Case Number: 2402991/2014

EMPLOYMENT TRIBUNALS

Claimant		**First Respondent**
Miss Ms E Forrai	**v**	Capita Translation and Interpreting Limited

PRELIMINARY HEARING

Heard at: **London Central** **On: 13 and 14 July 2017**

Before: Employment Judge K Welch

Appearances
For the Claimant: In person
For the Respondents: Mr T Sadiq (Counsel)

RESERVED JUDGMENT

The Claimant is not a worker under section 230(3) of the Employment Rights Act 1996. Therefore, the Claimant's claim for holiday pay is dismissed against the First Respondent.

REASONS

1. The Claimant's only remaining complaint is for holiday pay against the only remaining respondent, Capita Translation and Interpreting Limited. In order to consider a claim for holiday pay under the Working Time Regulations 1998 ('WTR') it is necessary for the Claimant to be a worker.
2. The parties had attended an earlier Preliminary Hearing dealing with case management issues on 6 April 2017 before Employment Judge Pearl. At this hearing, Employment Judge Pearl ordered a preliminary hearing to consider the sole issue of whether the Claimant is a worker under the WTR.

3. The Claimant arrived late for the hearing on the first day due to her assertion that the First Respondent had amended its website, therefore denying her the opportunity to obtain some evidence in support of her case.
4. As a preliminary issue, the Claimant requested an amendment to her claim, namely that she be classed as an employee as opposed to a worker. As a litigant in person, she had recently researched the cases in this area and wished to claim that she was an employee for the period November 2013 to July 2014. The First Respondent was given the opportunity to respond to the application and objected to it on the basis that no good reason had been provided for the proposed amendment. Also, that the First Respondent had prepared its case on the basis that the issue to be determined was whether the Claimant was a worker.
5. Having considered both submissions, I did not allow the amendment. In particular, I noted that the Claimant would not be prejudiced in any way, since the Tribunal only had to consider whether she was a worker at all material times (which is a lower test than that of employee) in order to be entitled to claim holiday pay. I also considered the lateness of the application from the Claimant and that the Respondent may be prejudiced by such amendment in the way in which it had prepared its case.
6. I had before me an agreed bundle of documents and read the documents each party directed me to. References to page numbers in this Judgement are to page numbers in that bundle. The Claimant sought to adduce 3 additional documents. Having provided the First Respondent with an opportunity to consider the first 2 documents, the First Respondent objected to their inclusion solely on the ground that it considered them irrelevant to the issues. In light of the fact that each of the documents was only one side of paper, I admitted them as evidence and added them to the agreed bundle. The final document which the Claimant wanted to adduce was agreed by the First Respondent and was therefore added to the bundle.
7. I heard evidence from the Claimant herself and Karl Johnson Operations Director of the First Respondent. The witness statements (there being 2 from the Claimant) stood as their evidence in chief, but were tested by cross examination and additional questions from myself.

8. The Claimant acknowledged prior to giving evidence that much of her first statement was not relevant to the sole issue of whether she was a worker but confirmed that it had been prepared when her case was much wider. However, she was unable to identify which passages were not relevant for me to read and I therefore read the whole of her statements.

FINDINGS OF FACT RELEVANT TO THE PRELIMINARY HEARING

9. The Claimant is an interpreter and translator, having been born and raised in Hungary with her native language as Hungarian. She has lived in the United Kingdom since 1983 and became a British citizen in 1992.
10. From January 2012 until 31 October 2016, the First Respondent provided interpreting and translation services to the Ministry of Justice (formerly the Second Respondent in this case) under a framework agreement to a range of organisations, including Her Majesty's Courts and Tribunal Service, the CPS, Her Majesty's Prison Service and some of the police forces throughout England and Wales. This service transferred to thebigword Limited on the loss of the contract by the First Respondent in October 2016.
11. The Claimant had provided interpreting and translation services to a number of different organisations on a self employed basis from 2008, prior to contracting with the First Respondent. The Claimant registered with the National Register for Public Services Interpreters ('NRSPI') in 2008 and has continued to be on their register since that time.
12. The First Respondent described this as, in effect, a 'yellow pages' for interpreter services whereby organisations could identify relevant interpreters and contact them to engage them to provide interpreting and/or translating services. The Claimant did not consider this description appropriate, but accepted that she had been registered on the NRSPI, and that she had to be, in order to undertake some of her other interpreting work, for example for the Metropolitan Police force, referred to below.
13. The Claimant entered into an Interpreter Services Agreement ('the Agreement') with the First Respondent on 2 November 2013 [pages 43 to 55]. The Claimant was not interviewed for this contract, there was no probation period or induction process.
14. The Agreement provided that the Claimant was engaged to provide interpreting services "on a non-exclusive basis". Further it provided:

a. "…The Parties acknowledge that the Interpreter may not utilise any other individuals or organisation in place of the Interpreter for these purposes." [Clause 3.3]
b. "No payment will be made by Capita in respect of holiday, sickness, pension rights, redundancy pay or other benefits." [clause 5.3]
c. "The Interpreter will be solely responsible for all tax liabilities, national insurance contributions, social security contributions and any other taxes and deductions payable in respect of the Interpreter for the provision of the Services…" [clause 5.4]
d. "The Interpreter shall defend, hold harmless and fully indemnify Capita against any loss …"[clause 9.2]
e. "Nothing in this Agreement shall be construed or have any effect as constituting any relationship of employer and employee, or worker, or contractor between Capita and the Interpreter, and the Interpreter shall procure that it shall not hold itself out as such." [clause 11.5]
f. "This Agreement is personal to Capita and the Interpreter and neither may sell, assign, sub-contract or transfer any duties, rights or interests created under this Agreement without the prior written consent of the other." [clause 11.8]
g. "This Agreement is not an exclusive agreement, and subject to the Interpreter's obligations in this Agreement, nothing in this Agreement will operate to prevent the interpreter from engaging in other services." [clause 11.9].
h. The Agreement had annexed to it an Interpreter code of professional conduct.

15. The First Respondent also provides an Interpreter Handbook [pages 72-128], although the Claimant stated in cross examination that she had not read this. This states at page 76, "Interpreters engage with us as freelance suppliers and are not directly employed by Capita TI. For the avoidance of doubt, we confirm that upon acceptance to our Interpreter Panel, you are not considered an agency worker under the Agency Worker Regulations 2010. Furthermore, nothing in this handbook, nor any Assignment offered to you shall be construed or have effect as constituting a partnership, joint venture or contract of employment between Capita TI and the Interpreter."

16. The Interpreter Handbook includes an Interpreter Code of Professional Conduct [pages 115 to 116] which provides "fundamental provisions that Capita expects [its] Interpreters to follow…". This includes, "arrive wearing clothing and accessories appropriate to the nature of the Assignment to show your respect to the customers, witnesses, victims, prisoners and others you are assisting."
17. There is a Quality Assurance and Behaviour Management Process document [pages 129-138]. This document refers to affecting "a change" to interpreters' "behavior to be more appropriate, or to remove the supplier for the approved panel to avoid repeat issues." This is not the same as the disciplinary procedure which applies to the First Respondent's employees.
18. The Claimant was not otherwise subject to performance management, appraisal systems or grievance procedures.
19. The Respondent suggested that there was a right of substitution contained within the Agreement (at clause 11.8 referred to above). However, the Claimant asserted that there was no right of substitution, and further that substitution was not even allowed under the Agreement, referring to clause 3.3 of the Agreement. I agree with the Claimant that there was no unfettered right of substitution. I am not convinced by the First Respondent's argument that clause 11.8 provided a right of substitution and agree that clause 3.3 appears to be an exclusion to this in any event.
20. The rates for interpreting services were standard rates, set within the Framework Agreement between the First Respondent and the Ministry of Justice, for the interpreting work carried out on their contracts. However, it was clear that, on occasion, the Claimant had negotiated an additional payment in order to accept the job and make it more financially beneficial. Further, there was evidence that the Claimant refused some work due to the fee offered and it not being financially viable. The Claimant considered that the rates offered were very low and required the Claimant to work every available hour in order to earn sufficient to live. Her evidence was that she saw working for the First Respondent as her "main job" and any other work was ancillary to this.
21. It was clear from the evidence before me that the First Respondent offered the Claimant a number of assignments under the Agreement. Computer generated printouts of these were seen at pages 171 to 212. The printouts showed information including the date and job offer address, whether the Claimant had

accepted or declined the job offer and whether the offer had expired without confirmation from the Claimant. It also, in a few cases, gave reasons for the refusal by the Claimant, ranging from "unavailable/ working elsewhere", "job venue is too far away", "not financially beneficial" and "not interested in job type".

