



Case No 2202214/2019

# EMPLOYMENT TRIBUNALS

***Claimant***

Miss H Jones

***Respondent***

Open Age

**AND**

**Heard at:** London Central

**On:** 9 December 2019

**Before:** Employment Judge Palca

**Representation**

**For the Claimant:** In person

**For the Respondent:** Ms L Millin, of Counsel

## JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant was not an employee of the Respondent
2. The Claimant was a worker of the Respondent, as defined by s.230(3)(b) of the Employment Rights Act 1996;
3. The Claimant was employed under a contract personally to do work, in accordance with s.83(2)(a) of the Equality Act 2010
4. It follows that the Claimant's claims that she was unfairly dismissed, was entitled to a redundancy payment, and was entitled to a payment in lieu of notice as compensation for the Respondent's breach of contract, are struck out on the basis that the Tribunal does not have jurisdiction to hear them
5. The remainder of the Claimant's claims continue

# EXTENDED REASONS

## Parties

1. The Respondent is a charity which provides educational and other services to the elderly. The Claimant was engaged to provide certain of those services. Her contract was brought to an end on 2 April 2019. On the same date, and having applied for an early conciliation certificate from ACAS on 24 February 2019 which was issued on 6 March 2019, the Claimant brought proceedings against the Respondent for: unfair dismissal (including automatically unfair dismissal for making a protected disclosure), detriment for having made public interest disclosures, direct and indirect sex discrimination, harassment related to sex, breach of contract as a result of non-payment of notice pay and failure to pay a redundancy payment. On 24 July 2019 the Respondent filed its ET3 denying the claims and in particular claiming that the Tribunal did not have jurisdiction to hear the claims because the Claimant was an independent contractor.

## Issues

2. The preliminary issues for the Tribunal to determine are:
  1. Whether the Claimant was an employee under s.230(3)(a) Employment Rights Act 1996
  2. Whether the Claimant was a worker under s.230(3)(b) Employment Rights Act 1996; and/or
  3. Whether the Claimant was employed under a contract personally to do work (s.83(2)(a) Equality Act 2010) and
  4. Any strike out orders or deposit orders

## Evidence

3. Each party produced a bundle of documents. Mr I Cassidy, the Chief Executive of the Respondent, gave evidence for the Respondent. The Claimant gave evidence, as did various of her tutees, namely Paula Bruce, John Gonsalves, Julian Bower, Sheila Benson and Norman Hillman.

## Facts

The Tribunal found the material facts were as follows:

4. The Claimant began working as a tutor for the Respondent on 4 October 2007. The Respondent is a charity that helps people above the age of 50 through delivering a wide range of group activities and classes, including languages and arts culture. It is funded in part by various London boroughs and delivers activities both at centres run by it and from community venues. It is a free to join membership charity and refers to older people who take part in its activities, of whom there are about 4,500, as members. It has contracts of employment with 35 people and in general those whom it regards as employees do not

deliver classes but are tasked with ensuring that a varied programme is delivered by tutors.

### Contract terms

5. The Claimant is a university graduate. She had worked as a self-employed reporter since 2004. At the start of each term she would be given a contract, described as a service level agreement, and a purchase order asking her to deliver a number of classes on particular dates, at specific venues. The purchase order contained the following terms:-

1. *"The issue of this purchase order enables you to provide a service to Open Age in line with the terms and conditions overleaf.*
2. *Open Age is not obliged to offer work and the tutor is not obliged to accept the offer of work.*
3. *The purchase order will state a maximum number of sessions/hours, however, Open Age is not obliged to provide work for the stated number of sessions"*

Overleaf there is a tutor service level agreement which includes the following clauses:

3. *You plan and deliver the courses in a professional manner and with due regard to equal opportunities, health and safety, safeguarding (including the government's prevent strategy) and the age of the students .....*
  4. *You arrive at the venue on time to ensure that the room is ready and the class starts on time*
  5. *You complete registers and ensure that students complete the Open Age membership forms ...*
  8. *You collect weekly payments from students and forward these to Open Age*
  9. *You promote other services and activities that Open Age provides...*
  10. *You inform your Open Age support officer as early as possible if you are unable to attend a session ...*
- It is agreed that Open Age will (1) pay you on 15 month so long as your claim forms are in the office by 5 month and you have supplied your unique tax reference number and your national insurance number"*

