EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Mrs C McPhillips	Beacon Counselling

JUDGMENT OF THE EMPLOYMENT TRIBUNAL (ON A PRELIMINARY HEARING)

HELD AT Manchester on 31 July 2019 (and in Chambers on 23 December 2019)
EMPLOYMENT JUDGE Warren

Representation
Claimant : Ms J McCarthy, solicitor
Respondent: Mr B McCluggage, counsel

RESERVED JUDGMENT

1. The Judgement of the Tribunal is that on reconsideration the strike out judgement is set aside.

2. The claimant was an employee from February 2015 to the date of her dismissal on 20 December 2017 under the Priestnall and Hazel Grove contracts. She is a qualifying employee for the purpose of her unfair dismissal claim

3. For all other periods when the claimant worked for the respondent, and under any other contract than the Priestnall and Hazel Grove contracts she was either self employed or a worker.

REASONS

Background and Issues

1. This case has had a very difficult history. It was listed to establish whether the claimant, whose case had, on the face of it, been struck out, should be given relief, and be allowed to continue with her case against the respondent and secondly if so, to establish her status. She argued that she was an employee. The respondent asserted that she was self employed. If she was an employee there is an issue over whether she qualified to bring a claim by having 2 years' service. The very brief background is that the claimant is a qualified counsellor. She has worked for the respondent for a number of years, sometimes, in the early years, as a volunteer and sometimes in a paid capacity. The claimant's original claim was that in relation to one particular contract 'the Priestnall contract' and the subsequent Hazel Grove contract, she was an employee with over 2 years' service and thus entitled to the protection of the Employment Rights Act 1996 against unfair dismissal. The case changed today to plead that all previous service was on an employed basis– and her schedule of loss appears to assert that she has been an employee since her paid work started in or around 2010.

2. The issues to be resolved today:-

3. Should the strike out judgement be reconsidered, set aside, and the claimant allowed to continue with her claim?

4. Was the claimant an employee of the respondent in connection with any or all of her employment with the respondent? The respondent concedes that from the date of signing of the written contract of employment in the case of the Priestnall contract in April 2016, to the date of her dismissal, she was an employee.

5. Did the claimant have 2 years' service as an employee so as to enable her to qualify to bring a claim of unfair dismissal?

6. When did the claimant's service as an employee begin and end?

The Evidence

7. I heard evidence from the claimant on her own behalf and from Mr Harper, the chief executive officer, on behalf of the respondent. Both had made witness statements upon which I relied as their evidence in chief. There was an agreed bundle of documents.

8. Subsequent to the Hearing, but before I reached judgement, both parties submitted additional documents, the claimant to suggest that she had been paid for work which was not included in the schedule in the bundle of documents, and the respondent to negate that assertion. The fact remained that neither party had the opportunity to cross examine the other's witness about these, and in any event I did not find that they assisted me in reaching my decision, as the evidence was insufficient to make a marked difference on the original evidence.

9. I decided the case on the evidential test 'the balance of probabilities'.

10. There was evidence to suggest the claimant had been less than truthful about the signing of the draft contract in February 2015 (she could not account for the fact that she appeared to have signed it months before it was created). I found the rest of her account to match the contemporaneous documents in the bundle, and to be credible. I found Mr Harper to be credible in that his account appeared to match the contemporaneous documentation throughout. Where his account differed I considered it to be based on mistaken belief (for instance over the issue of the date when an employment contract came into being for Priestnall)

11. Both parties provided helpful submissions both orally and in writing

The Facts

12. Based on the evidence I heard and read, and the submissions made by both parties, I made the following findings of fact.

13. The respondent is a charity which provides counselling services within schools and to adults. It is a charity based in Stockport.

14. The claimant began working with the respondent as a volunteer, when she was a student counsellor, in 2007. She later qualified and was sometimes paid for her work, in different capacities, as the respondent obtained work through different funding schemes.

15. Once qualified the claimant as also able to run her own private practice and in May 2016 she ceased volunteering.

16. Mr James Harper was the CEO of the charity.

17. There were 3 categories of counsellors – volunteers, self employed counsellors and employed counsellors.

18. The claimant worked in various 'projects' run by the respondent -

and by example confirmed that one with Pennine HCT and another with Stockport Council, both had service level agreements in which she provided a service through the respondent. Her hours were fixed and she provided invoices for her services and was paid without deductions. She saw clients on her own using her professional skills and was a member of and regulated by a professional body. She agreed that at that stage there was no requirement for notice on termination, but had professional considerations for her clients to conclude her contracts ethically.

19. In 2010 the claimant earned £72.00, and the respondent issued a P60, they now say in error. In 2011 the claimant earned 120.00, and again a P60 was issued, and again the respondent said that was a mistake.

20. The claimant confirmed that she was paid gross of income tax and national insurance and included all her payments on her tax self assessment form.

21. On occasions the counsellors would be invited to apply for specific projects and some would be selected to undertake the work.

22. When the claimant's father died her clinical supervisor invited her to take time off. There was work available for her if she wanted, but she chose not to take it. She was not required to provide sick notes, and took the best part of 12 months away.

23. On her return she continued to work on an hourly paid basis and did not receive pay slips – her pay was again paid gross of deductions.

24. In November 2015 the claimant had an issue with the respondent's paperwork (p.133), and both claimant and respondent described her as 'self employed' in the context of her work in schools.

25. A schedule was provided with the work undertaken by the claimant each month throughout her time with the respondent. There were gaps where she did not work (between January 2012 and April 2013, and in August 2013 and September 2013, then between November 2013 and April 2014. From April 2014 she appears to have been paid for work every month to January 2018. The payments varied between £62.00 to £1279 monthly.

26. In January 2015 there was a discussion about the claimant providing counselling to Priestnall School – 'the Priestnall Contract'. The claimant received a contract of employment setting out the terms. However the contract had the wrong school name on it. The claimant informed the respondent of this, and nothing appears to have happened other than that the claimant commenced work at Priestnall School in

February 2015 for 6 hours per week.

27. The claimant wrote to Mr Harper complaining about a pay issue and describing herself as ‘self employed’ on 27 November 2015.

28. In December 2015 Mr Harper sent the claimant a contract of employment which he explained would mean she became an employee rather than self employed and invited her to take advice.

29. On 26 February 2016 there was a disciplinary issue raised and a hearing. The claimant’s self employed status was again noted.

30. On 21 March 2016 the claimant signed a contract of employment for her work at Priestnall School with a start date of 1 April 2016.

31. The claimant provided PAYE details for payroll on 8 May 2016 and indicated she would cease volunteer work to focus on her private practice.

32. In July 2017 the claimant was advised that following an issue with a pupil at Priestnall, the school had requested that she should not continue.

33. In September 2017, after the school holidays, the claimant did not return to Priestnall but continued to work at Hazel Grove School for 1 hour a week.

34. On 20 December 2017 the claimant was given 4 weeks contractual notice, along with 2 other counselors when the respondent dismissed on the grounds of redundancy.

35. In January 2018 the claimant was suspended from other ongoing work with the respondent.

36. In March 2019, the claimant brought a claim of unfair dismissal to the Tribunal, initially on the basis of her dismissal as an employee from the Priestnall and Hazel Grove work, and since then, on the basis of all of her work with the respondent was as an employee.

37. The matter was listed for a preliminary hearing on 20 July 2018. The claimant, who was unrepresented at the time, attended the Tribunal, but left before her case was heard.

38. Employment Judge Warren made an ‘unless order’, and relisted the matter for 5 November 2018. The unless order required the claimant to write to both the respondent and Tribunal on or before 19 October 2018 to indicate her intent to actively pursue her case by attending the preliminary hearing failing which her claim would be dismissed under Rule 38 Tribunal

Rules.

39. The claimant wrote to the Tribunal on 25 July 2018 by email indicating that she would attend the hearing on the 5 November 2018. She did not however write to the respondent as required.

40. The respondent rang the Tribunal a few days after the 19 October and was erroneously told that the claimant had not confirmed her intent to take part on 5 November.

41. The respondent rightly assumed that the case had been dismissed.

42. There had however been no confirmation in writing by the Tribunal of the dismissal as required by the Rules.

43. The claimant instructed a solicitor who attempted, but failed to make contact with the respondent on 2 November 2018.

44. On 5 November 2018 the respondent failed to attend the Hearing, assuming the case to have been dismissed. The claimant and her solicitor did attend.

45. The case did not proceed, but the Employment Judge subsequently concluded that she should reconsider the decision to dismiss the claim in the circumstances (Under the provisions of Rule 38 Tribunal Rules) and the matter was listed to be heard on 3 June 2019 and subsequently on 31 July 2019.

46. If the decision was revoked and the claim allowed to stand, the hearing would continue, as originally planned for 20 July 2018 to consider the claimant's employment status and whether or not she had qualifying service for her unfair dismissal claim

The Law

47. Rule 38 Employment Tribunal Rules of Procedure 2013:-

48. An Order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming that this has occurred.

49. A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the tribunal in writing, within 14 days of the date when the notice was sent, to have such an

order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.

50. The principles to be considered are set out in *Enamejewa v British Gas Trading (2015) UKEAT/0347/14.*

51. In considering if a judgement should be set aside, it is to be considered whether it is in the interests of justice to do so. It is appropriate to consider factors which have occurred subsequent to the making of the order as well as those which occurred before it was made. The reasons include the reason for the default, whether it was deliberate, the seriousness of the default, the prejudice to the other party and whether a fair trial remains possible.

Employment Status

52. Section 230 Employment Rights Act 1996.

(1) In this Act employee means an individual who has entered into or works under… a contract of employment
(2) In this Act contract of employment means a contract of service or apprenticeship whether express or implied and if express whether oral or in writing
(3) In this Act worker… means an individual who has entered into or works under…
    (a) A contract of employment
    (b) Any other contract whether express or implied and if it is expressed whether oral or in writing, whereby the individual undertakes to do or to 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

And any reference to a worker's contract shall be construed accordingly.

53. In *Dakin v Brighton Marina Residential Management Company and others UKEAT/0380/* handed down on 26 April 2013, Mr Justice Langstaff (President) stated that the necessary constituents of a contract of employment were:- there must be a contract between employer and employee, it must contain mutuality of obligations which are related to work, the employee must be subject to control of the employer at least insofar as there is room for such control, and the employee must be obliged to perform his work personally for the employer – *Autoclenz v Belcher [2011] UKSC 41*, and finally that it must not contain terms which are inconsistent with it being a contract of employment. In deciding what

agreement had been reached between the parties in cases where there was no written contract an Employment Judge should consider 2 sources of evidence:- What the parties have done in performance of the contract and what is said to have been orally agreed.

Conclusions

The Strikeout Issue

54. In this case it is noted that a written notice must be sent to the parties who then have 14 days in which to apply for relief from the strike out. In this case no notice was ever sent – and so the time limit did not 'bite' before the Employment Judge decided of her own instigation to reconsider the decision to strike out under Rule 38 so as to allow the claim to continue. The real issue is whether it is in the interests of justice to do so.

55. The reason for the default was that the claimant, then a litigant in person, misread the order. She attempted to comply by notifying the Tribunal promptly of her intent to attend the next hearing. In error her email was not attached to the tribunal file which led to the compounding of the situation when the respondent was told she had not complied at all.

56. However I consider that a fair trial remains possible because cases of the same age are still being heard in the Tribunal now without any consideration of them becoming too stale for witnesses to recall matters. Delays from December 2018 have not been of the parties making but because of listing issues specifically and generally within the Tribunal.

57. In conclusion the original strike out judgement is revoked and the claimant may proceed with her case.

The claimant's status

58. The respondent concedes that from April 2016 (when she signed an employment contract) the claimant became an employee on the Priestnall contract. However that would not give her two years qualifying service before dismissal, and would not account for the post 10 years service she now claims she was an employee.

59. For the sake of completeness I have considered all of the arguments in both written and oral submissions.

60. I find that the Claimant commenced work in February 2015 at Priestnall School. She was sent a draft contract shortly after that – but it

contained the name of the wrong school. It was a contract of employment. It was never signed by the claimant or returned and the respondent failed to supply a second corrected contract despite the claimant emailing to request the same at the time. The production by the claimant of a signed version of the corrected contract dated 10 February 2015 is incredible. The corrected version was only created 10 months later.

61. I do not however even need to consider the claimant's credibility in this regard. The fact that she started work in February 2015 is not in dispute, and equally nothing changed thereafter other than in April 2016 when the claimant signed a corrected contract of employment. The respondent believed that this was the first time she became an employee in relation to Priestnall School, and began to treat her as such in relation to her pay. The respondent was in my judgement mistaken.

62. The respondent provided a draft contract of employment at the outset of this period of work, but failed to correct the name of the school on it. This clearly indicated an intent to employ her as an employee for the Priestnall contract from the very start. The claimant began work as an employee, on the understanding that the terms under which she was working were, bar the school name, contained in the draft contract. No one corrected her otherwise. She apparently complied with the terms of the contract and was paid accordingly. The fact that she was paid gross was not unusual – she had been before. The fact that she was described or described herself as self employed is not a 'killer blow' in what has been a fluid working environment over a period of 10 years.

63. The parties clearly intended, in February 2015, that she be an employee for this particular contract. In April 2016 the position was regularised when she did sign a contract of employment. In particular I note that there were no significant changes in either party's working practices, other than that afterwards she received her pay net of deductions, and received pay slips. She continued to work at the same school on the same basis, earning the same rate of pay and for the same hours, and with the same level of control by the respondent.

64. I am therefore satisfied that in relation to the Priestnall contract the claimant was an employee from February 2015. This means that regardless of when her contract came to an end – July 2017 or December 2017, she was a qualifying employee with 2 year's service so that she can bring an unfair dismissal claim.

65. Whilst her contract of employment for Priestnall came to an end, the claimant continued to be an employee in relation to her contract of employment with Hazel Grove in any event, described as a 'transfer'.

There would always have been a 6 week gap to account for the school holidays. There is no suggestion that the claimant resigned or was in some way dismissed during this period. No dismissal process was followed, and it therefore would seem to be a natural hiatus in the working year, typical of a contract of employment of this nature involving a school. The hours for Hazel Grove were less, but continued until the claimant's dismissal for alleged redundancy on 20 December 2017. She clearly remained subject to the same terms and conditions on what was described as a 'transfer'.

66. In relation to all of the other work undertaken by the claimant I consider that she was self employed or a worker for the following reasons:-

67. She was accountable for her own tax and national insurance and had to invoice the respondent to be paid.

68. There was no contract of employment. Whilst she had to commit to particular projects, she had the opportunity, without repercussions, to turn down offers of contracts.

69. She could choose not to work, as she did, for lengthy periods of time. There was thus no mutuality of obligation

70. She could operate her own private practice alongside her work for the respondent.

71. She was responsible for her own professional insurance and membership of professional bodies.

72. She did not have written contracts of employment other than in 2 specific cases (Priestnall and hazel Grove where it was clear that the parties intended there to be a relationship of employer/ employee.

73. Apart from the Priestnall and Hazel Grove contracts, she remained marked as self employed for other work with the respondent and was treated accordingly, without any apparent demur on her part.

74. She described herself at various times as 'self employed', as did the respondent

75. Whilst the work had to be undertaken by the claimant, once she agreed to see a client, she accepted that she had a professional duty to complete the counselling sessions regardless of any level of control by the respondent.

76. I do not find that the reality is different to the parties' intentions in this regard.

77. I do not find that the gaps when the claimant chose not to work are in any event covered by section 212 (3) Employment Rights Act 1996 as a temporary cessation of work. As a self employed person/ worker she could work or not work as she chose, and there was no mutuality of obligation for the respondent to offer work and if offered, for the claimant to accept it.

78. I have considered the impact of the case of *Cornwall County Council v Prater 2006 ICR 731 CA* but concluded that this case can be seen in a different light. Had there been sufficient features for me to conclude that there had been a contract of employment throughout then the temporary gaps may have been viewed in another way – although some were extensive and would have broken the contractual tie in any event. The gaps in the Cornwall case amounted to 14 months over 10 years. In the claimant's case one of the gaps was over 12 months in itself, which she accepted in her evidence was her choice.

79. I have however to consider all of the features of this case

80. Taking all of these features into account and looking at the circumstances as a whole, I consider the working practices of both parties to reflect a working relationship based on the claimant being self employed or a worker other than in relation to Priestnall and Hazel Grove. I take into account that it is the accumulation of detail that matters *(Ready Mix Concrete (South East Ltd v Ministry of Pensions* cited above. Looking at these it is clear that there was a different way of working when the claimant was self employed or a worker as against when she was employed, she had no provision for notice pay, she could take or leave work, her hours varied according to the contracts under which she was operating, and the length of contracts varied. She self insured. She was thus an employee for the Priestnall contract and Hazel Grove contract, but self employed, and or a worker for everything else. It is worthy of note that on dismissal she was paid contractual notice pay for the Priestnall and Hazle Grove work, but not for any other work she was doing.

81. As the key issue in this case is whether or not the claimant was an employee from the outset of her paid work with the respondent, or at any point thereafter, I have not considered it necessary to study her working practices other than against that one test. She may have been a worker some of the time and self employed at others. On the balance of probabilities though, I am satisfied that other than on the Priestnall and Hazel Grove contracts, she was not an employee.

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Employment Judge Warren

Signed on 23 December 2019

Judgment sent to Parties on

3 January 2020