EMPLOYMENT TRIBUNALS

Claimant: **Miss T Tyrell**

Respondents: **(1) Skylark Solutions Ltd.**
(2) Background Clubs Ltd.

Heard at: **East London Hearing Centre**

On: **13 December 2024**

Before: **Employment Judge S Shore**

Representation
For the claimant: In Person
For the first respondent: Mr J Treston, Litigation Consultant
For the second respondent: No Appearance

PUBLIC PRELIMINARY HEARING JUDGMENT

1. The claimant was not an employee of the first respondent under the definition in section 230(1) of the Employment Rights Act 1996 (ERA).

2. The claimant was an employee of the first respondent under the definition in section 83 of the Equality Act 2010 (EqA).

3. The claimant was a worker of the first respondent under the definitions in s.230(3) ERA, and s.43k of the ERA.

4. The claimant's claim of UDL is struck out as the Tribunal has no jurisdiction to hear it.

REASONS

Law

1. Section 230(3) of the Employment Rights Act 1996 ("ERA 96") provides in part;
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; and any reference to a worker's contract shall be construed accordingly.

2. Section 83 EqA

83 Interpretation and exceptions

(1) This section applies for the purposes of this Part.

(2) "Employment" means—

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

3. Section 43K ERA

43K Extension of meaning of "worker" etc. for Part IVA.

(1) For the purposes of this Part " worker " includes an individual who is not a worker as defined by section 230(3) but who—

(a) works or worked for a person in circumstances in which—

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

(c) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for "personally" in that provision there were substituted "(whether personally or otherwise)",

4. In **Autoclenz Ltd v Belcher and ors** [2011] ICR 1157, the Supreme Court held that the written agreement is not decisive in determining employment status, and the relative bargaining powers of the parties must be taken into account.

5. In **Uber BV and ors v Aslam and ors** [2021] ICR 657, the Supreme Court held that 'worker' status is a question of statutory, not contractual, interpretation, and it is therefore wrong in principle to treat the written agreement as a starting point. The following are some relevant extracts from of the speech of Lord Leggatt:

> *"38. The effect of these definitions, as Baroness Hale of Richmond observed in Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32; [2014], paras 25 and 31, is that employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else. Some statutory rights, such as the right not to be unfairly dismissed, are limited to those employed under a contract of employment; but other rights, including those claimed in these proceedings, apply to all "workers".*
>
> *….*
>
> *69. Critical to understanding the Autoclenz case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation.*
> *….*
>
> *75. The correlative of the subordination and/or dependency of employees and workers in a similar position to employees is control exercised by the employer over their working conditions and remuneration. As the Supreme Court of Canada observed in McCormick v Fasken Martineau DuMoulin LLP 2014 SCC 39, para 23: "Deciding who is in an employment relationship ... means, in essence, examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working*

conditions and remuneration, and corresponding dependency on the part of a worker. ... The more the work life of individuals is controlled, the greater their dependency and, consequently, their economic, social and psychological vulnerability in the workplace ..."
…

87. In determining whether an individual is a "worker", there can, as Baroness Hale said in the Bates van Winkelhof case at para 39, "be no substitute for applying the words of the statute to the facts of the individual case." At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who is employed under a "worker's contract".
….

91. Equally, it is well established and not disputed by Uber that the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working."

6. I also considered the cases of **Clark v Oxfordshire Health Authority** [1998], IRLR 125 CA, **Pimlico Plumbers Ltd v Smith** [2018] UKSC 29, and **Ter-Berg v Simply Smile Manor House Ltd and ors** [2023] EAT 2.

Conduct of hearing

7. Prior to the hearing, I was provided with:

   7.1 An indexed and paginated bundle of documents consisting of 76 pages;

   7.2 The witness statement of Loren Chame, Operations Manager of the first respondent, whose witness statement dated 27 November 2024 consisted of 47 paragraphs over 5 pages; and

   7.3 The witness statement of the claimant, whose witness statement dated 30 November 2024 consisted of 2pages and 10 paragraphs with 13 exhibits.

8. The Claimant is unrepresented. I reminded her that the Tribunal operates on a set of rules. Rule 2 sets out the overrunning objective of the Rules (their main purpose) which is to deal with cases justly and fairly. It is reproduced here.

   "The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far that is practicable –

   (a) Ensuring that the parties are on an equal footing;

(b) Dealing with cases in ways that are proportionate to the complex that are importance to the issues;
(c) Avoiding unnecessary formality and seeking flexibility in the proceedings;
(d) Avoiding delay so far as compatible with proper consideration and the issues, and
(e) Saving expense.

The Tribunal shall seek to give effect to the overriding objective in interpreting or exercising any power given to it by these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall cooperate generally with each other and with the Tribunal."

9. I reminded the parties of the purpose of the hearing as ordered by EJ Beyzade, which was for me to determine the claimant's employment/worker/self-employed status.

10. I considered the matters at paragraphs 2.1 to 2.4 of the List of Issues in relation to the claimant and the first respondent only because the second respondent had not attended. On inspection of the file, the seconds respondent had been re-served with the claim and other papers after the preliminary hearing before EJ Beyzade on 14 August 2024. The Notice of Claim sent to the second respondent indicated that its response had to be received by 2 October 2024. It was received on 4 October 2024.

11. No notice of rejection had been sent to the second respondent in respect of it's late response. I have attended to that matter.

Findings of Fact

12. All findings of fact were made on the balance of probabilities. If a matter was in dispute, I have set out the reasons why I have decided to prefer one party's case over the other. If there is no dispute over matter, I simply record the finding or make no comment as to the reason the finding was made. I have not dealt with every single matter that was raised in evidence or on the documents. I have only dealt with matters that I found relevant to the issues that I had to determine. No application was made by either side to adjourn this hearing to complete disclosure, to obtain more documents or call more evidence, so I have dealt with the case based on the documents and evidence produced to me.

13. I find that the claimant was not an employee but was a worker for the first respondent. I make that finding because:

    13.1 The claimant had no written agreement with the respondent that set out the terms of their contractual relationship. There was no document that described the claimant as an employee or worker.

    13.2 The claimant described herself as self-employed in the document attached to her ET1.

13.3 This is not a case where I had to look at a contract, so the approach to contractual documents set out in **Autoclenz** and confirmed by **Uber** is not relevant.

13.4 The analysis I had to apply was to the facts of the relationship between the claimant and the respondent.

13.5 I find that the claimant's evidence about the start of her working relationship with the respondent looks like someone joining a company rather than becoming a contractor – Exhibit 1.

13.6 The claimant was never given any form of written contract with the respondent.

13.7 No documents were produced (letters, emails, messages etc.) that contained any details of the terms of the agreement between the parties.

13.8 The parties agreed that the claimant was paid £15.00 and then £17.00 per hour for her work.

13.9 The claimant never made a written claim for and was never paid holiday pay.

13.10 The claimant never substituted for other door staff.

13.11 The claimant was not paid sick pay.

13.12 The claimant was paid gross (without deduction of income tax or National Insurance) throughout her work with the respondent. The claimant was responsible for her own tax and NI.

13.13 The respondent provided the claimant with a radio and Hi-Viz jacket.

13.14 The claimant invoiced for her work.

13.15 The claimant worked consistent days from November 2023, but not consistent hours.

13.16 The claimant was free to work for other organisations. She was a part-time employee in the public sector and undertook work on the door of establishments that she was not booked to work at by the respondent.

14. I find that the respondent did not exercise much control over the claimant. I make the following relevant findings:

14.1 The claimant worked the same days for the same hourly rate from November 2023 in her engagement with the respondent. This leans towards a worker or employee relationship.

14.2 The first respondent briefed the claimant about the work she had to do. She was then supervised by the client at the venue.

14.3 I find that there was nothing tying the claimant to the first respondent and that she was free to work for other organisations. I make that finding because there was no agreement (written or verbal) in place that imposed any restrictions on the claimant's ability to work elsewhere.

14.4 I find that there was no mutuality of obligation between the first respondent and the claimant. The claimant could refuse work offered. The respondent did not have to offer work to the claimant.

14.5 The claimant could not substitute a suitable alternative to do her work.

Employment Judge S Shore
Date: 13 December 2024