EMPLOYMENT TRIBUNALS

Claimant: Mrs H Matthews

Respondent: Razors Edge Group Limited

Before: Employment Judge Sharkett (sitting alone)

Held at: Manchester 29 March 2021 (In chambers 14 April 2021

REPRESENTATION:

Claimant: Mr A Marshall
Respondent: Mr J Searle of Counsel

RESERVED JUDGMENT on a Preliminary Issue

1. The Judgment of the Tribunal is that the claimant was an employee of the respondent as defined by s.230 (1) Employment Rights Act 1996.

REASONS

1. This was a Preliminary Hearing to determine the employment status of the claimant when her working relationship with the respondent ceased. It is the claimant's case that notwithstanding the fact that there was an agreed change in her employment status in 2017 from that of an employee to a self-employed contractor, the true relationship remained that of an employee and she is entitled to pursue the statutory claims of unfair dismissal, notice pay, unlawful deduction of wages in respect of pay and annual leave and a claim of unlawful discrimination by reason of her part time worker status and the

protected characteristic of sex and disability. The disability relied on being that of the long-term effects of coronavirus.

2. The respondent disputes that the claimant was an employee or a worker at the time her relationship with the respondent terminated. It is the respondent's case that the claimant actively pursued the change in her employment status. It was the respondent's case and that she was a self-employed contractor who hired a chair in the respondent's premises in order to undertake her role as a hairdresser on her own clients and was neither an employee or a worker at the time the relationship between them ended. In written submissions received following conclusion of the evidence in this matter the respondent conceded that the claimant was a limb (b) worker for the purposes of section s30 (3)(b) Employment Rights Act 1996 (ERA 1996), but not an employee.

3. The issues to be determined by the Tribunal were identified as:

    a. Was the claimant working under a contract of employment and therefore an employee of the respondent within the meaning of section 230 (1) of ERA 1996.

    b. If not an employee, was the claimant a worker for the respondent within the meaning of section 230(3)(b) ERA 1996, and/or Regulation 2(1) of the Working Time Regulations 1998, Regulation 1(2) of the Part-time Workers (prevention of Less Favourable Treatment) Regulations 2000 in that:

        i. they worked under a contract whereby the claimant undertook to do or to perform personally any work or services for the respondent, and

        ii. the respondent was not by virtue of that contract a client or customer of any profession or business undertaking carried on by the individual?

    c. Whether the claimant was 'in employment' for the purposes of s83(2) Equality Act 2010

4. Mr Marshall of Counsel appeared on behalf of the claimant and called claimant to give evidence.

5. Mr Searle of Counsel appeared on behalf of the respondent and called evidence from:

    a. Mr Stewart Black – owner and director of the respondent,
    b. Mr Tony Hefferman - General Manager of the respondent,
    c. Mr James Roberts – former manager with the respondent and now owner of James Roberts Salon.

6. All witnesses gave evidence in chief by way of written witness statements which had been exchanged and had been read by the Tribunal prior to hearing oral evidence. The Tribunal was also provided with a joint bundle of documents consisting of 302 pages. All references to page numbers within the body of this judgment are references to pages in the bundle provided unless otherwise stated.

FINDINGS OF FACT

7. Having heard all the evidence, both oral and documentary, and having regard to the submissions of the parties, the Tribunal makes the following findings of fact on the balance of probabilities. This Judgment is not a rehearsal of all the evidence heard, but is based on the salient parts of the evidence on which the Tribunal has based its decision.

8. The claimant commenced work as a senior stylist for the respondent at one of its hair salons in Manchester City centre on 7 August 2007. Whilst the claimant does not recall receiving a written contract of employment at that time a signed copy of a statement and terms and conditions of employment, dated 2 November 2007, was produced and it was not disputed that it was her signature on the document (p44). It is not disputed that the claimant was an employee when she started to work for the respondent.

9. The claimant was initially employed to work 40 hours per week over five days, but following a return from maternity leave in July 2010 the respondent agreed that she would work 24 hours per week over three days.

10. In September 2015, the claimant moved to work at another of the respondent's salons, 'James Roberts Hair & Beauty'. She moved with the consent of the respondent and continued to work the same hours. The respondent had historically owned/operated a number of salons within its Group, one of which was 'James Roberts Hair & Beauty' (the Salon), which was managed by Mr James Roberts (Mr Roberts), on behalf of the respondent. Mr Roberts continued to manage the Salon on behalf of the respondent until 6 July 2020 when it transferred to Mr Roberts (Manchester) Limited. Whilst not relevant for the purposes of this preliminary hearing, it is not disputed that the TUPE Regulations applied to this transfer (p216). At the time of the transfer there were no hairstylists employed at the Salon. The only employees were trainees and receptionists.

11. Mr Roberts had encouraged the claimant to move to the Salon in 2015 and it is clear from text messages between him and the claimant that the two had previously enjoyed a friendly relationship. On her move to the Salon the claimant on the whole continued to work 24 hours per week over three days. In or around January 2017, during a conversation or 'chat' between the claimant and Mr Roberts the subject of the claimant's earnings arose. The claimant who was by this time a senior stylist with ten years' experience was still earning little over the national minimum wage. It is not disputed that Mr Roberts told her that she would be better off by about £600 per month if she was to become self-employed. It is not disputed that the claimant expressed

an interest in doing this and accepted in oral evidence that she did ask to become self-employed and was eager to do so, solely because she thought she would be £600 per month better off.

12. Enquiries were made of senior management within the respondent to see if the claimant would be allowed to 'go' self-employed and on 16 July 2017 the claimant started to rent a chair in the Salon where she worked, paying a percentage of her takings as rent. The respondent issued a P45 to the claimant (p81) and the claimant employed the services of an accountant to assist her in setting up her self-employed status with HMRC. The claimant ceased to be a member of the auto-enrol pension scheme and was no longer eligible for paid holiday or sick leave. It is the claimant's case that Mr Roberts manipulated the claimant into wanting to become self-employed. The Tribunal finds that there is no real evidence to support this assertion and the claimant was a willing party to the change for the reasons given above. However it is clear from communication from the claimant to Mr Roberts that this was something he was in favour of, as the text seeks his permission in delaying the transition slightly so that the claimant could secure a mortgage (p92). It is also the claimant's case that although the manner in which she was remunerated by the respondent changed, nothing else about her employment did. She was still required to attend the Salon during the hours in which she had previously been contracted to work and remained under the control of Mr Roberts in respect of the same aspects of her work as had previously been the case. She continued to use the same tools owned by the respondent that she had previously used and continued to be expected to help out her colleagues and cover reception duties when she was not busy with a client. Unlike some of the junior staff in Salon she was not required to wear a uniform but was required to follow a dress code along with the other stylists and this continued to be the case post 16 July 2017.

13. Mr Stuart Black who is the owner/director of the respondent was most helpful in explaining how the salons operated. Whilst he left the day to day management and responsibility for staff to Mr Tony Heffeman, the general manager of the respondent, it was clear from his evidence that he had a full understanding of the operation having been in the industry and 'owned' the respondent for many years. Mr Black explained that within the respondent there are currently 8 staff that are employed and 5 who are self- employed. Of the self-employed staff 3 of them were previously employed before becoming self- employed. He confirmed that all trainees were employed and that no one was permitted to become self-employed immediately following qualification. This is somewhat different to the practice of many salons known to the Tribunal which require all staff to become self-employed on qualification. Mr Black explained that the decision on whether a stylist can change from being employed to self-employed is always made by him and that any decision would be based upon the economic viability for the respondent, having looked at the income generated by the particular stylist. He explained that he did not deal with the administrative aspect of the change himself but left this to his general manager, Mr Heffeman, who was responsible for HR matters. Mr Black also explained that once a stylist converted to self-employment they would continue to work at the particular salon but would no longer receive

wages through payroll; instead they would 'rent a chair' in the salon and the takings earned from work they carried out personally would be allocated under their name, together with commission for any products they sold to clients. From those takings the stylist would be charged a rent for the chair which would be set at one of the two figures decided by Mr Black, (45% or 50% of their takings) with 45% being norm and the minimum. The stylist would also be required to pay VAT on the amount charged as required by HMRC. The balance would be a gross payment made to the stylist for which they would then have to account to HMRC as self-employed income. Mr Black confirmed that the claimant was charged rental for the chair at the rate of 45% of her takings plus VAT and that although he was of the view that stylists were in a position to negotiate the rent with him, a lower rate than 45% would not be agreed as it would not be economically viable for the respondent. Having heard this evidence and that of the claimant on this matter the Tribunal find that it is clear that the claimant was not in a position to negotiate the terms upon which she rented the chair as this was pre-determined by the respondent.

14. Mr Heffeman told the Tribunal that it is left to the stylists to approach him if they wished to become self-employed, which is what the claimant had done. He explained that if the respondent did not allow people to work on a self - employed basis through chair rentals, they would lose stylists to other salons. The Tribunal accepts that the practice of chair rental is common within the hair and beauty industry and the terms under which they are offered is produced by the National Hairdressing Federation. A copy of an 'Independent Contractor Chair Renting Licence Agreement' (the Agreement), was produced to the Tribunal although it is a version which post-dated July 2017 (p51). It was not signed by the claimant and the claimant is adamant that she was never shown this or any similar document. Mr Black explained that it would have been Mr Hefferman who would have given this to the claimant and that it was his responsibility to make sure it was signed and returned to Mr Black. Mr Hefferman was unable to say with any certainty that he gave a copy of this document to the claimant and could not explain why, if he had given her a copy, he had not made sure it was signed and returned to Mr Black. The Tribunal notes that under the terms of the Agreement any variation of the Agreement can only be made with the written consent of both parties and that *"If the Agreement is not signed it will not be enforceable" (p70).* On the basis that the claimant is quite clear that she has neither seen nor signed this Agreement and the respondent can neither confirm that it was signed nor produce a signed copy of the same, the Tribunal finds that on the balance of probability a copy of this Agreement was not provided to the claimant and nor was the content of the same brought to her attention. The Tribunal makes this finding not only because of the lack of confirmation or production of the signed Agreement but also because, if the terms of the Agreement had been made known to the claimant and completed in accordance with the guidance provided, it is unlikely that she would have had the need to send the text messages to Mr Roberts expressing her confusion and lack of knowledge about payment of VAT.

15. Mr Black gave oral evidence that if an individual did not return the Agreement they would usually assume that they had accepted it. Given the content of the Agreement and in particular the fact that it specifically provides that if it is not signed, it is not enforceable, the Tribunal does accept that on the balance of probability this would have been the approach of a person of Mr Black's experience of business and the industry. The fact that the manner in which she was paid changed and that she was made aware that she would be no longer entitled to holiday pay, sick pay and membership of the auto-enrolment pension scheme is not indicative of conduct accepting the terms of the Agreement unless the same can be shown on the balance of probabilities. to have been brought it her attention and the respondent has been unable to do this.

16. Notwithstanding that the Tribunal finds on the balance of probabilities that the Agreement was not entered into by the parties, the question of the claimant's employment status remains to be determined and the content of the Agreement itself may be of some assistance in determining what the respondent's intentions would have been had the same been concluded and whether the conduct of the relationship reflected those intentions.

17. The background clause to the Agreement sets out that it is not the intention of the parties to form an employer and employee relationship and that each party will have ultimate command and authority over all aspects of their respective business or enterprise and be readily identified as having such authority. That they shall each be responsible for the rewards and losses of their respective businesses and that neither party is solely obligated to, or rely or depend on the decisions of the other.

