

## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: S/4104647/2016

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Preliminary Hearing  
Held in Edinburgh on 15 December 2016 and 3 and 24 May 2017

Employment Judge: Mark Mellish (sitting alone)

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15 Mrs S Carmichael

Claimant  
In Person

20 Pilton Community Health Project

Respondent  
Represented by:  
Ms R Edgar  
HR Consultant

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Tribunal is that the Claimant was not an employee of the  
30 Respondent prior to 1 June 2015 and therefore did not have sufficient qualifying  
service to claim unfair (constructive) dismissal.

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### **REASONS**

#### **Introduction**

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1. The Claimant submitted a complaint of constructive dismissal.
2. The Respondent resisted the claim, arguing that the Claimant did not have the required two years service in order to be able to claim constructive

dismissal. In summary, the Claimant's case was that she was employed by the Respondent as a Counsellor from approximately July 2005. In contrast, the Respondent argued that the Claimant was engaged as a self employed Counsellor for a number of years until the end of May 2015. The Respondent accepted that the Claimant became an employee on 1 June 2015; under a Statement of Particulars dated 29 March 2016. It was common ground that the Claimant resigned from her post on notice which expired on 10 May 2016.

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10 3. A Preliminary Hearing was listed to determine the Claimant's employment status and therefore whether she had sufficient qualifying service to make her claim to the Tribunal.

15 4. The case was originally listed for a one day hearing in December 2016. It was, however, necessary for the case to be continued to the 3 and 24 May 2017 in order to hear the Claimant's case and the parties closing submissions. The case was originally due to be continued on 27 March 2017; however, that date was vacated following an application made on behalf of the Respondent.

20 5. The Claimant gave evidence on her own behalf. Evidence was led for the Respondents from Ms Jennifer Richards (Director and, in effect, Chief Executive).

25 6. There was no agreed bundle of productions lodged with the Tribunal. Instead, each party produced their own bundle. The Claimant's bundle was numbered C1 to C56 while the Respondent's bundle was numbered R1 to R52. A small amount of documentation was subsequently added to the Respondent's bundle as follows: (i) An email from the Respondent to the  
30 Tribunal office dated 3 May 2017, with attachment (pages R53 to R54) and (ii) Documents entitled "Contract for Services" for various Counsellors (other than the Claimant) engaged by the Respondent in 2001 and 2002 (pages R55 to R63).

7. Written submissions were provided by the Claimant and the Respondent's representative; in addition both parties made oral submissions.

**Findings of Fact**

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8. The Tribunal found the following facts to be admitted or proved:-

10 (i) The Claimant was engaged by the Respondent as a Counsellor in the Adult Counselling Service. She worked with individuals with psychological problems.

15 (ii) The Claimant originally worked on Thursday evenings between 5.00pm and 8.30pm. She would typically see three clients during this time. Her place of work was the Craigroyston Community Centre.

20 (iii) At some point prior to 2010, as the Community Centre was about to close, the Claimant began working from the Respondent's premises. Her evening work was moved to Wednesdays, although her hours of work remained the same. In addition to Wednesday evenings, the Claimant also began to work on Mondays between 10.15am and 1.45pm. Again, this typically involved seeing three clients. However, if she had only two clients, she would finish at 12.45pm.

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30 (iv) Clients came to the Respondent mostly on the basis of self referral, although there were rare instances of referrals from GP's. A Counsellor such as the Claimant was allocated new clients based on information from an assessment process. An individual would attend an assessment meeting where they would discuss their issues with a Counsellor and agree whether counselling was appropriate. The individual would then be placed on a waiting list until a suitable vacancy arose and they were placed with a Counsellor relevant to their needs.

5 (v) The Respondent (“PCHP”) is a charitable organisation, based in Edinburgh. It runs various projects and services in the local community; for example, supporting individuals with reducing barriers to their health (both physical and mental), community integration and childcare. The charity has a Board of Directors. The Board has eleven members; Mr Rae is the Chairman. The Board delegates the day to day running of the business to Mrs Richards, who is effectively the Respondent’s Chief Executive. Mrs Richards was originally employed from 2009 as a Development Worker. She was appointed as a Director in February 2012. Her predecessor was Mr David Hewitt; he left the Respondent in December 2011, having been employed for around 8 years.

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(vi) The Team Leader who was latterly responsible for the management of the Adult Counselling Service is Mrs Targett. Her predecessor was Ms Gallagher; she was in post when Mrs Richards was appointed as Director but she left the Respondent’s employment in 2014/15.

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(vii) A document entitled “Contract for Services” was found on the Respondent’s computer system (page R22). The Claimant is named as “The Contractor” in the document. Her “Job Title” is Counsellor. Her date of “Commencement of Work” is said to be 25 1 June 2006. Under the heading “Pay”, the Contract states “£20 per hour on receipt of invoice”. It goes on to say “No payments are made for pension scheme, sick leave, maternity leave, holidays or redundancy. No payments are made for overtime, research or administration”. Under the heading “Information 30 Required”, the document states “It is a requirement of the project that before signing this contract the contractor agrees to provide: Full Schedule D reference, Confirmation that Class 2 NIC is paid (or exemption certificate), Written confirmation at year-end that

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all income from PCHP has been shown on Self-Assessment Return for both tax and NI purposes, Confirmation of Professional Indemnity Insurance". The copy of the document provided was not signed or dated.

