



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101740/2023

5

Held in Glasgow via CVP (Cloud Video Platform) on 30 and 31 May 2023

Employment Judge: J McCluskey

10 **Ms Sunitha Kemlo**

**Claimant
Represented by:
Mr N Paterson -
Solicitor**

15 **Blackfaulds House Nursing Home Limited**

**Respondent
Represented by:
Mr K McGuire -
Counsel**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided to dismiss the claim because:

1. A Tribunal does not have jurisdiction to determine the complaint of discriminatory unfair constructive dismissal under section 39(2) and section 25 39(7)(b) of the Equality Act 2010 because the claimant is not an employee within the meaning of section 83 of the Equality Act 2010.
2. A Tribunal does not have jurisdiction to determine the complaint of direct race discrimination under section 13 of the Equality Act 2010 because the claimant is not an employee within the meaning of section 83 of the Equality Act 2010.
- 30 3. A Tribunal does not have jurisdiction to determine the complaint of race related harassment under section 26 of the Equality Act 2010 because the claimant is not an employee within the meaning of section 83 of the Equality Act 2010.

REASONS

Introduction

1. A case management preliminary hearing took place on 17 April 2023 at which the claimant confirmed that she claims direct race discrimination and harassment on the grounds of race under section 13 and section 26 of the Equality Act 2010. She confirmed that she also claims unfair constructive dismissal under section 39(2) and section 39(7)(b) of the Equality Act 2010. These are resisted by the respondent.
2. At the case management preliminary hearing the Employment Judge ordered that a public preliminary hearing be listed to determine the following preliminary issue:
 - a. In the period from in or about June 2021 until 24 September 2022 (the date of the claimant's purported resignation):
 - i. was the claimant employed under a contract of employment with the respondent, or
 - ii. was the claimant employed under a contract personally to do work with the respondent?
3. At the outset of the public preliminary hearing the Tribunal clarified and agreed with the parties that the issue for determination was employee status as set out above. Mr Paterson confirmed that the claimant does not bring a claim under section 41(contract workers) of the Equality Act 2010.
4. The claimant led evidence on her own account. The respondent led evidence from (1) Mrs Charlotte Campbell Home Manager; and (2) Mrs Kathy Munro Operations Support Manager.
5. The Tribunal was referred to a number of jointly produced documents. The Tribunal was also referred to a joint statement of facts. On the basis of the evidence before it, the Tribunal made the following material findings of fact.

Findings in fact

6. The respondent is a private limited company which operates as a residential nursing home. The owner/director of the respondent is Mrs Sharda Poddar.
7. The respondent's workforce comprises a number of employees and a number of people who are provided to the company through various providers.
8. The claimant is the owner and sole director of Bizz Nurse Ltd (company number – SC549927). Bizz Nurse Ltd is a private limited company. Bizz Nurse Ltd is an active company incorporated on 10 December 2016. Bizz Nurse Ltd was previously known as Johnandsu Limited. Johnandsu Limited changed its name to Bizz Nurse Ltd on 7 September 2018.
9. The claimant used Bizz Nurse Ltd to provide her services to the respondent from about June 2021 until 24 September 2022 when the relationship ended.
10. There was no contractual documentation governing the relationship between the claimant and Bizz Nurse Ltd. There was no contractual documentation governing the relationship between Bizz Nurse Ltd and the respondent.
11. Bizz Nurse Ltd invoiced the respondent on a regular basis for payment for the claimant's services. The respondent made payments direct to Bizz Nurse Ltd.
12. The parties produced for the Tribunal invoices on headed notepaper from Bizz Nurse Ltd to the respondent for payment of the claimant's services and remittance advices from the respondent to Bizz Nurse Ltd making payment of those invoices.
13. The respondent did not make any payments direct to the claimant for the services carried out by the claimant.
14. The claimant took a salary from Bizz Nurse Ltd. The claimant was responsible for her own tax and national insurance affairs. She had an accountant who submitted her own personal tax return and Bizz Nurse Ltd's tax return to HMRC.

15. The claimant is a qualified nurse who is registered to practise in the UK. The claimant's experience was set out in a CV at pp 68-70 of the bundle. The CV states at the top "Bizz Nurse Ltd" and provides a Bizz Nurse Ltd email address. In a paragraph directly underneath, it states "...*Being a business owner affords me the opportunity to dedicate myself to worthwhile nursing projects.....*".
- 5
16. The claimant had previously provided nursing services to Mrs Poddar, through Bizz Nurse Ltd, at another care home in which Mrs Poddar was involved called Lancefield Care Home. Lancefield and the respondent are separate legal entities. The claimant knew Mrs Poddar from this previous arrangement.
- 10
17. The claimant operated through Bizz Nurse Ltd with a number of care homes, which were listed on her CV. She had done so for a number of years.
18. On or around 15 May 2021 there was an exchange of messages between Mrs Poddar and the claimant. Mrs Poddar messaged the claimant and asked "I have a request to make can you do 2 permanent nights at Blackfaulds house nursing home?". The claimant replied to say that she could do so. Mrs Poddar replied "How much you going to charge per night?" The claimant confirmed to Mrs Poddar "same as before maam..." and referred to the hourly rate that the claimant had charged at Lancefield.
- 15
19. Following the exchange of messages between the claimant and Mrs Poddar on or around 15 May 2021 the claimant began providing nursing services to the respondent from around mid-June 2021. The claimant usually worked two shifts per week, on set nights, for the respondent. There were a few of these shifts which the claimant chose not to work.
- 20
20. The claimant did not require the respondent's permission not to work a shift. The claimant could choose not to work a shift and then it would be up to her or the respondent to find a replacement. On some occasions the claimant would arrange for another nurse (Bobby) to carry out her shift. Bobby had been introduced to the respondent by the claimant. On other occasions, Mrs Campbell would find another person to work the shift or do the shift herself.
- 25
- 30

21. The claimant, in performing her role, was required to comply with duties and obligations set out in the Nursing and Midwifery Council ('NMC') Code of Conduct. This was required of the claimant in providing nursing services to the respondent whether or not she was employed under a contract of employment with the respondent.
22. The claimant was the only nurse on duty when she worked on the night shift. She would do a handover with Mrs Campbell in the morning to inform her of any issues that arose during the nightshift and to organise medicines. Most of the time Mrs Campbell worked as a nurse, in addition to her role as the Home Manager. The handover on a change of shift was required of all nursing staff, whether or not employed under a contract of employment with the respondent. It was required to comply with the duties and obligations of all nurses in the NMC Code of Conduct.
23. The claimant was not subject to any appraisals by the respondent.
24. The claimant was not subject to any training by the respondent. All practising nurses were required to carry out a medical competencies' revalidation process around every three months by the NMC, regardless of their employment status. The respondent did arrange e-learning training for new members of staff who were engaged through the respondent's payroll. Staff who were engaged by the respondent through agencies or limited companies, including the claimant, were not subject to e-learning training.
25. At the same time as providing nursing services to the respondent, the claimant provided nursing services to Craig En Goyne Nursing Home. She provided services there on around 5 or 6 occasions whilst providing services to the respondent. Her services were provided to Craig En Goyne through Bizz Nurse Ltd.

Observations on the evidence

26. It is not the function of the Tribunal to record all of the evidence presented to it and the Tribunal has not attempted to do so. The Tribunal has focused on

those parts of the evidence which it considered most relevant to the issues it had to decide.

27. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event in fact occurred.
28. The respondent's witnesses Mrs Campbell and Mrs Munro gave their evidence in a straightforward manner. They were both credible and reliable witnesses. The claimant's evidence was unclear at times. For example, she said she did not know if there were any advantages in setting up Bizz Nurse Ltd. She said she had set Bizz Nurse Ltd up because the agency she was employed through at the time said her options were 'payroll or limited company'. She said the limited company option was 'new' and her friends were setting up limited companies. She appeared to suggest that because her friends were setting up limited companies she chose to do so too. The claimant also said that she used an accountant who submitted her own personal tax return and Bizz Nurse Ltd's tax return to HMRC. The claimant had been providing nursing services through Bizz Nurse Ltd to various care home providers since she had set the company up. The Tribunal found it surprising that having operated in this way for a number of years and having the benefit of an accountant to prepare tax returns she would not have any insight into how providing her services in this way might work and whether there were any advantages in doing so. The Tribunal appreciates that tax matters and legal matters in this area are not straightforward. However, the Tribunal found the claimant's evidence about the reasons for setting up a limited company and the potential benefits in doing so to be somewhat evasive.
29. There were not many factual issues in dispute in the case. There was one disagreement about whether the claimant had been subject to appraisals by Mrs Campbell. The claimant was asked in examination in chief how often she had appraisals with Mrs Campbell and replied that they were 'regular'. She

