EMPLOYMENT TRIBUNALS

Claimant: Mrs Helen Johns

Respondents: Dawn Bibby Productions Limited (1)
Miss Dawn Bibby (2)

Heard at: Bury St Edmunds (by video)

On: 17 May 2023

Before: Employment Judge C H O'Rourke

Appearances
For the Claimant: Mr D Jones - counsel
For the Respondents: Ms P Douglass – HR consultant

RESERVED PRELIMINARY HEARING JUDGMENT

1. The Claimant was a worker, but not an employee of the Respondents.

2. The Claimant's claims of constructive unfair dismissal and arrears of notice pay and Furlough Pay are dismissed, for want of jurisdiction.

3. The Claimant's claims of arrears of holiday pay and pension contributions and of a failure to provide a s.1 ERA statement of terms and conditions will proceed to hearing.

REASONS

Background and Issues

1. The Claimant worked for either the First or Second Respondent (or possibly both), from September 2019, until the termination of her contract, at her choice, with effect 30 November 2021. Her role was described by all three parties as '*assistant'* to the Second Respondent (R2).

2. The Respondents are engaged in the sale of craft products, using TV and the internet to generate sales. R2 (Miss Bibby) started the business, subsequently incorporating the First Respondent (R1).

3. The Claimant has brought claims of constructive unfair dismissal, breach of contract in respect of pay in lieu of notice, unlawful deductions from wages, arrears of holiday pay and a failure to provide written terms and conditions of employment, compliant with s.1 of the Employment Rights Act 1996 (ERA).

4. The Respondents contend that she was neither an employee nor a worker and was instead a self-employed contractor and that therefore the Tribunal does not have jurisdiction to consider her claims.

5. This Public Preliminary Hearing was listed to decide the following:

    a. Was the Claimant an employee of either or both Respondents within the meaning of section 230 of the Employment Rights Act 1996? or

    b. Was the Claimant a worker of either or both Respondents within the meaning of section 230 of the Employment Rights Act 1996?

6. The Claimant asserts that she was an employee of Miss Bibby throughout.

7. Hearing Process. At the conclusion of the evidence there was insufficient time for the parties to make closing submissions and it was agreed that they would be provided in writing by no later than 1 June 2023 (and with which they did comply), after which this Reserved Judgment would be provided. It was agreed that if it was decided that the Claimant was an employee, a 'standard' two-day listing would be needed, or instead, if a worker, one day.

The Law

8. Section 230 ERA states:

(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" (except in the phrases "shop worker" and "betting worker") 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;

and any reference to a worker's contract shall be construed accordingly.

9. The Claimant's counsel referred to a range of authorities, to which I shall refer, as I consider appropriate, below.

The Evidence

10. I heard evidence from the Claimant. On behalf of the Respondents, I heard evidence from Miss Bibby; Mr Stuart Bestwick, who had asked the Claimant to quote for work on his company's website; Ms Ute Johnson, a Design Team volunteer with the Respondents; Ms Janette Sleeman, another volunteer; Ms Denise Holmes, another volunteer; Ms Sharon Ianuzzi, R1's Design Team Manager and Mr Matthew Stringer, a director of a company doing business with R1.

11. The Claimant's evidence can be summarised as follows:

    a. She started work with R2 as an assistant and after R1's incorporation in April 2021, she continued in that role, also becoming the Company Secretary. She was recruited via an advertisement on R2's Facebook page [separate document], stating that she '*may soon need an assistant … someone to help me with show prep and general admin … bit of everything really and flexible on when they can work …'*.. When she applied, she said that she had been a general manager of an import business for nineteen years, dealing with buyers, logistics and accounts [55]. No form of express contract was drawn up between the parties.

    b. The working relationship was a close one and she was in a position of trust, but she had limited freedom in how she delivered work. She considered herself micromanaged, giving several examples. Her duties were broad and she was expected '*to muck in with everything'* and was described by R2 as her '*right hand girl'*. The role was initially part-time but developed to full time. She became an essential part of the business. She was asked when she had decided that she was an employee and she said '*after about a month or six weeks, when I realised the extent of the role.'* She was challenged as to her assertion of being 'micromanaged' and said messages [71] indicated examples of her being requested to do tasks. She disagreed that this was simply evidence of her taking it upon herself to do various jobs.

    c. Early on in her employment she needed and was provided with training.