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(viii) A screenshot was produced by the Respondent (R54), showing a document entitled "Suzanne Carmichael Contract.doc", alongside a "Date modified" of "11/08/2006 12:30".

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(ix) A number of other documents entitled "Contract for Services" were produced by the Respondent (pages R55 to R63). They were a series of such contracts concerning other Counsellors who had worked for the Respondent; some nine individuals in total who had commenced work on various dates in 2001 and 2002. The terms were, however, identical to the Contract for Services concerning the Claimant (at page R22).

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(x) A document entitled "Tenderer's Submission" was produced from the Claimant's personnel file (R23 to R39). Under the first heading, it is stated "The purpose of this document is to allow PCHP to identify suitably qualified and experienced Providers to deliver the Services and outcomes specified in the Service Specification within the ITT". Under "Part A – Tenderer and Financial Information" (pages R 24 and R25), the Claimant entered her name, address and contact information together with her bank details. Part B1.2 of the document states "You are required to submit current certificates for professional liability insurance cover". In response, the Claimant enters "PPS UK" and confirms her membership number. Most of the rest of the document consists of the Claimant's answers to various assessment questions (pages R28 to R34). However, at the end of that section (page R34), the Claimant states "I am an experienced Counsellor who has worked with a vast spectrum of issues both in private practice and in various counselling

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5 agencies and organisations within Edinburgh ... Currently, I have a small private practice and am also employed at Link-up Support Centre. I would be keen to bring my skills and experience to PCHP, both counselling and if required, my group work skills". The Claimant signed the tender document where required (pages R36 to R39); the top of the final page referred to "Tender for a Service to provide sessional counselling to PCHP". The document was dated 21 July 2010.

10 (xi) A document entitled "Contract for Sessional Services" (page R40) was found on the Respondent's computer system under "historical documents". The Respondent's position was that this was a 2010 document. Once again, the Claimant was named as "The Contractor", although her job title was "Self Employed  
15 Sessional Counsellor". Once again, under the heading "Pay", the Contract states "£20 per hour on receipt of invoice ... No payments are made for pension scheme, sick leave, maternity leave, holidays or redundancy. No payments are made for overtime, research or administration". Under the heading  
20 "Information Required", the document states "It is a requirement of the project that before signing this contract the contractor agrees to provide: Confirmation of Professional Indemnity Insurance". The copy of the document provided was not signed or dated.

25 (xii) The above mentioned three documents were the only "contractual" documents relating to the Claimant that the Respondent was able to find regarding the period before June 2015.

30 (xiii) As indicated above, in the period prior to June 2015, the Claimant submitted invoices to the Respondent with regard to counselling sessions provided (examples can be found at R41 and R42 for April and May 2015). A typical entry, such as that for

Monday 4 May 2015, contains a claim for £40 i.e. 2 hours work at £20 per hour. This indicated that the Claimant would have seen two clients that day. However, on Monday 27 April and Wednesday 20 May, the entry simply states “unwell” and no claim for payment is made. Similarly, on Monday 11 May, the entry states “Holiday” and no claim for payment is made. In general terms, Counsellors were not paid any extra for preparing a session or for writing up their notes.

10 (xiv) The Claimant made her own arrangements to pay income tax and National Insurance contributions prior to June 2015.

15 (xv) If a client cancelled a session with more than 24 hours notice, no payment was due to the Counsellor. If a client cancelled within 24 hours of a counselling session, then the Counsellor could claim the standard fee.

20 (xvi) Counsellors were not paid if they took holiday or were off work sick. In addition, if the Respondent was closed for example, for the Christmas or Easter holidays, Counsellors were not entitled to payment.

25 (xvii) The Respondent would be notified by Counsellors’ if they took holiday; they did not seek the Respondent’s permission. The Counsellor would, however, usually tell their clients that they would be unavailable. There was no designated number of weeks that a Counsellor was able to take off in a year.

30 (xviii) The Claimant did not receive formal support and supervision from the Respondent prior to June 2015; although there would obviously have been ad hoc conversations with managers around matters such as new clients or notification of holidays. By contrast, employed staff would have supervision sessions with their line managers every 4 to 6 weeks.

5 (xix) The Claimant did conduct initial assessments with potential clients; she would be paid £30 per assessment meeting, which would last an hour to an hour and a half. There was no additional payment for preparation or writing up.

10 (xx) Counsellors such as the Claimant could claim payment for certain administrative tasks such as telephone calls to Social Workers and GP's; this was payable upon submission of an invoice at £10 per hour.

15 (xxi) Counsellors would be invited to attend both training and Team Meetings. However, they were not required to attend; it being recognised that they might work elsewhere.

(xxii) Prior to June 2015, the Claimant did not have an email address with the Respondent, nor did she have her own log in on the computer system.

20 (xxiii) Matters changed in June 2015. The Respondent had made the decision to offer the Counsellors a contract of employment. This included two Counsellors in the Young Persons Counselling Service as well as the Claimant. This decision was made as it was difficult to manage the budget when an unknown amount would be spent on counselling on a monthly basis; clearly invoices could vary. In addition, as Mrs Richards explained, it was recognised that the Counsellors were disconnected from the project. However, they would now be brought into the organisation and would therefore attend, for example, Team  
25 Meetings and Supervision.  
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(xxiv) The Claimant was given a Statement of Particulars of Employment, dated 29 March 2016 (the copy in the Claimant's bundle at C35 is signed only by Mrs Richards and is dated



31 March 2016). The Statement (pages R43 to R51 in the Respondent's bundle) confirmed that the Claimant's job title was Counsellor and that her employment commenced on 1 June 2015. It was said that it was a fixed term post until 31 May 2016.