6. The "contract for teaching services provided by self-employed tutors" includes the following clauses

- 1.1 *"Open Age is not obliged to offer the tutor work. When Open Age reasonably requests a tutoring service, the tutor is not obliged to accept the offer of work*
- 1.2 *In agreeing to provide a tutoring service the tutor is not obliged to provide the service themselves and can engage another tutor to provide the service on their behalf in consultation with Open Age. Due to the nature of Open Age's work and in line with Open Age's policies, any tutor providing a tutoring service on behalf of Open Age must be reference checked, DBS checked and hold up to date public liability insurance*

- 2.4 *The tutor shall be responsible for all income tax and national insurance contributions ...*
- 2.6 *The tutor shall at their expense effect all necessary insurance (public liability) against claims arising out of performance of the services and undertakes to indemnify Open Age in respect of any negligent acts or defaults of the tutor in the performance of the services. The tutor shall produce for Open Age evidence of such insurance before the provision of service commences.*
- 2.7 *The tutor shall not provide services to clients introduced to them at Open Age in a private capacity inside and outside of Open Age facilities.*
- 3.1 *Either party may terminate this contract by giving written notice to the other party at any time”.*

### Mutuality of Obligation

7. The purchase order and other contractual documents did not significantly change throughout the time the Claimant was engaged by the Respondent. She would be sent the purchase order prior to each term to teach a number of classes during the term. The number of classes was not consistent. Evidence before the Tribunal showed that the Claimant generally taught between 3-5 classes per week. They were generally 2 hours long each, though at least one was only for 1.5 hours. There were often 12 lessons per term, though in 2018 at least one class had the lessons reduced from 12 to 10. From time to time the Respondent would cancel classes, for example Italian classes were terminated in 2018 and other classes might or might not be substituted.
8. Before any new commitment, the Respondent would ask the Claimant if she was willing to teach a particular course, using wording that appeared generally to embody a request and not a command. On at least one occasion the Claimant said she did not think it appropriate, though she was eventually persuaded to do so. The Claimant said in evidence that she felt constrained to accept everything she was offered and had no choice for fear that otherwise she might lose other tutoring sessions. She characterised the requests as a formality. Given the way in which the requests were expressed, the Employment Tribunal did not think this was the case.
9. The Employment Tribunal found that there was no legal obligation on the Claimant requiring her to agree to take tutoring classes proposed by the Respondent, even though as a matter of practice she did accept. The Employment Tribunal therefore found that the wording of clause I of the Contract for teaching services provided by self-employed tutors represented the reality of the situation.
10. In support of the view that the Claimant did not feel contractually obliged to agree to teach all courses offered, the tribunal notes that the claimant similarly did not feel obliged to attend training courses. So far as training was concerned, the Claimant was not required to attend staff meetings or staff training sessions. These were in general not mandatory, unless required by funders. In 2014, in an exchange of emails between the Claimant and her manager, the Claimant

makes it clear that she will decide whether she can attend a training session once she knows the precise amount she will be paid for attending.

11. The Claimant's line manager would give the Claimant instruction, in at least one training session which the Claimant was not paid to attend, on the practicalities of the courses, for example the need to tell members about health and safety issues or fire procedures, or to ensure that the Claimant or members filled in enrolment and other forms. This instruction did not extend to the content of each individual lesson. These procedures were necessary as some of the Respondent's members are in their 90s and therefore potentially vulnerable adults. Funders, such as local councils, required information, which was gathered from the forms which tutors such as the Claimant would have to hand out, indicating to funders the degree to which the Respondent was meeting its obligations.
12. There is no exclusivity clause in the Claimant's contract. The evidence is that the Claimant was available to carry out private tutoring work, and that she did so on at least two occasions for Holland Park Tutors. While the contract contains a clause preventing the Claimant from teaching the Respondent's members in a private capacity, this clause only applied during the currency of the relevant contract. The Claimant found working for the Respondent very convenient, especially after her daughter was born in 2014, because the venues were near her daughter's school and teaching took place in day time. In reality though, the Claimant does not appear to have been actively marketing her services to others.
13. Having begun her engagement with the Respondent, the Claimant stopped being a freelance journalist.
14. There were some occasions when the Respondent would receive funding to provide a particular course, such as French literature, but none of the Respondent's members would attend the lessons. The Claimant was engaged to provide some of those courses. Even when no one attended, the Claimant would get paid at her standard rate until the course was formally withdrawn, at which point payments would cease.

#### Lesson management

15. So far as each class is concerned, the Claimant would be told by the Respondent what the subject of the course was. There was a dispute as to how much control the Respondent exercised over the content. The classes were taught at a time and at a venue set out by the Respondent. The Respondent from time to time required the Claimant to accept particular members into her classes, for example there were times at a beginner's class where beginners would be introduced late in the academic year, when a number of other members had improved beyond beginner status, requiring the Claimant to backtrack her teaching. However, it was clear that the Claimant regarded herself as very capable to teach classes, for example she told the tribunal that she did not need to prepare for classes in Creative

Journalism, and, if called upon to teach them, would be ready to extemporise. On other occasions, for example for a Spanish film course, the Claimant and her manager would each suggest films which might be discussed in class, and she would have to decide, given the experience of the relevant members, how difficult a film might be shared with the class. The Claimant was also given guidance on teaching methods, such as introducing quizzes and having class discussions. The tribunal concluded that there were certain obligations that the Claimant had to fulfil regarding the practicalities of running her class, though she was in general responsible for the content of the lessons.

16. In the performance of her duties the Claimant was provided with any necessary equipment by the Respondent, from pens and paper to photocopying facilities and use of a projector. She was invited to office parties, generally free of charge, on occasions seen by the Employment Tribunal as a "guest", though for the 2018 New Horizons end of year party tutors were asked to pay £10. The Claimant did not regularly attend staff meetings or staff training sessions (though as set out above she did attend some tutor training sessions). Nevertheless, the Claimant felt integrated within the organisation and regarded herself as an employee. Her class members viewed her as such as well.
17. During the course of her classes, particular those not occurring on the Respondent's premises, in addition to teaching the Claimant would among other things, at the Respondent's request, serve hot drinks to class members, take a register and collect course payments. For her Spanish film classes, initially she would carry with her and set up the viewing equipment. On at least one occasion she was asked to deal with an elderly class member who had a hygiene problem. She was also contractually required to promote the Respondent's services, which she did from time to time, for example by putting up posters advertising her course.

#### Pay and benefits

18. The Claimant would submit monthly invoices to the Respondent. She was paid at an hourly rate, said to be inclusive of VAT. She was responsible for paying her tax and national insurance. Her contract required her to take out public liability insurance, but she never did, and certain of the Respondent's staff knew she had not done so and did not encourage her to do so.
19. The Claimant did not apply for or receive statutory maternity pay when her daughter was borne. On one occasion, she suffered a second degree burn on the morning of a day she was due to teach, and was still paid for the session. This appeared to the Tribunal to be a one-off act of kindness rather than an acknowledgment that the Claimant was entitled to sick pay. The Claimant was not contractually entitled to sick pay, nor was she contractually subject to the Respondent's disciplinary and grievance procedures, and the Respondent never sought to put her through such a process.

## Substitution

20. The Claimant's contract, at clause 1.2 contained a substitution clause, set out at paragraph 6 above, which provided that she was not obliged to provide the service herself but could engage another tutor to provide the service on her behalf in consultation with Open Age. Any substitution had to be referenced and DBS checked and the substitute had to hold up to date public liability insurance.
21. The Respondent's position is that substitution occurred, for example when the Claimant went on maternity leave she recommended people who might replace her. What happened then was that the Respondent engaged the individual directly, that individual submitted invoices direct to the Respondent and was paid directly by the Respondent. The Claimant was not paid for the sessions. The only other example of "substitution" provided by the Respondent was when a Tai Chi teacher was due for surgery and another teacher unknown to her, took over her duties. Again, because all replacement tutors are paid directly by the Respondent, that replacement tutor would have submitted invoices direct to the Respondent who would have paid her directly.
22. In the Tribunal's view, the events described in the preceding paragraph are not substitution. Substitution would have occurred had the Claimant engaged her substitute directly, had received payment for the service from the Respondent, and had then herself paid the substitute a fee for attending in the Claimant's stead. Here, the Respondent is contracting with and paying another tutor to fill in when the original tutor could not attend work. The constraints around providing a substitute are (understandably given that tutors are dealing with vulnerable adults) very onerous. In practice, save with an enormous degree of notice, obtaining someone with the relevant updated DBS checks and references would have been burdensome.
23. The Employment Tribunal finds that as a matter of practice no substitution, as the term is normally regarded, occurred, and that on occasions when replacement tutors were engaged, they were engaged directly by the Respondent rather than by the tutor, and the tutor received no payment for the event. Looking at the reality of the position and the factual situation, the Tribunal found that the substitution clause does not represent the true agreement between the parties.
24. Throughout the time the Claimant worked for the Respondent, she described herself as self-employed.

