EMPLOYMENT TRIBUNALS

Claimant: **Miss K Rushton**

Respondent: **Planet Leasing Limited**

Heard at: **East London Hearing Centre (in public)**

On: **22 May 2024**

Before: **Employment Judge Gordon Walker (sitting alone)**

Representation
Claimant: represented herself
Respondent: Mr J Stuart, counsel

RESERVED JUDGMENT

1. At the material time, the claimant was not an employee of the respondent within the meaning of section 230(1) Employment Rights Act 1996.

2. At the material time, the claimant was not a worker of the respondent within the meaning of section 230(3)(b) Employment Rights Act 1996.

3. At the material time, the claimant was not an employee of the respondent within the meaning of section 83(2)(a) Equality Act 2010.

4. At the material time, the claimant was not a contract worker of the respondent within the meaning of section 41 Equality Act 2010.

5. Therefore, the Tribunal does not have jurisdiction to hear the claimant's claims.

6. All claims are dismissed.

REASONS

Introduction

1. By claim form dated 4 September 2023, the claimant presented claims for arrears of pay, and claims of sex, pregnancy, and maternity discrimination.

2. The respondent brokers the leasing of motor vehicles and franchises other companies to do so. The claimant was initially employed by the respondent as a sales executive. Latterly she set up a limited company which entered into a franchise agreement with the respondent. The franchise agreement was terminated on 24 May 2023.

3. At a private preliminary hearing on 4 March 2024, this public preliminary hearing was listed to determine the claimant's employment status.

4. This judgment does not seek to address every point about which the parties have disagreed, it only deals with the points that are relevant to the issues at paragraph 5 below. If I have not mentioned a point, it does not mean that I have overlooked it, it simply means it is not relevant to these issues.

The issues

5. The issues as agreed at the private preliminary hearing were:

   5.1 At the material time, from April 2022 to May 2023, was the claimant employed by the respondent?

   5.2 At the material time, from April 2022 to May 2023, was the claimant a worker of the respondent as defined by section 230(3) Employment Rights Act 1996 or section 83 Equality Act 2010?

   5.3 At the material time, from April 2022 to May 2023, was the claimant a contract worker of the respondent as defined by section 41 Equality Act 2010?

Procedure, documents, and evidence heard

6. The Parties produced a core bundle of 68 pages and a documents bundle, initially of 348 pages with eight further pages added at the outset of the hearing by agreement.

7. The claimant and Mr G Rose (director of the respondent) gave evidence at the hearing. They produced signed witness statements.

8. The parties made submissions in writing which were exchanged after the hearing. The parties referred to, and provided copies of, legal authorities.

9. Mr Rose disclosed a medical condition which meant that he paused before answering questions. This was taken into account where necessary. No further adjustments were required.

Findings of fact

10. I took all evidence that I was referred to into account. I only made findings of fact on those matters relevant to the issues set out at paragraph 5, above. I reached my findings of fact on the balance of probabilities, based on the evidence. Numbers in square brackets refer to pages of the documents bundle.

11. On 1 September 2021 the parties entered into a contract of employment [54-65] The claimant was employed as a sales executive. She was paid a basic salary plus commission. She had set working hours of 9:00 AM to 6:00 PM Monday to Friday. She was required to work at the respondent's office in Leigh on Sea which was about 45 minutes from her home. She was entitled to 20 working days holiday per year, for which she was paid. She was entitled to statutory sick pay. There were absence notification procedures for sickness and holiday absence. Notice periods were in place for termination of employment: one month's notice was required after the probationary period. There was a disciplinary and grievance procedure and an occupational pension scheme.

12. In February 2022 the claimant resigned. She had decided to find a new role outside of the automotive industry because she needed more flexibility given her young family. For several years the claimant had been interested in becoming a franchisee of the respondent, or a similar company. She had been unable to pursue this because she did not have the startup funds.

13. At the end of February 2022, the claimant had a conversation with Mr Rose where he offered her a franchise with the respondent without her having to incur the startup costs, such as the franchise fee.

14. The claimant accepted this offer. In oral evidence she explained that she would not have remained working for the respondent under the contract of employment. She viewed the franchise agreement as an opportunity to earn more money and to have flexibility to work from home and at times that suited her. She understood that, according to the written terms of the franchise agreement, she would no longer be an employee of the respondent.

15. On 1 March 2022 the claimant set up a limited company called KLMW limited ("KLMW") [129]. She was the sole director, shareholder and employee of KLMW. KLMW's trading name was Planet Leasing Thurrock, which reflected the territory it was assigned by the respondent: the Thurrock area.

16. On 1 April 2022 the respondent and KLMW entered into a franchise agreement [139-180].

17. The claimant was also named as a party to the agreement. The agreement referred to her as "individual". The individual's obligations as set out at clause 24 [168-169] were to guarantee the performance of the franchisee's obligations; and to be a director and 100% shareholder of the franchisee devoting her full time and attention to the franchisee business. There was also a clause about what would happen in the event of death or incapacity of the individual [DB159-161].

18. The franchise agreement states that there is a manual of the respondent setting out the way in which the franchisee shall operate the franchisee's business. There was no such manual. Mr Rose said in oral evidence that the respondent had intended to write a manual but decided that face to face verbal engagement was sufficient. He explained that the respondent used regular meetings, training, monitoring, mentoring and support provided by himself and his business partner to achieve the objectives of the manual i.e.

to set out the way in which the franchisee shall operate the franchisee's business.

19. The franchise agreement places obligations on KLMW:

    19.1 For example: about their premises, a requirement to attend and become a member of their local BNI network, and to use only specified equipment and stationery.

    19.2 KLMW was not, without the previous written consent of the respondent, allowed to engage in or be involved in any business other than the respondent's business and was required to procure that the claimant, as the individual, complied with the similar obligation.

    19.3 Mr Rose explained in oral evidence, and I accept, that KLMW would need to seek approval from the respondent for any fundamental change, such as any new employees of KLMW, or a change of premises.

20. At the outset of the franchise relationship, KLMW was given an important client (Belvoir) by the respondent, to ensure continuity because the claimant had managed that client as an employee. Mr Rose sent messages to the claimant in May 2023 asking her how she as getting on with this client, and whether she was staying in touch and suggesting deals [191].

21. As set out at paragraphs 18-20 above, the respondent exercised influence or control over the way that KLMW operated its business. I find that the purpose of this was for the respondent to protect its brand image. KLMW was operating under the Planet Leasing brand. As explained by Mr Rose in oral evidence, and I accept, the respondent's aim was to ensure that its brand was consistently represented throughout the territories so that the customer would receive the same customer service and competitive edge. From the client's perspective, there was no difference between working directly with the respondent or one of the franchisees, they were all operating under the same brand name and would appear to be part of the same company.

22. Each franchisee had a separate territory. Franchisees generated their own business, for example through the local BNI network. If there were pre-existing customers of the respondent within a specific territory, the respondent might retain that business rather than refer it to the franchisee. If enquiries were made centrally through the respondent from customers within a specific territory, those might be referred to the relevant local franchisee, whether they were or not was determined by the respondent: the oral evidence of Mr Rose was accepted on this point. The claimant's evidence in her witness statement at paragraph 34 that the respondent referred enquiries that had to be dealt with according to the respondent's standards is also accepted, save that I find that these enquiries were referred to KLMW rather than to the claimant.

23. When the claimant was working for KLMW under the franchise agreement she had the same access to the respondent's systems and used the same

log-in details that she had used when employed under the contract of employment dated 1 September 2021.

24. All income generated by KLMW was collected by the respondent on behalf of KLMW and the respondent retained an arrangement fee on each sale made by KLMW. KLMW issued invoices to the respondent which were then paid [146].

25. The claimant took dividends from KLMW as well as a salary. She completed a personal tax return and the company filed accounts. This was a more favourable tax arrangement for the claimant than when she was paid by PAYE under the contract of employment dated 1 September 2021.

26. Occasionally the claimant was asked to work at the respondent's office helping out with administrative tasks. For example, in June and July 2023 [199; 221]. The respondent offered to pay the claimant for her fuel expenses, but she was not otherwise paid. In cross examination the claimant referred to this as her "doing a favour" for the respondent, she said that in return she was asking for prompt payment of her invoices, she described this in an email as "a favour for a favour" [199]. Mr Rose also described this arrangement as the claimant doing the respondent a favour. I find that the claimant's work in the respondent's office was done by the claimant as a favour and was not part of the franchise agreement or work done by the claimant for remuneration.

27. There were some documents in the bundle where the claimant was referred to as being employed or as an employee. Mr Rose used the term "indirectly employed" to refer to the claimant, and others in a similar position, in a WhatsApp message of 24 October 2022 [206]. The police classified the respondent's allegation of a crime as "theft by an employee" [226]. Jordan Deterville, Sales Supervisor described the claimant as an ex-employee [229]. I do not find these documents persuasive or helpful as to the claimant's status. I am concerned with what the claimant did on a day-to-day basis and also what the contractual documents say, as explained in the conclusion section below.

Parties' submissions

28. The parties produced helpful written submissions which speak for themselves.

29. Those submissions and the case law referred to by the parties were taken into account when reaching my decision, even if not expressly referred to below.

The law

30. Section 230 Employment Rights Act 1996 states, so far as is relevant:

230 Employees, workers etc.

(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.

31. Section 83(2)(a) Equality Act 2010 states:

(2) "Employment" means—

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.

32. Section 41 Equality Act 2010 states:

Contract workers

(1) A principal must not discriminate against a contract worker—

(a) as to the terms on which the principal allows the worker to do the work;

(b) by not allowing the worker to do, or to continue to do, the work;

(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

(d) by subjecting the worker to any other detriment.

(2) A principal must not, in relation to contract work, harass a contract worker.

(3) A principal must not victimise a contract worker—

(a) as to the terms on which the principal allows the worker to do the work;

(b) by not allowing the worker to do, or to continue to do, the work;

(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

(d) by subjecting the worker to any other detriment.

(4) A duty to make reasonable adjustments applies to a principal (as well as to the employer of a contract worker).

(5) A "principal" is a person who makes work available for an individual who is—

(a) employed by another person, and

(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(6) "Contract work" is work such as is mentioned in subsection (5).

(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

33. The classic statement of the nature of the section 230(1) Employment Rights Act 1996 employee relationship is set out in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 1 All ER

433 at page 515, and confirmed in **Autoclenz Ltd v Belcher and ors** [2011] ICR 1157 at paragraph 18.

34. The law on employee status (for the purposes of section 230(1) Employment Rights Act 1996) is summarised in **Anglian Windows Ltd (t/a Anglian Home Improvements) v Webb** [2023] EAT 138 paragraphs 23-24.

35. The law on worker status (section 230(3)(b) Employment Rights Act 1996) and section 83(2)(a) Equality Act 2010 employment status is summarised in **Sejpal v Rodericks Dental Limited** [2022] EAT 91, paragraphs 7-35 and **Plastic Omnium Automotive Ltd v Horton** [2023] EAT 85, paragraphs 34-42.

36. On the relevance of the written terms, the law is set out in **Autoclenz Ltd v Belcher and ors** [2011] ICR 1157, paragraphs 22-39; **Uber BV and ors v Aslam and ors** [2021 ICR 657 paragraphs 68-77 and the recent cases of **Ter-berg v Simply Smile Manor House and ors** [2023] EAT 2 paragraphs 38-46; **Plastic Omnium Automotive Ltd v Horton** [2023] EAT 85 paragraphs 38-39 and **Anglian Windows Ltd (t/a Anglian Home Improvements) v Webb** [2023] EAT 138 paragraphs 22-26.

37. On the issue of section 41 Equality Act 2010 contract workers, I had regard to **Leeds City Council v Woodhouse** [2010] EWCA Civ 410; and **Harrods Ltd v Remick and others** [1998] ICR 156.

38. In her submissions, the claimant referred to the case of **Johnson-Caswell v MJB (Partnership) Ltd** case number 3101854/2011. This is a first instance case (i.e. at Employment Tribunal level) and is therefore not a case that I am bound to follow, or that has been approved at a higher level as being decided correctly. I therefore did not find this case of assistance when reaching my conclusions.

Conclusions

39. The franchise agreement reflects faithfully the intentions and the true agreement of the parties as to the nature and basis of their working relationship.

40. This was not a situation where the claimant was required to sign contractual terms to receive work and to be paid. The claimant elected to terminate her employment contract with the respondent as she no longer wanted to be an employee. This is evidenced by her resignation and her oral evidence. She had always wanted a franchise agreement because the contractual arrangement was more favourable to her as it allowed her greater flexibility and remuneration and a beneficial tax arrangement. She was previously precluded from entering into such an agreement due to the startup costs, which were waived by the respondent.

41. The claimant was a party to the franchise agreement. However, her contractual obligations under that agreement were not to work for the respondent, or to provide a personal service to them. That was not the position under the written contractual terms or in practice. The franchise agreement formalised the commercial relationship between two businesses:

the respondent and KLMW. The claimant was in business on her own account as the sole director and shareholder of KLMW.

42. The claimant was not an employee (within the meaning of section 230(1) Employment Rights Act 1996) of the respondent at the material time:

42.1 First, for the reasons stated above, she was not required to provide personal service to the respondent. She was required to be the sole shareholder of KLMW and to devote her full time and attention to KLMW's business. If she was required to provide personal service, it was to KLMW and not to the respondent.

42.2 Second, the respondent exercised control and influence over KLMW as set out at paragraphs 18-20 above. This was to protect the respondent's brand. As the claimant was the only director, shareholder, and employee of KLMW, it is easy to confuse obligations placed on KLMW as being obligations placed on the claimant. I conclude that the obligations were on KLMW, and the respondent did not exercise direct control over the claimant.

42.3 Third, there was no mutuality of obligation between the claimant and the respondent. The claimant was free to choose her working hours with KLMW. The arrangements for paying fees was an arrangement between the respondent and KLMW and was conditional upon KLMW generating income.

42.4 Fourth, the terms of the contract were consistent with a franchise agreement:

42.4.1 The respondent exerted control over KLMW to protect its brand. KLMW was trading under its brand name, as a franchisee.

42.4.2 KLMW's only clients were Planet Leasing clients. KLMW's trading name was Planet Leasing Thurrock. It was in the nature of the franchise agreement that KLMW's clients (whether directly generated or referred by the respondent) were Planet Leasing clients.

42.4.3 The claimant says that the following facts were consistent with employment status: (1) that her level of access and log-in details were the same as when she was employed under the contract of employment dated 1 September 2021; and (2) customers would not know the difference between the respondent and Planet Leasing Thurrock, unless explicitly told. I reject this submission. First, the log-in details simply gave KLMW access to the respondent's systems as required to perform its obligations under the franchise agreement. The fact that the log-in details remained the same was for convenience and reflected the fact that the claimant was the only employee, director, and shareholder of KLMW. Second, it was important for the respondent to ensure consistent service to all Planet Leasing clients to protect its brand image.

43. The claimant was neither an employee (within the meaning of section 83(2)(a) Equality Act 2010) nor a worker (within the meaning of section 230(3)(b) Employment Rights Act 1996) of the respondent at the material time. Whilst she was a party to a contract with the respondent, this was not a contract where she undertook to perform work personally for the respondent.

44. Turning to the issue of whether the claimant was a contract worker within the meaning of section 41 Equality Act 2010. Having regard to the statutory wording, for the claimant to be a contract worker the respondent must (1) make work available to her and (2) she must be supplied to the respondent by KLMW in furtherance of a contract between the respondent and KLMW. In **Harrods** the Court of Appeal said there were two questions that had to be answered (1) whether the work done by the individual was done for [section 41] purposes; and (2) whether the individual was supplied under a contract.

45. The respondent did not make work available to the claimant. The respondent made work available to KLMW, but even this was not guaranteed. The Belvoir client was a one-off gesture by the respondent to ensure continuity of management of an important client and was not indicative of how the relationship operated in practice thereafter. Thereafter, even if a Thurrock client made a central enquiry with the respondent, this was not guaranteed to be made available to KLMW. KLMW was expected to generate its own business, which it did.

46. I find that the work done by KLMW was work done for the Planet Leasing brand. However, I find that the work was done for Planet Leasing Thurrock and not for the respondent. As confirmed in **Leeds** paragraph 22**,** the fact that the respondent derived some benefit from the work (in this case through the arrangement fee) is not enough to bring it under section 41.

47. The claimant was not supplied to the respondent. The claimant worked for KLMW. She worked at her KLMW home office on the days and times of her choosing.

48. As the key requirements of section 41 Equality Act 2010 are not met, I conclude that the claimant was not a contract worker either.

49. It follows from my conclusions that the claimant does not have the requisite status to bring her Employment Tribunal claims. The Tribunal does not have jurisdiction to hear the claims and they are therefore dismissed.

Employment Judge Gordon Walker
Dated: 18 June 2024