EMPLOYMENT TRIBUNALS

OPEN PRELIMINARY HEARING

Claimant: And **Respondent:**

Razan Alsnih Al Quds Al-Arabi Publishing & Advertising

Heard by: CVP **On**: 2 July 2021

Before: Employment Judge Nicolle

Representation:

Claimant: Mr F Neckles, of the PTSC Union
Respondent: Mr Livingstone, of Counsel

JUDGMENT

1. The Tribunal finds that the Claimant is an employee in accordance with s230(1) of the Employment Rights Act 1996 (the ERA)

REASONS

The Hearing

1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

2. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended the hearing.

3. The parties were able to hear what the Tribunal heard.

4. The participants were told that it is an offence to record the proceedings.

5. From a technical perspective, there were no major difficulties

6. The Claimant was provided with the assistance of an Arabic interpreter, Mrs W Mahdi. I was satisfied that with the benefit of Mrs Mahdi's interpretation the Claimant was fully able to follow and participate in the hearing.

7. There was an agreed bundle comprising of 90 pages. The Claimant gave evidence and Ms Pat Sundram, Business Manager (Ms Sundram) gave evidence on the Respondent's behalf.

8. Mr Neckles and Mr Livingstone made closing submissions. Neither provided the Tribunal with skeleton arguments. Mr Neckles did, however, provide me with copies of the case law authorities of Autoclenz Ltd v Belcher and others [2010] IRLR 70 and DACAS v Brookstreet Bureau (UK) Ltd [2004] IRLR 358.

The Issues

9. At a Closed Preliminary Hearing before Employment Judge Isacsson on 10 November 2020 she ordered that an OPH should be heard to determine what is the Claimant's employment status? Is she an employee or worker? Further, what was the Claimant's effective date of termination (EDT)?

10. The parties advised that it had been agreed that subject to my determination of the question of employee status that the EDT was 6 February 2020. The parties also advised that the protected disclosure claims had been withdrawn pursuant to an email to the Tribunal on 30 March 2021.

11. Mr Neckles confirmed that the remaining substantive claims comprised unfair dismissal, breach of contract in respect of notice pay, unauthorised deduction from wages and for holiday pay under the Working Time Regulations 1998.

Findings of Fact

The Claimant

12. The Claimant contends that she was an employee of the Respondent from 13 February 2014 until such employment was terminated on 6 February 2020. She was an Online Editor.

13. The Respondent maintains that throughout her engagement with it that the Claimant was a self-employed freelancer. As such, the Respondent denies that she has acquired the benefit of any statutory rights whether as an employee or a worker.

Commencement of the Claimant's engagement

14. The Claimant says that the terms of engagement were described to her orally by Ms Sana Aloul, Editor in Chief (Ms Aloul). She says that the former Online Editor also attended parts of this discussion. The Claimant says that during this meeting Ms Aloul

referred to various conditions of her engagement which would be consistent with employee status to include her being subject to the Respondent's disciplinary and grievance procedures, an entitlement to annual leave and a prohibition on working for any other business. The Claimant says that Ms Aloul said that her terms would be contained in a contract. No such contract was ever provided.

15. Ms Sundram denies that it was ever represented to the Claimant that she would be engaged on employment terms. However, the position of Ms Sundram as a witness was unsatisfactory in that she was not a direct party to communications between Ms Aloul and the Claimant and in effect was merely repeating what she had been told by Ms Aloul. Whilst Mr Neckles made submissions that the evidence of Ms Sundram should be disregarded as being hearsay I did not consider that this would be appropriate given the relative informality of evidence in the Employment Tribunal as opposed to the County or High Court. Nevertheless, I took this into account in weighing up the weight to be placed on the Respondent's evidence. I considered it particularly surprising that Ms Aloul was not called to give evidence given that she was apparently at work and therefore would have been able to give her evidence remotely with relatively minimal disruption to her normal business activities.

16. On the balance of probabilities, I consider it unlikely that Ms Aloul would have made express reference to an intention to provide the Claimant with a contract of employment and to policies such as the disciplinary and grievance policy. I reach this finding absent any evidence to corroborate the Claimant's assertion as to the content of this conversation but also given that in my opinion it would be relatively unusual for an employer representative to refer to disciplinary and grievance policies and not working for any other business during an introductory meeting.

Monthly payments

17. Ms Bartram says that the Claimant received a monthly retainer paid in arrears. This was initially £1,000 but was more latterly increased to £1,500 before reverting back to £1,000.

18. At no stage did the Claimant issue an invoice in respect of work undertaken. The payment typically did not vary to reflect the amount of work undertaken by the Claimant albeit Ms Sundram said there were some relatively rare occasions where the Claimant received an additional payment to reflect additional work undertaken.

Tax and National Insurance contributions

19. The Claimant says that she understood that the Respondent was deducting tax and national insurance from the monthly retainer payments made to her. The Respondent says that no such deductions were made. I find that payments were made to the Claimant gross. Given that her expectation was that her tax and national insurance contributions had already been deducted it would therefore appear probable that the Claimant did not account to HMRC in respect of tax and national insurance contributions.

Hours of work

20. There is a significant dispute between the parties as to the number of hours worked by the Claimant. She contends that she was working up to 60 hours a week. The Respondent says that she typically worked between three and four hours a day. The Respondent says that she was largely free to determine her own working hours and the time of day during which work was undertaken. This is disputed by the Claimant who says that she was required to work for hours stipulated by the Respondent to reflect its editorial and publication scales.

21. The Claimant says that she initially worked for an average of eight hours a day starting at 12 noon and more latterly was required to work from approximately 10:30am to 12pm. However, the specific hours worked by the Claimant were not entirely clear from the evidence.

22. There was also a dispute as to the hours worked by the Claimant when she was required by the Respondent to perform her duties from its office. The Claimant says that she typically worked from 12 noon to 8pm whilst the Respondent says that she was only required to attend for two or three hours within this period at her discretion.

23. I find that the Claimant was required to work hours as determined by the Respondent. I do not accept the Respondents evidence that she was free to determine her own working hours. This would be inconsistent with the production requirements of the online news of a newspaper. I also find that it would be in consistent with requiring the Claimant to attend the Respondents place of work for it to be entirely at her discretion as to what time she would arrive, how long she would be in attendance and at what point she would depart. This would be inconsistent with the Respondents rationale for requiring her to attend its offices namely that her work required monitoring and supervision.

Place of Work

24. For most of her engagement the Claimant worked from home or on occasion from other locations, for example, when she travelled to visit her family in Syria.

Holiday entitlement

25. The Claimant did not receive holiday pay at any time during her engagement. Whilst she went to Syria for ten days in 2018 and 20 days in 2019 the Respondent says that she continued to provide her services. However, her payment for the period she was in Syria in 2019 was reduced by the Respondent on the basis that the cost of living in Syria was much lower compared to London.

Day to day supervision and control

26. The Claimant says that Ms Aloul was responsible for supervising and monitoring her work. She says that Ms Aloul would normally suggest topics to be covered but on other occasions she was free to make her own choice.

27. The Claimant would not place articles she had written directly on to the newspaper's online website. She would first upload them onto the company intranet where they would be reviewed, proof read and sometimes changes would be made to the content to include headlines and pictures before they were published online.

28. The Claimant says that her journalistic content was subject to the Respondent's editorial and style guidelines. This included guidance on the relative complexity of language used so that it was commensurate with the audience profile the Respondent was primarily writing for.

Performance review

29. The Claimant was not subject to any formal performance appraisals or reviews. She refers, however, to meetings taking place on and as required basis when work plans would be set.

Training

30. The Claimant was not provided with any training.

Position of the Claimant's husband

31. The Claimant's husband has been engaged as an Editor by the Respondent for approximately 25 years. The Respondent contrasts his position as an employee subject to an employment contract, the receipt of monthly payslips and the deduction of tax and national insurance contributions with that of the Claimant and asserts that it should have been self-evident that her position was different from his and that of a self-employed freelancer rather than his position as an employee. The Claimant says that she was not aware of her husband's tax and national insurance status, whether he had a contract of employment or received monthly payslips.

Provision of equipment

32. The Claimant was provided with a laptop by the Respondent. The company logo appeared automatically on the laptop.

The Claimant's refusal to use the Viber App.

33. In January 2020, the Claimant was instructed by the Respondent to use the Viber App on her personal phone. This was consistent with the Respondent's practice that its journalists should use the Viber platform to communicate and upload proposed articles for review. The Claimant refused to do this as she objected to what she described as constant annoying messages via Viber on her personal phone.

34. The Claimant's refusal to use Viber was seen as a significant issue by the Respondent. Whilst Ms Bartram's evidence was that it was entirely up to the Claimant what she chose to do I find that the reality of the situation was that the Respondent made a non-negotiable request that the Claimant use Viber and it was not therefore a matter to be determined at the Claimant's discretion if she wanted to continue her engagement with the Respondent.

Events prior to the termination of the Claimant's engagement

35. The Claimant sent an email to Ms Bartram at 11:36 on 15 January 2020 attaching an earlier email she had sent under the subject "grievance complaint" to the Respondent on 13 January 2020. In this earlier email she stated that she would be submitting a grievance complaint latter that day. A dispute exists as to when the Claimant's grievance letter dated 13 January 2020 was submitted. It is apparent that it was not received by the Respondent until sometime after 13 January 2020 but the precise timing as to when it was submitted is not directly material to the issue I need to determine.

The Claimant's grievance

36. In her grievance the Claimant complained that Ms Aloul had bullied, harassed, victimised and discriminated against her on the grounds of her race. She referred to Ms Aloul having required her to start attending the office five months previously.

Claimant's email to Ms Aloul of 28 January 2020

37. The Claimant referred to spending an average of 55 hours a week working for the Respondent. She said that it had come as a shock to be told that she was not an employee of the Respondent. She referred to her recently submitted grievance.

Ms Sundram's letter to the Claimant dated 6 February 2020

38. In this letter responding to the Claimant's email of 28 January 2020 she stated that the Claimant was a freelancer on a monthly retainer. She disputed that the Claimant worked 55 hours per week but said that it was rather three to four hours per day. She denied that the Respondent had any direct control over her work and said that she was largely unsupervised and was at all times a self-employed freelancer. She said that the Claimant could work from home or wherever she wished.

The Claimant's email to Ms Sundram dated 11 February 2020

39. The Claimant responded to Ms Bartram's letter of 6 February 2020. She stated as follows:

> "I was in charge of the online website and the whole social media that was related to the company, I was given full authority to manage and deal with these important aspects of the company, I was given the authority to post my articles online without the need to discuss them with anyone".

40. The Respondent says that the Claimant's statement above is inconsistent with her assertions that her work was subject to the editorial control and guidance of the Respondent. I find that the Claimant had some level of autonomy in her choice of subjects and content but nevertheless remained subject to the overarching editorial guidelines and control of the Respondent. I reach this finding particularly in the context of Ms Bartram's evidence that the Respondent had concerns regarding what it refers to as a decline in the quality of the Claimant's written work and an increasing perpensity for her work to include mistakes. Whilst Ms Bartram's evidence was that the Respondent wished to give the Claimant the opportunity to improve I find this inconsistent with the position which would have been the case had the Claimant been a genuine freelancer which would have been to discontinue the retainer rather than to seek to provide additional supervision to improve the quality of output.

Reasons given for the termination of the Claimant's services

41. It is apparent that the Respondent has given various inconsistent reasons for dispensing with the Claimant's services. In paragraph 2 of its grounds of resistance it is explained because of a significant drop in the standard of her freelance work output and her refusal to follow instructions i.e., in relation to the use of the Viber App. Paragraph 9 of the grounds of resistance refers to there being a significant downturn in business meaning that her services were no longer required.

The Law

42. The starting point is the definitions of employees and workers under the ERA.

S.230(1) defines an "employee" as an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

S.230(2) provides that a contract of employment means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

S.230(3) defines a "worker" as an individual who has entered into or works under (or, where the employment has ceased, worked under):

- a contract of employment (limb (a)), or
- any contract, whether express or implied and (if 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 ("limb b").

43. There is considerable overlap as to the applicable test for determining the status of individuals as employees or workers. This is particularly so after the decision of the Supreme Court in Uber BV and others v Aslam and others [2021] ICR 657. The Court held that not only is the written agreement not decisive of the parties' relationship, it is not even the starting point for determining worker status. The Court held that the determination of "worker" status is a question of statutory interpretation, not contractual interpretation, and that it is therefore wrong in principle to treat the written agreement as a starting point. The correct approach is to consider the purpose of the legislation, which is to give protection to vulnerable individuals who are in a subordinate and dependent position in relation to a person or organisation who exercises control over their work. The Court held that Uber exercised significant control over the services provided by drivers using its platform.

44. The tests set out by Mr Justice MacKenna in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433, QB remains good law. He held that for a contract of service to exist three conditions needed to be fulfilled namely:

- the servant agrees that, in consideration of a wage or other remuneration, he/she will provide his own work and skill in the performance of some service for his master;

- he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient agree to make that other master; and

- the other provisions of the contract are consistent with it being a contract of service.

45. The continuing relevance of the criteria in Ready Mixed Concrete was confirmed by the Supreme Court in Autoclenz, where Lord Clarke called it the "classic description of employment".

46. In Nethermere (St Neots) Ltd v Gardiner and Anor [1984] IRLR 240 CA Lord Justice Stephenson held that there must be an irreducible minimum of obligation on each side to create a contract of service.

47. The Nethermere decision was cited and approved by Lord Irvine in Carmichael and Anor v National Power Plc [1999] ICR 1226, HL, when he posited that a lack of obligations on one party to provide work and the other to accept work would result in "an absence of that irreducible minimum of mutual obligation necessary to create a contract of service".

48. It is necessary for a tribunal to consider the individual facts of a case in reaching its determination as to a claimant's status whether as an employee, worker or as self-employed. This involves consideration of not just the written documentation but also an investigation and evaluation of the factual circumstances in which the work was performed. It is also necessary to consider the intention of the parties as objectively ascertained to include considering the surrounding factual matrix and the conduct of the parties to include any oral exchanges.

49. It may be relevant to consider the tax and national insurance status of the relationship but this will generally not be a conclusive factor.

50. Mr Neckles referred me specifically to various passages in Autoclenz to include:

> "It does not matter how many times an employer proclaims that he is engaging a person as a self-employed contractor; if he then imposes requirements on that person which are the obligations of an employee and the employee goes along with them, the true nature of the contractual relationship is that of employer and employee".

And further:

> "Even where the arrangement has been allowed to continue for many years without question or either side, once the Courts are asked to determine the question of status, they must do so on the basis of the true legal position, regardless of what the parties had been content to accept over the years. An employee should not be estopped from contending that he is an employee merely because he has been content to accept self-employed status for some years".

51. He also referred me to the following paragraphs in the Judgment in DACAS:

> "An irreducible minimum of mutual obligation is necessary for a contract of service, i.e., an obligation to provide work and to perform it, coupled with the presence of control".

And further:

> "The employment tribunal had erred in holding that the applicant was not an employee of the council to which she had been assigned by the agency to work as a cleaner for a number of years because there was no express contract between the applicant and the council. In reaching that decision, the tribunal had failed to address the possibility that there was an implied contract of service between the applicant and the council. A contract of service may be implied, that is deduced, as a necessary inference from the conduct of the parties and the work done".

Conclusions

52. I find that the reality of the relationship between the Claimant and the Respondent is consistent with that of employment. Further, if I should be wrong in this conclusion, I have no doubt in finding the alternative that the Claimant fulfilled the lower threshold required to demonstrate her having status as a worker.

53. I reach the conclusion that the Claimant was an employee of the Respondent for the following reasons.

54. Notwithstanding the absence of a written contract of employment the factual relationship between the Claimant and the Respondent was consistent with her having employee status.

55. The Claimant did not undertake any work for any other organisation for a period of six years.

56. The Claimant had a regular working pattern with the Respondent. Whilst there was a dispute between the parties as to the number of hours worked, I find it is unequivocal that the hours worked and the time at which they were worked were not solely at the Claimant's discretion. It is apparent that the Claimant was required to provide her services to reflect the operational requirements of the Respondent. These requirements changed over time and were controlled by the Respondent.

57. Further, the payment of a monthly retainer to the Claimant was in my view consistent with the payment of a salary as opposed to a fee for services rendered. In particular, the retainer was generally the same amount and did not typically vary to reflect the quantity of services provided in any given month. Had there been a genuine freelance relationship the expectation would have been that the Claimant would have submitted monthly invoices itemising the work undertaken and the fee for such services and further that this fee would vary from month to month to reflect the Claimant's discretion as to how much work she had decided to undertake. There was no such variation. The consistency of the monthly payments was in my opinion consistent with an employment relationship.

58. I find that the Respondent exercised a sufficient degree of supervision and control over the services provided by the Claimant to satisfy this particular condition of an employment relationship. I consider it particularly significant that the Respondent in perceiving that the quality of the Claimant's written output had declined in late 2019 decided that she required additional monitoring and supervision and required her to work from its premises. I find this to have been wholly inconsistent with a self-employed working arrangement. Whilst there may well be occasions when genuinely self-employed individuals work at a client's premises this would generally be to perform specific tasks and not where the primary motivation for the provision of the services in house was to enable additional supervision and monitoring of the quality of the work provided.

59. The provision of a laptop by the Respondent is a factor consistent with a degree of integration in to the work place. Further, the requirement that the Claimant should download the Viber App on her mobile phone is again indicative of a significant degree of control as to the basis upon which the services would be provided. Again, I find this to be consistent with a contract of service rather than a self-employment relationship.

60. I find that whilst the Claimant had a degree of autonomy in the content she produced this was ultimately subject to the editorial control of the Respondent. Whilst I acknowledge Mr Livingstone's argument that a newspaper would always have a degree of editorial control over the content of its journalists, whether employees or self-employed, I nevertheless find that this control went beyond that you would expect in the case of a freelance journalist. For example, the Claimant was frequently provided with guidance as to the stories she should cover, and the Respondent had significant editorial input on her output to include changing pictures and headlines.

61. Whilst not determinative the reasons given by the Respondent for the termination of the Claimant's engagement are indicative of an acknowledgment that she had a status beyond that of a genuinely self-employed person. For example, reference was made to a reduced requirement for her services of the type she provided and alternatively a significant drop in the standard of her work.

62. Whilst the Claimant did not receive paid holiday there was an ongoing expectation throughout a period of six years that she would provide a virtually continuous service. The reality of the relationship, as opposed to what the Respondent contends, is that she was engaged on a virtually daily basis to provide services. Had the relationship been a genuine freelance one there would have been an expectation that there would be periodic gaps in the provision of the services whilst the Claimant performed other activities or took periods away from the provision of the services. There were no such periods.

63. Whilst the Claimant did not have tax and national insurance contributions deducted from the monthly retainer I do not consider this to be a determinative. I accept the Claimant's explanation that she believed that tax and national insurance were being deducted by the Respondent.

64. Overall, I consider that the course of conduct between the parties to be consistent with an employment relationship. I consider that the evidence of Ms Bartram had limited value in so far as she was primarily articulating the Respondent's position that the relationship was one of a freelancer rather than providing evidence specific as to the actual functions performed by the Claimant and her working arrangements.

65. In accordance with Autoclenz and Uber it is necessary for me to look at the reality of the relationship rather than what label the purported employer seeks to place on it. It is also relevant to consider the fact that the Claimant was clearly in a subordinate position in terms or status in the negotiation of her terms and perceived, in my view correctly, that a refusal by her to provide her services on the terms as stipulated by the Respondent would result in the cessation of her services. Ultimately this is what happened when the Claimant first refused to use the Viber App and secondly sought to challenge, however belatedly, the basis upon which her services were provided and her status to include issues relating to the sums paid to her and her entitlement to holiday pay under the Working Time Regulations.

66. For the reasons as set out above I therefore conclude that the Claimant had employee status and that her claims predicated on her being an employee, to include but not limited to unfair dismissal, should therefore proceed to a full merits hearing.

67. As previously indicated, I would, in any event, have no doubt in concluding that the claimant was a worker and therefore would have been entitled to pursue claims under the Working Time Regulations but given my findings above I have concluded that the relationship is properly characterised as being that of employee and employer.

_____

Employment Judge Nicolle

9 July 2021

Sent to the parties on:

09/07/2021.

For the Tribunal:

OLu..