EMPLOYMENT TRIBUNALS

Claimant: Ms Ayers

Respondents: (1) Endurance business Services Limited
(3) Paystream Mymax Limited

Made at: London Central (by video)

On: 6 - 8 September and 13-15 December 2023

Before: Employment Judge E Burns
Ms L Goodfellow
Dr V Weerasinghe

Appearances

For the Claimant: Represented herself.
For R1: David Green, Counsel
For R3 Helen Bennet and David Johnson, Employee

JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

(1) The Claimant was an employee of R3, as defined in the Employment Rights Act 1996 and the Equality Act 2010.

(2) The Claimant was not an employee or worker of R1, as defined in the Employment Rights Act 1996.

(3) The Claimant was not an employee of R1 as defined in the Equality Act 2010.

(4) The Employment Tribunal does not have jurisdiction in relation to the Claimant's claims against R1 and they therefore fail and are dismissed.

(5) The Employment Tribunal does have jurisdiction to consider the Claimant's claims against R3 for unauthorised deductions, but these fail on their merits and are dismissed.

REASONS

THE ISSUES

1. This is a claim arising from work undertaken by the Claimant for R1 between 23 and 26 January 2023.

2. The issues to be determined were as set out in the appendix.

THE HEARING

3. The hearing was a remote video hearing. From a technical perspective, there were a few minor connection difficulties from time to time. We monitored these carefully and paused the proceedings when required. The participants were told that it was an offence to record the proceedings.

4. The Claimant gave evidence.

5. For R1 we heard evidence from:

   - Veronica Vigano, who line managed the Claimant while she performed work for R1
   - Megan Freeman, a Recruitment Consultant for LHI

6. David Johnson, Legal Manager at R3 gave evidence for R3.

7. The hearing had to be held in two parts because unfortunately Ms Freeman was unwell and unable to attend in September 2023. During the first part of the hearing we heard all of the witness evidence except Ms Freeman's evidence.

8. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

9. There was an agreed trial bundle of 690 digital pages which included some additional documents which were admitted into evidence during the course of the hearing with the agreement of the parties. We read the evidence in the bundle to which we were referred and refer to the hard copy page numbers of key documents that we relied upon when reaching our decision below.

10. We explained our reasons for various case management decisions carefully as we went along and also our commitment to ensure that the Claimant was not legally disadvantaged because she was a litigant in person. We regularly explained the process, visited the issues and explained the law when discussing the relevance of the evidence.

11. As a result of our commitment to ensuring the Claimant was not legally disadvantaged as a result of being a litigant in person, at the end of the first

part of the hearing, the Tribunal Panel raised the possibility that the Claimant's relationship with R1 might fall to be considered under section 41 of the Equality Act 2010. This was notwithstanding that she was pursuing her claim on the basis of an implied contract between her and R1.

12. Following a discussion with the parties about the potential relevance of section 41 of the Equality Act 2010, we made a case management order that if the Claimant wanted to advance this argument, she should write to the Respondents and the tribunal to confirm her position. We asked that she include confirmation whether she accepted that she needed to make an amendment application to do so. This was in response to Mr Green saying, on behalf of the R1, that he considered an amendment application would have to be made and indicting that it would be opposed.

13. Following the first part of the hearing, R1 applied in writing for the case management order to be set aside. The Claimant made an application in writing to include reference to section 41 of the Equality Act 2010 and the Respondent sent in a written response opposing the application. At the hearing in December, we began by hearing oral submissions from the parties in support of these applications.

14. We decided not to set aside the case management order, but also not to allow the amendment. We gave oral reasons for our decision.

15. In summary, our reasons for not setting aside the order were because we disagreed that it was in the interests of justice to do so. We disagreed with Mr Green that he had not had the opportunity to take instructions before effectively agreeing to the case management orders in the terms made. Had he asked for additional time to give further consideration to the matter and take instructions, we would have been able give it to him, especially given that there was a full day of hearing time available.

16. In addition, when reaching our decision on setting aside the case management order and when considering the amendment application, we accepted that by introducing the question of the applicability section 41 of the Equality Act 2010 we had raised a matter that had not been raised by the Claimant. We considered this was justified because we were not suggesting a new cause of action, but seeking clarity in relation to the tribunal's jurisdiction under Part 5 of the Equality Act 2010 in the factual circumstances before us. We note that the list of issues separated out matters of jurisdiction from what are described in it as claims. We were not seeking to instigate any discussions as to the contents of the section headed claims.

17. We were prompted to raise the matter of section 41 of the Equality Act 2010 by the lack of any reference to section 39 of the Equality Act 2010 in the list of issues and the fact that two of the questions (5 and 6) in the list potentially pointed to us being required to give very broad consideration to the tribunal's jurisdiction to consider the Claimant's claims against R1 and R3.

18. It was not clear to us that the Claimant, a litigant in person, was aware of the existence of section 41 of the Equality Act 2010 and its potential relevance to her case, nor that there had been sufficient interrogation of this at the earlier case management hearing.

19. Although the Claimant purported to apply to amend her claim to rely on section 41 of the Equality Act 2010, her revised particulars of claim did not set out a viable basis for such a claim. This was because she was trying to argue that she was both simultaneously: (i) an employee of R1 under the extended definition of employee found in section 83(2) of the Equality Act 2010, because there was an implied contract between her and R1 that she provide services personally to R1 and (ii) a contract worker employed by R3 with R1 as the principal for the purposes of section 41 of the Equality Act 2010.

20. In light of the lack of viability of this argument and the fact that we were mid-hearing, we decided not to grant the amendment. In our judgment, the Claimant was not prejudiced by not being able to run an argument that was not viable, whereas had we allowed the amendment, the Respondents would have suffered some prejudice, from a practical perspective, based on the fact that they had prepared the case based on the Claimant's argument there was a direct contractual relationship between her and R1.

FINDINGS OF FACT

21. Having considered all the evidence, we find the following facts on a balance of probabilities.

22. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

Background

23. R1 is a UK registered company that is part of large global corporate group trading under the name "Sompo International". The business describes itself as a global specialty provider of property and casualty insurance and reinsurance. Its UK head office is in London. To support its businesses, R1 has an internal Data Management team.

24. In late 2022, R1 identified a need to engage someone to assist Senior Data Manager, Veronica Vigano, who leads the Data Management team, for around six months. R1 contacted the recruitment agency LHi to assist it in its recruitment for the role.

25. R1 wanted to engage a contractor to undertake the role, rather than employ anyone directly and so Megan Freeman, a recruitment agent who worked for LHi and specialised in contractor recruitment became involved. Ms Freeman approached the Claimant about the role in December 2022.

26. The Claimant has around 12 years' experience of working as a specialist data analyst services as a contractor. She has worked for end clients through a personal service company and also through intermediaries.

27. The Claimant is a single parent with a child who was aged 11 at the relevant times for the purposes of the claim. She lives with her child about an hour away from London.

Recruitment of the Claimant

28. The Claimant attended an interview with Ms Vigano on 14 December 2022. Ms Vigano also has a further follow-up conversation with her on the telephone on 4 January 2023. Over the course of those two conversations, Ms Vigano explained the requirements of the role to her.

29. Ms Vigano also informed the Claimant that the successful candidate would need to be available to work during core business hours (9 am to 5 pm) from Monday to Friday. In addition, she explained that although the work could be carried out remotely, there was also a requirement for a physical presence in the head office for 2 days a week. She explained that R1 operated a policy at that time whereby employees were required to work in the office for three out of five days, but for contractors, the requirement was reduced to two days.

30. In connection with the requirement to work in the office two days a week, Ms Vigano told the Claimant that she (Ms Vigano) usually worked in the office on Tuesdays and Wednesdays and that these were the days when other members of the Data Management team were usually present.

31. We find that Ms Vigano did not expressly say the Claimant would need to work in the office on those two days, but understandably the Claimant understood her to be saying that her preference would be for the Claimant to be in the office on the same two days, Tuesdays and Wednesdays.

