Case No: 2203034/2019

EMPLOYMENT TRIBUNALS

Claimant: **Ms Sangita Sagan**

Respondent: **Cover Up Clothing Ltd (1)**
Live Unlimited Ltd (2)

Heard remotely by CVP **On: 26 August 2020**

Before: Employment Judge Henderson

Representation
Claimant: In person
Respondent: Ms Hatch (Counsel)

RESERVED JUDGMENT

1. **The claimant is not an employee of either of the respondents and her claims for unfair dismissal; statutory redundancy payment and breach of contract (notice pay) cannot be heard by the Tribunal;**
2. **The claimant is a worker within the meaning of section 230 (3) Employment Rights Act 1996 (ERA) and her claim for unlawful deduction of wages, in respect of unpaid holiday pay can be heard by the Tribunal.**
3. **The Tribunal will list a Full Merits Hearing for the unlawful deduction of wages claim (for 3 hours).**

REASONS

Background and Conduct of the Hearing

1. This was an open preliminary hearing (OPH) postponed from 6 April 2020.There had been two Case Management Hearings on 29 January 2020 and 5 May 2020.
2. The hearing was a remote public hearing, conducted using the cloud video platform (CVP). The parties agreed to the hearing being conducted in this

way. In accordance with Rule 46 (of the Tribunal Rules of Procedure 2013), the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended. No requests were made by any members of the public to inspect any witness statements or for any other written materials before the Tribunal.

3. From a technical perspective, the claimant had some difficulties in joining the hearing initially, but was eventually able to do so and the hearing continued without any further technical problems. The participants were reminded that it was an offence to record the proceedings.
4. As the claimant was a litigant in person, I spent some time at the commencement of the hearing explaining the process which would be followed during the course of the day. I also noted that as remote hearings could be particularly tiring, we would be taking regular breaks during the course of the day, which we did.
5. At the hearing I heard evidence from the claimant (who adopted her two statements dated 9 March 2020 and 15 June 2020 as her evidence in chief) and from Ms Rachel Heather on behalf the respondents (who adopted her two witness statements which were undated as her evidence in chief). The respondents also produced a short witness statement from Mr Cornelius Nolan, but he was unable to give his evidence in person due to family commitments. I have noted his witness statement (undated) but am only able to give limited weight to that statement given Mr Nolan's inability to attend the hearing.
6. There was also a bundle produced electronically (of 79 pages) and page references in this Judgment and Reasons are to that bundle unless otherwise specified. Ms Hatch had also prepared a skeleton argument on behalf the respondents and the claimant had been given advance notice of this. The claimant had helpfully prepared a written note in summary of her case, which she read out at the hearing. I reserved my decision.

The Issues and the relevant law.

7. The purpose of this OPH was to determine the following issues:
    a) was the claimant an employee within the meaning of section 230 (1) ERA? Alternatively,
    b) was the claimant a worker within the meaning of section 230 (3) ERA?
8. Ms Hatch had helpfully summarised in her skeleton argument the key legal principles and case law applicable to determining these issues, in particular the cases of **Ready-Mixed Concrete v Minister of Pensions and National Insurance [1968] 1 All ER 433** and **Autoclenz v Belcher [2011] IRLR 820**. I explained to the claimant that the question of whether someone was an employee/worker was a complex one, which depended significantly on the factual findings made by the Tribunal. Given the clear dispute between the parties as to the factual situation in this case, I explained that it was for me to decide whose evidence I preferred and why.

Summary of the areas of dispute between the parties.