22. It was clear from these printouts that some of the offers were accepted, which may have been for prolonged periods, since the printout did not identify whether the assignment was long or short term or even the expected duration. However, I am satisfied that the Claimant was free to accept and/or reject assignments if she wished and that the First Respondent was under no obligation to offer the Claimant further interpreter assignments.
23. The First Respondent would contact the Claimant in a variety of ways to offer her assignments; by phone, email and/or the First Respondent's on-line portal, which the Claimant had access to. The Claimant's evidence was that she was unable to accept many of the job offers due to being already working on assignments with the Ministry of Justice through the First Respondent.
24. There was a facility for interpreters to mark on their profile page with the First Respondent that they are not available for work for any reason. The Claimant confirms that she never did this but accepted that she could have done so.
25. Once an assignment had been accepted, the Respondent gave evidence, which was not challenged by the Claimant, that the Claimant could decide not to continue with the assignment should she wish to cancel it at any stage.
26. When working on assignments for the First Respondent, the Claimant was not supervised, directly or indirectly, by the First Respondent. Should complaints be brought against the interpreter, then there was a procedure for dealing with these, although as already stated, this was not the same as the First Respondent's disciplinary procedure used for its employees.
27. Whilst there was a Quality Assurance and Behaviour Management document, there was no presence from the First Respondent within the Courts or whichever place the Claimant was providing her interpreting services. The Claimant's own evidence was that she was working under the control of the Court staff, when working on MOJ work. She stated that she was working without supervision and that it would very difficult for others to supervise her in a language they did not speak.

28. The Claimant's first assignment with the First Respondent commenced on 4 November 2013.
29. It was clear from the Claimant's evidence, which was not disputed by the First Respondent, that the Claimant worked on some lengthy criminal cases providing interpreting service under the Agreement. From November 2013 until the end of June/ early July 2014, the Claimant's evidence, which I accepted, was that she was involved in back to back criminal cases, during which she worked full time for the First Respondent. The Respondent did not produce evidence of the length of her assignments or hours of work and therefore, I accept the Claimant's evidence in this regard.
30. The Claimant accepted in cross examination that there was no guarantee from the First Respondent as to the amount of work to be provided, and that she was under no obligation to accept work from the First Respondent. However, she said that there was more work available than she could have accepted.
31. It was agreed by the parties that the Claimant never provided her interpreting services for the First Respondent itself, nor was she ever based in its offices. The nature of the work was that she provided interpreting services having accepted an assignment, wherever the First Respondent's clients wanted them delivered. Most of this work was with the Ministry of Justice, although there was evidence of at least 2 other assignments she carried out on behalf of the First Respondent for other end users.
32. The Claimant made much of the fact that the First Respondent provided her with some equipment, namely headsets in multi-partied criminal trials so that she was able to interpret to a number of defendants at the same time, who also wore headsets so that they could hear her interpretation. Whilst I accept that the First Respondent did provide these head sets, they were to assist in the Court environment and were not provided as personal equipment for the Claimant herself.
33. One of the additional documents provided by the Claimant, and which the First Respondent agreed to be added to the bundle, was a screenshot from the First Respondent's website [page 255]. The First Respondent had subsequently removed this web page, although despite the Claimant's suggestion that this was related to her claim, I do not consider this to be the case. The page on the website was entitled, "Interpreting services" and in the background appeared a

picture of a woman with a headset and microphone on. I do not find that this picture adds any additional evidence to this case.

34. The Claimant also had to wear a badge when working in the Courts. The Claimant refused to acknowledge that this was for security, indicating others who did not wear a badge (including Judges). However, I am satisfied that the Courts required this and it was not at the request of the First Respondent. The First Respondent provided no uniform to the Claimant.
35. Interpreters working for the First Respondent are required to log the hours that they worked on an assignment on the First Respondent's on line portal, and confirm when the assignment has been completed. The system will then generate a message to the interpreter to confirm the payment to be made to him/her. The First Respondent's automated systems will generate an invoice for the interpreters once the interpreters confirm that the amount is correct.
36. The Claimant did not receive or claim any holiday pay, sick pay or other benefits (including pension) from November 2013 until October 2014 (when the claim form for this claim was presented).
37. The Claimant received weekly payments from the Respondent from which she was responsible for her own tax and national insurance contributions.
38. However, it was also apparent, and the Claimant confirmed this in her evidence, that she undertook other work on a self employed basis whilst carrying out work for the First Respondent under the Agreement. The Claimant gave evidence that she earnt approximately 80% of her earnings from the First Respondent when working what she called full time for them. However, she stated that this did not show the amount of work she did for others, since it was much more lucrative than the work carried out for the First Respondent.
39. Even during the period from November 2013 to 2016, in which the Claimant was said to be working full time on assignments for the First Respondent, the Claimant worked for other organisations, and for some providing interpreting and/or translation services.
40. For example, during the period November 2013 and June/July 2014, the Claimant provided interpreting services to the Metropolitan Police force. She stated that this was done in the evenings and at weekends, since it was much more lucrative than the fees paid under the Agreement with the First Respondent. She also provided ad hoc translation services. In addition, she