then said that they were 'yearly' with the last one being in July or August 2022. The claimant provided services to the respondent from about mid-June 2021 until 24 September 2022. If the appraisals were yearly this indicated that there had been two appraisals. The Tribunal considered that the claimant's earlier evidence about 'regular' appraisals was intended to suggest that they were more often than annual. Mrs Campbell's evidence was that she had not carried out any appraisals with the claimant. Mrs Campbell's evidence referred to all nurses having to carry out a medical competencies' revalidation process around every three months by the NMC, whether or not employed under a contract of employment with the respondent. All nurses, regardless of employment status, need to do this and obtain feedback for the revalidation process. Mrs Campbell suggested that this is what the claimant may be referring to by way of appraisals. She was clear that these were not appraisals.

5
10
15 30. The Tribunal preferred the evidence of Mrs Campbell that the claimant had not been subject to appraisals. The claimant's own evidence about the frequency of appraisals was not clear. There was no documentary evidence provided to the Tribunal which showed that appraisals had been signed off by the respondent, as asserted by the claimant. There was an element of regular feedback and communication required by the claimant and the respondent in relation to the medical competencies' revalidation process and it seemed likely that this was the regular feedback from Mrs Campbell to which the claimant referred. Further, it was not challenged by the claimant that the medical competencies' revalidation process was required by all nurses regardless of their employment status.

20
25
30 31. There was another dispute in the evidence about whether the claimant had been subject to training by the respondent. The claimant said that there were around seven e-learning training courses which she had been required to complete by the respondent. Mrs Campbell said that whilst the respondent's payroll employees were required to carry out e-learning modules at the

beginning of their employment there was no such requirement for agency or limited company nurses, including the claimant.

32. The Tribunal preferred the evidence of Mrs Campbell that the claimant had not been subject to e-learning or any other training by the respondent as that was not required of agency or limited company nurses. The claimant's evidence about any e-learning was too general. It lacked any detail to allow the Tribunal to determine that on, balance, it was more likely than not that she had completed e-learning courses and that she had been required to do so by the respondent. Further, there was no documentary evidence provided to the Tribunal to show that e-learning had been completed.

Relevant law

33. The Equality Act 2010 (EqA) provides at section 83 Interpretation and exceptions “(1) *This section applies for the purposes of this Part [5].* (2) *‘Employment’ means—(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work; (b) ...; (c) ...; (d) ...*”
34. The Employment Rights Act 1996 (ERA) provides at section 230 Employees, workers etc... “(1) ... (2) *In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing. (3) In this Act “worker” 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.*”
35. The authorities suggest that the two definitions are treated as meaning essentially the same thing. **Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32; Allonby v Accrington and Rossendale College (Case C-256/01) [2004] ICR 1328 ECJ; Pimlico Plumbers Ltd v Smith [2018] UKSC 29.**

36. The Tribunal directed itself to the Supreme Court decision in **Uber BV and ors v Aslam and ors 2021 ICR 657, SC**, which held that the wording of the agreement between the parties is not decisive as to the existence or otherwise of an obligation of personal service. The determination of 'worker' status under section 230(3)(b) (and by extension 'employee' status under section 83(2) EqA) is a question of statutory, not contractual, construction. The written agreement should not be treated as a starting point. Tribunals should rather focus on the practical reality of the working arrangements and have regard to the purpose of the legislation, which is to give protection to vulnerable individuals who are in a subordinate and dependent position in relation to a person or organisation who exercises control over their work.

Submissions

37. Both representatives made oral submissions and provided written submissions to the Tribunal. The Tribunal carefully considered the oral and written submissions of both parties. and has dealt with the points made in submissions, where relevant, when setting out the facts, the law and the application of the law to those facts. It should not be taken that a submission was not considered because it is not part of the discussion and decision recorded.

