EMPLOYMENT TRIBUNALS

Claimant: Miss M Watters

Respondent: Dominvs Group Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD on CVP (London Central) **On: 17 February 2021**

Employment Judge: Employment Judge Henderson (sitting alone)

Appearances
For the claimant: In Person
For the respondent: Ms E Misra (Counsel)

JUDGMENT

1. **The Tribunal has no jurisdiction to hear the claimant's claims for disability discrimination/harassment under the Equality Act 2010 (EQA): the claimant is not a "contract worker" under section 41 EQA; the claimant is not in "employment" within the meaning of section 83 (2) (a) EQA; the claimant is self-employed. The claims cannot proceed further.**

2. **The Final Hearing listed for 15-17 June 2021 (3 days) is vacated (no longer required);**

3. **The date provisionally agreed with the parties at the end of the Preliminary Hearing on 17 February, for further Case Management Discussions on 17 March 2021 is not required.**

REASONS

Introduction

1. The claimant brought complaints of disability discrimination/harassment under the Equality Act 2010 (the EQA) in an ET1 presented on 9 June 2020. The claimant was engaged by the respondent under a contract commencing on 2 December 2019, which terminated on 17 February 2020. The claimant says that this was a contract of employment and was terminated because she informed the respondent that she had been diagnosed with breast cancer. The respondent says that the claimant was a self-employed consultant and the Tribunal has no jurisdiction under the EQA; in the alternative the respondent denies that the claimant was discriminated against because of her disability.

2. This was an Open Preliminary Hearing (OPH) to determine whether the Tribunal has jurisdiction to hear the claimant's claim for disability discrimination/harassment under the EQA. The relevant issues are:
-was the claimant in "employment" as defined in section 83 (2) (a) EQA? Or
-was the claimant a contract worker under section 41 EQA? If not
-was the claimant self-employed?

The Relevant Law

3. Section 83 (2) EQA defines "employment" as "(*a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work*". Section 83 (4) provides that a reference to an employee is to be read with subsection (2).

4. Section 41 EQA provides as follows:
Subsection (5)" *a "principal" is a person who makes work available for an individual who is- (a) employed by another person, and (b) supplied by that other person in furtherance of the contract to which the principal is a party (whether or not that other person is a party to it).*
Subsection (7) *a "contract worker" is an individual supplied to a principal in furtherance of the contract such as is mentioned in subsection (5) (b).*

5. I was referred by Ms Misra to the relevant cases of **Autoclenz v Belcher & others [2100] UKSC 41** and **Windle v Secretary of State for Justice [2016] ICR 721 (Court of Appeal).**

6. At the time of the hearing, the Supreme Court had not yet issued their judgement in the case of **Uber BV and others v Aslam and others [2021 UKSC 5**. However, having had an opportunity to consider that decision, whilst it did not overturn any of the relevant parts of the authorities cited to me, it did take the principle in **Autoclenz** further, to clarify that the primary question for the Tribunal was one of statutory interpretation not contractual interpretation (paragraph 68 of Lord Leggat's Judgment). So that the starting point was not

the contract between the parties but the legislation and whether the claimant fell within the relevant definitions. The relevant statutory provisions in the Uber Case related to National Minimum Wage and holidays under the Working Time Regulations; however the decision would relate to any statutory provision affording protection to employees/workers.

Conduct of the Hearing

7. The hearing was held on the Cloud Video Platform (CVP) as agreed with the parties at the Case Management Discussion held on 9 December 2020. The parties provided an agreed electronic bundle of documents of 154 pages. Page references in this Judgment and Reasons are to that bundle.

Preliminary Issue on admission of witness evidence

8. I dealt, at the commencement of the hearing with a preliminary issue raised by the claimant who objected to the inclusion of the witness statements of Sean Brookes and Jordan Greenaway on behalf of the respondent.

9. The claimant said that the respondent's solicitors had exchanged the witness statement of Anthony Simler (in accordance with the Case Management Order) on 8 February 2021 simultaneously with the exchange of her witness statement. However, Mr Simler's statement was unsigned and undated and on 10 February the respondent sought to add the witness statements of Messrs Brookes and Greenaway. The claimant said she believed that Mr Simler's witness statement was "unlawful" in that it was unsigned, but also that the later witness statements gave the respondent an unfair advantage in that they had been prepared after the respondent had seen her own witness statement.

10. Ms Misra explained that after exchanging Mr Simler's witness statement on 8 February, the respondent learned that he would be unable to attend the OPH and so provided the two further witness statements. Ms Misra accepted that neither of the witnesses had been personally involved in the negotiations with the claimant (as had Mr Simler). However, each witness was able to give relevant evidence to the issues regarding the employment/self-employed status of the claimant.

11. Further, Ms Misra recognised the claimant's concern with regard to late exchange of the witness statements, but sought to reassure the claimant and the Tribunal that those statements did not seek to rebut what the claimant had said in her own statement and did not give the respondent an unfair advantage. Ms Misra also stressed that the majority of the relevant evidence was contained in the Trial Bundle which contained contemporaneous documentation around the negotiation of the claimant's contract with the respondent.

12. I confirmed with the claimant that she had an opportunity to read the witness statements and she also confirmed that she had prepared questions for the two witnesses in the event that their evidence was admitted at the hearing.

13. I explained to the claimant that the fact that witness statements were unsigned did not make them invalid. I could only attach limited weight to Mr Simler's statement as he was not present to give oral evidence. However, if I allowed the evidence of Mr Brookes and Mr Greenaway, they would each confirm their evidence on oath which would "override" the fact that they had not signed their witness statements.

14. Having heard from both parties I decided to allow Mr Brookes and Mr Greenaway to give evidence. I explained that their evidence was relevant to the issues I had to determine in the OPH regarding the claimant's employment/self-employed status in relation to the respondent. It would be of assistance to the Tribunal to hear their evidence.

15. I noted that the claimant's had read those statements and had prepared questions for the witnesses: accordingly she was not prejudiced by the admission of that evidence. On the other hand, the respondent would be prejudiced by the exclusion of the evidence, as Mr Simler was unable to attend the hearing. I also explained to the claimant that the Overriding Objective required me to ensure that there was a fair hearing for both parties.

16. I offered the claimant additional time to consider her questions to the respondent's witnesses, but she confirmed that she did not need this.

17. I therefore, heard evidence from the following: the claimant and on behalf of the respondent from Sean Brookes (Director of Asset Management and Development at the respondent) and Jordan Greenaway (director of Transmission Private, an agency which provides communication services to the respondent group). Each of the witnesses provided a written statement, which they confirmed on oath as their evidence in chief to the Tribunal.

Evidence and Findings of Fact

18. I shall only make such findings of fact as are necessary to determine the relevant issues set out above. Much of the evidence was not disputed: the issue between the parties was one of interpretation.

19. The claimant (C) has worked in the design industry for over 25 years. C confirmed in her oral evidence that she was the sole shareholder and director of K&M Ventures Limited (K&M) - a UK company set up on 3 March 2008 - registered number 06521641 (pages 83-85). C explained that she used that company as the legal entity to run her interior design business, which operated under the brand name, Lemiena and which she had established in 2004. Pages 86-94 were extracts from Lemiena's website. C confirmed that the Lemiena business had been set up to enable her to open trade accounts which would in turn allow her to obtain trade discounts for her clients.

20. C confirmed (in response to a question from me) that she also used K&M as a legal vehicle to receive income from her rental properties; for telephone bills and various "little projects" of hers, such as small interior design jobs. She said

that she if she took money out of K&M, she did so through director's fees. She confirmed that she had never been employed by K&M and had no employment contract with that company. C made reference in her evidence to her accountant who advised her on financial matters for K&M.

21. Dominvs Group is a family owned group of companies, creating and developing properties (including a growing hotel collection) in prominent postcodes across the UK. The owners are Sukhpal Ahluwalia (SA); his wife Rani Ahluwalia (RA) and their three sons.

22. C attended an interview with SA and Mr Greenaway (JG) on 12 October 2019. The initial meeting was to see if C was suitable for the vacant Chief of Staff role. C described this role in her oral evidence as a PA or First Aide, though I note that her CV (pages 111-115) submitted for this role is headed "EA (Executive Assistant) and Chief of Staff" and set out her most recent experience acting as Head of Staff; PA for various organisations but also referred to "working on private projects".

23. JG said that it was identified during the meeting on 12 October, that C did not have the relevant experience/qualifications (e.g. legal) for the Chief of Staff role. However, during the interview C mentioned her interior design business and discussions then took place with regard to a business opportunity for a new interior design partnership between C and the respondent, in particular with RA.

24. C was referred in cross examination to email exchanges starting on 21 October 2019 (pages 35-43) and she accepted that these clearly referred to her working with the respondent (particularly with RA) in a joint business partnership, which would involve C using her own business contacts as well as being introduced to those of the respondent.

25. At page 36 (13 October) C refers to relishing the opportunity "to grow a successful partnership" and sends a link to her Lemiena website. At page 37 (22 October) C refers to "business opportunities" which she can offer the respondent; she also refers to her exhibiting at the recent Independent Hotel show in London and offered to share her "leads" obtained there with the respondent. At page 39 (22 October) C writes to RA referring to their recent meeting and to connecting and working together and to "our projects". At pages 41 and 42 (24 October) there is document headed "Business Partnership with Rani Ahluwalia and Melanie Watters", which sets out the basics of a business plan.

26. C accepted in cross-examination that these all referred to a joint business venture, but she said that her long term plan was to be a director (as an employee) in any start-up company. However, I find that the tone of the documentary evidence (both to and from C) does not suggest that this is the case.

27. C referred to her email of 9 November 2019 to SA and Mr Simler, which she said showed her intentions. This referred to her need an income of £5,500 net per month and refers to "a basic salary of £4000 net PAYE" and also to

separate director's fees invoiced through her company. However it also refers to her being a 50% shareholder. C also referred to an email to her dated 14 November from RA which referred to her job title being as "my PA". C said that this showed that the intention was that she should be RA's personal assistant. The email does say that this will be double-checked with SA. C also said in her oral evidence that SA had wanted C to train RA in business but that RA was more interested in C being her PA. C said that SA always had the final say in business decisions within the Alhuwalia family.

28. C met with Mr Simler (AS) on 12 November and in an email dated 13 November (page 46) he refers to them being "on the same page" and attaches a Consultancy Agreement (page 95) for signature. That agreement describes C and K&M jointly as the Consultant; the Services (in Schedule 1) are provided by the Consultant, but allow for a substitute to be provided. It was accepted that the contract lasted for less than two months and no substitute was ever provided. There is a one month notice period for both parties to terminate the contract. The Consultant has personal liability and agrees to indemnify the Company for any loss. Clause 13 states that the Consultant is an independent contractor and the contract is not one of employment. I find that the contract itself is consistent with a self-employed relationship between the company and the Consultant.

29. The Services at Schedule 1 referred to the Consultant being required to *"assist, advise and deputise for RA in starting up and building a branded interior design business, a fabric business and other duties as may arise such as diary management, setting agendas, attending meetings following up overseeing design and build of website, negotiating supply contracts amongst others".* The Services were to be provided remotely from the Consultant's home address or at other appropriate business addresses chosen by the Consultant.

30. On 18 November 2019 C emailed SA and AS (page 49) saying she had added her company details and would be signing the agreement. C said that in this email she had raised her concerns about the Consultancy Agreement not referring to her as an employee (which was what she had intended). However, C accepted in her oral evidence that the email did not raise this matter at all, but referred to the future development of the business and her wish to be involved as a director/shareholder and also to a 6-month trial period. She also wanted the title of Director to ensure she had the correct business profile when negotiating with those outside the respondent company.

31. C signed that Agreement on 2 December 2019. She said in her oral evidence that she had not read it all in detail; that she had not noted or fully understood the clause about status as an independent contractor and that she had not thought to take legal advice on the contract (despite the specific reference in clause 17.2 to each of those items). I asked why she had not taken legal advice and she said that she had wanted to trust the Ahluwalia family and did not want to "make a fuss" also she did not want to spend the money on instructing a lawyer.

32. Given C's own description of her business background and the fact that she has run her own business and company for many years and is experienced in taking professional advice from her accountant, I did not find her evidence to be plausible on this matter. I find (on a balance of probabilities) that C had read and understood the terms of the Consultancy Agreement; that she hoped that the business venture would be a success and that in due course she hoped to secure a role as a Director and Shareholder, which may well have included an Executive employment contract at that stage. I do not accept C's evidence that she believed that that Consultancy Agreement was in reality a contract of employment as a PA.

33. Turning to the evidence presented to me about the reality of the working relationship. On 23 January 2020 (page 74) K&M submitted an invoice to the respondent for C's monthly fee of £5000. This showed VAT of £1,019.23 charged. C said this had been drawn up by her accountant. She accepted that this showed that she had not expected to be paid under the PAYE system, which undermines the credibility of her evidence that she believed the contract was one of employment.

34. C referred to three practical matters, which she said indicated that she was an employee: a) she had a desk in the respondent's office; b) she had a company laptop and c) she had a company email address.

35. The respondent's evidence was that there was a hot-desking policy or people often used meeting rooms to work at the respondent's premises if they were free. JG said he often did this even though he was an external advisor. C attached to her witness statement an email from AS dated 9 December 2019 (in response to a question from C) explaining that she could use a free desk from Tuesday to Friday but would have to hot-desk on a Monday. C accepted that she did work from home occasionally. AS did tell C (page 68) on 9 December 2019 that the agreement was for full-time working: C was expected to be in the office when she did not have out of office commitments.

36. There was email evidence to show that C had asked for specific software to be provided for her own AirMac laptop, which had been duly done. SB agreed that C had asked to have the laptop of RA's former assistant, as it had various presentations and other diary information on it. He said that C was usually seen with two laptops: her own and that of the former PA. C did not challenge this evidence.

37. C accepted that she had requested a company email address (page 50). JG said that he too had a company email address as it make it easier when working with the respondent. C also accepted that she had asked for and used the title "Director of Projects" on the emails (for example pages 67 and 70). I also note that the content of the email addressed to RA on 13 December 2019 does not support C's assertion that she was carrying out only the role of PA.

38. C accepted that she did not expect to seek approval or agreement for any holiday or time off. C's substantive claim is that she was "dismissed" because she told RA on 17 February 2020 that she had been diagnosed with pre-

cancerous cells in her breast: she refers to working remotely for 4-6 weeks and to arranging the date of her operation to suit the respondent's business. C confirms this in an email to SA (cc'd to RA) in which she describes herself as a consultant and says that she is legally informing SA and is happy to take any time off as unpaid. There was no reference to sick leave and no medical certificates were provided to the company.

39. I do not find that C has shown on a balance of probabilities that these three matters (in paragraph 34 above) and the other evidence presented, show that she was in reality an employee of the respondent company.

Conclusion

Contract Worker – section 41 EQA

40. The claimant placed great emphasis on her position as a "contract worker" under section 41(5) EQA but unfortunately she cannot fall within that definition. This is based on her own evidence that she was never employed by K&M and so was not supplied by that company to the respondent.

41. The Tribunal has no jurisdiction to hear the claim under this section.

Employee in the extended sense – section 83 (2) EQA

42. As mentioned above in this section "employment" is defined as "(*a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work*". As the claimant was not legally represented she did not specifically identify whether she regarded herself as under a contract of employment or under a contract personally to do work. However, during her evidence she consistently said that she had been seeking to be employed and believed she had been carrying out the duties of a PA. I accept that some of her work may have been akin to a PA's duties as this was expressed as part of the Services in Schedule 1 of the Consultancy Agreement.

43. In his judgment in **Windle** Underhill LJ referred to employment under section 83 (2) (a) as "employees in the extended sense". He went on in paragraph 11 to say,

"*As to how the distinction is to be made between the two kinds of self-employment—that is, between employees in the extended sense and the "truly self-employed", as it is sometimes put—in* **Hashwani** *Lord Clarke JSC said, at para 34:"The essential questions … are … those identified in paras 67 and 68 of* ***Allonby [2004] ICR 1328*** *, namely whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services. Those are broad questions which depend upon the circumstances of the particular case. They depend upon a detailed consideration of the relationship between the parties*

…The answer will depend upon an analysis of the substance of the matter having regard to all the circumstances of the case."

44. On the basis of the findings of fact set out above I have found that the claimant fell into the latter category described above; namely as an independent provider of services who was not in a relationship of subordination with the person receiving the services. It may be that the role and future business relationship which the claimant had envisaged did not materialise as she had hoped, and that RA and the respondent did not regard her as a true business equal, but that does not necessarily alter her legal status.

45. I find that the consultancy agreement does appear to reflect the reality of the relationship between the parties.

46. I did not hear submissions on the **Uber** case as the judgment was not handed down until after the OPH. However, given Lord Leggat's words regarding the primacy of statutory interpretation over contractual interpretation my conclusions would not be altered by the **Uber** decision.

47. The claimant is not an employee for the purposes of section 83 (2) (a) EQA and the Tribunal has no jurisdiction to hear her claim for disability discrimination.

48. The Final Hearing dates set for 15-17 June 2021 (3 days) are vacated (no longer required). The provisional date of 17 March 2021 for a further Case Management Hearing is also not required.

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Employment Judge Henderson

JUDGMENT SIGNED ON: 26 February 2021

JUDGMENT SENT TO THE PARTIES ON
02/03/2021

FOR THE SECRETARY OF THE TRIBUNALS