EMPLOYMENT TRIBUNALS

Claimant: Ms L Crocombe

Respondent: Equity Release Supermarket Ltd

Heard at: Manchester **On:** 26 March and 24 April and 25 April 2024 (in chambers)

Before: Employment Judge Slater

Representation
Claimant: Ms Brooke-Ward, counsel
Respondent: Ms S Firth, counsel

RESERVED JUDGMENT

1. The claimant was a worker in relation to the respondent in accordance with the definition in the Employment Rights Act 1996 from 28 January 2020 until 24 February 2022.

2. The claimant was an employee of the respondent in accordance with the definition in the Equality Act 2010 from 28 January 2020 until 24 February 2022.

3. The claimant was not an employee of the respondent in accordance with the definition in the Employment Rights Act 1996 at any time in the period from 28 January 2020 until 24 February 2022.

4. Since the claimant was not an employee in accordance with the definition in the Employment Rights Act 1996, the Tribunal does not have jurisdiction to consider her complaints of unfair dismissal and wrongful dismissal/breach of contract, so these complaints are dismissed.

5. The claimant's remaining complaints of disability discrimination, sex discrimination and victimization under the Equality Act 2010 and of unauthorised deductions from wages and in relation to holiday pay will proceed to a final hearing as listed on 3-7 June 2024.

REASONS

Issues

1. This was a public preliminary hearing to determine (1) whether the claimant was an employee or worker within the meaning of section 230 Employment Rights Act 1996 (ERA) and/or (2) whether the claimant has the protection of the Equality Act pursuant to section 83(2) Equality Act 2010.

2. This hearing was not listed to determine whether, if the claimant was not an employee within the Equality Act sense, she could bring a claim under the contract worker provisions in section 41 of the Equality Act 2010. It appears that this possibility was not discussed at the case management preliminary hearing. I raised this with the parties and the respondent considered over the adjournment, whether they accepted that, if the claimant was not an employee, she was contract worker and the respondent was the principal for the purposes of section 41 of the Equality Act. At the resumed hearing, the respondent accepted that, if the claimant was not an employee in the Equality Act sense, the respondent was a principal and she was a contract worker for the purposes of a claim relying on s.41 EqA.

3. At the start of the hearing, Ms Firth sought to renew an application to postpone the final hearing which had previously been refused. I did not consider there was any material change of circumstances since the application had previously been made, so informed the parties I could not consider this application.

Evidence

4. I had an electronic bundle of 499 pages. There were five witnesses: the claimant and Sheri Firmin for the claimant and Lynsey Harrison, Mark Gregory and Graham Evans for the respondent. There was also a witness statement from Lauren Weir made in support of the claimant's claim. Ms Weir did not attend to give evidence and the respondent agreed that I could read the statement and give it such weight as I considered appropriate. Ms Firmin and Ms Weir were engaged by the respondent as financial advisers under the same type of arrangements as the claimant. Ms Harrison has been the respondent's Chief Operating Officer since 2020. Mr Gregory is the Chief Executive Officer of the respondent. Mr Evans is the respondent's Head of Compliance.

5. There was insufficient time in the listing of one day to hear all the evidence. I heard the evidence for the claimant on 26 March and we reconvened on 24 April 2024 when I heard the evidence for the respondent and the parties' submissions. There was insufficient time to make and give judgment on 24 April 2024 so I made my decision in chambers on 25 April 2024.

6. On the afternoon of 23 April 2024, i.e. the day before the hearing was due to resume, the respondent made an application to put in a supplemental witness statement for Graham Evans relating to regulatory matters. They also sent a supplemental hearing bundle containing documents not already admitted in evidence. The written application did not explicitly apply for these further documents to be admitted in evidence. Ms Firth, at the resumed hearing, made an application to admit the supplemental witness statement and the additional

documents. The claimant objected to the application. I refused the application for these reasons which I gave orally at the time.

6.1. My decision is that I refuse the respondent's application to admit further documents in evidence and a supplemental witness statement for Graham Evans. I do not consider that the application arises from anything which could not have been anticipated prior to the hearing on 26 March. It was clear that control was an aspect which would need to be addressed in dealing with the status issues, and that regulatory compliance would be an aspect of that. Indeed, Mr Evans' original witness statement deals with regulatory compliance.

6.2. If the respondent had wished to deal with this in more specific detail, they had plenty of opportunity to do this prior to the serving of the witness statements before the hearing on 26 March.

6.3. I have had no explanation as to why the additional documents which do not relate to regulatory compliance were not disclosed earlier and included in the original bundle if they were considered to be of relevance and importance. From the description Ms Firth has given of the documents, which I have not read myself, it appears they are put in to bolster further the witness evidence on matters which have already been included in respondent's witness statements.

6.4. I consider that the claimant would be severely prejudiced by late admission of the documents and the admission of the supplemental witness statement. These were only served yesterday afternoon, although the previous hearing was around a month ago, and claimant's counsel has not had a chance to consider them and to take instructions. The admission of these documents and witness statement would very likely lead to the postponement of this preliminary hearing or, at the very least, it not being completed today, and the postponement of the final hearing listed for June 2024. The case has already had a lengthy history and I consider that we should use our best endeavours to complete it sooner rather than later.

6.5. I do not consider it in the interests of justice to allow the respondent's application and I refuse it.

Facts

7. The claimant worked for the respondent from January or February 2020 until the working relationship was terminated on 24 February 2022.

8. The respondent is a business which specialises in advising individuals on equity release schemes. It is authorised and regulated by the Financial Conduct Authority. The respondent, through advisers engaged on what they described as employed or self-employed terms, provides advice to clients who are potentially interested in equity release. The advice was provided at relevant times for a fixed fee of £995 and might or might not recommend an equity release product, depending on the client's individual circumstances. The advice could be against equity release. The clients, who are mostly pensioners, are generally regarded as highly vulnerable. Advice will have to take into account, for example, the impact

receipt of a loan due to equity release would have on eligibility for state benefits. The respondent is not tied to any particular equity release provider. Their advisers can recommend products from the whole market.

9. When I refer to employed and self-employed advisers in these reasons, I am adopting the terminology of the respondent for the purposes of identifying categories of adviser rather than, in this section on facts, reaching any conclusion as to whether the respondent was correct to identify the claimant and certain other advisers as self-employed.

10. At the time Lynsey Harrison prepared her witness statement, according to her evidence, the respondent had 22 advisers they described as self-employed.

11. The first contract signed by the claimant was between the respondent and the claimant personally (page 139). This described the claimant as a consultant and an independent contractor, stating expressly in clause 13 that nothing in the agreement should render the claimant an employee, worker, agent or partner of the respondent. The contract was dated 28 January 2020 with a commencement date to be confirmed.

12. The claimant confirmed in evidence that she understood herself to be self-employed when she signed the first contract. The claimant registered with HMRC as a self-employed individual.

13. The claimant entered into a loan agreement with the respondent (page 135). The respondent loaned the claimant £7,500 to be repaid in monthly installments during 2020.

14. The claimant underwent induction training with the respondent for which she was not paid. This ended on 28 February 2020.

15. The claimant was told by Mark Gregory at her initial meeting with him that she should set up a limited company for tax and liability reasons. The respondent wished to engage the claimant's services via a personal services company (PSC) on the basis of advice from their accountant, which Mr Gregory understood to relate to IR35. The claimant had no choice as to the form of the arrangements under which her services were to be provided to the respondent. If she wanted to work for the respondent, she had to set up a PSC which would then enter into a contract with the respondent for the provision of the claimant's services. This was not a case where the claimant was offered a choice of arrangements, or where the claimant requested that her services be provided under such arrangements.

16. The claimant did not already have a PSC. She set up her own limited liability company, Essex Equity Release Ltd (the PSC), which was incorporated on 23 March 2020. The claimant was the sole director and person with significant control of this company.

17. On 24 March 2020 the PSC entered into an agreement with the respondent to provide the claimant's services to the respondent (page 192). I will refer to this as the second contract. This superseded the first contract.

18. The claimant did not do any work for which she was paid by the respondent prior to the entering into the second contract on 24 March 2020. The first business issued by the claimant was in the month of May 2020.

19. The second contract is a document of 18 pages headed "Self employed adviser agreement". It was signed by Mark Gregory on behalf of the respondent and by the claimant on behalf of the PSC (described in the agreement as "the Consultant"). It appears to be in a standard format. Indeed, it refers to the claimant frequently throughout the document as "he" and "him", providing further evidence that it was not tailored specifically to the claimant. I heard no evidence to suggest that the claimant had any input into the terms of the contract. In the second contract "the Individual" is defined as being the claimant. "The Services" are defined as "the services of an independent financial adviser provided by the Consultant and/or Individual in a consultancy capacity for the Company".

20. Clause 2.1 provides: "The Company shall engage the Consultant and the Consultant shall make available to the Company the Individual to provide the Services on the terms of this agreement." In other words, the services of the claimant as an independent financial adviser were to be provided by the PSC to the respondent.

21. Under Clause 2.2.2, the contract can be terminated by either party giving the other two months prior written notice.

22. Clause 2.3 provides:

> "For the avoidance of any doubt, there is no requirement for the Consultant to provide the Individual to provide any Services to the Company and the Consultant shall determine when the Services are provided by the Individual. However, the Consultant agrees to give reasonable notice to the Company if the Individual does not intend to provide any Services during any period of Engagement and shall notify the Company as soon as reasonably practicable if the Individual cannot provide the Services due to ill-health or injury."

23. Clause 3 provides that the PSC shall procure that the claimant shall carry out duties as specified in that clause.

24. Clause 3.2 provides that the Services are to be carried out from the claimant's home address or such other place as the parties may from time to time agree.

25. Clause 3.5 provides that, during the term of the contract, PSC shall not and shall procure that the claimant shall not, unless with the written consent of the respondent, carry out any work for anyone else, which is similar in nature to the Services nor shall the PSC and/or the claimant hold any other FCA controlled function.

26. Under the contract, the PSC was to be paid for the Services on a split of fee and commission only basis. Clause 4 sets out the terms relating to the split of fees and commission. Different percentages of fee and commission were to be paid to the PSC depending on the source of the lead. Self-generated business had a higher percentage than leads provided by other means. Commission earned in a

calendar month was to be paid normally by no later than the 7th day of the following calendar month. Clause 4.4 provides that the respondent would send to the PSC each month a statement of account showing commission payable. In the event of any dispute about the amount due, the decision of the respondent was to be final. The PSC agreed to then send to the respondent a monthly invoice for commissions due.

27. In practice, the PSC did submit invoices to the respondent for the fee/commission split due, on a monthly basis, following the respondent providing the PSC with a statement of account. The first was sent in May 2020.

28. Clause 5 provided that the PSC and/or the claimant would bear their own expenses, including provision of their own data protection licence. The PSC agreed to pay to the respondent a monthly fee to cover practice expenditure, including the cost of access to the respondent's CRM system.

29. Clause 6 allowed the PSC, with the prior approval of the respondent, to engage or employ any suitable third parties to assist with administrative work incidental to carrying out the Services. The PSC would be responsible for paying such a person. Clause 6.2 provides:

> "The Consultant may, with the prior written approval of the Company and subject to the following proviso, appoint a suitably FCA compliant, qualified and skilled substitute for the Individual to perform the Services on his behalf, provided that the substitute shall be required to enter into direct undertakings with the Company, including with regard to confidentiality. If a substitute is appointed, the Consultant shall continue to invoice the Company in accordance with the terms of this Agreement and shall be responsible for the remuneration of the substitute. For the avoidance of doubt, the Consultant will continue to be subject to all duties and obligations under this Agreement for the duration of the appointment of the substitute."

30. In practice, on the basis of evidence from the respondent's witnesses, approval would have only been given for a substitute who had been trained by the respondent in their systems and processes. I heard no evidence to suggest that the claimant or any other self-employed adviser engaged under the same type of contract had ever, in practice, provided a substitute financial adviser. Some advisers had engaged what was described as a paraplanner, but such a person assisted the adviser and did not substitute for them in giving advice to clients.

31. There were provisions in the second contract relating to confidential information and data protection.

32. Clause 9 provided that the PSC would have personal liability for and would indemnify the respondent for any loss, liability, costs, damages or expenses arising from a breach by the PSC, the claimant or any substitute of the terms of the contract, including any negligence in the provision of the Services. The PSC agreed to comply, and to procure the claimant to comply, with the terms of the respondent's professional indemnity insurance.

33. On the basis of the evidence of Mark Gregory, I find that the respondent took out professional indemnity insurance which covered claims against the respondent

and against the claimant, including for negligent advice. I do not consider there is any basis in fact for Ms Firth's closing submission that, despite the evidence of Mr Gregory, she suspected that, if a claim in negligence was made against the claimant personally, the claimant would not be covered by the respondent's professional indemnity cover. I find that, if there was an excess on the policy (which there was at times, but not all times) and a claim had been made arising from negligent advice given by the claimant, the PSC or the claimant personally would have been expected to reimburse the respondent for the excess on the policy.

34. Clause 13 relates to status, stating that nothing in the contract shall render either the PSC or the claimant an employee, worker, agent or partner of the respondent.

35. Clause 14 provided that the PSC had to provide the claimant, or procure that the claimant provided, her own laptop, mobile phone and printer together with any further equipment that might be necessary for the performance of the Services.

36. The claimant did, in practice, provide her own equipment at her own expense.

37. Clause 15 contained restrictive covenants applying for 6 months after termination of the contract.

38. A Schedule acknowledged regulatory responsibilities applying to the PSC and the claimant and set out the PSC's agreement, and agreement to procure that the claimant complied with various things, including the FCA principles and Handbook, and to act in certain ways.

39. The claimant signed a letter dated 24 March 2020 to the respondent (the side letter) (page 210). The side letter referred specifically to the second contract of the same date, under which the letter stated that the PSC agreed to provide the claimant's services to the respondent. By the language of the letter, it is clear it was drafted by the respondent's advisors who had drafted the second contract. It states that expressions used in the letter have the same meaning as in the second contract (the "Agreement" in the letter). The PSC is referred to as the "Consultant Company" and the respondent as the "Company". The letter states:

40. "In consideration of the Company agreeing to enter into the Agreement with the Consultant Company at my request I personally confirm, undertake and agree with the Company as follows:"

41. Ten numbered points follow. Points 1 to 3 are as follows:

> "1. I will procure that the Consultant Company will in all respects duly perform and observe all the provisions and obligations contained in the Agreement and on the part of the Consultant Company to be performed or observed, and I will indemnify the Company in respect of any loss or damage that the Company may suffer or incur in performing the said provisions and obligations except to the extent that those consequences are shown not to be the result of any wrongful or negligent act or omission on my part.

> "2. I will render my services to the Consultant Company during the term of the Agreement in order to enable the Consultant Company to perform its obligations under the Agreement and to do all acts and things that may be necessary or desirable on my part to procure the full implementation of the provisions of the Agreement in accordance with its terms.
>
> "3. I confirm that I am employed by the Consultant Company and that, in relation to the provision of my services in connection with the obligations of the Consultant Company to the Company under the Agreement, I will look solely to the Consultant Company for remuneration, payment and reimbursement of expenses and will indemnify the Company in respect of all tax, social security contributions, interest, penalties, or tax upon tax which the Company may become liable by reason of payments made or benefits provided to the Consultant Company under the Agreement. I accept that if the Company and/or the Consultant Company require me to cease providing the Services on its behalf, I shall have no claim or cause of action against the Company or their respective officers or employees."

42. Points 4 to 6 relate to trade secrets, confidential information and property of the respondent.

43. Points 7 to 10 set out restrictive covenants to apply to the claimant for 6 months from termination of the second contract.

44. The second contract includes no obligation on the respondent to provide the PSC and/or the claimant with any work. In practice, the respondent would send to the claimant and other self-employed advisers leads which might or might not result in business being done. Leads were contact details for a potential client. I the notes of the meeting Ms Harrison had with the claimant on 10 February 2021, Ms Harrison referred to "the optimum number of leads for a full-time adviser of 40 per month (p.277). Sheri Firmin's witness statement, at paragraph 2, stated that she had been told by Mark Gregory that she would be guaranteed 40 leads a month. In cross examination, Ms Firmin gave evidence that there was an obligation to provide leads, but clarified that this was up to 40 per month rather than a guarantee of being provided with 40 per month. The claimant did not give evidence that she had been told of any guaranteed minimum number of leads per month. I find that there was no guaranteed minimum number of leads. However, there was an understanding that the respondent would provide the claimant with at least some leads on a regular basis. The express obligation on the claimant to provide the respondent with reasonable notice if she was not available to take leads only makes sense in the context of an understanding, or expectation, that the respondent would be providing her, if she was available, with leads on a regular basis. It also seems unlikely that the respondent would have made the claimant a loan if there was not an understanding that the respondent would provide her with leads, some of which would be converted into business to the profit of the respondent and the claimant.

45. Leads would be sent to advisers daily, anytime from 7 a.m. to 10 p.m., unless the adviser had informed the respondent that they were not available for a certain period to take leads. When the lead was sent, I find that there was an expectation that the adviser would attempt contact with the client within an hour of the lead being sent (referred to by Ms Harrison in one email as the "golden hour"), unless

the lead was sent outside the office hours of 9 a.m. to 5 p.m. If leads were not responded to in this period, they could be reallocated. The respondent could choose not to send leads to an adviser and might do so, for example, if they considered that the adviser was not acting quickly enough, or at all, in response to leads.

46. The claimant did give notice at various times that she was not available to take leads e.g. when she wanted to spend time on administration, or was going on holiday. She also notified the respondent as soon as possible if she could not take leads because she was unwell.

47. In addition to advisers engaged under what they described as self-employed contracts, the respondent engaged some advisers on direct contracts accepted to be employment contracts. I accept the respondent's evidence that these directly employed advisers were engaged on different terms to the claimant. The differences included the following. They were paid a salary and bonus, rather than a fee/commission split only. They had fixed working hours, 9 a.m. to 5 p.m., with one late shift per week, working a weekend rota. They had to have holiday requests approved and received holiday pay. They worked from home but had equipment provided by the respondent. They advised by telephone only, unless prior permission was given by the respondent for them to attend a face to face meeting with a client, in which case they were reimbursed for expenses. They had a line manager. They had targets to meet and had formal performance/development plans if they did not achieve expectations of sales targets or compliance requirements.

48. The claimant, after making initial contact with a potential client by telephone or email, following provision of a lead, made her own decision as to how to follow up that lead, if the potential client agreed to further contact. This could be by telephone and/or a face to face meeting. If the claimant attended face to face meetings, this was at her own expense.

49. There was some evidence about partial reimbursement of one hotel expense to the claimant but it appears this was a one-off. The claimant was, in general, responsible for meeting her own expenses.

50. Emails were sent to all staff, including employed and self-employed advisers. These included about meetings for CPD purposes which were described as mandatory.

51. The respondent is authorized by the Financial Conduct Authority (FCA). Graham Evans, the respondent's Head of Compliance, manages the risk of advisers, whether they are employed or self-employed. If the adviser is an employed adviser, Graham Evans will feed back concerns to the employee's line manager. Any possible termination of employment of an employee will follow application of the respondent's disciplinary process. This is not followed when the concern is about a self-employed adviser. Both employed and self-employed advisers were told that they must consult Graham Evans, and/or get his approval

about certain things. An example is in an email dated 13 April 2020 in which Graham Evans writes to all advisers about property purchase for buy to let investment purposes (p.215). He wrote that any such cases could only be considered for application once they had been fully discussed and signed off and approved by him on a case-by-case basis. Graham Evans, when it was put to him in cross examination that he could override an adviser if he thought a certain course of action was too risky, said it had never happened and he was not going to be the judge and jury as to whether they could do something; he was just pointing out questions which should be put to customers. I find that Graham Evans did not have the power to stop a self-employed adviser giving particular advice if that adviser insisted on going against his advice. However, the self-employed advisers were given a very strong steer that they should follow his advice, to the extent that emails told them certain things needed Graham Evans' approval, even when he did not have the power to stop them. I find it more likely than not that, had an adviser gone against Graham Evans' advice, they would have been at risk of their contract with the respondent being terminated. The respondent did have the power to insist, in relation to the work of employed advisers, that certain things were approved by Graham Evans.

52. An adviser can be authorized by a firm authorized by the FCA or can be authorized directly by the FCA. The respondent gives authorization to their self-employed advisers. An adviser on equity release can only be regulated with one firm so advisers cannot do business both under the respondent authorization umbrella and under their own direct FCA authorization. The respondent would not send leads to advisers who would not then transact the business under the respondent's umbrella. The respondent pays for leads from various sources.

53. There was some time spent in evidence about whether a self employed adviser who had a self generated lead, would be prevented by the restrictive covenants in their contract in contacting that client after the contract came to an end. The view of the respondents was that they would not, if it amounted to new business e.g. a further loan. I do not consider it necessary for the purposes of my decision to make any finding as to whether the respondent's witnesses were correct in their interpretation of the restrictive covenants.

54. If the claimant wanted to advertise her services, she had to get the approval of the form of advertisement from Mark Gregory. I accept Mr Gregory's evidence that this was to ensure compliance with FCA requirements.

55. During her engagement with the respondent, the claimant had a number of 1:1s with Lynsey Harrison. Although Ms Harrison described these as "catch ups", there appears to have been a degree of formality to them, from the document which was sent after the meeting. An example is that following a meeting on 10 February 2021 (page 276). This includes statistics on number of leads provided in a review period of January to December 2020 and in January 2021, applications submitted and commission/fees received. There is a comment about whether leads are being managed effectively and whether any actions are required. Under a heading of "expectations from the company", Ms Harrison recorded: "As a company, the optimum number of leads for a full-time adviser is 40 leads per month. From these, we would expect a conversion rate of 1 in 10. We would also like you to achieve 1 self-generated sale per month. Your average sales in 2020 were 3.8 per month at a conversion rate of 1 in 16.1." She also wrote: "FLG – No more than 30

outstanding tasks at any one time (leads will be stopped if high number of outstanding tasks).” She wrote: “These expectations will be monitored quarterly & lead numbers/file checks will be adjusted accordingly.”

56. The claimant and Ms Firmin gave evidence that Lynsey Harrison told them that they could not have a What’s App group with other advisers. Lynsey Harrison accepts that she told them they should not discuss leads on such a group but denies that she told them to delete the App. I accept that the claimant and Ms Firmin both believed Ms Harrison to be telling them to delete the group. There is no contemporaneous record of what Ms Harrison said so there is no reliable evidence as to the words used. I do not consider it necessary to make a finding as to what happened beyond what is accepted to have been said, about not discussing leads on a What’s app Group.

57. Ms Harrison also told the claimant to make a change in relation to a Facebook post, where the claimant had made a comment about the US elections. Ms Harrison did not want the respondent’s name to be associated with the post.

58. On 23 February 2022, the claimant was invited to attend a meeting with Graham Evans the following day. The claimant attended the meeting and recorded the meeting, without the knowledge of Graham Evans. Graham Evans raised concerns about the claimant’s work and relationship with compliance. He raised concerns about there being no client agreement on a file, no fee agreement, no ID, saying: “all these things are putting the business at risk and they really can’t continue Lucy. I hate to be the one to tell you.” The claimant then asked: “So this isn’t a one-to-one meeting, this is a disciplinary meeting?” Graham Evans replied: “No, Yes, very much so. I didn’t want to spook you yesterday, but it’s just not sustainable.” It is agreed that the claimant’s engagement with the respondent was brought to an end by Graham Evans in this meeting.

59. I accept the evidence of Graham Evans that, if the claimant had been one of their employed advisers and her risk assessment gave cause for concern, he would have discussed her performance with her line manager and then arranged a joint informal meeting to discuss his concerns. The discussion would be recorded together with any agreed actions to correct the failings. This could move to a performance improvement plan and potentially dismissal depending on performance. He understood that the claimant was self-employed so he believed there was no formal process required to sever the contract.

60. The claimant did some volunteering with a dog charity. This was not part of any business conducted by the claimant personally or by the PSC.

Submissions

61. Ms Firth produced written submissions and also gave oral submissions for the respondent. Ms Brooke Ward made oral submissions only for the claimant. The representatives agreed that they would each make oral submissions limited to 20 minutes each, to enable us to complete the part of the hearing with the parties on 24 April 2024.

62. Ms Firth's written submissions helpfully took me through various relevant legal authorities. Ms Brooke Ward referred to one employment tribunal level judgment but was unable to provide me with a copy of the judgment and reasons since it was before the time such judgments appeared on the Tribunal's website. I had not received a copy of the brief case report which Ms Brooke Ward had read, by the time I was preparing these reasons.

63. In summary, the respondent's submissions were that the claimant was not working under a contract with the respondent during the period when any work was done, the contract from March 2020 being between the respondent and PSC, so the claimant could not be a worker. If there was a contract between the claimant and the respondent, the claimant was not a worker because the claimant was not obliged to perform any work for the respondent. Personal service was also not required because there was a genuine substitution provision. The claimant and the PSC were carrying on a business undertaking of which the respondent was a customer. If the claimant was a worker, she was not an employee, because there was no mutuality of obligation in the sense in **Brook Street Bureau Ltd v Dacas** [2004] EWCA Civ 217, nor was there the requisite control.

64. In summary, the claimant's submissions were that the side letter read with the March 2020 contract meant that the claimant did work under a contract with the respondent to which she was a party. The PSC was set up on the suggestion of Mark Gregory. The reality of the situation was that the arrangements were to distance the respondent from employment and IR35 status. The case law around status was to protect claimants against creative arrangements.

65. While there was a clause allowing substitution, the reality was that the clause was unworkable. Personal service was required.

66. The respondent was not a client or customer of the claimant. The claimant was not allowed to advertise her own services. She could not work for another business in similar operations. The claimant was recruited to work as a integral part of the respondent's business.

67. Ms Brooke Ward submitted that the claimant was a worker.

68. The claimant also submitted that she was an employee in the ERA sense. There was a high degree of control, beyond what was required to satisfy FCA requirements. There was an expectation of a conversion of 1 in 10 leads and an expectation of the way leads should be worked. There was mandatory attendance at certain events for CPD. There was mutuality of obligation. The giving of the loan to the claimant must have been in the expectation that the claimant would service the loan by the claimant doing work for the respondent, based on leads provided by the respondent. There was an expectation that leads would be worked. If not,

they could be removed. Reasonable notice was required if the claimant was not available to take leads.

The Law

69. Definitions of "employee" and "worker" for the purposes of complaints brought under the Employment Rights Act 1996 (ERA) are included in that Act. "Worker" is a wider category than that of "employee". All employees, within the ERA definition, will be workers, but not all workers will be employees.

70. An "employee" is defined by section 230(1) ERA as being "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." "Contract of employment" is defined as meaning a contract of service or apprenticeship. Whether an individual works under a contract of service is determined according to various tests established by case law. A tribunal must consider relevant factors in considering whether someone is an employee. An irreducible minimum to be an employee will involve control, mutuality of obligation and personal performance, but other relevant factors will also need to be considered.

71. The definition of "worker" in s.230(3) ERA is "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."

72. "Employment" for the purposes of the Equality Act 2010 (EQA) is defined in section 83(2)(a) as follows: "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work."

73. The definition of "worker" in s.230(3) ERA has been equated by the Supreme Court with that of "employment" in s.83(2)(a) EQA: **Bates van Winkelhof v Clyde & Co LLP [2014] UKSC32**.

74. The authorities of in **Plastic Omnium Automotive Limited v Horton [2023] EAT 85, Sejpal v Rodericks Dental Ltd [2022] EAT 91** and **Catt v English Table Tennis Association [2022] EAT 125** all emphasise the importance of applying the statutory tests in a systematic way. The first question for determining worker status is whether there was a contract between the claimant and the putative employer. As HHJ Tayler states in paragraph 17 of **Sejpal**, the nature of the agreement is not to be analysed by applying undiluted common law contractual principles. He writes: "While there must generally be a contract, the true nature of the agreement must be ascertained and contractual wording, that may have been designed to make things look other than they are, must not be allowed to detract from the statutory test and purpose." In paragraph 19, HHJ Tayler quoted from the Supreme Court decision in **Uber BV v Aslam [2021] UKSC 5,** when writing that the realistic and wordly-wise determination of the true nature of the agreement between the parties must be undertaken with a focus on the statutory provision. The parts quoted included what Lord Leggatt wrote in paragraphs 70 and 76 of the **Uber** judgment:

> "70. The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose….
>
> "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 "worker". To do so would reinstate the mischief which the legislation was enacted to prevent. 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."

75. HHJ Tayler commented at paragraph 23 that the concept of mutuality of obligation goes principally to the issue of whether there is a relevant agreement or agreements. There must be mutuality of obligation for there to be a contract at all.

76. At paragraph 29, HHJ Tayler wrote that the concept of substitution is particularly relevant to the question of whether an agreement is for personal service. He quoted from the Court of Appeal decision in **Pimlico Plumbers Ltd v Smith [2017] ICR 1511**, which included the statement that a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality.

77. In **Catt**, at paragraph 50, the President of the EAT, Mrs Justice Eady, wrote that the Tribunal's focus in that case should have been on the question whether there was a contract between the claimant and the respondent whereby the former undertook to perform work or services for the latter. Eady P considered the Tribunal's reasoning suggested that it had lost sight of this question, focusing instead on questions of vulnerability, subordination and dependency. Eady P wrote in paragraph 50 that "Those may well be very relevant issues in many cases – in particular where the standard form documentation provided by the more powerful party does not reflect the reality of the relationship – but they were unlikely to provide material assistance in the circumstances of the present case."

78. In **Plastic Omnium**, the claimant had a personal services company which entered into a written contract with the respondent specifically for the performance of services to it by the claimant. The claimant had been invited by the respondent, some years after he started working for the respondent, to become an employee but the claimant was satisfied that the arrangement he had was beneficial to him and the offer was not of interest to him. The Tribunal found that the 2011 agreement reflected the true agreement between the parties. The EAT allowed an appeal against a decision of the Tribunal that the claimant was not a worker. In paragraph 55, HHJ Tucker referred to the Tribunal's finding that the 2011 agreement reflected the true agreement between the parties and that they acted in accordance with it. She wrote: "The Judge therefore concluded that there was a contract in existence pursuant to which the Claimant provided services, personally, to the Respondent. In addition, the Judge concluded that that contract reflected

the reality of the agreement between the parties. What the Judge did not do, however, was to consider who the parties were to that agreement. The agreement was not between the Claimant and the Respondent. Instead, it was between ProManProManOne (entities with their own legal personality) and the Respondent."

79. In paragraph 59, HHJ Tucker concluded that the Judge erred in law by failing to engage with the issue that the contract was not between the parties. She wrote: "Further, the Judge found that the contract was an accurate reflection of the parties' agreement. The Judge also made a finding that the Respondent had asked the Claimant to consider becoming employed by it, but that the Claimant declined that offer, preferring the existing basis upon which he worked for the Respondent." HHJ Tucker continued in paragraph 60: "The finding that the Claimant was subordinate to others within the Respondent, and dependent (presumably upon the Respondent) as its primary or sole client, did not mean that the Judge could simply step around, or ignore that significant issue. Those issues could have been relevant to whether the written agreement reflected the reality of the agreement between the parties, or, for example, whether the structure created by it was unilaterally imposed upon the Claimant. Yet, the Judge concluded that the written agreement was in accordance with the reality, and the parties' agreement, and of benefit to the Claimant."

Conclusions

80. I consider first whether the claimant was a "worker", which is the same test for employment in the EQA sense.

81. The first question to be determined is whether there was a contract between the claimant and the respondent whereby the claimant undertook to perform work or services for the respondent.

82. As Ms Firth has pointed out, there are two periods: the first being from the first contract entered into on 28 January 2020, and the second being from the second contract entered into on 24 March 2020. There is no dispute that there was a contract between the claimant and the respondent in relation to the first period, although the respondent makes arguments that the claimant was not a worker even during this period, because the respondent was a client or customer of the claimant. I will return to this argument.

83. In relation to the period of engagement when the second contract was in place, the second contract was, on the face of the written terms, between the PSC and the respondent. Whether, if this had been the only written document relating to the terms of engagement, I would have found that the agreement did not reflect the reality of the situation and that there was, in fact, a contract between the claimant and the respondent, is one I do not need to address. This is because there is the side letter, signed on the same day as the second contract, by the claimant, addressed to the respondent. This side agreement makes it clear, in my view, that there is an agreement to which the claimant and the respondent are parties, for the claimant's services to be provided personally to the respondent. The side letter makes it clear that it is the claimant who is to make sure that the PSC provides her services to the respondent. Point 2 in the letter expressly sets out the claimant's commitment to render her services to the PSC so that it can perform its obligations

under the second contract. The claimant personally undertakes, in the side letter, to comply with restrictive covenants in the same terms as those in the second contract.

84. I conclude that the true intention of the parties was that the claimant agreed to provide her services to the respondent in accordance with the obligations contained in the side letter read with the second contract. Mr Gregory was frank in his evidence that the arrangements were done on the advice of their accountant, with the aim of avoiding the application of IR35. Whether or not that aim was achieved is not a matter for me to decide. This was not a situation, as in **Plastic Omnium**, where the claimant freely chose for her services to be provided to the respondent via a PSC. This arrangement was imposed on her. If she wanted to work for the respondent, this was to be the way things were arranged. I conclude that the second contract does not reflect the reality of the situation. There was, in reality, a contract between the claimant and the respondent. There was an element of mutuality of obligation in the arrangements between the claimant and the respondent. If the claimant did work within the scope of the agreement, the respondent would pay her, via her PSC, an amount of fees/commission. The contract contemplates the claimant making herself available for work at least some of the time, requiring her to notify the respondent if she is unavailable for work.

85. The service to be provided by the PSC was the personal service of the claimant. The terms of the side letter support this. The substitution clause was conditional. The claimant could appoint "a suitably FCA compliant, qualified and skilled substitute for the individual to perform the services on his behalf, provided that the substitute shall be required to enter into direct undertakings with the company, including with regard to confidentiality". In practice, approval would have only been given for a substitute who had been trained by the respondent in their systems and processes. The claimant could not appoint someone to substitute for her in the provision of advice on equity release, if the claimant suddenly found herself unable to work a particular lead, unless the work was passed to another of the respondent's self-employed advisers.

86. The fact that the second contract and side letter replaced a contract to which the claimant and the respondent were the parties, written in very similar terms to the second contract, supports a conclusion that the arrangements entered into with the second contract were deliberately structured as they were to try to mask the reality of the situation which had been more correctly set out in the first contract.

87. I conclude, therefore, that in relation to both the first and second periods, there was a contract between the claimant and the respondent whereby the claimant undertook to perform work or services for the respondent.

88. Given this conclusion, the claimant was a worker unless the respondent was a client or customer of any profession or business undertaking carried on by the claimant. I conclude that the respondent was not a client of such a business. The claimant could not do equity release work for any other client. She relied on the respondent's FCA authorization to do this work and could not have had FCA authorization also in her own right to do this type of work. She set up her PSC with the sole purpose of doing work for the respondent. She did not do work of any other type for anyone else as part of a business carried on by her. Any volunteering the claimant did with a dog charity was not part of a business conducted by her.

89. I conclude that the claimant was a worker and an employee in the EQA sense throughout her engagement with the respondent.

90. I turn next to whether the claimant was an employee of the respondent within the ERA definition. I do not consider there is any distinction between the first and second periods for this purpose, given my conclusions that the claimant was a worker throughout her engagement with the respondent. I must consider all relevant factors to determine whether the claimant was an employee. An irreducible minimum to be an employee will involve control, mutuality of obligation and personal performance, but other relevant factors will also need to be considered.

91. I consider first mutuality of obligation. In concluding that there was a contract between the claimant and the respondent in relation to the second period, I concluded that there was some mutuality of obligation. However, this was of a limited extent. The respondent was under an obligation to pay the claimant on a fee/commission split basis for work done. The contract contemplates the claimant making herself available for work at least some of the time, requiring her to notify the respondent if she is unavailable for work. However, the contract does not require the claimant to make herself available for work for any particular amount of time. I accept, in practice, that, if the claimant did not make herself available for large amounts of time, the respondent might respond by not sending her many, if any, leads in the periods when they understood her to be available. There is no commitment in the contract to a minimum amount of leads to be provided by the respondent, although I conclude there was an expectation that the respondent would provide at least some leads to the claimant, at times when she had not indicated she was not available for work.

92. In relation to control, I conclude that there was a greater element of control over the claimant's work than the respondent asserted. Some of the control was necessary to ensure FCA compliance. However, emails requiring certain things to be approved by Graham Evans were written in terms stronger than reflecting him giving advice. I conclude that the discussions with Ms Harrison were more than simply coaching. The notes show there were expectations about conversion rates. However, the claimant had considerable flexibility about how (subject to FCA compliance) and when she did her work. There was an expectation of making initial contact with the prospective client within an hour of the lead being sent (except when it was sent out of office hours) but otherwise the claimant could do the work when she chose. The claimant could choose, in agreement with the client, whether contact after the initial email or telephone contact, was by a face to face meeting or by telephone or email.

93. The claimant provided her own equipment at her own expense. She paid a monthly fee to the respondent for use of their systems. These factors point against employment status.

94. I conclude, having regard to the limited control exercised by the respondent and the limited extent of mutuality of obligation taken together with the other factors pointing against employment status, that the claimant was not an employee of the respondent within the ERA sense.

Employment Judge Slater
Date: 29 April 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
29 April 2024

FOR EMPLOYMENT TRIBUNALS

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