32. There is a dispute of fact as to whether the Claimant told Ms Vigano in the meeting on 4 January 2023 that she would have difficulty attending the office for full days on Tuesdays and Wednesday. According to Ms Vigano's evidence, the Claimant did not raise any concerns with Ms Vigano about the requirements and on that basis, Ms Vigano made a verbal offer to her. According to the Claimant's evidence, she did mention a difficulty to Ms Vigano, but did not mention that it was for childcare reasons. We have not found it necessary to resolve this factual dispute because of the communications that took place the following day.

33. Having met the Claimant and told her she would like to proceed, Ms Vigano emailed Ms Freeman to say she was happy with the Claimant and would give HR the go ahead (444). Ms Freeman emailed the Claimant that evening to confirm the offer, subject to contract. Her email stated that the "Contractor Pay Rate" was *"£600p/d inside IR35", but added that her estimated take home £7,476.31 - after all tax and NI deductions."* Certain pre contract matters had to be resolved before they could proceed, including the Claimant deciding which umbrella company she would use. (400)

34. The following day, 5 January 2023, the Claimant messaged Ms Freeman on WhatsApp at 09:09 and told her that she would have difficulty attending the London office for full days on Tuesdays and Wednesday for childcare reasons. She said she could work in the London office on these days, but would need to do half days. She asked Ms Freeman to speak to Ms Vigano about this. (394)

35. The Claimant told us that the reason she made this request was because she collects her son after school on Tuesdays and Wednesdays. She added however, that it was no problem for her to continue work remotely on those days (on the train and back at her home) and to complete the core hours identified by Ms Vigano. Her difficulty was being in London until 5pm on those particular days.

36. Ms Freeman emailed Ms Vigano on 5 January 2023 at 09:24 saying:

"I've spoken with [the Claimant] this morning, she just wanted to get some clarification regarding on-site.

2 days p/w on site Tuesday and Wednesday may be tricky due to childcare, she can do these as a half day in the office or comfortably go in on a Thursday.

Please can you confirm we could work with a flexible arrangement?" (433)

37. Ms Vigano replied saying:

"*I appreciate [the Claimant's] transparency on this matter.*

Her suggestion works for me, I can be flexible in that sense however [R1] has hybrid policy which can ultimately we need to abide to. Unless there are specific circumstances she will need to have 2 days presence in office per week overall." (431)

38. Ms Vigano explained to the tribunal that she understood that what she had agreed to was that if the Claimant worked in London on a Tuesday or Wednesday, she would do a half day in the London office starting at 9 am, travel home for around an hour or so and then continue to work remotely at home until 5pm, thereby fulfilling the requirement to work core business hours.

39. Ms Vigano accepted that the email envisaged that the Claimant would have to make up the overall requirement to have two days' presence in the office by doing a full day on another day. Ms Vigano said this was because R1 had adopted its hybrid policy relatively recently and she felt she needed to set it out. In her mind, it was important for the Claimant to come into the office on Tuesdays and Wednesdays, at least at the start, so that they could spend time together in person and the Claimant could meet and be supported by the other members of the team. For her, this was more

important that the Claimant being in the office for two days overall and she would have been happy to be flexible about this.

40. Ms Freeman fed back to the Claimant by phone that day that Ms Vigano was happy to be flexible about the two days on site and that the Claimant was free to choose which days she wanted. The Claimant accepted the offer.

Contractual Documentation

41. Between 5 January 2023 and the Claimant's start date of 23 January 2023, the relevant contractual material and vetting checks were undertaken.

42. Because the role had been assessed by R1 as falling inside IR35, the Claimant was required to undertake it using an umbrella company. Our understanding of an umbrella company, based on the evidence of Mr Johnson, is that it exists to enable contractors with payroll services.

43. Mr Johnson described the nature of R3s business as being the supply of its employees to third party businesses to complete temporary assignments for them. R3 does not find the temporary assignments for its bank of employees, however. It does not operate a recruitment business and does not have the skills to do so. Instead, an individual who wants to be engaged on a temporary assignment with a business will come to R3 and ask it to become involved as an umbrella company.

44. As an umbrella company R3 does not simply run the individual's pay roll, however. Instead it agrees to employee the individual and to contract with the third party business to provide the individual to it for a fee, namely the day rate the individual has been offered. This ensures the individual is covered by R3s employer's liability insurance. Although the individual's wages are paid out of the day rate, as described below, R3 can end up incurring additional costs, which is has to pay out of its profits, such as if an individual becomes unwell and is entitled to receive statutory sick pay or where an individual takes statutory leave and is entitled to statutory pay such as maternity leave and pay.

45. Having been told that she needed to use an umbrella company for the engagement, the Claimant was able to choose which umbrella company she could use. She initially suggested one that she had used previously. However, because that was not a company with whom LHI had a framework agreement, she chose R3, because there was an existing framework agreement between LHI and R3 that meant there would be no delay getting the contracts in place. The Claimant had an existing relationship with R3 from an assignment she had undertaken using it in 2021.

46. On 13 January 2023, the Claimant contacted R3 by telephone to ask about reactivating her profile with them. The call was recorded by R3 and a partial transcript provided in the bundle (393). The representative of R3 took some details from the Claimant in order to be able to provide her with an illustration showing what her take home pay would be.

47. We note that the Claimant had had a similar conversation with a representative of R3 when she first entered into a relationship with them. A transcript of that conversation was also included in the bundle (380). That conversation was more specific about how the financial relationship would work, but in our judgment, it can be clearly understood from the illustrations.

48. R3 calls the day rate that people who use it are offered, the "umbrella rate". From that it deducts the costs of employing that person including a fee called a margin, at a rate agreed with the recruitment agency involved, employer's national insurance contributions and an amount for the apprenticeship levy, plus any employer's pension contributions. This produces a net figure which is then treated as their gross income made up of three elements: basic pay, commission and holiday pay. From this, income tax, employee national insurance and any employee pension contributions are deducted. There is a choice whether to receive the holiday pay element rolled up or at the time of taking holiday.

49. Following the telephone conversation, R3's representative generated two financial illustrations for the Claimant based on an umbrella rate of £600 per day and a 5 day week. She sent them to the Claimant by email. One illustrated the way payments would be treated if the Claimant paid a pension contribution of £1,000 per week by way of salary sacrifice into a private pension (404) and one show the position without any pension contribution (405) based on a standard tax code.

50. As she was happy with the illustrations, the Claimant confirmed to Ms Freeman that she would be using R3 as her umbrella company. This communication led to the creation of a number of different documents.

51. R1 already had a framework agreement in place with LHI in relation to the provision by LHI of people to do work for it. Effective from 14 March 2019, a copy was of the framework agreement was included in the bundle at pages 168 - 173. We note that the agreement expressly excludes the possibility of third parties (i.e. people who are not parties to the contract) relying on the contract via the Contracts (Rights of Third Parties) Act 1999.

52. An assignment schedule called a "Statement of Work" was issued in relation to the Claimant's assignment (184). It has a recital at the beginning that said:

" This assignment schedule ("Statement of Work") is, in relation to the supply of the contractors named within, is a schedule to the Standard Terms of Business Supply of Contractor Services to Clients between LHi Group Ltd, a company registered in England and Wales No. 04444015 with its registered office at 6th Floor, 138 Cheapside, London, EC2V 6BJ ("LHi") and the Client dated 14/03/2019 (hereinafter referred to as "the Agreement"). In the event of a conflict between this Statement of Work and the Terms, this document will take precedence. In all other respects the Terms remain unchanged."