20 *Respondent's submissions*

38. Mr McGuire addressed the Tribunal on the general themes emerging from the case law and made reference to **Sejpal v Rodericks Dental Ltd [2022] EAT 91; Quashie v Stringfellow Restaurants Ltd [2012] EWCA Civ 1735; Ready Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968] 2 QB 497; Autoclenz Ltd v Belcher [2011] ICR 1157; Uber BV v Aslam [2021] UKSC 5; [2021] I.C.R. 657; Carmichael and Another v National Power PLC [1999] I.C.R. 1226, HL; Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32.**

39. He submitted that the claimant has failed to identify the existence of a bilateral contract between herself (as an individual) and the respondent, thus the

claimant's arguments fall at the first hurdle. He submitted that the message exchange between the claimant and Mrs Poddar on or around 15 May 2021 did not offer the claimant any assistance. The claimant's own evidence was that she worked through a limited company of which she was a director (and at the material times the sole director). The claimant, as the sole director of Bizz Nurse Ltd, will of course arrange with nursing homes (clients of her business) for her (the claimant) to provide nursing services. In everyday settings many directors take actions on behalf of the companies of which they are directors. The directors are not usually personally bound by those arrangements.

5
10
40. He submitted the claimant was supplied to work for the respondent through Bizz Nurse Ltd. The arrangement was supported by the documentary evidence and any other conclusion would be artificial.

15
20
41. He submitted that the claimant chose to set up a limited company to offer her services to nursing homes. The claimant worked through a business organisation. This benefitted the claimant in terms of flexibility and tax matters. The claimant had an accountant who submitted her own personal tax return and Bizz Nurse's tax return to HMRC. From the evidence given, it does not appear that the claimant has ever asserted to HMRC that she is an employee of the respondent. The claimant's CV is couched in terms of her working through Bizz Nurse Ltd.

25
42. He submitted that the high point of the claimant's arguments is that she worked two night shifts per week. However, this does not advance her claim that she has a contractual relationship with the respondent. This only means that the respondent and Bizz Nurse Ltd agreed that the claimant will work two night shifts for the respondent. This is not a permanent agreement. The evidence of Mrs Campbell was that if the respondent could employ 'payroll' nurses it would, and it would not have to use agency nurses.

30
43. He submitted that if it is found that there is a contractual relationship between the parties, it is not a contract of employment. There is no 'mutuality of

obligation' between the parties. On occasion the claimant informed the respondent that she was not able to carry out a shift. On some occasions the claimant would arrange for another nurse (Bobby) to carry out her shift. Sometimes Mrs Campbell would find another person to work the shift or do it herself. The claimant did not require the respondent's permission not to work the shift. The claimant could choose not to work a shift and then it would be up to her or the respondent to find a replacement.

5
10
15
44. Mr Maguire accepted that when the claimant was at work, she would have the usual responsibilities and professional duties of a nurse. She appeared to have a high degree of autonomy in carrying out her nursing duties. She was the only nurse on duty when she worked on the night shift. She would do a handover with Mrs Campbell to inform her of any issues that arose during the nightshift and to organise medicines. There was little further in the way of direction and supervision given to her. The claimant, in performing her role, was required to comply with duties and obligations set out in the NMC Code of Conduct. This would be the case whether or not she was employed under a contract of employment with the respondent. Mr Maguire also submitted that for the reasons already stated above, the claimant was not employed by the respondent under a contract personally to do work.

20
25
45. He submitted that Bizz Nurse Ltd was a client of the respondent. The respondent agreed with Bizz Nurse Ltd for the supply of nursing services (performed by the claimant). The claimant operated through Bizz Nurse Ltd. In such circumstances the claimant can be seen as carrying out a professional or business organisation, and the respondent is a client of that organisation. He invited the Tribunal to find that the claimant was not in the employment of the respondent under a contract of employment or a contract personally to do work (section 83(2)(a) EqA and that the Tribunal has no jurisdiction to deal with the claim.

Claimant's submissions

46. Mr Paterson also addressed the Tribunal on the general themes emerging from the case law and made reference to the cases of **Sejpal v Rodericks Dental Ltd [2022] EAT 91**; **Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32**; **Allonby v Accrington and Rossendale College (Case C-256/01) [2004] ICR 1328, ECJ**; **Pimlico Plumbers Ltd v Smith [2018] UKSC 29**; **Nursing and Midwifery Council v Somerville UKEAT/0258/20**; **Uber BV and others v Aslam and others [2021] UKSC 5**; **James v Redcats (Brands) Ltd [2007] ICR 1006**; **Jivraj v Hashwani [2011] IRLR 827**; **Byrne Bros (Formwork) Ltd v Baird [2002] I.C.R. 667**; **Cotswold Developments Construction Ltd v Williams UKEAT/0457/05**; and **Clarkson v Pensher Security Doors Ltd UKEAT/0107/09**.
47. He submitted that in **Sejpal** it had been emphasised by the EAT that in determining whether someone is a worker, the starting point and constant focus should be on the statutory wording. A structured approach should be adopted where the starting point should be a determination of whether there was a contract between the worker and the employer. The Tribunal should focus on the wording of the contract and the concepts of mutuality of obligation, irreducible minimum and umbrella contract. The Tribunal should next consider whether there was a requirement for personal service and lastly the Tribunal should consider whether the claimant carried on a profession or business.
48. Mr Paterson considered each part of the **Sejpal** guidance in turn. He submitted that there was a contract between the claimant and the respondent. This was partly express, as detailed in the messages exchanged by the claimant and Mrs Sharda Poddar on or around 15 May 2021 *'I have a request to make can you do 2 permanent nights at Blackfaulds house nursing home?'*
49. Mr Paterson submitted that a contract between the claimant and the respondent could also be implied by the 'mutuality of obligation' which existed between the parties. He submitted that the two "permanent" shifts per week referred to in the message from Mrs Poddar and that the claimant had

regularly carried out two shifts per week, satisfied the irreducible minimum of obligation part of the test.

50. He submitted that the contract was one requiring personal service by the claimant and the other party to the contract (the respondent). The claimant's private limited company was simply a vehicle for payments to be made. Bizz Nurse was not material to the claimant's employment relationship with the respondent. Mrs Poddar's initial approaches to the claimant were to her as an individual, a worker who she knew from their ongoing working relationship at another care home.
51. He submitted that the claimant had swapped shifts with the nurse Bobby on only a few occasions and in any event a limited power of substitution, if it did exist, was not inconsistent with an obligation of personal service.
52. Mr Paterson submitted that Mrs Campbell was more senior as the Home Manager, therefore when the claimant handed over to Mrs Campbell, the claimant was subordinate to her. He submitted that the claimant was also integral to the business, as she was the only nurse during the night shift. He submitted that the predominant purpose was for the claimant to provide care.
53. Mr Paterson also invited the Tribunal to find that the claimant did not carry on a profession or business, as set out in the final part of the **Seipal** case. He submitted that the claimant's tax status was just one element to take into account. Other elements which had already been considered were also relevant, being mutuality of obligation, irreducible minimum, personal service, substitution and predominant purpose. He invited the Tribunal to find that the claimant was in the employment of the respondent under a contract of employment or a contract personally to do work (section 83(2)(a) EqA and that the Tribunal has jurisdiction to determine her claim.

Discussion and decision

54. The Tribunal was referred to a number of cases by both representatives. The Tribunal considered that the points to extract from those cases is that there is

no one factor which is determinative. A Tribunal in considering whether the claimant was in the employment of the respondent under a contract of employment or a contract personally to do work (section 83(2)(a) EqA) must have regard to any contractual documentation and to all the circumstances of the particular case. The Tribunal accepted that the general themes arising from case law and which should be considered by a Tribunal determining the issue are the terms of any contract, mutuality of obligation, irreducible minimum, personal service, substitution, predominant purpose, subordination, control and integration.

5
10 55. The Tribunal noted and directed itself to the authorities referred to by both parties to the effect that the definition of employment in the extended sense under section 83(2) EqA and under section 230(3)(b) ERA are treated as meaning essentially the same thing and that guidance from case law on both sections is relevant in this case.

15 56. The elements required to satisfy the statutory definition of a worker under section 230(3)(b) ERA are (i) there must be a contract between the worker and the putative employer, whether express or implied. (ii) the contract must require personal service. (iii) the other party to the contract is not the customer or client of any business undertaking or profession carried on by the individual.

20
25 57. In **Sejpal** the EAT emphasised that in determining whether someone is a "worker", the focus should be on the statutory wording. The EAT said (i) The starting point for the Tribunal should have been to determine whether there was a contract between the putative worker and employer. The Tribunal is required to assess the true nature of the agreement, without excessive focus on wording that might be designed to avoid worker status being established. The concepts of "mutuality of obligation", "irreducible minimum" and "umbrella contract" are tools that may be used to assist the Tribunal in its determination. (ii) The Tribunal should then consider whether there was a requirement for personal service. This may be answered with assistance from the tools of "substitution" and "predominant purpose". (iii) The Tribunal should consider

30

whether the putative worker carried on a profession or business undertaking and, if so, whether the putative employer was a client or customer by virtue of the contract between them. The concepts of "subordination", "control" and "integration" are tools that may be relevant to these final two questions.

5 *Contract between claimant and respondent*

58. The Tribunal firstly considered whether there was a contract between the claimant and the respondent. It determined that there was no such contract. Mr Paterson submitted there was a contract between the claimant and the respondent. He submitted that the contract was express and relied on the exchange of messages between Mrs Poddar and the claimant on or around 10 15 May 2021 where the approach was from Mrs Poddar to the claimant as an individual. He submitted that a contract can also be implied between the claimant and the respondent by reason of the mutuality of obligation between the claimant and the respondent and irreducible minimum of work ie two 15 nights per week, required by the respondent of the claimant.

59. Mr Maguire submitted that there was no contract between the claimant and the respondent. The arrangement was between Bizz Nurse Ltd and the respondent as evidenced by the invoices. He submitted that there was no mutuality of obligation between the claimant and the respondent and no 20 irreducible minimum of work between them. He submitted that this was evidenced as on some occasions the claimant did not work her shift and she did not have to get permission from the respondent before not working a shift. All she had to do was inform the respondent that she was not working the shift.

25 60. **Sejpal** directs that in determining whether there is a contract between the putative worker and employee concepts of "mutuality of obligation", "irreducible minimum" and "umbrella contract" are tools that may be used to assist the Tribunal. There was no evidence led to suggest an umbrella contract and no submissions made about this.

61. There was no dispute between the parties that the claimant did not require permission from the respondent if she did not wish to work the 'permanent' shift days to which she had been allocated. There was no dispute that all she had to do was inform the respondent. On those occasions she either agreed with another nurse (Bobby) to cover her shift or she told Mrs Campbell who found someone else to work the shift. Bobby was a nurse who had been introduced to the respondent by the claimant. If Bobby was working the shift the claimant let Mrs Campbell know. In practice, there were only a few shifts which she did not work. But the essential point is that no permission was needed from the respondent.
62. The Tribunal was satisfied, on this evidence, that there was no mutuality of obligation and there was no irreducible minimum of work required by the claimant. The claimant could choose not to work the shift. On occasion she did choose not to work the shift, without any repercussions, despite the shift having been described by Mrs Poddar as 'permanent'.
63. The Tribunal also considered the exchange of messages between the claimant and Mrs Poddar on or around 15 May 2021. Whilst the Tribunal accepts that the first message was sent to the claimant personally, as opposed to the Bizz Nurse Ltd email address, the Tribunal considered that in the subsequent exchange immediately afterwards about the hourly rate of pay the claimant signposted an arrangement which involved Bizz Nurse Ltd. Mrs Poddar asked how much she would charge. The claimant replied, "*same as before*", which was a reference to when Bizz Nurse Ltd had provided the claimant's services to Lancefield Nursing Home. There was no dispute that all the claimant's services to the respondent had in fact been invoiced by Bizz Nurse Ltd.
64. The Tribunal did not agree with the claimant's submission that Bizz Nurse Ltd was simply a vehicle for payments to be made through and was not material to the claimant's contractual relationship with the respondent. The Tribunal was satisfied that the involvement of Bizz Nurse Limited was part of the matrix of factual matters to be considered by the Tribunal in determining whether

there was a contract between the respondent and the claimant, although not the only one. In this regard the Tribunal noted that the invoicing of the claimant's services to the respondent was from Bizz Nurse Limited and the messaging on around 15 May 2021 referenced previous pay arrangements, which had been made to Bizz Nurse Ltd and not to the claimant herself.

65. Having considered each of these matters the Tribunal determined that there was no contract between the claimant and the respondent.

Personal service

66. The Tribunal then went on to consider whether there was a requirement for personal service. **Sejpal** directs that this may be answered with assistance from the tools of "substitution" and "predominant purpose". The Tribunal was satisfied that there was no requirement for personal service as there was an ability for the claimant to provide a substitute and personal service was not the predominant purpose of the arrangements.

67. Mr Paterson submitted that although there was evidence of the claimant substituting with the nurse called Bobby there was no evidence that she was allowed to substitute another nurse. This was not a matter which was put to the respondent's witnesses. Although the claimant said she had not substituted with anyone other than Bobby, there was no evidence led that she was not allowed to do so. Mrs Campbell's evidence was that the claimant did not need permission if she did not wish to do a shift but required to tell her. Mrs Campbell's evidence more generally was about using agency nurses and self-employed nurses as well as payroll nurses to meet staffing requirements. Sometimes Mrs Campbell worked the shifts herself. The claimant had introduced the nurse Bobby to the respondent. It appeared to the Tribunal that it was more likely than not that if another competent, qualified nurse had been introduced by the claimant to Mrs Campbell, the claimant would have been able to substitute with that nurse.

68. Mr Paterson referred to **Byrne Bros (Formwork) Ltd** which provides that a limited power to appoint substitutes is not inconsistent with an obligation of

personal service. The claimant did not lead evidence to suggest that she had only a limited power to appoint substitutes. The fact that she only chose to exercise the ability to substitute on a few occasions does not mean it is limited. Her power to appoint substitutes would of course only be other nurses. This does not mean that it is limited. The claimant had played a role in introducing Bobby to the respondent. There was no evidence led to suggest that she was prevented from introducing other nurses to the respondent to cover any of her 'permanent' shifts.

Profession or business undertaking

10 69. The Tribunal then went on to consider whether the claimant carried on a profession or business undertaking and, if so, whether the respondent was a client or customer by virtue of the contract between them. **Sejpal** directs that "subordination", "control" and "integration" are tools that may be relevant to these questions. The Tribunal was satisfied that the claimant did carry on a profession or business undertaking and that the respondent was a client or customer by virtue of the contract between them.

15 70. The claimant's CV referred at the top to "Bizz Nurse Ltd" and provided a Bizz Nurse Ltd email address. In a paragraph directly underneath, it stated "...Being a business owner affords me the opportunity to dedicate myself to worthwhile nursing projects.....". The claimant operated through Bizz Nurse Ltd with a number of care homes, which were listed on her CV. She had done so since the company was incorporated in 2016. The Tribunal was satisfied that these care homes were her clients. That was the clear impression created by the CV. She was never paid directly by the respondent but always through the Bizz Nurse Ltd account. She issued invoices on Bizz Nurse Ltd headed paper. She engaged the services of an accountant to submit tax returns for herself and for Bizz Nurse Ltd. There was no suggestion that this was a sham arrangement or anything other than a legitimate business undertaking.

71. Mr Paterson submitted that the claimant was in a position of subordination to the respondent, in particular Mrs Campbell who was the Home Manager. He suggested that because the claimant did a handover to Mrs Campbell at the end of her shift and because Mrs Campbell was more senior than her, this meant that she was in a position of subordination. The Tribunal did not agree with this. The Tribunal was satisfied that the handover to Mrs Campbell was because, most of the time, Mrs Campbell worked as a nurse in addition to her role as the Home Manager. The handover on a change of shift was required of all nursing staff, whatever their status. It was required to comply with the duties and obligations of all nurses in the NMC Code of Conduct. It did not indicate that the claimant's relationship with the respondent was one of subordination.

72. The Tribunal also considered control and integration. The claimant was not subject to any appraisals or training by the respondent. This was different for new members of staff who were engaged through payroll, who required to carry out e-learning modules when their employment began. By contrast, none of the staff who were engaged by the respondent through agencies or limited companies, including the claimant, were subject to e-learning training. This did not indicate to the Tribunal that the claimant was in a position of integration or control by the respondent. The claimant did have certain duties and responsibilities with which she had to comply. These were duties and responsibilities required by the NMC Code of Conduct and with which all nurses are required to comply by their professional body, regardless of their employment status. To be clear, there was no suggestion by the respondent that the claimant was not complying with these duties and responsibilities.

73. In summary, the practical reality of the working arrangements between the claimant and the respondent was that the claimant was carrying on a business undertaking. She was not in a subordinate and dependent position in relation to the respondent. The respondent was a client or customer of Bizz Nurse Ltd.

Conclusion

74. In conclusion, the claimant was not employed under a contract of employment with the respondent, nor was she employed under a contract personally to do work with the respondent. The Tribunal is satisfied that the claimant is not in employment under S.83(2) EqA, therefore the Tribunal has no jurisdiction to consider her complaints. Her claim is therefore dismissed.

5

Employment Judge: J McCluskey
Date of Judgment: 24 July 2023
Entered in register: 27 July 2023
and copied to parties

10