EMPLOYMENT TRIBUNALS

Claimant: **Miss K Marples**

Respondent: **BWA Health & Care Services Limited**

At an Open Preliminary Hearing by CVP

Heard at: **Leicester (remotely)**

On: **27 and 28 January 2021**

27 April 2021 (in chambers)

Before: **Employment Judge Ahmed (sitting alone)**

Representation
Claimant: **In person**
Respondent: **Miss Morgan (Consultant - Peninsula Business Services)**

RESERVED JUDGMENT

The Claimant was an "employee" within the meaning of Section 230(1) of the Employment Rights Act 1996.

REASONS

1. This was a preliminary hearing listed to determine whether the Claimant was an 'employee' within the meaning of Section 230 (1) of the Employment Rights Act 1996 (ERA 1996).

2. The Claimant worked for the Respondent as a Support Worker from 9 November 2012 to 14 November 2019, when she resigned for alleged bullying behaviour.

3. At this hearing the Claimant gave oral evidence on her own behalf and the

Respondent called evidence from Miss Yvonne Woodhouse, the Managing Director of the Respondent.

4. The Respondent operates a domiciliary care agency providing support workers to various clients throughout the country. Most of the clients are sent to the Respondent by local authorities. The Respondent then provides personal assistants who undertake activities for users as bathing and showering, meal preparation and accompanying users to appointments.

5. It is agreed the Claimant worked on a zero hours contract. She provided dates of availability on a four-weekly basis which were then entered into a rota. Miss Woodhouse gave evidence to the effect that if the Claimant decided not accept a shift on the rota there were no consequences. However, the Claimant gave contrary evidence. I prefer the evidence of the Claimant. I am satisfied that there were instances when the Claimant cancelled her shift from the rota and she was spoken to about potential repercussions, including possible disciplinary action. Furthermore, when she had to cancel a shift for perfectly legitimate reasons she was penalised by being taken of the rota for some subsequent shifts.

6. In the bundle there is a sample of schedules and rotas. They show the Claimant worked regularly for the Respondent with very few breaks. The Claimant did not undertake work for anyone else during the relevant period.

7. The parties entered into a written agreement on 18 September 2015 (it is not clear why it was not done in 2012 when the relationship began). The agreement contains the following relevant provisions:

"These terms constitute a contract for services between the employment business and the temporary worker and they govern all assignments undertaken by the temporary worker. However, no contract shall exist between the employment business and the temporary worker between assignments. For the avoidance of doubt these terms shall not give rise to a contract of employment between the employment business and the temporary worker. The temporary worker is engaged as a self employed worker although the employment business is required to make statutory deductions from his/her remuneration……."
Clause 8. Conduct of Assignments
The temporary worker is not obliged to accept any assigned offered by the employment business but if he/she does so, during every assignment and afterwards where appropriate he/she will co-operate with the client staff and accept the directions supervision and control of any responsible persons in the client organisation."

THE LAW

8. Section 230 of Employment Rights Act 1996 ("ERA 1996"), so far as is relevant, states:

(1) 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.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."

9. It is now well established that for someone to be an 'employee' within the meaning of section 230(1) ERA 1996 at least four factors must be present. If any of them are absent then whatever else the relationship may be, it is not a contract of employment. If they all exist that only means that it is *possible* it is a contract of employment but further consideration of additional factors is necessary.

10. The four minimum factors are:

10.1 That there must a contract between the parties;

10.2 There must be the appropriate degree of control;

10.3 The contract must impose an obligation on the worker to provide work personally;

10.4 There must be mutuality of obligation between the two – that is there must be an obligation on the employer to provide work and an obligation on the employee to do that work.

11. In **Autoclenz v Belcher & others** [2011] IRLR 820, the Supreme Court made it clear that the question in every case must be about what the true nature of the agreement is between the parties and it is not necessarily the label set out in the written agreement:

12. In **O'Kelly & others v Trusthouse Forte plc** [1983] ICR 728 CA, Sir John Donaldson explained that in approaching the question of whether a claimant is an employee, a Tribunal must:

"consider all aspects of the relationship, no single factor being in itself decisive and each of which may vary in weight and direction, and having given such balance to the factors as seems appropriate, to determine whether the person was carrying on business on his own account".

13. In relation to the control element many employees by virtue of their skill and expertise may be subject to very little direct control. The Tribunal must take account of organisational matters, such as the degree to which an individual is integrated into the employer's organisation, whether there is an existing disciplinary procedure which is applicable to the individual and whether the individual is included in any schemes for occupational benefits. The Tribunal must also have regard to the economic reality of the relationship between the parties and whether the claimant can be said to be in business on her own account, whether she worked for another business, whether the claimant could send a substitute or sub-contract the work and whether there were any other factors consistent or inconsistent with the existence of an employment relationship.

14. During the course of closing oral submissions, I drew the attention of the parties to the cases of **St Ives Plymouth Ltd v Haggerty** (2008) AER 317 and **Pulse Healthcare Limited v Carewatch Services Limited and others** (2012) AER113, neither of which were cited to me in submissions. As I had 'sprung' these cases on the

parties, and they did not have time to consider them properly, I considered that it would be appropriate to adjourn submissions and allow the parties time to send in written representations on those cases. I then reserved judgment – unfortunately the earliest date available was some time ahead - and directions were given for the parties to make written submissions. I am grateful to the parties for their submissions.

CONCLUSIONS

15. There is no dispute in this case that there was a contract between the parties.

16. I am also satisfied there was the requisite degree of control. The Claimant had to undertake work in accordance with the requirements of the business. She naturally had a degree of discretion as to how she undertook her responsibilities. I am satisfied there was a sufficient degree of control for an employment relationship to exist.

17. I am also satisfied that the contract imposed an obligation upon the Claimant to carry out work personally. I do not accept the Respondent's argument that the Claimant could send a substitute. She never did so in practice and any substitute would no doubt have to be agreed and approved by the Respondent. The reality is that the Claimant was expected to undertake the role personally.

18. The substantive issue in this case is whether there was mutuality of obligations. That arises in relation to the gaps in her employment when the Claimant was not working. I have therefore considered whether there was an existence a global or 'umbrella' contract in relation to periods when the Claimant was not working.

19. In **Pulse Healthcare**, the local Primary Care Trust supported a 24 hour critical care package for a lady who had severe physical disabilities. There was a contract between Carewatch and the Primary Care Trust for provision of that package. The Trust then terminated the contract and entered into a contract with Pulse to provide the package. The Claimant's case was that her employment transferred to Pulse. An issue arose as to whether the Claimant was an employee because of an alleged absence of mutuality of obligations. The question was whether the Claimant worked under a global or 'umbrella' contract of employment - by which was a meant a contract of employment covering the whole of the work which the Claimant did for Carewatch and a succession of individual contracts covering individual shifts or individual periods of rostered work.

20. The EAT in **Pulse Healthcare** found that the Claimant was indeed employed under a global contract of employment and thus was able to satisfy the test of mutuality. It was argued on behalf of the Respondent that a zero hours contract was incompatible with the concept of mutuality of obligations but the EAT rejected that argument and found that did not reflect the true nature of the agreement.

21. In **St Ives**, the Claimant was a bindery Assistant for a business printing books and magazines. It was common ground that the claimant in that case was employed under a contract of employment during the periods when she was actually at work. However, in order to have sufficient continuity to be able to bring her claim for unfair dismissal she had either to show that she was employed under a single umbrella

contract or that the gaps in her employment would count for continuity purposes. The Employment Tribunal found that there was an umbrella contract and as such there was mutuality of obligations. The issue was whether the expectation of being given work, resulting from the practice over a period of time of itself constituted a legal obligation to provide some work or to perform the work provided, even where there was no duty to undertake any particular work offered or a minimum amount of work.

22. The majority of the EAT in St. Ives found that mutuality of obligations did indeed exist. At paragraphs 26 and 28 of the judgment of the EAT, Elias J (as he then was) set out the position:

"In our judgment, it follows that a course of dealing, even in circumstances where the casual is entitled to refuse any particular shift, may in principle be capable of giving rise to mutual legal obligations in the periods when no work is provided. The issue for the tribunal is when a practice, initially based on convenience and mutual cooperation - an alternative if less personal description may be market forces - can take on a legally binding nature….The majority consider that it is important to note that the test is not whether it is necessary to imply an umbrella contract, or whether business efficacy leads to that conclusion. It is simply whether there is a sufficient factual substratum to support a finding that such a legal obligation has arisen. It is a question of fact, not law.

23. Miss Morgan on behalf of the Respondent seeks to distinguish this case from both **Pulse Healthcare** and **St Ives** on the basis that there was no expectation for the Claimant to be available and if she provided her availability she was rostered and if not she was at liberty to cancel her availability for any reason and she in fact did so.

24. I have already found that if the Claimant either did not make herself available or if she cancelled her availability from the rota she was subject to repercussions and adverse consequences. That to my mind that created an expectation that the Claimant would work hours allocated to her. The Claimant was threatened with disciplinary action if she did not work her rota hours. When she pulled out of a rota without agreement, future shifts were made unavailable to her for a limited period of time. That created a degree of obligation on the Claimant to be available. The written agreement of a zero hours contract did not therefore reflect the reality.

25. The reality was that the Claimant had very little choice but to work the shifts allocated on the rota as and when it was issued. The Claimant was normally obliged to do work and the Respondent was normally obliged to provide it, as it did with great regularity. The facts in this case support the existence of an 'umbrella' contract and which continued to exist during periods when the Claimant was not working thus fulfilling the requirement of mutuality as well as continuity for the purposes of any qualifying period.

26. I have gone on to consider other factors relevant to employment status. The Claimant did not provide her own equipment to perform her role. She took no financial risks in the relationship, she did not hire any helpers, she appeared to be subject to discipline and the rules of the organisation. She was part of the business and would have been seen as such. The Claimant could not practically sub-contract the work nor did she ever do so. The Claimant was issued with payslips. National insurance deductions were made as well as deductions for employer and employee pension contributions. There was reference in the agreement to disciplinary sanctions for failure to meet standards.

27. I am satisfied that the majority of the factors point to the Claimant being an employee.

28. Accordingly, the Claimant is entitled to bring a complaint of constructive unfair dismissal as an employee. It has not however been decided whether such a complaint has either been 'pleaded' or whether it requires an amendment. That was not an issue to be determined at this hearing and is left for future consideration.

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Employment Judge Ahmed

Date: 20 July 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

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