EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103017/2018

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Held in Glasgow on 11 September 2018

Employment Judge: Robert Gall

10 **Ms S Munro** **Claimant**
Represented by:
Ms L Madden - Solicitor

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Town And Country Glasgow Limited **Respondent**
Represented by:
Mr K Maguire - Advocate

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was in a relationship of employment, in terms of section 83 (2)(a) of the Equality Act 2010, with the respondents between February and November of 2017, that relationship being one
25 in which she was employed under a contract personally to do work. The case will now proceed to a hearing.

REASONS

1. This case called for a Preliminary Hearing ("PH") at Glasgow on 11 September 2018. Ms Madden appeared for the claimant. Mr Maguire
30 appeared for the respondents. Evidence was heard from the claimant herself and also from Karen Mackenzie, an owner and director of the respondents. A joint bundle of productions was lodged. Three additional productions were lodged on behalf of the claimant on the morning of the PH. The respondents took no objection to those documents being lodged.

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2. A case management PH had been held on 20 July 2018. That had resulted in the PH on 11 September 2018 being arranged.

3. The position of the claimant is that she was employed in terms of section 83 (2)(a) of the Equality Act 2010 ("the 2010 Act"). She complains of unfavourable treatment said to have been because of her pregnancy and illness suffered by her as a result of her pregnancy. The respondents maintain firstly that the Tribunal does not have jurisdiction to consider the claim as the claimant was not employed by them within the meaning of the section in the 2010 Act just referred to. They also deny that there has been discrimination as claimed by the claimant.

4. The following are the relevant and essential facts as admitted or provided.

Facts

5. In January 2017, the claimant noticed on Gumtree an advert placed by the respondents. Her reply to that advert appeared at page 39 of the bundle. Her reply was dated 26 January 2017. She submitted her CV to the Gumtree website. Gumtree sent it to the respondents stating:

> *"You have received a reply to your ad: ESTATE AGENCY RECEPTIONIST REQUIRED posted in General Jobs in "Lenzie"."*

6. Having received the communication from the claimant and her CV, Mrs Mackenzie replied for the respondents thanking the claimant for her application and stating:

> *"We have a position in Lenzie branch weekends and covering holidays on a freelance bases* (sic), *please email myself direct if this of interest to you."*

7. The claimant confirmed that the details set out by the respondents *"would be perfect"*. She then attended a meeting with Mrs Mackenzie when the job was explained to her.

8. The respondents had working for them in Lenzie three negotiators who dealt with the receipt of offers and discussion of those with sellers, two permanent members of staff as administrators, and freelancers, the number of whom varied between four and six. Permanent staff were subject to an appraisal system. Freelancers, including the claimant, were not.

Role of the claimant

9. Mrs Mackenzie explained to the claimant what hours of work were involved in the weekend post. She explained the duties of a receptionist with the respondents. Those duties involved handling phone calls received and passing those to the appropriate person within the respondents' organisation. That might be to Duncan Mackenzie, husband of Mrs Karen Mackenzie. He was the valuer with the respondents as well as being a director. He would attend properties potentially for sale to arrange to value them. Alternatively calls might be passed to others in order to arrange viewings of houses for which the respondents were responsible for marketing and selling. On occasion the claimant herself would organise those viewings if, for example, others who might undertake that task were engaged on a different telephone call.

10. At interview, Mrs Mackenzie said to the claimant that the working arrangement would be on a *"freelance"* basis. There was at no time a contract of employment issued to the claimant nor any statement of terms and conditions of employment. The claimant was aware from at or close to the commencement of the working relationship between herself and the respondents that work for the respondents was to an extent seasonal, with the period leading up to and immediately after Christmas being quiet for the respondents. The period over summer was far busier for the respondents.

Working relationship in practice

11. As a result of the interview the claimant was informed by Mrs Mackenzie that she had *"got the job".* She was to work in the respondents' branch in Lenzie, although could, on the decision of the respondents, be asked to work at their office in Bearsden.

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12. The claimant started with the respondents the following week. Her first three days were training days. During those training days, she was shown the system by which the respondents worked, their email system and software and also how to take bookings for viewings.

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13. Thereafter the claimant worked two weekend days during the last weekend in February and for weekends in March.

14. The claimant was aware from the outset of her employment that payments made by the respondents for work which she carried out on their behalf would be made gross to her. It was her responsibility to account to HM Revenue & Customs for tax and also for National Insurance. She required to complete documents, copies of which appeared at pages 30 to 38 of the bundle. Those documents were completed as she fulfilled hours of work with the respondents. They are headed "*Freelance – Invoice"* in all but two instances. Pages 32 and 38 are not so headed. Page 32 is headed *"Stacy Munro Timesheet April 2017".* Page 38 does not have a heading.

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15. On all of the documents at pages 30 to 38 of the bundle, the dates are shown with hours detailed and an hourly rate stated. The mathematical calculation is then shown of the sum due to the claimant in respect of those hours of work.

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16. The claimant completed these documents herself. She had then to submit them to the Office Manager, Ms Egan. Ms Egan considered them and approved or adjusted them in line with her view of the hours worked. They were then passed to Mrs Mackenzie who arranged for transfer of the appropriately approved amount from the bank account of the respondents to the bank account of the claimant.

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17. The claimant was free to do as she wished when not working within the offices of the respondents.

18. The claimant knew the dialy tasks which she was to fulfil. Heer line manager was Ms Egan. She reported to her. Ms Egan gave the claimant tasks to do. The claimant would return to Ms Egan to confirm to Ms Egan when she had done those tasks.

19. Approximately a month after the claimant commenced working with the respondents, Ms Egan as office manager spoke with the claimant. She enquired of the claimant whether the claimant would be interested in working during week days on the basis that Ms Egan would find someone else to work at weekends. She said that the preference of the respondents was that the claimant would work weekdays as she knew what she was doing, rather than that the respondents would recruit someone else for weekdays during the busier times which were in prospect.

20. The claimant had not intended to work weekdays as she had a young child for whom to care. In response to the approach from Ms Egan as to working weekdays, the claimant stated to Ms Egan that although the office of the respondents opened at 9am, she had to drop her daughter off by 9.30am and would therefore be in at the office for 10am. That was agreed with Ms Egan. The claimant therefore moved to working four days, Monday, Wednesday, Thursday and Friday. The increased hours are shown in the invoices which appear in respect of April onwards at pages 32 to 38 of the bundle.

21. These four days per week continued until around August 2017 when the respondents said to the claimant she should move to a three day a week working arrangement. The claimant did this. That three day a week working arrangement remained a regular one, just as the four day per working week had been, with regular days and hours.

22. The claimant was aware that the working relationship was described as being *"freelance".* She understood that there was no holiday pay paid to her if and when she took holidays. She also understood that there was no sick pay

paid to her in respect of any period of illness absence. There was no requirement for her to submit a sickline or doctors note in the event that she was absent through ill health.

5 23. The claimant was also aware that it was her decision as to whether she worked or did not work on any particular day. She was also aware that the respondents might not require her services. When she commenced working during weekdays she spoke to Ms Egan at conclusion of each of the first two weeks. She enquired whether the same days were to be worked by her the
10 following week as had been worked by her during the week about to end. Ms Egan confirmed that this was so and after this had occurred on two occasions became somewhat annoyed. She said to the claimant that there was no need for her to ask this question as her shifts would always be the same.

15 24. The hourly rate paid by the respondents of £8 per hour was increased by them with effect from the time worked by the claimant on 1 June 2017. The increased rate was £10 per hour.

25. If the claimant did not wish to come into work on a particular day or wished to
20 organise a holiday, the arrangement which operated was that she would communicate with Ms Egan in advance of any such day.

26. In this situation, when the claimant spoke to Ms Egan, Ms Egan would say that she would approach one of the other freelancers to confirm that they
25 could cover for the claimant. The claimant herself received phone calls enquiring whether she could cover for other freelancers who were not to be present at work on a particular day. Occasionally Ms Egan would say to the claimant in the situation described that she was too busy to speak to a freelancer to try to arrange cover. She would in that circumstance ask the
30 claimant to speak to one of the freelancers to try to arrange cover, at times suggesting that the claimant spoke to suggested freelancers mentioning one or two by name for that purpose.

27. The claimant never simply approached a freelancer about covering her intended hours if she was to be absent. Ms Egan would arrange cover or would ask the claimant to contact a freelancer, suggesting names of appropriate freelancers to her. If, on the claimant speaking to any such person, that person was not able to cover the claimant's hours it fell back on Ms Egan to arrange for cover. There was no time when it was suggested to the claimant that she could arrange a substitute from outwith the ranks of the freelancers. The claimant did not ever attempt to arrange a substitute other than through the course of speaking to Ms Egan. As mentioned that resulted in Ms Egan either approaching the freelancer or requesting that the claimant do so, on the basis that if the claimant did not successfully find a freelancer to cover the hours the claimant had been scheduled to work, Ms Egan took on responsibility for finding cover.

28. If sick, the claimant did not simply get up and go home. She regarded it as a grey area as to whether Ms Egan could have questioned her or taken issue with any wish on her part to go home through ill health.

29. The claimant had health issues whilst working between February and November of 2017. Those occurred from approximately June 2017 onwards. As a result of those health issues, the claimant would feel unwell during some days whilst working with the respondents.

30. If that circumstance occurred and the claimant felt sufficiently unwell that she believed she required to leave work and to return home, she would speak to Ms Egan as the person to whom she reported. She would say that she felt unwell and was intending going home. On each of those occasions, she was in a position where she could have simply left work. She regarded it as appropriate however to alert Ms Egan to her proposed departure from work and to explain to her the reason for this.

31. The claimant was absent for two weeks due to ill health in August 2017. She took the view, knowing of the reason for ill health and the fact that it was likely that it would last for a period, that it was fairer to the respondents to confirm

to them that she would not be available for a fortnight. The claimant did not at this point arrange a substitute. The respondents dealt with arranging cover in her absence.

5 32. Around this time due to her worry over how her sickness and inability to be at work would affect her job, she raised with Mrs Mackenzie her anxiety regarding work.

33. Mrs Mackenzie replied by text. The precise date of that text is unknown. A
10 copy of it appeared at page 46 of the bundle. It read:

"Hi Stacy.
Stop worrying right now. Your baby and you come first. You take as much time as you need, there will always be hours at Town And
15 *Country as long as market is good. We value your input, an amazing person and the team always speak very highly of you, so ignore the negatives and think positive. I will pop into office tomorrow. Stop worrying please. K x"*

20 34. During her time with the respondents, the claimant always sat at the same desk. She always reported to Ms Egan.

35. If a freelancer such as the claimant had unexpectedly not appeared at work with the respondents for hours for which they were scheduled, someone from
25 within the respondents' organisation would send that person a text asking whether they were okay and whether they were intending coming in. If there was no reply to that text then, if the respondents were not particularly busy, work would carry on without that freelancer. If the respondents were busy then other freelancers would be approached to see if they could cover the
30 hours which had been anticipated the freelancer who did not show in this scenario would have undertaken. On the return to work of the freelancer who had unexpectedly been absent, the respondents would ask that freelancer if there were any problems. It would then be up to the freelancer whether he or she explained anything further as to their non appearance.

Termination of working relationship

36. The claimant had been aware that a quieter period of work for the respondents was in the approach to Christmas and early part of a new year. At these points, the property market was not particularly active. She was aware that in that circumstance, it was likely that any arrangement of the freelancers would come to an end.

37. At the start of November 2017, the claimant became concerned that the time when the respondents' business would be quiet was approaching. She sent a text to Duncan Mackenzie asking about her hours and whether they would continue. That text was sent on 1 November 2017 and replied to by Mr Mackenzie on that date. A copy of the text exchange appeared at page 47 of the bundle. It read as follows:-

Text from Mr Mackenzie in response to the claimant

"Yes same hours as normal Stacy."

Text from the claimant to Mr Mackenzie

"Great thanks just wanted to clarify"

Text from Mr Mackenzie to the claimant

"This shall be the last week for cover Stacy. I shall be informing Nev also. The branch hasn't been converting enough viewing appointments or valuations to justify having more staff in. If it changes I shall be sure to let you know. I appreciate all your efforts, you are a valued member of my staff."

38. The claimant was not present at work on 1 November. On returning to work on 2 November, she found an email waiting for her. That had been circulated

to the claimant and to others in the lettings team. It came from Mr Mackenzie. It read:-

> *"It appears none of you are arranging many appointments.*
>
> *We need to lower asking prices to generate more business.*
>
> *I shall ask the part time staff to finish up this Friday as we don't require all the staff for the level of appointments being booked."*

39. When the claimant saw the email of 1 November from Mr Mackenzie, she left the office of the respondents. She submitted a letter on 9 November to the respondents. That letter was responded to by Mr Mackenzie by letter of 16 November 2017. A copy of the letter from Mr Mackenzie appeared at page 49 of the bundle. It read:

> *"I refer to your correspondence of 9 November 2017.*
>
> *We were all very disappointed to see you walk out at the start of your recent shift, without the courtesy of an explanation or reason for your actions.*
>
> *As you are fully aware, you were employed on the basis of being freelance, with no fixed hours. The business is very much seasonal and there is no demand for additional staff at certain times of the year.*
>
> *We do on occasion employ permanent staff. You have frequently been unable to attend or complete shifts that you were given, therefore we did not believe that you would be interested in working full time. We did not receive any formal application from you for the vacancy in which you refer* (sic). *We most certainly did not and would never discriminate against you or any other staff member for being pregnant.*

We shall consider any application you make in the future for any roles within the firm, should you wish to apply.

We wish you the very best for the future."

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40. The claimant had been aware, as mentioned that the working relationship with the respondents was likely to come to an end in the period before Christmas. Her father had provided monies by way of an investment to the claimant and to her sister. A company was formed with a view to trading as florists. The company was incorporated on 24 October 2017. The claimant is a director of that company. A copy of the certificate of incorporation and details from the Registrar of Companies appeared at pages 41 to 45 of the bundle. It took some time for the business of the florists to commence trading. The claimant had worked there since approximately the beginning of July 2018. She now works four full days there each week. The claimant has also had a further child. The child was born in February 2018.

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41. At no time did the claimant trade as a provider of receptionist services.

The issue

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42. The issue for the Tribunal was whether the claimant was employed by the respondents under a contract personally to do work. If she was, a claim of discrimination was possible. If she was not then such a claim was not competent.

Applicable law

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43. Section 83 (2)(a) of the 2010 Act states that employment means (as relevant for this case) employment *"under a contract personally to do work"*.

44. There are various cases in which these provisions have been considered and which assist in shedding light as to circumstances in which the statutory test as to whether someone is, for the purposes of the 2010 Act, able to bring a claim of discrimination by virtue of being employed under a contract personally to do work is met. The most relevant of these cases are as follows:

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- ***Pimlico Plumbers Limited v Smith 2018 UKSC 29 ("Pimlico")***
- ***James v Redcats (Brands) Limited 2007 ICR 1006 ("James")***
- ***Allonby v Accrington & Rossendale College & others 2004 ICR 1328 ("Allonby")***
- ***Jivraj v Hashwani 2011 ICR 1004 ("Hashwani")***
- ***Halawi v WDFG UK Limited T/A World Duty Free 2015 IRLR 50 ("Halawi")***
- ***Capita Translation and Interpreting Limited v Siacuinas & another UK EAT 181/16 ("Capita")***
- ***Bates van Winkelhof v Clyde & Co LLP 2013 UKSC 32 ("Bates")***
- ***Cotswold Development Construction Limited v Williams 2006 IRLR 181 ("Cotswold")***
- ***FNV Kunsten Informatie en Media v Staat der Nederlanden (Case – 413/13) 2015 ER (EC) 387 ("Kunsten")***
- ***Windle & another v Secretary of State for Justice 2016 EWCA Civ 459 ("Windle")***

45. These cases establish that a Tribunal must consider whether the obligation of personal service is the *dominant feature* of a contractual arrangement. Notwithstanding that however, the sole test remains the obligation of personal performance. ***Pimlico*** confirmed that there may be cases in which assessing the significance of the right to substitute is assisted by reference to whether the dominant feature of the contract is personal performance.

46. ***Allonby,*** followed by ***Hashwani*** and subsequently ***Halawi*** confirm that a Tribunal must consider whether a claimant performs services for and under the direction of another person in return for remuneration or whether that claimant is an independent provider of services who is not in a relationship of subordination with the person receiving these services.

47. Whether therefore there is subordination or whether there is a right to substitute are important elements in assessment by a Tribunal of the status of a claimant in a case such as this.

48. The definition in the 2010 Act in terms of section 83(2) is wider than the definition of employment in terms of section 230 (1) of the Employment Rights Act 1996. The wording of the 2010 Act means that a claimant, although genuinely self employed, may be involved in contracting personally to do work and may therefore fall within the definition in section 83 (2) of the 2010 Act, enabling that person to bring a claim of discrimination, although not able to bring a claim of unfair dismissal or redundancy.

Submissions

Submissions for the claimant

49. Ms Madden for the claimant highlighted the statutory provisions in section 83 (2)(a) of the 2010 Act. She founded upon ***Allonby*** and ***Pimlico***. She also referred in passing to ***Bates.***

50. ***Pimlico***, said Ms Madden, dealt with the issue of personal performance. That relationship contrasted with the position where there was a client/customer relationship. If an express unfettered substitution right existed then there was no personal performance involved. ***Pimlico*** had been in fact specific and was different to the circumstances before the Tribunal in this case. It had, in that case, stretched the meaning too far to say that substitution actually existed. The case had made it clear that the tax position was not determinative. If subordination existed then it was likely that employment was in place.

51. Ms Madden referred to ***Cotswold*** and its view that an important issue was whether a worker actively marketed services as an independent person to the world in general. That had not occurred in the case of the claimant in this case. That element had been mentioned in paragraph 44 of ***Pimlico.***

52. Paragraphs 45 and 46 of ***Pimlico*** were also of importance. They referred to ***Hashwani.***

5 53. Contrasting this case with that of ***Halawi***, Ms Madden said, in the case of this claimant there was an obligation to provide personal performance. The respondents were not customers or clients of the claimant. Reality was key. The claimant had met the test under the 2010 Act.

10 54. Turning to the evidence, Ms Madden highlighted that the claimant had responded to an advert which sought an individual as a receptionist. The respondents had not approached a contractual provider of those services sought. The claimant had submitted her CV. She had been interviewed personally and assessed as an individual. She had been trained at the start
15 of the relationship. She had been offered work, had accepted that, had performed the work and then had been paid.

55. Weekend shifts had been involved for the claimant at the outset of the relationship. She had made herself available for those shifts. The
20 respondents had then asked her to cover a four day weekday role. The claimant made herself available for several months. During this time the respondents told her that her working days were reduced to three days per week. Those were set days. She was then absent. She did not, Ms Madden said, have the opportunity to refuse to do the dates. There was an
25 expectation that she would work those dates. The text message from Mr Mackenzie referred to *"the same hours as normal".*

56. The claimant accordingly had set hours, said Ms Madden. There was an agreed core shift pattern in place. The claimant had at no time been told by
30 the respondents that there were no hours available to her.

57. The evidence from Mrs Mackenzie, Ms Madden submitted, was of limited assistance. She had not been present when matters to which the claimant gave evidence occurred. The claimant had dealt with Ms Egan.

58. The Tribunal should not regard the evidence of Mrs Mackenzie as being credible when she said that the claimant was free to turn up and to leave without explanation or reason and would continue to get work. The claimant had been given training. Her tasks had been explained to her at the start of the relationship. She was given tasks to help with by the line manager. The claimant received tasks from Ms Egan and would return to Ms Egan to confirm that tasks had been done.

59. The claimant's work location of Lenzie was determined by the respondents. Her desk allocation was determined by the respondents. If she was asked to go to another location, that would be a matter for the respondents to decide.

60. All of this evidence supported there being subordination, Ms Madden submitted. Further, there had been no written statement of terms and conditions giving the claimant the right to substitute. The claimant's evidence had been that if she was sick she would inform the respondents. She did not arrange a substitute during her two week absence through sickness. The respondents did that. If she was to be on holiday she would arrange for another freelance member of staff to cover for her. Sometimes Ms Egan did this, sometimes the claimant did it. It was not a question of her finding anyone of her choosing to cover her work. Insofar as Mrs Mackenzie said that was possible, the evidence of the claimant should be preferred. There was no genuine unfettered right to substitute.

61. Ms Madden then turned to the issue of payment. Timesheets were completed. Those were headed up as invoices in many instances. They were however timesheets. The claimant's interest in the florist's business was irrelevant in determining relationship with the respondents, Ms Madden said.

62. Other relevant elements could be found in the correspondence between the parties. The claimant had been dealt with as an individual. There had been reference to her input, to her being valued and to her being part of the staff.

The dominant purpose of the relationship was the personal performance by the claimant. Mrs Mackenzie had accepted that.

63. ***Pimlico*** had referred to the existence or lack of existence of an umbrella contract. The working relationship however could be looked at. The claimant had been working under a contract personally to do work, Ms Madden submitted. It might be suggested that there were a variety of small contracts looking at weekend work, four day working and then three day working. The claimant had not been free however to unilaterally vary her hours. She considered them to be set hours. In analysing the evidence and the facts which pertained, the claimant met the test under the 2010 Act. She had been recruited by the respondents to work for them as an integral part of their business. There was no evidence to suggest that the respondents had been clients or customers of the claimant.

Submissions for the respondents

64. Mr Maguire said that each engagement of the claimant should be looked upon as an individual contract. There was no suggestion by her that she was employed under an umbrella contract covering the whole of the period.

65. The facts required to be looked at in the round, said Mr Maguire. He referred to the case of ***Windle***. It was important to consider what the claimant was doing if she was not working with the respondents. Here, she was under no obligation to them whatsoever and could do exactly as she wished.

66. There was also reference by Mr Maguire to ***Capita*** and ***Halawi.***

67. Factors such as whether a service company was involved, whether rights to sick pay, holiday pay or to substitute listed were all of importance, submitted Mr Maguire.

68. Turning to the evidence, he maintained that credible and reliable evidence had been given by Mrs Mackenzie. Her evidence should be accepted where it varied from that of the claimant. She had accepted when she was relying

on what she had been told. She had given her evidence in a professional manner intended to assist the Tribunal. The claimant on the other hand was hesitant in parts of her evidence. She had sought to change or “spin” her evidence in some areas.

69. What was certainly the case was that the claimant had been engaged on the basis of being freelance. She had accepted that. She had dealt with her own tax and national insurance. She had submitted timesheets or invoices and had then been paid. She did not receive holiday pay or sick pay.

70. She discussed with the respondents what hours she was to work and what she was to do. As with any freelancer, it was agreed when she would attend work. It was up to her however whether she appeared or not. There would be discussion between the parties as to when the business needed her attendance and whether she was available. It was not set in stone that she would work four days per week. There was no obligation on her to work those four days.

71. There was very strong evidence that the claimant could call the respondents and say that she was not coming in on one agreed day. There would be no action taken against her. There would be no disciplinary proceedings. No reasons required to be given by the claimant for any decision not to appear. She did not require permission from the respondents to return home at any point. If she was not to appear, Ms Egan would try to find someone from the freelancers to cover her work or would say to the claimant that she should try to find a freelancer or would just make do.

72. Mrs Mackenzie said the claimant might leave if she was having a bad day. The claimant had said she did not use those words, but had said her pregnancy and anxiety went hand in hand and she would not come in or would leave due to feeling unwell on a particular day. No action would be taken by the respondents if the claimant did decide simply to leave. She did not need permission to do that.

73. There had been discussion as to the claimant moving from four to three days per week. She was not engaged on any basis of working a four day week indefinitely.

5 74. The claimant had not been subject to any formal appraisals. Her colleagues had said she was doing a good job but there was no appraisal in place for her. Mrs Mackenzie's evidence that the training was to enable the claimant to carry out day to day tasks had not been challenged. The claimant attended work, put her computer on, figured out what needed done and then did it. Her day
10 to day work did not require much supervision or direction from the respondents.

75. In the absence of an umbrella contract, the Tribunal should look at the case on assignment by assignment basis. The fact that there was an absence of
15 an umbrella contract meant that there was less support for there being a contract personally to do work.

76. The evidence had been clear. Freelancers, including the claimant, could simply tell the respondents when they wanted a day off. They did not require
20 to ask the respondents. The respondents could not stop them taking a day off although they said that it would be helpful for the freelancer in that scenario to arrange cover, said Mr Maguire. That showed or tended to show that the contract was not personally to do work. It was a contract to do work. If the claimant did the work, she would be paid. If she did not work she would not
25 be paid. She could not turn up with there being no comeback. She could then return to work at some future date. It was not a condition of any holiday that she arranged cover.

77. All of these factors were fatal to her argument in this case, submitted Mr
30 Maguire, in the absence of there being an umbrella contract for work to be done personally. Her two to three week absence whilst ill did not support her case.

78. Mr Maguire said that a holistic approach required to be undertaken. Looking at the evidence on that basis and at the legal principles involved, her claim could not proceed if she had not met the test in terms of the 2010 Act, he argued.

5 **Brief reply by the claimant**

79. Ms Madden said that there was mutuality between the parties on the basis of weekend working, four days per week working and then three days per week working and on each of those until the variation was agreed. There would be an umbrella contract therefore in place. Whether an umbrella contract was 10 in place was one factor in the consideration. The Tribunal should also look at the issue of subordination and the relationship between the parties. The claimant's evidence had been that she only left her shift early in circumstances where that was for health reasons, except on the final occasion when she left her place of work in November 2017. She had not ever simply 15 walked out. It was in that context that no action was taken against her.

Discussion and decision

80. It was common ground that the claimant had been engaged as a freelancer. She was aware that she did not receive sick pay and that she did not receive holiday pay. She was also aware that her working relationship with the 20 respondents would be likely to come to an end when business became less busy. That, she was aware, was generally around November with business picking up approximately at the beginning of March each year.

81. The claimant was responsible for meeting her own tax and national insurance 25 payments. She was paid by the hour, submitting timesheets for approval by the office manager. That process led to payment to her being made.

82. The relationship between the claimant and the respondents was not contended by the claimant to have been one of employment in terms of the 30 Employment Rights Act 1996. The definition of employment in terms of that Act, and the cases on the point, contrast with the definition in the 2010 Act, as detailed in section 83 (2) of the 2010 Act. A wider range of working

arrangements constitute employment under the 2010 Act than is the case in terms of the Employment Rights Act 1996. Someone, for example, who is self employed may be viewed as being contracted personally to do work and therefore to be in an employment relationship for the purposes of application of the 2010 Act. That person would not be an employee under the employment Rights Act 1996.

83. Helpfully, there have been relatively recent cases which are of assistance in clarifying section 83 of the 2010 Act. Those in particular are ***Allonby, Hashwani*** and ***Halawi.***

84. ***Hashwani*** is a case which ultimately was decided by the Supreme Court.

85. The case of ***Pimlico*** refers in paragraph 45 to ***Hashwani*** and paragraph 34 of the Judgment in ***Hashwani***. In that paragraph Lord Clarke, with whom the other members of the Court agreed, identifies the question as being:

> *"whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services."*

86. Looking to apply the tests in the cases referred to above and in particular the elements mentioned immediately above in the quotation from ***Hashwani***, I have concluded that the claimant was someone employed under a contract personally to do work.

87. I regarded the following elements as being particularly persuasive in that regard:-

    (a) The claimant was part of the organisation of the respondents. The advert for the post looked for an individual to reply. The

claimant did that. She was interviewed and joined the respondents. She received training in their processes.

(b) When at work, the claimant *"reported in"* to Ms Egan, the office manageress. She had tasks which were part of a daily routine, such as answering the phone and referring calls appropriately. She also then would speak with Ms Egan and obtain tasks to do from her, reporting back to her when those were done.

(c) The respondents determined where the claimant worked and what were to be her hours. There was a regularity about those hours. When the claimant asked whether she was required for the week day hours hours after the first week or two of working those hours, she was told not to ask and that those were hours which she would work.

(d) The claimant's hours increased, with Ms Egan making the comment that the respondents wished the claimant to work the extra hours required during the week as they were busy, with someone else then being found for the claimant's original hours at the weekend. That seemed to me to be a clear indication that the respondents wished the claimant to carry out the work for those hours, preferring her to anyone else. It did not sit with there simply being a requirement for *"a body"* to carry out the work of a receptionist on a particular day.

88. Whilst the claimant could decide not to turn up, or could decide to go home at any point, the reality was that she was expected to notify the respondents in either situation rather than simply not turn up or walk out of the building. The situation of the claimant deciding, for no good reason, that she would not appear at work or that, for no good reason, she would simply leave the building did not occur during the employment of the claimant. When she was absent it was on holiday, which was prearranged, or due to illness. If it was due to illness the claimant telephoned and spoke to Ms Egan. Ms Egan then

arranged cover through one of the other freelancers. On occasion, Ms Egan said that she was too busy to arrange that cover. She would then ask the claimant to speak to one of the freelancers, generally mentioning the particular freelancers she might have had in mind. That again was consistent with subordination in my view. If the claimant went home at any point prior to her scheduled finish time when working with the respondents, it was on the basis she was not feeling well. The reality was not therefore one of the claimant coming and going as she pleased. There was never any time at which the claimant did not appear but sent along someone who was unknown to the respondents to cover in her absence. Although Mrs Mackenzie said that could have happened providing the person was reasonably competent, the evidence from the claimant was that Ms Egan would look to cover the claimant's hours, if the claimant could not personally appear to work them, by arranging for the services of another freelancer or, if that was not possible, simply *"making do"*. There was no evidence that Ms Egan had, for example, said to the claimant if the claimant was being asked to contact a freelancer due to Ms Egan being busy, then if the freelancer was not available, the claimant could potentially have a friend or relative, for example, cover her work.

89. A further piece of evidence exists which in my view is of importance in determining the nature of the relationship between the claimant and the respondents. The respondents say that the claimant could walk out and go home at any point in the day and that there was nothing they could do about it. It was entirely up to her. No repercussions would or could follow. However, when she actually **did** leave the office without saying anything, Mr Mackenzie took her to task. His letter of 16 November 2017 contains the following sentence: -

> *"We were all very disappointed to see you walk out at the start of your recent shift, without the courtesy of an explanation or reason for your actions."*

90. That to me is entirely inconsistent with the claimant having the right to take that step and with the respondents being aware of and content with position. It is far more consistent with subordination in my view.

91. Whilst therefore in terms of the contract, the claimant might simply decide for no reason that she was not going to appear one day or was going to take a holiday and that she could walk out when the mood took her, in reality these events were not expected and did not happen. Mrs Mackenzie said that it would be expected that a freelancer would not walk out with no explanation in that out of common courtesy they would say what they were doing. She also said that the respondents had four or five *"as and whens",* as the freelancers were viewed, who would be backup and would cover hours if one of the other freelancers could not appear. That again underlined that the practicalities of any substitution were matters, in effect, controlled by the respondents. That involved Ms Egan arranging the substitute or pointing the claimant in the direction of someone who was first port of call. Ms Egan only left the arrangement of a substitute to the claimant when she herself was too busy to undertake the task of finding a substitute.

92. ***Pimlico*** confirms that the obligation of personal performance is key. In my view the respondents wished the claimant to carry out the work. They opted to offer her more hours. They agreed that her start time would be slightly later than otherwise would have occurred. This was on the basis that she required to drop her daughter off. The very discussion and reaching of an agreement on that matter pointed towards there being a contract personally to do work being met. The evidence described a discussion and agreement around this arrangement rather than the claimant being free simply to turn up when it suited her.

93. I recognised that there were pointers and elements which weighed against there being a contract personally to do work. Those elements are detailed above and include there being no holiday pay, no sick pay, submission of timesheets, payment by the claimant of her tax and national insurance and

acceptance by the claimant that she could leave work on a particular day if she chose to do that. The claimant also accepted that the right of substitution existed. The reality in relation to the last two points was as detailed above however.

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94. It was also common ground that the claimant could do as she wished when not at work with the respondents. When this point was put to the claimant in cross examination on the basis that she could, for example, be a florist when she was not working with the claimants, her reply was that this could be the
10 case as long as she was not doing it on the days when she was to be working with the respondents. That to me again therefore pointed to there being a contract to do work personally. An employee can, in general terms for example, if not working weekends with their employer, do work of a different type at weekends. That seemed to me ultimately to be the scenario which
15 the claimant was speaking about in evidence.

95. If the claimant did not show up for work, the respondents did not, in effect, shrug their shoulders and regard it as the claimant demonstrating the freelance nature of her employment. They would telephone to enquire as to
20 the position, following it up with a text. Whilst that is perhaps demonstration of a human caring aspect, it does not sit particularly well with a situation in which there was no subordination involved.

96. Integration of the claimant in the business was in my view underlined by the
25 reference by Mr Mackenzie to the claimant's *"normal hours"* and his reference to her being *"a valued member of my staff"*.

97. The respondents maintained that this case was similar to that of ***Windle***. They said that in ***Windle,*** the absence of an umbrella contract operating
30 between assignments was, although not conclusive, a relevant factor in assessing whether the claimants were employees for the purposes of the 2010 Act.

98. It did not seem to me that the claimant in this case supplied services on an assignment by assignment basis. There was a relevant working pattern with anticipated and actual repetition of the same working arrangement, whether weekends, four days or three days per week as those particular elements were agreed between the parties from time to time.

99. Weighing all the relevant factors, I concluded on the evidence and facts found as to the working relationship between the parties that the claimant was employed for the purposes of the 2010 Act and is therefore able to bring a claim alleging discrimination. Whether that claim is well founded, of course, remains to be seen.

100. The clerk to the Employment Tribunals is requested to fix a one hour case management PH in person to confirm the issues for the hearing and to make arrangements with regard to documents and any other matters relative to the hearing. In addition, parties should attend the PH with information as to availability of parties, representatives and witnesses in order that dates can be set down for the hearing.

Employment Judge: Robert Gall
Date of Judgment: 25 September 2018
Entered in register: 27 September 2018
and copied to parties