## Law

25. The Claimant complains that she has been unfairly dismissed, has been subject to detriment as a result of having made a protected disclosure, of direct and indirect discrimination and harassment because of her sex or related to sex, for breach of contract and for a redundancy payment. Her claims for unfair

dismissal, breach of contract and a redundancy payment cannot be maintained in the Employment Tribunal if she is not an employee. Her claim in relation to detriment for having made a protect disclosure can be made if she is a worker, as defined by s.230 of the Employment Rights Act 1996. Her claims relating to discrimination and harassment can only be brought if she is an employee or a person under a contract personally to do work, as set out in s.83(2) of the Equality Act 2010.

26. Section 230 of the Employment Rights Act 1996 provides:

1. *In this Act “employee” means an individual who has entered 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” ... 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”*

27. Section 83(2) of the Equality Act 2010 defines employment as meaning “*employment under a contract of employment, a contract of apprenticeship or a contract personally to do work*”.

### Submissions

28. The Claimant argued that she was employee – she was continuously employed and subject to a huge amount of control. She never declined any job, and was seen by staff as an employee and was required to carry out duties, such as dealing with a member with a personal hygiene problem, beyond the responsibility of a simple tutor.

29. The Respondent argued that the Claimant was self-employed. She called herself self-employed, she had the ability to turn down requests to work. The agreements were clear and included a valid right of substitution. She did not receive sick or maternity pay, invoiced the Respondent directly and was obliged to pay her own tax and national insurance. It relied on the cases of Express and Echo v Tanton [1999] IRLR 367 and Autoclenz.

### Conclusion

#### Mutuality of Obligation

30. The Employment Tribunal finds that the contract between the parties accurately reflected the position that the Respondent was not obliged to provide work to



the Claimant, and the Claimant was not obliged to accept it. It is clear that on occasion the Respondent dropped courses, whether during a term or at its end, and that the number of courses the Claimant was required to teach varied from term to term. There is no evidence that the Claimant objected to this 'presumably on the basis that she accepted that the Respondent was entitled to withdraw courses. While it appears that the Claimant only rejected an offer of work once, and was later persuaded to accept it, it is clear from the exchanges between the parties, for example the Claimant stating that she would only consider whether or not to attend a training course once she knew how much she would be paid, and from the tone of the Respondent's requests, that the Claimant was at liberty to reject any offer of engagement.

31. The Claimant was entitled to take on other work, though in practice given her personal circumstances, rarely did so.

#### Control

32. The Employment Tribunal finds that the Respondent determined what subjects the Claimant was to teach, when and where. She was also subject to rules about certain aspects of how she conducted the class and collected relevant fees, and was required to market the Respondent's courses. Generally, the Claimant was responsible for the actual content of the course lessons. She was also required to take on responsibilities one might normally consider to be outside straight tutoring roles such as providing refreshments and dealing with her tutees' personal issues. The degree of control to which the Claimant was subject was therefore not insignificant.

#### Integration

33. The Claimant, and those she taught, regarded herself as integrated within the Respondent's organisation, for example because she attended office parties. However, she was not obliged to attend all training courses, did not attend staff meetings, was not subject to any disciplinary procedures, and was not treated by the Respondent in general identically to those it regarded as employees.