d. The role became very personal to her skills and her experience and she had to undertake it personally and could not outsource it.

e. Her rate of pay, at £10 per hour, was set by R2, without negotiation. She was challenged as to whether to or not she could have negotiated this figure and said that she '*didn't feel I could.'*. She was paid for travel time, but not travel expenses. She said that she was reliant on that income.

f. She was entitled to a 'staff discount' [121]. She disagreed that everybody, including non-employees, such as volunteers, got the discount and she that that was '*a perk for the volunteer roles'*, with that being described for them as a '*design team discount'* (as opposed to 'staff').

g. Following a dispute between the Claimant and R2 in April 2021, the Claimant resigned [125]. She was offered a pay rise, to £12 per hour and a profit share from the website [159] and retracted her resignation.

h. Over the period September 2019 to March 2020, her working hours/days varied from 10 to 20 days a month. She was paid by the hour and invoiced at the end of each month, but she simply regarded these documents as timesheets [e.g., 200]. She was challenged on this interpretation, as the invoices included the phrase '*thank you for your business'* and provided her payment details. She said that this was the only way she could get paid and that the '*thank you'* was an automatic insert on the document. She was responsible for filing her own tax returns, for which she used her own software 'QuickBooks – self-employed', claiming as a self-employed person. She also claimed for and received two 'self-employment Income Support Scheme' grants in April and September 2021 [194]. She sometimes worked very irregular hours, to suit R2's lifestyle (she has fibromyalgia which results in her having difficulty sleeping). If tasks needed to be done, she had to stay to complete them, which, if she had the choice, she would not have done, as she had caring responsibilities. She was challenged on this point, it being suggested that it was her choice to do any such additional hours and she said that '*I was conscious that the work needed to be done. I was dedicated and there was nobody else to do it.*' She denied that she chose her working hours based on the work that needed to be done and to suit her own arrangements.

i. She agreed, in cross-examination that her work tailed off, initially at least during Covid lockdown. When it was suggested that she was ineligible, at the time, for a furlough payment, as she was not on PAYE (a prerequisite of the Furlough scheme) she said that she continued to do some work and therefore would have been ineligible, in any event, because of that.

j. She was not aware she could have taken holiday, but always asked R2 for permission to take time off [122]. She agreed, in cross-examination that she knew the difference between employment and self-employment and was challenged, therefore, as to how she could say this, when she had been an employee in the past. She said that she had never been told she could take paid holiday. When it was put to her that holiday is a statutory right, she said that she'd had no contract. When it was

suggested that this was something she could have raised with R2, she said that she '*didn't believe I was entitled to it at the beginning'*.

k. She did have other work, as a Slimming World consultant, which she had been doing since May 2018, before joining R2 and which she was able to fit in with her work for the Respondents and with which they agreed, '*on the condition that I must complete all work required of me*.' She and her husband also ran an eBay business [55]. She said that she and R2 had discussed her role in Slimming World, and it was suggested that she told R2 that she was '*self-employed'* and that she '*wanted considerable flexibility*'. She denied that, stating that her role with Slimming World was a fixed commitment. She agreed that her role with the Respondents was not described by R2 as employment and that she did not ask if that was the case and instead was '*told to invoice as a self-employed role'*. When asked why she had not sought clarification, she said that she was keen to take on the role and didn't know the extent of the job and that being told she was self-employed was not up for negotiation. She said that she would '*have preferred an employed role and was not happy as self-employed, but I really wanted the role. I believed I was helping her by making it easier for her without PAYE.*'

l. She could not refuse any tasks.

m. Following the Respondents acquiring an industrial unit, in January 2021, she worked from both there and home.

n. She used the Respondents' equipment, less her own laptop and mobile phone. With regular contacts she used her own phone and email address, but when communicating with other third parties, she had use of a company mobile phone and used a company email address. She denied that it was her choice to continue to use her own phone and number and email address, stating that there was no other option at the time. Her business card described her as '*Assistant to Dawn'* [94].

o. Over time and particularly during the Covid period, the Respondents' business increased, and the Claimant's hours also increased, which she could undertake, as her work for Slimming World had declined.

p. On 29 March 2021, she also began working for Sarah Payne Studios Limited, but only on the basis that it did not impact on her work for the Respondents. That relationship continues. She agreed that that work was and is being done on the basis of her being a self-employed consultant. It was pointed out that she had done quite a bit of work for that business in April to October 2021 [monthly invoices 308 onwards] and was asked whether the Respondents were aware of this, and she said that they were not. She also carried out some work for Mr Stringer's business, for which she invoiced him directly [107]. She said that she had to do this to get paid and that R2 was fully aware of the arrangement, as it would be of benefit to her business. She also agreed that she had told him that she '*had plenty of time spare'*. She was asked whether she had ever asked the Respondents if this was ok, based on her assertion that they were her

employer and she said that '*it was like having an ad hoc bar job, to get extra money'.* She was further pressed as to whether she would ask the Respondents if the work was to be for a similar business and she said that the businesses were similar, but the work was different. She agreed that she had also done work for a Mr Laurie, a colleague of R2, who had asked her for help [72-80] and that she had not told R2 of this, as Mr Laurie had '*said he didn't want R2 to know*'.

q. She resigned on 20 October 2021, citing a breakdown in trust and confidence [133]. She agreed that she had experience of previous resignations, as a former employee, and was challenged therefore as to why, in her email, she had referred to '*terminating the working agreement between us'*, rather than simply say 'I resign'? She said that she had done so '*on legal advice, as I didn't have a contract, which implied a 'working agreement'.'* She also agreed that she had not demanded arrears of holiday pay, for the same reason. She was asked whether, at that point, she believed herself to be self-employed and she said that she '*didn't believe so, as she was submitting tax returns*. Rather contradictorily, she then went on to state that she had in fact decided that she was an employee, '*two years before'*. When asked if she had ever discussed that belief with R2, she said that they had '*had various conversations, but there was no evidence'* and that when she '*attempted to bring up this issue, she was shot down*' (also, she agreed, subsequently that these latter incidences related to discussions about others). She also agreed that it was an '*omission'* on her part not to have referred to such discussions in her witness statement, particularly in the absence of any contractual documentation or even any lengthy documentary evidence as to the nature of the contractual relationship. She said that the many requests she received from R2 following her departure, for assistance with IT etc. indicated the degree of her integration.

12. The Respondent's evidence can be summarised as follows (firstly that of R2):

a. From the outset, the Claimant wanted flexible working hours to fit around her Slimming World commitments, also her and her husband's eBay business and her caring responsibilities.

b. The Claimant told her that she wished to remain self-employed, so that she could set her own hours and would invoice for her time. R2 accepted that she had titled the Claimant as her '*assistant'*, for the purposes of introducing her to others, rather than as a 'consultant'. She agreed that the Claimant was not a 'supplier' to her business. She denied that the true reason she described the Claimant as 'self-employed' was to save having to arrange PAYE and deal with HMRC and said that it was the Claimant's choice and that she had never refused to take her on as an employee.

c. The Claimant chose her own hours of work and told R2 when she was going to work and when she wasn't, over which R2 had no control. It was the Claimant's choice to work a large number of hours, as that suited her. R2 had to '*right from the start … had to ask her if she was free and when'* [55-57, 99 and 125]. It was the Claimant's choice, for example, to work in

the evenings and when R2 asked her about whether she might not prefer to be at home with her husband she said that she needed to earn money and '*she might as well do it when her husband was sleeping.'* R2 was challenged as to her comment [54] that '*it's flexible, as long as we get the work done'* and was asked what if the Claimant didn't do it and said that '*if she didn't do it, I would – she told me she had her own company and priorities.'* She said that when there were deadlines, imposed by the TV station, they would be met by either the Claimant or herself.

d. The Claimant was not obliged to be at R2's home or premises at any specific time unless it was agreed in advance. Nor did R2 know when the Claimant was there, or not, trusting her to be honest. She said that the Claimant had never called in sick, although she did accept at the end of the relationship, there was reference by the Claimant's husband to her being sick, due to her (R2) seeking the lap top log-in details, which the Claimant would not provide.

e. As to substitution, R2 said in answer to a question as to what would happen if the Claimant had sent somebody else to do her work, that '*she could have done so – her sister replaced her own one occasion and her husband also helped.'* A substitute, she said, would have been able to pack goods and post them.

