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EMPLOYMENT TRIBUNALS

Claimants:
1. Mr F Bruce
2. Mr R Harrelson

Respondents:
1. Joanne Nash
2. Merton London Borough Council
3. Lifestyle Care Management Ltd

Heard at: East London Hearing Centre
On: 19 & 21 April; 10-12 May & 16 May 2017

Before: Employment Judge Brown

Members: Ms L Conwell-Tillotson
Mr L O'Callaghan

Representation

Claimants: Mr J Jupp (Counsel)

1st Respondent: Mr P Warnes (Consultant)

2nd Respondent: Mr E Capewell (Counsel)

3rd Respondent: Mr K Sonaike (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1. The Claimants are employed by the First Respondent, pursuant to contracts of employment. They were so employed at all times material to these claims.
2. The Claimants' employment did not transfer to the Third Respondent pursuant to a service provision change under *TUPE 2006*.

3. The Claimants' contracts have not been frustrated.
4. The First Respondent has made unlawful deductions from the Claimants' wages by failing to pay them, at all, since 25 June 2016.
5. The First Respondent failed to give the Claimants statements of employment particulars and the First Respondent shall pay to each of the Claimants 4 weeks' pay in respect of this failure.
6. The First Respondent unreasonably failed to comply with the provisions of the *ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015)* in respect of the Claimants' grievances about not being paid, by failing to hold a meeting to discuss the Claimants' grievances and not giving the Claimants any outcome to their grievances. The Claimants are therefore entitled to a 25% uplift on their award for unlawful deductions from wages and associated financial loss, pursuant to *s207A TULR(C)A 1992*.
7. The Claimants sustained financial loss by way of bank charges and interest charges attributable to suffering unlawful deductions from wages and it is appropriate that the First Respondent compensates the Claimants for that financial loss.
8. The First Respondent shall pay the Claimants the following sums in compensation for their claims:

The First Claimant Mr Bruce

(Net weekly pay: £544.09)

8.1	Unlawful deductions from wages 25 June 2016–12 May 2017:	£ 24,895.05
8.2	Associated financial loss <i>s24(2) ERA 1996</i> :	£ 1,903.52
8.3	25% ACAS uplift on 8.1 and 8.2 (total £26,798.57):	£ 6,699.64
8.4	4 weeks gross pay (capped at £479) <i>s38 EA 2002</i> :	£ 1,916.16
8.5	<u>TOTAL:</u>	<u>£ 35,414.37</u>

The Second Claimant Mr Harrelson

(Net weekly pay: £544.09)

8.6	Unlawful deductions from wages 25 June 2016–12 May 2017:	£ 25,101.47
8.7	Associated financial loss <i>s24(2) ERA 1996</i> :	£ 953.52
8.8	25% ACAS uplift on 8.1 and 8.2 (total £26,798.57):	£ 6,513.75
8.9	4 weeks gross pay (capped at £479) <i>s38 EA 2002</i> :	£ 1,916.16
8.10	<u>TOTAL:</u>	<u>£ 34,484.90</u>

REASONS

Preliminary

1 The Claimants brought complaints of unlawful deductions from wages, failure to provide a statement of initial employment particulars and a failure to inform and consult under *Regulation 13 TUPE Regulations 2006*, as well as seeking an uplift for failure to comply with the *ACAS Code of Practice* against the three Respondents. They had originally been engaged by the First Respondent, who contended that the Claimants' employment had transferred to the Third Respondent.

2 The parties had agreed a list of issues arising in the claim and responses. The issues were as follows:-

Wages claim

2.1 Were the Claimants engaged under a contract of service or a contract for services, or were they workers, and if so for which Respondent:

2.1.1 from the outset of their work as the First Respondent's carers?

2.1.2 after 26 April 2016?

2.2 In relation to issue 1(b), the following sub-issues arise:

2.2.1 Did the Claimant's employment transfer to the Third Respondent pursuant to TUPE 2006 and if so, when did any such transfer take place? The Claimants and the First Respondent allege that a service provision change falling within Regulation 3(1)(b)(i) (outsourcing) or Regulation 3(1)(b)(ii) (reassignment) TUPE occurred on or around 26 April 2016. In relation to this:

2.2.1.1 What were the 'activities' carried out before and after any relevant transfer?

2.2.1.2 Were the said activities fundamentally the same before and after the transfer?

2.2.1.3 Was there an organised grouping of employees immediately before the transfer

2.2.1.4 Were the Claimants or either of them assigned to that organised grouping immediately before the transfer?

2.2.1.5 Who was the 'client' before and after the alleged transfer?

- 2.2.1.6 Who was the 'contractor' if anyone before the transfer and who was the contractor after the alleged transfer?
- 2.2.1.7 Did the 'client' intend that the activities would, following the transfer, be carried out by the transferee other than in connection with a single specific event or a task of short-term duration?
- 2.3 Was any contract of employment with the Claimants frustrated after 26 April 2016?
- 2.4 Do the Claimants remain employed and if so, by which Respondent?
- 2.5 If the contract is extant and enforceable, what were the terms of the contract under which the Claimants were employed with regard to payment of wages?
- 2.6 Did the Claimant's employer make unauthorised deductions from their wages in respect of the period after 26 June 2016 and if so, in what sum?
- 2.7 To what compensation, if any, are the Claimants entitled pursuant to section 24(2) ERA 1996?