received income from other roles, including teaching oriental dancing and lecturing for 2 hours per week. This prevented her from being able to accept a long term assignment dealing with extradition at the Westminster Magistrates' Court.

41. The Claimant continues to be registered with and provide services on behalf of the First Respondent, who engages some 3,500 interpreters to provide interpreting and translation services. In addition, the Claimant is registered with thebigword Limited, who took over the interpreting services agreement with the Ministry of Justice in October 2016.

42. **SUBMISSIONS**

43. Both parties referred me to the following cases:

Windle and others v Chief Constable of West Yorkshire Police and the Secretary of State for Justice [Employment Tribunal (1800295/2012), Employment Appeal Tribunal ([2014] IRLR 914) and Court of Appeal ([2016] ICR 721)]

Awan v Capita Translation and Interpreting Limited [Employment Tribunal 240531/2013]

Khan v Capita Translation and Interpreting Limited [Employment Tribunal 2204774/2014]

Chet v Capita Translation and Interpreting Limited [Employment Tribunal (2463265/2013), Employment Appeal Tribunal (UKEAT/0086/15)]

Siacuisas v Ministry of Justice Employment Appeal Tribunal (UKEAT/0181/16)

Cotswold Developments Construction Ltd v Williams EAT [2006] IRLR 181

Autoclenz v Belcher Supreme Court [2011] UKSC 41

Hospital Medical Group Ltd v Westwood Court of Appeal [2012] IRLR 834

Halawi v WDGF UK Ltd [Employment Appeal Tribunal (UKEAT/0166/13); Court of Appeal [2014] EWCA Civ 1387]

Bates van Winkelhof v Clyde & Co Supreme Court [2014] IRLR 641

British Gas Trading v Lock Employment Appeal Tribunal [2016] IRLR 316

Pimlico Plumbers Ltd and another v Smith Court of Appeal [2017] EWCA Civ 51

Quashie v Stringfellows Restaurants Limited Court of Appeal [2012] EWCA Civ 1735

44. The First Respondent had provided the Tribunal with a written skeleton argument and was given the opportunity to expand upon this orally. In brief, the

First Respondent denied that the Claimant was a worker within the definition at section 230(3) WTR (see below) and asserted that the relationship between the Claimant and the First Respondent fell within the professional/ client exemption contained within that definition.

45. The First Respondent relied upon some of the interpreter cases which have already been decided, even those relying upon the definition of worker under section 83(2)(a) of the Equality Act 2010 ('EqA') on the basis that there is no material difference between the 2 definitions.
46. The First Respondent therefore considered that the Claimant was a freelance interpreter and was not a worker under regulation 2 of the WTR.
47. The Claimant also provided a written skeleton argument, which she read out to me, expanded upon slightly and which she then handed in to me at the end of her oral submissions. The Claimant contended that she had worked full time for the Respondent, and whilst acknowledging that this was not spelt out as clearly as it might have been in her statement, the statement had to be read in light of her original claims under the Agency Workers Regulations. The Respondent was unable to answer the Claimant's assertion that she worked full time.
48. The Claimant never believed that she was engaged as a freelance interpreter, and viewed it as equivalent to a zero hours agency contract, however accepted this as she knew that there would be continuous work which she states in her submission, "ie a long trial coming up."
49. The Claimant relied upon her assertion that no substitution or sub-contracting was allowed by the First Respondent in supporting her claim to be a worker. Further she considered that there was mutuality of obligation in her case and that she satisfied the higher test of employee as well as worker.
50. Finally, she considered that the Respondent's suggestion that the First Respondent was a client of hers had been rejected in similar cases and that it defied common sense.
51. **LAW**
52. I had regard to the following sections of the ERA which provides a definition for the status of individuals most relevant to this case:
53. Section 230(3) ERA defines a worker:

"(3) In this Act, "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"

54. In Autoclenz Limited v Belcher [2011] IRLR 820, Clarke LJ giving the leading judgment in the Supreme Court stated at paragraph 29, "The question in every case is, as Aikens LJ put it at paragraph 88 quoted above, what was the true agreement between the parties." He went on at paragraph 35 to say:
"So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."
55. There have been other recent cases on whether an individual is to be classed as a worker or an employee. Some of these are Employment Tribunal decisions and are therefore persuasive but not binding. However, I have had regard to the Court of Appeal decision concerning worker status of Pimlico Plumbers Ltd and Mullins v Smith [2017] EWCA Civ 51. Sir Terence Etherton MR gave a useful summary of the position as regards personal performance at paragraph 84 of his judgment:
"I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of

substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

56. In order to be a worker there needs to be the following:
    a. The existence of a contract;
    b. Personal service;
    c. The other party is not the customer or client of any business undertaking or profession carried out by the individual; and
    d. mutuality of obligation.
57. In Bates van Winkelhof v Clyde & Co, Lady Hale said: "..the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. ….The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else." In the particular case, she went on to say, "It is accepted that that appellant falls within the express words of s.230(3)(b). Judge Peter Clark held that she was a worker for essentially the same reasons that he held Dr Westwood to be a worker, that she could not market her services as a solicitor to anyone other than the LLP and was an integral part of their business. They were in no sense her client or customer. I agree."
58. In deciding whether an individual is "carrying on a business undertaking" the EAT in Cotswold Developments Construction Ltd v Williams held that it was important to consider whether the individual marketed themselves to the outside world in general. Langstaff J said at paragraph 53,
    "…it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he

is recruited by the principal to work for that principal as an integral part of the principal's operations, will, in most cases demonstrate on which side of the line a given person falls."

59. Langstaff J also stated in that case, "What is plain is that for an individual to be a worker he must be: (a) subject to a contract; (b) whereby he undertakes to perform work personally (c) for someone who is not a client or customer of a profession or business of his."

60. I considered the Employment Tribunal judgment of Chet v Capita Translation and Interpreting Services Limited and the Employment Appeal Tribunal decision in the same case as being particularly useful to my considerations, since it was based upon similar, but not identical facts. Employment Judge Holmes, found at paragraph 40:

"..the exclusion of persons from "worker" status applies to not only persons who supply their services to persons who are customers of any business undertaking, but also to those who are clients of any profession carried on by them. There is, it seems to us, no doubt but that providing interpreting services to the Court Service and Police is a profession…..In our view, all the indications are consistent with the claimant carrying on the profession of interpreter, and the respondent, under the old contract…being a client. We appreciate that in reality ALS [the predecessor of the respondent] may have been the claimant's major, and ultimately, her sole client, but that does not detract from the nature of the relationship, and there are no terms of the original contract which preclude the claimant from providing her services for any other client if she so wished."

61. The EAT in this case found that it is for the Tribunal to find facts as to whether the relationship between the parties was that of professional and client. Langstaff J (President) stated in his EAT judgment, "….in any particular case, the whole of the facts have to be considered by a Tribunal initially at first instance, in order to address the consequence of a multifactorial test in which no one feature is ever likely to be itself entirely decisive (though, in different situations the integration test or the dominant purpose test might have a useful role to play). Quite what a worker provides to an agency which markets the worker's services is a question which can legitimately be viewed in different ways."

