Case No: 2203057/2019/V

EMPLOYMENT TRIBUNALS

Claimant: Miss B Pawlicka

Respondent: Gregory Park Holding Ltd
T/A Four Seasons Hotel Hampshire

PRELIMINARY HEARING

Heard at: **Bristol** **On:** **6 August 2020**

Before: Employment Judge Midgley

Representation
Claimant: In person
Respondent: Mr B Phelps, Counsel

RESERVED JUDGMENT

1. The claimant was not an employee of the respondent but was a worker for the purposes of section 230 ERA 1996 on the occasions where she accepted offers of work.

2. The claimant is not therefore entitled to bring a claim of unfair dismissal pursuant to sections 94 and 100 ERA 1996. The claim under sections 94 and 100 ERA 1996 are therefore struck out.

3. The appropriate course to take in respect of the claim under section 44 ERA 1996 will be decided on receipt of written arguments from the parties addressing the consequence of the decision of the High Court in (R on the application of the Independent Workers' Union of Great Britain) v The Secretary of State for Work and Pensions [2020] 11 WLUK 139 ("IWUGB"); and in particular addressing whether (a) the claim should be stayed, pending the appeal in IWUGB; (b) should be permitted to proceed; or (c) should be dismissed.

REASONS

The Claim

1. By a claim form presented on 17 August 2019 (at London Central), the claimant brought complaints of unfair dismissal contrary to sections 94 and 100(c) ERA 1996 on the grounds that she had brought to the respondent's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety.

2. The relevant factual circumstances relating to that allegation are that on 26 May 2019 the claimant cut her finger and advised the respondent that she was unable to complete a shift because of the risk of infection. The claimant had been offered work on the 27th and 28th of May 2019, and had accepted those offers, but declined to work on the 27 May due to her injury, but on 28 May indicated that she was available to work. The respondent notified her that her shift had been reallocated on the basis that she had indicated she was unable to work shifts in question. The claimant alleges that she was not offered another shift after that date under her resignation on 23 July 2019. As I understand the case (it is not clearly identified in the ET1), that is the nature of the claim under section 44 ERA 1996,

3. On 8 November 2019 the respondent filed its response by which it defended the claims. In particular, it argued that the claimant was not an employee and therefore was not entitled to bring a claim pursuant to section 100 ERA 1996.

4. On 27 May 2020 a telephone case management hearing before Employment Judge Gray occured. The claimant did not attend, and so the precise nature of the claims could not be clarified, but the matter was listed for this preliminary hearing to determine whether the claimant was an employee or a worker.

Procedure, Hearing and Evidence

5. The preliminary hearing was listed by Employment Judge Gray to determine the following issues:

   5.1. the claimant's application pursuant to rule 37 to strike out the respondent's response;

   5.2. the claimant's application for an anonymity order pursuant to Rule 50;

   5.3. whether the claimant was an employee the respondent.

6. The hearing was conducted by the Kinly Cloud Video Platform ("CVP").

7. The claimant confirmed at the outset of the hearing on 6 August 2020 that she was no longer pursuing her application for the response to be struck out or for an anonymity order.

8. I was provided with an agreed bundle of 77 pages, a statement in support of the claimant from a Miss Smolinska and for the respondent a statement from Ms Nicki Johnston, the respondent's Regional Director of People and Culture.

Miss Smolinska did not attend to give evidence and I explained to the claimant that in those circumstances I could give her statement little weight.

9. It was agreed that the claimant's skeleton argument would be treated as her witness statement and, consequently, both the claimant and Miss Johnson gave evidence by affirmation and answered questions from Mr Phelps, and the claimant respectively, and from me.

10. During the hearing, the claimant complained that she had had insufficient time to consider the statement of Miss Johnston and to prepare her questions for her. I therefore permitted the claimant an hour over the lunch break to consider Miss Johnston's statement for that purpose. In particular I directed the claimant to paragraphs 2 to 5 and 7 of the statement, indicating that it appeared they contained matters that she would need to challenge to establish that she was an employee and, if she did not do so, the likelihood was that I would accept that evidence unless it was manifestly obvious that it was implausible or that Miss Johnson was simply not credible.

11. After the adjournment the claimant confirmed that she was ready and able to continue her cross examination. She then proceeded to ask a series of sensible questions.

12. The parties had each prepared a skeleton argument and expanded upon them orally in making their closing arguments.

The Issues

13. The issue to be determined was whether the claimant was an employee or a worker as defined in section 230 ERA 1996.

The Background Facts

14. The respondent operates a number of hotels. The premises in question is the Four Seasons Hotel Hampshire ("the Hotel"). Amongst the services provided at the Hotel is a childcare service called "Kids for All Seasons" (hereinafter "the Club").

15. The demand at the Hotel is seasonal and the respondent requires flexibility to move from a minimum to a maximum number of staff depending upon that demand. Consequently, it employs 260 full-time and part-time employees and a bank of approximately 100 support workers who are engaged through the respondent's Casual Worker Agreement ("the Contract") to meet the varying seasonal demand.

16. The respondent's practice was to email the workers engaged on the Contract when bookings suggested that demand would be high and/or staff absence indicated that there would be insufficient staff. The workers could then indicate whether they were willing to work the specific shifts offered.

<u>The Contract</u>

17. The Contract identifies the worker as a "casual worker" and specifies that it creates no obligation on the Hotel to offer work or on the casual worker to accept it. In addition, it specifies that the offer of work creates no presumption

of a further offer of work or any presumption of any obligation that future offers of work must be accepted. Similarly, it expressly negates any continuity of service between the termination of one shift/session and the commencement of the next and/or any global or umbrella relationship in between any individual engagements.

18. Different hourly rates of pay are identified for work in the Club and Housekeeping teams.

19. The Contract does not guarantee any basic hours of work.

20. Where a worker is engaged, a uniform may be provided, and the contract requires that it is worn at all times.

21. The Contract does not contain any provision for sick pay, but rather requires that a worker who has accepted work must notify the respondent no later than two hours before the scheduled start time if they are unable to attend due to sickness.

22. Either party is entitled to terminate the agreement without notice, so that an offer of work can be withdrawn or an agreement to undertake work can be withdrawn with no notice even on the day in question. However, the respondent did not adduce any evidence to establish that such a course had ever been taken.

23. The Contract refers to a disciplinary and grievance process. Mrs Johnston's evidence, which I accept, is that the respondent has a series of policies and procedures to ensure that workers and employees are treated in a fair and reasonable way, and for that reason, has drafted the Contract to include the disciplinary and grievance procedures for workers.

24. The respondent provides training for its workers. Although there was limited evidence adduced by the respondent on the point, it is clear that the bank workers were given training in relation to health and safety, and the processes and expectations of each role. By way of example the claimant adduced a training checklist for the 'turndown' service in the Housekeeping team, which listed the tasks to be undertaken.

25. Those provisions necessarily allowed for a degree of control of the workers in the manner in which they performed their duties, whilst ensuring that the respondent's standards were maintained.

26. When signing a Contract, workers are required to provide a signed consent for a Biometric fingerprint to be taken to enable the respondent to monitor their attendance as the respondent uses biometric fingerprint scanners for the workers and employees to sign in and out of work. The relevant form, the 'Biometric fingerprint Declaration', which is provided to both workers and employees states "I ("the employee")…" Mrs Johnston's evidence, which I again accept, is that the wording was drafted because the policy applied equally to workers and employees, and it was an oversight that the term "employee" rather than "employee/worker" had been used on the form.

<u>The claimant's engagement</u>

27. The claimant signed a Contract on 12 October 2018. She was trained by the respondent in the tasks she was to undertake and was required to sign a Biometric Fingerprint Declaration.

28. Between October 2018 and January 2019, the claimant accepted an increasing number of hours, with the result that in January 2019 she worked 91 hours. She was engaged to work in the Housekeeping team but accepted an increasing number of shifts to work in the Club. She was provided with a uniform and the necessary training.

29. Between January and February 2019 Myuki Kawamoto, who appears to have managed the casual workers, emailed the claimant on several occasions asking whether she was willing or able to work on certain days or to cover certain shifts. On each occasion is clear that the claimant had the option to reject the proposed shift, and there is no evidence of any compulsion on her to accept them. The claimant accepted in cross examination that she refused certain shifts that were offered to her, although she said she did so on limited occasions.

30. In February 2019, following the surge in demand at the Hotel relating to the Christmas and New Year periods, the requirement for Housekeepers and Club members reduced. Consequently, the claimant‘s hours reduced to 40 that month.

31. As a result of the reduction, the claimant accepted and started a part-time role with the Ministry of Defence as a Personal Assistant commencing in February (she had applied for the role in November 2018). She continued in that role until June 2019.

32. The claimant accepted in cross examination that she only accepted shifts from the Hotel which suited her personal circumstances and did not conflict with the hours that she worked elsewhere. Thus on 30 April 2019, the claimant emailed Briony Norman, the respondent's Recruitment Manager, advising her that she was working for the Ministry of Defence as a Personal Assistant, but enquired whether it be possible to have a permanent contract for fixed hours in some capacity, stating that the current system was not working for her. The claimant enquired about work at the weekends (so that she could undertake alternative employment in the week).

33. Miss Norman replied, indicating that the respondent was willing for the claimant to work for it at weekends, and for the claimant to undertake work for other employers at other times.

34. It is clear to me from the correspondence in the bundle and the claimant’s evidence during the hearing, that she sought a permanent role with the respondent with fixed hours to enable her to manage her finances. Her frustrations with the respondent derived from her inability to secure fixed and guaranteed hours. Consequently, when that was not possible, the claimant sought to maintain her income by accepting other work from other employers.

35. The claimant was clearly successful in doing so; she accepted that whilst she was engaged with the respondent in accordance with the terms the Contract, she undertook work for six other companies. Such work included the part-time role above and work as a deputy manager for a separate company. Thus, the

claimant only worked one shift for the respondent in each of the periods 18 March to 14 April, and 15 April to 19 May 2019.

36. On 26 May 2019, the claimant was carrying out a turndown service as part of the Housekeeping team and cut her finger on broken bottle whilst. The claimant indicated to her manager that she would be unwilling to work for the following three days because of her fears of infection with hepatitis B and septicemia is the wound became infected.

37. The claimant did not work between the start of June and the end of July 2019, although she remained on the respondent's list of casual staff. On 23 July 2020 the claimant requested a P45 and any outstanding holiday pay, stating that she no longer wished to accept further work from the respondent.

The Law

38. Section 230 ERA 1996 provides as follows:

> (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.

39. The essential test of a contract of employment remains that stated by MacKenna J in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 (" RMC ") at p.515C-D:

> "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."

40. The consideration of the law relating to that test was considered by the Supreme Court in Autoclenz Ltd v Belcher [2011] UKSC 41. I can do little better that to quote the Court's careful and helpful summary of the relevant legal principles to determine whether there was a contract of employment (sometimes referred to as a contract of service'), or a contract for services with a worker, or neither:

> "19. Three further propositions are not I think contentious:
>
> (i) As Stephenson LJ put it in Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612 , 623, "There must … be an irreducible minimum of obligation on each side to create a contract of service."
>
> (ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status*:* Express & Echo Publications Ltd v Tanton [1999] ICR 693, 699g, per Peter Gibson LJ.
>
> (iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg the Tanton case, at p 697g .
>
> 20. The essential question in each case is 'what were the terms of the agreement?'…
>
> 21… Aikens LJ put it correctly in the remainder of para 89 as follows:
>
> > "But in cases of contracts concerning work and services, where one party alleges that the written contract terms do not accurately reflect the true agreement of the parties, rectification principles are not in point, because it is not generally alleged that there was a mistake in setting out the contract terms as they were. There may be several reasons why the written terms do not accurately reflect what the parties actually agreed. But in each case the question the court has to answer is: what contractual terms did the parties actually agree?""

41. The Court of Appeal endorsed the approach of Elias J in Tanton at 57-59 to that issue (see 25 to 29) and the approach of Aikens LJ in Autoclenz in the Court of Appeal at 90 to 92 that:

> "What the parties privately intended or expected (either before or after the contract was agreed) may be evidence of what, objectively discerned, was actually agreed between the parties: see Lord Hoffmann's speech in the Chartbrook case [2009] AC 1101, paras 64–65. But ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed."

42. That task, as the Supreme Court identified in Autoclenz, necessitates a purposive approach which requires the tribunal to take into account the relative bargaining power of the parties in deciding whether the terms of any written agreement in truth represent what was agreed, and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only part (see paragraph 35).

43. Once the terms of the contract have been identified, the necessary task for the tribunal is to determine what the nature of that contract is. In order to be a contract of employment the following must be present:

    43.1. There must be mutuality of obligations:

        43.1.1. Indeed 'if there are no mutual obligations of any kind then there is simply no contract at all,… If there are mutual obligations, and they relate in some way to the provision of or payment for, work which must be personally provided by the worker, there will be a contract in the employment field; and if the nature and extent of controller sufficient, it will be a contract of employment' (see James v Greenwich London Borough Council [2008] EWCA Civ 35 (EAT) per Elias J at para 16).

        43.1.2. In order to be an employment contract mutuality must subsist over the entire duration of the relevant period (see Clark v Oxfordshire Health Authority [1998] IRLR 125).

        43.1.3. An expectation of being offered work, resulting from the practice over a period of time, can result in a legal obligation to provide some work or perform work provided (see St Ives Plymouth Limited v Haggerty UKEAT/0107/08, unreported 22 May 2008 and Addison Lee v Gascoigne [2018] ICR 1826).

        43.1.4. The question mutuality is relevant both to the question of whether there was a contract, and if so what sort of contract it was, whether one for service or one for services (see James and Quashie v Stringfellow [2013] IRLR 99 CA).

    43.2. There must a contractual obligation to provide the service personally (see Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51).

    43.3. There must be sufficient control of the one by the other to amount to a relationship of master and servant (Montgomery v Johnson Underwood Ltd [2001] EWCA Civ 318. All aspects of control are relevant including both the control exercised over the performance of activities, the contractual right to control and also the ability of a purported employee to pick and choose when they work. In that regard the test is not whether the putative master exercise day-to-day control, but whether the master retained a sufficient right of control (see White v Troubeck (UKEAT 0117/12/SM).

44. If there exists a relationship of client and customer, wherein the putative employee is offering services by selling products on behalf of his putative employer and his own products or services, that may well be a factor mitigating against any form of employment or worker relationships (see Inland

Revenue v Post Office [2003] IRLR 199 EAT, particularly at 46 where it was noted that it was not necessary that the business in question predates or is independent of the contract).

45. Similarly, if there is a contract, the fact that an individual is paid by clients and takes economic risk is a powerful pointer against a contract being one of employment; the Tribunal must examine and assess all the relevant factors which make up the employment relationship to determine the nature of the contract (see Quashie v Stringfellow [2013] IRLR 99 CA paras 48-51).

Workers

46. The requirement mutuality of obligation applies equally to consideration of whether an employee is a worker under section 230 (3) (b) (see Cotswold Developments Construction Ltd v Williams [2006] IRLR 181, EAT).

47. The absence of mutuality of obligation during the period between engagements may shed light on the character of the contract formed when engagements were undertaken (see Windle and anor v Secretary of State for Justice [2016] ICR 721, CA).

48. There must be an obligation to do at least some work (Commissioners for Her Majesty's Revenue and Customs v Professional Game Match Officials Ltd [2020] UKUT 147 (TCC)).

49. If sufficient mutuality of obligation exists, the tribunal must determine whether there is an obligation for personal service.

Section 44 ERA 1996

50. IN (R on the application of the Independent Workers' Union of Great Britain) v The Secretary of State for Work and Pensions [2020] 11 WLUK 139, the High Court considered whether (a) the Framework Directive 89/391 EC had been transposed in national law in s.44 ERA 1996 in a way which gave effect to the purpose of the directive and provided for sufficient equivalent protections for workers as were provided and intended in the Framework Directive.

51. The High Court held that:

51.1. Applying Pfeiffer v Deutsches Rotes Kreuz Kreisverband Waldshut eV (C-397/01) EU:C:2004:584, [2004] E.C.R. I-8835, [2004] 10 WLUK 104 that the term worker in article 3 of the Framework Directive should be afforded a broad interpretation to encourage the improvement of the health and safety of workers at work.

51.2. The "workers" protected by the Framework Directive included all those who fell within the autonomous EU law definition applicable for the purposes of the treaty provisions on free movement and equal pay, with the exception of domestic servants. "Employers" were those for whom and under whose direction workers performed services and who had responsibility for the undertaking and/or establishment. Consequently, the obligations of the Framework Directive were not properly transposed into UK law (see paras 82-83).

51.3. In particular that the requirement in art.8(4) and art.8(5) that the employer ensure that all workers were able, in the event of serious and imminent danger, to take appropriate steps to avoid such danger, and that they would not be disadvantaged for doing so was properly transposed as regards employees by the Employment Rights Act 1996 s.44 and s.100. However, the UK had failed properly to implement art.8(4) and art.8(5) in respect of limb (b) workers (paras 124, 126).

51.4. The absence of protection for limb (b) workers against unfair dismissal was a structural feature of UK employment law and there is nothing in art.8(4) and art.8(5) of the Framework Directive which requires Member States to confer protection from unfair dismissal on person who, under national law, enjoy no such protection (para 137).

Conclusions

52. I am satisfied on the balance of probabilities that the Contract represented the entire agreement between the parties and that it reflects the claimant's and respondent's intentions at the time of the agreement as to the terms under which the claimant would work.

53. The nature of the contract was clear from its title and from its terms and was understood and accepted by the claimant. That is reflected in the claimant's request to the Respondent for a contract with guaranteed hours that was made in April 2019.

54. As a consequence of the terms of the contract there was no mutuality of obligation; the respondent was not obligated to provide the claimant with work and the claimant was not obligated to accept it if it was offered. There were no guaranteed hours which were to be offered to the claimant. Applying the test in James there was no obligation on the respondent to offer even a minimum amount of work, and the claimant was entitled to reject all offers. That is entirely consistent with the respondent's use of a large bank of employees and the seasonal nature of the work in question. It is also consistent with the fact that respondent had no qualms that the claimant was accepting work from a number of other employers concurrent to her employment with it.

55. Moreover, even if the claimant were to accept an offer of work, she was entitled in accordance with the notice provisions to decline it even on the day she was scheduled to work, just as the respondent was entitled to withdraw it.

56. I am satisfied that the terms of the contract were reflected in the reality of its performance. As I have found there were occasions where work was offered to the claimant that she did not accept it. Such an arrangement is entirely inconsistent with the existence of any mutuality of obligation. The claimant would turn down shifts offered to her if they clashed with the hours that she was scheduled to work for other employers.

57. Moreover, the claimant worked for six different companies for differing periods between October 2018 and July 2019. The claimant accepted that such work included work on days when she was rostered to undertake work for the respondent, albeit at different hours. Following her injury on 26 May 2019, the claimant declined to work shifts on 27 May, notifying the respondent on the morning.

58. Accordingly, there can be no contract at all, and certainly no contract of employment during periods where the claimant was not working. There was no umbrella contract suggesting mutuality of obligation across any period. I therefore conclude that the claimant was not an employee for the purposes of section 230 ERA 1996.

59. I next consider whether the claimant was a worker for the purposes of section 230(3) ERA 1996.

60. When the claimant accepted a shift, I am satisfied on the balance of probabilities that in practice she was required to attend to work it. There was no evidence before me of any causal worker withdrawing an offer to work a shift on the day, or of the Hotel pulling such a shift. That is consistent of the context of the Hotel seeking to meet oscillating demand by requesting casual contract workers to accept shifts and to cover those where others pulled out before the day of the shift in question. The evidence of the emails from Ms Kawamoto suggests that such request were made approximately a week in advance.

61. On those occasions where work was offered and accepted, I therefore conclude that the necessary mutuality of obligation existed, both for the Hotel to provide work and to pay for it and for casual worker to undertake it.

62. The obligation was for the casual worker personally to undertake the work on the shift; there was no evidence and no suggestion before me of substitution ever having taken place.

63. When the casual worker attended a shift, they were required to wear a uniform provided by the respondent and to adhere to and comply with the fairly rigorous requirements of the Club or Houseworking departments by following the actions on the checklist in respect of which they had been trained by the Hotel. They were required to maintain certain standards of personal conduct and of performance and, were they to slip from those standards, could be subject to the respondent's disciplinary and grievance procedure.

64. I am satisfied therefore that the necessary elements of personal service, control and integration were present during each shift worked by the claimant for her to be classified as a 'worker' within the meaning of s.230(3)(b) ERA 1996.

The implications of the decision in IWUGB

65. The claimant's claim that she was unfairly dismissed because she raised health and safety concerns (pursuant to section 100 ERA 1996) cannot proceed as the right against such dismissal is only available to employees and not to workers.

66. At present, the High Court in IWUGB has declared that the United Kingdom has failed to properly implement the provisions of the Framework Directive (namely article 8(4) and the second paragraph of article 8(5)) which require that workers who take the appropriate steps in response to serious and imminent danger are not to be disadvantaged for doing so, unless they act carelessly or negligently.

67. The articles would not have direct effect against a private employer, which is not an emanation of the state. There is nothing in the IWUGB decision which addresses whether s.44 ERA 1996 can be interpreted in a manner which is compatible with the requirements of articles 8(4) and (5) of the Framework Directive. The present state of the law therefore suggests that the claim under s.44 ERA 1996 should be dismissed, although such a course would ignore the effect of the decision in IWUGB and would need to be reconsidered if the Court of Appeal upholds the decision of the High Court and addresses the question of the interpretation of s.44 ERA 1996.

68. The parties are therefore directed within 21 days of the judgment being sent to the parties to file and exchange written arguments as to whether the appropriate course is (a) to dismiss the claim under s.44 ERA 1996, (b) to permit the claim to proceed or (c) to stay the claim pending the outcome of the appeal in IWUGB.

69. I recognise that the claimant is a litigant in person, who is not legally qualified and for whom English is not her first language, and therefore do not expect or require her to address the law in any detail unless she wishes to do so.

_____

Employment Judge Midgley

Date: 18 November 2020

……..