The recital if followed by a table with the following information:

Reference	*3546140/MF*
Agreement Date	*13/01/2023*
Client Information	
Client Company Name	*Sompo International (Endurance Business Services Ltd)*
Client Company Registered	*Address 2 Minster Court, Mincing Lane, London, England, EC3R 7BB*
Client Company Registration Number	*06279652*
Location/s where Services are to be delivered	*Remote work from the UK with ocasional traveling ot client side.*
Contractor Services Information	
Name of Contractor	*Paystream My Max Limited*
Representative of Contractor	*Anifatu Ayers*
Description of the Services	*Data Analyst*
Start of Assignment	*09 Jan, 2023*
End of Assignment	*07 Jul, 2023*
Specific hours/days/time keeping requirements	*40 hours per week to be agreed locally by Contractor and Client*
Notice period for Client to terminate Assignment	*4 weeks' written notice*
Notice period for Employment Business to terminate Assignment	*4 weeks' written notice*
Contractor Opted-Out	*Yes*
Status Determination	*INSIDE*
Charges Information	
Employment Business Charge	*standard hours £750.00 per day plus VAT as applicable*
Employment Business Charge non-standard hours	*N/A*
Additional fees / expenses	*N/A*
Transfer Fee	*As per the agreement dated 14/03/2019*
Payment terms	*30 days from the date stated on the invoice*

53. The document had spaces for signature by R1 and LHI.

54. LHI and R3 also had a framework agreement, a copy of which was contained in the bundle of documents (186 – 191). The framework agreement does not include a clause excluding the application of the Contracts (Rights of Third Parties) Act 1999. A document called an Assignment Schedule was generated by LHI. It has a recital at the beginning that said:

"This Assignment Schedule is subject to and forms part of the Agreement dated 10/02/2016 (Agreement For The Engagement And Provision Of Services) of LHi Group Ltd, a company registered in England and Wales No. 04444015 with its registered office at 6th Floor, 138 Cheapside, London,

EC2V 6BJ ("LHi/The Employment Business"). In the event of conflict between the terms and conditions and this Assignment Schedule, the terms and conditions will take precedence save where expressly provided for within the terms and conditions or where additional term/conditions or variations are expressly stated below within this Assignment Schedule. In all other respects the Agreement remains unchanged."

55. The recital is followed by a table with the following information:

Reference	*3546140/MF*
Agreement Date	*Friday, 13 January 2023*
Contractor Ltd	*Paystream My Max Limited*
Registration Number	*6042225*
Client Name	*Sompo International (Endurance Business Services Ltd)*
Location/s where Services are to be delivered	*Remote work from the UK with ocasional traveling ot client side.*
Representative of Contractor	*Anifatu Ayers*
Description of the Services	*Data Analyst*
Start of Assignment	*09 Jan, 2023*
End of Assignment	*07 Jul, 2023*
Contractor Fee	*£600.00 per day plus VAT as applicable*
Additional Hours Agreement	*N/A*
Expenses Agreement/ Policy	*N/A*
Notice period for the parties to terminate the Assignment	*4 weeks' written notice*
EAA Conduct Regulations 2003 Contractor Status	*Opt Out*
Health and Safety Issues/ Risks	*N/A*
Status Determination INSIDE	*INSIDE*

56. The document had spaces for signature by LHI and R3. The document shared with the Claimant for her information (408).

57. It is notable that the person completing the schedules did not capture the detail that had been agreed regarding the location where the services were to be delivered, although it is clear that the two documents match up to the extent that the same typos appear in both regarding the location.

58. Finally, R3 issued the Claimant with a contract of employment dated 13 January 2023 (179 – 183).

59. Several of the clauses in the contract of employment are relevant and are set out below:

"Recitals

A) The Employer is a business which provides the Services of its Employees on multiple Assignments for various Customers and Clients and at various locations.

B) The Employee agrees to work on Assignments on behalf of the Employer.

Definitions and Interpretation

“Assignments” mean the periods during which the Employee is engaged to provide services to Customers or Clients

"Basic Pay Rate" means either the current National Minimum Wage or, if applicable, the National Living Wage rate from time to time;

"Clients" mean any third party (other than a Customer) for whom or at whose premises the Services are performed;

"Customers" mean any third party, comprising either an employment business or agency or other business, and who is a party with whom the Employer enters into a Customer Agreement

"Customer Agreements" mean the agreement between the Employer and the Customer to provide Services to a Client

Duties

2.2 For the avoidance of doubt, this Agreement is not subject to a probationary period (as defined under Part I, Section 1(4)(6) Employment Rights Act 1996). The Employee further accepts that the Employee has no contractual relationship with any Customer or Client.

2.4 The Employee is obliged to complete any Assignment which is offered to and accepted by the Employee. If the Employee wishes to terminate an Assignment, the Employee must give the Employer at least one month’s notice. Termination of an Assignment is not termination of the Employee’s employment by the Employer or by the Employee and does not affect the continuity of the Employee’s employment.

Hours of Work

4.2 Save as provided for herein the Employer does not guarantee that there will always be a suitable Assignment to which the Employee can be allocated. The Employee acknowledges that there may be periods when no work is available for the Employee. In such circumstances the Employer has no obligation to pay the Employee when the Employee is not carrying out work or on an Assignment. The Employee is obliged to work when required by the Employer. If the Employee does not work when required to do so by the Employer, without good cause, the Employer shall be entitled to terminate the Employee's employment with immediate effect.

Duration and Notice

5.2 ….when the Employee is not on an Assignment, the Employee is obliged to contract the Employer each and every Monday by 12pm to notify the Employer of his availability to undertake further Assignments. In the event that the Employee fails to contact the Employer for any continuous period of four weeks following the end of the Employee's last Assignment, the Employee expressly agrees that the Employer may choose to treat this as the Employee's resignation with immediate effect.

Remuneration

7.1 The Employee's contractual entitlement is to be paid at the Basic Pay Rate. However, total pay will vary according to the rates payable by the Customer to the Employer in respect of the Services provided to the Customer by the Employer under the Customer Agreement as set out at 7.3 and 7.4. The Employee will be notified in writing by the Employer of the hourly or daily rates payable to the Employer as agreed between the Employer and current Customer or Client for particular Assignments as soon as reasonably practicable.

7.2 The Employee shall keep a timesheet record of the hours spent performing the Services. The timesheet must show the number of hours the Employee has worked each day and be signed by each of the Employee and the current Client. The Employee must submit a copy of each timesheet to the Employer. The Employee can only claim payments for hours worked that are supported by correctly completed timesheets. Original timesheets must be forwarded to the Customer.

7.3 All monies paid to the Employer by the Customer shall belong to the Employer, not the Employee. The Employer will deduct its own costs from the sums paid to it by the Customer, including but not limited to the Employer's margin, Employer's NI, apprenticeship levy and holiday pay accrued. The remaining amount will be payable to the Employee as gross pay. Where the Employer has agreed a rate with a Customer which is expressed in a currency other than GB Pounds sterling, currency conversion costs will be incurred prior to payment to the Employee. In these circumstances the Employee consents to the deduction of the currency conversion cost from the gross pay which is due to them.

7.4 As a minimum, the Employer will pay the Employee the Basic Pay Rate for all hours worked and holiday pay (in accordance with clause 9 below) for correctly submitted and authorised timesheet hours or days. The Employer will pay the Employee a commission which shall be any difference between the gross pay referred to at 7.3 above and the Basic Pay Rate.

….

7.8 In entering into this Agreement the Employee acknowledges and confirms that the Employee has, where applicable, read and understood the personal illustration of how pay will be calculated in respect of the first Assignment, emailed to the Employee prior to the Employee entering into this Agreement, Further the Employee confirms that the Employee has had an opportunity to query any aspect of how pay shall be calculated and that the Employee has no further queries on entering into this Agreement."

60. The Claimant signed the contract electronically on 13 January 2023 (183).

23 – 26 January 2023

Monday 23 January 2023

61. The Claimant was notified on 20 January 2023 that her first day of work would be Monday 23 January 2023 and she would be required to attend the London office. In fact, this was in error. Ms Vigano had a deadline to meet on 23 January 2023 and had therefore asked that the Claimant be told to start on Tuesday 24 January 2023. However, because the Claimant arrived a day early through no fault of her own Ms Vigano did her best to make time to meet her and carry out some induction activities that day.

62. Ms Vigano asked the Claimant to attend the offices the following day, on Tuesday 24 January 2023, so that she could induct her properly. At around 5 pm on Monday 24 January 2023, the Claimant messaged Ms Vigano to say she was leaving and would see her the next day in the office. (522)

Tuesday 24 January 2023

63. The Claimant did not travel to London the next day, however. Instead, she messaged Ms Vigano at around 8 am on Tuesday 24 January 2023 to say:

"*Morning, sorry i can't make it into eh office today. I realized that I have an office tour booked ion for Thursday afternoon so that will be my second day in the office*." (522)

64. This late notification gave Ms Vigano very little opportunity to object to the Claimant's stance. Her preference was for the Claimant to move the office tour so the Claimant could spend time with her, face to face, and with her other team members. She answered the Claimant saying:

"I think office tour could be rearranged." (523)

*"It is more important that you are in office when team is in." (*524)

65. The Claimant replied saying:

"Ok I can come in when next you're in if that's ok. Today was going to be a half day as well so it just made it a little too stressful" (525)

66. Ms Vigano replied,

"*Tuesday and Wednesday were a requirement set at interview and subsequently clarified with agent."* (526)

"I understood they were shorter days on office but your presence was key" (527)

"*Additionally it would have been better to let me know yesterday rather than early morning outside business hours.*" (528)

67. The Claimant replied,

"*Apologies for messaging outside business hours. I messaged at nearly end of day yesterday that I would be in the office as i intended to come in but on realising I would need to make another trip on Thursday I couldn't come in today and that's why I messaged you early.*"(529)

68. Ms Vigano replied,

"*Office tour is not a priority." (530)*

"It is harder for me to do onboarding remotely. (531)

69. The Claimant replied,

"I think the miscommunication over yesterday didn't help much. I was told that I need to be in the office at least once to twice a week. The specific days for Tuesday and Wednesday meant I couldn't be in the office for a full day due to my commitments hence the half days." (532)

70. The Claimant worked at home that day, but Ms Vigano was able to carry out some induction activities and allocate some work to her. They met on-line during the day. During that meeting, Ms Vigano explained to the Claimant that the team had a monthly Data Governance meeting between 4 and 5 pm on a Tuesday and asked her to attend the meeting so that she could support her there. The Claimant told Ms Vigano that was not available to do so.

71. Ms Vigano told us that she assumed that the reason the Claimant could not attend the meeting was because of childcare. She explained that she was a single parent herself and understood that it can be difficult to make last minute childcare arrangements. She therefore did not insist on the Claimant attending the meeting that day and did not send her a meeting notification as a result. She went on, however, to ask the Claimant about her ability to attend the meeting in future months. The Claimant told her that she would have difficulty doing this.

72. The Claimant denied saying this. She told us that the reason she was not able to attend the meeting was not for childcare care reasons. We do not know why the Claimant was not able to attend the meeting because she could not recall. Based on what she said when giving evidence and in particular her answers to questions put to her about when she had to collect

her son from school, we find that the reason was not childcare. The subsequent message the Claimant sent Ms Vigano about her whereabouts between 4 and 5 pm on Tuesday reinforces this finding.

73. The interaction led the Claimant to contact Ms Freeman by telephone. The Claimant told her that she was unable to meet R1's requirement to be present on a Tuesday and a Wednesday because of childcare commitments and her commute. She said she could work half days on Tuesdays and Wednesday and make up her time in the evenings. It was the first time the Claimant had mentioned working in the evening.

74. The Claimant told Ms Freeman that if R2 was not able to be flexible she would not be able to continue with the contract, but did not give Ms Freeman the authority to offer terminate the contract on her behalf.

75. The conversation led Ms Freeman to email Ms Vigano at 11:16. In her email she said:

"*I've just had a call from Anifatu who has advised that she is worried about the hybrid working policy.*

She understands that Tuesday and a Wednesday are required to be on-site due to the hybrid working policy but is struggling due to childcare and the commute.

As we discussed below, she is happy to do Tuesday and Wednesday as half days (make up the time in an evening when she is at home) or can comfortably come in on a Thursday. What flexibility can we have with the number of hours on-site?

If Sompo are unable to have flexibility, unfortunately Anifatu will not be able to continue the contract. I'm conscious this is quite an urgent requirement and given the niche skillset required, plus the length of time to do checks, it could be quite a while before a suitable replacement is found. " (418A)

76. We do not construe this message as being an offer to terminate the contract. Aside from the fact that legally such a concept does not exist, we interpret this communication as being one in which Ms Freeman was asking Ms Vigano if R1 could be more flexible. When read with her final sentence, we believe that Ms Freeman was emphasising that without further flexibility the Claimant considered she would be unable to continue and this was not necessarily in Ms Vigano's interests given her need for someone to support her.

77. Ms Vigano replied to Ms Freeman at 13:14, saying:

"I am discussing this with my manager and HR, we do need 2 full days in the office at least and the point of Tuesday and Wednesday is to be in office with the team, I also understand during the day she has times when she is not available for childcare, it is a lot of flexibility required.

I am aware of her skillset but I had set expectations clearly and I need to move within Sompo's guidelines, our employees have to be in office minimum of 3 days a week.

These are my comments, I will feedback with once met with HR." (418 – 418A)

Wednesday 25 January

78. The Claimant travelled to the London office on Wednesday 25 January 2023. She arrived at 9 am. While she was in the office, Ms Freeman and Ms Vigano spoke on the telephone about the Claimant's position.

79. The Claimant left the office at around 2pm. At 14:14, Ms Vigano emailed Ms Freeman saying:

"As discussed we have discussed, we understand that Anifatu cannot meet core working hours and therefor we accept her having to terminate the contract" (431)

80. As there had in fact been no offer to terminate or actual termination of the engagement by the Claimant, but rather than indication from her that she would find it difficult to meet the requirements without flexibility, we find that in sending this message Ms Vigano instigated the termination of the engagement and the reason for her decision was because the Claimant was unable to meet the requirement to meet core hours.

81. At 14:42, Ms Vigano, who had not been able to speak to HR, emailed them to explain the decision that she had her line manager had taken. In her email she said:

"The overall offer from Anifatu is to be in office Tuesday and Wednesday 9 – 2pm 1 hour travelling time and for the rest of the day on and off due to school runs. Ex- Yesterday we had Data Governance Group 4 - 5pm she could not attend and support me due to childcare.

Basically aside from office presence she is not fully available during core hours, so in agreement with [my line manager] we cannot accept these conditions.

We accepted her proposal to terminate the contract." (521)

82. Ms Freeman called the Claimant that afternoon and told her about Ms Vigano's decision. The Claimant raised the matter of notice so Ms freeman went back to Ms Vigano to check this point. Ms Vigano confirmed the termination was to be with immediate effect and this was communicated to the Claimant by Ms Freeman.

Thursday 26 January

83. Despite having been told that the engagement had been terminated, the Claimant logged on to do work from home the following morning. Ms Vigano messaged her at 11:57 to ask her if she had spoken to Ms Freeman.

84. During the course of several messages, which appeared in the bundle on pages 419 – 427 and 541 – 586, the two women exchanged their views on the mechanism for the termination and the reason for the termination.

85. With regard to the mechanisms of the termination, Ms Vigano told the Claimant she had accepted the Claimant's offer to terminate the assignment. The Claimant disputed that she had offered to terminate the contract and said instead, so far as she was concerned the contract was being terminated in breach of the notice provisions by R1.

86. When Ms Vigano sent the Claimant a copy of the email she was relying on as being the Claimant's offer to terminate the contract, the Claimant said Ms Freeman had not consulted her before sending a message in those terms. She pointed out that had she wished to terminate the contract she would have given four weeks' notice. She concluded the chain of messages by saying she had "taken this conversation as your termination" and would log off.

87. With regard to the reason for termination, Ms Vigano said this was because the Claimant could not work core business hours (9 to 5 Monday to Friday), whether on site or remotely. When the Claimant challenged Ms Vigano's assertion that she was unable to attend core hours. Ms Vigano pointed out that the Claimant had not been available between 4-5pm on the Tuesday (554). The Claimant defended her position saying she was available 4:30 to 5pm that day and added:

    "*I am allowed breaks surely – I did half an hour break at lunch to make up for this*." (560)

Dispute Re Payment

88. On 26 January 2023, emails were sent by LHI to Ms Vigano and to the Claimant to formally terminate the assignment. They were initially sent with an incorrect date on them, but this was later corrected (452 – 454).

89. The Claimant replied to the email from LHI at 12:47 to say that she had stopped working and attached her timesheet for payment. She requested that payment be made through her umbrella company. She claimed for the dates she had worked including a half day for 26 January 2023 and for four weeks' notice. (455, 461-462).

90. The Claimant had contacted R3 by telephone and email on the previous Wednesday evening to explain that R1 had indicated an intention to terminate the assignment. She told R3 that the termination appeared to be without the correct notice and was therefore in breach of contract.

91. Notification of the termination had not reached R3 by 26 January 2023 when a representative of R3 replied to the Claimant's email. The Claimant was advised that the agreed notice was 4 weeks, but explained that there would be clauses that meant the contract could be terminated with immediate effect. The representative asked the Claimant to provide contact details for LHI so R3 could follow it up (440).

92. It took various emails and phone calls to get clarity. LHI Group subsequently confirmed in writing, on 5 April 2023, that it was relying on clause 10.2.3 of the framework agreement between it and R3 which says:

"….LHi may without notice and without liability instruct the Consultant Company to cease work on the Assignment at any time, where…. for any reason the Consultant Company proves unsatisfactory to the Client;"

The email exchange also confirmed that a representative of LHI had communicated this was the relevant clause by telephone to R3 on 30 January 2023 (490 – 501).

93. In the meantime, on 17 February 2023, the Claimant forwarded an email received from LHI to R3 which said that her timesheets had been approved. It is not possible to tell from the email, what had been approved.

94. LHI and R3 have an arrangement with regard to making payments that is automated. LHI make payment directly to R3 and send them a payment remittance. On receipt, this prompts R3's system to generate an invoice for its internal use.

95. In this case, the remittances were dated 21 February 2023 for £1,800 plus VAT and 6 March 2023 for £300 plus VAT.

96. R3 generated two invoices. The first is dated 21 February 2023 and is for a multiple of three times the umbrella rate of £600 plus VAT (479). The second is dated 6 March 2023 and is for a multiple of 0.5 times the umbrella rate of £600 plus VAT (482). According to email correspondence the payments were made for the following reason:

"*The Client (Sompo) has agreed to pay her for 23, 24 and 25 January and LHi has agreed to pay a half day for the 26th as a gesture of goodwill in response to the fact the termination notice was sent to the Claimant first in error by our Contracts team (it should have gone direct to Paystream) and it was sent late in the day*." (495)

97. R3 then generated two payslips dated 7 February 2023 for the Claimant, together with a breakdown of the deductions from the umbrella payments (480 – 481 and 488 – 489). The documents, taken together, show the following:

- An umbrella payment of £2,100 (3.5 x £600)

98. Deductions were made from the umbrella payment as follows:

- Margin: £29
- Employer's national insurance contributions: £228.81
- Apprenticeship levy: £9.17

99. This left gross pay of £1,833.02, which was shown on the Claimant's payslips as:

    - Basic Pay: £249.38
    - Commission £1,386.24
    - Holiday Pay £197.40

100. There were then deductions for PAYE (income tax) and Employee's national insurance contributions of £167.00 and £104.32 respectively. This left the Claimant with net pay of £1,561.70.

Termination of Contract between Claimant and R3

101. On 3 April 2023, R3 tried to contact the Claimant by phone but did not get through to her. It therefore emailed her on 5 April 2023 to draw to her attention clause 5.2 of her contract of employment. The email said:

    "*As your assignment terminated on 25 January 2023 you were required to contact PayStream every Monday from that date to confirm availability for further assignments. Our records show that you have not contacted us in regards to availability for further assignments and as such we have chosen to treat this as your resignation from employment with immediate effect. Your employment with us will end today and we will provide your P45 to this email address." (504)*

THE LAW

Employment Status / Jurisdiction

Background

102. The jurisdiction of the tribunal to consider the various complaints she brought depend on her employment status. She needed to establish a different status for each type of complaint.

103. The Claimant's complaints of unlawful deductions of wages relied on her having the status of a worker of the relevant respondent under section 230 of the Employment Rights Act 1996. Section 230 tells us the following:

    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.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly.

104. For a claim of breach of contract, the Employment Tribunal's jurisdiction is governed by S.3 of the Employment Tribunals Act 1996 (ETA), together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. Only employees can pursue claims for breach of contract against their employers, and only on relation to certain types of alleged breaches. The definitions of employer and employee found in section 230(1) of the Employment Rights Act 1996 apply.

105. For a claim of indirect sex discrimination under section 19 of the Equality Act 2010, the relevant statutory provisions, based on the way the case was put by the Claimant, are found in sections 39(2) and 83 and 212.

106. Section 39(2) of the Equality Act 2010 prohibits discrimination by an employer against its employees. Section 83 defines employment for the purposes of the equality Act. It says:

> *(2) "Employment" means—*
>
> *(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;*
>
> *….*
>
> *(4) A reference to an employer or an employee, or to employing or being employed, is to be read with subsections (2) …*

107. Section 212 *says* "employment" and related expressions are to be read with section 83.

108. Although the language used in the Employment Rights Act 1996 and the Equality Act 2010 is different, the extended definition of employee found it in the Equality Act 2010 encompasses the definitions of employee and worker as defined in the Employment Rights Act 1996. In other words, employees and workers under the Employment Rights Act 1996 will be employees for the purposes of the Equality Act 2010.

109. This is because the Equality Act 2010 definition includes people employed under a "contract of employment", thereby mirroring sections 230(1) and (2) and people employed under a "contract personally to do work", thereby mirroring, in substance, section 230(3)(b).

Determining Employment Status

110. When determining employment status, the starting point is usually the written documents that are in place. However, the label that the parties may put on an arrangement is not determinative. It may be necessary to consider the reality of what happened in practice and look to other communications between the parties rather than rely on the contractual documentation entered into between the parties (*Autoclenz Limited v Belcher and others* [2011] UKSC 41; *Uber* BV *and others v Aslam and others* [2021] UKSC 5).

111. In the *Uber* case in particular, important considerations which led to the Supreme Court deciding that the documentation should not be relied upon included: (a) the documentation did not reflect the reality and appeared to have been put in place deliberately to avoid the Uber drivers gaining employment rights; (b) there was a significant imbalance in the commercial bargaining power of the respondent and the drivers; and (c) the drivers were precisely the individuals who needed basic employment law protections.

112. When considering an individual's employment status, there are various factors that tribunals should consider based on previous cases. None of these factors are decisive, individually, however, as many of the features

common to an employment relationship will also arise in worker relationships and in relationships where there is genuine self-employment. It is necessary to consider the relationship as a whole.

113. Key factors to consider are:

(i) whether there is mutuality of obligation;

(ii) whether there is an obligation of personal service or a right of substitution exists;

(iii) the degree to which an individual agrees to be subject to the other's control;

(iv) the degree of integration of an individual into the other's organisation;

(v) the degree of financial risk involved for the individual, including whether they are required to provide their own equipment and have their own insurance and the extent of their ability to profit;

(vi) whether there are other elements of the relationship that point to one form of relationship or another. Examples include the right to sick pay and holiday pay.

114. Different tax regimes potentially apply to employees, workers and the genuinely self-employed. Complex tax rules, such as IR35, have developed to ensure individuals and those that engage them pay the correct levels of tax. Although employment status for tax purposes status is informative, it is not determinative of employment status in employment tribunal claims.

Multi-Party Scenarios

115. Often where tribunals are required to determine employment status, there is a direct contractual relationship between the entity that needs work undertaking for it and the individual who provides that work. The question for the tribunal is whether the individual in the direct relationship, is an employee, worker or self-employed of the other party in the relationship.

116. It is also common, however, to find work relationships that involve multiple parties and for questions of employment status to arise between the parties. Although, in the simplest form, three parties are involved:

- The client who needs work to be done for it (the end user)
- The individual who provides the work
- A third legal entity that sits between the two and who contracts with the client to provide the individual to client provide the services

such arrangements do not need to be limited to three parties.

117. Case law confirms that an employee cannot be employed by two different employers at the same time to perform the same work (*Patel v Specsavers Optical Group Ltd* UKEAT/0286/18).

118. We consider the same principle applies to worker status, such that an individual cannot be a worker for two or more different entities at the same time in connection with the same work. It also follows that the individual cannot have different employment status with different legal entities at the same time in connection with the same work. Therefore, in a multiparty arrangement, the individual performing the work for the end user will not usually be an employee or worker of the end user because they already have that relationship with one of the other participants in the arrangement.

119. The possibility of an alternative finding that there is an express or implied direct contractual relationship between the client/end-user and the individual exists, however, depending on the circumstances. Case law tells us this will only be in the rarest of circumstances (*James v Greenwich London Borough Council* [2008] IRLR 302, CA).

120. We note that an individual involved in a multi-party arrangement does not lose their right to bring discrimination claims under the Equality Act 2010 against the client/end-user absent the finding of a direct relationship between them and the client. This is because section 41 of the Equality Act 2010 can be used instead. It is therefore not necessary to imply a direct relationship between the individual and the client/end user so that he or she can bring a valid discrimination claim.

Unauthorised Deductions from Wages

121. Section 23(1)(a) of the Employment Rights Act 1996 allows a worker to make a complaint to an Employment Tribunal that her employer has made a deduction for her wages in contravention of section 13 of the same Act.

122. Section 13 is headed "Right not to suffer unauthorised deductions" and says:

> *(1) "An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
>
> *(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*
>
> *(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
>
> *(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation*

to the worker the employer has notified to the worker in writing on such an occasion."

123. A deduction includes a complete failure to pay. Wages is defined in section 27 of the Employment Rights Act 1996.

Breach of Contract/ Wrongful Dismissal

124. The Claimant is claiming that R1s decision to terminate the engagement with immediate effect was in breach of contract as she was entitled to four weeks' notice of termination.

125. When considering a claim of this nature, in addition to the question of jurisdiction referred to above, the tribunal must be satisfied that there was an obligation on the employer, under a contract of employment, to give the employee four weeks' notice of termination. The claim will be defeated if this is not the case and if the contract was terminated with immediate effect in reliance on another provision or via the mechanism of acceptance of a repudiatory breach by the employee involved.

Indirect Sex Discrimination

126. Indirect sex discrimination is defined in section 19 of the Equality Act 2010.

127. Subsection 19(1) of the Equality Act 2010 provides that:

"A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's."

128. Subsection 19(2) provides that for the purposes of subsection 19(1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) "A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

129. The burden of proof is on the Claimant initially under s 136(1) Equality Act 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. In an indirect discrimination case, this means that the Claimant must prove the application of the PCP, the particular disadvantage in comparison to others

and that the Claimant was put at that disadvantage. The burden then passes to the Respondent under s 136(3) to show that the treatment was justified.

130. The phrase 'provision, criterion or policy' is a term of jargon that is not defined in the Equality Act. Tribunals should avoid applying a strict interpretation of the phrase. The EHRC Code of practice says:

"It should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision." (Paragraph 4.5)

131. The PCP in an indirect discrimination should be a neutral provision that is applied regardless of the relevant protected characteristic. Careful consideration needs to be given to scenarios where the Claimant wants to rely on a decision or requirement that has in practise been applied solely to them. This may rule it out as a PCP, but not in every case. If the decision or requirement is capable of being applied to someone other than the Claimant and would have been, it is permissible to rely on it (*Ishola v Transport for London* [2020] EWCA Civ 112 CA; *British Airways Plc v Starmer* [2005] IRLR 862, EAT)

132. When it comes to the question of group disadvantage, further guidance on the matters which the Claimant has to prove was given by the Supreme Court in *Essop v Home Office* [2017] UKSC 27, [2017] 1 WLR 1343. The Supreme Court held that the section 19 did not require a Claimant alleging indirect discrimination to prove the reason why a PCP put the affected group at a disadvantage. The causal link that must be established is between the PCP and the disadvantage. The proportion of those with the protected characteristic who can comply with the PCP must be significantly smaller than the proportion of those without the protected characteristic. It does not matter, in this respect, that the PCP does not disadvantage all those who share the protected characteristic.

133. The EHRC Employment Code provides useful guidance on this question and how to approach it (paragraphs 4.9 – 4.22). In order to test whether there is a group disadvantage, it may be necessary to construct a pool of people for comparison (paragraphs 4.15 – 4.22). A strict statistical analysis of the relative proportions of advantaged and disadvantaged people in the pool is not always required, however. Tribunals are permitted to take a more flexible approach depending on the case before them.

134. Some group disadvantages are so well known that the tribunal can take "judicial notice" of them without the need for evidence. It is a generally accepted fact that women as a group bear the greater burden of childcare responsibilities compared to men. However, as noted by the EAT in *Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] ICR 1699, EAT, care must be taken not to assume that this means that the group disadvantage requirement will always be met. This "*will depend on the*

interrelationship between the general position … and the particular PCP in question." (paragraph 50).

135. In addition to proving group disadvantage, the Claimant must show that she experienced or would have experienced the actual disadvantage as an additional stage of the test for unlawful indirect discrimination.

136. As to the question of justification, a respondent must normally produce cogent evidence of justification: see *Hockenjos v Secretary of State for Social Security* [2004] EWCA Civ 1749, [2005] IRLR 471. What needs to be justified is the PCP itself (*Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] ICR 704). The Tribunal must focus on the proportionality of having the PCP at all, rather than the question of reasonableness of applying the rule to the particular claimant (*The City of Oxford Bus Services Limited t/a Oxford Bus Company v Mr L Harvey* UKEAT/0171/18/JOJ).

137. In *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38, [2014] AC 700 the Supreme Court (see Lord Reed at para 74, with whom the other members of the Court agreed on this issue: see Lord Sumption, para 20) reviewed the domestic and European case law and reformulated the justification test. The test as we understand it requires us to consider:

(1) whether the objective of the PCP (the alleged legitimate aim) is sufficiently important to justify the limitation of a protected right;
(2) whether the PCP is rationally connected to the objective;
(3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and
(4) whether the impact of the right's infringement is disproportionate to the likely benefit of the PCP.

138. In other cases, the question of whether a particular aim is legitimate has been expressed as being whether it 'corresponds to a real need' of the employer: see *Bilka-Kaufhau GmbH v Weber von Hartz* (case 170/84) [1984] IRLR 317.

139. While a tribunal must take account of the reasonable needs of a respondent's business, it is for the tribunal to assess for itself both whether or not an aim is legitimate, and whether it is proportionate. It is not a 'range of reasonable responses' test (*Hardy and Hansons plc v Lax* [2005] IRLR 726; *MacCulloch v Imperial Chemical Industries plc* [2008] ICR 1334).

ANALYSIS AND CONCLUSIONS

Employment Status

140. In our judgment, the contractual documentation in this case is clear and in good order and reflects the arrangement that the parties intended should apply. We reject the Claimant's arguments that:

(a) there was an express verbal contract agreed between her and R1 that she would personally provide services to R1;

(b) we should imply such an agreement.

141. R1 identified a need for someone to provide data analyst services to it on a short term basis. It did not want to employ someone in the role, but wanted to engage a contractor. It considered the role would fall inside IR35 however, which would necessitate either that it made tax and NI deductions to the payments to made to the individual or the individual would need to be engaged via a third party and an umbrella company.

142. R1 therefore asked R2 to find a suitable candidate, relying on the fact that there was a framework agreement in place between them.

143. R1's representative, Ms Vigano interviewed the Claimant and it was her decision to engage the Claimant. She also told the Claimant that she was going to make her an offer. This was not a formal contractual offer capable of acceptance by the Claimant. It was always understood that the offer would be made formally through R2.

144. When Ms Freeman communicated the offer in writing on 4 January 2023, it was expressed to be subject to contract. The contracts were not able to be financed until the Claimant had provided her right to work documents and crucially, agreed which umbrella contract she wanted to use and entered into a contract of employment with that umbrella company. The umbrella company the Claimant chose was R3 and on 13 January 2023 she signed their standard "contract of employment".

145. The contractual arrangements that were then put in place were:

- A collateral contract between R1 and R2, subject to the terms and conditions of the framework agreement between them

- A collateral contract between R2 and R3, subject to the terms and conditions of the framework agreement between them

No express verbal agreement was concluded between R1 and the Claimant separate to this process or that is capable of superseding this process.

146. The relevant collateral contracts both name the Claimant as the person who would be providing the services. Although the contracts include a right of substitution, this was not a likely or realistic option for anyone and this is likely to be why the engagement was determined to be inside IR35. Another reason why IR35 applied was because the expectation was the Claimant would become a member of Ms Vigano's team (albeit temporarily) and subject to her direction and management. However, the fact that the Claimant personally was to be providing the services to R1 does not mean that there was a direct contractual relationship entered into between her and R1.

147. The Claimant knowingly entered into the contract of employment with R3, the umbrella company because she understood that this was a requirement in order for her to be able to accept the engagement with R1.

We have given careful consideration to the Claimant's arguments that the relationship between her and R3 was not one of employment. We note that when cross examined on the point, she accepted that the contract between her and R3 was a genuine contract of employment. At the same time, however, she argued that R3 was merely providing payroll services to R1 and R2 and so we have been careful to consider the point.

148. In our judgment, there are certainly some potential artifices in the relationships R3 has with the employees that work for it on engagement with clients. Mr Johnson acknowledged that R3 does not find the engagements and in fact does not have the expertise to do so. Usually it is approached by people who have been offered an engagement as a contractor and either need to use an umbrella company because the role is deemed to be inside IR35 or to avoid setting up their own company and their own payroll.

149. Although the primary purpose of the relationship is payroll, the arrangement R3 has with its employees does ensure that R3's employees benefit from employment rights. There is no right to guaranteed work or pay, but there is a right to statutory sick pay and to statutory leave and pay. Although we think it unlikely that such rights are relied upon very often in practice, if they are triggered, R3 is required to fund any payment required to be made out of its profits.

150. In our judgment, although these potential artifices exist, the relationship is not such that it would be appropriate for us to describe it as a sham and imply an alternative direct contract between R1 and the Claimant.

151. Our decision, on this point, has been influenced by the fact that the Claimant is a highly skilled individual who chooses to provide specialist data analyst services to clients as a contractor. In addition to undertaking temporary assignments like the one offered to her by R1, she also has her own data analysis business. Her skill set means that she is well placed to find traditional employment with a large range of employers, but instead she chooses to work as a contractor because of the generous day rates offered and to enable her to run her own business.

152. In summary, our decisions on employment status are:

- The Claimant was an employee of R3, as defined in the Employment Rights Act 1996 and the Equality Act 2010.

- The Claimant was not an employee or worker of R1, as defined in the Employment Rights Act 1996.

- The Claimant was not an employee of R1 as defined in the Equality Act 2010

Breach of Contract

153. The employment tribunal does not have jurisdiction to consider the Claimant's claim of breach of contract against R1.

154. We say this, based on our decision on employment status. That decision was that the Claimant was not an employee of R1 and did not have a contract of employment with R1 that entitled her to four weeks' notice.

155. In addition, we note that on her own case, the Claimant appears to accept she was not an employee of R1. She relies on being a worker under section 230(3)(b). Even if, contrary to our decision, the Claimant is right about this and there was a direct contractual arrangement between her and R1 that included the four weeks' notice, she cannot purse a claim for wrongful dismissal against R1 in the employment tribunal as a worker and there would be no jurisdiction in any event.

Unauthorised Deductions

156. Based on our decision about her employment status, the Claimant cannot pursue an unauthorised deductions complaint against R1 as she was not a worker of R1. She can, however, pursue a complaint of this nature against R3, as we find she was R3's employee.

157. On her own case, however, namely that she was a worker of R1, the Claimant could pursue an unauthorised deductions claim against R1. However, she could not simultaneously pursue a claim of unlawful deductions against R3 as she cannot be a worker of one company and an employee or worker of another company in relation to the same work.

158. Despite our decision on employment status, we have considered the merits of both the Claimant's complaints in any event. Our findings are that both claims fail on their merits.

159. This is because the Claimant received payment for the period of time she performed services for R1. The engagement lasted 3.5 days. A contract rate of £600 per day had been agreed and R1 paid for the Claimant's full time working. We consider it was appropriate for R1 to pay half of a full days' rate for the Thursday as the Claimant was not meant to work that day at all, but did complete half a day's work.

160. Turning to the deductions made by R3, in our judgment, these were fully authorised and in line with the contractual agreement the Claimant entered into with R3. That agreement specifically referred to the illustrations she had been provided by both R3 which showed how her pay would be calculated based on the day rate she had been offered.

161. The first set of deductions were what are best understood as employer costs. These were made from the day rate of £600. This was not, strictly speaking, a payment made to the Claimant. Instead, it was a payment made by LHI to R3 for the provision of the Claimant pursuant to the contract between LHI and R3. But regardless of this technical point, the Claimant

was made fully aware of the deductions that were to be made and had agreed them in advance.

162. The next set of deductions were made to the Claimant's remaining gross pay. These too were in line with the illustrations she had received and which she had agreed in advance.

163. The Claimant argues that she ought to have been provided with a status determination under section 61 of the Income Tax (Earnings and Pensions) Act 2003 before any deductions could be made. We consider this argument to be misconceived, but note that the Claimant was fully aware that the role she would be undertaking for R1 had been determined to be inside IR35 and therefore it is difficult to understand what else she considers ought to have been communicated to her.

164. She also argues that the deductions should have been made from the headline rate of £750 per day paid by R1 to R2 for her services. We disagree. The rate discussed with the Claimant at all times was a rate of £600 per day. She also understood that both sets of deductions (the employer costs and the usual employee tax deductions) would be made from the day rate of £600. This was in line with the predicted net payment sent to her by email when the offer was first made, subject to contract, by Meg Freeman.

165. The Claimant only became aware that the rate being paid by R1 to LHI was £750 per day as a result of the disclosure process in the litigation. This was the day rate of £600 plus an additional £150 per day to pay for the recruitment services LHI had provided to R1.

Indirect Sex Discrimination

166. Our decision regarding the Claimant's employment status means that we have no jurisdiction in relation to her claim of indirect sex discrimination. We have nevertheless considered the claim on its merits and rejected it in any event.

167. Before dealing with different elements of the indirect discrimination claim, we note that when the Claimant made her closing submissions, the way she addressed the claim was more akin to a direct sex discrimination claim or sex-related harassment claim.

168. The Claimant suggested that Ms Vigano was perfectly content with her engagement until she found out that the Claimant had childcare responsibilities, at which point she made the decision to terminate the engagement. In other words, Ms Vigano terminated the Claimant because she had childcare responsibilities. We understood the Claimant to be suggesting that because more women have childcare responsibilities than men, this was tantamount to saying the reason for the termination was because of the fact that she was a woman or was related to her being a woman.

169. For the sake of completeness, we reject this argument. Ms Vigano did not terminate the Claimant's engagement because she learned that the Claimant had childcare responsibilities. Ms Vigano learned about the Claimant's childcare responsibility on 5 January 2023 when she received Ms Freeman's email requesting flexibility on behalf of the Claimant. This was before the engagement began and not on Tuesday 24 January 2023 as the Claimant invited us to find.

170. Ms Vigano knew, before the engagement commenced, that the Claimant would have difficulty attending the site on Tuesdays and Wednesdays for full days because of her childcare responsibilities. This was why she had agreed to half days in the office on those days. On Tuesday 24 January 2023, Ms Vigano learned two new bits of information which led to her decision to terminate the engagement. The first was that the Claimant had was not able to guarantee her availability (in the office or remotely) on a Tuesday between 4 and 5 pm once a month for the data governance meetings. The second was that the Claimant had told Ms Freeman that on a Tuesday and Wednesday that if she had to work in the office on a Tuesday or Wednesday, she would not to be able to be available for the core hours on those days and would have to make up the time in the evenings due to her childcare responsibilities and her commute.

Did R1 apply a provision criterion or practice ("PCP") to work in the office two days per week Tuesday and Wednesday, 9am to 5pm?
If so, was it applied to all persons including the Claimant?

171. Our factual findings are that the PCP expressed in the list of issues did not exist and was not applied to the Claimant. In this section we explain why we reached that decision and also what we find was applied to the Claimant and whether this meets the requirements of a PCP for the purposes of an indirect sex discrimination claim pursued under section 19 of the Equality Act.

172. R1 had a hybrid working policy that required employees to work in its offices for three out of five days. For contractors, the requirement was two out of five days.

173. In the team that the Claimant was recruited to work in, there was a preference for the days in the office to be Tuesdays and Wednesdays because these were the days that the Head of the Team was in the office. However, this was no stronger than a preference and there was flexibility in relation to the days team members could work.

174. In addition, the team that the Claimant was recruited to work for was a team providing a support function to the other teams in the business. Along with the other support functions, members working in support teams needed to be available to work during the core business hours, 9 am to 5 pm, albeit with an hour for lunch.

175. With regard to what was applied to the Claimant, we find that she was required, at the beginning of the engagement, to have a presence in the

office on Tuesdays and Wednesdays, but that she need not work from 9 am to 5pm in the office on those days. Instead, Ms Vigano agreed that she could work half days in the office on those days provided she was still available to work remotely until 5pm for the rest of the afternoon.

176. Although not tested in practice, our finding is that had the Claimant worked half days in the office on Tuesdays and Wednesdays, Ms Vigano would have been relaxed about the Claimant not having to make up this up to two whole days in the office.

177. The PCP we have therefore considered is a PCP whereby the Claimant was required to work 9pm - 5pm five days a week, with two half days on Tuesday and Wednesday in the office.

178. We have considered whether this was a one off decision that applied only to the Claimant rather than a generic neutral PCP for the purposes of an indirect sex discrimination claim. In our judgment, it is the type of rare one off decision that can be treated as a general PCP following the authority in the *Starmer* case.

179. We say this because what we found happened in practice was that Ms Vigano adapted the general requirements that existed for the Claimant, both because she was a new starter and because of her difficulties with being in the London office on Tuesday and Wednesday afternoons. There was an expectation that the Claimant would be present on Tuesdays and Wednesdays for onboarding purposes. In addition, Ms Vigano agreed to half days in the office on those days, provided the Claimant was still able to work during core hours.

180. In our judgment, Ms Vigano would have agreed the same adaptations for any new starter, male or female, who was in the same position as the Claimant and had difficulty being in the office on Tuesday or Wednesday afternoon, for whatever reason.

Did the PCP put or would it put women at a particular disadvantage compared to men?

181. We have considered this question for the PCP that we have found, as a matter of fact, was applied to the Claimant and not the PCP she asserted existed. This is because we are satisfied that R1 had sufficient opportunity to defend the claim based on the revised PCP and so to do so would not cause injustice to R1.

182. Our finding is that group disadvantage is made out and the test is section 19(2)(b) of the Equality Act 2010 is met.

183. In our view, this is not the type of case where there is a need for a case where we do not need to be represented with specific evidence of disadvantage, but we can take a broad brush approach.

184. We take judicial notice that statistically women still bear the greater responsibility for childcare when compared to men. We have had regard to the guidance given by the EAT in the *Dobson* case, that we should not jump to the conclusion that this undisputed fact means that group disadvantage is made out in this case. In our judgment, however, the position is clear.

185. According to the Equal Treatment Bench Book, quoting statistics from the Office for National Statistics, in 2019, 75% of women with dependent children worked compared with 92.6% of fathers. Most mothers in employment worked part-time until the youngest child was aged 11 – 15. The Equal Treatment Bench Book also notes that women are more likely than men to accept lower pay in favour of a shorter commute, most probably due to caring responsibilities.

186. We consider these facts inevitably means a smaller proportion of women than men would be able to meet the PCP imposed on the Claimant by the R1 because it combined a requirement for full time working from 9 am to 5 pm and commuting into Central London two days a week.

Did that PCP put, or would it put, the Claimant at the disadvantage in question?

187. We have considered this question for the PCP that we have found that was, as a matter of fact, applied to the Claimant and not the PCP she asserted existed. Again, this is because we are satisfied that R1 had sufficient opportunity to defend the claim based on the revised PCP and so to do so would not cause injustice to R1.

188. Our finding is that the Claimant has not demonstrated that she suffered the disadvantage in question.

189. We made this finding because the Claimant's evidence was very clear. According to her, the only limit that her childcare responsibilities placed on her was an inability to be present in the London office between 9 am and 5pm on Tuesdays or Wednesdays. She asserted, when giving evidence, that there was that there was no childcare reason that meant she was not able to work between 9am and 5pm, provided on a Tuesday and Wednesday she was able to work remotely on the train or at home in the afternoons rather than at R1's London office.

190. This assertion does not explain why the Claimant told Ms Viagno she was unable to attend the regular monthly data governance meeting on Tuesdays between 4 and 5pm or why she at one point said that she would need greater flexibility to complete work in the evenings. However, we consider we have to take the Claimant's assertion at face value.

If so, can R1 show that that PCP was a proportionate means of achieving a legitimate aim?

191. In any event, we find that the PCP that we found was applied, was a proportionate means of achieving a legitimate objective, meaning that there

would have been no unlawful indirect sex discrimination even if the Claimant's childcare responsibilities were the reason she could not comply with the PCP.

192. In our judgment, the PCP corresponded with the legitimate aims relied on by R1. In particular, the requirement to pending some face to face time with her line manager, through working half days in the office on Tuesdays and Wednesdays was necessary for an effective onboarding process. R1 disapplied its ordinary rule regarding working in the office for the Claimant, thereby adapting it so that it was proportionate in the circumstances. It could not, however, further adapt the requirement to work the core hours of 9 am to 5 pm because of the need to be available as a business support unit.

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Employment Judge E Burns
7 February 2024

Sent to the parties on:

...15 February 2024.....

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For the Tribunals Office

Appendix

List of Issues

JURISDICTION

Employment Status

1. Was the Claimant an employee of R1 and/or R3 pursuant to section 230(1) and (2) Employment Right Act 1996?

2. If not, was the Claimant a worker of R1 and/or R3 pursuant to section 230(3) Employment Rights Act 1996?

3. Was the Claimant "in employment" pursuant to section 83(2) Equality Act 2010?

4. If not, was the Claimant a self-employed contractor?

5. Subject to the answer to 1 to 4 above, which of the Claimant's claims does the Employment Tribunal have jurisdiction to consider?

6. Who is the appropriate Respondent in respect of those claims which the Employment Tribunal has jurisdiction to consider?

CLAIMS

Unlawful Deduction from Wages

7. The Claimant claims £300.00 from R1 for a half days' pay.

8. Has the Claimant received all sums properly payable by R3?

9. Is the Claimant due such sums by R1 and/or R3 as an unlawful deduction from her wages pursuant to sections 13 to 27 Employment Rights Act 1996?

Breach of Contract/Wrongful Dismissal

10. Is the Claimant entitled to 4 weeks' notice pay or any other sums by way of a breach of contract from R1.

11. Do the sums claimed by the Claimant arise and/or are outstanding on the termination of the Claimant's employment?

12. Do the sums claimed by the Claimant fall into one of the categories identified in section 3(2) Employment Tribunal's Act 1996 and Article 3 Extension of Jurisdiction Order 1994:

    (i) damages for breach of a contract of employment or any other contract connected with employment;

    (ii) the recovery of a sum due under such a contract;

(iii) the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.

Discrimination

13. Did R1 apply a provision criterion or practice ("PCP") to work in the office two days per week (Tuesday and Wednesday), 9am to 5pm?

14. If so, was it applied to all persons including the Claimant?

15. Did it put or would it put women at a particular disadvantage compared to men? Pursuant to section 23(1) Equality Act 2010, has the Claimant shown facts that the Employment Tribunal could conclude women were put at a particular disadvantage to men by working 9am to 5pm in the office (Tuesday and Wednesday)?

16. Did that PCP put, or would it put, the Claimant at the disadvantage in question?

17. If so, can R1 show that that PCP was a proportionate means of achieving a legitimate aim?

    The legitimate aims relied upon being as follows:

    (i) The need to ensure an effective onboarding process.
    (ii) The proper supervision and management of staff.