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(xxv) The Claimant would now receive an annual salary of £5310.18, based upon the full time equivalent. She was paid monthly and her salary was subject to the necessary deductions for income tax and national insurance contributions.

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(xxvi) As an employee, the Claimant was entitled to paid annual leave. The Statement of Particulars confirms that a full time employee would be entitled to 25 days holiday, which part time employees would receive pro rata. The Claimant was also entitled to sick pay, subject to the provisions of the contract. In addition, the Claimant would now be subject to the Respondent's personnel policies, such as the Disciplinary and Grievance Procedures and Code of Conduct. Such matters were set out in an Employee Handbook.

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(xxvii) The Claimant was entitled to join the Respondent's Pension Scheme.

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(xxviii) The Claimant was contracted to work 8 hours per week. Electronic timesheets (excel documents) would be completed and submitted to her line manager.

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(xxix) Clearly, as an employee, the Claimant would be paid if one of her clients did not turn up for a session (previously, there was no provision for payment where a client cancelled more than 24 hours before the appointment). Further, if a client did not turn up for an appointment, the Claimant could not go home; as an employee she would have to do other work within the

organisation. That other work would be allocated by the relevant Team Leader.

5 (xxx) The Claimant would now attend supervision sessions with her Team Leader.

10 (xxxi) The Respondent had monthly whole Team Meetings across the organisation. If an employee was at work, they would be expected to attend unless they had a session with a client which they could not cancel. Training sessions would also be arranged; again, if an employed Counsellor was at work, they would be expected to attend. Clearly, if individuals were not at work, they would not be expected to attend the foregoing; it was recognised that people had other jobs. However, if they were able to attend, 15 they were invited to do so.

20 (xxxii) The Claimant submitted a letter dated 10 April 2016 (page R52) to her line manager, Mrs Targett; it was subsequently scanned and sent to Mrs Richards. The letter stated as follows "I am giving one months notice terminating my fixed term post at PCHP. Ideally, I would like to return to self employed status and continue to work with my clients. However, if this is no longer an option, I hope that I will be allowed to continue working with my present clients until a natural ending in their counselling 25 process".

30 (xxxiii) Mrs Richards did not agree to the Claimant's request to return to self employed status; she was of the view that people had been offered contracts of employment for a definitive reason and that reason remained.

(xxxiv) The Claimant's period of employment with the Respondent therefore came to an end on 10 May 2016.

(xxxv) As a Counsellor, the Claimant is required to attend Clinical Supervision for one and a half hours each month. The role of a Clinical Supervisor is to provide emotional and therapeutic support. In her evidence, the Claimant stated that when she began working with the Respondent, they provided group supervision; they paid supervisors to come in and provide Clinical Supervision. Counsellors were paid £10 per hour for attending. However, over time, that arrangement changed and the Claimant was free to choose her Clinical Supervisor. The change of practice occurred before Mr Hewitt left the Respondent. The Claimant thereafter used her own Clinical Supervisor; who would (most recently) invoice the Respondent for £45 per month. The Claimant would pay the Clinical Supervisor £15 to make up that persons fee of £60. The Respondent paid the Claimant £15 to attend Clinical Supervision sessions of an hour and a half.

(xxxvi) Mrs Richards explained in her evidence that it is the norm (at least locally) that Counsellors have their Clinical Supervision paid for (or contributed to) by their Agency. The Respondent also pays for Clinical Supervision in respect of volunteers and student Counsellors.

(xxxvii) The Claimant worked for another organisation during the course of her involvement with the Respondent. She is employed as a Counsellor at the Link Up Women's Support Centre; she has a contract of employment. She began work in 2004 and her employment continues to date. She works for 8 hours per week (having started with 4 hours) on Wednesday and Thursday.

(xxxviii) The Claimant has her own private practice; from 2008 to date. She conducts this business from home. The Claimant started with between two and four clients and now works with five clients on Monday, five on Tuesday and two on Thursday evening. Her

Clinical Supervisor sometimes refers clients to her and sometimes she will be recommended by an existing client.

5 (xxxix) The Claimant has had her own Professional Indemnity Insurance from 2005 to date. She confirmed it would cover complaints about her and her work. The Insurance Company is called PPS.

### **Claimant's submissions**

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9. The Claimant, in summary, submitted that:-

- 15 (i) She was an employee of the Respondent and therefore entitled to pursue her claim of constructive dismissal.
- 20 (ii) She began at PCHP as a Sessional Worker – Counsellor in or around June 2005. She applied in response to an advertisement in a newspaper; this was initially for an Evening Counsellor.
- 25 (iii) As stated in the Counsellor Handbook, she was subject to a 3 month trial period and an Annual Personal Review (the latter never took place).
- 30 (iv) There was a stated mutual obligation between PCHP and the Claimant to give a period of notice if either party wished to end the contract.
- (v) The hourly rate she was paid was set by her employer in 2005 and was not negotiated.
- (vi) There was no break in her service with PCHP from the day she began in June 2005 until she resigned in May 2016. She worked continuously throughout the 11 years.

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- (vii) In 2010, Sessional Counsellors were invited to apply again for their positions. The Claimant understood that that only two people did; herself and her former Line Manager. She understood that PCHP management felt that the Counsellors had been given too much power and influence and this process was intended to redress the balance. There were no differences before and after this resubmission or any changes to the contractual terms. The hourly rate of pay remained the same and was fixed by her employer and there was no break in service.
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- (viii) In 2015, she was offered a fixed term contract for 10 months; June 2015 until 31 March 2016.
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- (ix) She had fixed hours and days she worked for PCHP. She originally worked with clients at Craigmoyon Community Centre; when that was closed she worked from PCHP premises. A counselling room and all items needed to perform the job were supplied by PCHP.
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- (x) There was always personal service in her situation; when she was off work for a number of months following a serious operation, she was not able to provide a substitute. When the Claimant returned, she simply picked up the same clients.
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- (xi) Whilst the Claimant was provide with a copy of the alleged contract from 2006, there is absolutely no mention of any right for her to provide a substitute.
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- (xii) The rate of pay was always something controlled by the Respondent; the Claimant was paid depending on the number of hours carried out, including any additional work required for any particular client, such as contact with their GP. In addition,

5 she was also paid to undertake separate supervision. When she first started, there was group supervision provided by the Respondent. This carried on for a number of years and thereafter she received separate individual supervision for which she was paid £10 per hour (as well as the Respondent making a material contribution towards the costs for the supervisor, who would invoice them separately).

10 (xiii) It is strange that in an apparent tender process in 2010, the price was set by the Respondent; not opening up the price for the provision of the counselling service to those counsellors tendering for the work.

15 (xiv) The Respondent was obliged to provide her with clients to counsel and she was obliged to counsel those clients. If her counselling with one client was coming to an end, then she would let the Respondent know and they would then source and secure further clients. The Claimant always worked the same shifts and saw approximately the same number of clients  
20 each week. If a client cancelled then either a replacement would be found or, if it was less than 24 hours notice, she would receive the same pay (even if she did not have to counsel any clients).

25 (xv) When she started, the Claimant was made aware of the Counsellors Handbook, which contained various obligations for her to fulfil during her employment. She had to follow all policies and procedures and there was reference within the Handbook to regular reviews, albeit these never actually took  
30 place. She was required to carry out her job in compliance with those policies and procedures fixed by the Respondent.

(xvi) In her case, there was mutuality of obligation.

(xvii) An employee would commonly be told their place of work and their working day/hours. The Claimant was told the days and hours she was required to work and worked largely to the same pattern throughout her employment.

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(xviii) An employee would commonly be subject to the employer's day to day direction and rules/policies relating to employees, particularly in relation to standards at work. The Claimant was subject to the Handbook as well as being subject to the Respondent's control over the clients that she counselled, the time constraints around the length of therapy, having to seek and explain her reasoning about any extension needed (she could be and was overruled) and the recording of all information relating to that counselling.

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(xix) A self employed individual would usually have a greater degree of freedom in their method of working than an employee.

(xx) Whilst a Counsellor, the Claimant has various professional obligations in terms of continuing professional development, which requires ongoing supervision sessions with a suitably qualified supervisor. This was an ethical requirement independent of whether or not she worked for the Respondent; yet they paid her an hourly rate for the supervision sessions and they also made a significant contribution to the supervisor's costs (90%). Further, the Claimant never had to pay any sort of rent or other payment to use the facilities; that was all provided by the Respondent.

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(xxi) In relation to the question of control:

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- She was answerable to both the Therapeutic Manager and the Director.

- When clinical supervision was provided within PCHP, attendance was mandatory with a designated supervisor rather than one that was chosen by her.
- There was an expectation from management that she would attend meetings outwith her normal hours and she was repeatedly challenged when she could not attend. More recently, although she was not openly challenged on this issue, the pressure still existed but was more subtle.
- She followed PCHP procedure with regard to paperwork, including a written checklist of questions for a client initial appointment, a script for confirming financial contributions and C.O.R.E (Clinical Outcomes in Routine Evaluation, which is a psychometric tool). She needed and received training for this.
- It is unusual in her line of work that the employer can overrule the work done in an actual counselling session but it did occur on one occasion with detrimental consequences for the Claimant and the client (this was a complaint dealt with by Mrs Gallagher).

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(xxii) In addition to the above:

- All equipment, as well as consulting rooms were provided by the Respondent.
- The Respondent provided all support staff such as receptionists.
- There was no financial risk to the Claimant.
- There was no personal financial investment by the Claimant in the role and the management was always carried out by the Respondent.
- The Claimant received a fixed hourly rate for her consulting and she was also paid overtime to cover additional work that was necessary for each client.

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- The Respondent paid her the same hourly rate for the consulting at the same intervals, regardless of whether or not she was consulting the whole time she was there.
- The Claimant should have been entitled to holiday and sick pay but simply never received this.

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(xxiii) PCHP had its own internal complaints procedure; should her conduct or standard of work have been called into question, she would have been subject to the policies and procedures.

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(xxiv) Initially, the Claimant worked specifically for the evening service but over time also began working within the daytime service. This resulted in her having both daytime and evening clients for the majority of her time working for the Respondent. She worked with either 5 or 6 clients at a time; 2 but mostly 3 clients on Monday mornings and 3 on Wednesday evenings. Her hours of work were fixed between 10.15am and 1.45pm on Monday (finishing at 12.45pm if only seeing 2 clients on that day) and 5pm to 8.30pm on Wednesday evenings.

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(xxv) Over the years, the duties and tasks she was given expanded and the actual working arrangements changed over a period of time. The Claimant believes she was being integrated into the business of the Respondent. Examples are as follows. The Claimant:

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- Was given the responsibility of carrying out initial assessments for potential clients; matching clients with Counsellors who might best suit their needs or referring clients to other services if counselling was not appropriate.
- Was asked by Mrs Gallagher and later Ms Targett to be available to support new student or volunteer Counsellors.
- Liaised with other health care professionals: GP's, Psychiatrists, Social Workers, Police etc.

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- Attended meetings with Social Workers, attended Family Meetings, and was involved in attending a Police Station to support a client. She attended the Royal Edinburgh Hospital with a client who needed to be admitted for her own safety. These are only some examples of many and she would always be entitled to payment for overtime.
- Was asked to meet with management from another organisation who were looking to access PCHP's counselling service; this led to PCHP providing counselling for that organisation.
- Attended PCHP Open Day to promote the counselling service. At all times, she was a representative of and acting as an employee of the Respondent. As a result of attending the Open Day, she uncovered serious unethical practice by a Counsellor working within PCHP; she raised her concerns with management and, after an investigation, the Counsellor in question was "let go". The Claimant's understanding, based upon this episode, was that all Counsellors, including herself, would be subject to internal procedures in terms of discipline and dismissal particularly as the Counsellor who was dismissed was, like the Claimant, a sessional Counsellor.
- Was available to and provided emotional support to other members of staff; for example she supported someone who was experiencing bullying by her line manager. She also gave emotional support to a senior development worker who was suffering from stress at work.
- Provided cover at the reception desk to allow staff to take meal breaks/when they were short staffed.
- Liaised with "women Supporting Women" (a department within PCHP) regarding a more effective referral system between the counselling service and themselves.

- Helped out where she could when needed; including small tasks such as taking down Christmas decorations.

5 (xxvi) She was always an employee of the Respondent and regarded by any visitors or clients or third parties as being an employee of the Respondent.

10 (xxvii) Her contract was never amended to reflect the reality of the work, extra duties or increased responsibility. No pay increase was negotiated and the move from the duties originally assigned to the reality of what she actually did felt like a natural progression. The varied roles were not invoice separately and she continued to be paid per hour. PCHP paid a contribution to her external clinical supervision on a regular monthly basis  
15 from 2011; the cost was initially £40 but increased to £45. Over the years, the approach to the work became less business like and the Claimant believes she became integrated into the organisation.

20 (xxviii) When she was issued with her contract of employment in 2015, her role did not change. She was subject to the same policies and procedures, subject to the same level of control and carried out exactly the same tasks (with only a little more administration required using a computer). The only difference  
25 was that she would be entitled to sick pay and holiday pay.

(xxix) She worked continuously for 10 years for the Respondent in exactly the same role.

30 (xxx) In her case, the only documentation is the contract that has been produced by the Respondent and is in such brief terms (which were never actually complied with) that this should not be regarded as determinative of her status. Further, this is a

document that she had never seen before her recent request for information.

5 (xxxi) From her very first shift with the Respondent, the Claimant was in fact an employee. The irreducible minimum requirements for a contract of employment i.e. personal service, control and mutuality of obligation all existed from day one. She became totally integrated into the business and followed all policies and procedures brought to her attention. She was paid a fixed rate, with no real financial risk on her part and to anyone looking in at the Respondent, she would be regarded as an employee.

10 (xxxii) The Claimant meets the definition of an employee as set out in the ERA 1996 and she should be permitted to continue with her constructive dismissal claim.

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#### 10. Authorities referred to:

- 20 • Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2 QB 497.
- MacFarlane and another v Glasgow City Council [2001] IRLR 7.
- Staffordshire Sentinel Newspapers Ltd v Potter [2004] IRLR 752.
- Real Time Civil Engineering v Callaghan UKEAT/0516/ZT.
- Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471.
- 25 • Carmichael v National Power [2000] IRLR 43.
- Younis v Trans Global Projects Ltd and another UKEAT/0504/05.
- ABC News Intercontinental Inc v Gizbert UKEAT/0160/06.
- Drake v Ipsos Mori UK Ltd UKEAT/0604/11.
- Motorola v Davidson & another [2001] IRLR 4.
- 30 • Brook Street v Dacas [2004] EWCA Civ 217.
- White & Anor v Troutbeck SA [2013] UKEAT 0177/12.
- Cassidy v Ministry of Health [1951] 1 ALLER 574.
- Troutbeck SA v White & Anor [2013] EWCA Civ 1171.

- Market Investigations v Minister of Social Security [1969] 2 QB 173.
- Hall (HM Inspector of Taxes) v Lorimer [1994] IRLR 171.
- Young & Woods Ltd v West [1980] IRLR 201.
- Ministry of Defence HQ Defence Dental Service v Kettle  
5 UKEAT/0308/06/LA.

**Submissions on behalf of the respondent**

11. On behalf of the respondent, it was in summary submitted that:-

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(i) The Claimant's claim for constructive dismissal is dependent on her being able to demonstrate that, at the date of termination of her employment, she had at least two years service as an employee. She must demonstrate that she was an employee as defined by S.230 Employment Rights Act 1996 ("ERA"). This definition is distinct both from the definition of a worker in the ERA and the definition of an employee for the purposes of income tax legislation.

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(ii) The Respondent accepts that the Claimant became an employee on 1 June 2015; before that date, she was self employed.

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(iii) In relation to the question of mutuality of obligation, PCHP was not required to provide clients; there was an agreement about the target number of clients for each counsellor but the number varied. The Claimant indicated how many sessions she was available to deliver but PCHP was not obliged to offer her all those sessions. The Claimant was not obliged to work; she could cancel clients if she wished to take time off. She would do this by informing the clients directly; she did not seek the agreement or approval of PCHP. The Claimant confirmed in evidence that there was no particular limit on time off or holidays.

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5 (iv) The understanding and intention of the parties are relevant. PCHP invited applicants to submit tenders to deliver counselling; most recently in July 2010. The Claimant successfully submitted a tender. She was engaged on a contract for services and acted in a way consistent with being a self employed contractor up until June 2015, when she accepted an offer of an employment contract. The Claimant recognised the difference in status when, at the point she resigned in April 2016, she specifically requested to return to self employed status.

10 (v) The Claimant's relationship with PCHP prior to 1 June 2015 was one of a professional delivering a service:

- 15 • She was free to work for others without requiring the Respondent's permission.
- She had her own business with private clients and her own professional indemnity insurance.
- The number of clients she counselled fluctuated; there was no obligation on PCHP to provide clients.
- 20 • She submitted invoices each month for the client sessions that she had delivered; she was paid per client at a rate of £20. Although this was sometimes referred to as an hourly rate, it was in effect a per client rate; she was not paid extra for preparation time, writing up time or the time between clients.
- 25 The Claimant also conducted client assessments in respect of which she received a payment of £30.
- She accounted for this income and paid tax and NI as a self employed person.
- If a client did not turn up for an appointment, she could leave.
- 30 • She was under no obligation to perform work for PCHP.
- The Claimant was not paid for holidays or sick leave.

5 (vi) The organisation had little control over the way the Claimant carried out her counselling. She received clinical supervision from an external person of her choice. The Claimant was not integrated into the organisation as an employee; she did not receive management supervision sessions, did not have a PCHP email address or a username for the computer network. Further, she was not required to attend team meetings or training sessions.

10 (vii) The Claimant came into the project, delivered counselling sessions and was free to do that in the way that she chose. She sought advice from her clinical supervisor on any issue that arose in counselling sessions for PCHP clients in the same way as she did for any other of her clients.

15 (viii) The Claimant pointed to an incident where her work was overruled by PCHP as evidence of control. However, this related to a complaint that had been made, which gave the Respondent a legitimate interest in taking action, regardless of the employment status of the Claimant.

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(ix) The Claimant gave evidence of other work that she undertook that she considered made her part and parcel of the organisation. She confirmed in cross examination that most of these were not work that she was required to do; some she was asked to do and some she took it upon herself to do. Where she needed to contact other professionals as a result of issues arising from her counselling sessions, she was paid an additional £10 per hour to do so; which she would invoice for as part of her monthly invoice.

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30 (x) From 1 June 2015, the relationship changed. The Claimant was engaged on an employment contract. The Claimant:

- Was paid a salary at the appropriate point on the organisation's pay scale and contracted to work 8 hours per week.
  - Was paid through PAYE.
  - 5 • Was entitled to paid annual leave and public holidays, paid sick leave and was entitled to join the organisation's pension scheme.
  - Was required to follow the organisation's procedures in taking leave and in relation to sickness absence.
  - 10 • Had a probation period (while the Claimant gave evidence that she did not think this was appropriate, she had not raised this as an issue at the time).
  - Was required to complete timesheets.
  - Received direct line management from the counselling team leader (Mrs Targett) and was required to attend regular support and supervision sessions with her.
  - 15 • Was allocated a PCHP email address and a user ID for the computer system.
  - Was obliged to seek agreement from the organisation to work elsewhere.
  - 20 • Was expected to do other work for the organisation (such as administrative work) if a client did not turn up for an appointment.
- 25 (xi) When all of the factors are considered, prior to 1 June 2015, the relationship was not one of employer/employee and therefore the Claimant did not have the necessary two years qualifying service to claim constructive dismissal when she resigned from the organisation on 10 May 2016.
- 30 (xii) The Claimant gave evidence about arrangements in place prior to the appointment of the current Director, Mrs Richards in February 2012. The Respondent is not in a position to confirm or deny



5 these arrangements as the staff involved are no longer employed. However, if any of these arrangements lead the Tribunal to conclude that the Claimant was an employee at that time, there is a break in service between those pre 2012 arrangements and the formal appointment of the Claimant as an employee on 1 June 2015. Therefore, any period of employment prior to 2012 would not count towards the Claimant's continuous service unless the Tribunal also concluded that she was an employee from 2012 until 1 June 2015.

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### **Relevant Law**

12. Section 230(1) of the Employment Rights Act 1996 ("ERA 1996") states that  
15 "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".

13. Section 230(2) of the ERA 1996 states that "In this Act "contract of  
20 employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

14. The terms "contract of service" and "contract for services" are not defined in  
25 statute. However, in broad terms, under a contract of service a person agrees to serve another whereas under a contract for services they agree to provide certain services to the other. The question of whether a person is employed under a contract of service or a contract for services is often a mixed question of fact and law.

15. Section 108 of the ERA 1996 states that the right not to be unfairly  
30 dismissed " ... does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination".

### **Discussion and decision**

16. The preliminary issue for the Tribunal to decide was 1) whether the Claimant was an employee 2) whether the Claimant had sufficient qualifying service for a complaint of unfair dismissal.

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17. In order for the Claimant to proceed with a claim for constructive dismissal, the Claimant must show that, at the date of termination of employment, she had at least two years service as an employee; as defined by the ERA 1996.

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18. The Respondent conceded that the Claimant became an employee on 1 June 2015. Before that date, the Respondent argued that the Claimant was self employed. Clearly, if the Respondent was right then the Claimant would have insufficient qualifying service to pursue her claim as her period of employment came to an end on 10 May 2016.

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19. The first issue for the Tribunal to consider was the status of the contractual documents relating to the period prior to June 2015.

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20. However, before doing so, the Tribunal must refer to the Claimant's original position concerning the documents entitled "Contract for Services" and "Contract for Sessional Services" at pages R22 and R40 respectively. As part of her evidence in chief, the Claimant produced a written statement. At paragraph 18 of that statement she said "I have never seen or received these documents before and would suggest that they have been created for the purposes of this Tribunal". The Respondent's representative objected to this, not least on the basis that it had not been put to Mrs Richards in cross examination. During cross examination by the Respondent's representative, the Claimant was asked to look at a number of other documents entitled "Contract for Services" concerning other Counsellors who had worked for the Respondent (see paragraph 8(ix) above). The Claimant agreed that this was likely to be the standard contract in place in 2002. She also agreed that it looks very similar to the contract at R22; albeit she said that she never received a document that looked like this. When asked whether she still

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believed that R22 had been fabricated for this Tribunal, the Claimant replied “I am unsure”. When she was shown the screenshot at R54 (see paragraph 8(viii) above) and asked whether this would allay her concerns regarding fabrication, the Claimant replied “yes”. To be clear, the screenshot was said  
5 by the Respondent to refer to the Contract at R22 and the date it was modified (i.e. 11 August 2006). At the end of this exchange, the Tribunal was left concerned that the Claimant had made such a serious allegation, seemingly without any evidence to support it, beyond her own assertion.

10 21. The Tribunal considered Mrs Richards to be a credible witness, who gave her evidence in a straightforward and convincing manner.

22. In her evidence, Mrs Richards confirmed that it was her understanding that the documents at R22 and R40 would be the documents governing the  
15 relationship between the Claimant and Respondent prior to 2015. On the balance of probabilities, the Tribunal thought that likely to be the case. The Document at R22 was a Contract which had clearly been issued to a number of other Counsellors who had commenced work a few years prior to the Claimant. The Contract at R40 was in similar but not identical terms.  
20 The details relating to both Contracts are set out above at paragraphs 8(vii) and (xi).

23. The Tribunal went on to consider matters relating to the period prior to June 2015 in more detail in light of its finding.

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24. The Claimant commenced work on 1 June 2006; that was recorded at R22 and R40.

25. It is clear that the Claimant was required to provide personal service as a  
30 Counsellor. She was not able to provide a substitute and given the nature of the work, it would not be appropriate in any event. This point was not disputed by the Respondent; they recognised the importance of the professional relationship between a Counsellor and her clients.

26. As to mutuality of obligation, it did not seem to the Tribunal that there was an obligation on the Respondent to provide work and an obligation on the part of the Claimant to accept that work. As set out above, the Claimant worked for a period of hours on Mondays and Wednesday evenings.  
5 However, as Mrs Richards said in her evidence, the number of clients which could be seen was based upon the monies available. Funding was received from Edinburgh Council and could be reduced. The Claimant was paid £20 per hour for the work she did, subject to the submission of an invoice to the Respondent. The Claimant was not obliged to work; the evidence confirmed  
10 that she could take time off if she wished, without seeking the approval of the Respondent's managers. In addition, there was no particular limit or designated number of weeks that a Counsellor could take off in a year.

27. As to control, it is clear that many skilled people carrying out a professional  
15 role will have a great deal of autonomy in the way they carry out their work. That was undoubtedly true in this case; the Claimant was a Counsellor and the Respondent had little control over how that was carried out on a day to day basis. She received Clinical Supervision but that was delivered by a person outside of the Respondent's organisation. As the evidence  
20 confirmed, the Respondent may have paid supervisors to come into the organisation or may have contributed to the cost of supervisors chosen by the Claimant. However, Mrs Richards explained it was the norm (at least locally) for Agencies to pay for (or at least contribute to) the cost of such supervision. In any event, the evidence indicated that, as a Counsellor, the  
25 Claimant was required to have a period of clinical supervision each month; she would no doubt have sought the advice and support of her supervisor in relation to her work with the Respondents as she did in relation to her work elsewhere.

30 28. In addition, the Claimant did not receive formal support and supervision from the Respondent; albeit there would obviously have been conversations with managers concerning the practicalities of new clients or notification of holidays. An employee of the Respondent would have had regular supervision sessions with their line manager. Counsellors such as the

5 Claimant would have been invited to attend Team Meetings and training but they were not required to do so. Of course, as was the case with the Claimant, they might have been working elsewhere. Prior to June 2015, the Claimant did not even have an email address with the Respondent, nor did she have her own log in details for the computer system.

10 29. The Claimant sought to persuade the Tribunal to find in her favour on the basis of the degree of integration into the Respondent's business. However, as above, she did not have supervision sessions with the Respondent's management, she was not required to attend Team Meetings or training and she did not have a Project email address or a username for the computer network.

15 30. In terms of the specific examples given by the Claimant at paragraph 9(xxv), they were insufficient to persuade the Tribunal that the Claimant had been integrated into the business. They were events which occurred over an extended period of time and did not seem to provide evidence of the Claimant being required to undertake tasks. The Claimant confirmed in evidence that she was asked to conduct Initial Assessments but was happy to do so. She was paid by invoice. She was asked rather than required to support new student or volunteer Counsellors. She was paid £10 per hour via invoice for liaising with other professionals. She was asked to meet the management of another organisation which was looking to access the Respondent's counselling service. The Claimant raised concerns with regard to unethical practice by another Counsellor but accepted in evidence that she would have a duty of care to report in such circumstances. With regard to emotional support given to other staff, the Claimant accepted in evidence that she had been approached by the staff involved. The Claimant confirmed in evidence that she had been asked but had also offered to cover the reception desk. Finally, the Claimant confirmed in evidence that she had taken it upon herself to liaise with "Women Supporting Women" (a department within PCHP) regarding a more effective referral system.

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31. In terms of how the parties described themselves, it was clear from the terms of the contracts at R22 and R40 that it was intended that the Claimant should be an independent contractor; she would be paid upon receipt of invoices, was required to confirm that she had her own Professional indemnity Insurance and was expressly not entitled to sick pay, holiday pay and so on. Further, when the Claimant came to resign from her fixed term post with the Respondent, she said that she would like to return to self employed status. The Tribunal is, of course, aware that the manner in which the parties describe themselves and their intentions will not be decisive; although in a marginal case it could perhaps tip the balance. Certainly, in this case the Claimant seemed to regard herself as having self employed status prior to June 2015.

32. In reaching its decision, the Tribunal also took note of the following matters.

33. The Claimant was free to work for others without requiring the Respondent's permission. She was employed as a Counsellor with another organisation, the Link Up Women's Support Centre from 2004; indeed her employment continues to date. She is now engaged for 8 hours per week on Wednesday and Thursday. In addition, the Claimant has her own private practice, which began in 2008 and continues to date. She works from home and now has five clients on Monday, five on Tuesday and two on Thursday evening. Her Clinical Supervisor occasionally refers clients to her and sometimes she will be recommended by an existing client. The Tribunal considered that as the Claimant was free to provide services to others and did so, this would be a factor to support a conclusion of self employed status. Of course, it is entirely possible for a person to have more than one part time employment so the Tribunal approached this factor with some caution. However, the Claimant seems/seemed to have something of a "portfolio" career; building up a working week from various engagements.

34. The Claimant had her own Professional Indemnity Insurance from 2005; she was of course required to confirm she had such insurance under the terms of the Contracts at R22 and R40.

35. The Claimant submitted invoices to the Respondent in respect of the counselling sessions she had delivered in a month. She was paid £20 per hour to see clients and was not paid extra for preparation time or writing up notes. The Claimant also conducted initial assessments with potential clients and invoiced the Respondent for a payment of £30 in respect of this; again, she was not paid extra for preparation or writing up. The Claimant was entitled to additional payment for certain administrative tasks such as telephone calls to GP's and Social Workers; however, this was again paid upon submission of an invoice at £10 per hour.

36. The Claimant made her own arrangements to account for income tax and national insurance contributions; it was only after 1 June 2015 that she was paid via PAYE with tax and NI deducted at source.

37. If a client cancelled a counselling session with more than 24 hours notice, the Claimant was not entitled to any payment; albeit if a client cancelled within 24 hours a fee was payable. Further, in evidence, the Claimant conceded that if the final client of the day cancelled she was free to leave. If the first client of the day cancelled, the Claimant was free to come in later if she was aware in time. The Claimant accepted that there was no requirement for her to perform work if there were no clients.

38. The Claimant was not paid for holidays or sick leave.

39. Obviously, matters changed from 1 June 2015; the Claimant was engaged on a contract of employment. The details of how the relationship changed are set out between paragraphs 8(xxiii) and (xxxi) above.

40. Having considered all of the relevant factors, the Tribunal concluded that the Claimant was not an employee of the Respondent prior to 1 June 2015. Therefore, as at the date of termination of her employment with the Respondent on 10 May 2016 she did not have the necessary two years qualifying service to make a complaint of unfair dismissal. The Claimant

(amongst other matters) was certainly required to carry out the work personally but she was paid by invoice for work done, worked elsewhere concurrently and accounted for tax and NI on a self employed basis.

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10 Employment Judge: Mark Mellish  
Date of Judgment: 04 September 2017  
Entered in Register: 05 September 2017  
and Copied to Parties