18. Prior to July 2017 the claimant worked 24 hours per week over three days. Whilst the claimant has complained about being pressured to work more hours is not relevant to the issue to be determined by this Tribunal. As set out above, the claimant's evidence is that once she became self-employed for payment purposes nothing else changed, she continued to work the hours she had previously been contracted to do and was expected to stay at the Salon until 'home time' even if she did not have any clients booked in. She was however only paid for the clients she saw and did not receive any payment for hours she worked when she was not seeing a client. She also had to obtain permission from Mr Rogers before she was allowed to take holiday, and that although her holiday requests were never refused, this was no different to the position when she was an employee prior to 2017. The Tribunal note that as late as May 2019, the claimant was still referring to Mr Roberts as her boss on social media and thanking him for his support in a colour competition (p117 & 118)

19. It is the claimant's evidence that the only thing that changed at work when she became self-employed was that she was notified of how much she would be paid by invoice as opposed to a payslip. Mr Black was unable to say what the claimant's working hours were explaining that this would have been down to Mr Heffeman or Mr Roberts. He did however confirm that the claimant would have been required to have been in the salon at 10am because otherwise it

would not have been possible to book clients in. He also explained that she would have been required to stay at the salon in between appointments and would not have been permitted to go home before 5.30 if she did not have any more appointments for the day. He explained that if someone was trying to build up regular clients they cannot do that if they are not there when someone rings up or walks in. Mr Black also explained that the claimant would be required to tidy up after herself or if she did not have a client in, sit on reception if the receptionist was on a break. He said however that he was not there but that this would be usual. The Tribunal finds that given Mr Blacks experience of the way in which the salons work and the fact that he 'owns' them it is more probable than not that the description he has given is correct especially as it is consistent on the whole, with the account given by the claimant.

20. Mr Roberts disputes that the claimant was required to stay at work when she had no clients and says that she was free to come and go as she pleased as long as she did not have clients booked in. In support of his evidence he refers the Tribunal to a text message as evidence of the claimant deciding when she will come in (p112). Although this text is not dated, the Tribunal accepts the claimant's evidence that the text refers to a time during the pandemic when rules required limited numbers of people in the salon at a time and that it was for this reason that she was indicating a time she would attend in order to accommodate this. The claimant explained that she would be required to attend work at 10am even if her first appointment was not until 12.15 (p235). She explained that during the periods when she did not have a client she would help the team in the salon by clearing up or perhaps helping with a colour. The claimant also explained that she was not paid for the hours when she was in the salon with no clients as she was only paid on the basis of the monies taken in respect of clients she had seen. Whilst the Tribunal accepts that the claimant may on occasion, have left the Salon during working hours if she did not have a client booked in, she could only do this if she remained contactable and available on her phone so that she could return to the Salon in the event of any walk in clients. In reality she was only able to pop out to the shops local to the Salon and would be expected to return at any time. On the balance of probabilities the Tribunal accepts that claimant's account of being required to physically attend work at times she did not have clients and of carrying out unpaid work during that time. Mr Robert's evidence was inconsistent with the evidence of Mr Black who was quite candid in his response to questions and explained that the claimant would have been expected to be in the salon during opening hours so that she would be able to take 'walk ins' or people that rang on chance for appointments. He explained that this would be normal for someone who was trying to build a bank of regular clients and was normal in the industry.

21. Whilst Mr Roberts sought to dispute the claimant's evidence that she was required to ask his permission for many things, there is an abundance of documentary evidence in the form of text messages that supports the claimant's position. For example her text (p108), thanking him for allowing her to go home early when she was not well and asking if '*it would be ok with the salon if anything comes of it'* in respect of her considering entering an art

event. There are also text messages from the claimant where it is clear that she seeks permission in respect of working practices for example p97, 99, 100, 102, 103, 113). Mr Roberts did accept that the claimant had to obtain his permission to take holidays and that the holiday request forms used were the ones used when she was an employee. There is also evidence of the claimant asking for holiday in the text messages provided and evidence of dissatisfaction of 'staff' about the change in duration of holidays imposed by the respondent. (p112). The Tribunal finds on the basis of the oral and documentary evidence before it, that post July 2017, the claimant was required to work the same hours that had previously been agreed and did not have the flexibility to decide her own hours or days of working. In addition the Tribunal further finds that the claimant remained under the control of Mr Roberts post July 2017 in the same way as she had done whilst working under a contract of employment. His permission was required not only to take holiday but also in respect of any matters relating to work including being allowed to leave work early if she did not have any clients booked in. The only aspect of the claimant's work which was not controlled by Mr Roberts was the manner in which she exercised her skill of hairdressing, although even that was fettered to a degree by the obligation on the part of the claimant to use only the hair and styling products provided by the respondent.

22. In respect of the practical aspects of the claimant's work the Tribunal accepts that the claimant was told how much she would have to pay for the rental of the chair (45%) For the reasons given above the Tribunal find that the claimant was not in a position to negotiate the rate she paid. The Tribunal find that the claimant's desire to account for her own tax and national insurance and thus have more money in her pocket each month was the driving force of her decision to make the move and that there was little else she was interested in at that time. Consequently, this was the only matter she addressed her mind to until she realised that she would incur other charges as a result of her decision.

23. In respect of how the claimant got her work, the Tribunal finds that this did not change. The claimant's regulars continued to book appointments through the salon reception using the salon's software system. Although it is Mr Roberts' evidence that the claimant's regular clients would have become hers the Tribunal has not been referred to any documentary evidence that demonstrates this to be the case. Mr Roberts also gave evidence that the claimant would have been able to access their personal information on the system unlike those who were employed by the respondent, but it is clear that in order to do this she would have needed a change to her password to enable her to access anything other than the client's hairdressing products and history. Mr Roberts accepted that he would have been responsible for making sure that the claimant was given a higher level of access and that if this had not happened, which was the claimant's evidence, then that would have been a mistake The claimant explained that payments from all clients were taken through the respondent till and that as she was not given any additional access to the system she had to ask the receptionist to look to see how much her takings were as she was unable to access this information herself. It is clear from the Agreement that the claimant would have been

expected to have access to information about her takings because she would have been required to produce this information to the respondent in order to receive payment. However, she did not do this and given that Mr Roberts was unable to show any evidence of the claimant's enhanced access to the system following the change in the way in which she was paid, the Tribunal prefer the evidence of the claimant who has been clear and consistent in her account of her working conditions and practices. The Tribunal find on the balance of probability, the claimant's regular clients remained just that, her regulars and there was nothing to suggest that they had become clients of the claimant instead of the respondent. If the claimant was not in work for any reason it would be the salon who would contact the client if needed, to cancel or offer an alternative stylist or appointment. Whilst the claimant may have been able to speak to clients by phone when she was in the salon to perhaps discuss their requirements she did not have access to a record of their personal information and it would be the receptionist who would deal with practicalities. The Tribunal finds that the claimant had her own regulars but they were clients of the respondent or the Salon not the claimant. She did not have access to their personal information and on Mr Black's oral evidence it would not have been acceptable for the claimant to make appointments to see her regulars in any other venue than the Salon. Mr Roberts explained in oral evidence that if a new client wanted to book an appointment they would be booked in with whoever it was thought was best for the client. The Tribunal find that there was an expectation that the claimant would attend work on each of the days agreed during the agreed hours and that if a client was booked in to see her, or someone walked in looking for an appointment she would be expected to take the booking.

24. It is the claimant's case that she did not have any control over the amount she charged the clients she attended upon and that it was not open to her to offer discounts on either her services or the products sold and upon which she would be paid commission. She was also not allowed to use products of her own choice or send someone else to do her work if she was unable to. She was also not permitted to work elsewhere

25. Mr Black explained that the price the claimant would be required to charge her clients would have to be within the senior stylist range of the respondent's charges. He agreed that it would 'of course' not be permissible for her to undercut her colleagues or charge higher rates such as those charged by Mr Roberts as she would have to work within the parameters of the salon. It was Mr Roberts evidence that the claimant was free to offer discounts to her clients but it is clear from the text message from the receptionist to Mr Roberts that this was not the case because this text is clearly asking Mr Roberts, whether the claimant is permitted to offer a discount to entice clients in on a quiet day or whether she is to simply say she has got vacancies (p112). The Tribunal finds on the balance of probabilities that the claimant did not have any control over the amount she charged for her services as this was set by the respondent and any deviation from the same could only be applied with the permission of her 'manager' Mr Roberts. Mr Roberts accepted readily in oral evidence that it would not be permissible for the claimant to use alternative products on her clients as it would be 'unorthodox' to do so.

Similarly he agreed that no one would offer discount on the products sold to clients as this would not be acceptable to the supplier.

26. The claimant also explained that although she used and continued to use the respondent's equipment, she had, as is usual practice within the hairdressing industry, always purchased her own scissors. She had also more recently purchased a hairdryer which would also appear to be normal as it was Mr Robert's oral evidence that they did not have spare hairdryers hanging around. Both these products were bought through the respondent via the Salon and it was not disputed that the respondent was invoiced for the same. The respondent did not invoice the claimant for the goods but simply took payment for them from the claimant. When questioned the claimant confirmed that she did not offset these purchases against her tax liability as she did not have any proof of purchase and did not know that she could. The respondent did not dispute the claimant's evidence or offer any explanation as to why it did not provide an invoice to the claimant for the goods she purchased for her purported business through the respondent. The Tribunal find that given the respondent's own experience of business, had the claimant been in business of her own account it would have been usual to invoice the claimant for the same as it would have been unable to offset the cost of that purchase to its own business expenses given that the respondent had not actually incurred that cost.

27. Mr Roberts agreed in oral evidence that although there was provision with the Agreement for the claimant to provide a substitute to cover her work if she was not in, in reality this had never happened with anyone and that he '*honestly [didn't] know how it would happen in practice'.* This is consistent with the claimant's evidence that she was not allowed to send someone else if she was unable to attend. For this reason the Tribunal find that the claimant was not permitted to send someone else in her place if she was unable to attend work and that it would have been something she would have welcomed had she been able to do it

28. In respect of further terms of the Agreement, the Tribunal note that the respondent continued to provide insurance cover for the claimant on its policy which is inconsistent with the terms the Agreement which requires the Independent Contractor to have in force a certificate of insurance at all times.

29. In addition, bearing in mind the general terms of the Agreement which would have given the claimant flexibility about the way in which she wanted to work following the opening of the Salon after lockdown, the Tribunal note that Mr Roberts would not have been a party to the Agreement and therefore would have had no authority to refuse to allow what the claimant asked. By contrast as her manager, it is likely that he would and this is what happened.

30. Whilst Mr Roberts denies asking the claimant to produce a fit note, it is clear that although the claimant knew she was self-employed for payment purposes she still felt she needed to produce both the fit note and the letter from her doctor explaining why a phased return to work was needed. It is also clear that she did this in order to obtain Mr Robert's permission to return to work in the way her doctor proposed for a short period of time. The Tribunal find that

as an independent contractor the claimant would have had control over the hours she worked and would have been able to tell Mr Roberts what she proposed to do as opposed to ask and be refused permission. The fact that this did not happen is another example of Mr Roberts exercising control over the claimant in respect of the working relationship.

Submissions

31. For the respondent Mr Searle submits that, subject to the claimant not letting clients down she was free to come and go as she pleased and was also free to change her hours of work coming in late and leaving early as long as she made the respondent aware of what she was doing. In contrast to other employees she was not required to wear the uniform tea shirt or desist from wearing jeans to work. She was allowed to apply discounts to individual clients. unlike employees, and that although never exercised the claimant nonetheless had a contractual right to send someone else in her stead to carry out her work.

32. Mr Searle submits that the claimant was eager to become self-employed and asks the Tribunal to accept the respondent's credible evidence that a ' new' contract was given to her at that time. He accepts that although the respondent had provided training for the claimant this was not funded by the respondent. He submits that the claimant realised that she would earn more some months than others and was prepared to take that risk. She was he submits the author of her own destiny and stood to earn far more depending upon how hard she worked. In respect of working equipment Mr Searle accepts that the claimant continued to use the large equipment needed for some treatments but says it would be unrealistic to expect each self-employed stylist to provide their own.

33. Mr Searle referred the Tribunal to the cases of **Pimlico Plumbers Ltd v Smith [2018]UKSC 29 [2018 IRLR 872; Bates Van Winklehof v Clyde & Co LLP [2014] UKSC 32 and Uber BV v Aslam [2018] IRLR 97**, along with the relevant legislation on employment status. He submits that on the basis of these cases the claimant does not satisfy the definition of an employee because she had the right of substitution, was able to choose the hours she worked, accounted to HMRC for her own tax and insurance and paid 45% of her gross turnover to the respondent in return for the rental of a chair.

34. Mr Searle concedes on behalf of the respondent that the claimant was a worker working under a contract for services.

35. For the claimant Mr Marshall submits that although the claimant can be seen to be asking to become self-employed,, the reality of the situation is that after ten years of being an employee it is only after Mr Roberts has told her she could be better off by £600 per month if she became self-employed that she considers doing so. He submits that contrary to the respondent's assertion that she was the driving force behind it, it was only when Mr Roberts dangled the carrot of more money that she began to entertain the idea.

36. Mr Marshall asks the Tribunal to find that the claimant was not given a copy of the Independent Contactors Agreement and that the reality of the situation, given the evidence presented to the Tribunal, is that the claimant remained an employee of the respondent notwithstanding the fact that she purportedly became self-employed. He submits that the claimant remained under the control of Mr Roberts and was not free to come and go as she pleased or pick and choose who she provided hairdressing services to. All appointments were booked through the salon and the claimant was given a list of appointments she was expected to undertake. She did not have access to the personal details of these clients which was only available to those with higher access to the system. He submits that there is no evidence to support the respondent's contention that once the working arrangement changed in July 2017 the clients who had their hair done by the claimant became her clients and not clients of the respondent. On the contrary he submits that Mr Black conceded in oral evidence that in circumstances where another stylist may have seen one of the claimant's regulars in her absence, there was nothing to stop them soliciting her regulars to book with them instead.

37. Mr Marshall reminded the Tribunal of the working arrangements of the claimant and Mr Black's evidence of what would usually be expected of those who worked as independent contractors for the respondent. He referred the Tribunal to the inconsistent evidence of Mr Roberts who contrary to his written evidence confirmed that the claimant was required to obtain permission from him to take annual leave. In addition he reminded the Tribunal that contrary to Mr Robert's evidence that the claimant was free to come and go as she pleased subject to not letting clients down, when she asked to vary her hours for a short time to allow her a phased return to work during her recovery from coronavirus, he refused her request.

38. Mr Marshall submits that there is sufficient evidence to show that the claimant was not able to negotiate the terms of the rental agreement for the chair, was required to remain at work for the hours she had been previously contracted to do and had no control over her working practices save for the way in which she practiced her skill. She was not permitted to work elsewhere or provide someone else to attend to her regulars in her absence, and there is no evidence to support the respondent's contention that the client's she attended upon became or were her clients. He also reminded the Tribunal that the claimant had always provided her own scissors, brushes and combs etc and that this did not change after July 2017. Neither did the position in relation to the manner in which she was required to dress at work or the provision of indemnity insurance which continued to be provided by the respondent.

The Law

39. S.230 ERA, so far as relevant, provides:

> (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.

Reg 2(1) WTR 1998 adopts the same definition of worker as the ERA.

40. There are thus three categories of relationship, conveniently summarised in Bates van Winkelhof v Clyde & Co. LLP [2014] ICR 730 (per Baroness Hale at [24] and [25]):

‘24. First, the natural and ordinary meaning of “employed by” is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.

25. Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in Hashwani v Jivraj (London Court of International Arbitration intervening) [2011] ICR 1004 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else. The general medical practitioner in Hospital Medical Group Ltd v Westwood [2013] ICR 415, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a “worker” within the meaning of section 230(3)(b) of the 1996 Act.’

41. A worker who meets the definition in s.230(3)(b) ERA is now commonly referred to as a ‘limb (b) worker’ or ‘an employee under the extended definition’.

42. The definition of employee in s.230(1) ERA turns on the meaning of the phrase ‘contract of service’ in s.230(2) which, impliedly, is to be contrasted

with a 'contract for services'. The usual starting-point is the passage in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2QB 497 at 515, in which MacKenna J. said:

> '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.
>
> I need say little about (i) and (ii).
>
> As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be: see Atiyah's Vicarious Liability in the Law of Torts (1967) pp. 59 to 61 and the cases cited by him.
>
> As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.'
>
> ……..
>
> I can put the point which I am making in other words. An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control.'

43. In respect of the need for personal performance, the Supreme Court in Pimlico Plumbers v Smith [2018] ICR 1511 endorsed the principles set out by Sir Terence Etherton MR in his judgment in the same case in the Court of Appeal ([2017] ICR 657 at [84]:

> '84. In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an

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

44. No contract of employment can exist in the absence of 'mutual obligations subsisting over the entire duration of the relevant period': Clark v Oxfordshire Health Authority [1998] IRLR 125 at [22]. In Carmichael v National Power plc [1999] ICR 1226 (at 1230) Lord Irvine cited this passage with approval, in support of the proposition that, if there were no obligation on the employer to provide work, and none on the putative employee to undertake it, there would be 'an absence of that irreducible minimum of mutual obligation necessary to create a contract of service.'

45. In Quashie v Stringfellow Restaurants Ltd. [2013] IRLR 99 at [12] Elias LJ held:

'In order for the contract to remain in force, it is necessary to show that there is at least what has been termed 'an irreducible minimum of obligation', either express or implied, which continues during the breaks in work engagements: see the judgment of Stephenson LJ in Nethermere (St Neots) v Gardiner [1984] IRLR 240, 245, approved by Lord Irvine of Lairg in Carmichael v National Power plc [2000] IRLR 43, 45. Where this occurs, these contracts are often referred to as 'global' or 'umbrella' contracts because they are overarching contracts punctuated by periods of work. However, whilst the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement, the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee

46. A mere expectation that an individual will undertake a certain amount of work is not the same as an obligation to do so. In Hafal Ltd v Lane-Angell, UKEAT/0107/17 Choudhury P. held at [29] that:

'The Tribunal's findings indicate that the Claimant was expected to provide dates of availability to the Respondent. The Claimant would then be placed on the rota. There was an expectation that the Claimant would be able to provide

work should she be contacted whilst on the rota. However, there is no finding that the Claimant was obliged to provide any or any minimum number of dates of availability, certainly not for the period before 1 May 2015. It is a trite observation that an expectation that the Claimant would provide work is not the same as an obligation to do so. I recognise that there may be cases where, as a result of a commercial imperative or market forces, the practice is that work is usually offered and usually accepted and that such commercial imperatives or forces may crystallise over time into legal obligations. That was the case in Haggerty. However, in that case, there were no express terms negating such obligations. I consider that to be a significant distinguishing feature. On the facts, this case is closer to the situation in Stevedoring and Carmichael than that in Haggerty.'

47. If there is sufficient mutuality of obligation that the contract might be one of employment/service, the next question which falls to be determined is control. Although not the sole means of identifying a contract of employment, control remains an essential element of the test. The question is not whether the employer controls the way the putative employee does the work, rather whether the employer can, under the terms of the contract, direct him/her in what s/he did (Wright v Aegis Defence Services (BVI) Ltd, UKEAT/0173/17/DM at [35]). That is distinct from showing that the employer controls the way that the employee does the work. Even an absence of day to day control may not be relevant, if the employer retains the ultimate contractual power to direct what work should be done (White v Troutbeck SA [2013] IRLR 949, CA).

48. As for the third element of the test in Ready-Mixed Concrete, there is no definitive list of the features of any agreement which point towards, or away from, its being a contract of employment. In Hall (Inspector of Taxes) v Lorimer [1994] ICR 218, the Court of Appeal upheld Mummery J, who in the High Court ([1992] ICR 739) held that it was necessary to consider many different aspects of the person's work activity, and that this was not to be done by way of a mechanical exercise of running through items on a check list to see whether they were present in, or absent from, a given situation. Not all details are of equal weight or importance in any given situation.

49. As to the requirement for personal performance, the principles referred to in the summary of Sir Terence Etherton MR in Pimlico Plumbers v Smith (above at para 168) apply equally to worker status.

50. The individual will not be a limb (b) worker if the status of the party for whom s/he works is 'that of a client or customer of any profession or business undertaking carried on by the individual'. In Bates van Winkelhof, at [34] onwards, Baroness Hale summarised a number of the authorities which have considered that provision:

51. In Cotswold Developments Construction Ltd v Williams [2006] IRLR 181, para 53 Langstaff J suggested:

"a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."

35. In James v Redcats (Brands) Ltd [2007] ICR 1006, para 50 Elias J agreed that this would "often assist in providing the answer" but the difficult cases were those where the putative worker did not market her services at all. He also accepted, at para 48:

"in a general sense the degree of dependence is in large part what one is seeking to identify—if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached—but that must be assessed by a careful analysis of the contract itself. The fact that the individual may be in a subordinate position, both economically and substantively, is of itself of little assistance in defining the relevant boundary because a small business operation may be as economically dependent on the other contracting party, as is the self-employed worker, particularly if it is a key or the only customer."

36. After looking at how the distinction had been introduced into the sex discrimination legislation, which contained a similarly wide definition of worker but without the reference to clients and customers, by reference to a "dominant purpose" test in Mirror Group Newspapers Ltd v Gunning [1986] ICR 145, he concluded, at para 59:

"the dominant purpose test is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependent work relationships, or is it in essence a contract between two independent business undertakings? ... Its purpose is to distinguish between the concept of worker and the independent contractor who is in business in his own account, even if only in a small way."

37. The issue came before the Court of Appeal in Hospital Medical Group Ltd v Westwood [2013] ICR 415, a case which was understandably not referred to in the Court of Appeal in this case; it was argued shortly before the hearing in this case, but judgment was delivered a few days afterwards. Hospital Medical Group Ltd ("HMG") argued that Dr Westwood was in business on his own account as a doctor, in which he had three customers: the NHS for his services as a general practitioner, the Albany Clinic for whom he did transgender work, and HMG for whom he performed hair restoration surgery. The Court of Appeal considered that these were three separate businesses, quite unrelated to one another, and that he was a class (b) worker in relation to HMG.

38. Maurice Kay LJ pointed out, at para 18, that neither the Cotswold "integration" test nor the Redcats "dominant purpose" test purported to lay down a test of general application. In his view they were wise "to eschew a

more prescriptive approach which would gloss the words of the statute". Judge Peter Clark in the appeal tribunal had taken the view that Dr Westwood was a limb (b) worker because he had agreed to provide his services as a hair restoration surgeon exclusively to HMG, he did not offer that service to the world in general, and he was recruited by HMG to work as an integral part of its operations. That was the right approach. The fact that Dr Westwood was in business on his own account was not conclusive because the definition also required that the other party to the contract was not his client or customer and HMG was neither. Maurice Kay LJ concluded, at para 19, by declining the suggestion that the court might give some guidance as to a more uniform approach: "I do not consider that there is a single key with which to unlock the words of the statute in every case. On the other hand, I agree with Langstaff J that his 'integration' test will often be appropriate as it is here." For what it is worth, the Supreme Court refused permission to appeal in that case: [2013] ICR 415, 427.

39. I agree with Maurice Kay LJ that there is not "a single key to unlock the words of the statute in every case". There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of "subordination" to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves. As Elias J recognised in the Redcats case [2007] ICR 1006, a small business may be genuinely an independent business but be completely dependent on and subordinate to the demands of a key customer (the position of those small factories making goods exclusively for the "St Michael" brand in the past comes to mind). Equally, as Maurice Kay LJ recognised in Westwood's case [2013] ICR 415, one may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into the other party's operation as to fall within the definition. As the case of the controlling shareholder in a company who is also employed as chief executive shows, one can effectively be one's own boss and still be a "worker". While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker.'

52. Whether the terms of the contract reflect the true agreement was considered in Consistent Group Ltd v Kalwak [2007] IRLR 560, and cited with approval by Lord Clarke JSC in Autoclenz v Belcher [2011] ICR 1157 in the Supreme Court, Elias J. said this:

'57. The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work, in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He said this (p 697 g) 'Of course, it is important that the

industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham it will want to say so.'

58. In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.

59. ... Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance ...'

53. In Uber BV v Aslam [2019] ICR 845, the majority of the Court of Appeal held (at para 66):

'The effect of Autoclenz Ltd v Belcher [2011] ICR 1157 in our view is that, in determining for the purposes of section 230 of the ERA 1996 what is the true nature of the relationship between the employer and the individual who alleges he is a worker or an employee, the court may disregard the terms of any documents generated by the employer which do not reflect the reality of what is occurring on the ground.

and at para 73:

[...] '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 worldly-wise", "sensible and robust" approach to the determination of what the true position is.'

Secondary findings of Fact and Application of Law

54. The only issue to be determined by this Tribunal is the employment status of the claimant. It is the claimant's case that although once she had been told by Mr Roberts of the financial benefit of becoming self-employed she asked to do so, nothing else about her working relationship changed once that took effect from July 2017. It is her case that the true relationship was not that she started in business of her own account but that she remained an employee, notwithstanding her part in changing the way in which she received payment for her work. In submissions Mr Searle on behalf of the respondent has conceded that the claimant was a 'limb b' worker for the purposes of s230

ERA 1996 but disputes that she was an employee. Mr Marshall submits that the claimant was an employee.

55. The matter of determining the employment status of the claimant is not a tick box exercise or indeed one where more ticks on one side of the argument will result in success for the claimant, as not all ticks carry the same weight in determining employment status; the case law that has developed over time is clear in its direction that Tribunals are required to look at all the circumstances surrounding the relationship, including the documentary evidence and what the actual working circumstances were in any given case.

56. For the reasons set out in the findings of fact above the Tribunal found that the claimant had not been made aware of the contents of the Agreement however in applying the facts of this matter to the law, the Tribunal may refer to the imputed intention of the terms of the same by way of example, where appropriate, in reaching determination on certain aspects of the claimant's employment status.

57. It is true that the claimant agreed to become 'self -employed' and that she actively pursued this change. However, the manner in which someone is paid may not reflect the true agreement between the parties. Whilst the claimant gave up her right to holiday and sick pay in return for the right to become self -employed, and she also gave up her right to be a member of the respondent pension scheme, it is clear for the reasons set out in the findings of fact above that her incentive for taking this course of action was her understanding that she would be better off by approximately £600 per month if her payments did not go through PAYE.

58. It is quite clear from the evidence that the claimant was not in the business of building up a client base so that she could delegate appointments to others. It was she personally who saw her regular clients and any others who had been booked in for appointments with her by the Salon. Although the Agreement provided for the claimant to provide a substitute, it is clear that even if the claimant had agreed to the terms of that Agreement she would have not been allowed to substitute with anyone other than someone approved entirely at the discretion of the Salon owner. In addition Mr Roberts was quite clear in his oral evidence that he had never had experience of anyone sending someone in their stead to carry out the work and. that he didn't know how it would happen in practice. It is quite clear therefore that the reality of the situation, was that there was no right of substitution and nor would there have been any real right even if the claimant had entered into the Agreement before the Tribunal. There is no doubt, nor is it disputed that the claimant was required to provide a personal service.

59. In respect of whether there was any mutuality of obligation between the parties, Carmicheal v National Power plc [1999] ICR 1226, established that a contract of employment cannot exist in the absence of mutual obligations subsisting over the duration of the relevant period. If there is no obligation on the employer to provide work and none on the putative employee to undertake it, there would be 'an absence of the irreducible minimum of mutual obligation

necessary to create a contract of service'. It is quite clear from the evidence that the claimant was expected to attend work on the days and during the hours that she had previously been contracted to work. Whilst there may be evidence of some occasions when hours might have been varied these were always only with the permission of Mr Roberts, evidence of these requests having been produced to the Tribunal. The claimant was required to attend work on her agreed days irrespective of whether she had clients booked in or not and there was also an expectation that she would accept all appointments booked in on those days by the respondent irrespective of whether they were her regular clients or not. She was also expected to take any walk-in clients or clients that might want appointments if their regular hairdresser was not available for any reason. Whilst walk in clients may well have been few and far between, although there was no supporting evidence that this was the case, the claimant would non the less have been expected to take any appointments or opportunity of appointments made available to her however they arose. By the same token there was an expectation of the part of the claimant that the receptionist would book in new clients for her in the same way as they would be booked in for all other staff. That she was expected to attend work in the manner prescribed by the respondent is perhaps most telling when she asked for a phased return to work following lockdown. It was clear on this occasion that there was no equality of bargaining power or flexibility in the hours in which the respondent would allow the claimant to work and her request was refused. It is clear from the facts of this case as set out above that there was a mutuality of obligations between the parties to provide and undertake work.

60. The Tribunal has also considered the control exercised over the claimant Control is an important but not determinative element of the test for determining whether or not the claimant is an employee of the respondent. The question in respect of control is whether the employer can direct her in what she did. That is distinct from showing that the employer controls the way in which the employee does the work. This will be the case even where there is an absence of day to day control by the employer if they retain the ultimate contractual power to direct what work should be done (White v Troutbeck SA [2013] IRLR 949 CA).

61. For the reasons set out in the findings of fact the Tribunal is in no doubt that the respondent controlled the claimant in what she did. In reality following her transition to self-employment in July 2019 nothing changed save for the way in which she received her money and the fact that she now had to pay a defined percentage of the money she earned to the respondent, for the rental of her chair. The claimant was still required to attend work on her designated days and stay there for her designated hours even if she had no clients booked in. If she did leave early this was only with the permission of Mr Roberts, as is evidenced by the text thanking him for allowing her to go home when she was unwell. She was also required to be contactable if she left the Salon during the day to go to the shops or for lunch, so that she would be available in the event that a walk-in client attended the Salon or someone rang for a late appointment. She was required to comply with the respondent dress code and help other colleagues with cleaning and tidying the premises

and helping out on reception. If she wanted to take annual leave she had to make a written application on the forms provided to all staff by the respondent and, she had to wait for approval from Mr Roberts before committing to any bookings. The fact that she never had a holiday request refused was no different to the position pre-July 2017. There is also evidence that the respondent provided training for the claimant both on and off the premises (p100 & 109), and that she was required to work an extra day per week to make up for her training attendance at the external course. On the basis of the evidence before it and for the reasons given above, the Tribunal is satisfied that save for the manner in which the claimant cut and styled a client's hair, the respondent had full control over the hours she worked and directed her in what she did in the same manner it did prior to July 2017 when she was an employee of the respondent.

62. Finally before reaching a determination on the employment status of the claimant, the Tribunal has considered if, and to what extent the claimant may have been in business of her own account. The Tribunal has considered this aspect despite the claimant's requirement to provide a personal service with no right of substation, the mutuality of obligation that the Tribunal has found between the parties and the level of control exercised over the claimant by the respondent.

63. The claimant's oral evidence was not disputed that post July 2017 she was still required to comply with the respondent dress code at work, in that staff were not allowed to wear jeans and should wear black in order to give a consistent look. Nor was the fact that she had always both pre and post July 2017, provided her own scissors and brushes etc and more latterly her own hairdryer. Some of these products had been purchased through the respondent, as had always been the practice, and she had accounted for the money for them directly to the respondent without being provided with any proof of her purchases to use to offset the costs as expenses in her annual self-assessment tax return. She also continued to use the large equipment provided by the respondent as she had always done and was required to use only the hairdressing products used by the Salon. She was told of her charge out rate and was not permitted to apply discounts to clients without the permission of Mr Roberts, which is evidenced in text messages before the Tribunal. She was required to attend work during the hours that had been agreed pre-July 2017, and was still required to assist others and cover reception on occasions when she was not seeing a client. To all intents and purposes she was an integral part of the Salon and there was nothing that would have differentiated her from any other members of staff either to her own regular clients or those of other members of staff.

64. Contrary to the respondent's evidence the claimant's regular clients did not become hers post July 2017. Post July 2017 clients continued to book appointments through the respondent reception and were entered on the respondent software. Unlike the respondent's other self-employed stylists, the claimant was not given enhanced access to the personal details of her regular clients. Payments from all clients were taken through the respondent till and the claimant was not given enhanced access to details of the monies taken

through the till that related to her 'clients'. In order to find out how much money had been taken she had to ask the receptionists to access the information for her. She could not therefore, as would have been required under the terms of the Agreement, provide these details to the respondent, on the contrary it was the respondent who told her how much money she was entitled to. The respondent also continued to provide insurance cover for the claimant, whereas under the terms of the Agreement she would have been required to provide her own cover.

65. Whilst there was a small degree of financial risk to the claimant if she lost her regular clients and was unable to build up more, the reality of the situation was that the claimant, through ceasing to be paid subject to PAYE, was led to believe by Mr Roberts that she would be in a better financial position and there is no evidence that the risk of anything other was discussed with her. She was not required to buy into the respondent and continued to attend the Salon for work and use all the same products and equipment as she had previously without any additional charge other than the agreed rental. It has not been suggested that the claimant was required to pay a minimal or nominal amount each month to the respondent in the event that her earnings did not reach a certain figure or she earned no money at all. The cost of the rental was predicated on takings from clients attending the Salon and if there were no takings attributed to the claimant no monies would be payable by her. In the circumstances it cannot be said that the claimant took any real financial risk in changing the manner in which she was paid. Nor can it be said that post July 2017 she started in business of her own account with her own clients. This is further supported by Mr Black's oral evidence that it would not have been acceptable for the claimant to see her regular clients in any other salon other than one within the respondent.

66. Having had regard to all the evidence in the round, it is clear that although agreement was reached for the claimant to receive payment for her work on a self-employed basis and that as a result of that agreement she paid a percentage of the takings generated from the clients she saw as a payment for rental of a chair to work from in the salon, the reality of the situation was that nothing else about the working relationship changed at all. The claimant was not in business of her own account either as an independent contractor or a limb (b) worker. She had no control over the hours or manner in which she worked needing permission to vary any part of her working agreement including needing permission to leave early or take annual leave. She was unable to negotiate the rate at which clients were charged or to offer discounts without the permission of Mr Roberts. If any client, whether known to her or not, was booked in for an appointment with her during the days on which she was expected to attend she was required to take that appointment and similarly she would expect new client appointments to be booked in with her in the same way as they would be for all other staff.

67. The Tribunal acknowledges that the practice of chair rentals by hairdressers is a common and accepted practice. Had the terms of the Agreement been properly concluded, and performed it may well have resulted in a contract with the claimant as an independent contractor. However, the true working practice

that existed in these particular circumstances bears no resemblance to the terms set out in that Agreement or one that would find the claimant to be a limb (b) worker for the purposes of s230(3)(b) ERA 1996. The Tribunal is satisfied that the claimant is able to satisfy the definition of employee under s230 ERA 1996.

68. In conclusion, the claimant was an employee of the respondent under s230 (1) ERA.

Employment Judge Sharkett

Date: 10 May 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

11 May 2021

FOR THE TRIBUNAL OFFICE

[je]