Failure to provide statement of initial employment particulars

- 2.8 Did the Claimants' employer fail to provide them with a statement of initial employment particulars in accordance with section 1 ERA 1996?
- 2.9 If so, to what compensation, if any, are the Claimants entitled pursuant to section 38 EA 2002?

Failure to inform and consult

- 2.10 If there was a service provision change pursuant to TUPE, did the transferor fail to inform and consult in accordance with Regulation 13 TUPE?
- 2.11 If so, to what compensation, if any, are the Claimants entitled under Regulation 15 TUPE?

Failure to comply with the ACAS Code

- 2.12 Does section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 apply to the Claimant's claims under sections 23 and 24 of the ERA and, if so, was there a failure to comply with the Code and, if so, by whom?
- 2.13 Should there be an increase in any award and if so by what percentage?

3 During this hearing the Tribunal made a number of orders with regard to procedural matters. It gave reasons for making the orders at the time.

4 The Tribunal heard evidence from the two Claimants. It heard evidence from the First Respondent; from Sandra Mak for the Second Respondent; and from Lorna Lewis for the Third Respondent. There was a bundle of documents, to which a number of documents was added during the hearing. All parties made closing submissions. The Claimants and First and Third Respondents made written submissions, as well as oral submissions. The Tribunal reserved its judgment. The parties agreed the basis for calculation of amount of the wages claim.

Findings of Fact

5 The First Respondent has physical disabilities. She has cerebral palsy with limited use of all four of her limbs and a speech impediment. She uses an electric wheelchair. The First Respondent requires 24 hour care. She is intelligent, has mental capacity and can read and understand the contents of documents. She can make decisions with regard to all aspects of her care and finances.

6 The Second Respondent is a Local Authority. Its Social Services Department has been assisting the First Respondent since 1973, pursuant to its statutory duties.

7 The First Respondent became friends with Mr Harrelson (the Second Claimant) in 1991. In the same year, the Claimant moved into a rented flat, to live independently. The Claimant was assessed by her social worker at the time as needing one-to-one support 24 hours a day.

8 The First Respondent decided to engage live in carers through an organisation called Community Service Volunteers. The Second Respondent's Social Services Department paid for the cost of carers.

9 Mr Harrelson started caring for the First Respondent in about 1992, 3 days a week, being paid £57 for those three days. That arrangement ceased for about a year shortly afterwards.

10 The Independent Living Fund was then set up by the Department of Work and Pensions, to help people with disabilities to live at home in the community, rather than living in a care home. Independent Living Fund payments were paid directly to disabled people, so that they could employ their own carers. When a disabled person chose to employ carers directly, the disabled person was required to give the carer's name, address, National Insurance number and weekly, or four weekly, pay details to the Independent Living Fund.

11 In February 1993 the First Respondent's social worker (from the London Borough of Merton Social Services) and a Independent Living Fund Assessor met with the First Respondent, to assess her needs. They explained to her her duties as an employer. The London Borough of Merton and the Independent Living Fund agreed a funding arrangement for the First Respondent, for 7 nights' sleep in care, plus day time care hours.

12 Between 1993 and 2012 the First Respondent received Care Plan Review visits annually. All the reviews agreed that the First Respondent was able to communicate her own needs and to direct her own care, with some support.

13 On 29 April 2002, the London Borough of Merton entered into a direct payment agreement with the First Respondent and, thereafter, until 2016, the London Borough of Merton made direct payments to the First Respondent's bank account, to enable her to fund her own care.

14 After a break in caring arrangements, Mr Harrelson cared continuously for the First Respondent from 1996 until 2016. Both Mr Harrelson and the First Respondent told the Employment Tribunal that the First Respondent employed Mr Harrelson as a carer from that date. Mr Harrelson could not remember what contractual terms were agreed between him and the First Respondent in 1996. Both Mr Harrelson and the First Respondent agreed, however, that the First Respondent did employ Mr Harrelson. Local Authority social workers understood, throughout the period, that the First Respondent was employing her carers directly.

15 Mr Harrelson and Mr Bruce are in a relationship and have been since 2005. Mr Bruce and the First Respondent both told the Employment Tribunal that, from September 2005, the First Respondent also agreed to employ Mr Bruce as her carer.

16 The First Respondent, Mr Bruce and Mr Harrelson all told the Tribunal that, when both Mr Bruce and Mr Harrelson were working for the First Respondent, Mr Bruce and Mr Harrelson would alternate caring duties for the First Respondent, so that each would work a full 7 days, for 24 hours each day, and then the other would work the next 7 days. Although the First Respondent had her own flat in the London Borough of Merton, in fact, she lived almost exclusively in the Claimants' home, in Essex. There, she had her own room with a bed, table, television and three piece suite for visitors. The Claimants' home had a wet room which was available for the First Respondent, for washing and personal care.

17 The First Respondent and Claimants told the Tribunal that the caring duties which the Claimants were required, by the First Respondent, to undertake included assisting with medication, feeding the First Respondent, washing and dressing the First Respondent, personal hygiene tasks, caring for the First Respondent's home and doing shopping for her. The First Respondent and the Claimants agreed that the First Respondent would tell the Claimants what they were required to do in their caring duties; for example, if the First Respondent wanted to go to the bank or cinema, she would ask the appropriate Claimant to accompany her, to assist her.

18 The Claimants adapted a transit van to transport the First Respondent around. They took her on trips to visit her parents in Cambridgeshire. Later, when the van needed to be replaced, the First Respondent met the payments which were due under the vehicle finance agreement. Occasionally, when the First Respondent needed to stay at her own flat, at least one of the Claimants would accompany her there.

19 The First Respondent engaged a payroll company to calculate the Claimant's wages, National Insurance and tax and to produce payslips for them. When the London Borough of Merton made payments to the First Respondent's bank account for

her care, the First Respondent would go to the bank to transfer payments to the Claimants of the net amount of pay shown on the payslips. To the end of the tax year ending 5 April 2016 the Claimant paid Mr Bruce £37,563.17 gross; she paid Mr Harrelson £37,734.69 gross.

20 Mr Bruce and Mr Harrelson worked exclusively for the Claimant. They did not work for any other disabled person. They did not hold themselves out as being available for work elsewhere. In recent years, the First Respondent agreed to pay the Claimants holiday pay when they went on holiday, after the Second Respondent advised her that she should do this because the Claimants were her employees.

21 On 11 April 2016, an anonymous caller telephoned the First Respondent's social worker, Sandra Mak, Team Manager at London Borough of Merton Social Services. The caller said that he was calling on the First Respondent's behalf and said that there was a safeguarding issue in relation to Mr Bruce, amounting to neglect and physical and emotional abuse.

22 The allegations are strenuously denied by Mr Bruce and there has never been a concluded investigation by the London Borough of Merton in relation to them. All parties agreed that it was not for this Tribunal to make any findings on the truth of the allegations.

23 The London Borough of Merton Social Services Department agreed to meet the First Respondent on 26 April 2016, at the Merton Centre for Independent Living. Mr Bruce accompanied the First Respondent to the meeting. Mr Jackson, the First Respondent's social worker at the time, asked to speak to the First Respondent in private, in the presence of Colin Finch, the First Respondent's MCIL Advocate.

24 The First Respondent made allegations against Mr Bruce; that he caused her harm and neglect by making her eat more than she wanted to, by keeping her waiting when she was on the toilet and when she wanted to go out.

25 The First Respondent was clear that she did not wish to return to be cared for by Mr Bruce. Mr Jackson, her social worker, suggested to the First Respondent that she move to a nursing home environment, as an interim measure. The First Respondent said that her ultimate goal was to move to a different flat in Colchester, to live near her friends.

26 The Third Respondent is a company which specialises in the delivery of care services to vulnerable adult service users. It operates 22 care homes, one of which is called Eltandia Hall.

27 The Second Respondent had an existing agreement with the Third Respondent for the provision of residential and nursing care to older people at Eltandia Hall (pgs.275-276 and 200-248).

28 Pursuant to the agreement, the London Borough of Merton agreed to pay to the Third Respondent £540 per bed for residential care each week, or £670 per bed for nursing care each week. The London Borough of Merton arranged for transport for the First Respondent to be taken to Eltandia Hall on 26 April 2016 and for the locks to be

changed on her flat.

29 On 26 April the home manager of Eltandia Hall wrote to the First Respondent, saying that the Home could “meet the needs of your client”. The letter enclosed a standard contract and personal allowance contract and asked the First Respondent to sign both and return them (p.560).

30 A financial details form completed at the time recorded that the First Respondent had been admitted on 26 April 2016 and that the type of admission was “respite,” rather than permanent. The admission was described as a London Borough of Merton admission and the financial contact for invoicing was stated to be Transactional Services Merton Civil Centre (p. 561).

31 The contract which was sent to the First Respondent was entitled “Nursing/ Residential Placement Agreement/Contract Social Services Funded” (p.565). Ms Lewis, the Home Manager, confirmed in evidence that all new residents, or their representatives if they did not have capacity, were required to sign this form of contract. The contract, as drafted for the First Respondent’s residence, provided that: Joanne Nash was the service user; Patricia Nash was her receiver or attorney; the London Borough of Merton was the authority who was responsible for the care of the service user; the Third Respondent was the proprietor; and that all four of these were parties to the contract.

32 The contract provided, in its introduction, that the proprietor: “runs residential care home. The Service User is in need of accommodation and personal care and/or the Local Authority has applied to the Proprietor for a place at the Home”. The contract said that the proprietor had agreed to provide accommodation and personal care to the service user and that the service user had agreed to pay the proprietor such contribution towards fees which may be assessed.

33 The terms of the contract provided, at clause 1, that, subject to payment of the weekly fees, the proprietor would provide to the service user at the home specified accommodation and care, including a single room, food, light, heat, laundry, personal care and meals.

34 Clause 1.7 provided that the aim would be to maintain choices and opportunities for and the independence of the service user.

35 Clause 2 provided for fees and personal expenses. By clause 2.1 the contract said: “The fees are initially £986 per week payable in advance ... the Service User, the Receiver/Attorney and the Authority will each use their best endeavours to ensure that the fees are paid promptly ...” Paragraphs 2.2 to 2.5 governed payments of client contributions. Clause 2.6 provided that the billing of fees would be made on a 28 day cycle in accordance with a list of dates which would be issued to the service user. It stated, “The first date in each billing cycle as it appears on the bill delivered to the service user shall be referred to as the due date”. By clause 2.8 the contract said: “Fees are payable with effect from the Due Date.” Clause 2.9 said:

“If the Service User fails to pay a bill within 14 days from the Due Date ... then the Proprietor reserves the right to recover interest ...”

36 Clause 3.1 provided for a trial period. It provided that the first four weeks following admission to the Home would be treated as a trial period, during which either the proprietor or the service user might terminate the agreement by giving one week's notice in writing. Clause 7 provided for termination. It specified various circumstances in which the Service User, the Receiver or Attorney, or the Authority could give four weeks notice to the Proprietor.

37 The First Respondent did not sign the contract herself. Her mother signed it on her behalf, even though the First Respondent had capacity to sign the contract. The First Respondent told the Tribunal that she had not seen the contract. The Tribunal noted that, during the First Respondent's evidence to the Tribunal, she said, on a number of occasions, that she had not read documents, even though these had been provided to her (p.577).

38 On 3 May 2016, a purchase request was raised by the London Borough of Merton Community and Housing Department, which stated:

“Agency: London Borough of Merton, Commissioning Brokerage
Customer: Ms Joanne Nash
Date care to start: 26/04/2016
Service Being Requested: Short Term YPD bed at cost of £986pw.”

The First Respondent's mother also signed a Personal Allowance Contract with the Third Respondent, on the First Respondent's behalf, on 5 May 2016 (p.579 to 580).

39 It was agreed between the parties that the London Borough of Merton paid the fees for the First Respondent's care at Eltandia Hall direct to the Third Respondent at all times and that the First Respondent was not required to make any contribution to the fees. The Second Respondent told the Tribunal that it arranged for the First Respondent to move to the Third Respondent's Care Home pursuant to the Second Respondent's statutory duties under section 18 Care Act 2014.

40 On 26 April 2016, Mr Jackson and Mr Finch told Mr Bruce, face to face, that Mr Bruce was being suspended. The First Respondent told the Tribunal that she agreed to Mr Bruce being suspended, but not to Mr Harrelson being suspended.

41 On 27 April 2016 Mr Harrelson emailed Sandra Mak, asking whether he had been suspended too. He said that he had been told by the London Borough of Merton not to attend work. He expressed concern about the First Respondent's welfare (p.310). Ms Mak replied to both Mr Bruce and Mr Harrelson on 28 April, saying that Merton Social Services had received safeguarding alerts, were undertaking a full investigation under their safeguarding adult procedures and that Ms Nash's personal assistants, Mr Bruce and Mr Harrelson, were suspended on full pay, on a without prejudice basis, whilst London Borough of Merton investigated the alerts raised. She asked that the First Respondent's keys and bank cards be forwarded to the First Respondent.

42 There were some delays in the First Respondent paying the Claimants after April 2016, but all parties agreed that the Claimants were paid in full until 25 June

2016.

43 On 3 June 2016 Ms Mak wrote to the Third Respondent, saying that Ms Nash had been staying at Eltandia Hall Younger Person's Unit "for several weeks for urgent respite" (p.583). She said that it had come to her attention that the First Respondent would require one-to-one support to access the community once a week, for three hours, in order to escort the First Respondent, the bank or shops in Wimbledon. Ms Mak asked for a quote for that support, per hour, and asked when it would start. Ms Mak chased her enquiry about the cost of one-to-one support for the First Respondent to access the community on 16 June 2016 (p.586).

44 On 24 May 2016, Sandra Mak wrote to the First Respondent, saying that direct payments to her would be terminated, because the First Respondent had not fulfilled her responsibilities under the direct payment agreement and had not managed her support plan and the employment of personal assistance in the manner required by the Council. Ms Mak said that the last day of the direct payment care package would be 9 June 2016. Ms Mak said that the London Borough of Merton would commission care provision for the First Respondent at her home and would end her respite placement when a start date for the new commission care had been confirmed. Ms Mak told the First Respondent:

"You will also need to contact your personal assistants to advise them of the reason for current suspension; termination of employment as well as the end of your Direct Payments care package because these are within your role as their employer."

45 Ms Mak reminded the First Respondent that she had access to legal advice under her insurance policy (p.332-333).

46 On 27 June 2016 Ms Mak met with the First Respondent and advised her to make the Claimants redundant. The First Respondent was willing to make a redundancy payment to Mr Harrelson, but not to Mr Bruce (p.366).

47 On 26 July 2016 Ms Mak wrote to the First Respondent in a letter headed, "For your urgent attention – Employer's responsibilities" (p.386). Ms Mak said that the First Respondent had been advised, twice, about the importance of giving notice of termination to both her personal assistants. Ms Mak said that, as an employer, the First Respondent would need to inform her personal assistants that her social care was no longer funded through direct payments and of the implications for their employment.

48 On 26 July 2016 Ms Mak also emailed the Claimants, saying that the First Respondent's direct payments care package had ended in June. She told them to contact the First Respondent's legal representative for further information (p.388).

49 On 1 August 2016 the First Respondent's social worker and Sandra Mak, met again with the First Respondent and told her that her nursing home placement at Eltandia Hall would become permanent in four weeks, which would have ramifications for her flat in the London Borough of Merton. The First Respondent confirmed that she did not wish to return to her flat (p.415).

50 On 23 September 2016 Sandra Mak wrote to the First Respondent, saying that her current respite nursing care placement at Eltandia Hall would become permanent on 26 September 2016. Ms Mak said,

“You have informed us that you do not wish to return to live at your rented property ... Over the past few months, you have consistently expressed a preference to move out of Merton to be nearer to your friends and family in Essex.” (p.442)

51 In November 2016, the First Respondent gave the Second Respondent signed authority to act on her behalf as agent, to take steps to consult with the Claimants and terminate their employment, by making them redundant, or otherwise by bringing their employment to an end (p.492-493).

52 On 26 November 2016, the First Respondent signed an individual service agreement with the Second Respondent regarding services it would provide to her, the detail of care provision arrangements and the details of the pay arrangements for her care (p.496 to 507).

53 On 15 December 2016, London Borough of Merton wrote to the Claimants, saying that the First Respondent had authorised the Council to act on her behalf in sending the letter and saying that it would be acting on her behalf in conducting a redundancy consultation exercise with the Claimants. The Claimants were invited to a redundancy consultation meeting on 22 December 2016 (pgs.512 and 514).

54 On 1 February 2017, the First Respondent withdrew her authorisation for the London Borough of Merton to act on her behalf in the redundancy process. The Claimants have never received notice of dismissal for redundancy, or for any other reason. The London Borough of Merton informed the Claimants that the Local Authority was no longer authorised to act for the First Respondent on 15 February 2017 (p.544).

55 Ms Mak told the Tribunal that the First Respondent had initially moved to Eltandia Hall on a respite basis.

56 The First Respondent had a cat which lived in the Claimants' house. They continued to look after the cat after the First Respondent left their care. The First Respondent did not contribute the cost of its upkeep.

57 The First Respondent was not supported to go into the community to go to the shops, bank, cinema and concerts for many months after she moved to Eltandia Hall (p.465). When at the Third Respondent's Care Home, the First Respondent was required to comply with the schedules and organisation of the Care Home.

58 The First Respondent had a number of complaints about the quality and standard of care given to her at the Third Respondent's Care Home; for example, not being provided with her medication and not being assisted to go to the toilet when she needed to and not being assisted to drink liquids when she was in bed.

59 The First Respondent told the Tribunal that she knew that Mr Bruce and

Mr Harrelson would not be caring for her when she moved into Eltandia Hall.

60 The First Respondent was cross-examined by the Third Respondent about being moved to the Care Home and her intentions at the time. It was put to her that she was moved into the Home to allow an investigation to take place into her allegations against Mr Bruce. The First Respondent said that the purpose of her move to the Home was to get her away from Mr Bruce. She then agreed that the investigation would take place while she was in the Home, but said that the investigation was out of her hands.

61 Also, when cross-examined by the Third Respondent, the First Respondent agreed that everyone involved regarded the placement of the First Respondent in the home as an emergency short-term measure, while matters were investigated but, in cross-examination by the Claimants, she said that matters were out of her hands and that she had no idea how long she would be in the Care Home.

62 The First Respondent agreed that she did not have carers assigned only to her while she was in the Third Respondent's Home.

63 At the Third Respondent's Care Home, the First Respondent was assisted with washing, dressing, feeding, drinking, her toilet needs, manipulating objects like her phone and books and getting into bed, on a 24 hour basis. The care she was given was like the care that she was given by the Claimants. The First Respondent told the Tribunal that the carers at Eltandia Care Home performed exactly the same personal care as she received from the Claimants.

Relevant law

Contracts of Employment

64 There are four requirements which must be fulfilled in order for a contract of employment to be found to exist between the parties:

- 64.1 A contract exists between the worker and the alleged employer;
- 64.2 An obligation exists on the worker to provide work personally (*Express & Echo Publications Ltd v Tanton* ("Tanton") [1999] ICR 693);
- 64.3 There is mutuality of obligation (*Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612, 623), and
- 64.4 There is an element of control over the work by the employer consistent with the contract being one of employment.

65 With regard to mutuality of obligation, this does not require the employer to provide work on all occasions, *Wilson v Circular Distributors Limited* [2006] IRLR 38. In that case, the EAT said that mutuality of obligation exists on behalf of an employer, if when work was available it must be offered and also, on behalf of the employee, where an employee was required to undertake work when it was offered, unless he had a very good reason not to, such as being ill.

66 Even if all the requirements are fulfilled, the contract may be one of employment, rather than must be one of employment. The Courts have stated that the

Court or Tribunal will weigh up all the relevant factors and decide whether, on balance, the relationship between the parties is governed by a contract of employment; *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968], QBD 497, *Carmichael and Another v National Power Plc* [1999] ICR 1226 HL, *Express and Echo Publications Limited v Tanton* [1999] IRLR 367 and *Hewlett Packard Limited v O'Murphy* [2002] IRLR 4.

67 The factors which can be taken into account have included: whether the person doing the work provides his or her own equipment; the degree of financial risk taken by the individual doing the work; the intentions of the parties; a prohibition on working for other companies and individuals; remuneration by way of wages or salary; payment during absence for illness; paid holidays. Those are not exhaustive factors, but are an indication of the relevant factors which can be taken into account.

Frustration

68 The doctrine of frustration has developed in the context of commercial contracts. When the doctrine applies to a contract, the contract no longer binds the parties to it. The doctrine operates in the following way, “.. a contract should cease to bind the parties if, through no fault of either of them, unprovided for circumstances arise in which a contractual obligation becomes impossible of performance or in which the performance of the obligation would be rendered a thing radically different from that which was undertaken by the contract, ” per Sir John Donaldson MR in *Marshall v Harland & Wolff Limited* [1972] ICR 101.

69 The doctrine of frustration arises in the employment context commonly in cases of imprisonment, or where an employee otherwise becomes permanently incapable of doing a job, see *Egg Stores (Stamford Hill) Ltd v Leibovici* [1977] ICR 260.

70 In *Four Seasons Healthcare Ltd v Maughan* [2005] IRLR 324 the EAT agreed with an ET's decision that a Care Home employee's contract had not been frustrated, either by his abusing a patient, or by the imposition of bail conditions preventing him from entering the Care Home. Frustration occurred when he was convicted and was found unfit to work in a Care Home for the purposes of legislation regulating Care Homes.

Service Provision Change - TUPE

71 Where there has been a transfer of an undertaking, the transferee's employees' contracts of employment have effect as if they had originally been made between the employees and the transferor.

72 The domestic provisions governing transfer of undertakings are set out in the *Transfer of Undertakings (Protection of Employment) Regulations 2006*. Reg 3 TUPE Regs 2006 provides,

“3(1) These Regulations apply to—

(b) a service provision change, that is a situation in which—

- (i) activities cease to be carried out by a person (“a client”) on his own behalf and are carried out instead by another person on the client's behalf (“a contractor”);
 - (ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person (“a subsequent contractor”) on the client's behalf; or
 - (iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,
- and in which the conditions set out in paragraph (3) are satisfied”.

73 The conditions in paragraph (3) are,

“..(a) immediately before the service provision change –

(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.”

74 In *Churchill Dulwich Ltd (in liq) v Metropolitan Resources Ltd* [2009] IRLR 700, [2009] ICR 1380 the EAT considered that a difference in location of provision of services is highly unlikely, on its own, to determine that no service provision change under the regulation has taken place. It also considered that the fact that the new contractor performs some additional duty or function is unlikely to negate the application of reg 3(1)(b). The EAT decided that, in considering the question as to whether there was a service provision change and an assumption of 'activities' by another person from the original service provider, the employment tribunal has to consider whether the service provided after the change is fundamentally or essentially the same as that provided before the change; and the answer to that question is a matter of fact.

75 At [30] of its Judgment, the EAT said, “The statutory words require the employment tribunal to concentrate upon the relevant activities; and tribunals will inevitably be faced, as in this case, with arguments that the activities carried on by the alleged transferee are not identical to the activities carried on by the alleged transferor because there are detailed differences between what the former does and what the latter did or in the manner in which the former performs and the latter performed the relevant tasks. However it cannot, in my judgment, have been the intention of the introduction of the new concept of service provision change that that concept should not apply because of some minor difference or differences between the nature of the tasks carried on after what is said to have been a service provision change as compared with before it or in the way in which they are performed as compared with the nature or mode of performance of those tasks in the hands of the alleged transferor. A common sense and pragmatic approach is required to enable a case in which problems of this nature arise to be appropriately decided, as was adopted by the tribunal in the present case. The tribunal needs to ask itself whether the activities

carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. The answer to that question will be one of fact and degree, to be assessed by the tribunal on the evidence in the individual case before it”.

76 In order for there to be a service provision change transfer, the client must be the same before and after the transfer, *Hunter v McCarrick* [2013] ICR 235.

77 In *Robert Sage t/a Prestige Nursing Care Ltd v O’Connell* [2014] UKEAT/0336/13, the EAT upheld an Employment Tribunal’s decision that a hope and wish that, following a service provision change, activities would be carried out by a transferee in connection with a task of short term duration was not an intention that they would be so carried out. Accordingly, the Employment Judge did not err in holding that the exception in *Transfer of Undertakings (Protection of Employment) Regulations 2006 Reg 3(3)(a)(ii)* did not apply to exclude the transfer of activities from the scope of TUPE.

78 In order to be transferred, the employees must have been assigned to the organised grouping of employees immediately before the transfer. In *Robert Sage t/a Prestige Nursing Care Ltd v O’Connell* [2014] UKEAT/0336/13, the EAT decided that an employee, who had been subject to concluded disciplinary proceedings, resulting in her being prohibited from carrying out work with a client, X, before the transfer, was not assigned to the group of employees working with X, which group was subject to the service provision change. However, in *Jakowlew v Nestor Primecare Services Limited* [2015] ICR 1100 at [25], Richardson J observed in the EAT, “...it has been argued that suspending an employee on full pay pending disciplinary proceedings has the effect of removing him from the organised grouping of employees to which he belonged. I agree with Mr Salter, who said that suspension of this kind is another category of excusal from attendance like holiday, study leave and sickness absence. The expectation of the parties will be that, if the disciplinary proceedings do not end in demotion or transfer, the employee will return to work in the group to which he had belonged.”

Discussion and Decision

Claimants engaged under a contract of service or contract for services or were they workers? If so, for which Respondent?

79 The Tribunal considered whether the Claimants had been engaged under a contract of employment, whether oral or written; whether there was mutuality of obligation between the Claimants and the First Respondent; whether the First Respondent exercised control over the Claimants’ work, consistent with a contract of employment; whether there was an obligation on the Claimants personally to do work, and whether all other factors were consistent with the existence of a contract of employment between them.

80 The Tribunal noted that the First and Second Respondents and the Claimants said that the First Respondent and the Claimants agreed that the Claimants would work for the First Respondent, providing personal care to her, in return for salary. The Second Claimant started continuous work for the First Respondent pursuant to this agreement in 1996. The First Claimant started continuous work for the First

Respondent, pursuant to this agreement, in September 2005.

81 It was apparent from the evidence that the number of hours worked, the rate of pay for the work, and the pattern of the hours worked by the Claimants changed over the long history of the working relationship. However, on the evidence, the Tribunal found that, in recent years, up until 26 April 2016, there was a clear agreement between the First Respondent and the Claimants that the Claimants would work for 7 days each, working alternate weeks, providing 24 hour care for the First Respondent, that the First Respondent would pay salary the Claimants salary for doing so (with the First Respondent deducting tax on a PAYE basis for the work) and that the First Respondent would pay the Claimants holiday pay. The Tribunal found that there was an oral agreement between the First Respondent and the Claimants to employ the Claimants as carers, from 1996 in the case of the Second Claimant, and from 2005 in the case of the First Claimant. In addition, the Tribunal found that the precise terms of the oral agreement were varied, orally, between the parties, from time to time.

82 The Tribunal also decided that there was mutuality of obligation between the First Respondent and the Claimants. The First Respondent agreed to provide work and the Claimants agreed to do the work. There was no discretion in the First Respondent not to provide work and there was no discretion reserved to the Claimants not to do the work. The nature of the employment relationship was that the Claimants were required to provide personal care to the First Respondent, to meet her essential needs, at all times.

83 The Tribunal found that there was an obligation of personal service. The Claimants were required to do the work personally. There was no agreement that the Claimants could substitute a third party carer, instead of them.

84 The Tribunal found that the First Respondent exercised control over the work. The First Respondent had capacity; she told the Claimants what work she wanted them to do; for example, when to dress and wash her and when to attend to her toilet needs, when she wanted to go to the bank, shops and into the community.

85 The Tribunal found that, on balance, the other features of the contract were consistent with a contract of employment. The Claimants received holiday pay and PAYE tax deductions were made from their pay. They worked exclusively for the First Respondent and did not seek any other caring work. They took no financial risk; their work was not in the nature of a business. All involved believed and intended that this was a contract of employment. While the First Respondent mainly lived at the Claimants' home in recent years, this seems to have been for convenience; the Claimants also worked at the First Respondent's home when she wished to stay there. In addition, while the Claimants did not appear to have received sick pay, there was no evidence that they were ever sick.

Frustration

86 The doctrine of frustration applies where, without the fault of either party, a supervening event renders performance of a contract practically impossible.

87 The Third Respondent argued that performance of the employment contract

between the Claimant and First Respondent became impossible because the First Respondent felt that Mr Bruce had been abusive towards her. However, the Employment Tribunal found that the contract remained in existence during the Claimant's suspension and during the purported investigation process. It is quite clear that the First Respondent continued to pay the Claimants pursuant to their contracts of employment after she initially went to the Care Home.

88 The Tribunal decided that it would be possible for an employer, who believed that misconduct had occurred, to be satisfied, following an investigation, that what had been perceived to be abuse, had been explained during the investigation, so that it was no longer seen as abuse. An employer might accept, following an investigation, that they had been mistaken as to their characterisation of the conduct, so that the employment contract would be able to continue thereafter.

89 The Tribunal found that the contract was not frustrated simply by the First Respondent going to live in a Care Home and the Claimants being suspended on full pay. The agreement with the Home could be ended and the First Respondent could feasibly have returned to the care of the Claimants.

90 The Tribunal did not conclude that the subsequent termination of the care funding arrangement operated to frustrate the contract. The Tribunal decided that many employments are funded by external funding arrangements: it is not the case that such employment automatically comes to an end if that funding is withdrawn.

91 The Claimants' contracts of employment were not frustrated.

Service Provision Change

92 The Tribunal considered, first, what were the activities carried out before and after any relevant transfer. The Tribunal decided that the relevant activities before the purported service provision change encompassed providing personal care, 24 hours a day, for the First Respondent in the Claimants' home and, occasionally, in the First Respondent's home; regularly accompanying her into the community, to go to the shops, bank, theatre, cinema and other amenities and to visit her parents.

93 The activities performed by the Third Respondent were providing 24 hour personal care, in a Care Home, rather than in the First Respondent's own home or the Claimants' private residential house. The care was provided on a structured basis in a Care Home, according to the Care Home timetable. No dedicated carers were allocated to the First Respondent's care. The activities carried out by the Third Respondent did not include accompanying the Claimant into the community; there was little or no support given to her to enter the community.

94 The Tribunal found that there was a significant difference between the activities carried out before the purported transfer and after the transfer. The Tribunal considered that caring activities provided in an institutional setting only, with little or no access to the community, where the client has no choice as to location of care, is qualitatively different to caring activities provided in the client's home, or at the First Respondent's private house, along with regular and extensive facilitation of access to community amenities. Those activities were not fundamentally or essentially the same;

there were more than minor differences between the activities. There was a fundamental difference between the restrictive, regimented care activities confined only to an institutional Care Home and caring activities provided in the community, at home and peripatetically in wide ranging community settings.

95 The Tribunal decided that there had been an organised grouping of employees immediately before the transfer: the Claimants themselves.

96 It decided that the Claimants were assigned to the organised grouping immediately before the purported transfer. Mr Bruce had been suspended immediately before the First Respondent moved to the Care Home. Mr Harrelson had not been suspended. However, the Tribunal decided that mere suspension did not prevent an employee from being assigned to an organised grouping of employees. Suspension is a category of excusal from the workplace, following which the employee will return to the group to which he was assigned. This is to be contrasted with the case of an employee who has been subject to concluded disciplinary action and permanent removal from the organised grouping; see the case of *Jakowlew*, compared to the case of *Robert Sage*.

97 The contractor(s) before the purported transfer were the Claimants and, afterwards, the contractor was the Third Respondent. The Tribunal considered that the client before the transfer was the First Respondent. She remained the client after the transfer, according to the contract which was signed on her behalf by her mother. The First Respondent contracted with the Care Home; it appeared that it was the First Respondent who was required to pay the fees (even if, in fact, the Local Authority paid the fees). By clause 2.1 the contract said: "The fees are initially £986 per week payable in advance ... the Service User, the Receiver/Attorney and the Authority will each use their best endeavours to ensure that the fees are paid promptly ..." Paragraphs 2.2 to 2.5 governed payments of client contributions. Clause 2.6 provided that the billing of fees would be made on a 28 day cycle in accordance with a list of dates which would be issued to the service user. It stated, "The first date in each billing cycle as it appears on the bill delivered to the service user shall be referred to as the due date". By clause 2.8 the contract said: "Fees are payable with effect from the Due Date." Clause 2.9 said:

"If the Service User fails to pay a bill within 14 days from the Due Date ... then the Proprietor reserves the right to recover interest ..." (emphasis supplied).

98 In addition, the contract, entered into by the parties to it, which included the First Respondent and the Third Respondent, provided for care and accommodation to be provided to the First Respondent by the Third Respondent.

99 The Tribunal decided that the First Respondent did not intend that the activities would, following the transfer, be carried out by the transferee in connection with a single specific event, or task of short-term duration. While the First Respondent had entered the Home on a "respite care" basis, no end date was ever set or contemplated. The First Respondent said she intended to move to Colchester, but the Tribunal concludes that, in reality, she *hoped* to do so. In cross-examination, she made clear that she did not want to go back to her flat in LB Merton. Nevertheless, there was never any plan or expectation that the First Respondent would move to an address in

Colchester.

100 In conclusion, the Tribunal decided that there was no service provision change between the First Respondent and the Third Respondent, because the activities carried out by the Claimants for the First Respondent were not fundamentally or essentially the same as the activities carried out for the First Respondent by the Third Respondent. While the other requirements for a service provision change transfer were fulfilled, the qualitative change in the activities meant that there was no service provision change.

101 The Tribunal decided that the Claimants were employed by the First Respondent throughout the period relevant to these claims and remained so employed at the date of the Tribunal hearing. Their contracts were not frustrated. They were entitled to be paid from 25 June 2016 to the date of the ET hearing, by the First Respondent, who was their employer.

102 The Tribunal comments that the Claimants have been badly treated by the London Borough of Merton and by the First Respondent. The allegations against them have never been investigated and or brought to a conclusion; nevertheless, the Claimants have not been paid and they are subject to significant barriers to employment, because of the uninvestigated allegations against them. Both have been arrested by the Police, due to allegations made by the First Respondent, but released without any charge. The First Respondent has not even made the Second Claimant redundant, although she claims not to be making allegations against him.

103 Despite advice to do so, the First Respondent has never brought the Claimants' employment to an end.

104 The Tribunal concludes that the Claimants are entitled to recover the interest payments claimed in their schedule of losses, pursuant to *s24(2) ERA 1996*. There is no doubt, from the Claimants' evidence, that they have incurred substantial debts and associated interest payments because they cannot meet their outgoings, due to the fact that they have not been paid. The First Respondent is at fault for not pay the Claimants and it is appropriate that she sustains that financial loss, not the Claimants.

105 On several occasions, the Claimants wrote to the First Respondent and the London Borough of Merton, asking for payment. For example, the Claimants wrote to wrote to LB Merton, who passed the correspondence on to the First Respondent, on 21 July 2016 (p379), 25 July 2016 (p383) and 3 August 2016 (p396). The Tribunal decided that those letters amounted to grievances which were never investigated or resolved. The First Respondent arranged no meetings and did not give the Claimants any outcome to their grievances, contrary to the *ACAS Code of Practice: Disciplinary & Grievance Procedures 2015*. These failures were unreasonable. The First Respondent was advised by LB Merton, on several occasions, to resolve the Claimants' employment issues. She had access to legal advice under a contract of insurance. Pursuant to *s207A TULR(C)A 1992*, the Claimants are entitled to a 25% uplift on their claims for unlawful deductions from wages and resulting interest/bank charges, for very significant failure to investigate their grievances. They were left in limbo by the First Respondent, who did nothing to resolve their employment situation.

106 The parties agreed that, if the Claimants succeeded in their claims, they were entitled to the sums set out in their schedule of loss (p.74 bundle).

107 The Claimants were never given a contract of employment and are entitled to 4 weeks pay in respect of this, pursuant to s38 *Employment Act 2002*. The First Respondent failed to provide written terms and conditions to the Claimants from the outset, as well as on the occasions when their terms, regarding wages and hours of work, changed. This was a serious breach of ss1 & 4 *Employment Rights Act 1996*.

108 The First Respondent shall pay the Claimants the following sums by way of remedy for their claims.

Mr Bruce

109	(Net weekly pay: £544.09)	
109.1	Loss of earnings 25 June 2016 – 12 May 2017:	£24,895.05
109.2	Financial Loss s24(2) <i>ERA 1996</i>	£ 1,903.52
109.3	25% uplift on (total £26,798.57)	£ 6,699.64
109.4	4 weeks gross pay (capped at £479) s38 <i>EA 2002</i>	£ 1,916.16
109.5	TOTAL	£ 35,414.37

Mr Harrelson

110	(Net weekly pay £548.60)	
110.1	Loss of earnings 25 June 2016 – 12 May 2017:	£25,101.47
110.2	Financial Loss s24(2) <i>ERA 1996</i>	£ 953.52
110.3	25% uplift on (total £26,054.99)	£ 6,513.75
110.4	4 weeks gross pay (capped at £479) s38 <i>EA 2002</i>	£ 1,916.16
110.5	TOTAL	£ 34,484.90

Employment Judge Brown

22 June 2017