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THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mrs M Canga Cortez **v Templewood Cleaning Services Ltd**

Heard at: London Central **On**: 13 and 14 July 2017

Before: Employment Judge Auerbach
Members: Mr M Baber
Ms J Collins

Representation:

Claimant: Mr R O'Keefe, trade union representative
Respondent: Ms S Stuart, counsel

REASONS

Introduction

1. The claim form was presented on 18 June 2016. The Claimant is employed by the Respondent as a cleaner, having worked for them since November 2010. Her employment is continuing.

2. The conduct of the litigation prior to our hearing had not been smooth and at times there had been a lack of engagement on both sides. For some time there was also a lack of clarity in relation to the nature and alleged factual basis of the Claimant's complaints.

3. The claim form originally included claims of race discrimination, but at the start of the hearing before us, Mr O'Keefe withdrew all such claims and, without opposition, we dismissed them upon withdrawal. The remaining live claim was of unlawful deduction from wages.

4. Mr O'Keefe indicated that, in summary, the basis of this claim was the proposition that the Claimant was contractually entitled to receive at least 30 hours' work per week, paid at the Respondent's prevailing hourly rate, and that, in breach of that right, the Respondent had cut her hours to around 15 hours per week with effect from January 2016. This cut was imposed, he said, when she was moved from working at the offices of one client of the Respondent: Mediacom, to those of another client: Office Group. Her case, he told us, was that at Mediacom's offices she had worked six hours per day from Tuesday to Saturday. This consisted of 3 hours per day cleaning a bar area and a further 3 hours cleaning another area.

5. Mr O'Keefe accordingly confirmed that, if successful, the Claimant sought an award of wages to reflect the difference between what she *was* in fact paid from the beginning of 2016 up to the date of presentation of the claim, and what she *would* have been paid, had she worked 30 hours per week throughout that same period.

6. Pursuant to the provisions of part II of the **Employment Rights Act 1996**, an unlawful deduction will occur when, on a given occasion, the worker is paid less than the amount of wages that is "properly payable" on that occasion (see section 13(3)). Where, as here, the complaint is not about the hourly rate applied, but about the number of hours' paid work that were given, then, in order for the claim to succeed, the Tribunal must find that the worker had a contractual right to be given the minimum number of paid hours of work per week that she claims.

7. While Mr O'Keefe had explained the Claimant's case that the number of hours' work per week given to her had in *fact* reduced, the basis on which the Claimant asserted that she had, prior to this change, a contractual *right* to work (and hence be paid for) at least 30 hours per week, required some further clarification. We accordingly adjourned for a short time to allow him an opportunity to obtain further instructions.

8. When we reconvened, Mr O'Keefe confirmed that the Claimant did not assert that there was any express written term of her contract of employment guaranteeing her at least 30 hours' work per week. Rather, he said, she relied on two matters. Firstly, around the time when she first joined the Respondent, the Claimant had had a discussion with a manager called Jose Fraga about her hours, on which she would rely as giving rise to an oral express term. Alternatively, he said, since joining the Respondent she had been consistently deployed to work at the same premises, working substantially the same number of core hours, for many years. This, he would argue, gave rise to an implied term by

custom and practice, that these hours had become her minimum guaranteed hours, by the time that the change complained of occurred.

9. There were factual disputes about what hours the Claimant had actually been working prior to January 2016, and on what basis, and also about events leading up to and surrounding the changes in the Respondent's arrangements with Mediacom. However, the core of the Respondent's case, explained Ms Stuart, was that the position was simply governed by an express zero-hours clause in the Claimant's written contract. The effect of that, she said, was simply that there were no minimum guaranteed hours.

10. It was also the Respondent's case that as a matter of fact there were opportunities for the Claimant to work additional hours, both before and after the change at the end of 2015, including on other client contracts after the move to Office Group took place. So, on their case, and though this was not guaranteed, the Claimant could in fact have continued to work 30 hours per week for the Respondent, had she wished to do so.

11. Mr O'Keefe's position, in response, was that the written contractual clause relied upon by Ms Stuart was unclear in its effect and/or did not reflect the true agreement between the parties.

12. The basis of the wages claim, and the issues to which it gave rise, were only fully particularised in this way at the start of the hearing, and we then reviewed with the representatives whether we were in a position to proceed with the hearing in substance, and/or whether any further preparations were required.

13. Ms Stuart told us that Mr Fraga had left the Respondent's employment some time ago, and she was not in a position to call him as a witness; but she did not object to proceeding on that account. The witness statements that had been prepared on both sides did not necessarily address all of the issues that had now been clarified in discussion, but both representatives were content that this could be fairly managed by allowing some additional oral evidence in chief to be elicited from each witness, as necessary, prior to cross-examination. Both of them wished to proceed with the substantive hearing, on that basis.

14. Because, prior to the start of the hearing, there had been claims of race discrimination, a three-person Tribunal had been convened. Now that there was only a wages claim, this could, potentially, be heard by the Judge sitting alone. However, Ms Stuart indicated a preference for the wages claim to be heard by the full Tribunal. Mr O'Keefe had no view either way, and the Judge decided in the circumstances that the full three-person Tribunal should hear, and decide, the wages claim.

15. We were provided with a bound bundle of documents and witness statements. As we were about to start hearing the first live witness, Mr O'Keefe indicated that there were some additional documents that he

wished to table, and Ms Stuart that she opposed these being put before the Tribunal. Without initially looking at the documents, the Tribunal then had an initial discussion with the representatives about how this dispute might, depending on the nature of the issue, be resolved; and then allowed the representatives a further break for dialogue. They were then able to agree the contents of a supplemental bundle, including some redactions of parts of the documents in it, which was put before us.

16. We then heard live evidence from the Claimant, and then for the Respondent from Brian Tovey, Area Manager, Joao De Canha, Area Supervisor and Daniel Dawes, Area Manager. The Claimant was assisted by an interpreter, Mr Gonzalez. Each of them supplemented the evidence in their witness statements with further oral evidence in chief, and each was cross-examined and answered questions from members of the Tribunal.

17. We heard oral closing submissions from both representatives. Mr O'Keefe also referred us to **Pulse Healthcare Limited v Carewatch Care Services Limited**, UKEAT/0123/12, 6 August 2012. That decision itself cites a number of other authorities, including in particular, **Autoclenz Limited v Belcher** [2011] ICR 1157.

18. At the conclusion of the hearing we gave an oral reasoned decision and our written judgment was subsequently promulgated. Mr O'Keefe requested written reasons and these are now provided.

The Facts

19. The Respondent is a provider of cleaning services, and other facilities and support services, to multiple clients. Although the figure fluctuates, it has around 650 employees. Much of the recruitment of cleaners by the Respondent is conducted informally and by word of mouth. There is a diverse work force but with a significant contingent of Spanish and Portuguese speakers for whom English may not be the first language. Recruitment is often conducted through the personal contacts of existing supervisors and/or other existing workers who share a common first language with those who are hired.

20. The Claimant started working for the Respondent in November 2010. Her first language is Spanish. She was recruited by a then Area Supervisor, Jose Fraga. Two copies of a standard statement of terms and conditions of employment were signed by the Claimant, on two different occasions, but in identical terms. One copy was dated 29 November 2010 and was signed by her and by Mr Fraga on that day. Another copy, which was the one that the Respondent had on its file, was signed by the Claimant on 27 November 2010 and then by Mr Dawes, an Area Manager, on 13 December 2010.

21. The actual typed content of both documents was identical. Witnesses could not be sure why this was done twice. We concluded that both

were authentic documents, and that there must have been some lack of communication or misunderstanding, which led to the exercise being completed twice, once involving Mr Fraga and once involving Mr Dawes, and both times involving the Claimant signing the document.

22. We reproduce here Clause 5, in both documents, heading, text, and numbering, as it appeared:

> 5 Normal Hours of Work Regular schedule
>
> 5.2 This is a zero hour's contract, you will be required to work allocated hours set out in your availability matrix. Once you have agreed to these hours either verbal or by contract, failure to attend work will be dealt with under the disciplinary procedures.
>
> 5.3 You will be provided notice of hours of work, however there may be occasions where you will be required at short notice.
>
> 5.4 Any overtime agreed either verbally or contracted, you will be required to work, and failure to attend will be dealt with under the disciplinary procedures.

23. The Claimant gave evidence that she had a conversation with Mr Fraga in which he told her that she would be filling a slot working at the offices of a client called Mediacom, and what the hours would be. We accepted that they had a discussion to that general effect.

24. We found that the context was this. The Respondent had agreements to provide cleaning services with various clients. The clients, and/or their requirements, changed from time to time, but, at any given time, a particular client contract would give rise to a number of "slots" for individual cleaners. If a cleaner who was usually assigned to a particular slot on a particular client contract left, and no other employee was available, a new recruit would be assigned to that slot.

25. Against that background, when the Claimant was recruited she was assigned to an available slot working on the Mediacom contract. As part of her induction she was shown what the particular cleaning tasks at the Mediacom offices involved, and so forth.

26. There was a considerable lack of clarity, and some inconsistency, in the evidence we heard, both from the Claimant and from some of the Respondent's witnesses, regarding what the Claimant's working hours or work patterns actually were in the years that followed.

27. What was at least clear was that the Claimant did, as a matter of fact, continue to work on the Mediacom contract right up until the end of 2015. Beyond that, the clearest and most coherent picture of the Respondent's arrangements with Mediacom, the actual arrangements and hours that the Claimant worked, and how and why things changed at the end of 2015/start of 2016, came from Mr Dawes. Indeed, once we had heard Mr Dawes give evidence, matters that were explained by him,

also helped us better to understand the evidence we had also heard from Mr De Canha, and which was consistent with that of Mr Dawes.

28. Doing the best we could, and drawing on the totality of all the witness and documentary evidence we had, we made the following findings.

29. Firstly, when she started in 2010, the Claimant was initially generally working a pattern of daily 3 hour shifts, five days per week, totalling 15 hours per week. However, as the payslips in our bundle showed, by 2012 she was regularly doing more shifts, and averaging at least 30 hours a week. By this time, she was doing a certain number of hours cleaning a bar area at the Mediacom offices, and a certain number of hours cleaning other areas of the building including a kitchen and/or a meeting room.

30. By 2015, the pattern that the Claimant was usually asked to work was 3 hours on Monday, 5½ hours each on Tuesday, Wednesday and Thursday, 7 hours on Friday and 4 on Saturday, totalling 30½ hours per week. This was supposed to be made up of 3 hours cleaning of office areas each evening, after the office had closed, with additional hours cleaning the bar in the mornings, when the bar would be shut. The office cleaning in the evenings was originally scheduled to start from 7pm but at the client's request that start time was at some point put back to 8pm, because the office was often used for late meetings.

31. It was envisaged that the hours working cleaning the bar would be spread across Tuesday, Wednesday, Thursday, Friday and Saturday mornings, but we accepted Mr Dawes' clear evidence that the Claimant in fact did not come in on Friday or Saturday mornings to do the bar work, because it suited her better to stay at the premises and do that work late in the evening or into the night, after she had finished her evening work cleaning elsewhere in the building.

32. In addition to the foregoing, the Claimant was regularly asked to, and regularly did do, additional hours of work for the Respondent, for example to cover for absent colleagues who would normally also be working at Mediacom, or to work on other client contracts on other sites, when additional hands were required, or slots needed covering ad hoc.

33. In addition to the ordinary cleaners who were deployed to work on the Mediacom site, there was a site supervisor, based at the site, Natalie Price. An Area Supervisor would have responsibility for a number of client contracts, and the sites covered by those contracts. When the Claimant was recruited the Area Supervisor whose responsibilities included the Mediacom contract was Mr Fraga. In around June 2015 he left the Respondent and Mr De Canha took over as the Area Supervisor whose responsibilities included Mediacom. He had responsibility for a large number of sites, but Mediacom was one of the larger and more important sites; and he visited it frequently, sometimes as much as every day. Mr De Canha in turn reported to an Area Manager: Mr Dawes.

34. In around September 2015, Mediacom told the Respondent that it wanted to change the way that its cleaning services were provided. In particular, it was concerned that the current arrangements made security difficult to manage. Hitherto the Respondent had deployed about 23 cleaners to work on the Mediacom contract. They were doing a variety of different shift lengths, of one, two, three or more hours, and had various different start and finish times. Mediacom wanted to move to a system where all the cleaners sent by the Respondent to its premises did shifts of similar lengths, and all of them arrived and left at about the same time. They considered this would make it easier for their security team to manage and monitor the position. In addition, Mediacom indicated that they wanted the Respondent, so far as possible, to reduce the overall numbers deployed to this contract, again for security reasons.

35. Mediacom were a long-standing client with whom Mr Dawes had a long and good personal relationship. They conveyed to him that this was the shape of the change they were looking to bring about, but they were content to allow the Respondent some considerable latitude in terms of how, and over what timescale, they would bring about the change.

36. The overall number of daily cleaning hours necessary to service the Mediacom contract was 64. It was originally envisaged that the change would be achieved by moving gradually to an end point of having 16 cleaners deployed on the contract, each working a 4-hour shift. Some attempt was made to move towards that work pattern, but this did not prove a success, because cleaners starting as late as around 9pm were leaving at around 1am and having trouble getting home. So, ultimately, instead, the move was made, in around February 2016, to deploying 8 staff, each working a night shift of 8 hours, and then leaving early in the morning, by which time public transport had resumed. This was the new work pattern that was eventually, achieved with 8 staff working the slots on the Mediacom contract going forward.

37. This change was brought about incrementally in the following way. As we have indicated, Mediacom gave the Respondent some latitude in terms of the timescale for implementing the change. There is a fairly regular level of turnover in this industry, and we accepted Mr Dawes' evidence that typically one to two people a month would leave. He also told us, and we accepted, that in December 2016 some five new client contracts began, creating significant opportunities to redeploy existing staff to those contracts.

38. The Respondent was, against this background, able to achieve the transition by a mixture of redeploying staff who had hitherto been deployed to Mediacom, but did not want to work the new Mediacom pattern, to other client contracts, not replacing staff who had worked on the Mediacom contract who left the Respondent altogether, and gradually correspondingly increasing the hours of those who wished to stay at Mediacom, working the new pattern. In this way they were able,

by stages, to achieve the transition, to fewer staff working longer hours at Mediacom, without dismissing anyone, and without requiring anyone to stay at Mediacom working the new pattern, who did not want to do so.

39. Mr Dawes gave clear evidence to this effect, and, having heard it, we were also able better to understand the evidence we had heard from Mr De Canha, which was entirely consistent with it. In particular, Mr De Canha maintained consistently in evidence, that no-one was required to stay on the Mediacom contract working the new pattern, who did not want to, that no-one was "got rid of", and that those who did not want to work the new Mediacom pattern were offered work at other sites.

40. Mr Dawes and Mr De Canha also between them gave evidence which was consistent, and gave us a clear picture of how they in practice went about communicating and implementing these changes in terms of their dealings and communications with the staff who had hitherto been working on the Mediacom contract. What happened was this.

41. In the first instance Mr Dawes discussed with Mr De Canha the changes that they were seeking to bring about in the Mediacom arrangements. Mr De Canha was then deputed to be the main line of communication with the individual cleaning staff currently working on the contract. This was because Mr De Canha was the Area Manager with particular responsibility for the site, he visited regularly, knew the staff well, and is multilingual, including speaking Spanish and Portuguese. He was therefore able to communicate most effectively with the staff concerned.

42. Mr De Canha in turn liaised with Ms Price, the Site Supervisor. We found that, with her help, he arranged to have at least one general meeting on site, open to all the cleaning staff, and then a series of further meetings, with smaller or larger groups, over the succeeding weeks and months. Mediacom's first approach to Mr Dawes took place in around September 2015 and the site meetings and discussions with staff then took place through the autumn. Throughout this period, Mr Dawes kept in touch with Mr De Canha as to how the process was going, in terms of the progress being made to gradually moving towards implementation of the new arrangements.

43. Mr De Canha was also responsible for services at a number of other large client workplaces, and was therefore aware of where there were opportunities in his patch, for cleaners who did not want to stay working on the Mediacom contract, and move to the new work pattern there, to move to working on other client contracts. Mr Dawes had some awareness of these opportunities as well, in particular in relation to the new contracts that were acquired in December; and information was exchanged between the two of them about this as well.

44. Mr O'Keefe challenged the Respondent's witnesses' evidence, that there had been regular meetings with the cleaning staff at Mediacom, discussing, or consulting with them about, the proposed changes to work

patterns there, and/or opportunities to be redeployed to work on other client contracts. In particular, in cross-examination and submissions, he suggested that it was remarkable that there was no formal consultation documentation disclosed by the Respondent, or in our bundle at all. There were no "at risk" letters, no formal letters convening consultation meetings or any other documentary evidence of that sort.

45. However, we found the picture painted by Mr Dawes and Mr De Canha, and the lack of any such documents, to be plausible and to hang together. These matters were not handled in a formal way, but simply by a series of informal meetings and discussions with staff, in which Mr De Canha communicated and kept in touch with them, at regular intervals throughout the autumn, and the changes were, piecemeal, put in to place through such dialogue. This way of managing things was in keeping with the wider picture we had of the informal approach to recruitment practices, how Mr De Canha was the main point of communication, in part for language-related reasons, and the way in which it was envisaged that the changes would be gradually implemented, without the need to contemplate any dismissals.

46. The Claimant, in her evidence at one point, appeared to suggest that she had not been spoken to *at all* about any of these matters before she came back to work, following a period of leave, in the New Year of 2016. She said at one point that she had not been to any consultation meetings at all and that she had, at best, only heard rumours from some of the other staff that they may be working increased hours at Mediacom. This was not convincing, and it was not consistent with her own evidence, when she described one of the consultation meetings at which she said Mr De Canha was aggressive and shouted at her. Although he denied shouting at her, this was evidence from her that she had been present at least at one such meeting at some point. Mr De Canha told us that she had been present at all of them. We found, in light of all the evidence available to us, that she was at least present at several of them, and that she generally understood what was envisaged.

47. The Claimant was on leave from 15 December 2015, returning on 4 January 2016. From when she returned, she worked at the offices of another client of the Respondent, Office Group, in Angel Square, working 15 basic hours per week.

48. The Claimant's evidence was that on 4 January 2016, Mr De Canha texted her to tell her where she would be working, and that, before that, she knew nothing either of where she would be working on her return from leave or what hours. Mr De Canha's evidence, however, was that, in the course of the discussions in the autumn, the Claimant had come to the view that she did not wish to continue working at Mediacom on the new pattern. He gave evidence, which we found plausible, that, in their initial discussion, she had not committed herself, but had said that she wanted to get advice or to consult elsewhere about her options. Then, at their second or third meeting, she had told him that she did not want to

continue at Mediacom under the new arrangements, and it was then that he had told her that he could offer her the opportunity at Angel Square.

49. Mr De Canha agreed that he had sent the Claimant a text with the Office Group address; but his evidence was that she knew before she went on leave that she would be moving to the Office Group contract in the new year and what the basic hours would be. But it was left that if she contacted him when she was back from her holiday, he would text her the precise address where she needed to go on her first day. He said that she then did text him, a day or two before 4 January, and he provided her with that specific information. Again, we found that that hung together with the wider picture, and we accepted his account.

50. Although the Claimant duly went to work at the Office Group site, she felt aggrieved about what had happened. As a matter of fact she had worked at the Mediacom site for some years, and the hours that she was working, and when she was working them, as of the end of 2015, had a been, as a matter of fact, a stable arrangement for some time, and suited her very well. She was not happy that she no longer had the option to continue working at the Mediacom site in the same way as before. She approached the CAIWU trade union and it took up her case.

51. Mr Durango the then General Secretary, sent an email, apparently to the "info" email address of the Respondent, on 8 January 2016. This stated:

> Marianela went to holidays on the 15th December 2015 and 4 January 2016 however the company sent Marianela to another contract deteriorating her working conditions. She used to work 7½ hours and is now working just 3 hours. The Company did not follow any procedure.
>
> Marianela is working now under protest as she is not accepting the change in her working conditions.
>
> Unless the Company pay Marianela her lost earnings and put her back to the old working conditions, we will help her to start her an employment tribunal against Templewood Cleaning.

52. When no reply was received, a follow up email was sent, indicating that they had received no reply, and that the Claimant had not been contacted, repeating that she worked under protest and again seeking her lost earnings and to be put back to her old working conditions. Again, no reply was received.

53. There was a dispute in evidence before us on the question of whether the Claimant was offered and/or expressed any interest in, opportunities to work additional hours for other clients of the Respondent, over and above the 15 hours per week working at the Office Group site.

54. The evidence of the Respondent's witnesses was that there were plentiful opportunities for the Claimant to have worked additional hours at other client sites, had she been interested, in particular because of the

influx of new work opportunities in December 2015 and the general high turnover of individuals periodically leaving their employment. However, according to the Respondent's witnesses, she was not interested in that, but only in maintaining her previous arrangements at Mediacom.

55. The evidence of the Claimant was that no such opportunities were offered to her. Indeed, her evidence was that she raised the subject with Mr De Canha, he said he would look into it and get back to her, and she also raised it with her new supervisor at the Office Group, but nothing was offered. Mr O'Keefe suggested that the fact that CAIWU received no replies to its emails was consistent with her account.

56. The Tribunal did not find it easy to come to a view as to what was truthfully going on here, but, doing the best that we could, the picture that we formed was that there were different elements of truth to what both sides were telling us. On the one hand, we accepted that it was the case – and Mr Dawes was particularly clear about this – that there were plentiful opportunities to do additional hours, in particular in the mornings, working at the sites of other clients of the Respondent. We also accepted that, for whatever reason, the Claimant did not proactively herself enquire about such opportunities. Consistently with that, the thrust of the emails from CAIWU was that what she wanted was for her *previous* working arrangements to be restored.

57. On the other hand, we were not persuaded that Mr De Canha or anyone else proactively approached the Claimant offering such opportunities. There was clearly a difficult or deteriorating relationship between them. She told us that there had been an occasion when he had shouted at her. His evidence was that she was not an easy person to get on with. He told us that she was constantly aggressive towards him, and that he formed the impression that she personally blamed him for the changes in the Mediacom arrangements, whereas, as far as he was concerned, he was simply the messenger. Mr De Canha, we concluded, *did* discuss with the Claimant the changes in Mediacom and what she wanted to do, and *did* convey to her the opportunity of a slot at Office Group; but he did not go out of his way to proactively bring to her attention opportunities to work additional hours at other sites; but nor were we persuaded that she further approached him on that subject.

The Tribunal's Further Findings and Conclusions

58. As we have explained, the outcome of this claim turned on whether there was an express or implied term of the Claimant's contract, to the effect that she was entitled to receive at least 30 hours' paid work per week. Her case was that there was either an oral express term, or an implied term to that effect. The Respondent's case was there was an express written term of her contract which occupied the field – clause 5 – the meaning of which was that there were no guaranteed minimum hours. The Respondent relied, in particular, on the statement within that clause that this was a "zero hours contract".

59. The Tribunal can take judicial notice of the fact that there is a wider public debate about the use of contracts that may be described as "zero-hours contracts" and their perceived merits or demerits. However, it was not any part of our task to engage in that debate. Our task was, solely, to determine whether, in light of all the facts, as of January 2016, the Claimant had the contractual right to be given at least 30 hours' paid work per week, and, if so, whether that right was honoured.

60. As we have recorded, there was a signed written contract of employment – in fact signed twice in identical terms. The parties were bound by the terms of that document unless, for some reason, it should be treated as not applying, whether because it was a sham, in the **Autoclenz** sense and/or because, for some reason, the position was instead governed by an oral express agreement or by an implied term.

61. Our starting point was therefore to consider the meaning and effect of clause 5. The task of interpretation required us to consider the ordinary natural meaning of the words of the clause. To the extent that they were ambiguous, or open to different shades of interpretation, the words had to be construed objectively, as best we could, drawing on the particular context of this employment as an aid to understanding their objective meaning.

62. Ms Stuart submitted that the relevant words of the clause were entirely clear and unambiguous: the clause states in terms, at the very start, that this is a "zero hours contract". That, she said, clearly and simply means (at least) that there are no guaranteed minimum hours at all. Mr O'Keefe, however, pointed to other features of the clause, such as the reference in the heading to "normal hours", and in clause 5.4 to "overtime hours", which, he suggested, had a different tenor.

63. We considered the clause as a whole. Ideally, every clause in a contract would be clearly and coherently drafted. In reality, for a variety of reasons, this is not always the case. It appeared to the Tribunal that this clause was not drafted with conspicuous skill or care. It was not properly sub-numbered, and not always grammatical or correctly punctuated. The heading was incoherent. To the Tribunal the clause had the hallmarks of having possibly been adapted from another form of clause, but not with all the care that a seasoned lawyer would bring to the redrafting. We had, nevertheless, to do the best we could to make sense of this imperfectly drafted clause, and what we thought it was intendedly objectively to mean, in the context in which it was made.

64. We therefore considered that wider context. It seemed to us, drawing on the evidence that we heard, that there were two potentially salient features of that context, one relating to supply, the other to demand. At the supply end, cleaners who offer themselves to work for companies like the Respondent will vary in terms of the number of hours they are looking to work, and when they are looking to work those hours,

depending on their own circumstances, needs, and other commitments. At the demand end, the Respondent is driven by the need to meet the requirements of its various clients, which are not consistent or necessarily stable. The Respondent, in short, wishes to be able to deploy the cleaners who work for it, flexibly, to meet the changing demands of those clients.

65. Different clients require different numbers of hours of service, at different times, and of different types. The requirements of a client may change from time to time, either directly in terms of the number of hours or times required, or by a knock-on effect of a change in the type of cleaning service required, on the total number of cleaner-hours needed to service that client. Mr Dawes gave the example of the impact which a change in flooring from carpeting to wood flooring can have on the number of hours needed to service that particular client. Clients also come and go. Although sometimes staff may TUPE across, they will not always do so. Cleaners may need to be deployed as necessary, to meet other ad hoc fluctuations in client needs, or to cover for absent colleagues.

66. Looking at the wording of clause 5 within that wider context, we drew the following conclusions.

67. Firstly, what this clause plainly did *not* do was stipulate specific standard or normal working hours – e.g. from a specified start time or times to a specified finish time or times on specified days of the week. Nor did it state, even, any specific number of standard hours in the ordinary working week. Such provisions are routinely encountered in contracts where the working pattern is expected to be stable over an indefinite period e.g. in a conventional Monday – Friday, 9am – 5pm, office job.

68. The omission of any such provisions in this case cannot have been accidental. If it had been intended that this employment was to be for a fixed working week, in terms of days, start and finish times, and/or for fixed or overall hours, this would have been expressly stated. That this clause did not do so, seemed to us be reflective of, the wider context that we have described, in which the Respondent did not consider itself able to offer certain and stable and unvarying hours and times of employment of that sort, and did not want to commit itself to doing so.

69. The reference, instead, to this being a zero hours contract, was, on its face, and consistently with the absence of any stated days, start or finish times, an express statement that *there were no* guaranteed hours, which also fitted with the wider context that we have described.

70. On the other hand, this was not a working environment where demand for the service fluctuates from hour to hour, or day to day, such that there was no predictable pattern for even a week or month ahead. As we have described, at any given point in time, the Respondent would have client contracts which gave rise to particular requirements which it would seek to meet by assigning particular cleaners to particular slots on

those contracts. But, in terms of supply, cleaners would have their own various availability to work, in terms of numbers of hours and times.

71. These features, it seemed to us, helped to make sense of the other parts of clause 5. Thus, the reference to "your availability matrix" suggested that the Respondent would need to know (whether or not this was actually done by filling in a form or matrix) what the individual's availability to work was, in terms of how many hours and when they wanted to work. The individual having indicated their availability, the Respondent would then, so far as it could, offer them a client slot or slots, which it needed to fill, and which matched their availability.

72. Once that slot had been offered and the individual had agreed to fill it, they would then be expected to honour that specific commitment and to turn up for work at the agreed times. This, we concluded, was the main sense of the second part of clause 5.2. The opening words made clear that there was no guarantee of any particular hours being offered, but, once an individual was allocated, and agreed to work, particular hours, over a certain period, then they were committed to them.

73. However, the opening words, and wider context, meant that the *Respondent* was *not* thereby committed to continuing to offer the same hours or work pattern in the future. This was, in particular, once again, consistent with the fact that the hours the Respondent required cleaners to work were directly driven by its need to match client demand. While that client demand would not be expected to fluctuate from hour to hour, or day to day, it *would* be expected to fluctuate at longer intervals, and the Respondent did not want to be committed to giving its cleaners hours which could not be varied to meet such changes in demand.

74. We accepted the evidence of Mr Dawes, in particular, that the Mediacom contract was therefore not typical, in terms of the degree of stability that existed in relation to it for some considerable period of time. It was more typical for clients to come and go, or for their requirements to vary, at regular intervals over the weeks or months; and the Respondent wished to retain the flexibility to meet such changing demands.

75. Thus, although a cleaner would usually be allocated to a particular slot working particular hours for a particular client, this was, in short, not guaranteed to last. The opening reference in clause 5 to this being a zero hours contract was intended to make this clear, whilst the remaining provisions catered for the practicalities and mechanics that we have described. This approach seemed to us to carry through also into sub-clause 5.3, reflecting that there were no fixed or guaranteed hours, but rather, that the employee would be told from time to time what their hours would be, and might sometimes be told this at short notice.

76. We did not find sub-clause 5.4 and the reference to overtime, nor the provision for possible discipline if the individual did not honour the hours to which they had committed, to be inconsistent with this model and the

point of origin that this was a zero hours contract. As to the former, this fitted with a context in which there would be ad hoc requirements, e.g. to cover for colleagues, or where additional resource was needed on a particular client contract, and hence opportunities for further hours over and above the slot to which the individual was currently assigned. As for the latter, the Respondent had slots to fill, *and* other ad hoc client commitments to meet. It wanted to know that if an individual was offered certain hours and agreed to do them, they were then committed to that.

77. We did not find the concept that the individual employee was expected to honour the hours that they were offered and accepted from time to time to be inconsistent with the overarching provision that there was no guarantee from the Respondent's side that any particular minimum number of hours, or particular working pattern would be offered, or continue to be offered in the future.

78. We considered, standing back, that the foregoing was the overall sense and objective meaning of this clause, construing the natural meaning of its words, read as a whole, and with the context that we have described.

79. Was, however, this clause a sham, in the sense identified in **Autoclenz**? That is, was there a basis to conclude that it did not, in fact, truly reflect the actual agreement between the parties? In an employment context, when considering that question, regard may need in particular to be had to the facts (if found) that the document is a standard one drafted by the employer, and the relative bargaining power of the parties. The ultimate question, having considered the document and the relevant surrounding circumstances is: what was the true agreement?

80. Mr O'Keefe referred us to the **Pulse Healthcare** case. There, the claimants had contracts which contained zero hours provisions, but the Employment Tribunal found that they were a sham, and the EAT upheld that decision. But that is simply an illustration of a case where, on its particular facts, the "sham" argument succeeded, and the Tribunal did not err in law. We had to consider the case before us on its particular facts, and we considered the particular context and circumstances of this case to be quite different from the context in **Pulse Healthcare**.

81. This case was not, we concluded, comparable to one in which, for example, the employer, with superior bargaining power, has inserted into a standard contract, wording deliberately drafted to defeat a claim of employment status, when that wording does not reflect the actual reality. In this case, although, as we have found, it was not particularly well drafted, clause 5 was intended to reflect the features of the agreement which it was, in the particular context of this area of work, intended to reach. It was not a provision which gave a false picture of the agreement being reached.

82. The fact that this contract was in a standard form drafted by the employer did not, by itself, make the provision a sham. The zero hours

and flexibility aspects of Clause 5 were intended genuinely to capture the agreement and understanding that the parties were reaching, reflecting, we repeat, the dynamics of supply and demand in relation to this particular employment.

83. Nor did the evidence we had, about the Claimant's conversation with Mr Fraga, around the time when she started, demonstrate that this clause did not reflect the true agreement between the parties. That conversation simply reflected Mr Fraga telling her, as a matter of fact, the client slot to which he could offer to deploy her, what the hours would be in that slot, and so forth. There was no basis to find that he said anything to the effect that the Respondent was committing to employing her for at least thirty hours per week, or anything to similar effect.

84. Accordingly, this provision was not a sham in the **Autoclenz** sense, and reliance on the conversation with Mr Fraga did not assist the Claimant.

85. Pausing there, we concluded that the written terms of Clause 5 formed part of the Claimant's contract of employment. They were not a sham. Their effect was that she did not have the contractual right to any minimum number of hours' work per week, and hence did not have the contractual right to a corresponding minimum level of pay.

86. Hence the Claimant did not have the contractual right that the level of hours that she had, in fact, been working at Mediacom for a considerable time by the end of 2015 would be maintained. As a matter of fact, the arrangement at Mediacom had proved to be a stable one for her, over a number of years, but that is a different point. The question is one of construction of the contract, in terms of whether there was a contractual right for this level of hours to be maintained. There was not.

87. We had no difficulty understanding that, as matters had turned out, from at least 2012, through to the end of 2015, the Claimant's practical experience was that her working arrangements were stable and satisfactory during that period. She came into work at the same work place every day, she was given the level of hours she wanted to do, with some opportunities for extra hours from time to time, and she was even given the latitude to make some bespoke adjustments of her own to when she actually did the work. We had no doubt that she experienced this as a stable arrangement, one that suited her well and on which she depended, and that it therefore had a significant effect on her when things changed, and she was very unhappy about it.

88. However, we repeat that the question we had to ask was the legal question as to whether she had the right for this arrangement to continue as a matter of contractual entitlement. For reasons we have explained, we did not consider that the contract that she signed conferred that right on her, nor that it was a sham in the legal sense.

89. Mr O'Keefe, we have noted, had a further line of argument. This was, in summary, that the stability of the arrangement over some years, meant that a term had become implied into the Claimant's contract, by way of custom and practice, to the effect that she had become entitled to a minimum of 30 hours per week paid work going forward. However, there were two legal difficulties with that line of argument.

90. The first is that, as the authorities indicate, for an implied term of that sort to be established in law, it must be found that there is, in fact, a custom and practice that is "reasonable, notorious and certain". That means, among other things, that it must be generally understood, in the workplace, or the relevant section of the workforce, with sufficient precision and certainty, what the custom and practice is. But, there was no evidence or suggestion here that the Respondent ever did anything over the course of these years to convey to the workforce of which the Claimant was a part an expectation or understanding, that there was a "floor" of 30 hours' work per week. The second difficulty is that, where an express term addresses a topic, such as hours, a term cannot be implied which contradicts it. In the present case, the field was occupied by the express provisions of clause 5, so there was no scope for an implied term to override it.

91. A slightly different way of framing the argument would be the contention that the adoption of a stable practice over time has resulted in an implied variation to the original agreement; but the authorities establish that the mere passage of time is not sufficient to bring about a change, if there is no necessity to infer that the old agreement no longer applies, and no evidence of any occasion or process by which there was an actual agreement to vary. Thus, by way of an analogy, the mere fact that an agency worker has worked for the end user for many years, does not, of itself, lead to the conclusion that they have become an employee of the end user, absent any such variation, because there is no necessity to infer such a change (see: **James v Greenwich Council** [2008] EWCA Civ 35). Similarly, in this case, there was no necessity to infer, simply from the fact that the Claimant had enjoyed the same arrangements for a number of years, that therefore they had become a matter of legal right.

92. So, as the decision in **Autoclenz** confirms, if an agreement (or a particular provision of it) was not a sham at the outset, then it will continue to apply unless or until there is some basis to infer that there has, in some way, been a further agreement to vary. But in this case it was not suggested that there was any particular occasion or circumstance (for example, when the Claimant's Mediacom hours increased) when there was a discussion or understanding that, henceforth, she would enjoy a certain level of guaranteed hours, varying clause 5 of her contract, and even though she had not done so in the past. There was no such suggestion, or evidence in this case.

93. We reflected on the distinct line of authority concerned with the position where a contract gives an employer express flexibility, for example an

express mobility clause enabling a worker to be deployed at the employer's whim to a different location. There is some authority to say that such flexibility clauses may need to be interpreted subject to a limited implied duty of the employer not to exercise the flexibility in such a way as would make it impossible for the employee to perform, for example by using a mobility clause to send an employee working in London to work in Edinburgh at impossibly short notice overnight.

94. However, Mr O'Keefe did not advance any such line of argument in this case; and in any event we considered that the degree of communication that we have found occurred with the Claimant in the autumn of 2015, about the impending changes at Mediacom and their implications for her, would have been sufficient to cross the relatively low threshold of this implied term. But as we say, in any event, the point was not argued.

Outcome

95. In conclusion, we repeat that the Tribunal understood that the Claimant was aggrieved at the ending of the arrangements at Mediacom which for her had, as a matter of fact, been stable for some years, as to her place of work, the level of hours and hence the income delivered, and as to her ability to work those hours at times convenient to her. We understood that it was a major upset for her when this changed, and she was aggrieved about it.

96. However, what we had to decide was whether she had the contractual right to continue to be given 30 hours' work per week. For all the reasons we have given, we came to the conclusion that she did not. We did not, therefore need to resolve the question of whether, if she had had such a right, the Respondent did sufficient, from the start of 2016 to make available to her opportunities to work such hours at other locations over and above the hours she was given at Office Group. Because the underlying contract right did not exist, the claim in any event failed.

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Employment Judge Auerbach

30 August 2017