EMPLOYMENT TRIBUNALS

Claimant: **Ms F Anibijuwon**

Respondent: **Florence Agency**

Heard at: **East London Hearing Centre (by CVP)**

On: **31 January 2025**

Before: **Employment Judge Chivers**

Representation

Claimant: Mr J Neckles, trade union representative
Respondent: Ms C Hayes, Head of People

JUDGMENT

1. The correct respondent is Florence Staffing Limited.

2. The claimant was not an employee of the respondent within the meaning of section 230(1) Employment Rights Act 1996. The Tribunal does not have jurisdiction to hear the claimant's claim of unfair dismissal and the claim is therefore dismissed.

3. The claimant's amendment application remains outstanding and will be considered at a Preliminary Hearing.

REASONS

Introduction

1. The decision was given orally on 31 January 2025 and written reasons having been requested in accordance with rule 60(3) of the Employment Tribunal Procedure Rules 2024, the following reasons are given.

2. The correct respondent is Florence Staffing Limited.

3. The claimant claims that she has been unfairly dismissed. The claimant is a registered nurse and asserts that she was employed by the respondent and was dismissed by them on 1 March 2024. The respondent is an employment business. They say that the claimant was not employed by them.

4. The claimant commenced ACAS early conciliation on 20 February 2024 and ACAS issued a certificate on 2 April 2024. The claimant issued proceedings on 1 May 2024 and a Response was filed on 23 July 2024.

5. The case was listed for a preliminary hearing to determine status. The hearing was originally scheduled for 12 November 2024, but that hearing was postponed. The notice of this hearing was dated 9 October 2024. There were no Case Management Orders issued in respect of documentation and witness statements.

Documents and Procedure

6. I received a bundle of documents from the claimant (of 95 pages), a witness statement of the claimant (3 pages, dated 30 January 2025) and a skeleton argument from Mr Neckles. The respondent did not provide any documents or witness statements. Ms Hayes confirmed that she had received the claimant's documents.

7. I heard evidence from the claimant and Ms Hayes.

8. There were some technical difficulties at the start of the hearing which meant that the hearing did not commence as planned at 10am but slightly later.

9. When the hearing did commence, Mr Neckles confirmed that he had emailed the Tribunal at 09:45 with an amendment application ("the **"Amendment Application"**). He referred to the ET1 referring to the claimant pursuing claims for "*unfair dismissal"* and *"other claims"* and stated that the claimant also complained of whistleblowing. He referred to the first paragraph of box 8.2 in the ET1 as demonstrating that the claimant had referred to whistleblowing in the Claim Form.

10. The hearing was adjourned at 10:35 to find the Amendment Application but without success. The hearing reconvened at 10:45. By consent, it was agreed that the hearing would continue with the Amendment Application outstanding. Judgment was given at 1:30pm. By this time, there was insufficient time to consider the Amendment Application and so this remains outstanding.

11. During the hearing - after the claimant had given evidence and prior to Ms Hayes giving evidence – Mr Neckles objected to Ms Hayes being able to give evidence on the basis that she had not submitted a witness statement or produced any documentary evidence. Mr Neckles said that the claimant was *"prejudiced"* by this. My assessment was that there were no case management orders issued by the Tribunal which did require the parties to submit either documents or witness statements. The respondent did not submit any documents to be considered. I did not take the view that the claimant was prejudiced by the lack of a witness statement. Notwithstanding this, I permitted Mr Neckles time to take instructions from the claimant on matters raised by Ms Hayes in her evidence as appropriate; so, after Ms Hayes had been questioned by Mr Neckles and answered my questions, there was a break to enable Mr Neckles to take instructions from the claimant and, having done this, he was given the opportunity to ask further

questions of Ms Hayes.

Findings of Fact

12. These Reasons do not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues that the tribunal must consider to decide if the claimant succeeds or fails. If I have not mentioned a particular point, it does not mean that I have overlooked it. It is simply because it is not relevant to the issues.

13. The claimant is a registered nurse with twelve years of working experience in private and public health sectors.

14. The respondent is an employment business. They operate an app whereby healthcare clients looking for workers to undertake shifts, post details of available assignments (such as hours of shift and type of work) on this app. Individuals who sign up with the respondent as available for work, log onto the app and are notified of these available assignments when they become available. An individual can then express an interest in doing a particular assignment and once selected by the end user client, the worker is then required to undertake that assignment.

15. The respondent does compliance checks on individuals (for example, right to work checks and checks on qualifications) prior to them being granted access to the pp.

16. The claimant utilised this app to get work. The app would contain details of available assignments from end user clients. The claimant would express an interest in particular assignments through the app. It would then be a matter for the end user client to decide whether or not to hire the claimant. There was limited human interaction in this process.

17. The claimant was issued with a document headed Terms of Engagement for Temporary Workers dated 2 April 2020 ("the **Terms of Engagement**"). She signed this document electronically.

18. The Terms of Engagement define the respondent as the "Employment Business", the claimant as the "Temporary Worker" and the "Client" as the *"person, firm, partnership, company or Group Member (as the case may be) to whom the Temporary Worker is introduced or supplied by the Employment Business."*

19. The Terms of Engagement also provide -

    "...this agreement constitutes a contract for services and not a contract of employment between the Employment Business and the Temporary Worker or the Temporary Worker and the Client." (clause 2.2)

    "...The Employment Business will endeavour to obtain suitable Assignments for the Temporary Worker. The Employment Business is not obliged to offer an Assignment to the Temporary Worker and the Temporary Worker shall not be obliged to accept any Assignment offered by the Employment Business." (clause 3.1)

"The Temporary Worker acknowledges that the nature of temporary work means that there may be periods when no suitable work is available. The Temporary Worker agrees that the suitability of an Assignment shall be determined solely by the Employment Business and that the Employment Business shall incur no liability to the Temporary Worker should it fail to offer Assignments of any type to the Temporary Worker." (clause 3.2)

"The Temporary Worker is not obliged to accept any Assignment offered by the Employment Business." (clause 4.1)

20. The Terms of Engagement do set out a list of obligations on the Temporary Worker in clause 4 and these include to *"co-operate with the Client's reasonable instructions and accept the direction, supervision and control of any responsible person in the Client's organisation"* (clause 4.1(a)), *"comply with all requirements"* of the respondent in the completion and renewal of all mandatory checks (clause 4.1(c)) and not engage in any conduct detrimental to the interest of the respondent or the client (paragraph 4.1(f)).

21. The claimant worked for other parties whilst the arrangement was in place with the respondent; the claimant was not required to work for the respondent exclusively. When the claimant was not working for the respondent, then she was not paid by the respondent.

22. The claimant was paid holiday, and her pay was subject to tax and national insurance. The claimant would submit timesheets and pay would be based on the work done as provided in those timesheets.

23. The claimant was required to undertake the work for clients personally. She could not send a replacement. The assignments were for a maximum of a 12-hour shift.

24. During an assignment, the respondent would have no interaction with the claimant. The respondent could not and did not monitor the claimant's performance or control what the claimant did at the time the work was done.

25. The parties could end the arrangement at any time without notice.

26. There was no minimum obligation of hours that were worked and no obligation on the respondent to provide work.

27. There is functionality for the respondent to restrict the claimant's access to the app – resulting in the claimant not then being able to express an interest in assignments. The claimant was not required to apply for assignments; it was a matter for her as to whether she did so or not. If she did not apply, then her access to the app and her access to potential assignments via the app was totally unaffected. The claimant remained able to use the app and express an interest in assignments as normal.

28. In terms of when access to the app was restricted, this occurred in certain circumstances. It would happen if someone's compliance documentation was no longer upto date or applicable. It could happen if there was a report of a high-risk incident – such as negligently administering medication -

involving the individual which would need to be investigated. It could also occur if an individual, having expressed an interest in doing an assignment and having been hired by the client, subsequently cancelled this without good reason. This caused issues for the respondent because they then had to then get a replacement to cover a shift at short notice. If an individual did this regularly, then this would lead to their account being restricted.

29. The claimant stated that she had had her access to the app restricted, but she said that this had *"not often"* happened and had not, prior to January 2024, happened *"in a while".* I find that the claimant's access to the app was at no stage restricted because she had refused assignments.

