



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Stenstrom

Respondent: Reaseheath College

Heard at: Birmingham Tribunal (via CVP) **On:** 24 May 2024

Before: Employment Judge Knowles

Representation

Claimant: Mrs J Stenstrom (in-person)

Respondent: Mr Allen (Counsel)

RESERVED JUDGMENT

The judgment of the tribunal is that the claimant is not an employee of the respondent. The Tribunal therefore does not have jurisdiction to hear the claimant's complaint of constructive unfair dismissal. As such, the claimant's claim is dismissed.

REASONS

1. This is the judgment following a hearing to determine whether the Tribunal has jurisdiction to hear the claimant's sole complaint of constructive unfair dismissal. Specifically the three issues to be determined were:-
 - 1.1 Whether the claimant was an employee of the respondent as defined by the Employment Rights Act 1996.
 - 1.2 If she was, whether she had sufficient service at the date of which her employment terminated to bring a complaint of unfair dismissal.
 - 1.3 If she did, whether she failed to comply with the requirements of ACAS Early Conciliation, and if she did, whether that means that the Tribunal has no jurisdiction to hear her complaint.
2. In this case the claimant, Mrs Stenstrom, has brought claims alleging constructive unfair dismissal. The claims are all denied by the respondent who alleges that the claimant was not an employee but a worker. The

tribunal's jurisdiction to hear this claim turns on the claimant's employment status, whether she has sufficient continuity of employment and whether she has complied with the requirements of ACAS.

3. This has been a remote hearing by Cloud Video Platform (CVP). The documents that I was referred to are in a bundle of 153 pages, the contents of which I have noted.
4. I have heard from the claimant, who was representing herself today with the assistance of her husband, Mr Stenstrom. I have also heard from Louise Woodman on behalf of the respondent. Both parties gave closing submissions.
5. I have considered all of the evidence provided and the submissions made at the hearing, including the respondent's skeleton argument. The hearing allocation was taken up with the evidence and the parties' submissions. There was not time to deliberate and deliver judgment and accordingly, judgment was reserved.
6. There was some conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

Facts

7. The respondent is a college offering a range of further education, apprenticeships and higher education courses to almost 4,500 students on its site in Nantwich, Cheshire. The respondent employed staff on permanent contracts and casual contracts under what they termed a 'Talent Bank Agreement'. Those on casual contracts are to fill in around the permanent staff. The 'Talent Bank' is in essence an internal agency. It provides the respondent with a flexible pool of resources and accommodates personal circumstances providing variable working patterns. Up until 2023 the respondent used a model of core permanently employed Inclusive Learning Practitioners (ILPs) with a small number of Talent Bank casual staff who fitted around that core enabling the provision to flex to cover demand.
8. The history of the Learning Support team of ILPs was that prior to the academic year 2016/17 the respondent employed ILPs through agencies to fulfil the student support needs. In September 2016 the respondent bought out the agency staff contracts and created a pool of casual worker to deliver what was required. Since then the respondent has been assessing the student support needs and creating permanent ILP roles to create a core team with less casual staff. In 2019 they have a core of 26 permanent ILPs (17.4 full time equivalent (FTE)) and 19 casuals. In 2020 there were 35 permanent (27.1 FTE) and 13 casuals. Following a consolidation exercise in 2020 after COVID, in September 2021 this became 34 permanent ILPs (24.8 FTE) and 3 casuals. The respondent took steps to consolidate regularly worked overtime and use of casuals into permanent contracts. In 2022 there were 32 permanent ILPs (25.1 FTE) and 4 casuals. In 2023 there are 34 permanent ILPs (24 FTE) and 0 casuals.

9. The claimant commenced employment at Reaseheath College, the respondent, in September 2017 as a Learning Support Assistant and joined the 'Talent Bank' within the College LSC (Learning Support Centre). Latterly her role was that of an Individual Learning Practitioner (ILP).
10. At the commencement of employment the claimant agreed to be available for full time equivalent hours between September and June each year (the college is closed to students in July and August). The claimant understood and accepted that the Talent Bank was in essence "an internal agency" which provided the college with a "flexible pool of resources and also accommodates personal circumstances to be supported with variable respective working patterns".
11. The claimant lives in a caravan park and is required to be off site for 6 weeks each year. The claimant explained this at the initial interview and it was agreed that she would not be available for work for a six week period each year between 16 January and 1 March. This arrangement was accepted by the respondent. The claimant, within her response to the grounds of resistance, accepts that there were break periods, confirming that there was "nothing within the contract that prohibits any break in service. At all times [she] declared her availability and agreed any such break period with her line manager". Within her response to the respondent's contention that she turned down work to go on a cruise between 22 September 2022 and 5 October 2022, the claimant was clear that 'there was not obligation to accept any work'. Due to the uncertainty of the claimants' hours at that point, she decided to go on the holiday as booked.
12. The claimant had carried out some work for the respondent remotely while in Spain in January 2022 working 9 hours remotely from Spain.
13. Each year the claimant would enter a Learning Support Assistance - Bank Agreement or Talent Bank Agreement – Inclusive Learning Practitioner (Talent Bank Agreement) which described the claimant as a casual worker and set out the terms of that so-called 'casual worker relationship'. The last Talent Bank Agreement the claimant entered was issued on 1 September 2022 and signed by the claimant on 2 September 2022.
14. Clause 1.1 of the Talent Bank Agreement states:

"This Agreement governs your engagement from time to time by the College as a casual worker. Accordingly, your name has been added to a register of casual workers of the College. You will receive no payment whatsoever for placement and/or inclusion on the register. For the avoidance of doubt, this is not a contract of employment. Your placement and/or inclusion on the register confers no employment rights on you whatsoever (other than those which workers are entitled). Any worker you undertake for the College will be upon the terms and conditions contained in this Agreement."
15. Clause 1.2 of the Talent Bank Agreement states:

"There is no obligation on the College to request that you undertake any duties and there is no obligation on you to accept any such request. You confirm your understanding that the College makes no promise or

guarantee of a minimum level of work to you. It is the intention of both you and the College that there be no mutuality of obligation between the parties at any time when you are not performing an assignment.”

16. Clause 2.1 states: “*You will work on a flexible, “as required” basis*”.
17. Clause 2.2 provides “*There is no guarantee that you will receive any such offers of work*”.
18. Clause 3.1 sets out “*Each offer of work by the College which you accept shall be treated as an entirely separate and severable assignment. The terms of this agreement shall apply to each assignment but there shall be no relationship between the parties after the end of one assignment and before the start of any subsequent assignment*”.
19. Clause 3.2 sets out “*The fact that the College offers you work should not be regarded as establishing an entitlement to regular work or conferring continuity of employment*”.
20. Clause 4.1 provides “*When the College wishes to offer you any work it will be communicated to you via telephone or email contact with details of the dates, nature of the work and hours. Once accepted and agreed this will be binding on both the College and you for the duration of the assignment*”.
21. Up until 2022, the claimant would work full-time during term-time (September to June) on a Monday to Friday working from around 8:30am/9am until 4:30pm each day. In around June each year the claimant would be asked by her manager if she was available for the coming academic year. This was usually via a Teams message with the claimant always giving full availability for term time save and except for the six-week period between 16 January and 1 March.
22. There was a lack of evidence within the bundle in relation to the request for availability. The claimant did make reference to a Teams message with her Line Manager, Debra Brennan, sent on 17 June 2021 which said “Hi Jules. It looks like the teaching is coming to a close this academic year and grades have to be submitted for all learners tomorrow. I won’t have any on the last week of term (next week) but I wanted to take this opportunity to thank you for the amazing support you have provided to the learners. Please let me know if you have any availability next academic year and enjoy the summer break”.
23. The claimant was subject to the respondent’s HR policies and procedures, including but not limited to data protection, health and safety, code of conduct, grievance/disciplinary and safeguarding and child protection. The claimant was on the respondent’s payroll system, was paid via PAYE and she had a single employee number for the entirety of her employment, she was entitled to holiday and holiday pay, plus other statutory leave. She had an email address throughout and access to all the relevant IT systems and resources of the respondent. The claimant was also included in the annual staff performance management process. These rights and privileges are all indicative of worker status, a point accepted by the respondent who’s position is that the claimant was a worker, but not an employee.

24. When working for the Respondent, it is not disputed that the claimant was required to provide personal service and there was no right of substitution.
25. The claimant was excluded from certain staff benefits such as the College Sodexo Reward scheme, any retention payments, workplace perks or voucher schemes.
26. The claimant confirmed in evidence that she had applied for a permanent ILP contract with the respondent prior to COVID but she was not given the position due to her need to have the break between 16 January and 1 March each year. The claimant continued working for the respondent under Talent Bank Agreements.
27. The claimant worked for the following number of hours, up until 2022 the reduction in hours in some months coincided with College holidays at Easter and term ends:

Having commenced in September 2017: 84.75 hours worked in November and 35.00 hours in December.

In 2018: 39.00 in April, 58.00 in May, 77.50 in June, 107.00 in September, 78.00 in October, 88.50 in November, 63.00 hours in December.

In 2019: 25.00 in January, 78.00 in March, 36.00 in April, 66.00 in May, 56.00 in June, 135.50 in September, 96.50 in October, 64.50 in November, 90.50 hours in December.

In 2020: 59.50 in March, 22.00 in April, 136 in September, 104.00 in October, 136.50 in November, 65.00 hours in December.

The claimant was placed on paid furlough from 8 May 2020 until the end of June 2020.

In 2021: 130.00 in January, 104.00 in February, 49.50 in March, 71.50 in April, 103.50 in May, 39 in June, 143 in September, 78.50 in October, 114.50 in November, 72 hours in December.

In 2022: 9 in January (having only worked 2 days), 29.50 in March, 11 in April (having worked for 3 days during April), 66 paid in June (in respect of hours worked during both May and June), 16.25 in September, 5 hours in October.

The claimant's last day of work was 7 October 2022. She formally resigned on 24 October 2022.

The claimant did not undertake any work in the following months:

2018: February (due to the claimant's availability), July-August (respondent was closed for the college summer holidays)

2019: February (due to the claimant's unavailability), July-August (respondent was closed for summer holidays)

2020: January – February (due to the claimant's unavailability), July 2020 (respondent's closure)

2021: July (respondent's closure)

2022 February (claimant's unavailability), July-August (respondent's closure).

28. There was also a break of over 2 weeks in September 2022 (from the week commencing 5 September 2022 and week commencing 12 September 2022 where no work was undertaken). The claimant worked 6.5 hours on Friday 2 September and then did not work until Tuesday 20 September 2022 (6.5 hours). The claimant was on holiday from 22 September 2022 until 5 October 2022.
29. The claimant was primarily supporting one provision, Crewe Alex apprenticeships. In December 2021 the claimant asked to be able to continue working remotely from Spain in January to March 2022 to support Crewe Alex. The claimant was passionate about the work she did and was considered hard working, experienced and very capable at her role. Crewe Alex, valuing the claimant's support, wanted to continue to have the claimant supporting their students remotely while she was in Spain.
30. In January 2022 the claimant made a request to work remotely for Crewe Alex from Spain, an arrangement Crewe Alex were keen to go ahead as the claimant was a valued support for their apprentices. Due to issues with the claimant working under the Spanish jurisdiction this request was refused by the respondent. The claimant then requested to work directly for Crewe Alex. The respondent considered this a conflict of interest as they had a direct contract with Crewe Alex to provide the support; if the claimant was doing this directly the respondent would not be meeting their contractual requirement of this support provision. The claimant was told that if she wanted to work directly with Crewe Alex she would need to end her current Talent Bank Agreement with the respondent. The claimant was deeply upset to not be able to support the students at Crewe Alex who she felt were being unjustifiably left with no support; while she was offering to support them and even to support them on a volunteer basis. The claimant referred to this refusal to agree to her working for Crewe Alex remotely and the then instruction that she would need to end her current Talent Bank Agreement, as an exclusivity arrangement within the Agreement. However, there is no such exclusivity clause set out within the Agreement. The claimant did not wish to end her employment with the respondent, a job which she had considered as her "forever job" and therefore she did not go any further with her request to support them remotely and continued under the Talent Bank Agreement.
31. However, from March 2022 onwards the number of hours the claimant was offered, and in turn the hours she worked, dramatically decreased compared to the hours she had worked in previous years. She had previously carried out invigilator duties but was not offered any in 2022. The decision had been taken to use permanent staff to invigilate at no additional costs, rather than employing Talent Bank staff at an additional cost. Vacancies were being advertised for full-time permanent ILPs while the claimant was available but not being offered work. The claimant did not apply for these roles. At this time, the respondent was returning to in-class delivery while still managing the effects of Covid and the impact of staffing upheaval. The decision was

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taken to use permanent staff fully, where possible, rather than Talent Bank staff. This change in approach to staffing was not specifically communicated to the claimant at the time leading, perhaps understandably, the claimant to feel unfairly treated and side-lined. The claimant did accept that she knew there was no guarantee of work but in her view there was always a mutual expectation, and things changed from March 2022.

32. The claimant found herself at the beginning of 2022/2023 academic year with no hours offered for work. As a result, with no work arranged or offered, she rearranged a holiday which had been postponed during Covid for a cruise between 22 September 2022 and 5 October 2022, something which she was entitled to do. A meeting took place between the claimant and the new Head of Inclusive Learning, Joanne Kavanagh, on 16 September 2022 to discuss the hours which could be offered to the claimant. During that meeting, the claimant was offered 4 days of learner support and a further 5 days to follow. The learning support hours offered to the claimant were all Math's and English. The claimant is dyscalculia and felt this allocation to her was done deliberately knowing that this would be an issue for her.
33. In that meeting the claimant confirmed she was on holiday from 22 September 2022 until 5 October 2022 and could not work until after her return.
34. The claimant raised grievances in her meeting on 16 September 2022 and then a revised grievance on or around 29 October 2022 in relation to the decision not to grant the request to work remotely for Crewe Alex, the alleged deliberate withholding of hours, her exclusion from a staff development day (albeit this was overridden, and she did attend), and allegations of bullying by her manager, Debra Brennan. I make no detailed findings of facts in relation to the grievance findings as this is outside of the issues to be decided at this preliminary hearing. Other than, following a grievance process the grievances were not upheld and neither was the claimant's appeal.
35. Having confirmed her intention to not return to work within a meeting to discuss her grievance on 10 October 2022, and also that she had secured another job with Winsford Academy, the claimant formally resigned on 24 October 2022. According to her ET1 Form, the claimant had commenced the new employment on 15 October 2022.
36. The claimant contacted ACAS commencing the Early Conciliation process on 22 September 2022. The ACAS Early Conciliation certificate was issued on 27 September 2022.

Law

37. Employees and workers are defined in section 230 of the Employment Rights Act 1996 ("the Act"). An employee is an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. A contract of employment is defined as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
38. Under section 230(3) of the Act a 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. (A worker who satisfies this test in subparagraph (b) is sometimes referred to as a "limb (b) worker").

39. Under section 94(1) of the Act the right not to be unfairly dismissed is limited to employees.
40. I have considered the following cases, some of which I have been referred: *Autoclenz Ltd v Belcher and Others* [2010] IRLR 70 CA and [2011] UKSC 41; *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497; *Pimlico Plumbers Ltd & anor v Smith* [2017] EWCA Civ 51; *Aslam Farrar & Others v Uber BV and Others* 2202550/2015; *Addison Lee Ltd v Lange and Others* UKEAT/0037/18/BA; *Nethermere (St Neots) Limited v Gardiner* [1984] ICR 612; *Express and Echo Publications Ltd v Tanton* [1999] IRLR 367; *Carmichael and Anor v. National Power plc* [1999] ICR 1226; *Uber BV v. Aslam* [2021] UKSC5; *Ford v Warwickshire County Council* (1983) 2 AC 71; *St Ives Plymouth Ltd v Haggerty* EAT 0107/08, *Kickabout Productions Ltd v Revenue and Customs Commissioners* [2022] EWCA Civ 502, *Byrne Brothers (Forwork) Ltd v Baird* [2002] IRLR 96, *Bamford v Persimmon Homes NW Ltd* [2004] All ER (D) 14 (Aug), *Ter-Berg v Simply Smile Manor House Ltd* [2023] EAT 2, *Clark v Oxfordshire Health Authority* [1998] IRLR 125, *Hafal Ltd v Lane-Angell* UKEAT/0107/17, and *Cornwall County Council v Prater* [2005] All ER (D) (Jun).
41. As confirmed in paragraphs 18 and 19 of Lord Clarke's judgment in *Autoclenz* in the Supreme Court:

"18: As Smith LJ explained in the Court of Appeal at paragraph 11, the classic description of a contract of employment (or a contract of service as it used to be called) is found in the judgement of McKenna J in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515C : "a contract of service exists if these three conditions are fulfilled: (i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service ... Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be".

19: Three further propositions are not I think contentious: i) As Stephenson LJ put it in Nethermere St Neots Ltd v Gardiner [1984] ICR 612, 623 "There must ... be an irreducible minimum of obligation on each side to create a contract of service". ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: Express and Echo Publications Ltd v Tanton ("Tanton") [1999] ICR 693 per Peter Gibson LJ at p699G. iii) If a contractual right, as for example

a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg Tanton at page 697G.”

42. Per Lord Leggatt in *Uber BV v. Aslam* [2021] UKSC 5 (at para 69), status must be assessed, “*irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation.*”
43. *Nethermere (St Neots) Ltd v Gardiner and anor* 1984 ICR 612 CA found that where the course of dealings between the parties has given rise to mutual expectations that work will continue to be provided, this can amount to sufficient mutuality of obligation to found the basis of a global contract. In *Nethermere*, the Court of Appeal upheld a tribunal’s decision to the effect that the long-standing relationship between homeworker and the company for which they worked had developed into a global contract obliging the company to provide and pay for work, and the worker to accept the work provided.
44. Similarly, in *St Ives Plymouth Ltd v Haggerty* EAT 0107/08 the EAT upheld an employment tribunal’s decision that a course of dealing had given rise to the expectation that H would be available for a reasonable amount of work and she expected to be offered a reasonable amount of work by SIP Ltd. This expectation was sufficient to create an umbrella contract between the parties, even though there was no obligation on the employer to offer a minimum amount of work and the individual was free to refuse to accept a particular offer of work if made.
45. In *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, the EAT held it was inconsistent for a tribunal to find that there was insufficient mutuality for employment (for unfair dismissal) but that the individual could still be a worker (for a holiday pay claim). Langstaff LJ pointed out that (a) mutuality is not an all-or-nothing concept, so that the question is whether there is an irreducible minimum (as termed by Stephen LJ in *Nethermere*) of obligations rather than a total commitment. The view was discussed that mutual obligations are necessary for there to be a contract at all. If there is a contract, it is necessary to determine what type of contract it is. Regard must be had to the nature of the obligations mutually entered into to determine whether a contract formed by the exchange of those obligations is one of employment, or should be categorised differently. It does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it.
46. Stevenson LJ in *Nethermere* put it as “...an irreducible minimum obligation..” in the context of a case in which home workers were held to be employees. Mr Justice Langstaff in *Cotswold Developments Construction* considered this further, Mrs Taverna had refused work when she could not cope any more. She worked in her own time. Langstaff LJ considered that it was plain that the existence and exercise of a right to refuse work on her part was not critical, providing that there was at least an obligation to do some. The tribunal in the *Nethermere* case had accepted evidence that

home workers such as Mrs Taverna could take time off as they liked. Although Kerr LJ dissented in the result, he too expressed the 'inescapable requirement' as being that the purported employees'...must be subject to an obligation to accept and perform some minimum, or at least reasonable, amount of work for the alleged employer.' The question is whether or not there was some minimum amount of work which the facts demonstrate that the claimant has obliged themselves to do. Put another way, the consideration is not to determine whether the claimant could, if they wish, refuse some work, but is rather to decide whether they were obliged to accept some work (even if they might reject the rest).

47. Considering control, a useful case is that of *White v Troutbeck SA* [2013] IRLR 949, in which Judge Richardson said '...the question is not by whom day-to-day control was exercised but with whom and to what extent the ultimate right of control resided'.
48. The status of the worker is to be decided by an objective assessment of all the factors, and the label attached by the parties is one of those factors. It is well established that the parties cannot change the nature of the contract by attaching the 'wrong label'. In the case of *Ter-Berg v Simply Smile Manor House Ltd* [2023] EAT 2, the judgment contains a useful summary of the correct approach to take to the question of attempts in contracts to label a relationship: "*In relation to clauses to the effect that a written agreement is not intended to create a relationship of employment or a worker relationship: (a) As held by the Supreme Court in Uber, such a clause will be void and ineffective if, upon objective consideration of the facts, the tribunal finds that it has as its object the excluding or limiting of the operation of the legislation in question (pursuant to section 203 (1) Employment Rights Act 1996 or the equivalent provisions of other legislation); (b) In any event, if, apart from such a clause, the other facts found by the tribunal point to the conclusion, applying the law to those facts, that the relationship is one of employment or a worker relationship, such a clause cannot affect that legal conclusion; but (c) If neither (a) nor (b) applies, then, in a marginal case, in which the tribunal finds the clause to be a reflection of the genuine intentions of the parties, it may be taken into account as part of the overall factual matrix when determining the correct legal characterisation of the relationship.*"
49. The case of *Carmichael v National Power plc* [1999] ICR 1226, [2000] IRLR 43, considered casual workers, with the House of Lords rejecting the CA's approach of implying into an agreement with two casual workers who were employed to show parties around a power station 'on a casual, as required basis' an implied term to the effect that the employer would provide a reasonable share of the work available to the guide in return for which the guide would perform a reasonable amount of the work offered and, in doing so, their finding that this created the relationship of employer and employee. *Carmichael* is stated in *Harvey* as an important evolutionary case on casual work and establishes that somewhere a line has to be drawn in the sand to show that a work relationship is *too* 'casual' to qualify as 'employment'. It can be seen alongside the contemporaneous decision of the Court of Appeal in *Clark v Oxfordshire Health Authority* [1998] IRLR 125, CA that a bank nurse was not an employee, even though she had been engaged by only one Authority over a period of three years (with only 14 weeks off); the lack of mutuality (no obligation on the employer to offer work and none on the individual to take it) was held to be fatal, as it was a year

later in *Carmichael*. Similarly, in *Hafal Ltd v Lane-Angell UKEAT/0107/17* it was held that a person working under a bank system was not an employee, particular emphasis being placed on an unambiguous contractual provision that there were no mutual obligations to provide or undertake work (and no other features of the arrangement to cast doubt on the bona fides of that provision).

50. The Supreme Court in *Uber BV v Aslam* [2021] UKSC 5, [2021] IRLR 407, considered *Carmichael* and *Autoclenz* in the judgment at [85]: “*In the Carmichael case there was no formal written agreement. The Autoclenz case shows that, in determining whether an individual is an employee or other worker for the purpose of the legislation, the approach endorsed in the Carmichael case is appropriate even where there is a formal written agreement (and even if the agreement contains a clause stating that the document is intended to record the entire agreement of the parties). This does not mean that the terms of any written agreement should be ignored. The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other. But there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it. Furthermore, as discussed, any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded.*”

Conclusions

51. Applying the law to the facts in this case, it is my judgment that the claimant was a worker and not an employee. The claimant did work a significant number of hours during 2017 to 2022. However, she was required to indicate her availability and would then be offered work. It was not proven on the evidence that the claimant was obliged to accept any work, or a minimum amount of work, while on the Talent Bank. When the claimant was offered work, she was free to undertake it or not. The claimant was entitled to, and did, turn down work in September 2022. Further, the claimant was not available for work from 16 January until 1 March each year. There was a lack of mutuality of obligation. The contractual provisions are clear and consistent with the actual working arrangements and reflect the true intention and understanding of the parties. The respondent had permanent employment contracts available which the claimant could have applied for, but she wanted to have the flexibility to be able to take time off and not be available for work for 6 weeks each year in addition to the respondent's standard holiday periods when she did not work. The claimant had the opportunity to apply to become a permanent employee but chose not to as she valued the flexibility of working under the Talent Bank Agreement, as a worker rather than as an employee.
52. As the claimant was not an employee, I have therefore not gone on to consider the second issue of whether she had sufficient service to bring a constructive unfair dismissal case.

53. In terms of the third issue in relation to whether the claimant had complied with the ACAS requirements. Whilst the point is academic given my decision on status, given the upset of the claimant on this matter, I did give my decision and reasoning on this point at the end of the hearing. I confirm, that applying the case of *Compass Group UK & Ireland Ltd v Morgan* UKEAT 0060/16, the legislation did not limit the scope of the claimant's EC certificate to events and allegations pre-dating 22 September 2022. This was a deteriorating situation and the claimant's resignation was an additional factual matter related to earlier events.
54. The Tribunal finds the claimant was not an employee of the respondent (but a worker). As such, the claimant's claim is dismissed.

Employment Judge **Knowles**

Date 11 October 2024

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>