APPLICATION OF FACTS AND LAW

62. Dealing firstly with whether there was a contract between the parties. The suggestion by the Claimant that the Agreement between the Claimant and the First Respondent was a sham is rejected. The Agreement was a true reflection of the believed status of the relationship between the parties. Whilst I considered whether there was inequality of bargaining power, and in this case the Claimant was clearly not able to amend the Agreement as she wished, she was free to reject work offered under the Agreement, and indeed did so on a number of occasions for a variety of reasons, including where the work was not financially beneficial to her. Also, on occasion, she negotiated additional amounts to be paid in addition to the standard fee for interpreting work.
63. I therefore agree that there was a contract between the parties which purported for the Claimant to be a freelance supplier of interpreting services and that this was not a sham.
64. I then considered whether the Claimant was undertaking to do work personally as is required for worker status. I am satisfied that the Claimant was engaged to perform work personally, and for similar reasons to those provided by Employment Judge Holmes in the first instance Chet decision referred to above, I find that, in the absence of an unfettered right of substitution, the Claimant was providing personal service under the Agreement to the First Respondent.
65. Clause 3.3 was relevant in that it specifically prevented the Claimant from using other individuals or organisations to provide the services to the First Respondent. I do not accept the First Respondent's argument that clause 11.8 of the Agreement (being the clause preventing the interpreter from selling, assigning subcontracting or transferring any interests under the Agreement to a third party without the prior written consent of the other) provided an unfettered right of substitution. Therefore, I am entirely satisfied that the Claimant was required to provide her personal services to the First Respondent.
66. I then have to consider whether in providing personal service to the First Respondent under the Agreement, the Claimant was excluded from being a worker on the basis that the status of the other party to the contract (in this case the First Respondent) was that of a client or customer of any profession or business undertaking carried on by the Claimant.

67. The Chet decisions were particularly helpful here, in that the Claimant did not consider the First Respondent to be her client or customer, since she provided no interpreting services to it. Rather, the interpreting services were provided to the MOJ, or other organisations on behalf of the First Respondent. However, as accepted by Langstaff J (President) in Chet, I agree that it is entirely plausible for the Claimant to provide services as a service provider to the First Respondent such that the First Respondent was the Claimant's client.
68. I took into account a number of factors in considering whether the Claimant was in a business or a professional such that the First Respondent was the Claimant's client as follows:
    a. The Claimant was free to offer and market her services to others, which she did on the NRSPI register, and indeed provided those services on a self-employed basis both before and during the existence of the Agreement;
    b. I do not find that the Claimant was integrated into the First Respondent's business; The Claimant was not interviewed, did not follow an induction process and was not subjected to appraisals or disciplinary processes as other employees/ staff were. Further, there was no training provided by the First Respondent to the Claimant;
    c. The Agreement was non-exclusive; she was free to work for others and did so during the whole of the Agreement, even when working the equivalent of full time hours on the assignments for the First Respondent;
    d. Whilst there was a procedure should complaints be received about individual interpreters, I do not find that this is inconsistent with an interpreter carrying out a business or acting in a profession. I would expect there to be some form of procedure to be followed in the event of complaints being received;
    e. There was no control exerted over the Claimant by the First Respondent. The Claimant in evidence confirmed that the First Respondent was not in a position to control her;
    f. The Claimant carried out work for the First Respondent from November 2013 until the date of her claim in October 2014. However, through out the whole of this period, the Claimant also provided her interpreting

services and translation services to other external organisations on a self-employed basis;

g. The Claimant was free to refuse work, which she did on a number of occasions. Whilst I accept that for some of these she may well have already been working on assignment for the First Respondent, I am not satisfied that this was the case for every such rejection. Importantly, this is not the reason provided by the Claimant herself, which included her not being interested in the job type, it not being financially beneficial to her and where the venue was too far away;

h. I also accept the First Respondent's evidence that it was not under any obligation to offer work. It is clear that Hungarian interpreters were often needed but this does not alter the position that the First Respondent was under no obligation to offer any such work to the Claimant and, as set out above, she was free to reject any such offer.

69. I distinguish the Claimant in this case from the type of individual in Bates van Winkelhof v Clyde & Co, who was held to be a worker by the Supreme Court, since here the Claimant was free to market her interpreting services to others. Also in that case, the Claimant was claiming to be a worker under the extended definition of worker for the whistle-blowing legislation.

70. I therefore consider that the Claimant was providing her services as a professional with the First Respondent as her client. Therefore, in my view, the Claimant fails in her claim for holiday pay, since I consider that she is not a worker under section 230 of the ERA, since whilst she provided personal service to the First Respondent, she fails the limb (b) test.

71. Turning finally to mutuality of obligation, I agree with Langstaff J in the Cotswold case, where he said, "Mutual obligations are necessary for there to be a contract at all." Here, whilst there was a contract in place between the Claimant and the First Respondent, there was not an ongoing obligation for the First Respondent to offer work once an assignment had finished and no obligation on the Claimant to accept any work, if offered.

72. In light of my findings, I therefore find that the Claimant was not a worker and her claim for holiday pay is therefore dismissed. The full merits hearing listed for 9 and 10 October 2017 is therefore removed from the list.

Employment Judge Welch
7 August 2017