



# EMPLOYMENT TRIBUNALS

**Claimant:** Huei-Ping Chen

**Respondent:** Iconic Worldwide Limited

**Heard at:** Watford (by video)

**On:** 11 July 2022

**Before:** Employment Judge Din

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mark Evans (Director of the Respondent)

# RESERVED JUDGMENT

The judgment of the Tribunal is that:

The Claimant was neither an employee of the Respondent nor a worker under section 230 of the Employment Rights Act 1996.

Accordingly, the Claimant's claims are dismissed.

# REASONS

## Introduction

1. The Claimant is Huei-Ping Chen (**Claimant**).
2. The Respondent is Iconic Worldwide Limited (**Respondent** or **Iconic**), company registration number 10726235. At the relevant time, the core business of the Respondent comprised audio visual solutions.

## Claims and issues

3. The Claimant claims that she is owed:

- a. Statutory holiday pay or (if greater) holiday pay consistent with the holiday pay paid to (other) employees of the Respondent;
  - b. Overtime pay consistent with the overtime paid to (other) employees of the Respondent, including for a period when she should have received bereavement leave; and
  - c. A sum for the time between her leaving her engagement with the Respondent (26 October 2019 and her starting another job (2 December 2019).
4. In light of the above, the Claimant claims GBP 8,105.10.
  5. In her claim form, the Claimant also claimed sex discrimination. However, this claim was dismissed on 14 August 2020 pursuant to an Order of Employment Judge Anstis dated 3 July 2020.
  6. The Respondent denies that the Claimant was employed. Further, the Respondent states that the Claimant was engaged as a contractor. As such, she was paid her agreed rate for the times that she worked in accordance with the agreement between the Claimant and the Respondent.
  7. The Respondent denies that the Claimant should have been paid equally with other Iconic employees (including in respect of overtime). This is because the services provided by the Claimant were different and, in any event, she was engaged as a contractor.
  8. In the response form, the Respondent states that it does not agree with the details given by the Claimant about early conciliation with ACAS. The Respondent provides no further details in this regard.
  9. In light of the above, it was agreed at the hearing that the issues are as follows:
    - a. the nature of the employment, worker or contractor relationship between the Claimant and the Respondent;
    - b. the Claimant's holidays and holiday pay (if any);
    - c. the Claimant's overtime and pay for overtime (if any);
    - d. the position with respect to bereavement leave;
    - e. the Claimant's claim for the period between 26 October 2019 and 2 December 2019.
    - f. Remedy (if applicable).

#### **Procedure, documents and evidence heard**

10. The Claimant's claim form was received by the Watford Tribunal office on 24 January 2020.
11. The Respondent's response form is dated 4 March 2020. The response form is accompanied by a document also dated 4 March 2020 from Mr Evans setting out further detail in respect of the Respondent's case.
12. There was no agreed bundle or list of issues prior to the hearing.
13. The Respondent provided various supporting documents for its case. The key document is a note entitled "Iconic v Miss Chen", which was accompanied by various exhibits. This document is not in the form of a witness statement. However, Mr Evans presented it, under oath, at the hearing.

14. The Claimant stated that she had not seen this material previously, although it was sent to the Watford Tribunal on 15 December 2020. I asked that Mr Evans email the materials to the Claimant (copied to the Tribunal), which he did. As the materials, and the underlying substance of the case, were clear to the parties and discussed at length at the hearing, I decided to proceed. The Claimant did not object and had time during the hearing to review the materials and to ask questions about them.
15. As part of the Respondent's materials, it put forward what is described as a witness statement by Simon Muir dated "December 2020". The version before the Tribunal was unsigned and did not contain a statement of truth. I do not consider that anything material turns on Mr Muir's evidence as stated, as all material points have been made by the Respondent and by Mr Evans at the hearing. In any event, Mr Evans adopted the factual points stated by Mr Evans (as they pertain to the Respondent) as part of his evidence under oath.
16. The Claimant provided a number of supporting documents for her case, including a number of WhatsApp discussions. The key document provided is a witness statement made by the Claimant dated 14 December 2021. The version before the Tribunal was unsigned. However, the Claimant adopted the content of the statement under oath at the hearing.
17. The Claimant also provided a "Remedy Request" document. This sets out the following:
- a. A claim for statutory holiday pay – GBP 2492.10;
  - b. A claim for "Discrimination of working pay", which is in fact a claim for unpaid overtime – GBP 3,963.00;
  - c. A claim for "Bullying", which is stated to be the time between her leaving her engagement with the Respondent and her starting another job – GBP 1,650.00.
18. The Claimant also puts forward a short witness statement by Andrew Faithfull. The version before the Tribunal was unsigned. There does not appear to be any dispute in respect of the material provided in that statement as it applies to the Claimant's case against the Respondent.
19. There were no witnesses at the hearing other than the Claimant and Mr Evans. Mr Muir was unavailable as he was on holiday at the time of the hearing. Although it would have been helpful to hear from him in certain respects, I decided to proceed with the hearing notwithstanding his non-attendance as the substantive issues before me could be decided upon without him.

