



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs. T Marshall  
**Respondent:** Bellway Homes Limited  
**Heard at:** Nottingham  
**On:** Wednesday 11<sup>th</sup> September 2019; and  
Monday 7<sup>th</sup> October 2019 (In Chambers)  
**Before:** Employment Judge Heap (Sitting alone)

## Representatives

**Claimant:** Ms. S Ismail - Counsel  
**Respondent:** Miss. T Vittorio – Senior HR & Legal Adviser

# RESERVED JUDGMENT FOLLOWING AN OPEN ATTENDED PRELIMINARY HEARING

1. The Claimant was an employee of the Respondent within the meaning of Section 230(1) Employment Rights Act 1996 at the material time with which her claim of unfair dismissal is concerned. She therefore has standing and sufficient continuous service to continue with that complaint and it will proceed to a full hearing.
2. The claim remains listed for a Preliminary hearing to be conducted by telephone on 16<sup>th</sup> October 2019 at which further Orders will be made and the Claimant's application to amend the claim determined. Notice of hearing has already been sent to the parties.

# REASONS

## BACKGROUND AND THE ISSUES

1. This Preliminary hearing took place at the direction of Regional Employment Judge Swann in a decision communicated to the parties on 23<sup>rd</sup> July 2019. He directed that the hearing be listed to consider whether the Claimant was an employee or a worker and, following on from that, whether the Tribunal had

jurisdiction to hear a complaint of unfair dismissal. The jurisdictional issue related only to the employment status of the Claimant during the course of her time working for the Respondent.

2. The decision to list the claim for a Preliminary hearing was taken after receipt of the ET3 Response in which the Respondent contended that the Claimant had not at all material times been an employee of theirs within the meaning of Section 230(1) Employment Rights Act 1996 ("ERA 1996") and thus that she lacked the standing to bring the complaint of constructive unfair dismissal that she presently advances. I should observe that that was the sole complaint referred to in the Claim Form, although there is now an extant application to amend the claim which I shall come to further in due course.

3. I established with Miss. Vittorio who represents the Respondent at the outset of the hearing that it was accepted that the Claimant was a worker within the meaning of Section 230(3) ERA 1996 and Miss. Vittorio confirmed that that was not at issue and it was only employment status where the parties were at odds. It is accepted – or at least accepted by the Respondent's witness for this Preliminary hearing - that the Claimant was an employee within the meaning of Section 230(1) ERA 1996 during the period 16<sup>th</sup> August 2016 and 1<sup>st</sup> March 2017 but of course of itself that would not assist her in these proceedings given that she would require a minimum of 2 years continuous service under Section 108 ERA 1996 to bring the claim.

### **THE HEARING**

4. During the course of the hearing, I heard evidence from the Claimant and also from Mrs. Carolyn Watkinson, Sales Director, on behalf of the Respondent.

5. In addition to the witness evidence that I have heard I have also had regard to the bundle of documents prepared for the purposes of this Preliminary hearing which runs to some 405 pages and the helpful written and oral submissions given by both the Claimant's and Respondent's representatives.

6. The Preliminary hearing was listed for three hours and once I had read into the substantial papers, heard evidence from both witnesses and the submissions on behalf of the Claimant and Respondent there was insufficient time remaining to make my determination and give judgment to the parties. That judgment was therefore reserved and made in chambers on 7<sup>th</sup> October 2019.

7. I also directed that in between those times the Claimant set out a draft of the application that she made in her agenda prepared for the Preliminary hearing to amend her claim and for the Respondent to reply to that. That has now been done and I deal with the way in which that application is to be dealt with below.

### **THE LAW**

8. Before dealing with my findings of fact and conclusions in relation to the issues before me, I have had regard to the law which I am required to apply when considering the matters which Regional Employment Judge Swann had set down for consideration.

Employee status – Section 230 Employment Rights Act 1996

9. An employee is defined by the provisions of Section 230(1) Employment Rights Act 1996. That section provides as follows:

*“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.”*

10. The starting point in considering the question of the relationship between the parties will be the terms of any written agreement between them. However, those terms should only be disregarded where they do not reflect the true agreement between the parties – in other words where the contractual terms do not reflect the actuality of the relationship (**Autoclenz v Belcher [2011] UKSC 41**).

11. Whether there is a “contract of service” (and thus a contract of employment) is to be determined against the whole picture of the relationship and will invariably include consideration of a variety of factors. However, the decision in **Ready Mixed Concrete (South East) Limited v. the Ministry of Pensions and National Insurance [1968] 2QB 497** will be of fundamental assistance to a Tribunal tasked with consideration of employee status.

12. In short terms, the **Ready Mixed Concrete** decision provides that a contract of service exists if the following three conditions are fulfilled:

- (i) The “servant” agrees that, in consideration of a wage or other remuneration, he or she will provide his or her own work and skill in the performance of some service for his “master” – i.e. the requirement for so called personal service;
- (ii) He or she agrees, expressly or impliedly, that in the performance of that service that he or she will be subject to the other’s control in a sufficient degree to make that other “master” – the so called control factor;
- (iii) The other provisions of the contract are consistent with it being a contract of service.

15. A key ingredient of employment status is the degree of mutuality of obligation of the parties to the contract. Mutuality of obligation is often described as the obligation on the employer to provide work on the one hand and the obligation on the individual to accept that work on the other. Without a sufficient degree of mutuality of obligation, there can be no employment relationship.

16. There are other potentially relevant factors which may assist in determining whether there is a contract of service (and which go to the third strand of the **Ready Mixed Concrete** test) such as the degree of any financial risk taken by the “employee”; who is responsible for provision of the tools of the trade; the degree of integration into the business or organisation; whether the individual is free to work elsewhere; the label placed on the relationship by the parties (although see **Autoclenz** above) and the nature and length of the relationship.

17. The Tribunal must consider the whole picture to see whether a contract of employment emerges, although mutuality of obligation and control must nevertheless be identified to a sufficient extent in order for a contract of employment to exist.

### **THE EVIDENCE**

18. Before turning to my findings of fact, I deal firstly with my assessment of the credibility and reliability of the witnesses from whom I heard. I begin that assessment with the Claimant. I was satisfied that the Claimant was a witness of truth who gave a credible account of the time and circumstances of her employment with the Respondent. I am able to place reliance on that account in determining the issues before me.

19. I was satisfied that Mrs. Watkinson also sought to give an honest account in her evidence before me but that she was somewhat hampered in giving a reliable account on the basis that she did not have any significant dealings with the Claimant (other than dealing with a grievance in September 2018) or real knowledge of her circumstances and had not considered in any real detail either the issues or relevant documents which have assisted me in dealing with the issue of employment status. She had not, for example, dealt with consideration of the Claimant's timesheets to ascertain when she had or had not worked for the Respondent. Moreover, there were a number of issues in her witness statement which were not correct – for example paragraph 24, which she accepted under cross examination was wrong despite having earlier confirmed her statement as being accurate, and paragraph 21 which was similarly inaccurate when one has regard to the timesheets at page 244 of the hearing bundle.

20. However, I do not take from that that Mrs. Watkinson's evidence was untruthful because it was clear to me that she had little if any knowledge of the relevant documents and had not checked them when she made, or approved, her witness statement. In many areas during cross examination she was unable to assist and on balance gave an answer that she did not know something with almost the same frequency that she was able to provide a response. Again, I consider that to be as a result of a lack of familiarity with the case, the issues and the documents. She has, it seems, been placed in a rather difficult position of being wheeled out on behalf of the Respondent to give evidence in a case of which she has very little if any real knowledge. Whilst, as I shall come to, she dealt with the Claimant's grievance that did not deal with the issue of employment status and that has only become a live issue since the Claimant presented her Claim Form to the Tribunal.

### **RELEVANT FINDINGS OF FACT ON EMPLOYEE STATUS**

21. I turn then to the facts that I have found based on the evidence that I have seen and heard. The parties should note that I have confined myself only to the findings which are relevant to deal with the issue of the Claimant's employment status but that I have considered all evidence in the round before reaching my conclusions.

22. The Respondent builds residential properties across the United Kingdom. In dealing with the sales of those properties it engages a number of Sales Negotiators. Those negotiators are engaged both employees but with a small minority, the Claimant included, being on arrangements that the Respondent contends amounted to a worker only basis. I should note that in relation to those

said to be workers, that only includes in fact the Claimant and one other “floater” who worked over a different geographical area to the Claimant.

22. The Claimant first started work for the Respondent on 4<sup>th</sup> April 2010. She was provided with a uniform and a name tag identifying her as a Sales Adviser (see page 55 to 60 of the hearing bundle). She was required to wear the uniform and name tag whilst completing her work. She also used the Respondent’s own systems, such as a laptop and later a desk top and a People Safe device, and did not provide her own “tools” to undertake the work.

23. The Claimant was also required by the Respondent to attend various training courses in topics such as Anti-Bribery and Corruption; Data Protection; Consumer Protection; IT Security and Customer Care (see pages 60 to 70 of the hearing bundle).

24. Prior to commencing work for the Respondent the Claimant was sent a letter of 1<sup>st</sup> April 2010 offering her the position of Sales Negotiator (Floater). That letter was headed “Offer Of Employment” (see pages 42 to 44 of the hearing bundle). The letter set out that the offer was subject to satisfactory references and a medical questionnaire being returned. It further set out the region to be covered by the Claimant and the requirement to complete mileage and time sheets, the latter of which were to be presented for signature by the relevant Field Sales Manager and presented to the office at the month end. There are a number of examples of the time sheets that the Claimant was required to complete within the bundle. They are headed Record of Hours Worked (Monthly Employee Paid Hourly). They describe the Claimant as an employee. After completing the time sheets the Claimant was then issued with wage slips detailing what were referred to as her salary and commission and assigning her an employee number (see for example page 52 of the hearing bundle).

25. The letter enclosed a number of documents including a statement of particulars of terms of employment which the Claimant was asked to sign and return and a number of other policies and procedures relevant to the appointment. That included the Respondent’s disciplinary, grievance and redundancy policies. The letter also set out that the Claimant’s employment was to be subject to a six month probationary period during which time the employment (and that was the term used) could be terminated at any time. The applicable notice period was referenced in the statement of terms and conditions of employment.

26. No specific hours of work were set within the offer letter and the only reference was to a request to sign an average weekly hours form which appears to be an opt out agreement under the Working Time Regulations, although I have not seen it.

27. As set out above, the letter was accompanied by a document headed statement of particulars of terms of employment (“The Terms”). It referred to providing the Claimant with the details of her employment which she was entitled to receive under the Employment Rights Act 1996. The clear intention, therefore, was to comply with the requirements of Section 1 ERA 1996.

28. The Terms set out the Claimant’s hourly rate of pay; hours and place of work; holiday entitlement; absence reporting procedure; pension entitlement; notice entitlement and requirements; details of the grievance and disciplinary procedures; confidentiality provisions, competition during employment and

delivery up of property upon termination.

29. The relevant part of the Terms with regard to hours of work said this:

*“You will carry out your duties as and when required. You may be required to work weekends and public holidays as part of your working days without any additional remuneration.*

*The above is subject to seasonal change and such flexibility as the Division of the Company or your work may require”.*

30. The Terms set out a specific absence reporting procedure, including a requirement to submit medical certificates or self certifications. Neither this section or any other part of the Terms set out a provision for the Claimant to be able to refuse work or to send someone else as a substitute. The Terms also set out notice requirements with both the period of notice that the Claimant could expect to receive and the period of notice that she was required to give.

31. The Terms also sought to regulate what was referred to as “Competition during Employment” with a requirement that the Claimant would not engage in any other business without the written consent of the Respondent.

32. I accept the Claimant’s evidence that although the Terms referred to her being required to carry out her duties “as and when required” that the regular practice was that she was given a considerable number of hours per month and that those hours were often over seventy hours per month. I accept the evidence contained at paragraph 6 of her witness statement that her average hours worked per month were in the following terms during the eight years of her employment for the Respondent. That excludes the periods when she worked full time hours as I shall come onto further below:

- a. 2010 – approximately 127 hours per month;
- b. 2011 – approximately 100.78 hours per month;
- c. 2012 – approximately 109.61 hours per month;
- d. 2013 – approximately 79.92 hours per month;
- e. 2014 – approximately 80.13 hours per month;
- f. 2015 – approximately 66.50 hours per month;
- g. 2016 – approximately 66.50 hours per month;
- h. 2015 – approximately 72.90 hours per month; and
- i. 2018 – approximately 33.75 hours per month.

33. Mrs. Watkinson was unable to provide evidence to gainsay the hours that the Claimant has set out that she had worked because she had not checked the relevant documents.

34. The Claimant’s case is that post the introduction of a new Sales Manager, Mr. Steve Smith, she was deliberately allocated less hours and I shall come to that further below. It is clear that there was a drop in hours at that time which was inconsistent with the previous regular patter of a considerable number of hours of work and the Respondent accepts that from June 2018 onwards the Claimant was not offered any more hours of work.

35. There were some months that the Claimant did not work at all or for significant periods but largely those were in quieter times when there was less of a demand on the Respondent’s sites – such as in December 2017 - or when she

was on an extended three week holiday in October 2017. Although she was not required to seek permission for that holiday I accept her evidence that she notified the Respondent about four months in advance that she would not be available and that those dates were placed on the office planner. Those times when she did not work at all were few and far between, however, when one considers the course of dealings over the eight year relationship and there were clear errors in Mrs. Watkinson's witness statement about those matters.

36. Originally, the position was that the Claimant would be booked for work by the Office Manager or Sales Manager and that she would receive an email with details of the development which she was to cover and the dates which she was to cover it. As a Floater, that would often be cover for holidays, sickness or other absence of the employed Sales Negotiators but could also include simply having another negotiator on site in busier developments. That was known as "double up" (see for example pages 273 and 359 of the hearing bundle).

37. Work on some of the developments could be long term with the Claimant covering for a month or so (see for example the records of hours worked at pages 194, 197, 200, 241, 273, 277, 279, 282 and 285 of the hearing bundle). I accept that it would not have been open to the Claimant during a period of long term cover to simply decide that she was not going to attend work the following day or for the rest of the period that she was booked to work at a development. Once she had offered dates or had given available dates and that had been accepted, it was not open to the Claimant to then say that she was not going to work.

38. The Claimant's evidence, which I accept, is that she was usually available to provide the cover and would then put the dates in her diary and undertake the work and that even if she did have other commitments, she would try to move those to ensure that she could work at the development in question. There were, however, times when the Claimant could not work on some of the specific dates offered to her (see for example pages 72, 73, 74, 75 and 77 of the hearing bundle). I note that on those occasions, there was a request as to whether the Claimant was available to undertake certain dates rather than an initial allocation to her and she was then booked for the dates that she was available to work. It appears that the times that she was not available were somewhat few and far between on the basis of the evidence before me and over the considerable number of years that the Claimant worked for the Respondent.

39. The position later changed to the Claimant being required to supply dates of availability before being allocated a specific date or development, although it is clear from exchanges between herself and the Respondent's Steve Smith (the then Sales Manager) that she preferred the original system.

40. On 8<sup>th</sup> May 2014 the Claimant was offered enrollment into the Respondent's Group SIPP pension scheme with a contribution of 4% from the Respondent.

41. In 2016 the Respondent decided to engage a full time Floater and that position was offered to the Claimant. In essence that meant full time hours. The Claimant accepted the position, albeit reluctantly, and she was sent a letter by the Respondent on 16<sup>th</sup> August 2016 confirming that she was now a Full Time Sales Adviser (Floater) with Commission (see page 51 of the hearing bundle). The letter set out that the Claimant was, with effect from 16<sup>th</sup> August 2016, to be given full time hours and an entitlement of £700.00 per month in commission. The letter expressly set out that all other terms in her contract (those being those

set out in the Terms) remained the same. I accept that in practice, other than now working full time, nothing as to how the Claimant undertook or was expected to undertake the work altered from how she had been doing it previously.

42. For reasons which it is not necessary for me to determine for the purposes of this hearing, things did not work for the Claimant in the full time position and on 3<sup>rd</sup> February 2017 she wrote to the Respondent's Sales Manager, Steve Smith, to ask to return to the position of "as and when floater". She set out her understanding that this would result in reduced hours (see page 79 of the hearing bundle).

43. Mr. Smith relied the following day and the relevant parts of his email (see page 82 of the hearing bundle) said this:

*"Sorry for the delay in coming back to you. I gave [sic] discussed this at length with Ben, at present there is no site we can offer you, this may chance [sic] at any point in which case I will let you know IMMEDIATELY!*

*With regard to returning to 'as and when', yes of course, I feel you are an invaluable member of my team and asset to the industry so if that is the only way to keep you – I'll take it!*

*Would the 1<sup>st</sup> of March be a mutually agreeable date to return to 'as and when'?"*

44. The Claimant accordingly resumed working as she had prior to 16<sup>th</sup> August 2016. No revised terms were sent to her recording the change in circumstances. Things remained as they had originally under the Terms.

45. By this stage, Mr. Smith was requesting details of the Claimant's availability to plan rotas and allocate work although as I have already observed, it was clear that the Claimant's preference was to be asked if she was available to work on specific dates first.

46. On 20<sup>th</sup> June 2018 the Claimant emailed Mr. Smith expressing her displeasure at an amended rota which she had received. Her email said this:

*"I have received the amended rota and as I am sure that you know I am not at all happy. I know that in the past you have pointed out that I can not pick and choose where I work, but I do not think it is reasonable to expect me to travel (according to Google maps) nearly 50 miles and anywhere from an hour and 10 minutes to an hour and 40 minutes to double up on an Ashbury site.*

*When I asked to go back to being Part time it was with the complete understanding that the hours I would be offered would be reduced. After a period of little work I asked you outright when in the office with you at Aspire last September if you still intended to use me or if I needed to find another job. You assured me that it was your intention to give me what ever work you could and you have done so up until recently. However, I was not on the Rota at all in May. You contacted me on 8<sup>th</sup> of May and offered me some work which I gratefully accepted. On the 27<sup>th</sup> May I emailed asking you if the Rota for June had been done and giving you the dates I would not be available. I received no acknowledgment from you to this email and I was completely unaware that the rota had already been issued to everyone the*



*previous Tuesday. I was not sent a copy and when I did see it, yet again I did not have a single days work. When you contacted me on the 8<sup>th</sup> of June to say you might have some work for me I asked you to let me know when you needed me as I was fully willing to rearrange my diary to accommodate where I could. After several emails back and forth I attempted to call you so we could discuss it and sort things out but you did not answer my call or return it. You were adamant in your email on Tuesday 11<sup>th</sup> that you wanted to know what days I couldn't work rather than tell me the days you wanted me to so I could help out. Having sent you the dates that I had things arranged you messaged me to say you didn't think it was going to work and that you would call me the following day to discuss. You didn't call, just sent me an email with the dates you wanted me to work. What should have been a very simple 'can you work on these days' turned into two days of stress and upset. I feel that I am being treated differently to how I used to me and almost bullied into submission!*

*I have worked for Bellway for over eight years and I love my job but this issue with the rota is becoming stressful. I have always tried to be as flexible as possible to meet the needs of the company and be a productive member of the team. I do however feel that asking me to go to Ashby del a Zouch is too much and I am not willing to travel this distance”.*

47. I am satisfied that the reason that the Claimant was refusing to attend a particular development on this occasion was, as is reflected in her email, the amount of travel involved. That, in my view, would be no different to an employee objecting to having to undertake something that they felt – rightly or wrongly – fell outside the scope of their duties and responsibilities.

48. Mr. Smith replied to the Claimant on the same day and his email reply said this:

*“As previously discussed with your current role – you are completely free to decline any work offered, as you have on this occasion. I will continue to offer you work as & when the needs of the business allow, but again as previously discussed I am not able to guarantee work. I will also continue to include you in all team emails, so that you are up to speed at all times. I will ensure that the rota is sent to you on all occasions”.*

49. It seems that matters were not resolved to the Claimant's satisfaction – and indeed she says that she was removed from the rota and not offered further work as a result of refusing to attend Ashby-de-la-Zouche - and she later issued a grievance. A grievance meeting was held on 10<sup>th</sup> September 2018 and thereafter the Claimant received a letter dated 27<sup>th</sup> September 2018 dismissing her grievance. It was indicated that a change of line manager and offer of mediation had been made but both had been declined by the Claimant. She was also offered a right of appeal against the decision (see page 98 of the hearing bundle).

50. On 12<sup>th</sup> October 2018 the Claimant was invited to join the Respondent's Permanent Medical Insurance (“PMI”) scheme (see page 58 of the hearing bundle).

51. The Claimant appealed against the decision of Mrs. Watkinson who heard her grievance and the appeal was determined and dismissed by the Managing Director, Gary Bell, on 28<sup>th</sup> November 2018. Part of the outcome letter said this:

*“In respect of your role at Bellway you are still considered an employee and should you wish to engage in further work for us I would ask that you provide your availability for December and January if possible in order to support our rota planning for the festive period”.*

52. The Claimant was invited to reconsider the resignation that she had by that stage given but that if she did not wish to do so she should provide a written resignation (see page 121 of the hearing bundle). The Claimant resigned in writing with immediate effect on 19<sup>th</sup> December 2018 setting out alleged breaches of contract that she contended that the Respondent had perpetrated and indicating that she intended to take legal action.

53. The Claimant did undertake employment elsewhere for another organisation, Chestnut Homes, but that was during a period when the Claimant was in dispute with the Respondent and not actually being allocated any work. Indeed, Mrs. Watkinson’s own statement at paragraph 28 accepts that from June 2018 the Claimant was not offered any further work. I make no finding as to why that was as it is not a matter for me in the context of this Preliminary hearing. However, the Claimant did not take up alternative work with Chestnut Homes until November 2018, the month before her resignation, and I accept from the evidence that that work was at times when she would have still been able to make herself available to work for the Respondent given that it occurred on days when the Respondent’s Developments were at that time closed. It is common ground that before undertaking that work, she did not seek the consent of the Respondent to do so as required by the Terms but it does not alter the fact that the Terms clearly envisaged and required that she would do so.

## **CONCLUSIONS**

### **Employee Status**

54. It is common ground from the provisions of Section 94 Employment Rights Act 1996 (which creates the right not to be unfairly dismissed) that a claim for unfair dismissal can only be brought by an “employee” as defined by Section 230(1) of that same Act. It follows that if the Claimant was not an employee of the Respondent that she would lack the standing to present a complaint of unfair dismissal and it similarly follows that that same complaint would have no reasonable prospect of success such that it should be struck out under Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

55. I begin by considering in respect of the facts of this matter each of the factors in **Ready Mixed Concrete**.

56. I firstly need to consider whether there is a contract between the Claimant and the Respondent. There plainly is a contract which is the Terms to which I have referred above. There is nothing before me, and I shall come to that further in the context of the third limb of the **Ready Mixed Concrete** test, which leads me to conclude that the Terms do not reflect the actuality of the arrangements as between the Claimant and Respondent.

57. I turn then to consider whether there was a requirement for personal service. There can be no doubt that that was the case here. There is no right of substitution either within the Terms or otherwise suggested by the dealings as between the Claimant and the Respondent. The Claimant had a uniform provided and was trained to the standards required by the Respondent as to how to undertake her duties. Again, there is nothing to suggest an ability to send a substitute or anything inconsistent with a requirement to give personal service.

58. There is then the question of control. It is clear that the Respondent had a significant degree of control over the Claimant and the way in which she undertook her work. As examples of this I note the following:

- (i) The Claimant was directed to which developments within her area she was required to work;
- (ii) She was required to don a company uniform and name badge;
- (iii) She was required to undertake specific company training so as to perform her duties in the way that the Respondent required and to undertake her work consistent with that training and the Respondent's policies;
- (iv) She was required to utilise the Respondent's systems, including IT systems; and
- (v) She was subject to the Respondent's disciplinary and grievance procedures. Although the former was never used, she was sent a copy with the Terms and it made clear that they were applicable to the Claimant.

59. Finally, although overlapping to some degree with other issues set out above, I consider whether the other provisions of the contract are consistent with it being a contract of service. I deal firstly here with the key ingredient of mutuality of obligation. The Respondent contends that mutuality of obligation was inherently absent in this relationship because there was firstly no obligation on the employer to provide work and no obligation on the Claimant to accept it if it was offered.

60. I am satisfied ultimately that this was not the case. In reality, there was work available and this was offered consistently to the Claimant and, with the limited degree of flexibility to which Ms. Ismail refers in her closing submissions, it was accepted. There may be times when the Respondent did not have work but that is not fatal (see **Wilson v Circular Distributers Ltd EATS/00/43/05**) given that I accept that when it was available it was always offered to the Claimant – or at least it was until relations with Mr. Smith soured - and in practice that created an obligation to do so. Indeed, resources were such that the Claimant was regularly and habitually offered work over a considerable number of years when it was available so as to meet the needs of the Respondent business. The Claimant's clear expectation was that there was an obligation to offer work to her if and when it was available, and that expectation was entirely reasonable given the circumstances of the clear and consistent prior dealings of the parties over a considerable number of years.

61. In terms of the Claimant's acceptance of work and the obligations upon her, it was not open to once she had been allocated her regular and considerable number of hours to decide that she did not wish to attend a development and simply not attend work. That was not least on the many long term assignments which she was allocated at various developments. In addition, when she was asked if she could undertake work at certain times (under the original

arrangements before the arrival of Mr. Smith) the Claimant would in nearly all cases accept or re-arrange her diary to make sure that she could work. Once that she had said that she could work and she was booked for a development, there is no evidence of the Claimant changing or being able to change her mind about working. Similarly, under the system operated by Mr. Smith with the Claimant providing dates of availability, there is no evidence of an entitlement to then refuse work that was offered in accordance with those available dates. That is with the rare exception of the Ashby-de-la-Zouche development which, as I have commented on above, was not a case of not being willing to work but as a result of a protestation as to travel which she believed fell outside the terms of her agreement with the Respondent. That refusal was in no way different to an aggrieved employee.

62. Whilst I take into account that Mr. Smith made reference in his email to the Claimant of her being able to refuse work and there being no obligation to provide it, that clearly was inconsistent with the arrangements of the previous years and did not manifest itself as a suggestion until the Claimant protested about being sent to the Ashby-de-la-Zouche development.

63. The practice, prior to Mr. Smith taking over operations, was that the Claimant would be asked if she was free to work a selection of dates and on the whole she would indicate her availability to work and be allocated work on a certain development. As I have already observed, there can be no reasonable suggestion, and there is no cogent evidence before me, that once she was allocated work at a development she was then able to renege on that agreement or otherwise refuse to attend.

64. The evidence points only to one occasion when the Claimant refused (my emphasis) to work at the Ashby-de-la-Zouche site which, I accept, was on the basis that she believed that that contravened an agreement that she had that she would not be required to travel for more than an hour to get to a particular development. I make no finding as to whether there was such an arrangement but it is clear that the Claimant maintained there to be one from her grievance and appeal and it is equally clear that the only basis for the refusal was the issue of travel.

65. In reality, again that does not differ from an employee who refused to undertake a particular task because they consider that it does not form part of their duties and/or breached some particular arrangement. The Claimant was not refusing out of personal choice or because she had something better to do, but because she had what she perceived to be a genuine objection to the amount of travel involved. That is not, in my view, something that can be properly characterised as an ability to refuse work.

66. In practice, the Respondent regularly asked the Claimant if she was free to work hours. As set out above, the amount of hours that she was allocated was not insubstantial and often on a long term basis. The Respondent was keen not to lose the Claimant and viewed her as part of the team. I am satisfied that provided that there were hours available – and there frequently were over that eight year period of employment – the arrangements were such that they would always be offered and, as Ms. Ismail puts it, with a limited degree of flexibility they would always be accepted. In reality, provided that there was available work it was offered and accepted and that created a degree of obligations and expectations on both sides.

67. Indeed, as Ms. Ismail also points out, as only the Claimant and one other colleague who worked in a different region provided “float” cover, there was little other available option for cover and, of course, the Claimant was taken on working full time hours as a “float” at a time when it is not disputed – by Mrs. Watkinson at least - that she was an employee. During that time, other than the number of hours offered and the commission arrangements, nothing in reality changed. The Claimant still performed and was expected to perform her work in the exact same way as previously.

68. I also take into account in respect of the fact that the contract must not contain terms which are inconsistent with it being a contract of employment, the fact that the Terms are anything but. They, as did the offer of employment, clearly refer to the Claimant as an employee and that she is receiving the terms as part of the Respondents obligations under the ERA 1996 – an obligation which does not of course apply to workers but only to employees.

69. Throughout not only the Terms but the whole dealings which the Claimant and Respondent had with each other it is clear that the expectation and understanding was that of an employment relationship. For example, the Claimant is referred to as a member of the “team”. Save as for one other individual who it is claimed by the Respondent was only a worker, the other Sales Negotiator team are all accepted to be employees and the way in which the Claimant performed her duties and was integrated within the team – for example by attending courses with the others; wearing the same name badge and uniform; being provided with wage slips referring to her as an employee and assigning her an employee number; completing time sheets referring to her as an employee and utilising the same systems – was entirely consistent with how accepted employees were dealt with by the Respondent.

70. Moreover, the Claimant was provided with policies which would usually only be applicable to employees such as the grievance procedure which she was also permitted to use without question as to its application to her. She was referred to as an employee in the appeal outcome and offered mediation and a change of line management. That is wholly inconsistent with someone who is only a casual “as and when” required worker who can refuse or be refused work and who has no obligations or commitment to the Respondent, as, indeed is the requirement for her to formally resign from employment as the appeal outcome asked.

71. Indeed, it is perhaps noteworthy that at all material times until the Claim Form was presented, the Respondent said and did nothing to maintain that the Claimant was not an employee and acted in all material ways as if she was. It was perhaps indicative of this that Mrs. Watkinson found it somewhat difficult in her evidence to explain why certain elements of the Respondent’s dealings with the Claimant did not have the hallmarks of an employment relationship.

72. I also take into account that it was the Respondent who was responsible for provision of the tools of the trade including uniform, training, IT systems and equipment and people safe devices. There was also clearly a significant degree of integration into the Respondent organisation and again I take into account the fact that she was described as a member of the “team” and wore the uniform and name badge to clearly identify her as a Bellways member of staff.

73. The nature and length of the relationship is also an issue to be taken into account here. I accept Ms. Ismail's submissions that this is a lengthy relationship of some eight years or more with the Claimant month on month being provided with a regular and significant number of hours of work. That is not consistent with an ad hoc as and when arrangement and is certainly not inconsistent with an employment relationship.

74. I do take into account the fact that the Claimant did undertake work elsewhere but I accept the position that that was at times that would not interfere with her accepting work from the Respondent because it took place on days on which the developments on which she worked were closed and that, although she did not do so, the Terms were such as to require her to obtain permission to undertake such work. Again, such a requirement for written permission is inconsistent with an ad hoc or casual worker arrangement when such an individual would be free without much if any limitations to accept and undertake work elsewhere.

75. Therefore, there are no factors present which are inconsistent with the contract being a contract for service and, in fact, somewhat entirely to the contrary.

76. I am therefore satisfied that at all material times the Claimant was an employee within the meaning of Section 230(1) ERA 1996. I should say, however, that had I not found to that effect then I would have nevertheless concluded that there were overarching obligations during the periods when the Claimant was not undertaking individual assignments to create an umbrella contract for the extended duration of the relationship. The clear expectations from the regular course of conduct and dealings of the parties over the years was that there would continue to be work offered when it was available (which for the most part it was) and for the Claimant (with a limited degree of flexibility as Ms. Ismail puts it) to accept it.

77. Thus, the Claimant was an employee of the Respondent within the meaning of Section 230(1) Employment Rights Act 1996 and she has standing to both bring and continue with her complaint of constructive unfair dismissal.

### **THE FULL MERITS HEARING AND APPLICATION TO AMEND THE CLAIM**

78. As indicated above, there was insufficient time to determine the issue of employment status at the Preliminary hearing. At that stage, the full hearing remained in the list for 16<sup>th</sup> October 2019 and the parties were agreed that even had it been possible to give Judgment at the Preliminary hearing the timetable would have been too tight to prepare in the time allowed. The full hearing has therefore, with the agreement of the parties, been converted to a telephone Preliminary hearing for the purposes of case management. Notice of hearing has already been sent to the parties.

79. That Preliminary hearing will deal with the Claimant's application to amend the claim and also, given my findings and conclusions on employment status, to relist the claim for a full merits hearing (irrespective of the conclusions on the amendment application) and to make fresh Orders for preparation for the same.

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Employment Judge Heap

Date: 10<sup>th</sup> October 2019

RESERVED JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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