f. It was suggested to R2 that the Design Group of volunteers (who worked in return for free craft work) were distinct from the Claimant's role, as she worked much more closely with R2. R2 said of the Group that they were essential to her business and she '*couldn't do the job without them'* and that it '*was scratch my back etc.'*. Her references to a 'staff discount' were general ones, meant to cover a range of people, who might include friends. She did not distinguish, in this respect, between the Design Group and the Claimant, or anybody else.

g. R2 knew that the Claimant had other clients, which she considered was nothing to do with her and was the Claimant's '*prerogative'*. This included work for a direct competitor of the Respondents, Mr Beswick of Oakwood Archer Ltd, in early 2021, which, if the Claimant had been an employee, the Respondents would not have permitted her to do. R2 accepted that it was possible that employees could work for others, such as in the example used of pub work, but not where there might be conflicts of interest and certainly not in secret. The fact that the Claimant was asked not to tell R2 implied that she herself perceived some conflict.

h. The 'company' mobile phone referred to by the Claimant was an old pay as you go model, used in the business premises for business calls. It was not provided *to* the Claimant, who used her own phone (for '*99% of calls out'*), as well as her own email address. When business cards were drawn up, she insisted that they should have her personal phone number and email address [88]. The cards were created for a business trip to Frankfurt, to create the right impression to third parties. The Claimant was given a business bank card, as she needed to be able to pay for postage

and keys to the unit, as without them she couldn't get access. She accepted that the Claimant had been '*a key part of the business'*.

13. Mr Bestwick's and Ms Johnson's statements were unchallenged. In brief summary, they said the following:

    a. Mr Bestwick said that when, in February 2021, he asked the Claimant to quote for a new website, he asked her if she would be able to do so '*in conjunction with her work with the Respondent'* and that she '*said that it was not a problem as she was a freelance contractor and not employed.'* She subsequently invoiced his Company and was paid for her work.

    b. Ms Johnson said that the Claimant had told her '*repeatedly that she was self-employed with Slimming World … as well as self-employed* (with the Respondents)'. She also said that the Claimant told her that '*she would not work in this position as an employee ever … and that being self-employed was a godsend because she could walk away any time if she wanted to*.'

14. Ms Sleeman's evidence is summarised as follows:

    a. She was a member of the Design Team. She also referred to the Claimant stating to her that she preferred being 'freelance', due to her other commitments.

    b. She had been offered a part-time job by R2 in July 2020, '*on the same basis as Helen on a self-employed basis, but it didn't suit my needs at the time.'* She denied the challenge that she had not in fact been offered this role, as the Claimant had not wanted her to have it. She confirmed that she had been offered it but turned it down '*as it was offered on a self-employed basis.'*.

15. Ms Iannuzzi was also a Design Team member. She said that the Claimant told her of her work with Sarah Payne but didn't want R2 to know. When it was suggested that the Claimant can't have been too concerned about that information getting back to R2, as otherwise she wouldn't have told Ms Iannuzzi, she said that she '*regarded the Claimant as a friend and confidante and knew that she trusted me'*.

16. Mr Stringer's evidence was as follows:

    a. He had asked the Claimant to do work for his Company, as he understood her to be a freelance contractor and she had never said anything to the contrary.

    b. The work she did for him was on the same basis.

    c. He overheard her talking to Mr Bestwick, describing herself as 'freelance' and that she could work for him, whilst continuing with '*her other freelance work'*. He also overhead another call from the Claimant's mother, where she reassured her that she could change her hours to take her to a hospital appointment, as she was freelance.

d. He was challenged as to his past use of the term 'employed' in relation to the Claimant and said that that was a slip on his part.

Submissions

17. Both parties provided detailed written submissions, which I will consider in my conclusions below.

Conclusions

18. I set out first the legal principles applicable to this case:

a. The guidance in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions [1968] UKHC 2 QB 497**, established the 'multiple test' used to determine employment status and which established an 'irreducible minimum' to establish a contract of service to be:

i. Control;

ii. Personal performance; and

iii. Mutuality of obligation.

b. This test was further considered and narrowed in **Autoclenz Limited v Belcher and others [2011] ICR 1157 SC**, to:

i. Did the worker agree to provide their own work and skill in return for payment (the Court approved the first-instance decision that in the absence of any evidence of a substitution provision, it could be inferred that it was never intended that there be substitution);

ii. Did the worker expressly or impliedly agree to be subject to a sufficient degree of control for the relationship to be one of employer and employee; and

iii. Were the other provisions of the contract consistent with it being a contract of service?

c. Tribunals are encouraged to step back to take the 'big picture' view (**Hall (Inspector of Taxes) v Lorimer [1993] EWCA ICR 218**).

d. The Claimant's counsel also referred to the following authorities:

i. **Pimlico Plumbers Ltd v Smith [2018] ICR 1511 SC** which emphasised that personal performance is a necessary constituent for a contract of employment (and by implication to also show 'worker' status).

ii. **Redrow Homes (Yorkshire) Ltd v Wright [2004] ICR 1126 CA** indicates that determining whether a contract includes an obligation of personal performance is a matter of construction and is not necessarily dependent on what happens in practice, where, for

example, it might be the case that while work is done personally that does not follow that there is an undertaking to that effect.

iii. In **Byrne Brothers (Formwork) Ltd v Baird and Others (2002) ICR 667 EAT**, the EAT gave guidance on what it termed this "*clumsily worded exception*". It held that the intention was clearly to create an "*intermediate class of protected worker*" made up of individuals who were not employees but equally could not be regarded as carrying on a business. According to the EAT, "*the essence of the intended distinction [created by the exception] must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves*". The EAT indicated that the effect of s.230(3)(b) ('limb (b) cases) was to '*lower the pass mark'*, to bring those providing personal service, but who did not meet the test for employment, within the protection of 'worker' status.

iv. The level of integration of the person into the business will often be relevant in determining whether they are a 'worker' or 'self-employed' (**Hospital Medical Group Ltd v Westwood [2013] ICR 415 CA**).

v. Whether or not the Claimant requested to be treated as self-employed does not prevent her later claiming that the relationship was actually that of employment (**Smith v Goodmayes Insulations Ltd EAT 55/97**) and she can resile from any prior agreement (**Young and Woods Ltd v West [1980] IRLR 201 CA**).

vi. 'Control' is a matter of degree: as stated in **Catholic Child Welfare Society and ors v Various Claimants and Institute of the Brothers of the Christian Schools and Others [2013] IRLR 219, SC**, the notion of control has moved on from the time when the relationship of employer and employee could correctly be described as 'master and servant'. In the Court's view, it is no longer "*realistic to look for a right to direct how an employee should perform his duties… Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus, the significance of control today is that the employer can direct what the employee does, not how he does it*."

Conclusions

19. Employment Status. I find that the Claimant was not an employee of the Respondents, for the following reasons:

    a. The '*irreducible minimum'* of **Ready Mixed Concrete** is not met, in respect of mutuality of obligation. All the evidence indicates that the Respondents had no obligation to provide work and pay a wage or salary to the Claimant, and the Claimant did not have a corresponding obligation to

accept and perform the work offered. She frequently turned down invitations to work, valued the flexibility the arrangement offered her and freely discussed the benefits with others. The Claimant seeks to rely on **St Ives Plymouth Ltd v Haggarty EAT 0107/08**, where a course of dealing had given rise to an expectation that Mrs Haggarty would be available for a reasonable amount of work and she expected to be offered such work, such expectation creating an 'umbrella contract' of employment between the parties. However, I distinguish that case from the one before this Tribunal, for the following reasons:

i. Mrs Haggarty was a bindery assistant working for a printing company, which had both permanent employees and a pool of casual workers, of which she was one. Unlike the Claimant in this case, she had little or no 'bargaining power', beyond the ability to refuse offers of work. The Claimant, in contrast, effectively dictated her own hours of work and the balance of power was very much in her favour.

ii. In the event that a member of the casual pool refused an offer of work, the Company simply approached another 'casual', or engaged an agency worker, greatly reducing, therefore, the effect on them of a refusal by Mrs Haggarty. In this case, however, a refusal by the Claimant could cause real difficulties for the Respondents, in meeting tight deadlines. It was clear from the evidence that had the Respondents been able, somehow, to impose mutuality of obligation on the Claimant, they would have wished to, but were unable to do so.

iii. Mrs Haggerty '*rarely, if ever*' refused shifts, which was not the case with the Claimant.

iv. Mrs Haggerty's role was open to comparison with those of permanent employees, creating the option for her of favourable comparison as to employment status, whereas the Claimant had no such comparator. The print company also engaged agency workers, to supplement the casual pool, thus creating a sub-strata of 'workers', against which Mrs Haggerty could also favourably compare herself, which again was not the case for the Claimant.