9. The parties agreed that the claimant had been employed by the first respondent (R1) from 21 July 2014 in the role of production coordinator. There was a written contract of employment (pages 18-21) and a letter at page 22, which confirmed the claimant starting salary at £35,000 per annum, with 22 days holiday. These were the only written documents evidencing the contractual relationship between the parties.
10. R1's business was to sell clothing direct to high street retailers. The second respondent (R2) was set up to sell clothing direct to the public online. R2 had a basic website but Ms Heather and her business partner, Tracey Egan, wished to improve the website and to obtain digital feedback on sales.
11. The parties also agreed that in June 2016 the claimant's role changed to that of E-commerce manager (providing digital marketing services to R2); that her annual payment was increased to £50,000 per annum and that the relationship terminated in May 2019. That is the extent of the agreement between the parties.
12. The respondent says that the agreement with the claimant was terminated on 2 weeks' notice due to cost-cutting. The claimant says that she told she was being made redundant but was not given the appropriate statutory redundancy payment or notice period and that she was unfairly dismissed. There is also a claim for accrued but unpaid holiday pay.
13. The claimant says that her employment relationship with R1 continued throughout the period July 2014 to May 2019, although she accepts that from June 2016 the work she did was for the benefit of R2. The respondents say that the claimant resigned from her employment with R1 at the end of May 2016 because she wished to return to her career in digital marketing. There was no opportunity for such skills with R1 as it sold directly to high street retailers. The claimant agrees that she had expressed a desire to return to digital marketing, but does not accept that she had resigned from her employment with R1. The claimant said she had had conversations with Mr Nolan and Ms Heather about her career aspirations but had never resigned formally or put her resignation in writing.
14. Ms Heather accepted that there had been no written resignation or any formal written acceptance of that resignation by R1. However, she maintained that the claimant had been issued with a P45 tax form which showed the termination date of her employment with R1 as 1 June 2016 (at page 29). The claimant said she had never seen or been sent the P45.
15. The respondent says that from 1 June 2016 the claimant was self-employed, which she had specifically requested, as this was beneficial to her as regards her tax position. It is agreed by both parties that from that date the claimant sent monthly invoices to R1 from various limited companies (owned by her ex-husband and then her brother) and on 2 occasions in her own name. The invoices are for the same amount each month and this amount was £50,000 divided by 12.
16. The claimant accepted that she had requested the invoice method of payment as being tax-beneficial to both parties, but said that there had been a conversation between her and Ms Heather in May 2016, when Ms

Heather confirmed that all the claimant's employment rights would continue. Ms Heather denied that any such conversation took place.

17. The claimant says that she continued to be integrated into the respondents' organisation; was under the control of the respondents via Sally McClellan, who was the Brand Manager for R2; had the use of the desk in R2's office and was an employee as before. All this is denied by the respondents.
18. The burden of proof as to the employment/worker status is on the claimant and the standard of proof is on the balance of probabilities.

Findings of Fact

Claimant's resignation from R1

19. The claimant accepted that she had told both Mr Nolan and Ms Heather that she was unhappy with her role as production coordinator and was looking to work in digital marketing. She set great store by the fact that she had put nothing in writing about her resignation and had received no formal written acceptance from R1. The claimant said she believed that nothing could be effective unless it was put in writing.
20. Ms Heather agreed that there was no written resignation or acceptance but said that she had conducted an exit interview with the claimant in which they had agreed the new terms for her appointment as E commerce manager for R2. The claimant said she recalled a meeting but it had never been described to her as an exit interview.
21. Both parties accepted that nothing had been put in writing with regard to the arrangements from June 2016. Both the claimant and Ms Heather also agreed that this was standard practice in the industry, with regard to supplier contracts. However, the claimant noted that the respondents had a written contract with the new supplier of digital marketing services.
22. There was a witness statement from Mr Nolan supporting Ms Heather's version of events as regards the claimant's resignation, but I did not hear evidence in person from Mr Nolan.
23. Given the directly contradictory evidence from the witnesses, and the lack of any supporting documentary evidence, it is difficult to reach a conclusion as to whether the claimant resigned. However, the question of whether her employment with R1 came to an end can be determined by the existence (or not) of a P45.

The P45

24. As mentioned above, the claimant said that she had never been given the P45. Ms Heather said in her evidence and her first witness statement (paragraph 6), that the P45 had been given to the claimant by Paresh Shah, R1's finance manager. The claimant correctly noted that there was no evidence produced from Mr Shah to confirm this.
25. However, Ms Heather did point out when giving her oral evidence that the claimant must have been able to produce a P45 to HMRC, in order to be paid as an employee of Tangerine Media Ltd and Ollie Ltd, which the claimant confirmed had been the case. The claimant said that she did not know whether or how the P45 would have been sent to HMRC but she did confirm that she received payslips and was paid under the PAYE system by both Tangerine Media Ltd and Ollie Ollie Ltd. I accept Ms Heather's

evidence that in order for this to be the case, there must have been a P45 from R1 presented to HMRC.

26. I therefore find that the claimant's employment with R1 under her written contract of employment had terminated on 1 June 2016 and that the claimant should have been aware of this fact, because she knew that she was being paid as an employee, by payslip and under the PAYE system, by first, Tangerine Media Ltd and then by Ollie Ollie Ltd.

The Invoices and the Claimant's relationship with other companies

27. The invoices submitted by the claimant to R1 for the period June 2016 to May 2019 were at pages 39-64. The invoices were all in the same format and were headed "contract e-commerce marketing and consultancy" and were for "contract work" or "e-commerce work" for the relevant month and expenses. From June 2016 to 28 February 2017 (pages 39-48) the invoices were from Tangerine Media Ltd. The claimant said that this was her husband's company and from November 2016, VAT was charged on the invoices for that company.
28. The claimant was referred in cross-examination to the notes to the financial statement for Tangerine Media Ltd (page 71) for the year ended January 2017 which stated that the average number of employees for the company for that year was 2. The claimant was asked whether she had been one of these employees. The claimant initially said that she "could have been", but subsequently confirmed that she was paid through Tangerine Media Ltd and that she received payslips which showed deductions for PAYE. The claimant said that this had all been dealt with by the company's accountants and her evidence was vague on the details. She said that Tangerine Media Ltd transferred the money owed, into her and her husband's joint bank account.
29. The claimant also said in cross-examination that she had never to her knowledge submitted or approved any tax returns. She said that she believed that as the tax deductions were noted on her payslip through the PAYE system there was no need for her to make such returns to HMRC. The claimant also said that she could not recall ever receiving a P60 tax form. I did not find the claimant's evidence on this last matter to be plausible. Given the claimant's evidence that that she had suggested the invoicing arrangements to the respondent in order to save tax, it is not then consistent for her to say that she had no idea about how tax matters worked and that she totally relied on her husband and/or her accountants.
30. The claimant said that she had provided all the services to R2 herself and had never been helped by her husband. Ms Heather accepted that the claimant had never delegated or substituted the provision of her services. The claimant also said that she had used Tangerine Media Ltd's accounting software, but all the invoices had been prepared by her.
31. The claimant separated from her husband and could no longer use Tangerine Media's bank account. She then invoiced R1 in her own name in February and March 2018 (pages 49 and 50) and from April 2018 to May 2019 submitted invoices in the name of Ollie Ollie Ltd (pages 51-64) , a company owned by her brother. These invoices also contained the claimant's national insurance number. The claimant said she had been told in June 2016 by Paresh Shah to put her NI number on the invoices,

but had only done so from February 2018 onwards. She could not explain why this was the case.

32. The claimant confirmed in cross-examination that she had been an employee of Ollie Ollie Ltd. She responded to questions from me, that she had received payslips which showed the deduction of PAYE, which she assumed had been duly accounted for to HMRC by the accountants, but that she could not be sure this had happened. The claimant could not recall the name of the relevant accountants.
33. The claimant's evidence on these matters was vague and unclear. There was no documentation produced relating to her payslips from Tangerine Media Ltd or Ollie Ollie Ltd or any tax documentation. Again, given her acknowledgement in cross-examination that she had been a director of 9 companies and had her own handbag business (Oliver Bear) it was not consistent that she would be totally unaware of her employment status and tax position as regards these companies. Further, given her evidence about her reliance on the accountants, it was not plausible that she was unable to recall the name of the accountants or provide any documentation from them about her financial affairs.
34. However, I was not presented with any evidence that the claimant provided any actual services to Tangerine Media Ltd or Ollie Ollie Ltd as an employee. Her evidence was that those employment relationships were solely as a means of payment and for tax efficiency reasons (though she was unable to explain the detail of those reasons).

Claimant's relationship with R1/R2 from June 2016

35. The claimant's evidence was that as far as she was concerned she had remained an employee of R1 since July 2014. She accepted that from June 2016 most of her work was for R2. She said that the invoicing arrangements were simply for tax purposes and that she had been told by Ms Heather that all her employment rights remained the same.
36. Ms Heather denied this. She said that she had 81 employees in her organisation and had set up the invoicing arrangements at the claimant's request. The claimant was the only person in the organisation who operated in this way. Ms Heather acknowledged that she would save on employers' national insurance contributions by using this arrangement but that otherwise there was no benefit to R1.
37. Given the difference in the evidence, I have to decide on a balance of probabilities whose evidence I prefer. I take into account the intricacies of the claimant's invoicing arrangements moving from Tangerine Media Ltd to those in her own name and then to Ollie Ollie Ltd. It is not plausible that the claimant would persist in maintaining the invoicing arrangements, especially after her separation from her husband, unless she felt there was a financial benefit for her to do so. This suggests that the claimant had a real interest in maintaining the arrangement and not simply reverting to being paid directly by R1/R2 through their PAYE system.
38. Further, given the claimant's emphasis (in her evidence on whether she had resigned) on the importance of putting confirmation of matters in writing, it is not plausible that the claimant would have omitted to ask for some written confirmation of her change of role/annual payment etc. The claimant could not explain why she had not done so.

39. I therefore prefer Ms Heather's evidence that she had not told the claimant that her employment rights would continue.
40. Ms Heather said that the invoices had been paid by R1 but there was then an intercompany recharge to R2 (pages 65-66). When the claimant was taken to this document in cross-examination she accepted the position, although she insisted that she had never been aware of the recharge at the relevant times.

Holidays/Sick Pay

41. The claimant accepted in cross examination that from June 2016 onwards, she had not requested holiday and did not need to seek permission, but had notified the respondents that she would be taking holiday (pages 32-33). She said that she liaised with Ms McClellan for short absences (one or two days) to ensure that one or other of them was in the office. Ms Heather did not dispute this.
42. Ms Heather accepted that the claimant was paid the same amount each month via the invoices regardless of which days she had worked during that month; she said she was only concerned that the work was being done, which it was.
43. The claimant had not taken any time off relating to sickness absence after June 2016 so there was no evidence available with regard to statutory sick pay.

Control/Integration

44. Under the contract of employment with R1 the claimant was expected to work 9 to 5.30 Monday to Friday. The claimant said that she still did this, but also said in her evidence that from June 2016, she worked 55 hours a week, which is not consistent with her earlier statement. I note that the claimant was paid significantly more from June 2016, which would be consistent with the working longer hours.
45. The claimant accepted that she was not required to keep time sheets and could work from home as and when she chose, but said that most of the respondents' employees worked in a similar way. There was no documentary evidence or other evidence on this matter. Ms Heather said the claimant chose how and when she worked. I find based on the limited evidence available, that the claimant's hours of work were not controlled or dictated by the respondents.
46. The claimant said that she had been asked by Ms Heather to carry out work in her former production role. Ms Heather accepted that she had done this once, as a favour, when Mr Nolan was on paternity leave and this was not part of the claimant's regular role/work pattern (page 25). The claimant did not accept this; she said she had been asked to help out between 3 to 4 times from June 2016 to May 2019. Even if I accept the claimant's evidence on this point, I do not find that this level of assistance would amount to ongoing control over her work/work pattern. The email from Ms Heather is couched in terms of a "request" requiring the claimant's agreement and not in terms of a direction/order from a manager.
47. The parties agreed that the claimant had assisted with interviews. Ms Heather said this was only for one candidate for a digital marketing role (Jared) as the claimant had the necessary technical knowledge. The

claimant said that she had recruited several candidates and had prepared their contracts of employment. This was denied by Ms Heather, who said that the claimant was recalling interviews which had had taken place before June 2016 (i.e. while she was still an employee). Ms Heather said that only she and Ms Egan had the authority to "hire and fire" employees. There was no documentary evidence produced on this point by either party. Again, I find (on a balance of probabilities) that the claimant has not demonstrated that she was integrated into the respondents' organisation or under their control as regards her working hours/pattern of work

48. The claimant said she had her own regular desk in R2's offices, which was not disputed by Ms Heather. It was accepted that the claimant liaised with Ms McClellan re any short absences. The claimant's evidence was that she was left to manage her own time and would only refer to Ms McClellan if there were any serious problems. She said this was the same for all employees. This was not accepted by Ms Heather. There was no other evidence on this matter.
49. The claimant referred to her attendance an open day in or around mid-July 2016 (pages 23-24). Ms Heather said that this had involved people from several organisations and was not specific to the respondents' employees. Ms Heather accepted that the claimant had retained her "coverup" email until around December 2016. She said that this was because it took a while to set up the email for R2 and the claimant needed an email address connected to the respondents when she was dealing with customers on their behalf.

Equipment

50. It was agreed that the claimant used her own laptop and mobile phone and paid for her mobile phone charges.

Conclusions

Was the claimant an employee?

51. Under section 230 (1) ERA an "employee" is defined as an individual who has entered into or works under a "contract of employment". There is no dispute that the claimant worked under a contract of employment from July 2014, and I have found that this contract of employment ended on 1 June 2016. Therefore, the relevant question is whether the claimant worked under a contract of employment from June 2016 to May 2019.
52. I have made findings of fact with regard to the relevant control, integration and other factors as identified in the **Ready-Mixed Concrete** case. My findings have been considerably hampered by the lack of documentary and supporting evidence produced in this case. The only document recording the agreement between the parties was the contract of employment, which I have found ended on 1 June 2016.
53. However, on the basis of the evidence presented to me, I find that the claimant has not demonstrated to the requisite standard of proof that she was under the control of the respondents, in particular as regards how and when her work was done; monitoring her attendance; deciding on when her holidays could be taken or being in charge of managing/disciplining her performance.

54. Turning then to the question of whether the terms of her relationship with the respondents from June 2016 are consistent with the agreement being contract of employment. Again, there was minimal documentary evidence available.
55. The claimant had submitted invoices to R1 throughout the relevant period: initially from Tangerine Media Ltd, then in her own name and finally from Ollie Ollie Ltd. The claimant accepted that she had been an employee of both Tangerine Media Ltd and Ollie Ollie Ltd; she had received payslips from them and they had operated PAYE on her behalf. The claimant accepted that she provided her own laptop and mobile phone. I find that the terms of the agreement between the parties (given the limited evidence available) were not consistent with a contract of employment, but were more consistent with that of an independent contractor.
56. I am conscious that the question of employment status is a difficult one and is predominantly factually based. The case law requires not simply an itemisation of all the relevant factors but a consideration of the "big picture" to reflect the reality of the situation (**Autoclenz)**. Given the lack of evidence presented to me in this case, I cannot find that the "reality" of the situation was that the claimant continued to be an employee after June 2016.

Was the claimant a worker?

57. Under section 230 (3) ERA, a worker is defined as "*an individual who has entered into for works (or worked) under: a) a contract of employment or b) any other contract. 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*". A contract may be express or implied and if express, maybe oral or in writing (ss 230 (2) & (3)). In this case the contract between the parties was express and oral.
58. Based on the findings of fact set out above, it was not disputed that the claimant contracted to personally provide Ecommerce services to R2. The claimant had never delegated the provision of her services, nor sought to substitute the provision of those services. The claimant charged the same amount each month throughout the period. The key issue, therefore, is whether the claimant provided those services to the respondents as clients or customers of any profession or business carried on by her.
59. The claimant's evidence was that Tangerine Media Ltd was her husband's company and that Ollie Ollie Ltd was her brother's company, and that effectively she had used these companies as a vehicle for payment. This evidence was not challenged by the respondent in cross-examination. The claimant had several former directorships with various companies and had run her own handbag business, Oliver Bear.
60. However, I was not presented with any evidence to suggest that the provision of the claimant's services to R2, was as part of any business run by her. There was no evidence of her providing services to any other customers or clients during the period June 2016- May 2019.
61. I, therefore, find that the claimant was a worker within the meaning of section 230 (3) ERA.

Claimant's Claims

62. As I have decided that the claimant was not an employee after June 2016, her claims for unfair dismissal; a redundancy payment and outstanding notice pay (breach of contract) cannot proceed as she is not eligible to pursue such claims in the Employment Tribunal.
63. As I have decided that the claimant is a worker, she is able to pursue her claim for unpaid holiday (3 days) as an authorised deduction of wages under section 13 ERA. The Tribunal will list a final hearing to determine this matter, which should be listed for 3 hours.

Employment Judge - Henderson

Date: 2 September 2020

JUDGMENT SENT TO THE PARTIES ON

03/09/2020

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FOR THE TRIBUNAL OFFICE