



EMPLOYMENT TRIBUNALS

Claimant: Mr K Bonsu

Respondent: Stockport Metropolitan Borough Council

Heard at: Manchester

On: 9 December 2019

Before: Employment Judge Leach

REPRESENTATION:

Claimant: Mr I Sram (Counsel)

Respondent: Miss R Wedderspoon (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was not an employee of the respondent for the purposes of section 230(1) of the Employment Rights Act 1996 ("ERA").
2. The claimant's application to amend his claim to include a claim of indirect race discrimination is refused.
3. The respondent's application that the Tribunal strike out the claimant's claims (or any of them) pursuant to rule 37 of the Employment Tribunals Rules of Procedure 2013 ("ET Rules") is refused.
4. The respondent's application for a deposit order pursuant to section 39 of the ET Rules is refused.

REASONS

Introduction

1. This preliminary hearing was listed to deal with the following issues:
 - (1) To determine whether the claimant was an employee of the respondent'

- (2) To consider the claimant's application to amend his claim so as to bring a claim of indirect discrimination (protected characteristic of race) under section 19 of the Equality Act 2010 ("EqA");
- (3) To consider the respondent's application for the claimant's claim to be struck out under rule 37(1)(a) of the ET Rules on the grounds that:
 - (a) the claims are scandalous or vexatious or have no reasonable prospect of success;
- (4) to consider the respondent's application (in the alternative to 3 above) for a deposit order under rule 39 of the ET Rules on the grounds that the claim has little reasonable prospect of success.

2. The claimant was engaged by the respondent as a casual support worker attending on vulnerable adults for whom the respondent was responsible. There is no dispute that the claimant, when so engaged by the respondent, was a worker under section 230(3) of the ERA although it is disputed that the claimant was an employee under section 230(1) ERA. There is no dispute that the claimant was protected against unlawful discrimination under Part V of the Equality Act 2010 ("EqA").

3. The claimant claims that he was employed by the respondent, that he was unfairly dismissed from that employment and that he was subject to unlawful race discrimination. The respondent's position is that the claimant's claim of unfair dismissal should be dismissed at this preliminary stage of proceedings as the claimant was not an employee of the respondent under s230(1) ERA.

4. As for the claims of race discrimination, the respondent's position is that these claims have either no or (in the alternative) little reasonable prospects of success and therefore the claims should either be struck out or be subject to a deposit order under the ET Rules (rule 37 and rule 39).

5. Witness evidence was provided on the issue of employment status. I heard evidence from the claimant. I also heard evidence from 2 witnesses for the respondent, being Emma Crewdson (Support Worker Bureau Manager) and Andrea Steward (Senior Service Manager within respondent HR team). Both respondent witnesses provided evidence about the respondent's engagement of casual support workers and why the respondent says that the claimant, who was engaged as a casual support worker, was not its employee for the purposes of section 230(1) of the ERA.

6. These Reasons deal with the issues considered at the preliminary as follows:

- A.** Was the claimant an employee of the respondent?
- B.** The claimant's application to amend his claim;
- C.** The respondent's applications for strike out/deposit orders.

7. Reference to page numbers below is a reference to the bundle of documents used at the preliminary hearing.

A. Was the claimant an employee of the respondent?

8. As noted above, there is no dispute that the claimant was a worker of the respondent. As such there is no dispute that the relationship between the parties satisfied the three requirements of section 230(3)(b) ERA, being:

- (1) That there was a contract between claimant and respondent,
- (2) Whereby the claimant undertook to perform personally work for the respondent, and
- (3) The respondent was not by virtue of the contract, a client or customer of an undertaking carried on by the claimant.

Findings of Fact**Terms of Engagement**

9. The claimant was engaged by the respondent as a casual support worker in September 2005 and the claimant continued to work for the respondent until his contract was terminated in February 2019.

10. The claimant and respondent agreed to written terms on three occasions:

- (1) On commencement of engagement. There is a letter dated 26/9/2005 (Letter 1);
- (2) On 27 November 2008 (Letter 2);
- (3) On 15 August 2014 (Letter 3).

11. Letter 1 included the following provisions:

"I am writing to confirm that you are offered a position as a casual support worker on the Stockport LD Partnership Accommodation Service Bank with effect from 19 September 2005. As a casual employee you will work on an ad hoc, irregular basis, as requested to meet the needs of the service and to cover for absences of permanent staff and temporary increases in workload. There are no set minimum hours and it should be clearly understood that there is no guarantee that work can be provided or continue."

"Your rate of pay will be based on Spinal Column Point 21, the minimum point on the salary scale for support workers. This equates to an hourly rate of £9.05 plus an enhancement for annual leave entitlement in line with the Working Time Regulations. The holiday pay you receive will therefore be proportionate to the number of hours worked on the Bank.

You will not normally be entitled to occupational sick pay.

Incremental progression on 1 April each year to the maximum of the scale i.e. SCP 26, will be dependent upon management support and where it can be demonstrated that you have worked regularly as a support worker on the Bank during the previous 12 months.”

“You are eligible to join the local Government Pension Scheme for hours worked on the Bank and should have received a form PF2 with your Bank application form to indicate if you wish to pay superannuation contributions on the hours worked.”

“If you do not have a permanent support worker contract within the Learning Disability Partnership and your only employment with the partnership is on the Bank, you will normally be required to work a minimum of six shifts over a three month period to ensure you are working safely and that your training and practice are kept up-to-date. Failure to comply with this requirement may lead to your details being removed from the Bank. You will therefore be required to undertake such training as is considered necessary by the Stockport Learning Disability Partnership.”

12. Letter 2 – relevant extracts:

“As a casual worker you will work on an ad hoc, irregular basis as requested to meet the needs of the service. There are no set minimum hours and it should be clearly understood that there is no guarantee that work can be provided or continue. Likewise, there is no onus on yourself to accept any work that is offered.”

“As a casual worker you can be based at any location and you will be responsible for your own travel arrangements to and from that place of work.”

“Your rate of pay will be £10.78 per hour. This includes a pro rata payment of annual leave entitlement which is £0.995 (based on the leave entitlement as set out in the Working Time Directive. Currently this stands at 24 days per annum, rising to 28 days per annum with effect from 1 April 2009).”

“As a casual worker you will be required to ensure that your standards and conduct do not fall below expected standards of behaviour set out in the Council’s Code of Conduct, given at induction.”

“Acknowledgement [for signature by the claimant]

I acknowledge receipt of a copy of the letter relating to the casual support worker bureau. I understand that as a casual worker I am not an employee of Stockport Council and that no contractual entitlements will arise out of this arrangement other than the agreed hourly rate of pay, statutory holiday pay.”

13. Letter 3 – relevant extracts:

“I can confirm that you are registered on the Council’s pool of casual support workers. As a casual worker you will work on an ad hoc, irregular basis as requested to meet the needs to the service and to cover for absences of permanent staff and temporary increases in workload. There are no set

minimum hours and it should be clearly understood that there is no guarantee that work can be provided or continue. Likewise there is no onus on you to accept any work that is offered.”

“As a casual worker you can be based at any location within the Stockport Council boundary. You will be responsible for your own travel arrangements to and from work.

Your rate of pay will be £10.01 per hour.

However you will actually be paid £11.22 per hour because your pay is enhanced to include payment for your statutory holiday entitlement (based on the leave entitlement set out in the Working Time Directive. This is called a ‘rolled up holiday’ rate. The Council reserves the right to change this pay arrangement at any time in the future so that your holiday rate of pay may change to the amount in the previous paragraph, with a separate payment for holiday taken.”

“It is your responsibility to ensure that you take your leave entitlement and that you notify the bureau when you wish to take leave. You must take at least 28 days’ holiday per year. You will not be entitled to occupational sick pay.”

“Casual workers are eligible to join the local Government Pension Scheme.”

“If you are prevented at any time from reporting for pre-arranged duty because of illness or incapacity you should inform the support worker bureau admin team or duty desk at the earliest opportunity prior to your arranged starting time, in accordance with the arrangements outlined to you.”

“As a casual worker you will be required to ensure that your standards and conduct do not fall below expected standards of behaviour set out in the Council’s Code of Conduct and relevant bureaux. Please note that the use of mobile phones during working hours should be restricted to emergencies only.”

“Acknowledgement [for signature by the claimant]

14. *I acknowledge receipt of a copy of the letter relating to the casual support worker. I understand that as a casual worker I am not an employee of Stockport Council and that no contractual entitlements will arise out of this arrangement other than the agreed hourly rate of pay and statutory holiday pay.”*

15. Letter 3 also ends:

“I would appreciate it if you could confirm that you are willing to accept this offer of casual work on the terms stated, by signing and returning the duplicate copy of this letter. Please return the signed copy within ten working days. A scanned email copy would be acceptable.”

16. Letter 3 is unsigned in the bundle. However, in evidence the claimant accepted that he had received, signed and returned a copy of Letter 3.

17. I find that as at the date of termination the written terms applicable to the claimant were those in Letter 3. These terms replaced terms of Letter 2 which in turn replace the terms of Letter 1. Whilst it is not expressly stated in letters 2 and 3, it was clear that on each occasion the terms replaced the previous terms.

18. Whilst I find that the terms of Letters 2 (and then 3) replaced the terms of Letter One, it is relevant that I make the following points in relation to Letter One as the terms were referred to on a number of occasions in evidence, particularly the claimant's evidence:-

- a. The term "employee" was used in Letter One (although not in Letters 2 and 3). It was used in the same paragraph as a provision noting that there is no guarantee of any work. I find that the use of this term was a drafting error at the time. The respondent was clearer in its terms in Letters 2 and 3
- b. There was reference to incremental progressions along a spinal column point ("SCP") pay system applicable in local government. The evidence from the claimant and the respondent's witnesses was that cost of living increases in hourly rates applied but there were no incremental increases on the local government salary spine. Again, I find reference to the SCP was a drafting error at the time. The reference did not appear in Letters 2 or 3.
- c. There was reference to the worker being eligible to join the Local Government Pension Scheme ("LGPS"). I refer to the issue of pension below.

The Respondent's Support Worker Bureau ("Bureau")

19. Evidence to explain the purpose and activities of the Bureau was provided by Emma Crewdson.

20. Effectively, the Bureau was set up by the respondent as an in-house agency. The respondent hoped to attract sufficient individuals who wished to engage in casual work, and so avoid the additional costs of sourcing casual work through an external agency. The Bureau worked specifically to assign support workers to vulnerable adults throughout the respondent Borough. Ms Crewdson provided evidence that in recent years, the respondent council has relied significantly on casual workers. This is because of frequent and significant gaps in service provided by its permanent/directly employed workforce. Ms Crewdson provided the following evidence:

"The Learning and Disability Service has the most problems with staff resourcing and the highest sickness absence levels in any department of the respondent. I acknowledge that it is a difficult, physically and sometimes mentally demanding job for reasonably low pay for those who work with the

service. However the respondent has a legal and [moral] obligation to its vulnerable members of the community. This means that it must be consistently dynamic in order to ensure that the respondent fulfils its legal obligations to those in the community who need round the clock care and support which the vast majority of those service users needing support from both the employed staff and the Bureau Support Team do.”

21. Where the respondent had legal obligations to provide services to a vulnerable adult, the respondent had to fill gaps left by staff vacancies or sickness or other absences. Otherwise it would have failed to meet its legal obligations.

22. The respondent had a process of covering gaps left by vacancies or absences:-

- a. It would try to cover the gaps by allocating its directly employed (permanent) care employees, in their normal working time, to work those hours.
- b. If this was not possible it would offer overtime to its employees. The respondent did/does not operate compulsory overtime but overtime was an option that it offered.
- c. If gaps remained then it would utilise the Bureau and see whether the hours could be covered using casual workers.
- d. If all else failed then it would contact an external agency (Reed) to source and supply workers to cover the vacant hours/shifts.

23. The claimant understood that the respondent employed contracted support workers and that they were different to the casual support workers. The claimant had applied for employment as a contracted support worker on a number of occasions although stopped applying after a number of unsuccessful applications.

24. I find that the resourcing difficulties encountered by the respondent in relation to its permanent employees (through employment vacancies, sickness or other absences) meant that there were significant opportunities for workers on the Support Worker Bureau to be provided with work and where the respondent was unable to cover shifts via the Bureau then it would contact an external agency. The claimant was aware that the respondent employed contracted support workers and that they were on different terms to the casual support workers.

The regularity of the claimant's work

25. A record of work carried out by the claimant was provided at pages 142-245. These records covered the period from 2 January 2017 up to the termination of the claimant's engagement in February 2019. The claimant's evidence is that he was working on average over 40 hours per week. The respondent did not dispute this. It is clear from the records that the claimant was engaged throughout this period on a large number of shifts/assignments. The claimant did not give evidence that his work followed a regular pattern, whether in terms of the hours of the day that he

worked or the days of the week that he worked. It is apparent from the information provided that sometimes the shifts were during the day, sometimes during the evening and sometimes required an overnight sleep. Even within each of these broad descriptions, the hours and location varied from day to day and week to week. However, in the period for which records were provided the claimant was provided with a constant supply of work. I find that he was working on average over 40 hours per week in this period.

Refusal of work

26. In its response the respondent states that between 20 December 2016 and 21 February 2019 the claimant on 506 occasions, either declined the offer of a work vacancy or voluntarily cancelled a work vacancy which had already been assigned to him.

27. The respondent sought to demonstrate this by the provision of a report headed "Declined Vacancies for Kwame Bonsu" (pages 106-141). The claimant did not accept that he had turned down assignments on over 500 occasions.

28. It was apparent that the majority of these occasions were not ones where the claimant chose not to work at all but ones where he exercised a choice of one assignment over another. Some examples were considered in the course of evidence. The examples used were those first ones recorded in the report, which were at the beginning of 2017:

- a. 6 January 2017 – the claimant had been down to undertake an assignment at Park Road. The claimant cancelled this assignment the day before (5 January 2017).
- b. 10 January 2017 – the claimant undertook a morning assignment at Highfield Road and declined an assignment in the afternoon/evening at Bramhall Lane.
- c. 18 January 2017 – the claimant worked on an overnight assignment from 3.00pm on 18 January 2017 to 10.00am on 19 January 2017 at Highfield Road. The claimant had been signed up for a morning assignment at Park Road but cancelled this at 3.00pm on 17 January 2017 in order to undertake his preferred assignment at Highfield Road.

29. Although each and every entry was not considered (that would have been disproportionate), I find that this was the way that the so-called refusals operated. The majority of the 506 or so entries applied where the claimant declined work rather than cancelling work that he had already agreed to do. It is also clear (from a comparison of the record at 142 to 245 with the record at 106-141) that work declined was usually where the claimant had preferred one shift over another on a particular day. There are also a number of examples (in addition to those referred to above) where the claimant cancelled work which he had previously agreed to do.

30. According to the records, during the period from 01/01/17 to the claimant's dismissal in February 2019 on 24 occasions he had accepted work and then

cancelled this work. As noted above, on some of these occasions the claimant did so, not to avoid an assignment altogether, but to exercise his choice and to opt for a preferred assignment that he had been informed about following the acceptance of the assignment that he then cancelled.

31. The evidence of Emma Crewdson was that shifts were sometimes cancelled by casual workers; that there was an expectation that adequate notice of a cancellation should be given and that “appropriate action” would be taken where there was a persistent pattern of cancellations. I accept this evidence. The records provided show that the claimant was able to cancel shifts already accepted. The respondent’s evidence was that it was acceptable for casual workers to do this but that the respondent would take appropriate action if there was a persistent pattern of cancellations. No evidence was provided on what the appropriate action would be in this particular circumstance but having considered all evidence provided I find that appropriate action may be:- (1) an investigation in to whether cancellations occurred in relation to a particular service user – there may be safeguarding issues (2) a decision not to continue to provide opportunities to that casual worker.

Obligation to accept work.

32. The claimant’s evidence in his witness statement (at paragraph 9) was that he was required to accept work. In responding to questions from Miss Wedderspoon he said that he was “forced to accept shifts.”

33. Other than by reference to a term in Letter One (I comment on this term below), the claimant provided no examples of when he was required or forced to accept shifts.

34. Andrea Steward and Emma Crewdson provided evidence that there was no obligation on a casual worker to accept any shift offered. They referred to the terms of Letter 3 which stated that there was no onus on the worker to accept any shifts and provided evidence that this was in reality how the contracts with casual workers operated.

35. An issue was raised in relation to the following term of Letter One:-

“ you will normally be required to work a minimum of six shifts over a three month period to ensure you are working safely and that your training and practice are kept up-to-date. Failure to comply with this requirement may lead to your details being removed from the Bank. You will therefore be required to undertake such training as is considered necessary by the Stockport Learning Disability Partnership”

36. The claimant referred to this term. In his statement he accepted that this requirement was only relevant to ensuring that he was able to work safely. In responses to questions from Miss Wedderspoon on this point, the claimant said that he understood that he needed to do at least 6 shifts over a 3 month period or he would be removed. I understood his evidence to be that it was because of this clause that he was required or forced to undertake work. As noted above, he did not

provide any other evidence in support of his assertion that he was required to undertake work.

37. The evidence of Emma Crewdson was that the respondent expected casual workers to undertake training for regulatory (CQC) purposes. Her evidence was that the workers *“will be trained in safeguarding matters and expected to follow safeguarding policies and procedures. In the Learning Disability Service it is crucial that the service user’s care plan is followed and is kept up to date and this will form part of the training.”*

38. Ms Crewdson answered questions from Mr Sram on this issue. She explained that care support workers (whether employed or casual workers) had to stay up to date with training required by the CQC. Some training updates are required annually, some twice yearly and some 3 times a year. Some of the training was provided whilst workers undertook shifts.

39. I find as follows:-

- a. the reason why a minimum number of shifts were indicated in the 2005 agreement (Letter One) was to ensure that the worker was up to date with training for regulatory (CQC) purposes.
- b. Letter 2 and Letter 3 did not have an indication of numbers of shifts to be worked to ensure that the worker remained sufficiently trained. However the requirement to ensure sufficient training remained.
- c. Some of the training was “on the job” by the workers demonstrating that they understood and followed service user care plans.
- d. There was not an obligation to work a minimum of six shifts over a 3 month period. This term did not appear in letters 2 or Letter 3.
- e. Should a worker who was signed up with the Bureau, not have carried out any shifts at all for a period of time then Emma Crewdson or one of her colleagues may well have raised this with the worker, due to minimum training requirements. It may have meant that the respondent chose not to continue to offer shifts to the worker at least until training shortfalls had been addressed.
- f. This issue did not arise with the claimant during the years that he was engaged with the respondent as he had been willing to accept a significant number of shifts offered to him.

The extent of the respondent’s control over the claimant.

40. The claimant’s evidence is that when he worked on a shift,

- a. all specific tasks were required to be carried out in line with the respondent's detailed procedures
 - b. he had to adhere to the care plan of every service user
 - c. he was unable to leave a service user when working on that shift, until such time as a relief worker attended
41. It is also clear from the evidence provided that, when he worked on a shift:-
- a. he was required to comply with instructions relating to the use of mobile phones
 - b. he was required to comply with the Council's code of conduct (a copy of which was in the bundle)
 - c. he was required to undertake and maintain minimum training to accord with standard set by the CQC
42. The evidence from Andrea Steward was that the claimant was free to engage in other work, there was no obligation on the part of the claimant to prioritise offers of work made by the respondent over other offers of work. It is also clear from the evidence (particularly the written terms) that there was no retainer or similar ongoing payment made by the respondent to the claimant. Payment would only be made for shifts which the claimant accepted and worked.
43. I find that the claimant was controlled by a number of instructions of the respondent whilst working shifts but that there was no control exercised by the respondent when the claimant was not working a shift.

Application of the respondent's policies and procedures

44. Fewer policies and procedures applied to the claimant and other casual workers with the Bureau than applied to the respondent's employees. I refer below to policies that arose in evidence.

Performance Development Plan ("PDP")

- a. I accept the evidence of Emma Crewdson that the Bureau workers did not have a PDP. As noted above, they were required to stay up-to-date with training which was a Care Quality Commission ("CQC") requirement rather than a PDP. This was monitored for regulatory purposes but did not form part of a PDP. Employees of the respondent did have PDPs which included regular reviews with their managers.

Disciplinary Procedure

- b. I accept the evidence of Andrea Steward that, when complaints were received about the claimant from service users, these were investigated from a safeguarding perspective and not using the respondent's disciplinary procedure applicable to its employees. There is evidence that complaints against the claimant were addressed but

no evidence that they were addressed by reference to an employment disciplinary procedure. I accept the evidence of Andrea Steward when she states “ *Managers are required to treat people fairly and to investigate any complaints or allegations of wrongdoing by a casual worker but the process is not required to be as robust and the timescales will not be the same. There is no right of appeal against any decision made to discontinue with the services of a worker but any complaint made by a former worker would be fully investigated and they would receive a response.*”

Holiday procedure

- c. The claimant was in receipt of rolled up holiday pay (paid by the respondent in an attempt to comply with the Working Time Regulations 1998). The evidence of Emma Crewdson was that they did not ask workers to notify them when holidays are taken: if those workers volunteered that they would not be available for a period of time to work shifts then they would record that on their system. The holiday entitlement was different to that of employees of the respondent whose entitlement was established by local authority collective agreements and national terms and who were required to obtain approval for periods of annual leave they wished to take.

Pension Issues

45. As noted above, Letter One stated that the worker was eligible to join LGPS. There was no reference to pension in Letter 2 (dated November 2008). Letter 3 stated that casual workers were eligible to join LGPS and made reference to auto enrolment. Auto enrolment was discussed briefly at the preliminary hearing and it was clear that reference to auto enrolment in Letter 3 was reference to compulsory auto enrolment under the Pensions Act 2008.

46. The claimant did not join LGPS until shortly before his dismissal and at a time when auto enrolment applied.

47. The reference to LGPS in Letter One pre dated auto enrolment. No evidence was provided (either by claimant or respondent) about whether, as at 2005, workers (who were not employees) were eligible to join LGPS. Mrs Steward was asked about this and did not know. Mrs Steward was able to confirm that workers (not just employees) were able to join LGPS following the introduction of auto enrolment.

The Law and Submissions

48. Section 230(1) ERA states:

“In this Act ‘employee’ means an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment.”

49. A contract of employment has to meet the minimum requirements at section 230(3)(b), being:

“A 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.”

50. These three requirements are relevant in consider whether an individual satisfies the definition of “worker”. To also satisfy the definition of “employee” additional factors need to be considered as identified by case law.

51. Both parties referred me to the case of **Readymix Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497**. It is relevant to refer to the passage in that Judgment often quoted:

“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 in the contract are consistent with it being a contract of service.”*

52. It is also relevant to have regard to the following passage in the Judgment in **Hall v Lorimer [1994] ICR 218** when considering the issue of employment status:

“This is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail. Not all details are of equal weight or importance in any given situation.”

53. Both counsel also referred to me other authorities, particularly in relation to looking at the reality of the relationship (rather than being confined to the contractual wording) as well as mutuality of obligation.

Mutuality of Obligation

54. Miss Wedderspoon referred me to the cases of **Carmichael v National Power PLC [1999] UKHL 47** (“Carmichael”) noting that the House of Lords in that

case made clear that the existence of mutuality of obligation is the “*irreducible minimum of a contract of employment*”.

55. Miss Wedderspoon also referred me to the earlier decision of **Clark v Oxfordshire Health Authority [1998] IRLR 125** (“Clark”).

56. In Clark, the Court of Appeal was also clear that it was bound by previous authorities in relation to a minimum requirement of mutual obligations (at para 22)...” *no contract of employment within the definition contained in section 153(1) of the 1978 Act [now s203(1) ERA] (whether it be given the extra statutory name “global” or “umbrella” or any other name) can exist in the absence of mutual obligations subsisting over the entire duration of the relevant period.*

57. In her submissions, Miss Wedderspoon stated that, where there are periods where no work is to be offered, then in order for there to be an employment relationship, the employer has to pay a retainer. She stated “*in the absence of a retainer in periods where there is no work to be done, there will be no contract of employment between the parties.*” In stating this, Miss Wedderspoon relied on the decision in Clark.

58. The judgment in Clark (para 41) noted this: “*I would, for my part, accept that the mutual obligations required to found a global contract of employment need not necessarily and in every case consist of obligations to provide and perform work. To take one obvious example, an obligation by the one party to accept and do work if offered and an obligation on the other party to pay a retainer during such periods as work was not offered would in my opinion, be likely to suffice. In my judgment, however, as I have already indicated, the authorities require us to hold that some mutuality of obligation is required to found a global contract of employment.*”

What terms did the contracting parties agree?

59. Mr Sram referred me to **Autoclenz Limited v Belcher & Others [2011] UKSC 41**, noting particularly that I am not bound to consider the written terms of a contract only and should answer the question as to what contractual terms the parties actually agreed.

60. Mr Sram also noted, in reliance on the **Autoclenz** decision, that I must consider whether or not the terms of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but if appropriate as time goes by.

Analysis – Applying the Law to the Facts

Mutuality of Obligation

61. There was no obligation on the part of the respondent to provide work for the claimant. The Bureau acted as an agency, filling gaps in care provision that could not be filled by the respondent’s employed workforce. If the respondent was able to fill a

gap by using its employed workforce it would do so. It was not under an obligation to provide work instead to casual workers.

62. The reality is that the respondent had to call on casual workers on the Bureau to a significant extent. However it did not do so because of contractual obligations to casual workers engaged through the Bureau.

63. The written terms made clear that there was no obligation on the part of the respondent to provide work and I accept that this was, in reality the position.

64. There was no obligation on the part of the claimant to accept work that was offered. He did so because he chose to, not because he was contractually obliged to.

65. Even where the claimant did agree to carry out a shift, the claimant was able to give "back word" in relation to a shift and he occasionally did so including where another shift option that was preferable to him was offered and he chose that other option.

66. There was a requirement that the claimant's training was up to date if he was to remain eligible to be offered shifts. There was an expectation that the claimant would have to undertake some shifts in order that the training updates could take place. I have considered whether this amounted to an obligation on the part of the respondent to provide work for the claimant to do and an obligation on the part of the claimant to accept work offered.

67. I have decided that it does not, for these reasons:

- a. Satisfying training requirements to ensure that an individual is eligible to carry out a particular type of work is a minimum requirement, whatever the relationship (employee, worker or genuinely self employed).
- b. Many types of work now require ongoing continuing development training or top up training.
- c. The respondent's care workers needed to meet training requirements of the CQC. This training (or some of it) was received when the individual worker worked with service users.
- d. Where an individual applies for and is accepted onto the books of an agency or a bank of casual workers (or, in the case of the respondent, the Bureau), they will intend to undertake some work at some stage (assuming some work is offered). Otherwise, they would not have applied at all.
- e. The training requirements would therefore be met during those shifts that the individual worker, exercising his or her choice, decided to work.
- f. Ongoing training requirements would not have been met if the worker did not work at all for long periods of time even though they were offered opportunities to work. In this case, where the worker was not

engaging at all, the respondent may well have reviewed whether to retain the worker on the Bureau.

- g. Training requirements would not have been met either if the respondent did not have any shifts to offer the casual worker on the Bureau. As I have already noted, my finding is that there was no obligation on the part of the respondent to provide any work to the claimant or other casual workers on the books of the Bureau. The Bureau arrangements were there to fill gaps that the employed workforce could not fill. If no shifts were offered then this would have impacted on training requirements but the training requirements did not compel the respondent to provide work if it did not need to do so.

Control.

68. Once the claimant had accepted a shift and was undertaking the work on the shift, he was obliged to comply with the respondent's instructions including the service user plan.

69. The respondent exercised no control over the claimant when the claimant was not undertaking a shift. He was free to decide whether to accept shifts offered; he was free to work for other organisations; he was free to prioritise the work of other organisations over any opportunities provided by the respondent.

Other factors.

70. The claimant was not subject to the employment policies and procedures of the respondent, the claimant was not subject to a PDP, there was no evidence that the claimant had a particular manager or supervisor that he reported to; no evidence of a supervisor or manager of the claimant was provided. The claimant was not integrated in to the respondent's workforce as an employee would be expected to be integrated.

71. The claimant was aware that he was not a contracted support worker. He gave evidence that he applied for employment as a contracted support worker position on some occasions although had not done so for a few years as he had been disheartened by unsuccessful applications. Letter 2 (2008) and Letter 3 (2014) made clear that the claimant was not an employee. The claimant was aware that he was registered to the Bureau as a casual worker and had signed and agreed to the terms of Letter 3 which made clear his status.

72. In his submissions, Mr Sram comments that the relationship between the claimant and the respondent in practice worked out to be different (ie it became an employment relationship) to the one which the respondent intended. (By this I understand Mr Sram to refer to the intended relationship portrayed in the terms of Letter 3). I have considered this argument, having regard to the Autoclenz decision to which Mr Sram referred me. There is nothing in the facts as I have found them which is inconsistent with the terms of Letter 3. I accept, for the time period reviewed at the preliminary hearing (January 2018 to February 2019) the claimant

worked on average in excess of 40 hours a week. All of this work was for the respondent. However that is not enough to show employment status. He worked these hours because he chose to, not because he was obliged to. The respondent was able to provide the claimant with enough opportunities to enable the claimant to work this many hours. The respondent did not provide the claimant with these opportunities because it was obliged to offer them to him, but because the demands of its vulnerable service users (and the respondent's legal obligations to those service users) had to be met.

73. My conclusion therefore is that the claimant was not an employee for the purposes of s230(1) ERA. There was no mutuality of obligation, the respondent did not exercise sufficient control over the claimant particularly between shifts and including in relation to the work that the claimant decided to undertake (it was for the claimant to choose); the claimant was not sufficiently integrated in to the respondent organisation; he was not subject to policies and procedures that the respondent employees were subject to; there was nothing in relation to how the relationship operated in practice which was inconsistent with the terms of Letter 3.

B. Application to Amend the Claim

74. At an preliminary hearing (23 August 2019), the claimant applied to amend his claim in order to include a claim for psychiatric injury. The case management orders made at that hearing required the claimant to formalise his application in writing by 6 September 2019.

75. The formal written application was made and is at pages 43B to H.

76. At 43A is a letter from the claimant's solicitors accompanying the application to amend. In this letter it is noted:-

“ The particulars of the claimant's claim of indirect and direct racial discrimination are attached.

Regarding the medical records of the claimant and a relevant consultants report, we are not yet in a position to provide any records or reports to the tribunal. We are taking further instructions which will inform the decision whether to proceed with the claim for personal injuries or to withdraw that claim. If latter, the need for the claimant's medical records, at any rate for the preliminary hearing, would be obviated.”

77. The terms “direct” and “indirect” discrimination had not been used in the original claim form or in the background document attached to it. However it is clear from the narrative in the document attached to the claim form that the case brought is one of direct discrimination only. The claimant claims that there were false allegations made against the claimant which “stem from a hatred for his racial identity” (the claimant is black and of Ghanian nationality and/or national origin). He also claims that he was treated less favourably “because of his African/black origin

and ethnicity than someone of a different racial identity in his position would have been treated.”

78. Mr Sram accepted that the claimant would need to apply to amend his claim in order to bring a claim of indirect discrimination and he made the application.

79. Section 19 of the Equality Act 2010 (EqA) defines indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's

(2) For the purposes of subsection 1 a provision criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

a. A applies or would apply it to persons with whom B does not share the characteristic

b. It puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it

c. It puts or would put B at that disadvantage, and

d. A cannot show it to be a proportionate means of achieving a legitimate aim.

80. In order to make a claim of indirect discrimination it is necessary for a claimant to identify the provision criterion or practice (PCP) that has been applied. No PCP is identified in the claimant's particulars at 43B to H. This was raised with Mr Sram in the course of submissions and it was apparent that there was no PCP being put.

81. In her submissions, Miss Wedderspoon referred me to the Employment Tribunal Presidential Guidance on General Case Management (guidance note 1) and the guidance provided in the judgment in *Selkent v. Moore* (1996 IRLR 661).

82. As the claimant has not set out in its written or oral application an understandable basis for an indirect discrimination claim I am unable to consider the application further. However, in applying the guidance more fully and having regard to the headings in the presidential guidance:-

a. The amendment to be made. This is an application to add a new cause of action. It is not simply a minor amendment or clarification of claim.

b. Time Limits. The application was first made on 6 September 2019. Assuming that the decision to remove the claimant from the Bureau (or the bank of casual workers) is the act being complained of in an indirect discrimination claim, it is out of time. The claimant was informed of the respondent's decision on or about 15 February 2019. ACAS was notified under the early conciliation procedure on 7 March

2019 The ACAS certificate was issued on 1 April 2019. By my calculation, the claim should have been issued by 8 June 2019.

- c. The timing and manner of the application. No reasons are provided as to why the claim of indirect discrimination was not been raised until 6 September 2019. No indication of an indirect discrimination claim is recorded in the case management summary following the preliminary hearing on 23 August 2019.

83. The application to amend the claim to include indirect discrimination (race) is refused.

C. Strike Out/Deposit Order Applications

84. The respondent applied for the claimant's claims to be struck out or for deposit orders to apply. The application related to all claims that the claimant sought to bring.

85. For the reasons provided above, only the direct discrimination claim remains and I have considered the respondent's application in relation to this claim only.

86. The basis of the direct discrimination claim is explained in the original claim form.

"24 the claimant believes that the treatment suffered in his employment with the respondent is as a result of his racial/ethnic origin. The claimant is a black African. A white person in his position would not have been subjected to such a deplorable treatment, that is, a dismissal on a whim on a flimsy ground, after so many years of committed and dedicated service to the respondent."

87. The further particulars document (at page 43B) confirms the basis of the claim

"3. C was dismissed by R on the basis of a false allegation. The contention is not that the falsity of the allegation makes the dismissal discriminatory. It is rather the readiness or uncritical acceptance of the allegations or facts as proven, without proper investigation or enquiry..... The questions put to C, the manner of questioning and the responses to C's answers leave the reader in no doubt that the so-called investigators were not interested in C's responses. The integrity or honesty of the accuser (a white person) had been assumed, in like manner as the dishonesty or lack of integrity of C, was accepted as a given."

88. In support of his claim the claimant refers to a previous incident (in 2010) when he was investigated and where it was ultimately found that he did not act as it had been alleged. This appears to be relied on as relevant background evidence although clarification on this point may be required.

89. In its response the respondent states that the actions taken against C were appropriate for safeguarding reasons. They also point to a comparable situation

involving a white care worker (referred to as BC) when they say the same action was taken. In his further particulars document, C refers to BC and states that there are a number of differences between BC's relevant circumstances and the claimants.

Strike Out.

90. The application for strike out is made under rule 39(1)(a) of the ET rules of procedure on the grounds that it has no reasonable prospects of success.

91. In her submissions Miss Wedderspoon noted that this presents a lower threshold than a test of "no prospects of success."

92. Miss Wedderspoon referred to the case of *Eszias v. North Glamorgan NHS Trust* (2007) ICR 1126 ("Eszias") The judgment in that case referred to the earlier (House of Lords) decision in *Anyanwu v. South Bank Students Union* (2001) ICR 391 and the following extract from the judgment of Lord Steyn:-

" for my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of process except in the most obvious and the plainest cases. Discrimination cases are generally fact sensitive and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other bias in favour of the claim being examined on the merits or de-merits of its particular facts is a matter of high public interest."

93. This is not an obvious and plain case for strike out. From the information before me at this preliminary stage, it is apparent that there are significant factual disputes in relation to the direct discrimination claim, including in relation to the strength of the evidence on the safeguarding claim, a claimed assumption of wrongdoing on the part of the claimant (and reasons why a decision was reached that the claimant was in the wrong) and the circumstances concerning BC. The evidence in this case should be heard and tested at a full hearing.

Deposit Order.

94. An application for a deposit order is made, under rule 39(1) of the ET rules of Procedure on the basis that the direct discrimination claim has little reasonable prospects of success.

95. In support of her application, Miss Wedderspoon referred me to an extract from an investigation interview (page 102), noting that even the claimant's union representative commented that the people alerting the respondent about the claimants alleged conduct were not racist.

96. Whilst this extract appears not to be helpful to the claimant, I have not at this preliminary stage attached any great weight to it. The extract referred to is a record of an individual's opinion about whether or not one or more characters are racist. The opinion was dependant on what the individual considers to be racist. It was an opinion about whether there was direct discrimination against the claimant. It was not an opinion about the merits of the claimant's case now put.

97. I was also referred to page 103 where the union representative informs the claimant of his view that the behaviour alleged amounted to bad practice. However the claimant disputes that he behaved as alleged and in his direct discrimination claim, complains that there was no proper investigation or enquiry in to the allegations made against the claimant.

98. As I have concluded in relation to the strike out application; evidence is in dispute and there should be an opportunity for the evidence to be heard, tested and considered at a final hearing. I am unable to conclude on the information before me, that the remaining claim (of direct race discrimination) has no reasonable prospects of success. I therefore refuse the application for a deposit order.

Employment Judge Leach

Date: 17 January 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
28 January 2020

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.