EMPLOYMENT TRIBUNALS

Claimant	**Respondents**
Ms G Gotora	**(1) Buckinghamshire County Council**
	(2) Ms Karen Brown
	(3) Ms Karen Dolton

PRELIMINARY HEARING

Heard at Watford **On: 25 & 26 April 2017**

Before: Employment Judge Manley

Appearances:

For the Claimant: **Mr R Owen-Thomas, Counsel**
For the Respondents: **Ms C Eccles, Solicitor**

RESERVED JUDGMENT

1 The claimant was not an employee of the first respondent. The unfair dismissal and the breach of contract complaints are dismissed.

2 The claimant was not a worker for the first respondent. The claimant was in business on her own account. The unlawful deduction of wages (holiday pay) complaint is dismissed.

3 The claimant was in employment with the first respondent under s83(2) Equality Act 2010.

4 The race discrimination complaint will be listed for a short preliminary hearing to clarify the issues and list for hearing.

REASONS

Introduction and issues

1. This was a preliminary hearing which was listed to determine the following issues:-

a) Whether the claimant was an employee of the respondent;
b) Whether the claimant was in employment under s83 (2) a) Equality Act 2010;
c) Whether the claimant was a worker.

2. This matters previously involved claims from three claimants but two claimants have withdrawn their claims so the issues which relate to this claimant are as set out above.

3. The first issue to be considered is whether the claimant can show that she was an employee of the first respondent, Buckinghamshire County Council ("BCC") for the purposes of her unfair dismissal and breach of contract complaints under Employment Rights Act 1996 (ERA). If she was not such an employee, I would then need to determine, for the purposes of the race discrimination complaint, whether she was in employment as defined in Equality Act (EQA) and/or a worker for the purposes of the unlawful deduction of wages complaint (also under ERA). The burden of proof rests on the claimant, it being in dispute that she is covered by any of these provisions. The respondents say that she was self-employed, in business on her own account. I have incorporated in my discussion of the law later in this judgment, the submissions of the respective parties.

4. At this hearing, I heard from the claimant and her witness Ms Rhodes, a former colleague. I also heard from Mr Lees for the respondents. I also read witness statements from six other witnesses for the respondents but they did not attend and their evidence was not challenged. The bundle of documents was extensive and contained within two lever arch files but I was only referred to a relatively small number of documents which were relevant to the issues. I decided to reserve my judgment, this being a particularly complex area of law.

The facts

5. I set out here the facts that I have found which are relevant to the issue of employment status and which, for the most part, are not in dispute.

6. The claimant worked as a family group conference co-ordinator ("FGC") for BCC. She commenced this work in April 2012 and it ceased on 25 March 2015 after BCC wrote to her and two others and said that they were ceasing to use their services.

7. The claimant first contacted BCC with a view to working for them in 2011. At that point in time the claimant was employed by Slough Borough Council ("Slough"), I believe at a childrens' centre although it is not clear to me what hours she was working for Slough. I have seen a contract of employment with Slough which mentions 30 hours a week and seems to suggest the employment was to be between November 2011 and 31 March 2012. There is a further document to suggest that her hours had changed from 15 to 19 hours per week in 2013 so she was still at Slough then.

8. FGC co-ordinators were managed by two people within BCC, Ms Tidball and Mr Lees and they job-shared managing the family group conference service. Family

group conferences are not part of the statutory duty of BCC but it is a service that it offers with the aim of finding solutions in the interests of children/young people. The usual practice is for a referral to be made by a social worker, employed by BCC, for such a conference to take place. The public documents prepared by or on behalf of BCC give details of the services of family group conferences. These documents make reference to the FGC co-ordinator having "*an impartial mediating role throughout the preparation*". It is clear that any meeting is a voluntary meeting and the FGC co-ordinator is referred to as "*independent*" on a number of occasions.

9. The claimant, having expressed an interest in becoming a FGC co-ordinator, was sent an application form which she completed. This gave her an opportunity to give information about her experience and so on, including information for CRB (DBS) purposes. The claimant was called for an interview in November 2011 and this involved some group work and a written exercise. There was quite a lot of detail within the interview about the work and the claimant's availability. The claimant agreed that she was interested in the work because it offered flexibility and she did have other employment. References were also sought and the claimant also had a safeguarding interview. The claimant had undertaken, at her own expense with an external provider, a three day course for a FGC co-ordinator role in 2010 and, as she was required to undergo induction with respect to taking up the BCC work, she was told that her travel expenses would be paid for that. She was also expected and undertook some shadowing of an experienced FGC co-ordinator.

10. An agreement was signed on behalf of Mr Lees and Ms Tidball and signed by the claimant on 25 April 2012. The document is headed "*Co-ordinator Agreement*". It sets out the parties as being "*The Family Group Conference Service, Buckinghamshire County Council, 1 Walton Grove, Aylesbury, Bucks HP21 7SL (referred to as the Client)*" and the claimant with her name and home address and, in brackets "(*referred to as the Co-ordinator*)".

11. Under the next heading "*Recitals*", the agreement reads:

> *"The Co-ordinator has specialist skills and abilities in convening and chairing Family Group Conferences and agrees to make such specialist skills and knowledge available to the Client in the completion of these tasks as defined. All Co-ordinators are expected to complete the 3 day Family Rights Group training and where they have not completed this training they would be expected to undertake this at their own expense within 18 months of beginning working for the client.*
> *The Co-ordinator is an independent contractor willing to provide for the Client as set out below:-*
>
> *Description of Services*
>
> *The Co-ordinator will*
>
> - *Convene and chair Family Group Conferences and reviews*

- *Type the family plan and forward to management within 3 to 5 working days before distributing to the family. Provide a summary of contacts with the family and the child or young person in the agreed format*
- *He/she will liaise with extended family members and friends and relevant workers*
- *Attend team meetings*
- *Attend professional consultation meetings as agreed*

Place of Work

The work base will be the Co-ordinator's home

Co-ordinator's Services

The Co-ordinator is to be retained on a non-exclusive basis to provide the services specified above to the Client.

The Co-ordinator shall provide his/her services with reasonable care and skill and to the best of his/her ability.

The Co-ordinator will hold Public Liability Insurance and will give a copy of this to the Client before commencement of work.

The Co-ordinator's motor insurance must also cover work for FGCs etc and a copy of the insurance certificate must be supplied at the beginning of the contract and annually thereafter."

12. The agreement was said to continue until termination by mutual agreement and stated that there would be a review and professional consultation meetings every three months. Mr Lees' evidence was that consultation meetings between himself and the claimant were actually more often and were to discuss the progress of the claimant's work. The agreement also stated that the manager would assess the co-ordinator's skills approximately every six months.

13. As far as remuneration was concerned there was said to be an "*agreed fee based on an hourly rate currently of £16.00 an hour*" and that there should be an *"invoice for each case detailing the number of hours worked and reasonable expenses incurred*".

14. Throughout the agreement, there is reference to BCC as "the client" and to the claimant as the "co-ordinator". As for working hours, the agreement says this: "*There is no set work pattern as the Co-ordinator will set their own work pattern to complete the agreed tasks within an agreed time*". Under a heading "*Status and tax liabilities*", it reads:

"The parties declare that it is their intention that the Co-ordinator shall have the status of self-employed person and shall not be entitled to any pension, bonus or any other benefits from the Client (other than those detailed in this agreement) and it is agreed that the Co-ordinator shall be responsible for all income tax liabilities, national insurance and other similar contributions in

respect of his/her fees. The Co-ordinator must register with HMRC if self-employed and provide proof to the Client that they are paying NI and tax."

15. As far as time off is concerned, the agreement states that there is no entitlement to sick pay or payment for annual leave or public holidays. As far as termination is concerned, the agreement states that it can be terminated with one month's notice by either party. There are then requirements about adhering to BCC's policies on diversity, health and safety and confidentiality. The claimant agrees that she was registered with HMRC as self-employed and that she had those insurances required of her.

16. During the claimant's working relationship with BCC, she also undertook various other pieces of work apart from that with Slough. She carried out a significant amount of work for Oxfordshire County Council; for Bracknell Forest and for Reading and West Berkshire Council. As I understand it, these were all agreements to work as a FGC co-ordinator for those other local authorities with the agreements being similar to that with BCC although the documentation for those arrangements was in a slightly different format. Mr Lees' evidence was that the arrangements for FGC co-ordinators to be self-employed was common practice amongst local authorities he was aware of, Kent County Council being the only local authority to have mostly directly employed FGC co-ordinators. The first respondent had one directly employed FGC co-ordinator.

17. I have seen copies of the claimant's invoices to the councils for whom she was working as well as a name badge where she is described as an "*Independent Family Group Conference Co-ordinator*".

18. The arrangement was that the claimant was based at home and, at the commencement of her working relationship, she used her own computer, printer and stationery. During 2014, because of security issues, all FGC co-ordinators, including the claimant, were issued with a BCC owned laptop. The claimant and other FGC co-ordinators, could access part of BCC's IT systems. In particular, they were able to access the FGC section of the "N" drive. The claimant was unaware of what other parts of the BCC's computer system she could access. The respondent's case is that it was limited to FGC service information. The claimant used her own mobile phone to make arrangements with the families and with others involved in the family group conferences. She did not charge BCC for these calls. The claimant was also encouraged, but not required, to attend team meetings and "*air and share*" meetings.

19. FGC co-ordinators were also encouraged to attend training, but my understanding is that the only requirement was to attend child protection training. Apparently, there was concern expressed by FGC co-ordinators about funding for training and, in two documents I was shown, one an email from Ms Tidball of 12 June 2013 and a team meeting on 23 July 2014, specific reference was made to this. Ms Tidball wrote to FGC co-ordinators as follows:-

"I know it is still an issue for some of you that FGC Service doesn't pay for your training time.

As self-employed co-ordinators, you are responsible for your own training. If we paid you. It would be seen as by The Revenue as a taxable benefit and you would have to declare this on your tax return. It could also affect your status as self employed"

In the team meeting in July 2014, it was recorded:-

"There was no uptake on the recent Forum, this maybe due to the fact that Co-ordinators do not get paid to go, as self-employed they should be taking responsibility for their own learning and the development of their own skills".

20. The process of beginning to set up a family group conference began with a social worker referring a matter to the FGC Service. One of the managers within the FGC Service would then ring one of the FGC co-ordinators, including the claimant. It is accepted that the claimant was one of the people who often rang asking for work and she gave evidence that she never refused any. She did, however, accept that she could have refused work if she wished to.

21. Once the claimant had accepted work, there was a process to follow set out on a flowchart. After an initial meeting with the social worker, the claimant would make contact with family group members to arrange a conference. The claimant's role was to book a venue, usually one that had previously been risk assessed, and attend the meeting to assist the family to draw up a family plan, a draft of which would be sent to the FGC Service manager. Mr Lees' evidence was that no changes would be made to the substance of that document but that spelling, grammar etc might be corrected as it might be submitted to court. There would then be review meeting with the family which the claimant organised.

22. Over the time in question, the claimant worked fairly often for BCC FGC Services. I was shown a calendar completed by the claimant showing, over the course of the three year period, that she worked for BCC sometimes only once a week, but often more than that, sometimes two or three days a week. As stated, the claimant carried out substantial work for other councils. On the information provided so far by the claimant, one estimate of the proportion of the claimant's time spent on work for BCC towards the end of the relationship, was that it amounted to about a seventh of her total earnings.

23. The time the claimant spent on work for BBC varied throughout the year and she regularly took a period of leave in March and April. She informed the respondent if she was to be away for any length of time but accepted that she did not ask permission for holiday in contrast with her work for Slough. There was no evidence that there had been an occasion when she was unable to carry out work because she was sick. The claimant accepted that she had not been shown an employee handbook or disciplinary procedure and that there had been no risk assessment at her home. She also accepted that the flexibility suited her because of her other commitments.

24. Mr Lees' evidence was that the FGC co-ordinators were reminded, and this appears in minutes of a team meeting, to check their emails on daily to see whether there was an offer of work. The FGC co-ordinators, including the claimant, were paid a fixed fee for each family group conference. The fee was

calculated on an estimate of the time it would take to arrange one but, as a matter of fact, this would vary depending on the number of people involved and the length of time the conference would actually take. This might mean that the claimant did it in less time than the estimate or indeed that it took longer than had been estimated. Although Ms Rhodes gave evidence that she had arranged to be paid extra if the conferences took longer, the claimant said that she had never had that arrangement but always just claimed the fixed fee for the conferences.

25. She did do some hourly paid work for BCC, when attending induction and team meetings and sometimes acting as an advocate for a child. Having looked at the calculation before me with respect to the claimant's invoices over the period in question, I accept that the breakdown is roughly 70% of invoices being for fixed fees and the other 30% being for hourly paid work. There is also a relatively substantial amount for expenses claimed, particularly in relation to travel.

26. It appears that an issue of concern arose with respect to some of the financial claims made by some FGC co-ordinators, including the claimant. This led to the claimant and others receiving the letter informing them that BCC would cease using their services pending an investigation. I find no further facts with respect to that matter save to say that the claimant's complaints are for race discrimination as well as unfair dismissal, unpaid wages and breach of contract.

Law and Submissions

27. This is an area which has led to a significant amount of case law and it seems sensible to incorporate in this summary, where appropriate, the submissions of the claimant's and the respondents' representatives.

28. The statutory provisions with respect to employee and worker status are set out in s.230 ERA. This reads:-

"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 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."

29. Dealing first then with the question of whether the claimant was an employee under the s230 (1) ERA definition, the leading case might still be said to be Ready Mix Concrete (South East) Ltd v Minister of Pensions & National Insurance [1968] 2QB 497 even though that case has been rather overtaken by different ways of working in the late 20th and early 21st century. It is still a good starting place, however and, the language of that case aside, my job is to consider whether there is a contract of service or a contract for services. In particular, in this case, I need to consider what level of control there was by the first respondent over the work undertaken by the claimant and what is consistent with the relationship being a contract of service or a contract for services. Not surprisingly, the respondents' representative submits that there was a lack of control whereas the claimant's representative submits there is sufficient control for me to find it was a contract of service.

30. There is also a disagreement between the parties with respect to whether, on the facts of this case, there is mutuality of obligation. The leading case here is Carmichael & another v National Power [2000] IRLR 43. The claimant needs to show that there was "mutuality of obligation". This can be shown by reference to documents and to what actually happened in practice and is necessary for there to be a contract of service. For the claimant, I am asked to take into account the fact that the written agreement does not explicitly state that the claimant could refuse work. The respondent's representative points out that the claimant agreed that she could in fact refuse work.

31. The essence of determining the claimant's employment status with respect to the first respondent requires me to consider all the available evidence. This must include the written documents, in particular the written agreement; evidence of what the parties' intention was at the time of making the agreement but also assessing what actually occurred in practice. It is often useful to consider what falls on the side of consistency with there being a contract of service (employment) and then, on the other hand, considering what falls on the side of consistency with there being a contract for services (self-employment). I am reminded by Carmichael that I should not determine the nature of the relationship "*solely by reference to the documents"*. In this case, Mr Owen-Thomas accepts that it was the intention of the parties that the claimant should be referred to as "self-employed". He is not suggesting a "sham" arrangement.

32. It might also be relevant to consider how integrated the claimant was within BCC's business. A question might arise as to whether she was a part of its 'core' business or whether this was a business that the first respondent chose to provide and was therefore not central to it. The first respondent is a publicly funded local authority and that makes questions about business decisions rather different from businesses whose purpose is to make a profit.

33. Bearing in mind the way in which payment was made to the claimant, that is not by way of a regular salary or wages, it may be also be right for me to consider the

economic reality test. For instance, I might consider whether the claimant was running a business of some description, whether she could profit or indeed whether there was any financial risk to her from the arrangements between the parties.

34. A recent case might by of assistance with respect to the question of employment status and that is Pimlico Plumbers Limited and Mullins v Smith [2017] EWCA Civ 51. This is particularly relevant to the question of whether the claimant was a worker under s230 (3) b). I am reminded by that case that the "over-arching question" is whether the alleged employer (in this case, the first respondent BBC) can be said to be a client or customer of the claimant. Of course, the facts in each case will be different and my findings will depend upon an assessment of those facts.

35. I was also asked to consider, by the claimant's representative, the case of St Ives Plymouth Ltd v Haggerty [2008] All ER 317 which states that there does not need to be work every week for an "umbrella" contract to exist. In White v Troutbeck SA [2013] IRLR 948 the court of appeal reminds me that the question of control should be considered in the light of modern ways of working.

36. If the claimant does not fit into the definition of employee whether under s230 (1) ERA, because there is no contract of employment, I will move on to determine whether she is afforded protection as a worker under s230 (3) b) ERA. One of the issues that might arise is the right (or otherwise) of the claimant to send a substitute if she was not able to do the work. This does not really arise in these circumstances because of the reasonable need of BCC to have qualified people who have had the relevant checks for working with vulnerable children. It is still necessary for a person wishing to rely on the "worker" definition to show that the respondent is not in the position of client or customer if the claimant is in business on her own account.

37. For her complaint of unlawful discrimination, she needs to show she was in "employment" as defined in s83 EQA. This reads:

Section 83 : Employment

Interpretation and exceptions

(1)This section applies for the purposes of this Part.

(2)"Employment" means—

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

39. This relates to whether the claimant is engaged personally to carry out work. In many ways, it relates back and is intertwined with many of the questions that arise when deciding the contract of services (employment) and contract for services points as set out above. The claimant may be in business on her own account and still fit within the definition for EQA purposes. Much will depend here on whether she was engaged personally (that is, with no right of substitution).

40. The representatives suggested in a short discussion at the end of the hearing that, if the claimant fitted into the definition of worker, she would also be likely to fit into the EQA employment definition. However, the statutory wording, as seen above, is different and I believe there are some circumstances, which may be limited, where a person may fit into one definition but not the other.

Conclusions

41. I consider first the matters about which there is little dispute. It is agreed that the claimant agreed to provide this work personally. There is no suggestion that there was any right to substitution once she had agreed to be FGC co-ordinator for a family group conference. Nor is there any suggestion that there were separate contractual arrangements for each particular period of work. The respondents agree it was an "umbrella contract". It is agreed that the claimant could refuse work and no minimum hours were suggested or agreed. The arrangements with respect to payment are agreed, namely that there were some fixed fee and some hourly pay sums paid on submission of invoices and that the claimant was responsible for her own tax and national insurance contributions as well as arranging public liability and car insurance.

42. The disputes arise around how to interpret the facts which go to the level of control and/or communication between the parties; any potential financial risk and how much the claimant was integrated into BCC's business.

43. I now consider which facts seem to indicate a contract of service (employment) and which indicate a contract for services. Starting with those that support the finding of a contract of employment, the first one is the way in which the claimant was recruited by way of application form, interview and some requirements for training. Next are the requirements to carry out the work in accordance with the process laid down by the first respondent and the regular meetings she had with its managers. Later in the relationship there was the provision of a laptop computer and an identity badge which provide limited access to the first respondent's premises. There was no right for substitution and no express right for the claimant to refuse work. Clearly the claimant in this case performed regular work over the period of time in question for BCC.

44. Those facts that suggest a contract for services (self employment) include the fact that the claimant was carrying out a substantial period of work elsewhere, both in an apparently similar pieces of work with respect to Family Group Conferencing but, with Slough, of a different nature and as an employee. She had only limited IT access to the first respondent's systems; she worked from home and supplied the vast majority of her own equipment including printer and stationery, mobile phone and car. She had to provide various forms of proof of having public liability and car insurance and was responsible for her own tax and national insurance. The requirements to attend training were very limited, she was not paid to attend training and otherwise it was only "encouraged". There was some financial risk to her because the family group conference fee was fixed. The claimant could refuse work. No minimum hours were expected of the claimant nor was any minimum work required to be offered by the first respondent. The service provided by the claimant formed part of a service offered by the first respondent but not part of its statutory duties.

45. This is a particularly difficult case because there are facts, as shown above, which point towards a contract of service as well as a contract for services. I deal firstly with the question of control. I accept that the level of control that the first respondent had over the way in which the claimant carried out her work was appropriate for work with vulnerable families. I do not accept that it is the level of control which indicates that the parties were in an employment relationship. The claimant was free to contact whichever members of the family she deemed appropriate and to set up the meeting at a time which fitted in with her requirements as well as those of the other participants. The fact that she was encouraged rather than required to attend most training and that she had paid for her own training before starting this contract does not, in my view, show a level of control that would be expected in this line of work for employees.

46. Neither do I accept that she was an integral part of the first respondent's business. This was a service that BCC did not have to offer. I accept that the access which she had to the council's IT systems, to the offices and so on are insufficient to indicate that she was in an employment relationship with BCC. I am also influenced by the fact that BCC, in line with other Family Group Conference services make it clear on public documents and for good reason, that the FGC co-ordinator is independent. That suggests independence of BCC itself and the social workers who were employed by it and away from integration.

47. I turn then to the question of economic reality. Within this I consider the matters which point towards the claimant being, at some level, dependent upon the first respondent. The claimant worked for a few local authorities and, on a broad assessment of the work she carried out for the first respondent, it was by no means the majority of her working time. She clearly could stand to gain if she managed to take less time with a conference than the estimated time and there was also a risk to her that, if the conference arrangements and the conference itself took longer, she would not make as much as the hourly rate anticipated. I think that is, perhaps to a relatively small extent, a financial risk to her. She also was paying her own tax and national insurance (as a self-employed person) and of course had to take out other forms of insurance. She used her own phone and other equipment such as stationery at her own expense. These all point to me towards a level of financial independence from the first respondent that is not consistent with a contract of employment.

48. I turn then to mutuality of obligation. Although it is correct to say there is no express right to refuse work contained within the written document that the claimant signed, there was clear evidence that she believed she could refuse that work if she chose to do so. The claimant as failed to show mutuality of obligation. I cannot ignore the fact that the claimant did choose to sign an agreement which clearly set out that she was a self-employed contractor. I assume there are probably some benefits to her with that arrangement as there might have been to the first respondent. I accept that the claimant was expected to abide by the first respondent's processes for family group conferences but do not accept that that indicates a contract of employment but would be a proper thing for a public body to ask independent contractors, especially in a field where vulnerable children are involved. Although these matters are not of central importance, I do believe it is of some relevance that the claimant was not paid for her holidays or when she

was sick and it is undisputed that no disciplinary proceedings were said to be relevant to her.

49. Taking a broad view of all these facts, I have come to the decision that, on the evidence before me, that this arrangement was one for a contract for services rather than an employment contract. That means that the claimant was not an employee under s.230 (1)ERA. The claimant was in business on her own account with a number of arrangements to carry out work for a number of organisations.

50. I then consider whether the claimant fits the definition under the s230 (3) b) "worker" limb. I cannot ignore the fact that the claimant signed a clear and unambiguous agreement which stated that the first respondent was her client. She accepted that she understood what that document said and agreed that it suited her flexible requirements. It is not suggested that document was a sham. The claimant entered into other similar arrangements with other local authorities. Using her own equipment, she did, I find, offer the services as an independent FGC co-ordinator to the first respondent which was one of her clients as is common practice in the sector. The claimant was in business on her own account and she does not fit within the definition of worker.

51. I turn lastly to the question of whether the claimant was in employment under s83 EQA**.** Here I am bound to find that she was engaged personally to do the work. There was no right to substitution. This means that her discrimination complaint can proceed whilst all other complaints must be dismissed.

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Employment Judge Manley

5 June 2017

Sent to the parties on:

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For the Tribunal:

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