EMPLOYMENT TRIBUNALS

Claimant: Ms L Charles
v
Respondent: Tina Euri Ltd t/a Moving Waves

Heard at: London South (via CVP) **On:** 7 June 2024

Before: Employment Judge Fredericks-Bowyer

Appearances
For the claimant: In Person
For the respondent: Mr L Fakunle (Solicitor)

RESERVED JUDGMENT ON PRELIMINARY ISSUE

1. The claimant was an employee of the respondent from 4 September 2017 until her effective date of termination on 7 July 2023. She has the standing to bring complaints of unfair dismissal and failure to pay holiday pay.

2. Liability and remedy in the case will be determined at the next hearing.

REASONS

Introduction

1. This hearing was listed for one day to consider the claimant's claims for unfair dismissal and a failure to pay holiday pay. The respondent's primary defence was that the claimant was a self-employed contractor, and not an employee (for the purposes of her unfair dismissal claim) or a worker (for the purpose of her holiday

pay claim). The respondent accepts that it did not pay the claimant holiday pay, but says that no holiday was requested and it could not be carried over. It accepts that it cancelled the claimant's contract. It pleads that it did not unfairly dismiss the claimant.

2. It seemed to me that there was not sufficient time in one day to properly hear evidence on and consider the employment status of the claimant and whether the respondent was liable for unfair dismissal and a failure to pay holiday pay. I directed that the employment status issue would be dealt with as a preliminary issue in this hearing, which was converted to a public preliminary hearing for that purpose. I heard evidence from the claimant in support of her claim, and from Miss Evriviadou, the director and founder of the respondent, in response.

3. This is my reserved judgment on that preliminary issue, having now had chance to reflect on the arguments I heard at the hearing. Page references in this judgment are references to the 171 page bundle I had access to at the hearing.

Issue to be determined

4. The issue to be determined was whether the claimant was (1) an employee as defined by *section 230(1)(a) Employment Rights Act 1996*, (2) a worker as defined by *section 230(1)(b)* of the same act, or (3) she did not fulfil either definition because she was a self-employed contractor working for her own business providing work for the respondent, her client.

Findings of fact

5. The facts as I find them, on the balance of probabilities, are as follows. If I have had to resolve any conflicts in the facts, I explain how I have done so at the material point.

6. Miss Evriviadou had a background in performing arts and set up 'Moving Waves' in 2015. The respondent is the company which operates the business, which delivers creative and performing arts sessions to adults and children across a variety of settings. The respondent has only ever recognised one person as an employee on payroll: Miss Evriviadou. The respondent engages with around 60 facilitators delivering the services, who it believes are self-employed. The respondent was seeking a marketing function when it first contracted with the claimant to fulfil that role.

7. The claimant came into contact with the respondent when it started to engage with marketing for a new play. She does not contend that she was an employee during her early engagement with the respondent, saying that these were temporary contracts with commission pay only. I do not, therefore, consider the position before the period covered by the claimant's claim, when she says her employment started on 4 September 2017.

8. The claimant has a background in acting and considers that profession to be her primary one. She had never worked in a marketing role previously and had only limited background in marketing type work. She had no prior marketing business or expertise. She never worked for anyone else during her engagement with the

respondent, and never had her own documents, registrations or materials to operate as a marketing consultant on her own account. Apart from her own computer, everything was provided to her by the respondent.

9. On 30 August 2017, Miss Evrividou (for the respondent) sent the claimant an e-mail which reads, relevantly (page 49):-

> *"I'm excited to officially be offering you a permanent marketing role for Moving Waves!*
>
> *Most details remain the same as the previous contract with some changes in the working hours regulations as we discussed, the target and the commission terms.*
>
> *As this is now a permanent role, we will also be updating your phone line to a yearly contract with a new network provider. Ideally we would like you to keep the same number so I'm currently looking into the best options available. Until then, please keep using the Lebara sim card and let me know when topping up is needed."*

10. The contract referred to in the e-mail was shown at pages 38 to 42. A schedule of documents and resources provided to the claimant on commencement of the role was shown at page 43. This included training materials, databases of contacts to use, templates of the invoices to be used for getting paid, templates for completing work, a mobile phone, and a sim card. The completed signature page of the contract was at page 166, signed by the claimant on 4 September 2017 and the respondent on 5 September 2017.

11. In her evidence, Miss Evriviadou explained that she drew up these documents herself based on a franchise agreement she had previously been a party to. She said that she never intended to have any employees and the contract was drafted to try to exclude that possibility. I accept that evidence. It is agreed that the respondent prepared all of the documentation with the parties and sent it to the claimant to sign and agree. The claimant did so without seeking to amend any of the documents.

12. The claimant, in her evidence, said that Miss Evriviadou was keen for the claimant to be self-employed to relieve any tax and employee obligations on the respondent. The claimant believed herself to be self-employed until she was advised otherwise. She said that she acted as if she was self-employed for this reason. I accept that evidence, also. I find that the parties set out with the understanding that the claimant was and would remain as a self-employed contractor, and would not be an employee or a worker.

13. The contract itself specifies on its face that the respondent is the "client" and the claimant is the "marketing associate". The agreement was expressed to come into force on 4 September 2024. The cover page (page 38) contains the wording *"The Marketing Associate accepts that she/he enters into the agreement as a freelance self-employed Marketing Associate and will undertake the services as a specialist*".

14. The first clause of the contract is called "Commencement of agreement", and says:-

> *"Before this point, the candidate will undergo an initial phone interview, a second face-to-face interview and will have successfully completed a training day.*
>
> *This is a permanent agreement of services which shall commence on Monday 4th September 2017.*
>
> *The [claimant] accepts that she/he enters into the agreement as a freelance self-employed Marketing Associate and will undertake the services as a specialist"* (page 38).

15. The second clause is called "Job description" and outlines the following relevant features of the claimant's role on pages 39 and 40:-

    15.1. The claimant was responsible for administration tasks such as *"chasing up payments, sending invoices, assisting with recruitment/meetings and updating social media pages".*

    15.2. The claimant *"must send a weekly report to [the respondent] to share their progress on marketing, completion of administration tasks and any other duties carried out during each shift. The report must include details of next week's working days…"*

    15.3. The respondent set the claimant a sales target and monitored it, and *"may decide to review this contract"* if the target is not met.

16. Page 40 outlines the claimant's expected working hours. She was –

> *"required to work 12 hours per week, on two working days per week… On some occasions, the [respondent] may require the [claimant] to complete tasks which cannot be rescheduled such as recruitment days… Where no set dates are required by the [respondent], it is at the [claimant's] discretion to decide their working hours/days…".*

17. Page 40 also outlines the position about overtime. It says the claimant *"will not be expected to work more than 12 hours per week"* but that overtime will be paid where unavoidable and with agreement.

18. The claimant worked at home and the contract stipulates she was responsible for her own tax affairs, and would be paid £8 per hour with commission and bonus available (page 41). The contract states that *"holidays cannot normally be taken during term time".* The contract says that the claimant needed permission to have time off, and that that holiday would not be paid (page 41).

19. Having heard evidence from both parties, I find the following facts about how that contract generally operated in practice:-

19.1. The claimant used an invoice template to invoice the respondent for hours worked, after complying with the requirement to submit a report including her hours for the week;

19.2. The claimant chose her own working days except when required to work on particular days;

19.3. Where the claimant worked in excess of her contract hours, the parties would agree for her to offset by working fewer hours in subsequent weeks and she was only occasionally paid overtime;

19.4. The claimant told the respondent whenever she was taking leave and the respondent never refused that leave;

19.5. The claimant's work would wait for her to return, with anything urgent being picked up by the respondent's Ms Evriviadiou;

19.6. The respondent provided the claimant with a phone and a list of contacts to try to generate work for the respondent; and

19.7. The claimant performed her role with diligence.

20. In May 2019, the respondent offered the claimant full time hours on a trial basis. The e-mail making the offer (page 52) opens with the words *"After a lot of consideration, I have decided to take the financial risk of offering you a full-time contract, initially a trial for 3 months"*. I find that the primary goal was to increase the volume of bookings the claimant generated. The respondent also mentions expanding the claimant's role with the administration of the business. The e-mail also refers to the claimant's pay as her 'salary'.

21. The claimant's hours were reduced in line with the respondent's lack of activity during the Covid-19 pandemic. The respondent did not operate a payroll for the claimant as an employee, and so the claimant was not able to benefit from any of the support offered by the Government to those in her general position. In March 2022, the claimant was offered to bring her hours up to 28 each week, with a rise in hourly rate to £11. The claimant was asked to cover the work of Ms Evriviadiou (the person owning and running the respondent) when Ms Evriviadou was on holiday (page 97 and 98).

22. Throughout, the respondent directed the emphasis of the claimant's work through instructing her to concentrate on certain sectors and areas which were thought to have the potential to generate more work for the respondent. These included the setting of targets (page 112; page 122 to 123).

Relevant law

23. The starting point in relation to considering the employment status of an individual is to consider the wording of the relevant statute. *Section 230(1) to Section 230(3) Employment Rights Act 1996* provides:

"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" (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."

24. There is no single test concerning how to determine a person's employment status. Each case falls to be determined on its own particular facts and often there are factors pointing in each direction which complicate the determination. The usual approach requires all aspects of the relationship to be considered and then I should ask the question whether the claimant was carrying on a business on their own account (*O'Kelly v Trusthouse Forte plc [1983] IRLR 369 CA*).

25. Naturally, this means that the wording in any document and the assumptions made by the parties will only be part of the matters to be considered when making a determination. The test is not 'what was the claimant called' or 'what do the documents label the parties' or 'what did the claimant think they were'. I may be required to look behind the contractual documentation to consider how the relationship operated in reality to determine the employment status of the claimant (*Autoclenz Ltd v Belcher [2011] UKSC 41*; *Uber BV v Aslam & others [2019] UKSC 29*).

26. In relation to whether someone is an 'employee' for the purposes of *s230(1)(a)*, case law provides that a person will not be an employee without the mutual contractual obligation for the employer to provide work and the employee to do that work which is provided (*Carmichael v National Power Plc [1999] IRLR 43, HL)*. This is often referred to in cases as the 'irreducible minimum of obligation'. Employees who have a contract of employment containing the irreducible minimum of obligation will also be 'workers' by operation of *s230(3)(a)*. Such workers are often referred to in cases as 'limb (a) workers'. That irreducible minimum of obligation may be implied into a contract even where the written contract does not expressly articulate an obligation on the employer to provide work (*Airfix Footwear Ltd v Cope [1978] ICR 1210 EAT*).

27. The requirement is for some work to be offered and some work to be done, but those obligations may arise by conduct even where there is little specificity about terms. In

Nethermere (St Neots) Ltd v Gardiner and anr [1984] ICR 612, CA, a group of machinists worked from home without direction about their hours or how much work they did. They could also take time off when they liked, so long as it was notified in advance. The Court decided that there was an overarching obligation despite these apparent freedoms, where on the facts of the case, the employer was obliged to offer some work to the machinists, who were obliged to do at least some of that work. This feeds in to the question of control, which is a relevant factor (though not determinative). Day to day control is not required. The question is whether the employer had a contractual right of control over the person (*White and anr v Troutbeck SA [2013] IRLR 949*).

28. A person might however be a 'worker' even in the absence of such an irreducible minimum of obligation – the obligations on each party is just part of the discussion about whether someone might be a 'worker' (*National Midwifery Council v Somerville [2022] EWCA Civ 229*). These workers may be caught by the definition outlined in *s230(3)(b)*, and are often known in cases as 'limb (b) workers'. Where I find that a person is not an employee, it is possible that they could be a 'limb (b) worker' if they meet the relevant requirements.

29. Those requirements are set out in the legislation itself: (1) there is a contract between the individual and the employer; (2) the individual must be required to work personally for the employer; and (3) the individual must not be working for someone who is in reality their customer or client. This last part is important because it is common for people to provide services under a contract to customers or clients without them benefitting from the protections offered by a 'worker' status. If all three elements are present, then it does not matter if the person is operating their own business (*Hospital Medical Group Ltd v Westwood [2012] IRLR 834 CA)*.

30. Part (1) of the legislation is self-explanatory. In the usual way, the contract may be written or may be found to have been agreed orally with terms found through the conduct of the parties. Part (2) requires the contract to not allow the person claiming to be a worker the ability to substitute with someone else who would complete the work. An employer-worker relationship is a personal one. If there is a right of substitution, then it tends towards the person not being a limb (b) worker. If that right of substitution is in reality forbidden or excessively curtailed in some way, then it is possible that the person might still be found to be a worker (*Pimlico Plumbers and another v Smith [2018] UKSC 29)*.

31. Part (3) of the legislation is one of central issue in this case and it is often determinative of the question whether a person is a worker or not. The determination of whether or not a person offers services to a client or customer includes consideration of other sources of income (*Johnson v Transcopo UK Ltd [2022] ICR 691 EAT*). The level of integration is also important. Where a person is held out externally as belonging to an organisation, it is more likely that they will be considered a 'worker' and not someone providing services to a client (*Hospital Medical Group Limited v Westwood [2013] ICR 415 CA*).

Discussion and conclusions

32. I start, perhaps counterintuitively, by ruling out the conclusion that the claimant was a self-employed contractor engaged by the respondent in a consultant-client

relationship. This is because Mr Fakunle effectively conceded the point in the hearing when he did not seek to mount a supported argument that the claimant was self-employed. With admirable frankness, he told me that he considered the claimant to be 'at least' a worker of the respondent, although he was instructed to argue differently. It appears that it is recognised, as I recognise, that the claimant never ran a marketing business. She was not set up to run such a business, because everything required to do so (such as the contract and scope) was prepared on the respondent's terms by the respondent.

33. The contract also named the claimant personally and there was no right for the claimant to substitute someone else to do the work. It is clear from the first clause that there was a selection exercise for the claimant's role and that she alone was authorised to do it. I do not consider that Miss Evriviadou covering for holiday from time to time qualifies as a substitution of the service because the service was then undertaken by the respondent directly. This was a contract for personal service and the respondent was not the claimant's client or customer. I consider it unarguable to seek to make out otherwise. It follows that the claimant was either an employee and limb (a) worker, or a limb (b) worker. This is the decision that was reserved because it seemed to me in the hearing to be a fine line in this case.

34. In my judgment, after reflecting on the evidence, there is an obligation on the respondent to provide the claimant with work and an obligation on the claimant to do that work. The amount of work fluctuates over time, essentially by agreement, but the obligations are present from 4 September 2017. That contract narrowly defines the role that the claimant is required to do. It requires the claimant to work for 12 hours per week. There is no nuance to that requirement. It is not expressed as 'up to 12 hours per week as may be necessary' or anything of that nature. The claimant is required to work and, in my view, there was a corresponding expectation that the respondent would provide the work. This obligation is implicit from the way the parties operated the contract. This is why the respondent seeks the claimant's agreement to vary her hours. In my view, the respondent recognised the obligations to provide work (and pay) in relation to the claimant's role. This is why the offering of 'full time hours' was expressed to be a 'risk' for the respondent, because in practice it committed itself to providing and paying for the claimant's hours. In practice, the respondent could not withdraw hours provided by the contract without agreement, and this is why there would be risk.

35. In addition to the mutuality of obligation in relation to providing hours and working them, I have found that the respondent exercised a significant degree of control and direction over the claimant and her work. Taking all of the features of the relationship together, I conclude that the claimant was an employee of the respondent from 4 September 2017. This means that she has the standing to advance her claims of unfair dismissal and holiday pay. A hearing, before me, will take place on 13 September 2024 in order to deal with those remaining issues.

36. I know the respondent will be disappointed by this judgment. I can only emphasise that what is written in the contract between the respondent and those working with or for it is only part of the nature of the relationships between the parties. The Tribunal can, does, and will, look beyond the labelling of an employee or worker as 'self-

employed' to work out (1) what the relationship is in practice and (2) how that fits with *s230 Employment Rights Act 1996*.

Employment Judge Fredericks-Bowyer
Date: 10 July 2024