EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 26/1/2023

Claimant: Ms Y Freire-Bernat

Respondent. Red Ents Ltd t/a Red Entertainment

Before: Employment Judge Mr J S Burns

Representation
Claimant: Mr L Harris (Counsel)
Respondent: Ms I Splavska (Litigation Consultant)

JUDGMENT

The Claimant and Mr LH, (the alleged perpetrator in the sex harassment claim) were at the material times both workers of the Respondent within the meaning of section 230(3)(b) of the Employment Rights Act 1996 and employees of the Respondent within the meaning of section 83 of the Equality Act 2010.

REASONS

1. The judgment followed an OPH to determine the above as preliminary issues.

2. The documents were in a bundle of 131 pages. I heard evidence from the Claimant, then her father Mr D Cummins, and then Mr M Brinkler, the Respondent's Producer and Director. I read a statement from Mr Llemmings, (the Claimant's erstwhile scene-partner who was engaged alongside the Claimant by the Respondent in 2022). I received written submissions from Ms Splavska and oral submissions from both sides.

3. It was accepted by the Respondent that LH would have had the same employment status as the Claimant because their engagements were very similar or identical in their material aspects. Hence the evidence focused on the Claimant's status.

Findings of fact

4. The Claimant is a young actress at the start of her career. In 2021 she had newly graduated from drama school. She paid Mandy and Spotlight (both actors' advertising websites) to display her photo and profile. The Respondent spotted her advert and contacted her, inviting her to 2 rounds of auditions which she attended unpaid and at which she had to demonstrate her personal acting skills and interpretation of the role. After the auditions the Respondent offered her an engagement for a season of work from 5/3/22 to 5/6/22 acting in the role of "Rachel the

Ranger" in a children's play called "Dinosaur Adventure Live 2022", which was to go on tour around various towns and cities in England.

5. The main terms of engagement were set out in a document entitled "Deal Memo" in the Respondent's standard form which provided for the Claimant to start on 28/2/22 with rehearsals for which she would be paid £100 per day and after that a flat fee of £4400 for all the performances. Transport and accommodation would be provided by the Respondent.

6. The document referred to the Respondent's standard terms and conditions as attached (although they were not attached). The document stated expressly that the Claimant would be self-employed. There was no reference in it to a right of substitution.

7. After asking a few questions the Claimant accepted and signed the document. There was no real negotiation and the Claimant had faced a choice of accepting the Respondent's standard terms or not getting the work.

8. The Claimant was provided with a Respondent's "Dinosaurs Welcome Pack" which provided social and health guidance to her about how she should conduct her relationship with the Respondent and others in the course of her engagement.

9. The only express reference to the possibility of the Claimant's role being filled by someone else was as follows "*If for any reason you do not feel well enough to participate in a performance, the CSM must be notified by 3pm at the latest. If it is a matinee day, the CSM should be notified by 11am. This is to ensure that your understudy is prepped for performance, and that any technical aspects (costume/sound) are readied in time.*"

10. The Claimant was told how she should appear (in terms of her costume on stage and how she should wear her hair). The Respondent provided her with most if not all of her costume. She was directed to follow the script and how she should act by the Respondent's performance manager. The places and times of the performances were dictated by the dates available to the Respondent and were passed on to the Claimant and other actors - also without any ability on their part to change or comment.

11. In addition to her acting, the Claimant was instructed by the Respondent to carry out, and did carry out, without additional pay, various menial tasks such as setting up and removing sets and displaying puppets and "meeting and greeting" audience members in order to promote merchandising.

12. The Claimant had never before drawn up an invoice but following the Respondent's instructions and with her father's help, she drafted and presented home-made invoices and was paid gross of tax. Her earnings have been so low that she has never had to submit any tax return and she does not keep accounts or have an accountant.

13. At about the time of her work with the Respondent she got in touch with an actor's agent but has not in fact ever signed up with an agent nor had any more work since her time in the Respondent's play.

14. The Claimant's engagement was terminated prematurely, which precipitated the claims she has brought.

The law

15. Section 230(3) ERA 96 provides in part;

230 Employees, workers etc.

(1)In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2)In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3)In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a)a contract of employment, or

(b)any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.

16. In Autoclenz Ltd v Belcher and ors 2011 ICR 1157, the Supreme Court held that the written agreement is not decisive in determining employment status, and the relative bargaining powers of the parties must be taken into account.

17. In Uber BV and ors v Aslam and ors 2021 ICR 657, the Supreme Court held that 'worker' status is a question of statutory, not contractual, interpretation, and it is therefore wrong in principle to treat the written agreement as a starting point. The following are some relevant extracts from of the speech of Lord Leggatt:

> *"38. The effect of these definitions, as Baroness Hale of Richmond observed in Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32; [2014] 1 WLR 2047, paras 25 and 31, is that employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else. Some statutory rights, such as the right not to be unfairly dismissed, are limited to those employed under a contract of employment; but other rights, including those claimed in these proceedings, apply to all "workers".*
>
> *….*
>
> *69. Critical to understanding the Autoclenz case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually*

agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation.

….

75. The correlative of the subordination and/or dependency of employees and workers in a similar position to employees is control exercised by the employer over their working conditions and remuneration. As the Supreme Court of Canada observed in McCormick v Fasken Martineau DuMoulin LLP 2014 SCC 39; [2014] 2 SCR 108, para 23: "Deciding who is in an employment relationship ... means, in essence, examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker. ... The more the work life of individuals is controlled, the greater their dependency and, consequently, their economic, social and psychological vulnerability in the workplace ..."

87. In determining whether an individual is a "worker", there can, as Baroness Hale said in the Bates van Winkelhof case at para 39, "be no substitute for applying the words of the statute to the facts of the individual case." At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who is employed under a "worker's contract".

….

91. Equally, it is well established and not disputed by Uber that the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working: "

18. On the facts of the case, the Court upheld an employment tribunal's decision that Uber drivers were 'workers' for the purposes of rights under the ERA, the WTR and the NMWA, given the degree of subordination and control to which they were subjected.

19. Section 83(2)(a) Equality Act 2010 provides that *(2) "Employment" means— (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;*

20. This section (which defines the class of persons who are protected from discrimination in their work by the Equality Act 2010) is a wider definition than that in section 230 ERA 1996. For example, it includes a self-employed person who is in business on her own account, as long as she is working under a contract for personal work by her.

Conclusions

21. The Claimant worked for the Respondent under a contract. The Deal Memo was a written contract expressly setting out and incorporating by reference terms and conditions, and signed by both parties.

22. Under the contract she personally undertook to perform acting for the Respondent. I reject the Respondent's submission that the Claimant had an effective right of substitution. The Claimant did not agree to simply ensure that some-one or other filled the particular role during the season. On the contrary, she was picked for her personal attributes and skills following auditions. I do not accept that in practice the Claimant would have been able to send a substitute chosen by her. The Respondent determined who acted in its productions and it hired them directly. The only reference to substitution was to situations in which if the Claimant was ill she would have to notify the Respondent early so the latter could arrange for its own understudy to cover the role.

23. The Respondent submitted that the Claimant was self-employed and in its written submission advanced a number of arguments in support of this.

24. On the evidence I accept the following of these submissions: *From the outset the intention of the two parties* (as per the Deal memo) *was that the claimant would be self-employed; The Claimant also has reputational risk; The Claimant was only temporarily engaged with the Respondent; The Claimant had an itinerant pattern of work: A number of separate engagements might be consecutive or concurrent. She was not exclusive to one show; She could appear in a number of different productions throughout the year, and she didn't need to report this or make the Respondent aware of this; The Claimant could have periods of unemployment between engagements; The Claimant was free to stop undertaking any work for the Respondent and no notice period was required; The Claimant was responsible and liable for the payment of her own tax and national insurance.*

25. On the evidence I reject the following of these submissions: *The Claimant was solely responsible for her performance, repetitions, and training* (Not true as she was rehearsed trained and directed by the Respondent). *The Respondent wasn't aware when and if the Claimant had holidays as the Respondent had no control or impact on it and the Claimant didn't report it.* (Not true as the Claimant would not have been free to take holidays in the middle of her engagement); *The Claimant could provide a substitute for her services. The show was not led by star names, so the audience was not attending to see a specific performer. The Respondent's position is that it wasn't principally important to them who would play the particular role*. (Not true - I have already dealt with this point above). *There was no mutuality of obligation between the Claimant and the Respondent.* (Not true - there was - under the Deal Memo).

26. "Self-employed" is not a term included in the statutory definitions under examination but it does appear in the exposition in the case law - for example in the speech of Lord Leggatt cited above.

27. As is made clear by the words of section 230 and the case law, the fact that a person is self-employed does not preclude a finding that she is a worker under the ERA 1996 and an employee under section 83 EA 2010. Even if a person is self-employed, she can still be both of these things if, in the particular engagement under examination, the degree of subordination and dependence on her part and the degree of control on the work-provider's part, is such that

in reality she has provided her services as part of a profession or business undertaking carried on by the work-provider.

28. On the facts, the Claimant was in a subordinate and dependent position in entering into and performing her engagement and the Respondent had a significant degree of control over her. Of note are the facts that she contracted on the Respondent's dictated standard terms, for low pay, to do work dictated to her, at times and places of the Respondent's choosing, and in the manner directed by the Respondent, wearing costumes supplied by the Respondent, in the course of a piece of business conducted by the Respondent.

29. As a matter of fact and degree I find that the Claimant was self-employed, but that the Respondent's status was not "*by virtue of the contract that of a client or customer of any profession or business undertaking carried on by* (her)". She was rather working under the Respondent's supervision in its own business. Hence, she was a "*worker*" as defined by section 230(3)(b) ERA 1996.

30. She was also contracted to personally to do work so she fulfils the definition of "*employee*" in section 83 EA 2010.

31. It follows from the Respondent's concession, that LB had the same status under both statutes.

J S Burns Employment Judge
London Central
26/01/2023
For Secretary of the Tribunals
Date sent to parties : 27/01/2023