholly inconsistent with an employer/employee relationship. An employee of the Respondent simply could not have said that. The reason for not providing Locum services in December was not ill health, it was simply because the Claimant had chosen to not provide any Locum services for the Respondent.

27. On 27th November 2021 the Claimant submitted to the Respondent what would turn out to be her last ever invoice for Locum services, for 15 days provided in November 2021, at the daily rate of £170, amounting to £2,550.00 **[112]**. On 23rd December 2021 the parties had the following exchange about February 2022 **[114]**:

Arpita: *Hi there Shahehna … I wanted to give you the February dates. Let me know if they work for you? 1,7,8,14,15,18,19,21,22,28.*

Shahehna: *Thanks for the Feb dates I am unable to work on 1st as I will be away from 26th January until 6th February and unable to work 14th and 15th.*

28. On 27th December 2021 Arpita asked the Claimant to let her know what days in January 2022 the Claimant could not do **[115]**. It does not appear the Claimant responded to this message. On 6th January 2022 Arpita followed it up with a further message asking her to confirm that she would be in this month on 7th ,8th ,10th ,11th ,13th, 24th, 25th and 31st **[115]**. The Claimant replied later that day stating **[116]**:

> '*I am sorry for the short notice Arpita. I have not been well and I have been advised strongly by my GP not to return to work and to take the next two months as sick leave to recover with medication. If you require a copy of this, I can provide. I will speak to Abdu regarding my exam. I hope to speak to you mid-February regarding my return to work*'.

29. The Claimant did not provide any more Locum services. Her last services had been provided in November 2021. On 1st February 2022 the Respondent wrote to the Claimant in the following terms **[119]**:

> '*It is with regret that we are writing to inform you that we have decided to withdraw our supervision during your pre-registration. We have notified the ABDO who advised us to write to you directly. We wish you well in your future endeavours*'.

30. On the same day the Respondent wrote to Mark Chandler, the head of Registrations and Examinations at ABDO. The exchange between them was as follows **[119-120]**:

> *'Mark, Thank you for taking my call a couple of weeks ago regarding supervision of Shahehna Begum. As mentioned, we have been left no choice but to stop supervising her from here on and have sent her both an e-mail and letter to express this decision. She was last in practise with us on the 30th of November 2021. Please feel free to call either Karen or myself for any further details. Kind regards Karen and Arpita'.*

'Dear Arpita, thank you for your e-mail and I'm sorry to hear that both you and Karen have not been able to talk to Shahehna. As of today, we will cease she her supervision with you and we have put a note on her contact history confirming this. Thank you again for your e-mail and best wishes, Mark.'

31. We shall turn now to the legal principles relevant to this claim:

The applicable Law

32. As identified by Employment Judge Goodman in the List of Issues that she drafted **[51-57]** before the substance of the Claimant's claims are considered it is necessary to take the important first step of establishing that the Claimant's working relationship with the Respondent had the necessary status required by law for each claim before it could proceed.

    32.1 To proceed with her claims of unfair dismissal, notice pay and breach of contract, the Claimant must have been an employee of the Respondent at the time of the effective termination of any working relationship.

    32.2 To proceed with her claims of accrued but untaken holiday pay the Claimant must have been a worker of the Respondent at the time of the effective termination of any working relationship.

    32.3 If the Respondent was, in reality, at the time of the effective termination of any working relationship, the Claimant's customer or client then the Claimant would not have the necessary status to present any of her claims.

33. The expressions 'employee' and 'worker' are defined in the **ERA** as follows:

> ***230 Employees, workers etc***
> *(1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
> *(2) In this Act 'contract of employment' means a contract of service or*

apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act worker[3] …. means an individual who has entered into or works under (or, where the employment has ceased, worked under) (a) a contract of employment; or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

34. The Tribunal is to adopt a mixed test in considering all of the relevant factors which point to the nature of the relationship. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions**[4] Mackenna J. held:

> *"A contract of service exists if the following three conditions are fulfilled: (i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service. …. The third and negative condition is for my purposes the important one … a contract obliges one party to build for another, providing at his own expense the necessary plant and materials. This is not a contract of service, even though the builder may be obliged to use his own labour only and accept a high degree of control: it is a building contract."*

35. No contract of service should be implied or imposed on the contractual relationship unless it is necessary to do so. If the contract works without such implication or imposition, none should be made. In the judgment of Bingham LJ, as he then was, in **The Aramis**[5] that:

> *"No contract should be implied on the facts of any given case unless it is necessary to do so, necessary that is to say in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in*

[3] 'Worker' is identically defined in regulation 2 of the **Working Time Regulations 1998**.
[4] [1968] 1 All ER 433 at 439I to 440F.
[5] [1989] 1 Lloyd's Rep 213

circumstances in which one would expect that business reality and those enforceable obligations to exist."

36. In **Cable & Wireless v Muscat**[6], the following observation was made:

"The essentials of a contract of employment are the obligation to provide work for remuneration and the obligation to perform it, coupled with control."

37. In **Craigie v London Borough of Hackney**[7] the EAT observed:

*"The court in **Muscat** took that, as I do, to be an express appreciation of the principle referred to in **The Aramis** the inference [of an employment contract] must be a necessary one and not merely a possible or even a desirable one." (My addition).*

38. In **Cotswold Development Construction v Williams**[8] the EAT held:

"[48] It cannot simply be control that determines whether a contract is a contract of employment or not. The contract must also necessarily relate to mutual obligations to work, and to pay for (or provide) it: to what is known in labour economics as the 'wage-work bargain'.
*[54] Regard must be had to the nature of the obligations mutually entered into to determine whether a contract formed by the exchange of those obligations is one of employment, or should be categorised differently. A contract under which there is no obligation to work could not be a contract of employment. It may be a contract of a different type: it might, for instance, be a contract of licence (see **Royal Hong Kong Golf Club v Cheng Yuen** [1998] ICR 131(Privy Council) or even carriage, as was the contract in **Ready Mixed**."*

39. The 'business reality' test assists in determining whether the Claimant is an employee or an independent contractor. I should, in addition to considering the degree of control, also consider the flexibility open to the Claimant in the level

[6] [2006] IRLR 354 at para 35 & 36.
[7] UKEAT/0556/06 at para 13.
[8] [2006] IRLR 181 at paras 48 and 54.

and type of services provided and the permanency of the relationship. The questions have a common theme: Was the Claimant really her own boss[9]?

40. Turning now to my conclusions.

Conclusions

41. As stated, it is only necessary to consider the substantive merits of the Claimant's claims (including whether they were presented in time and whether, if not, time should be extended) after I have determined whether the Claimant had the status to present them, given her working relationship with the Respondent.

42. Applying all of the legal principles to the facts in this case, as I have found them to be, my analysis is as follows:

    42.1 The Claimant's status started as employee. She was paid on a PAYE basis until November 2018 and every aspect of the relationship at that time, pointed to that of employer / employee.

    42.2 In November 2018 the Claimant's employment ended. She was served with a P45 and she switched to providing her Locum services to the Respondent when she wished to. I find that she well understood and accepted the change of status. I go further to find that the Claimant embraced the change, both as a means of both increasing her earnings and as a means of giving her complete control over when she provided her services. She was no longer beholden to the annual leave restrictions on employees and she had complete freedom to decide whether to accept or reject the days offered to her by the Respondents. From that point onwards the Claimant submitted invoices to the Respondent for the days she work she agreed to provide. Whilst she was

[9] **Withers v Flackwell Heath Football Supporters' Club** [1981] IRLR 307, EAT

still subject to the terms of the supervision agreement with ABDO, in every other respect the Respondent had become her client or customer. The Respondent lost the ability to control when the Claimant attended. They were beholden upon the Claimant to take the days she agreed to work.

42.3 The Claimant states in her evidence **[SB10.1]** that she was subject to significant control and mutuality of obligation by the Respondent, who she says, was obliged to provide her with work, that she was obliged to undertake it. This assertion is demonstrably incorrect as the Claimant would refuse any days that did not suit her **[88 & 108]** and told the Respondent she would not provide any Locum services at all in December 2021 **[109]** or January or February 2022. These messages demonstrate that the Respondent had no control over when the Claimant turned up.

42.4 Whilst the Claimant did comply with the Respondent's policies on site and was closely supervised, I find that both of these obligations arose out of the ABDO supervision training agreement that both the Claimant and Ms Hanlon and Ms Patel had undertaken, and not out of any obligation as employer / employee. There was an element of personal service in the ABDO agreement as it did not allow for the supervision to be provided to anybody else.

42.5 The economic reality was that the Claimant was now in control of her earnings and took all of the risks associated with that. She could and did provide Locum services to other practices and she could and did decide when to provide them to the Respondent.

42.6 From the end of November 2021 Ms Hanlon and Ms Patel remained, for ABDO purposes, the Claimant's supervisors, yet she had not provided any Locum services for 3 months. There was no indication when or if the Claimant would offer her Locum services again, and in my judgment it

was entirely proper for the Respondent to inform ABDO that they could no longer provide supervision in those circumstances.

43. In the circumstances it is my judgment that from November 2018 the Claimant was no longer an employee of the Respondent. By February 2022 the Claimant was not working under a contract of employment or anything that resembled it.

44. The ABDO trainee supervision contract was not a contract or agreement between the Claimant and the Respondent and the Respondent has no obligation under it. It was a personal agreement under which Karen Hanlon and Arpita Patel agree to supervise the Claimant, and the Claimant agreed to be supervised. To that extent it had a personal element to perform personally any work or services. However, it is my judgment that the agreement after November 2018 between the Claimant and the Respondent was one of a client or customer of any profession or business undertaking carried on by the Claimant. The Claimant negotiated her rates of pay. She worked when she liked for whomever she liked. During the relevant period, she invoiced the Respondent and Alan Simmonds as her clients.

45. In all of the circumstances of this case, after applying the law to the facts as I have found them, it is the Judgment of the Tribunal that:

45.1 The Claimant's claim unfair dismissal is dismissed.
45.2 The Claimant's claim of wrongful dismissal (notice pay) is dismissed.
45.3 The Claimant's claim for breach of contract (notice pay) is dismissed.
45.4 The Claimant's claim for holiday pay is dismissed.

46. It is not necessary to consider the substantive merits of those claims, or whether they were they were presented time, as I find they all fail at the first hurdle.

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Employment Judge Gidney

6th September 2024

Sent to the Parties on:

13 September 2024

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For the Tribunal: