EMPLOYMENT TRIBUNALS

Claimant: Mrs V Lobley-Eames

Respondent: Pastiche Europe Limited

Heard at: Manchester Employment Tribunal **On:** 16th September 2021

Before: Employment Judge Cronshaw (sitting alone)

Representation

Claimant: Ms Brooke-Ward (Counsel)
Respondent: Mr Perry (Counsel)

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant was an employee of the Respondent as defined by s230(1) Employment Rights Act 1996.

2. The Claimant, as an employee, is entitled to bring her claims of unfair dismissal and unlawful deduction from wages in the Employment Tribunal.

REASONS

1. This is a reserved judgment following a preliminary hearing on 16th September 2021 to determine the Claimant's employment status.

2. The hearing was a remote hearing which was consented to by the parties. The hearing took place by video conference using the Tribunal's CVP video platform. A face-to-face hearing was not held because it was not practicable due to Covid-19 restrictions, and no-one requested the same.

Background

3. The Respondent is an events and entertainment management company.

4. The Claimant started work for the Respondent on 1st June 2011. In summary, she was responsible for booking and organising events, training and providing entertainers and creating the performances offered at these events.

5. The pandemic hit the entertainment industry particularly hard and in March 2020, when lockdown was imposed, the Respondent indicated to the Claimant that she would no longer be paid by them. She was directed to the Self-Employment Income Support Scheme (SEISS) but asked to still carry out work for the Respondent so they would be in a good position to recommence events once lockdown was over.

6. The Claimant continued to work for the Respondent between March 2020 and October 2020 but did not receive any wage. On 30th October 2020 the Claimant sent an email to the Respondent giving 1 month notice of her resignation.

7. ACAS were notified under the early conciliation procedure on 25th February 2021 and a certificate was issued on 8th April 2021. The ET1 was presented on 7th May 2021. The ET3 was received by the tribunal on 9th June 2021.

8. The Claimant claims that she was constructively dismissed as she resigned in response to a fundamental breach in her contract, namely, not being paid. She further claims the wages that should have been paid between April and November 2020.

9. The Respondent, in the ET3, denies that the Claimant was an employee. They assert that the original contract between the parties was terminated due to frustration or mutual agreement on 27th March 2020. The parties entered into a further contract thereafter for the Claimant to provide services without receiving payment from the Respondent.

10. The Respondent denies any breach of contract and submits that any deduction in wages was consented to by the Claimant.

Procedure and evidence heard

11. I have been assisted by a 365-page bundle and witness statements from the Claimant Mrs Victoria Lobley-Eames and Director of the Respondent, Mr Paul Taylor.

12. I also heard oral evidence from the Claimant and Mr Taylor.

13. I received oral submissions from Ms Brooke-Ward, Counsel for the Claimant and Mr Perry, Counsel for the Respondent.

Issues

14. The single issue to be determined within this preliminary hearing was whether the Claimant was an employee as defined in s230(1) Employment Rights Act 1996 (ERA), as is her case, or a self-employed sub-contractor as asserted by the Respondent.

15. The Claimant's position is that the contract she signed does not reflect the reality of the relationship between the parties. The Claimant asserts she was required to provide personal service, that the Respondent had a contractual right of control over her and that there was mutuality of obligation. She was, therefore, an employee despite the naming of the contract.

16. The Respondent contends that the Claimant was not employed and was a sub-contractor only as per the terms of their contract.

The applicable law

17. The term employee is defined in s230(1) ERA 1996 as: '*An individual who has entered into or works/worked under a contract of employment*'

18. A contract of employment is defined, in s 230(2) ERA 1996 as: '*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing*.'

19. In *Autoclenz Limited v Belcher* [2011] IRLR 820, Lord Clarke said at [29]:

> "*The question in every case is…what was the true agreement between the parties."*

He went on at paragraph 35 to say:

> *"So the relative bargaining power of the parties must be taken into account 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 a part."*

20. In *Uber BV v Aslam (CA)* [2019] ICR 845 the majority described the approach as follows:

> "*Autoclenz shows that, in the context of alleged employment (whether as employee or worker), (taking into account the relative bargaining power of the parties) the written documentation may not reflect the reality of the relationship. The parties' actual agreement*

must be determined by examining all the circumstances, of which the written agreement is only a part. This is particularly so where the issue is the insertion of clauses which are subsequently relied on by the inserting party to avoid statutory protection which would otherwise apply. In deciding whether someone comes within either limb of section 230(3) of the ERA 1996, the fact that he or she signed a document will be relevant evidence, but it is not conclusive where the terms are standard and non-negotiable and where the parties are in an unequal bargaining position. Tribunals should take a "realistic and worldlywise", "sensible and robust" approach to the determination of what the true position is."

21. The classic test for considering whether a contract of service exists is found in the leading case of *Ready Mixed Concrete v Minister of Pensions* [1986] 2 QB 497 in which McKenna J held:

> *"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"*

22. These considerations are often broken down into the headings of; mutuality of obligation, control and personal service or substitution.

23. The mutuality of obligation refers to the requirement to the employer to offer work and the employee to accept it. If there is no requirement for either of the parties to do this, then there is no contract of employment. There must be an irreducible minimum on each side. (*Nethermere (St Neots) Ltd v Gardiner and anor* 1984 ICR 612, CA, and *Carmichael and anor v National Power plc* 1999 ICR 1226, HL).

24. When contemplating the level of control each party has over their contractual obligations, following HHJ Richardson in the case of *White v Troutbeck* SA UKEAT/0177/12:

> '*the key question is whether there is, to a sufficient degree, a contractual right of control over the worker. The key question is not whether in practice the worker has day to day control of his own work*.'

25. Generally, for a contract to exist an individual's own work or skill must be provided. This, requirement, however this is not absolute and in cases where the employer has involvement or control over who is appointed as a

substitute the courts have found in certain situations someone can still be considered an employee.

26. For example, in *MacFarlane v Glasgow City Council* [2001] IRLR 7, a limited power to delegate work to somebody else was found to be consistent with being an employee. In this case a gym instructor could arrange for a replacement if she was unable to take a session but they had to already be on the Council's books and they would pay them directly. The instructor was found to be an employee.

27. It is also important to consider whether the right to substitute could be used in practice. If that is not the case, the clause can be considered a 'sham' which does not reflect the true agreement between the parties (*Consistent Group Ltd v Kalwak* [2007] IRLR 560).

28. The Supreme Court in *Pimlico Plumbers Ltd v Smith [2018]* UKSC 29, [2018] IRLR 872 approved the analysis of the Court of Appeal in that case [2017] IRLR 323. Etherton MR at paragraph 84 said:

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

Findings of Fact

29. There are large parts of agreement between the parties in this case on the Claimant's responsibilities and the significant role she had within the Respondent. Indeed, it is not disputed that the Claimant was responsible, in large parts, for the day to day organisation of events with the company. This

included liaising with clients, organising and training performers, sourcing costumes and equipment, creating performances for specific events and even performing herself.

30. Although I have heard evidence on a number of points, I have confined myself to finding facts on limited issues relevant only to employment status. I have done so to avoid infringing on the considerations of a future tribunal hearing the unfair dismissal claim.

31. Firstly, the areas of agreement. The Claimant received a weekly payment from the Respondent for which she was required to invoice, the rate of pay was set by the Respondent and was, prior to March 2020 around £550 per week. The Claimant was not able to dictate her fee or charge for any additional hours she had worked. The Respondent paid the Claimant's expenses.

32. The Claimant was responsible for her own tax and national insurance, and she did not receive sick pay. The Claimant did not receive commission as other members of the team did, nor did she receive any additional fee when she performed in the shows provided during the events, save for one occasion (this is referred to as the 'snake dance' by the parties).

33. The Claimant located and organised the business premises from which the Respondent operates. The Claimant had access to the Respondent's paypal account and had permission to use it to purchase items required for events. The Claimant was authorised to give quotes for events and services to clients, as well as audition and hire performers.

34. Following the first lockdown at the start of 2020 the Claimant applied for, and received, a grant under the self-employed income support scheme.

35. The first dispute between the parties relates to the Claimant's job title. The Claimant's case is that she was employed as an Entertainment Manager, and later promoted to Events and Entertainment Director. This is disputed by the Respondent who states that she was never given any formal job title and her role remained the same throughout her time with them. The Respondent denies the Claimant was ever promoted.

36. The Claimant's evidence on this point is clear and is supported by her email signature which was created by another member of the Respondent's team, and changed between June and September 2018 (p136 and p211). When asked about this in cross examination Mr Taylor's evidence was that he was not concerned about how the Claimant presented herself and she could give herself any title, as long as it attracted clients.

37. I am not persuaded by the Respondent's evidence. I cannot accept that the director of a company would allow a 'contractor' to hold themselves out as a manager or director within a company and, in essence, promote themselves during their contract.

38. The bundle contains a number of emails to the Claimant from Mr Taylor relating to the financial position of the company (p210, 212 and 215 for example). Mr Taylor stated that he would regularly update all the team of sub-contractors about the finances of the business so they could all pull together to achieve a goal. I have not seen any evidence to support this however and the emails provided are sent to the Claimant only. I do not accept Mr Taylors explanation. The suggestion that business financials would be shared with a team of self-employed performers to assist in motivating them is not credible.

39. The Claimant only receiving these financial emails is consistent with Mr Taylor referring to himself and the Claimant as 'The Management of Pastiche' within an email not included in the bundle but provided during the hearing. My view is that this description, provided by the Respondent, is the true representation of the relationship between the parties.

40. I have also seen emails which demonstrate the Claimant was involved in disciplinary matters for the Respondent (p203-206). Taken together all this confirms to me that she held a position of responsibility and management.

41. I accept the Claimant's evidence on this point and find as a fact the Claimant was initially provided with the role 'Entertainment Manager' and thereafter promoted to 'Events and Entertainment Director' by the Respondent.

42. The Respondent asserts that the Claimant was offered employment in 2011 but declined preferring the flexibility of being a sub-contractor. The Claimant denies that this ever occurred and is emphatic in her assertion that the reason she moved roles to Pastiche in the first place was for increased security and the promise of career progression and partnership. Her desire to be employed is supported by her email at p215 where she references it and in her resignation email where she speaks of the numerous conversations she's had with Mr Taylor over the years about potential partnership.

43. The Claimant's desire to be secure, employed and grow the Respondent's business is clear in all the evidence. I do not accept the Respondent's case that the Claimant refused their offer of employment from the outset as that contradicts everything else I have read and heard in this case.

44. The Claimant has been consistent on this point throughout and I accept her evidence; firstly that she was never offered the chance of employment in

2011 and secondly that she was promised progression and ownership in the business throughout her time. This promise, she explained, was why she continually worked over her hours, and accepted she didn't receive commission or additional payment for performances. In my view there must have been an incentive for her to do that and I accept her evidence that the incentive was the promise, made by the Respondent, of future partnership.

45. The parties agree that the Claimant's initial salary, under the contract, was £25,000 and this was to be paid in equal monthly instalments. The invoices I have been provided with show weekly amounts, initially of £500 and then increasing to £550 which indicates to me, and I find as a fact, that the Claimant did receive a pay rise during her time with the Respondent.

46. The Claimant asserts that she also received bonuses if she hit her targets but this is disputed by the Respondent. Mr Taylor stated in evidence that any additional payments were for extra hours worked and that this was demonstrated by the invoiced 'extra hours' at p112. This contradicts the earlier evidence of Mr Taylor however that the Claimant was not entitled to additional payment for time worked over and above her 40 contracted hours and that she was required to manage her own time accordingly.

47. Further to this the email I have seen in the bundle at p113 from Mr Taylor clearly states, on two separate occasions, that he has transferred the Claimant a 'bonus' of £1000 for all her hard work over the past 12 months. I do not accept Mr Taylor's explanation that this is simply for extra hours worked and was paid at that time due to cashflow. The email is clear, the payment is a bonus – those are his words – and I have no reason to believe they mean anything other than the ordinary meaning of the word. I therefore find as a fact that the £1000 payment from the Respondent on the 4th June 2015 was a bonus payment.

48. The Claimant's case is that she required permission to take holiday and that she also received pay during her annual leave. Mr Taylor denied initially that any permission was required to take holiday, however, during cross examination accepted that there needed to be a certain number of staff available and therefore did have some input on when leave was taken. That can also be seen at p365 of the bundle where the Claimant requests permission for leave from Mr Taylor.

49. I also accept the Claimant's evidence that she was denied her request for holiday on a number of occasions. The Claimant was clear on this point and to some extent Mr Taylor agreed in cross examination that this could occur if the request would leave them short staffed. I therefore find as a fact that the Claimant had to have leave authorised by the Respondent.

50. Turning to the issue of holiday pay. I have seen differing invoice amounts from each party and I acknowledge that the Respondent has highlighted invoices where the full amount has not been claimed, however, I have not been provided with the circumstances of those invoices nor confirmation that the Claimant was actually away during those times. In addition to this the contract is silent on holiday. It does however state that the annual fee is payable in equal instalments which does not accord with the requirement to take unpaid holiday.

51. In contrast the Claimant has outlined dates when she was on holiday, and the locations, and referenced the corresponding invoices which clearly show the full amount was claimed.

52. I prefer the Claimants evidence on the issue of holiday pay. The Claimant explained in her evidence that paid holiday was agreed as that is what she received when working in her previous job role. When the parties initially discussed the terms of her move to Pastiche the Respondent agreed to honour that agreement. On this point the Claimant was clear and I have no reason to doubt what she says.

53. Mr Taylor's evidence on the issue of holiday pay was inconsistent and he contradicted his own witness statement in cross examination, as well as the the documentary evidence provided in the case.

54. In evidence Mr Taylor stated that he wouldn't know where the Claimant was and he would just pay what she invoiced. He believed that she was working whilst she was away. This contradicts the previous acceptance by Mr Taylor that he would have input on the Claimant's leave however.

55. I do not accept, given the extensive role the Claimant played within the company, that he was not aware where she was, what she was doing and if she was on leave. Given that leave was authorised by him, if there was no agreement to pay holiday pay, I would have expected a refusal to pay for those times when the Claimant was on leave. The Claimants evidence clearly shows this was not the case. I therefore find as a fact that the Claimant did receive holiday pay.

Conclusions

56. I will address each of the considerations regarding the employment status of the Claimant in this case separately for ease, but each conclusion has been drawn having taken account of the whole of the evidence both written and oral.

Mutuality of obligation

57. The Claimant was contracted to work not less than 40 hours a week for the Respondent, and was expected to work additional hours for no payment in order to fulfil her duties (p58).

58. For these hours the Claimant received an annual fee of £25,000 payable in equal instalments, in arrears, akin to a salary. Indeed Mr Taylor used the word salary when giving oral evidence to the tribunal. The Claimant is not able to dictate her own fees or charge for additional hours worked.

59. By construction this contract requires the Respondent to provide work to the Claimant – to sustain those 40 hours per week - and the Claimant has no ability to refuse. Indeed, she has little choice as she is unable to obtain other work due to the covenants in place, which I will discuss later.

60. The Claimant was in charge of the events and performers provided by the Respondent. She was obliged to perform services for the Respondent's, and, from the emails I have seen and the evidence I have heard throughout this case, she was available to them – and obliged to assist them – at all times. The Respondent was obliged, under the contract, to pay the Claimant for this work. The Claimant had to seek permission to take holidays – for which she received pay – and she received the same wage regardless of the amount of hours she worked.

61. On these facts I am satisfied that the requirement for mutuality of obligation has been demonstrated by the Claimant.

Control

62. The Respondent, in my view, retained a significant contractual right of control over the Claimant at all times both during her work under the contract for the Respondent and following the end of their relationship.

63. One of the most illuminative elements of this case is the highly restrictive covenant within the Claimant's contract which prevents her from working with or for any other company the Respondent had business with, or the Claimant had dealings with in the 12 months prior to the end of the contract. This covenant was in place throughout the life of the contract and for 6 months following termination.

64. I have seen emails at p310-311 which demonstrates that this covenant was strictly enforced by the Respondent with others who had previously completed work for them.

65. This, along with the contracted hours, prevented the Claimant from working for anyone else and restricted her freedom as a contractor. In addition to

this the Claimant was not able to dictate her own fees nor claim for any additional hours worked, as one would expect for a contractor.

66. This control, and the unequal bargaining position of the parties, is further demonstrated in March 2020 when the Claimant was told she would only receive two days pay for the final two weeks of March, and thereafter she didn't receive anything – except she was expected to continue to work for the Respondent.

67. Indeed, the Claimant was prevented from seeking any other work opportunities during this time, within the industry she had experience, because of the covenant in place. The control from the Respondent continued, despite no longer providing payment for the Claimant's services.

68. Within the category of control, I have also considered the Claimant's integration into the Respondent's business as this is relevant to the overall contractual influence the Respondent held.

69. The Claimant's job role, as I found earlier, is demonstrative of her position of responsibility within the company. The email from Mr Taylor dated 5th April 2018 which isn't included in the bundle but was provided during the hearing describes both him and the Claimant as "The Management of Pastiche". This is the reality of the situation and relationship between the parties.

70. The emails regarding the company figures and financials (p133 and 210 as examples) and the Claimant's involvement in disciplinary and staffing issues (p203-206) all indicate she was an integral part of the company with Mr Taylor acting as her superior.

71. This integration is further support for the contention that the Respondent held the ultimate control over the Claimant's work life and whilst I accept she had a degree of autonomy in her day to day role – due to her experience in the industry – that does not detract from the contractual hold the Respondent retained at all material times.

Personal service

72. As I outlined earlier, the parties in this case agree that throughout her time with the Respondent, the Claimant had a significant level of responsibility within her role.

73. The Claimant was hired because of her expertise in this area, and her business contacts, and it was those that she used to build the business within the Respondent.

74. I have heard evidence from the Claimant, that is supported by emails and text messages, that she was always available for clients, organised training

and created choreography over and above her contracted 40 hours a week. Indeed, the Mr Taylor accepted in his evidence that when the Claimant was involved in the performances at events she was not paid any additional fee.

75. It is clear to me that it was her services alone that the Respondent required, and it would have been impossible for someone to cover her role. This is demonstrated, to some extent, in the text messages I have seen whilst the Claimant was supposed to be on her honeymoon (p140-200).

76. The relevant part of the contract for this consideration can be found at page 58 and is headed 'Incapacity'. The key section is as follows:

> 'If the Sub Contactor cannot perform the Services due to illness or accident, the Sub Contractor will notify Pastiche as soon as possible on or before (if appropriate) the first day of absence.
>
> The Sub Contractor may, with prior written consent of Pastiche, substitute another person in place of the Sub Contractor to provide the Services…'

77. The contract ensures that the Respondent retains control over who could be named as substitute by requiring prior written consent as well as stipulating, by virtue of the heading 'Incapacity' that it can only be activated when the Claimant is unable to perform the services herself.

78. These elements quite neatly fall within the examples set out above in the case of *Pimlico Plumbers Ltd v Smith* which outlines that if a contract for substitution includes these provisions then, save for exceptional circumstances, it will be consistent with the requirement for personal service. The Respondent has not established any exceptional circumstances here.

79. Both parties agree that this clause was never used which, to my mind, indicates that it holds little value in reality and does not reflect the true relationship.

80. I accept the Respondent's submission that this in itself is not determinative but when included with the other elements as I have explained it demonstrates to me that the contract between the parties ultimately required the Claimant's individual skills and services and was consistent with the requirement for personal service.

Determination

81. As is set out above I am satisfied that the three elements of 'mutuality of obligation, control and personal service' set out in the case of *Ready Mixed Concrete v Minister of Pensions* have been established by the Claimant in this case. The fact that the Claimant does not receive sick pay and maintains,

in part, her own insurance does not dissuade me from this view given the other overwhelming evidence.

82. Whilst I acknowledge that the contract between the parties refers to the Claimant throughout as a 'sub-contractor', for the reasons I have set out above I do not accept that this represents the reality of the relationship between the parties.

83. For completion this means I am satisfied that the Claimant works under a contract of services which is the definition of a contract of employment set out in s230(2) ERA.

84. On that basis I conclude that the Claimant was an employee of the Respondent as defined by s230(1) Employment Rights Act 1996.

85. The Claimant is therefore entitled to bring her claims of unfair dismissal and unlawful deduction from wages in the Employment Tribunal.

Employment Judge Cronshaw
Date: 9th October 2021

SENT TO THE PARTIES ON
14 October 2021

FOR THE EMPLOYMENT TRIBUNAL