EMPLOYMENT TRIBUNALS

Claimant: Mrs P Roberts

Respondent: Train Fitness International Limited

HELD AT: Liverpool **ON:** 26 September 2017

BEFORE: Employment Judge Robinson
(sitting alone)

REPRESENTATION:

Claimant: Mr L Rose, Solicitor
Respondent: Mr A Sugarman, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. All the claimant's claims including those under the Equality Act 2010 relating to the protected characteristic of sex and her unlawful deduction of wages claims are dismissed on the grounds that the claimant is not an employee or worker of the respondent company as defined by section 83 of the Act. The respondent has also paid to the claimant all sums due to her so there is no claim for unlawful deduction of wages. In any event the claimant is not a worker as defined by section 230 of the Employment Rights Act 1996.

2. Consequently the Tribunal has no jurisdiction to deal with the claimant's claims and they are dismissed.

REASONS

1. I was informed that the claimant had been paid all monies due to her which she had invoiced and therefore there was no claim for unlawful deduction of wages,

although in fact the claimant was not a worker as defined by the Employment Rights Act 1996.

2. The issue therefore that I concentrated on was whether the claimant could pursue her sex discrimination claim because the claimant's relationship with the respondent came within the definition of section 83 of the Equality Act 2010 which sets out the definition of employment for the purposes of that part of the Equality Act 2010.

3. In coming to my conclusion I accepted that these matters are fact sensitive and I am required to consider all the features of the relationship between the claimant and the respondent in order to decide whether the claimant does fall within the safety net provided by section 83 of the Act.

The Facts

4. The claimant did not receive a copy of the respondent's contract and consequently did not sign up to a contract which established how the relationship could be defined. I have, however, no reason to doubt the respondent's witnesses who tell me that a copy of the contract was sent to the claimant. It just was not received. In coming to that conclusion and in establishing the facts of this case I found that all the witnesses, namely Mrs Roberts, Mrs Gaudy and Mr Williams, have all given their evidence telling me the truth as they see it.

5. Just because there is no written contract it does not mean there is no agreement between the parties. If a written agreement is put in place the parties usually know exactly where they are with regard to the relationship. It has been my task to glean from the facts what relationship the respondent had with the claimant.

6. The claimant is, and she accepts this, a self-employed fitness instructor and has worked in that capacity for six years. She worked for the respondent as a fitness tutor assessor. In other words she trained the trainees. In that capacity she had to insure herself with her regulatory body, the REP, obtain her own DBS, and work under the regulations and auspices of that regulatory body. The claimant invoiced the respondent for the five week assignment. I heard no evidence from the claimant as to how she had invoiced other organisations in the past when she carried out work for them. Her main job was as a self-employed fitness instructor. The money she received from the respondent was over and above the earnings received from her normal work. The claimant pays her own tax and national insurance, she pays her own expenses and then if she is able to, she claims back those expenses from the person or the company for whom she works.

7. When the claimant worked for the respondent she bought her own handouts and other equipment to use, such as putty to sculpture bones to demonstrate to the students and she used her own laptop. The daily rate she was eventually paid was negotiable between her and the respondent. The claimant chose not to negotiate it. If the respondent had been faced with some negotiation from the claimant they would have dealt with those negotiations in a commercial way.

8. The claimant was not required to wear the respondent's uniform. However one would have been supplied if a suitable outfit had been found for her. The claimant told me that there was not one in her size. Mrs Gaudy made enquiries as to whether she could find a uniform for the claimant. In the end the claimant was told by the respondent to wear her own dark coloured clothing.

9. As far as her own self-employed business is concerned, the claimant can of course choose when and where she worked, but with regard to the relationship with this respondent it was also for the claimant to decide where and when she worked. For example, she was offered, by the respondent, work in Leeds which she declined. She declined it because she had her own work as a fitness instructor to do at the time when she was being offered work in Leeds. The respondent accepted that the claimant could not meet the Leeds dates and that was the end of the matter. The claimant could fit in with the dates, however, that she was offered for the work in Manchester, the subject of this claim. The claimant then worked on the five week assignment for the respondent in Manchester.

10. During those five weeks the claimant worked, to a certain degree, under the directions of the respondent, but it was the agreement between the YMCA and the respondent which established how the respondent delivered the training to the trainees. The information the YMCA passed onto the respondent was then passed on to the claimant. She was given that information so that she could deliver the training in Manchester. Any control of the claimant was preordained by how the YMCA and the Train Fitness International Limited contract worked.

11. Monitoring the claimant's performance was only put in place in order to comply with the YMCA's requirements. Greater control which occurred later during the five weeks was placed upon the claimant because of the students' complaints. That level of control would not have occurred but for those complaints.

12. Those are straightforward findings of fact. More taxing was considering other issues like subordination, right of substitution, and mutuality of obligation.

13. There was no overarching contract in this case. It has not been pleaded by either side. Any assignments the claimant took up with the respondent were one-off assignments. At the time the claimant's work started with the respondent the nuts and bolts of the terms of the claimant's agreement with the respondent had not been put in place. At the outset Mrs Gaudy had a word with the claimant, told her to go to work in Manchester and the claimant agreed. That was the extent of the agreement between the parties at that stage.

14. The claimant did not know, however, that she had a right to put a substitute in place. However if asked the respondent, with some notice, would have allowed substitution, as per their standard contract that I have seen. It is just a pity that that contract was not put in place at the outset as it would have helped define the relationship between the parties.

15. The respondent does employ some of its workforce. It also hires subcontractors to do other work. This was not an organisation that seeks to avoid their employment obligation. They just have a business model that works for them.

The subcontractors that they employ cover the excess work with no obligation that they should be provided with that work. Their employees, however, do the bulk of the day-to-day training that has to be done.

16. When the trainers are asked to do work they have to complete it to a certain standard because of the relationship between, in this case, the YMCA and the respondent. The respondent has other clients as well as the YMCA who put in similar provisions in the agreement. The work of the claimant for the respondent, if she had been allowed to continue, would have been sporadic. She would have been called upon to work as and when she was needed by the respondent, and the claimant could have picked and chosen what work she did and what work she did not do.

17. I noted that there was an email written between the parties where this phrase is used: “You are working for us”. That phrase in itself does not take the claimant's claim any further. That phrase could apply just as much to, for example, a self-employed plumber as it would to a worker or an employee.

18. Those are the facts.

The Law

19. Section 83(2) of the Equality Act 2010 provides as follows:

> “Employment means…employment under a contract of employment, a contract of apprenticeship of a contract personally to do work.”

20. Subsection (4) of that section provides that a reference to an employer or an employee or to employing or being employed is (subject to section 212(11) to be read with subsections (2) and (3)).

21. Section 230(3) of the Employment Rights Act 1996 reads:

> “In this Act “worker” means an individual who has entered into or works under…any other contract whether express or applied 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.”

22. From the deciding cases referred to me by, in particular Mr Sugarman, I applied the following principles.

23. I had to distinguish between self-employed people who are in business on their own account and who actually work for customers or clients.

24. Personal service is an essential part of a contract of employment and where there is the ability to substitute that tends to point to the element of personal service being missing.

25. In **Pimlico Plumbers Limited & another v Smith [2017] ICR 657** "an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally". Even where there is a requirement for the "employee" to notify in advance the respondent company ("employer") before they can substitute is again inconsistent with the principle of personal service.

26. I cannot properly come to a conclusion in these cases without balancing all the circumstances of the case and weighing each factor one against the other. The task becomes a balancing act between two sets of competing sets of facts.

27. The question I ask myself is: did Mrs Roberts perform a service which was directed by the respondent and receive remuneration for that, or was she an independent service provider who has no relationship of subordination?

28. I recognise that any relationship where one party does work for another party there has to be some element of subordination. If a painter and decorator comes into one's house to decorate the dining room it is not for that painter and decorator to choose the paint, the wallpaper and the way in which he or she applies the paint and wallpaper. It is for the householder to establish some control over how the painter does his or her work.

29. What the "employee" may do at other times during his or her working week or month again may shed some light on the relationship (**Windle & another v Secretary of State for Justice [2016] IRLR 628**).

30. When considering all the circumstances I must look at the degree of control, the exclusivity of the engagement and its duration and the method of payment, the equipment and use of that equipment and the risks involved. How the parties label their relationship is not determinative, although it may help me in coming to a conclusion.

Conclusion

31. Applying that law to the facts of the case, and for ease of presentation I have set out further facts below, I concluded as follows.

32. There are some elements in support of the claimant being either a worker or employee of the respondent. There was certainly some control of how she carried out the work .Indeed, because of the complaints that control became more rigid as the five weeks went on.

33. I also noted that the claimant did not know that she had a right to put a substitute in place.

34. In coming to my decision I have not just focussed on that five week period of work. I have looked at the whole of the relationship between the parties. I find that there was no obligation for the respondent to offer work to the claimant, nor any obligation on the claimant to accept any work. When the claimant was offered work in Leeds she turned it down because it did not suit her to carry it out.

35. I noted the interview in November 2016 when the claimant rang up about an advert she had seen in the paper. I saw that "interview" more akin to a plumber or electrician tendering for work rather than a job interview as such. I accepted the respondent's evidence, which was not challenged, that Mr Williams and Mr Betts interviewed prospective employees and Mrs Gaudy had responsibility for interviewing tutors who provided services for the respondent company around the country when and where the work turned up. The respondent therefore employs some of its workforce and employs subcontractors for other work.

36. When considering the degree of control over the claimant by the respondent I was persuaded that the control was more over the quality of the work delivered by the claimant rather than the work itself. In performing her duties the claimant could actually deliver the training in whatever way she wished, save that she had to be governed by the rules of the national regulator which in this case was the YMCA. However, she was allowed to deliver that course with a good deal of autonomy and with the equipment that she provided. I accept, however, that the respondent rented the space for her to perform her work in, and she was told where to go to do the work.

37. The claimant could leave and go home once the course was delivered, either to her satisfaction or to the satisfaction of the respondent. It was her choice when she went home and how quickly she delivered the training.

38. I did consider the nature of the relationship outside the periods when services were not being performed for the respondent. I noted that the claimant ran her own business as a self-employed fitness instructor. The respondent was simply a client and customer of the claimant in the same way as those people who hired her to get them fit. The claimant would not have seen those clients or customers as her employer.

39. In short the claimant was engaged on an ad hoc basis. She was asked if she was available to teach two five week courses, one of which was in Manchester, and she was able to carry out that work for the respondent. When she was offered the work in Leeds, however, she refused because she had other work "in her diary".

40. The claimant only taught in Manchester for a limited period of time until the respondent employed a permanent employee, which took place in May. The respondent was required, with regard to their relationship with the YMCA, to comply with the YMCA's award policies, quality assurance arrangements and to organise effective systems to record the management of subcontracted work for them to retain a workforce of appropriate size and competence to undertake the delivery of the approved qualification. The claimant was being controlled, not by the respondent, but by the requirements the YMCA placed upon the respondent.

41. The respondent did not pay the claimant's tax or national insurance, and she invoiced the respondent for both services she provided and travel expenses. The claimant was not required to wear the uniform of the respondent and the work could be cancelled by giving notice that was no more than two weeks.

42. Finally, there was no sick pay due to the claimant and the claimant had to ensure that she was insured for public liability and professional indemnity insurance.

43. Balancing all those competing issues I decided that on balance the claimant was working for herself and not under a contract of employment or a contract personally to do work.

44. In those circumstances, therefore, she cannot pursue her sex discrimination claim and her claims are consequently all dismissed.

11-10-17

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Employment Judge Robinson

Date_____

JUDGMENT AND REASONS SENT TO THE PARTIES ON
13 October 2017

FOR THE TRIBUNAL OFFICE