30. The respondent did not have a routine appraisal process in place in respect of the claimant. There was no disciplinary or grievance process in place.

31. The respondent did restrict the claimant's access to the app and put the claimant's account *"on review"* in January 2024 following the claimant having been involved in several medication related issues including an incident on 12 December 2024 where it was alleged that medication was not administered to seven residents of a care home. The respondent conducted a *"full review"* of the claimant's account in March 2024 (and this led ultimately to the Terms of Engagement being terminated by the respondent).

32. On 1 March 2024, the respondent wrote to the claimant removing her access to use the app. The respondent confirmed this decision stating -

"I emphasised that Florence is unable to provide practical medication training or conduct competency assessments in practice to be able to assure us that you are working safety."

"...we have made the difficult decision to revoke your access to our platform."

Law

33. An employee is defined in section 230 (1) Employment Rights Act 1996 ("ERA") as *"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment."*

34. A contract of employment is defined (s230(2) ERA) as a *"contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."*

35. In ***Ready Mixed Concrete Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497*** at 515 Mackenna J set out the three conditions necessary for a contract of service to exist.

i. The employee 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 the employer ("mutuality of obligation")

ii The employee agrees, expressly or impliedly, that in the performance of that service he will be subject to the employer's control in a sufficient degree consistent with an employment relationship ("control").

Iii The other provisions of the contract are consistent with its being a contract of service.

36. In respect of mutuality of obligation, there must be an obligation on the employee to do some work and for the employer to pay for that. If there is an obligation to do some work, the fact that an employee is entitled to turn down (some) work is not necessarily inconsistent with mutuality of obligation and the obligation of personal service.

37. In terms of control, in *Ready Mixed Concrete, a*t 515, the court said:

"Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make [an employment contract]. The right need not be unrestricted."

38. Once mutuality of obligation and control are established, a multi-factorial approach must be applied to determine whether, judged objectively by reference to the contract and the circumstances in which it was made, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made and based on facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to the parties.

39. In ***Uber BV and others v Aslam and others [2021] UKSC 5*** the Supreme Court held that when deciding whether someone was a worker it was wrong in principle to treat the written agreement as a starting point. Rather, it was necessary to determine, as a matter of statutory interpretation, whether the claimant fell within the definition of a *"worker".* The Tribunal's findings should be based on the language of the agreement but also the way in which the relationship in fact operated and the parties' evidence about their understanding of it. In ***Autoclenz Ltd v Belcher [2011] IRLR 820***, 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. This principle applies to determination of employee status just as it does to the determination of worker status – ***Ter-Berg v Simply Smile Manor House Ltd [2023] EAT 2 para 47***. In this case, the EAT clarified that in a case where what was the true intention of the parties in reality is a live issue, it is necessary to consider all the circumstances of the case which may cast light on whether the written terms do truly reflect the agreement, applying the broad *Autoclenz* approach rather than stricter contractual principles. The EAT said that a written term stating that a person is not an employee, or worker could not stand if as a matter of fact the person was, nor if the object of the term was to defeat statutory rights. In the absence of these circumstances, it is however legitimate to have regard to the way in which the parties have

chosen to categorise the relationship, and in a case where the position is uncertain, it can be decisive.

Submissions

40. Mr Neckles submitted a skeleton statement and referred to the *'considerable overlap'* between determining the status of individuals as employees or workers following the decision of the Supreme Court in ***Uber BV and others v Aslam and others (2021) ICR 657.***

41. Mr Neckles referred to the tests sets out in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance (1968) 1 All ER 433*****, QB** and to the reference in ***Autoclenz Ltd v Belcher and others (2010) IRLR 70*** about these tests being the *"classic description of employment".* He also referred to the need for an *"irreducible minimum of obligation on each side"* in order to create a contract of service as set out by Stephenson LJ in ***Nethermere (St Neots) Ltd v Gardiner and Anor (1984) 240*** and the comments made in ***Carmichael v National Power (1999) ICR 1226, HL*** that a lack of obligation on one party to provide work and on the other to accept work would result in *"an absence of that irreducible minimum of mutual obligation necessary to create a contract of service."*

