EMPLOYMENT TRIBUNALS

Claimant: **Mrs Rashmi Dengri**

Respondent: **Star Kids Club Ltd**

Heard at: **London South Employment Tribunal (by CVP)**

On: **28 September 2023**

Before: **Employment Judge T Perry**

Representation
Claimant: Mr Aziz (Mackenzie friend)
Respondent: Mrs Y Thompson (owner and manager)

JUDGMENT

The Claimant was an employee and worker of the Respondent for the purposes of section 230 Employment Rights Act 1996.

REASONS

Claim and issues

1. The sole issue to be decided at today's hearing was the status of the Claimant under section 230 Employment Rights Act 1996.

Evidence

2. The Tribunal was provided with an agreed final hearing bundle of 83 pages. The Respondent had submitted to the Tribunal a further unpaginated bundle. This replicated much of what was in the agreed bundle and included witness statements. It also included some further documentation that appeared irrelevant for the purposes of today. I relied solely on the agreed bundle.

3. The Claimant gave evidence from a witness statement.

4. For the Respondent, Mrs Thompson and Mr Mudzengerere gave evidence from

witness statements.

5. I heard oral submissions from both sides.

Findings of fact

6. In July or August 2019 the Respondent sought to realign its relationship with its staff. Staff who had previously been directly employed by the Respondent were moved on to apparent contractor status via an "umbrella payroll model."

7. Mrs Thompson wrote the Claimant a letter on 2 February 2020. This confirmed an "offer of employment with the Star kids Day Nursery & Pre-school. This enclosed a job description. Mrs Thompson was listed as the Claimant's manager. The letter said it attached terms and conditions of employment, I saw one attachment, which stated that disciplinary and grievance policies applicable to the Claimant were included in the company guidelines. This letter was based on a template in place from before the July or August 2019 change to the Respondent's staffing arrangements.

8. Mrs Thompson said that it was explained to the Claimant later that day that this letter was issued in error and that references to employment were mistaken. I do not accept that any such clarification was given to the Claimant. Mrs Thompson initially suggested this was done by letter but there is no evidence of such letter.

9. The Claimant started work at the nursery on 3 March 2020. That day she and Mrs Thompson signed an assignment agreement. This listed the hirer as Star Kids Club Limited. The client was unnamed but at the same address as Star Kids Club Limited. The assignment was listed as ongoing. It provided for varying hours of work but with a minimum of 15 hours per week. Contractor fees were stated to be £9.22 per hour. The payment period was monthly on the 25th. Notice of one month from either party was required to bring the arrangement to an end. There was no mention of Global Challenge Payroll Services in this document. I accept that the Claimant signed this document believing it to be her terms and conditions of employment.

10. The Respondent has a set of policies and procedures, which applied to the Claimant. I have not seen all of these.

11. Thereafter the Claimant worked at the Star Kids Club nursery. The nursery was apparently shut during April and May 2020 due to covid and the staff at the nursey were told to apply for universal credit rather than being put on furlough. The Claimant was not paid during this period.

12. There was a rota for staff working at the nursery. This was set by Mrs Thompson. I

accept that the Claimant had some input into this (such as stating that she needed to be free to collect and look after her own children at various times). I accept that broadly once the rota was set there was an obligation on the Claimant to do the hours indicated. There was no contractual right for the Claimant to provide a substitute and she did not do so in practice. Absences were covered by existing staff or by agency staff hired by the Respondent.

13. Once at work, the Claimant's duties were directed by Mrs Thompson. The Claimant was assigned as key worker to set children, her activities were approved by the Respondent and told which room she was working in. The Claimant's break times were set by the Respondent.

14. The Claimant received payslips and P60s under the name of Star Kids Club Limited. The Employer PAYE reference numbers contained on these forms were not those belonging to Star Kids Club Limited but were rather for different companies related to Global Challenge Payroll. The payslips included separately itemised holiday pay, which was paid on a rolled up basis. The pay slips included a value for Annual leave remaining. The Claimant was paid solely for those hours she worked. The payslips were based on timesheets sent to Global Challenge by the Respondent.

15. The Claimant was required to get approval from the Respondent to take holiday. The Claimant was not paid holiday pay when she took holiday.

16. The Respondent says that payment was made to the Claimant by a company within the Global Challenge Payroll group but with the source of funds being the Respondent.

17. The Claimant did not submit invoices.

18. It has been suggested by the Respondent that after November 2021 the Claimant and/or her husband sought to have her salary paid to her gross and that she would be responsible for the payment of tax rather than having it deducted at source. The Respondent says that when the Claimant was told that she did not qualify for this, this resulted in the Claimant requesting a p45 and that one was issued to her in February 2022 for this reason. As, even on the Respondent's case, the change was not made to pay the Claimant gross, I do not consider that this is a matter that I can or should make a finding on today. However, it may be a relevant consideration later in the case both as to whether the Claimant was dismissed and, if she was, what was the date of that dismissal.

The Law

Section 230

19. Section 230 Employment Rights Act 1996 states

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.

Employment status

20. The question whether someone is an employee or not is one of fact.

21. Ultimately it is impossible to draw up a complete and immutable list of criteria to be considered when deciding whether a contract is one of employment or one for services: **Maurice Graham Ltd v Brunswick** (1974) 16 KIR 158, Div Ct;

22. The starting point is generally considered to be the judgment of McKenna J in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 2 QB 497, [1968] 1 All ER 433, where he said as follows:

"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly

or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service …'.'

23. One further factor which has been found frequently in the case law is 'mutuality of obligations' which will usually mean an obligation on the employer to provide work and an obligation on the employee to do it. This is of particular relevance in the area of casual work where it may well be a crucial element in drawing the line between relatively informal employment relationships and arrangements which ultimately are too loose to qualify.

24. The obligation to render personal service is of crucial importance. It is however far from conclusive; for there is nothing to prevent an independent contractor from undertaking to perform the relevant tasks personally.

25. In **Pimlico Plumbers Ltd v Smith** [2017] IRLR 323 (albeit in relation to the worker test) Etherton MR summed up the case law on substitution clauses as follows:

> *"[84] … In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."*

26. The key questions are the extent to which the right to substitution is fettered including as to when a replacement can be provided, what limitations are placed on the identity of that replacement, whether the client is entitled to choose the substitute and whether it is intended that the right to appoint a replacement should be exercised in reality as

set out in writing in the contract.

27. As to control, in **White v Troutbeck SA** Judge Richardson in the EAT ([2013] IRLR 286) held that the control test has to be applied in modern circumstances where many employees have substantial autonomy in how they operate, and are left to an extent to exercise their own judgment; the original idea that there must be detailed control of working methods may no longer always apply.

28. Moreover, at para 45 he said '… the question is not by whom day-to-day control was exercised but with whom and to what extent the ultimate right of control resided'. This was approved in the Court of Appeal [2013] IRLR 949, CA.

29. Eventually, a view must be taken on all of the facts by balancing all the factors (the modern 'multiple test'). This can include considering:

    29.1. What was the amount of the remuneration and how was it paid?—a regular wage or salary tends towards a contract of employment; profit sharing or the submission of invoices for set amounts of work done, towards independence.

    29.2. How far, if at all, did the worker invest in his or her own future: who provided the capital and who risked the loss?

    29.3. Who provided the tools and equipment?

    29.4. Was the worker tied to one employer, or was he or she free to work for others (especially rival enterprises)? Conversely, how strong or otherwise is the obligation on the worker to work for that particular employer, if and when called on to do so?

    29.5. Was there a 'traditional structure' of employment in the trade or has it always been a bastion of self-employment?

    29.6. What were the arrangements for the payment of income tax and National Insurance?

    29.7. How was the arrangement terminable?—a power of dismissal smacks of employment.

30. As to the status given to the relationship by the parties, in **Quashie v Stringfellow Restaurants Ltd** [2013] IRLR 99, CA Elias LJ summed the overall position up as follows:

"It is trite law that the parties cannot by agreement fix the status of their relationship:

that is an objective matter to be determined by an assessment of all the relevant factors. But it is legitimate for a court to have regard to the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain it can be decisive…"

31. The basic question as set out by the Supreme Court in the leading case of **Autoclenz Ltd v Belcher** [2011] UKSC 41, is whether the written contract represents the true intentions or expectations of the parties.

32. Autoclenz was reviewed recently in the Supreme Court in the case of **Uber BV v Aslam** [2021] UKSC 5

33. At [69] the judgment states:

"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."

34. Stressing then the policy of protecting vulnerable persons, it is further stated at [76]:

"Once this is recognised, it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker". To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it."

Worker status

35. The same requirement for personal service applies equally to worker status.

36. The tests for worker status under the Employment Rights Act 1996 and the Equality Act 2010 are effectively the same.

37. The test under both acts effectively include a requirement (made clear on the face of section 230(3)(B) Employment Rights Act 1996 and implied into the Equality Act definition by the Supreme Court's decision in **Hashwani v Jivraj** [2011] UKSC 40) that the status of the employer must not be "by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

Conclusions

Requirement to provide own work

38. There was no right to provide a substitute referred to in any document I have seen. In practice, it was the Respondent who arranged replacements when staff could not attend. In this case it seems clear to me that the Claimant was required to provide her own work personally.

Control

39. The Claimant was subjected to significant control by the Respondent as to when, where and how her work was done. This included setting the rota, approving absences, setting breaks, and assigning the Claimant to work in particular rooms and as key worker for particular children. The Claimant was subject to the Respondent's policies and procedures including as to disciplinary and grievance matters.

Other factors

40. Most other factors suggest the Claimant was in a contract of employment. She was paid monthly without having to submit invoices. Deductions were made at source from sums paid to the Claimant (although I accept this is not determinative in itself). The Claimant had no financial risk and provided no equipment. The contract was terminable on notice. The Claimant was closely integrated into the Respondent's organisation.

Labels applied by the parties

41. The labels applied by the parties were not consistent. The Respondent referred to the arrangement as employment in the offer letter. The labels of assignment, hirer, contractor, and client were included on the assignment agreement. These were terms

sought to be imposed by the Respondent. However, there was no mention of Global Challenge Payroll Services being the hirer. The hirer was the Respondent. The Respondent was also the client. In those circumstances, I am satisfied that the assignment agreement does not reflect the reality of the situation in relation to the Claimant's engagement.

Mutuality of obligation

42. When the nursery was shut, staff were told to claim universal credit. The Claimant took a month off to go to India during November 2021. Notwithstanding those two periods, I find there was mutuality of obligation in that the Respondent had committed to offer at least 15 hours a week and, in practice and under contract, I find that the Claimant had agreed to do those hours. There was an established pattern of working which reflected the obligations on both sides. This was not a borderline or casual situation where mutuality of obligation could be denied during periods when the Claimant was not working at the nursery.

The Claimant's status

43. The requirements for the tests for employment and worker status both having been met, I find that the Claimant was an employee and worker of the Respondent for the purposes of section 230 Employment Rights Act 1996.

44. The Tribunal will schedule a further Preliminary Hearing to consider case management through to the final hearing.

Employment Judge T Perry
Date 29 September 2023