v. The first-instance Tribunal considered the case a '*highly marginal*' one, which decision the EAT, by a majority, upheld, finding that the '*decision was one for the employment judge and we cannot say that he erred in law.*' I don't consider, therefore that this authority binds me, in the context of the factual matrix of this case.

b. It was clearly never the Claimant's intention that she be an employee. She had considerable employment and business experience and understood the difference between being an employee and not being one. The unchallenged witness evidence of the Respondents' witnesses was that she frequently described herself as 'self-employed' and indeed valued and benefited from that status. The letter terminating her engagement clearly

indicated that she did not consider herself an employee, even at that point. While the Claimant seeks to rely on the authorities of **Smith v Goodmayes Insulations Ltd** and **Young and Woods Ltd v West**, as to resiling from (as I have found) her stated preference to be 'self-employed', the circumstances in those cases are distinguishable from this one. In **Smith**, the claimant had been offered at the outset of his engagement the choice of being an employee or being 'self-employed' and he chose the latter, for tax advantage. In **Young**, the claimant had been an employee, from the outset, but had subsequently requested of his employer to be treated as 'self-employed', again for tax advantage. The EAT and Court of Appeal found, in both cases that regardless of the 'appearance' of self-employment, the 'reality' was in fact that these claimants were employees and the fact that they had 'purported' to have another status could be resiled from. There were also public policy considerations in parties being prevented from contracting out of the protection of employment legislation. In this case, however, those circumstances do not apply. There was never any possibility of the Claimant opting for employment status and she had not been initially an employee, who subsequently chose to change her status to self-employed. Nor was it the case that she chose self-employment solely for tax reasons, but instead, as she said herself, for the flexibility it afforded her, in working for the Respondents and for others. This was no sham arrangement for the purpose of paying less tax, but a genuine and stated preference by the Claimant from which, I consider, she cannot resile.

20. Worker Status. I find that the Claimant was, however, a 'worker' for the Respondents, for the following reasons:

    a. She was recruited as an individual, for her experience and expertise and apart from a few exceptional occasions, provided her services personally to the Respondents, throughout her engagement. There was no written contract and accordingly no substitution clause and it can therefore be inferred that such a facility was never the intention of either party (**Autoclenz**). In any event, it is clear that the Claimant's skills and experience could not have been replicated by any substitute and that therefore it was her personal service that was required.

    b. She was thoroughly integrated into the Respondents' business, in a position of great trust and dependence, to include being Company Secretary of R1 (**Westwood**).

    c. The work she did for the Respondents took the bulk of her time and provided her the bulk of her income. She was not a consultant, who might perhaps dip in and out of businesses, for specific projects, but thoroughly engaged in the Respondents' business.

    d. The Respondents did exercise 'control' over the Claimant, to the extent as established in **Catholic Child Welfare Society**. While the Respondents (in particular R2) did not, as the Claimant asserted, '*micromanage'* her, R2 did allocate her tasks, leaving her to get on with them, but still exercising overall control and deciding priorities.

e. Working for others, at the same time as working for the Respondents is not precluded by 'worker' status and indeed will be very common for many workers, in the modern 'gig economy'.

f. The Respondents were not a '*client or customer of any profession or business undertaking'* carried on by the Claimant. She was not in 'business', or in a profession, but was offering her personal expertise and abilities as services to the Respondents, as opposed, perhaps to forming a company to provide those services.

g. She was presented by the Respondents to third parties as R2's 'assistant'.

h. I don't consider that the Claimant's self-description as 'self-employed/freelance' precludes her from claiming 'worker' status, given the uncertainty (even in legal circles) of such terminology and which will be all the more so for the lay person.

i. There is no contractual documentation to the contrary.

j. The authorities indicate that the 'pass mark' is lower for worker status, than for employment (**Byrne Brothers**).

Judgment

21. The Claimant was a worker, but not an employee of the Respondents.

22. The Claimant's claims of constructive unfair dismissal, notice pay, and Furlough Pay are dismissed, for want of jurisdiction.

23. The Claimant's claims of arrears of holiday pay and pension contributions and of a failure to provide a s.1 ERA statement of terms and conditions will proceed to hearing.

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Employment Judge O'Rourke

3 June 2023

Sent to the parties on:

5 June 2023
For the Tribunal Office:

GDJ