42. Mr Neckles submitted that there was a need to consider not just the written documentation but to evaluate the factual circumstances in which the work was performed and consider the intention of the parties. Mr Neckles quoted further passages from *Autoclenz* and also from ***Brook Street Bureau (UK) v Dacas (2004) EWCA Civ 217.***

43. In his skeleton argument, which was provided to the Tribunal prior to evidence being given, Mr Neckles asserted that the claimant was an employee based on:

44.1 the *"written contract of employment at paragraph 2.2"* which *"sets out the factual relationship between the claimant and the respondent and is consistent with her having employee status";*

44.2 the payment of a monthly retainer to the claimant which was *"consistent with the payment of wages as opposed to a fee for services rendered"* because they were generally the same amount;

44.3 the degree of control exercised by the respondent over the claimant particularly in the latter part of 2024 when the quality of the claimant's written output had declined and the respondent *"decided that she required additional medication, medication administration theory training"* before being permitted to return to work;

45.4 payment of holiday;

45.5 her engagement on a *"virtually daily basis to provide services"* as against *"a genuine freelance one"* where there would have been *"an expectation that there would be periodic gaps in the provision of the services";*

45.6 the reality of the situation rather than the label the purported employer seeks to place on it given that the claimant was clearly in a subordinate position in terms or status in the negotiation of her terms.

44. For the respondent, Ms Hayes repeated the stated position of the respondent that the arrangement was a contract for services and nothing more.

Analysis and Discussion

45. My assessment is that there is no employment relationship between the claimant and the respondent.

46. In taking this view, I have had regard to the Terms of Engagement but have considered the content of this document in the context of the comments made in both the *Uber* and *Ter-Berg* cases and not restricted my enquiries to this document.

47. My view is that there was no mutuality of obligation between the respondent and the claimant. The claimant registered to apply for assignments on the app. If an assignment was posted on the app which the claimant wished to undertake, then the claimant would express an interest for that assignment. It would then be upto the end user client as to whether to hire the claimant for that assignment or not. The assignments were for a maximum of a 12-hour shift. There was no obligation on the respondent to post assignments which may be of interest to the claimant. Indeed, whether the claimant was hired for any assignment was for the end user client not the respondent. There was no obligation on the claimant to express an interest in any assignment which was posted; it was entirely a matter for her. There was no consequence to the claimant if she did not express an interest in an assignment (other than not being paid for the assignment). It was not the case that the claimant was penalised by being prevented or having reduced or restricted access to future assignments. The claimant remained free to express an interest in any assignment as she wished.

48. I make this assessment whilst acknowledging that the claimant's access to the app could be restricted but other than for compliance issues, this would only occur if the claimant, having expressed an interest in an assignment and then been booked for that assignment by a client, subsequently cancelled the assignment without good reason. It could also be restricted – as it was in January 2024 – if there were concerns reported to the respondent by an end user client. Prior to this, no occasions were identified when the claimant's access to the app was restricted.

49. I do not consider that there was sufficient control by the respondent over the claimant to establish an employment relationship. The actual involvement of the respondent in the claimant's activities once an assignment was booked was limited. The claimant would express an interest in an assignment and if the client wanted the claimant to undertake the assignment, then the claimant would be booked to do it. The respondent was not involved in this other than to ensure that the claimant had the requisite qualifications and credentials in order to be permitted access to

the app in the first place and that these qualifications and credentials were upto date.

50. There was no monthly retainer paid to the claimant. The claimant was paid for the assignments she undertook. If she was not working for clients through the app, then she was not paid by the respondent. The monies the claimant was paid depended on the assignments that she worked. She was free to work and did work for other clients. I acknowledge the claimant was entitled to holiday pay and paid national insurance and tax on monies received but this does not alter my view that there was no employment relationship between the claimant and the respondent.

51. In the circumstances, my decision is that the claimant was not an employee under section 230(1) ERA and so the claimant's claim of unfair dismissal fails.

52. The Amendment Application remains outstanding and will be considered at a separate hearing.

Employment Judge Chivers
Approved on: 5 February 2025

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