## **Facts**

20. The Respondent was formed in April 2017 and started trading in July 2017.
21. As well as the Claimant, the Respondent had other employees under written employment contracts, as well as three directors – Mr Evans, Mr Muir (the finance director, who was self-employed) and Robert Wall (a non-executive director, also self-employed).

## **Background to the engagement**

22. In July 2017, the Respondent's business was a start-up and small. Mr Evans states that the requirement for accounting services was limited, but expected to grow. I accept this.
23. It is agreed that Mr Evans and the Claimant met through a mutual contact and the position was not advertised. Mr Evans states that the Claimant was recommended as offering accounting, taxation and payroll services.
24. Mr Evans states, and I agree, that the Claimant offered her services as a contractor. Mr Evans further states that the flexibility of this arrangement suited the business at that time. He says that, as Iconic was a new company, there was not a requirement for permanent staff in the position. He also states that the limited amount of work meant it would not progress to a full-time position.
25. The Claimant was working part-time for an accountant when she started working with the Respondent, and this continued until January 2018. The Claimant states that she continued to do delivery jobs during the evening and, as such, she remained self-employed for tax purposes.
26. Throughout the Claimant's engagement with the Respondent, she had other business interests. These included a catalogue business, whereby parcels for the Claimant were delivered to the Respondent's premises.

#### The nature of the engagement

27. The Claimant states she was employed as an office manager starting on 14 July 2017, with that employment ending on 25 October 2019. She maintains that she was employee of the Respondent throughout the engagement.
28. The Respondent states that the Claimant never asked to become an employee, and the Respondent assumed that the Claimant was happy with the flexibility offered by being a contractor.
29. Initially, the Claimant's hours were irregular. This was until September 2017 when she and the Respondent agreed she would work 27.5 hours each week. She states that, when she joined, she was introduced as "an office manager / project coordinator / [Mr Evans's] PA". She adds that most of her work involved project management.
30. The Respondent states that it decided to contract the services of the Claimant to provide the following services:
- a. Prepare payroll and submit payroll returns to HMRC;
  - b. Bookkeeping and accounting services;
  - c. Supplier invoices and payments;
  - d. Customer invoices and receipts;
  - e. Other ad hoc work.
31. In oral evidence, Mr Evans also referred to project planning as part of the Claimant's role.
32. I find that the Claimant was engaged to perform a variety of tasks, including but not limited to the matters described by the Respondent – and there was some element of office management and project management involved.

33. There was no written agreement between the Claimant and the Respondent.
34. The Claimant states that, at the beginning of her employment, she only worked when she was told to. From September 2017, she worked from 9.30 to 15.00 Monday to Friday in the Respondent's offices in accordance with Mr Evans's instructions. In her statement, the Claimant states that she only wanted to work around her children and so Mr Evans set her hours as 9.30 to 15.00 Monday to Friday.
35. Mr Evans states that the Claimant worked the hours that suited her in order to complete the work required each month. He further states that any work by the Claimant outside of her set hours was done according to her schedule – it was up to her and to suit her. She was paid for any such work.
36. I find that the Claimant and the Respondent agreed on the hours that the Claimant would work. This took into account the Claimant's wishes regarding hours. I deal with hours worked outside of these "normal" hours in the sections on holiday and overtime below.
37. It is agreed that the Claimant used her own laptop and that she had access to a computer at the Respondent's premises. It is agreed that the Claimant would have received a work laptop from the Respondent, once the Respondent had sufficient funds. This did not happen.
38. The Claimant further states, and I agree, that if she was unwell (or absent for any other reason) she could not send any substitute for her work. She states that she needed to do the work personally.
39. It is agreed that the Claimant was allowed to bring her children into the office. Mr Evans states that this would not have been allowed for an employee in the absence of exceptional circumstances.
40. Although the Respondent had policies and procedures in respect of certain matters, these were not presented to the Claimant.

#### Engineers

41. It is agreed that engineers were hired by Iconic as permanent employees to carry out installations and maintenance for customers (**Engineers**).
42. It is further agreed that the Engineers signed written employment agreements with the Respondent. A sample employment agreement was put into evidence. The Claimant did not sign such an agreement.
43. The Engineers had set hours between 9am and 6pm. They were paid overtime at a rate of 1.5 times their normal hourly rate only if they worked more than 45 hours in a week.
44. The Respondent's policies and procedures were presented to the Engineers (unlike the Claimant).

#### Pay and benefits

45. It is agreed that the Claimant was engaged by the Respondent at an agreed hourly rate of GBP 10 per hour. This was increased to GBP 12 per hour in late 2018.
46. It is agreed that the Claimant did not receive any benefits beyond her pay and was not part of the Respondent's pension scheme.
47. It is agreed that the Claimant was never on the Iconic payroll.
48. The Claimant states that at the start of the engagement, Mr Evans asked the Claimant if she wanted to be on the payroll. However, as the Claimant was already on another company's payroll, she asked if she could be paid by invoice.
49. Under cross-examination, the Claimant confirmed that she did not include herself for PAYE at the Respondent because she was involved in other business. She added that it was also to save the Respondent money. She stated that she still paid tax, although I make no finding in this regard, as I do not have evidence of the Claimant's tax affairs, outside of those with the Respondent, before me.
50. It is not in dispute that the Claimant worked on the payroll every month from timesheets submitted by the Engineers and she submitted her own hours.
51. On the basis of these hours, the Claimant invoiced the Respondent for her services. The first such invoice included VAT. From the evidence, it appears that on occasion VAT was applied, on others only "Zero Rated Expenses" were referred to and sometimes no VAT was applied.
52. The Respondent has provided various documents, seen or prepared by the Claimant, that describe the Claimant's pay as "fees" or "audit or accountancy fees". This contrasts with the Engineers receiving what is described as a "salary".
53. The Respondent states, and I agree, that the Claimant did not query her "fees" being separate from the Engineers' salaries.
54. It is agreed that there were no deductions for the Claimant's tax and national insurance under the PAYE system.
55. In her oral submissions, the Claimant stated that she did not know the difference between PAYE and being paid by the Respondent through invoices. I do not find this as credible. The Claimant had to know the difference between an employee on the payroll and a self-employed contractor, as she was responsible for setting up the relevant accounting, including the payroll. She also made the relevant accounting entries.
56. As well as for her hours, it is not in dispute that the Claimant charged the Respondent for certain additional work. The Respondent has provided evidence that the Claimant provided the Respondent with taxi services. These were charged at a rate agreed with the Claimant and based on what a local taxi firm would charge, rather than as employee expenses based on a 45p charge per mile. Under cross-examination, the Claimant stated that she did this because she took advantage of the situation.

57. It is agreed that that the Claimant also provided childminding services. These were invoiced to the Respondent.
58. The Claimant booked travel and hotels for the Respondent. The Respondent paid for these from its own bank account. However, the bookings were done using the Claimant's personal email address – thus entitling her to any loyalty or advantage points that may result.
59. The Respondent states that, on occasion, the Claimant had to wait a considerable time before her invoices were paid. This was as a result of the Respondent's lack of funds. The Respondent also, on occasion, paid Respondent invoices from her own funds and was reimbursed by the Respondent sometime later.

#### Holidays and holiday pay

60. It is agreed that the Claimant was not paid if she did not work. As such, (unlike the Engineers) the Claimant did not receive holiday pay during her engagement. She did not receive sick pay, paid holiday over the Christmas period, extra days off over Christmas and New Year or bereavement leave.
61. The Claimant says, and it is agreed, that if she wanted to take any time off, she needed to submit a holiday form and have it approved by Mr Davis at least one week before. This followed an incident in April 2018, when The Claimant was absent from the office.
62. In either late 2018 or 2019, it is agreed that the Claimant asked for holiday pay. However, the Respondent did not want to change the Claimant's status from contractor to employee. The Respondent did increase the Claimant's hourly rate to GBP 12 per hour (see above). The Claimant accepted this.
63. The Claimant states that in April 2019, the Respondent, through Mr Muir, agreed to pay her holiday pay provided she had a one month notice period. This was not confirmed in writing. Mr Evans states that Mr Muir could not bind the Respondent in this regard. The Claimant states that Mr Evans was fully aware of the discussions and what she states to be the agreement made. Mr Muir does not deal with this matter in his purported witness statement of December 2020. I find that Mr Muir did make this offer and Mr Evans was aware of it. Nonetheless, subsequent to this, the Respondent did not pay the Claimant holiday pay.

#### Overtime and overtime pay

64. It is agreed that the Respondent paid the Claimant for all hours worked. The dispute relates to the amount that should have been paid, and in particular whether she should have paid more than her standard hourly rate for hours worked outside of her 27.5 hours, for holidays and other relevant absences.
65. The Claimant states that in March and April 2018, she submitted timesheets that included overtime charged at 1.5 times above her standard hourly rate. She had worked additional hours over this period because the Respondent was due to submit its first VAT return.

66. She states that, following a review of the claim for overtime, Mr Evans said that he did not agree to pay these additional sums and asked the Claimant to pay back any overtime that had previously been claimed. The Claimant did so. Under cross-examination, the Claimant stated that she paid the money back because she did not understand the consequences of doing so (i.e., that it could be seen as an acceptance that the amounts were not owed to her) and also in order to keep her job.
67. In her statement, the Claimant states that she worked on project planning matters during time she was due to have off in March and April 2018, including the Easter bank holidays and school holidays. It is agreed that the Claimant was only paid at her standard rate of GBP 10 per hour for these days, and not at the same level as the Engineers would have been if they worked on their holidays. The Claimant says, "Since then, I have carefully not worked over my set hours". However, it is agreed that she has been contacted by the Respondent out of her normal hours.
68. In December 2018, the Claimant was told that her father-in-law was seriously ill. As a result, she had to fly to Taiwan. Her father-in-law died shortly afterwards, and the Claimant needed to stay in Taiwan for two weeks for the funeral. The Claimant worked throughout this period. It is agreed that the Claimant was paid for her work during this period at her standard hourly rate. The Claimant contrasts this with the treatment some months later of two of the Engineers who were given paid bereavement leave without the need to do any work during that leave.
69. The Claimant states that in August 2019, she was asked to work extra hours, including her days off and a bank holiday. In light of the discussion with Mr Muir in April 2019 regarding holidays (see above), the Claimant believed that she would be entitled to overtime for her days off and the bank holiday, and submitted claims at the same rate as the Engineers. The Engineers received 1.5 times their normal hourly rate for overtime (excluding Sundays) and twice their normal hourly rate for overtime on Sundays, bank holidays or other holidays.
70. The Claimant expected to be paid at the same rates as the Engineers. However, according to the Claimant, Mr Muir refused this, stating that the Claimant was an employee, and an employer can decide how it pays its employees. According to the Claimant, Mr Muir further stated that the Claimant would be paid overtime, but only if she worked more than 40 hours in a week. I accept the Claimant's evidence that Mr Muir used these terms and made this offer.
71. The Claimant states that she was not paid on 31 August 2019 for August 2019, as was expected. She was only paid on 25 September 2019 for August 2019 at her standard hourly rate for the time that she worked, and was not given any uplift for overtime.
72. The Respondent denies that it agreed to change her status to that of any employee, to offer an uplift for overtime or to offer any other employee benefits.

The end of the engagement



73. The Claimant states that following the August 2019 discussions described above, Mr Evans's behaviour towards the Claimant changed and he either shouted at her or ignored her. She believes that she was bullied. Beyond her own evidence, the Claimant does not put forward any further evidence in this regard. Mr Evans states that, as a start-up, the environment was pressurised. However, he denies bullying.
74. On 27 September 2019, the Claimant was asked to leave the office by Mr Evans until further notice.
75. On 7 October 2019, the Claimant was invited back to work. The Claimant states that Mr Evans started to shout at her again on 25 October 2019 she left the Respondent for the final time. The Respondent agrees that the Claimant left of her own accord.
76. The Claimant did not work, and was not paid for, a period of notice. The Claimant states that she felt that she was bullied and so did not think that she should have to provide any notice.
77. The Claimant notified ACAS under the early conciliation process of a potential claim on 27 November 2019 and the ACAS Early Conciliation Certificate was issued on 29 November 2019. The Claimant's claim form was received by the Watford Tribunal office on 24 January 2020.

## **Law**

### Employment and worker status

78. An "employee" is defined by section 230(1) Employment Rights Act 1996 (**ERA 1996**) as being "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".
79. "Contract of employment" is defined as meaning a contract of service or apprenticeship. Whether an individual works under a contract of service is determined according to various tests established by case law. A tribunal must consider relevant factors in considering whether someone is an employee. An irreducible minimum to be an employee will involve control, mutuality of obligation and personal performance, but other relevant factors will also need to be considered.
80. A "worker" is defined by section 230(3) ERA 1996 as being:
- "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".*

### Holiday pay

81. The Working Time Regulations 1998 (**WTR 1998**) provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The WTR 1998 provide for 5.6 weeks leave per annum. The leave year begins on the start date of the claimant's employment in the first year and, in subsequent years, on the anniversary of the start of the claimant's employment, unless a written relevant agreement between the employee and employer provides for a different leave year. There will be an unauthorised deduction of wages if the employer fails to pay the claimant on termination of employment in lieu of any accrued but untaken leave.
82. A worker is entitled to be paid a week's pay for each week of leave. A week's pay is calculated in accordance with the provisions in sections 221 to 224 ERA 1996, with some modifications. There is no statutory cap on a week's pay for this purpose. Since the payment for leave in this case was due before 6 April 2020 (when there was a change to the relevant provisions) an average of pay of the previous 12 weeks is taken. In accordance with a series of cases including the Court of Appeal's judgment in *British Gas Trading Ltd v. Lock an anor* [2017] ICR 1, all elements of a worker's normal remuneration, not just basic wages, must be taken into account when calculating holiday pay for the basic four weeks' leave derived from European law, but not for the additional 1.6 weeks leave which is purely domestic UK law in origin.

#### Unauthorised deduction from wages

83. Section 13(1) of the ERA 1996 provides that an employer shall not make a deduction from wages of a worker employed by the employer unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing their agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to section 23 of the ERA 1996.

#### Breach of contract

84. If there is no expressly agreed period of contractual notice, there is an implied contractual right to reasonable notice of termination. This must not be less than the statutory minimum period of notice set out in section 86 ERA 1996.

#### **Conclusions**

85. The Claimant's claim for sex discrimination was dismissed prior to the hearing.
86. The Respondent states in its claim form that it does not agree with the details given by the Claimant about early conciliation with ACAS. No further evidence in this regard was provided, and so I have not taken this matter further.
87. It is unclear on what legal basis the claim for the period between 26 October 2019 and 2 December 2019 is made, and no legal basis for it has been set out. As such, I also do not consider it further.

#### Employment or worker status

88. The Claimant can only claim holiday pay and unauthorised deductions from wages, or claim for breach of contract, if she was an employee or (depending on the relevant area of law) a worker.
89. All employees are workers but not all workers are employees, so I start by considering whether the Claimant was an employee as defined under section 230(1) ERA 1996 or, if not, if she was a worker as defined under section 230(3) ERA 1996.

*Employee*

90. There was no written agreement between the Claimant and the Respondent. However, there was clearly an oral contract between the parties with terms with respect to the engagement between the Claimant and the Respondent.
91. Amongst other matters, this contract included the Claimant's hourly rate and hours of work. Further, the Respondent exercised control over the Claimant by deciding what work she did.
92. However, the other terms of the contract are not consistent with there being a contract of service.
93. There was no written contract of employment (unlike that in place for the Engineers). Further, she was not presented with (and was not regarded as being subject to) the Respondent's policies and procedures.
94. The engagement between the parties was that the Claimant was a contractor. The Claimant offered her services as such, and she was engaged by the Respondent on that basis.
95. The Claimant worked for others and carried on other lines of business outside of her arrangement with the Respondent. This continued throughout her engagement with the Respondent.
96. The Claimant was paid on an hourly basis. The Claimant invoiced the Respondent for fees, rather than being paid a salary. She claimed separate sums (by invoice) from the Respondent for taxi services and childminding in a manner consistent with being a contractor rather than an employee.
97. The Claimant was responsible for payroll matters and was aware of the difference between an employee on the payroll paid a salary and a contractor paid fees following the submission of invoices.
98. There were no deductions for tax and national insurance under the PAYE system.
99. There was no agreement with the Respondent that the Claimant would be paid holiday or sickness pay, or given bereavement leave.

100. She was not required to serve any notice and left her engagement with the Respondent immediately upon deciding to do so.
101. As the relationship developed, it was not the case that the contract between her and the Respondent changed such that she ceased to be a contractor.
102. In March and April 2018, the Claimant repaid certain sums of overtime that (the Respondent contends) were paid to her wrongly. That repayment does not mean that the Claimant's claim in respect of overtime is barred. However, it is telling that the Claimant repaid the sums and then continued her engagement with the Respondent. This may have been motivated by a desire to keep working – but it must have been clear to her that the arrangement was for her to keep working without overtime pay.
103. In late 2018 or early 2019, The Claimant did ask for holiday pay. However, this request was turned down, with an increase in The Claimant's hourly rate. The Claimant accepted this.
104. There was no obligation on the Respondent to pay the Claimant additional amounts for work that she did while she was in Taiwan or to provide her with paid bereavement leave. I can well see how she would see that situation as unfair, particularly as certain of the Engineers were later treated differently. However, that did not alter her arrangement with the Respondent in this regard.
105. With respect to the April 2019 offer by Mr Muir in respect of holiday pay, although I consider that the offer was made and Mr Evans knew about it, I do not consider that it was followed through to a binding agreement. I do not consider that the Claimant understood that she was subject to one month's notice from that point (and this was not something that either party recognised at the time of the Claimant's departure). In addition, none of the other aspects of the Claimant's engagement with the Respondent altered. Accordingly, I do not consider that the April 2019 offer changed the Claimant's status from contractor to employee.
106. Similarly, I do not consider that the use of the word "employee" by Mr Muir in August 2019 altered the substance of the contractual arrangement between the Claimant and the Respondent. The only potential change here was the offer that if the Claimant worked more than 40 hours, she would be paid overtime. I understand that this eventuality did not occur, so I do not need to consider it further.
107. Having regard to all relevant circumstances, I conclude that the Claimant was not an employee.

*Worker*

108. As the Claimant was not an employee, I need to decide whether she was a worker under the ERA 1996.

109. In light of the factors described above, I consider that the Respondent continued, by virtue of its contract with the Claimant, as a client or customer of a profession or business undertaking carried on by the Claimant.

110. In particular:

- a. The initial engagement was clearly a situation where the Claimant was working as a contractor.
- b. The Claimant continued business interests outside of her engagement with the Respondent.
- c. There were no deductions for tax and national insurance under the PAYE system.
- d. For the reasons set out above, her status as a contractor did not change over the time that she worked with the Respondent.

111. Having regard to all relevant circumstances, I conclude that the Claimant was not a worker.

Claims

112. As the Claimant is neither an employee nor a worker with respect to the Respondent, her claims in relation to holiday pay, overtime and bereavement leave fail.

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Employment Judge Din  
Date: 05 August 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS