



EMPLOYMENT TRIBUNALS

Claimant Mrs F Thompson

Respondent Dorset Council

JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON A PRELIMINARY HEARING

Heard at: Exeter **On** **17 October 2022**
(remotely)

Before: **Employment Judge Goraj**

Appearances

For the Claimant: **in person**

For the Respondent: **Mr S Wyeth, Counsel**

RESERVED JUDGMENT

THE JUDGMENT OF THE TRIBUNAL IS THAT: -

The claimant was not an employee of the respondent for the purposes of section 230 (1) and 98 of the Employment Rights Act 1996 and/or Article 3 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994/ sections 3 and 42 of the Employment Tribunals Act 1996 and the Tribunal does not therefore have jurisdiction to entertain the claimant's complaints of unfair dismissal and/or for breach of contract for notice.

REASONS

Nature of the Hearing

1. This Preliminary Hearing was conducted as a remote hearing (VHS) to which the parties consented. The hearing was conducted in such manner as it was in accordance with the overriding objective to do so.

BACKGROUND

The Claims

2. By a claim form presented on 23 August 2021, the claimant, who was appointed to the position of Independent Chair of the respondent's Fostering Panel (subsequently known as Fostering and Permanence Panel Chair) from 13 February 2008 brought claims for (a) unfair dismissal and (b) breach of contract in respect of notice following the termination of her appointment on 28 May 2021. The claimant's claim form and attached grounds of complaint are at pages 1 – 14 of the bundle of documents ("the bundle").
3. The claimant commenced the ACAS EC process on 10 July 2021 and the EC certificate was issued on 21 August 2021.

The respondent's response

4. The claims are denied by the respondent including on the grounds that the claimant was an office holder not an employee and that the Tribunals therefore did not have jurisdiction to entertain her claims. The respondent's response and attached grounds of resistance are at pages 15- 33 of the bundle.

The claimant's response to the respondent's grounds of resistance

5. The claimant was directed by the Tribunal to provide comments on the respondent's response relating to her employment status and duly provided such comments dated 15 December 2021 which are at pages 36- 43 of the bundle.

The Listing of the matter at a Preliminary Hearing

6. The matter was subsequently listed for a Preliminary Hearing to determine the claimant's employment status by a letter dated 31 January 2022 (pages 44 -46 of the bundle). The Tribunal directed that the preliminary issues to be determined at the Preliminary Hearing were:-

(1) Was the claimant an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996 (“the Act”) and,

(2) Was the claimant a worker of the respondent within the meaning of the Act?

The documents and witnesses

7. The Tribunal has received witness statements and heard oral evidence from the claimant and from Mr Gerard Connell, Service Manager for Fostering on behalf of the respondent. Mr Connell acknowledged that he was not in post at the time and that he was not therefore able to give evidence regarding the events in question, but he had experience and was able to explain how the fostering panel arrangements worked.
8. The Tribunal was provided with the bundle to which a number of additional documents were added as referred to below.

The submissions of the parties

9. The Tribunal was provided with the claimant’s Bundle of Law Documents and skeleton argument on behalf of the respondent. The claimant’s witness statement also makes reference to case law and guidance. The Tribunal has further been provided with extracts from relevant regulations and guidance as referred to below.

The clarification of the issues

10. The Tribunal clarified the issues with the parties at the commencement of the hearing including as the Tribunal noted that the claimant had referred at paragraphs 14 and 15 of her witness statement to matters of discrimination/ victimisation and associated provisions. There was also a discussion with the claimant as to whether she was seeking to make an application to amend her claim form to pursue a claim for holiday pay. After discussion with the claimant, she confirmed that she did not wish to make an application to amend her claim to bring a claim for holiday pay and further that she was not seeking to bring a complaint of discrimination/ victimisation. It was therefore agreed that as the only claims which the claimant was seeking to pursue were complaints of unfair dismissal and breach of contract (for which the claimant required employee status) it was not necessary for the Tribunal to determine whether the claimant was engaged by the respondent as a worker within the meaning of section 230 of the Act.

FINDINGS OF FACT

11. The Tribunal made the following findings of fact strictly for the purposes of the determination of the preliminary issues. Many of the following facts are agreed or, are not in dispute, between the parties. The Tribunal has addressed below any relevant areas of dispute between the parties.

Background

12. The respondent Council provides a fostering service as part of its wider range of services. The fostering service is governed by the Fostering Services Regulations in force from time to time pursuant to the provisions of the Children Act 1989 and the Care Standards Act 2000. The Fostering and Permanence Panel (which was known as the Fostering Panel prior to April 2018) ("the Panel") is constituted in accordance with Regulation 23 of the Fostering Services (England) Regulations 2011 ("the 2011 Regulations") together with Standard 14 of the National Minimum Standards for Fostering 2011. Government Guidance namely, the Children Act 1989 Guidance Volume 4: Fostering Services 2011(as amended) ("the Guidance") has also been issued under the Children Act 1989.

13. Regulation 23 of the 2011 Regulations regulates the Constitution and Membership of the Panel including regarding the maintenance of a central list of members, the resignation/ removal of members from the list and the constitution of the Panel pursuant to the 2011 Regulations.

14. The 2011 Regulations require that the Panel members must include "a person to chair the panel, who, in the case of any appointment made after 1 October 2011, must be independent of the fostering service provider (Regulation 23 (4) (i) of the 2011 Regulations). The 2011 Regulations also provide for the appointment of one or two persons who may act as Chair (vice chairs) if the Chair of the Panel is absent or the office is vacant (Regulation 23 (4) (ii).

15. Regulation 23 (10) of the 2011 Regulations prescribes the circumstances in which a person is not considered to be independent of the fostering service provider which includes a situation where the person is "employed by that local authority for the purposes of the fostering service or for the purposes of any of that local authority's functions relating to the protection or placement of children (Regulation 23 (10) (a) (ii). It is agreed that this does not preclude an employee from another part of the respondent Council from holding the position of Chair of the Panel.

16. There is however a dispute between the parties as to whether the above Regulation precluded the claimant, as the Chair of the Panel ,

from also being an employee of the respondent. This dispute regarding the interpretation of the 2011 Regulations is addressed further below.

The claimant's letter of appointment and subsequent documentation

17. There is limited documentation relating to the claimant's appointment /role. The Tribunal identified with the parties that the claimant was issued (in chronological order) with the following documentation: -

- (1) The letter of appointment from the then Dorset County Council dated 18 January 2008 / 5 March 2008 (there are 2 versions of this letter) at pages 52/55 of the bundle. In summary, the respondent :- (a) confirmed the claimant's appointment as "Independent Chairperson to the respondent Foster Panel", with a start date of 13 February 2008 (b) acknowledged the benefit to the respondent of the claimant's experience as member of another Panel / as a lawyer and magistrate (b) confirmed that the "terms of the tenure of your appointment" were in accordance with the (then) Fostering Services Regulations 2002(c) advised the claimant regarding the statutory limitations on her period of tenure including that she was entitled to serve one term of three years until 12 February 2011 at which time she could however chose to continue for a further period of up to 12 February 2014. The claimant was however advised of her right to serve for a shorter period/ terminate the arrangements on 4 weeks' written notice if they were not suitable to her (d) the claimant was asked to give as much notice as possible if she was unable to attend any meeting so that the respondent could make arrangements for the vice chair to sit to ensure that the Panel was quorate and (e) advised that there was an expectation that Panel members would attend at least one day of training per year. The letter also stated that the claimant had been issued with a document entitled "Effective Fostering Panels and the "Foster Panel Handbook for Members".
- (2) The terms of Reference for the Fostering Panel dated 13 January 2007 (at pages 50 – 51 of the bundle) which contains guidance to Panel members on the composition and role/ duties of the Panel.
- (3) A letter from the respondent dated 21 February 2011 entitled "Fostering Panel Tenure". In summary the letter confirmed that the claimant's second term of office would end on 12 February 2014 at which time she would, by mutual agreement, be eligible to serve a third and final term until February 2017. The claimant was further advised however that she could if she so wished, leave at any time.

- (4) The respondent Fostering Panel Member Agreement dated 1 March 2018 which is at pages 61 – 63 of the bundle. This agreement contained in summary, information regarding what was required of members of the Panel such as with regard to induction and training, preparation for and attendance at Panel meetings including that they were “expected” to attend at least one day of training per year, that there was a “minimum expectation that members will attend at least 75% of meetings to which they have been invited over a 12 month period” and that members of the Panel were “expected” to give at least 4 weeks’ notice of any unavailability to attend to ensure that the Panel was quorate. The agreement described the membership of the Panel which it stated must include the Chair or Vice Chair (“both of whom are independent”). The agreement addressed other matters such as continuing Panel membership, fees for Independent members and performance objectives. In summary, the agreement further stated that :- (a) there was no legal limit on the period of time for which members could serve on the Panel however a framework would be put in place to ensure that there was a healthy turnover of members (b) members could however relinquish their role at anytime but were “expected” to give at least one month’s notice (c) membership of the Panel could be terminated at any time if a person was deemed unsuitable to continue and (d) performance objectives would be agreed with Panel members with an annual review of performance and training needs. The document also included a summary of baseline performance objectives relating to the preparation for and general standards of participation at the Panel meetings.
- (5) A letter from the respondent then County Council to the claimant dated 19 February 2019 (which refers to an earlier letter dated 14 February 2019 which has not been provided to the Tribunal) confirming its intention to invite the claimant to join the newly constituted Fostering and Permanence Panel.

The claimant

- 18.** The Claimant was the Chair of the Panel from 13 February 2008 until the arrangement was terminated by the respondent on one month’s notice with effect from 28 May 2021.
- 19.** The claimant is a qualified lawyer (legal executive) by background who held the position of Panel Chair of 3/4 other Fostering Panels during the period of April 2019 to March 2020.
- 20.** When the claimant was first appointed to the respondent’s Panel this originally sat twice a month, but this subsequently rose to four times a month on dates which were set 12 months in advance, but which were always the first and third Tuesdays in the month. If the claimant was

unable to attend a meeting she would give the respondent a minimum of 4 weeks' notice to allow the respondent to arrange for a Vice Chair to cover in her absence.

- 21.** The claimant contends that she was contractually obliged to attend a minimum of 75% of Panel dates which standard was monitored in her annual performance review. The respondent accepts that there was an expectation that the claimant would attend a minimum of 75 % of Panel dates but denies that the claimant was obliged to do so. This matter is addressed further at paragraph 47 below.
- 22.** It was the responsibility of the claimant, as Panel Chair, to ensure that written minutes of the Panel were accurate, covered the key issues and views expressed by the Panel members and recorded the reasons for their recommendations.
- 23.** The claimant would also have normally met with the senior managers of the respondent on a quarterly basis to monitor the work and membership of the Panel , to discuss quality assurance feedback and to address any concerns about the Panel or the respondent's fostering service.
- 24.** The claimant received a fixed fee for her attendance at the meetings of the Panel which also covered any preparation work. The claimant submitted invoices to the respondent on a template document provided by the respondent in order to claim her fees together with a separate form for any travel expenses. The claimant's fees/ expenses were subject to the deduction of income tax and national insurance. There is an example of the claimant's payslip at page 65 of the bundle. The claimant is described on the payslip as a "Freelance Adhoc Worker" and the grade is recorded as "OFFSCALE". There is also an example of the claimant's expenses claim form at page 64 of the bundle which form is described as a "Travel & Subsistence Claim Form for Employees".
- 25.** The respondent provided the claimant with the equipment which was required for her to perform her role as Chair of the Panel including a lap top, IPAD and respondent email address.
- 26.** The claimant was not entitled to holiday pay and never received any sick pay or other monetary benefits. The claimant was invited to join the respondent's workplace pension scheme but declined to do so.
- 27.** The claimant attended annual reviews at which her performance and training needs were reviewed, and she was afforded an opportunity to raise any concerns (pages 67 – 70). The claimant was not issued with

or stated to be subject to the respondent's disciplinary or grievance procedures.

28. The claimant contended that she was subject to a high level of control by the respondent including with regard to the way in which the Panels were conducted/minuted and further that the respondent withheld two of her annual reports. Having given careful consideration to the available evidence, the Tribunal accepts that the respondent organised the Panels and issued terms of reference together with general guidance regarding the conduct of the Panel meetings. The Tribunal is not however, satisfied that the respondent subjected the claimant to any further management control. When reaching this conclusion the Tribunal has taken into account in particular that there is no evidence before the Tribunal to indicate that the claimant was subject to any line management or other review other than in respect of the matters referred to above. Further the respondent denied that any of the claimant's annual reports had been withheld and the claimant did not provide any evidence to support such allegation.

The submissions of the parties

29. The Tribunal has given careful consideration to the written and oral submissions of the parties together with the legal authorities relied upon by them.
30. The claimant relies in particular on the Supreme Court Judgment in **Autoclenz Ltd v Belcher and others [2011] ICR 1157**. In essence the claimant contends that, as was the case in **Autoclenz**, the written documentation does not accurately reflect the reality of the relationship between the parties which was, in reality, one of employer and employee including that she meets, on the facts, the requirements for employment status identified at paragraphs 19 and 37 of that judgment.
31. The respondent's Counsel has undertaken a comprehensive and detailed review of the law and authorities relating to employee status at paragraphs 15 -34 of his written submissions. The respondent has also asked the Tribunal to take Judicial notice of the status of fee paid Employment Judges, whose methods of payment and sitting arrangements are, he says, comparablr to those of Panel Chairs and who have been held to be workers not employees.
32. The principal submissions of the parties are addressed as part of the Tribunal's Conclusions below.

THE LAW

33. The issue in this case is whether the claimant was an employee for the purposes of section 230 (1) of the Act. As stated above, the Tribunal only has jurisdiction to entertain claims of unfair dismissal and breach of contract if the claimant was an employee. It is not sufficient for the claimant to be a worker.
34. Section 230 (1) of the Act defines an employee as “an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment”. Section 230 (2) provides that a contract of employment means “a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing. The Act does not however provide any further guidance.
35. There is extensive case law in this area as reviewed by the respondent in its written submissions. The Tribunal has had regard in particular (but not exclusively) to the guidance contained in the cases of **Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968]1All ER 433, QB, Nethermere (St Neots Ltd and Carmichael and anor v National Power plc [1999] ICR 1226 HL, Hall (Inspector of Taxes) v Lorimer [1994] ICR 218, CA and Autoclenz Ltd v Belcher and ors [2011] ICR 1157 SC.**
36. Having reviewed the above guidance the Tribunal has reminded itself in particular that: -
- (1) The authorities have established that in order for a person to be an employee there is a “irreducible minimum” without which it will not be possible for a contract of service to exist. This is comprised of three elements namely:- (a) personal service (b) mutuality of obligation and (c) control.
 - (2) In cases where a party seeks to challenge the genuineness of the terms it is sufficient to show that the written term does not represent the intentions or expectations of the parties. The relevant question is what was the true agreement between the parties.
 - (3) Overall, the Tribunal is required to balance the relevant facts against the key principles contained in the case law in order to determine whether the claimant meets the statutory definition for the purposes of section 230 of the Act.

- (4) In the circumstances of this case, the Tribunal is further required to consider whether the claimant was after 1 October 2011, in any event, statutorily prohibited from being an employee of the respondent by virtue of the operation of Regulation 23 (10) (a) (ii) of the 2011 Regulations as previously referred to above.

THE CONCLUSIONS OF THE TRIBUNAL

Was the claimant prohibited from being an employee of the respondent by virtue of Regulations 23 (4)(i) and (10) (a) (ii) of the 2011 Regulations.

37. The Tribunal has considered this matter first. As stated above there is a dispute between the parties regarding the interpretation/ effect of Regulation 23 of the 2011 Regulations and in particular whether the claimant was with effect from 1 October 2011, in any event statutorily prohibited, from being an employee of the respondent by reason of the combined effect of the above mentioned Regulations. In summary, the respondent contended that the claimant was so prohibited as from 1 October 2011 as there was a requirement for the Panel Chair to be independent of the fostering service provider and the person was not considered to be independent for such purposes if they were employed by the local authority for the purposes of the fostering service or for any of its functions relating to the protection or placement of children. The respondent further contended that if the claimant was an employee of the respondent (which is denied) it can only have been as an employee of such fostering service and the restriction therefore applied.
38. In summary, the claimant contended that the 2011 Regulations did not preclude her from being an employee of the respondent as the requirement not to be employed by the fostering service related to other roles rather than the position of Panel Chair itself.
39. Having given the matter careful consideration the Tribunal is not satisfied that the above-mentioned Regulations precluded the claimant from being an employee for the purposes of section 230 of the Act.
40. When reaching this conclusion the Tribunal has taken into account in particular that:- (a) the restrictions are stated to apply to any appointments made after 1 October 2011. There is however no evidence before the Tribunal to indicate that the claimant was formally reappointed (as opposed to the appointment running on) at any time after February 2011 (paragraph 17 above) and (b) in any event, the claimant was not employed in any other role within the respondent at the relevant time and further (c) the wording of 23 (10) (a) (ii) refers to "is employed" ie an existing state of affairs/ does not say "or as would otherwise be employed by reason of such appointment".

The application of section 230 of the Act.

41. The Tribunal has therefore gone on to consider the position in accordance with approach identified at paragraph 36 above.

Personal Service / Performance

42. The claimant's contends that there was an obligation of personal performance / service as :- (a) she was not entitled to appoint a substitute and (b) was required to give 4 weeks' notice of any unavailability for Panel dates so that the respondent could ensure that the Panel was quorate.

43. The respondent did not dispute the above / accepted that the issue of personal service was not "its best point".

The conclusions of the Tribunal

44. The Tribunal is satisfied on the facts, that the claimant was under an obligation of personal performance - there is no suggestion in this case that the claimant could provide a substitute. Furthermore, it is clear from the documentation at paragraph 17 that the claimant was "expected to give 4 weeks' notice of any unavailability so that the respondent could make the necessary arrangements to ensure that the Panel was quorate.

Mutuality of obligation

45. In summary, the respondent contended that in order for a contract of employment to exist there must be an "irreducible minimum of obligation on each side which is usually expressed as an obligation on the employer to provide work and pay a wage/ salary and a corresponding obligation on the employee to accept and perform the work offered. The respondent further contended that in this case that :- (a) the "irreducible minimum of obligation was not met as there was only an "expectation" (not an obligation) that the claimant would attend 75% of the Panel meetings and (b) there is not suggestion in the documentation that the respondent could compel the claimant to attend any particular meeting – quite the opposite as the claimant was requested to let the respondent know so they could make alternative arrangements.

46. In summary, the claimant relied on the Judgment in **Autoclenz** . The claimant contended in particular that the documentation did not reflect the reality of the situation as "the expectation" was in reality "an obligation" and any failure to do so would have been addressed within the annual performance review and could have led to sanctions against her.

The conclusions of the Tribunal

47. Having given the matter careful consideration the Tribunal is not satisfied that the claimant was obliged to attend Panel meetings. When reaching this conclusion the Tribunal has taken into account that there was a regular pattern of monthly Panel meeting dates and that the claimant's level of attendance at such meetings was reviewed at her annual performance reviews. The Tribunal has however balanced against the above that it is expressly and consistently stated throughout the documentation at paragraph 17 that attendance was, for all Panel members (including the Panel Chair) no more than an expectation together with a clear mechanism provided for the giving of notice so that alternative arrangements could be made to ensure that the meetings remained quorate in the event of any proposed non-attendance. Further the claimant accepted that she had acted in accordance with such arrangements for notice when she proposed to be absent on leave. Moreover, the claimant has not provided any evidence of any action being taken against her or any other Panel Member for non-attendance at Panel and /or training (in respect of which a similar expectation applied).
48. The Tribunal is accordingly not satisfied that the claimant has established that she was obliged to attend Panel meetings including therefore that the "contractual documentation" did not therefore reflect the true situation. The Tribunal is therefore not satisfied that the claimant has established mutuality of obligations.

Control and other factors

49. In summary, the respondent contended that the claimant had failed to establish the necessary level of control required for an employer / employee relationship including as:- (a) the letter of appointment and subsequent documentation with the references to tenure and terms of reference were not consistent with such a relationship (b) the claimant did not provide any evidence of the alleged management control including with regard to the alleged withholding of her reports (c) the claimant was not integrated into the respondent including as demonstrated by the claimant's exclusion from the holiday pay system (d) there is a clear similarity between the roles of Panel Chair and Fee Paid Employment Judges (including with regard to the payment of tax, claiming fees and sitting arrangements) who were held to be workers not employees.

50. Viewing the matter overall, the claimant has not established that she was an employee for the purposes of section 230 of the Act.

51. In summary, the claimant contended that :- (a) the reality of the situation was that she was under the control of the respondent such as to give rise to employment status including with regard to the withholding of her reports and control over the conduct of the Panel meetings and minutes (b) she did not initially hold any other Panel Chair roles which were, in any event, not inconsistent with an employer/ employee relationship as employees often had other part time jobs (c) she submitted her claims for fees on a template provided by the respondent, her pay was subject to statutory deductions and she was treated as an employee for the purposes of mileage/ expenses - all of which were consistent with her being an employee (d) further the respondent invited her to join its workplace pension and (e) viewing the matter overall and looking at the reality of the situation in accordance with **Autoclenz** she was an employee of the respondent.

The conclusions of the Tribunal

52. Having given the matter careful consideration the Tribunal is not satisfied that the respondent exerted control over the claimant in a manner which was consistent with an employer / employee relationship. When reaching such conclusion the Tribunal has taken into account in particular the following matters: -

- (1) The claimant's role as Panel Chair was subject to tenure / regulated by the published Terms of Reference in accordance with the 2011 Regulations and associated guidance for which the claimant received a fee rather than a salary.
- (2) The claimant was at liberty to, and did undertake, similar roles with other local authorities.
- (3) The claimant was not integrated into the respondent's line management structure and was not subject to any disciplinary or similar procedures.
- (4) The claimant was not entitled to/ did not receive any holiday or sick pay benefits.
- (5) Further the Tribunal is not satisfied on the facts that the claimant has established that she was subject to any significant control in

the performance of her duties as Panel Chair including that her annual reports were withheld.

- (6) Finally, the Tribunal is satisfied that the fact that the claimant had tax / national insurance deducted from her fees and mileage does not affect the Tribunal's conclusions regarding the lack of integration/ the claimant's employment status as the Revenue apply similar arrangements to office holder such as fee paid Employment Judges.

Overall conclusion

53. Having weighed all of the above factors the Tribunal is not satisfied that the claimant was an employee of the respondent for the purposes of section 230 of the Act. When reaching such conclusion, the Tribunal has taken into account its findings regarding the claimant's obligation to provide personal service. The Tribunal has however weighed against that finding those relating to the lack of mutuality of obligation relating to the attendance at Panel meetings and lack of control by/ integration in the respondent. Having weighed the matter overall the Tribunal is satisfied that the claimant's role as Panel Chair was as an independent officer holder and not as an employee of the respondent.
54. The Tribunal therefore does not have jurisdiction to entertain her complaints of unfair dismissal and /or breach of contract.

Employment Judge Goraj
Date: 11 November 2022

Judgment sent to the parties: 18 November 2022

FOR THE TRIBUNALS OFFICE

Online publication of judgments and reasons

The Employment Tribunal (ET) is required to maintain a register of judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>

The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in anyway prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other

parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness