EMPLOYMENT TRIBUNALS

Claimant: **S**

Respondents: **Liberty Retail Group (1)**
AMI Paris (UK) Limited (2)

Heard at: London Central Employment Tribunal **On:** 17 September 2020

Before: Employment Judge Khan (sitting alone)

Appearances
For the claimant: Mr H Hunter, counsel
For the first respondent: Ms M Bayoumi, counsel
For the second respondent: No appearance

RESERVED JUDGMENT

The claimant was a contract worker at all relevant times, for the purposes of section 41 of the Equality Act 2010.

REASONS

The Issue

1. This was an open preliminary hearing listed to determine the following issue:

   1.1 Does the claimant meet the requirements to be a 'contract worker' under section 41 of the Equality Act 2010 ("EQA"), such that she has standing to pursue her harassment claim against the first respondent?

The Evidence and the Procedure

2. This preliminary hearing was a remote public hearing conducted using the cloud video platform (CVP) under rule 46.

3. In accordance with rule 46, 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.

4. The parties were able to hear what the tribunal heard.

5. I heard evidence from the claimant. For the first respondent, I also heard evidence from Sarah Halsall, Operations Director; the statement of Charles Davis, Head of Sales Fashion, was taken as read.

6. There was a bundle of documents of 90 pages.

7. I also considered the closing submissions made on behalf of the claimant and the first respondent together with the legal authorities which each party relied on.

The Relevant Legal Principles

8. Section 41(2) EQA prohibits harassment of a 'contract worker' by a 'principal'. Under section 41(5) a 'principal' is defined as 'a person who makes work available for an individual who is (a) employed by another person and (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it)'. Under section 41(7) which mirrors these provisions a 'contract worker' is an individual supplied to a principal in furtherance of such a contract.

9. In determining whether a complainant meets the requirement of a contract worker under section 41, a tribunal must therefore address the following two questions: firstly, was work made available by the putative 'principal' for the putative 'contract worker'; secondly, was the 'contract worker' supplied in furtherance of a contract to which the 'principal' was a party. Both are questions of fact to be determined by the tribunal.

10. As to the first question: this is not limited to work in respect of which the principal has managerial powers (see Harrods v Remick [1998] ICR 156, CA) and the test is wider than a strict employment test, and requires, at the very least, that the work being done should be work for the commercial benefit of the principal (see Harrods and Leeds City Council v Woodhouse [2010] EWCA Civ 410, CA).

11. As to the question of supply: there must be in the contemplation of the employer and the principal that the former will provide the service of its employees in the course of the contract between them (see Jones v Friends Provident Life Office [2004] IRLR 783, NICA). Whilst the principal must be in a position to discriminate against the contract worker it will not always be necessary for the principal to exercise control or influence over the conditions under which the employee works for the working arrangement to be caught by section 41 (see Woodhouse).

12. It is self-evident that the provisions of section 41 widen the scope of protection available to discrimination complainants. They should be given a construction that is not only consistent with the statutory language but which also achieves the statutory purpose of providing a remedy to victims of discrimination who

would otherwise be without one (see Harrods [at page 162] and Jones [at paragraph 21] which were both approved by the Court of Appeal in Woodhouse).

The Facts

13. Having considered all of the evidence, I make the following findings of relevant fact on the balance of probabilities.

14. The claimant was employed by the second respondent, a ready-to-wear clothing brand, from 6 May until 3 August 2019 as a Brand Specialist to work at department stores, including the first respondent's department store, Liberty, to procure and process sales of its products. The claimant also worked at the Harrods and Harvey Nichols department stores on other days.

15. Although the first respondent was unable to locate a written agreement between it and the second respondent, I was taken to a pro forma supplier account form and agreement which included a contract for the purchase of the supplier's goods by the first respondent. I accept the evidence of Sarah Halsall, the first respondent's Retail Operations Director, that the second respondent would have been required to sign such an agreement in order to set up an account with the first respondent.

16. The commercial relationship between the respondents operated as follows. The first respondent bought stock from the second respondent. No further payments were made by the first respondent. The first respondent agreed to provide a designated in-store area to market this stock. Although there was no express requirement for a brand specialist to procure sales of the second respondent's products in the first respondent's store, Ms Halsall confirmed that the provision by the second respondent of an in-store brand specialist would be part of the discussion between the parties at around the time a contract was being agreed. The presence of a brand specialist in the Liberty store was more likely to drive up sales of the brand's products and therefore the first respondent's revenue, and profit. This had the knock-on benefit to the second respondent that better sales would strengthen its commercial relationship with the first respondent and lead potentially to more of its products being sold, and greater visibility and brand presence in the store. I therefore find it likely that the supply by the second respondent of one or more brand specialists to work in the Liberty store with the purpose of servicing the contract between them was in the contemplation of the parties at the time when it was agreed. Not only was this contemplated, this was in fact what happened.

17. The claimant worked at Liberty on a weekly basis and generally at least two days a week between 25 May and 16 July 2019.

18. She was given store approval following a meeting with Ryan Murr, the first respondent's Sales Manager for Menswear Casualwear and Concessions on 10 May 2019. This was required before the claimant could work at Liberty. This was not an interview it was in essence a gate-keeping exercise. As Ms Halsall agreed, it was important for the first respondent to know who was working on its premises. Although Ms Halsall said that she was not aware of a single occasion when store

approval was not given, I do not find that it follows that approval was automatically granted. This process amounted to an exercise of discretion and control by the first respondent. This control was ongoing because store approval could be withdrawn by the first respondent. Store approval was granted individually and could not be transferred to another brand specialist.

19. The claimant was also required to attend an in-store induction day which she did on 20 May 2019, together with other brand specialists and the first respondent's employees. She was trained on health and safety, security and human resources. This included training on the use of a till and she was required to sign the first respondent's Till Policy for Concession staff which provided that store approval could be removed if it was not complied with. This, together with the record of induction, was held on file by the first respondent's HR department. The claimant was given a security pass which provided access to and around the store.

20. Notably, the first respondent's induction material included the following exhortation "If you are part of our retail team expect to come away from today knowing the customer journey and how we Libertise the experience and know everything about our amazing loyalty programme." I accept the claimant's unchallenged evidence that as a result of her meeting with Mr Murr and the induction day she understood that she was required to assist the first respondent's customers with enquiries and to put sales through the till regardless of the brand being sold.

21. The second respondent was given a designated area to market its products in the menswear department in the lower ground floor of the Liberty store. This consisted of one or two racks of clothes. The claimant was required to ensure that her area was tidy and complied with the store's visual merchandising standards. I accept the claimant's evidence that she discussed with Mr Murr which items of stock to put out based on his in-store sales data. This additional stock was kept in the store room together with the first respondent's other stock.

22. The claimant was also required to adhere to the first respondent's dress code and grooming standards.

23. Ms Halsall agreed that through the store approval and induction process, and its requirement that the claimant complied with its dress code, and grooming standards in this customer-facing role the first respondent exercised a degree of control and influence on the claimant when she worked on its premises.

24. I also accepted the claimant's evidence that in her first week, Mr Murr released her early from her shift twice. This included her first shift on 25 May 2019 when she was released one-hour early at 8pm from her designated 11am – 9pm shift.

25. When the claimant complained about the conduct of T, who was one of the first respondent's employees, the first respondent conducted an investigation which involved the claimant meeting with two of the first respondent's managers and HR to discuss her complaint. I find that the way that the first respondent dealt with this complaint was more akin to a workplace grievance than a customer complaint. It is also notable that the first respondent's HR liaised with the second

respondent to rearrange the claimant's work schedule so that she was deployed elsewhere pending the resolution of this complaint. This showed that the first respondent had direct involvement in the claimant's deployment and therefore her availability to work in its store.

26. The only reason the claimant worked in the first respondent's store was because it sold the second respondent's product. Ms Halsall agreed that, as a brand specialist, the claimant was a part of the second respondent's brand presence. The claimant's work as a brand specialist at Liberty helped to achieve increased sales of the second respondent's products to the benefit of the first respondent who wholly owned them.

27. I have also found that in addition to procuring and processing the sales of the second respondent's products, the claimant was required to assist the first respondent's customers with enquiries and sales which related to its other stock. I accept the claimant's unchallenged evidence that she spent half of her time dealing with enquiries or putting through sales of the first respondent's other products. The first respondent therefore gained the additional benefit of having another sales assistant on the shopfloor at no additional cost on the days when the claimant worked at its store. The claimant was in effect part of the first respondent's sales force or retail team on the days when she was deployed to work in its store.

Conclusions

28. I find that the first respondent made work available for the claimant on the days when she was based in its store. She was given a designated work area on its premises. When working in Liberty she was required to assist the first respondent's customers with enquiries and with processing their purchases, only 50% of which were of the second respondent's products and all of which were of products that were owned by the first respondent. This was a commercial benefit to the first respondent because the claimant procured and processed sales of its stock at no additional cost to its business.

29. I also find that the claimant was supplied by the second respondent to the first respondent in furtherance of the commercial contract between them. She was deployed to work in the Liberty store for an average of two days a week in order to procure and process sales of the second respondent's products. This deployment was something which had been contemplated by the parties in the course of the performance of the contract. It was also something which the first respondent agreed to, facilitated and benefitted from.

30. The first respondent exercised a degree of control and influence on the days when the claimant worked on its premises. She was required to obtain (and retain) store approval, and comply with its Till Policy, merchandising standards, dress code and grooming standards. She liaised with Mr Murr in relation to restocking her area. I have also found that Mr Murr released the claimant from her shifts early on two occasions. The first respondent also liaised with the second respondent in relation to the claimant's deployment whilst it investigated her complaint against T.

31. I do not find that Halawi v WDFG UK Ltd T/A World Duty Free [2014] EWCA Civ 1387, CA, assists the first respondent, as Ms Bayoumi contended for. This is because Halawi was concerned with the construction of 'employment' under section 83(2) EQA. Whilst relevant to an examination of the underlying employment relationship between contract worker and employer, which was not at issue in this case, I do not find that this was relevant to the construction of 'contract worker' under section 41 EQA.

32. For these reasons I find that the claimant was a contract worker under section 41 EQA and has standing to bring the harassment complaint against the first respondent.

Employment Judge Khan

Date 29/09/2020

JUDGMENT SENT TO THE PARTIES ON

30/09/2020

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FOR THE TRIBUNAL OFFICE