#### Financial and related issues

34. The Claimant submitted invoices to the Respondent and was paid against those invoices. She was responsible for paying her own tax and national insurance. The Claimant received no sick pay (the Tribunal does not regard the one occasion, when she was still paid for a lesson which she had to abandon at the eleventh hour because she suffered a second degree burn, as indicating to the contrary). She also received no statutory maternity pay. There is no evidence that she was paid for holidays.
35. The Claimant did not incur any expenses in providing her course materials.
36. The fact that the Claimant would be paid for teaching classes she was contracted to teach, even if no one turned up to be taught, was deemed immaterial by the Employment Tribunal. The key issue regarding paying the

Claimant was that she was contracted to teach and attended, ready to teach; it was not whether or not any students actually attended the class - the fact that the Claimant was paid in those circumstances did not indicate to the Employment Tribunal that the Claimant was an employee.

37. The Respondent's contract required the Claimant to take out insurance but the Respondent did not enforce the clause, even though it knew the Claimant was not complying.

#### Substitution Clause

38. Applying Autoclenz v Belcher [2011] ICR 1157, SC the Tribunal has to determine the true agreement between the parties, looking at the reality of the situation. For the reasons set out above, the Employment Tribunal has concluded that the substitution provisions set out in the Respondent's standard contract terms are a sham and that even when someone taught one of the Claimant's lessons, the Claimant never made the direct substitution, never entered into a contract (whether in writing or oral) with the substitute, never paid the substitute, and was never given any payment for the lesson in question. The Respondent relied on Express and Echo v Tanton 1999 IRLR 367 CA, which held that if on occasion the Claimant had arranged for a substitute driver, then the substitution clause could not be a sham. As set out above, the Employment Tribunal has found that the Claimant could not choose at will to substitute tutors, and did pay someone to perform her tasks. This distinguishes the two cases. The tribunal concluded that the Claimant could not in practice engage a substitute to perform her obligations, as the term substitute is normally used.

#### Relationship with clients

39. The Claimant was not able to establish a business or teaching relationship with the Respondents members, while under contract, which indicates that she was not in business on her own account.

#### Labels

40. The fact that the Claimant described herself as self-employed is relevant, but is not dispositive of the issue. It is for the Employment Tribunal to determine the status of the Claimant's employment with the Respondent by applying the legal principles. The label does however indicate how the Claimant saw herself at the time.

#### Conclusion on Employment Status

41. There is no formula to be applied in assessing the Claimant's employment status. All aspects of the relationship are to be considered. However, a key element of a contract of employment is generally regarded to be whether or not there is mutuality of obligation. As found above, there was no mutuality of obligation. The Respondent had no obligation to provide work, and the Claimant had no obligation to accept.

42. The Claimant also invoiced the Respondent directly, was responsible for paying tax and national insurance, and had the opportunity to take on work from third parties. All these factors indicate that the Claimant was not an employee. The facts that she was under some degree of control, and had some integration into the Respondent's organisation, are not so strong as to indicate to the Tribunal that the Claimant's status with the Respondent was as employee.
43. Turning to whether or not the Claimant was a worker, or was employed under a contract personally to do work, the Tribunal bore in mind that in practice the Claimant always provided the work herself and was never paid when someone else provided the services, and that it has concluded that the substitution clause was a sham. It is also relevant that the Claimant bore no financial risk in performing her obligations, that she was not able to enter a business relationship with those she taught, that in practice she was not obliged to take out her own liability insurance, and that she very rarely performed any work other than for the Respondent. All these factors indicate that the Claimant was not in business and on her own account, and had undertaken personally to perform tutoring duties for the Respondent, so that the Respondent was not a client or customer of any profession or business undertaking carried on by the Claimant.
44. The Tribunal therefore concluded that the Claimant within the definition of worker set out at s.230 Employment Rights Act 1996, and that she was employed under a contract personally to do work and therefore falls within the definition of employment set out in s.83(2) of the Equality Act 2010.
45. Given the findings of the Tribunal, the Employment Tribunal has no jurisdiction to hear the Claimant's claims for unfair dismissal, breach of contract or for a redundancy payment. These claims are therefore dismissed.

Employment Judge Palca

Dated: 18/12/2019

Sent to the parties on:

19/12/2019

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For the Tribunal Office