RESERVED JUDGMENT

Case No.2404239/2018
2404244/2018
2404245/2018
2404265/2018
2404386/2018

EMPLOYMENT TRIBUNALS

Claimants:
1. Mrs J Clarke
2. Mrs J Boothman
3. Mrs J Blackstock
4. Mrs L Tiffin
5. Mrs J Mather

Respondent: Lancashire Care NHS Foundation Trust

HELD AT: Manchester **ON:** 5-7 November 2018 & 12 November 2018 (in chambers)

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimants: Mrs J Mather, in person, and on behalf of the other claimants
Respondent: Mr E Nutman, solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimants were employed under contracts of employment during, but not between, assignments.

2. If the claimants had at least two years' continuous employment ending with the effective date of termination:

2.1. The complaints of unfair dismissal are well founded but no compensatory award would be payable for unfair dismissal in accordance with the principle in *Polkey v AE Dayton Services Ltd [1987] UKHL 8*.

2.2. The claimants were entitled to be paid statutory redundancy payments by the respondent.

3. The complaints of breach of contract in respect of notice pay are not well founded.

4. There will be a further final hearing to determine whether the claimants had at least two years' continuous employment at their effective dates of termination and remedy, if applicable.

REASONS

Claims and issues

1. The claimants all claimed unfair dismissal and that they were entitled to a statutory redundancy payment. In addition, Mrs Boothman, Mrs Blackstock and Mrs Mather, (but not Mrs Clarke and Mrs Tiffin) claimed breach of contract in relation to failure to give notice of termination.

2. The issues to be considered were identified at a preliminary hearing on 30 April 2018. These issues are set out in the Annex to these reasons. The parties agreed at the start of the final hearing that these remained the issues to be decided by the tribunal, with the exception that there was no longer an issue as to whether Mrs Blackstock had an ACAS early conciliation certificate which covered her case; she had produced that certificate.

3. The issues identified at the preliminary hearing and confirmed at the start of the final hearing did not expressly refer to the issue of whether the claimants, if they were employees, had sufficient continuous employment to qualify for the right not to be unfairly dismissed and for a statutory redundancy payment. This issue would not arise if I found the claimants to have been employees under a "global" contract of employment covering all their periods of engagement. It could be a relevant issue, however, if I found that the claimants were employees during periods of engagement (whether the duration of a rota or a particular session) but not between such periods of engagement. I raised this with the parties before closing submissions. Since this issue had not been specifically identified earlier and might require additional evidence, I decided that the fairest way to proceed was to hear submissions and decide on all other issues relevant to liability and then, if length of continuous service was a relevant issue, deal with this at a further final hearing which could also deal with remedy, if applicable. If my decisions on other issues relevant to liability meant the claimants would fail in their complaints, that hearing would be cancelled.

Facts

4. The claimants are all dental nurses. From 1999, for all the claimants apart from Mrs Tiffin, who started in April 2003, the claimants worked as dental nurses for the emergency dental service, operated most recently by the respondent. None of the claimants has worked for this service since mid October 2017, when the arrangements for staffing the evening and weekend service changed.

5. The Emergency Dental Service (EDS) in which the claimants worked was set up in 1999 by Communicare NHS Trust. The service was set up because the health authority was receiving a large number of requests for emergency care from patients who were not registered with a dentist. The service was to provide evening and weekend sessions, 365 days a year at Accrington Victoria Hospital. Dentists who signed up for at least a minimum commitment to the rota were entitled to leave the EDS phone number on their practice answer phone and be exempt from any "out of hours" responsibility for their patients.

6. Joanne Pearce, who was Dental Informatics Urgent Care Coordinator for the respondent from around 2012, began working for EDS, accompanying the dentist for whom she worked in her day job. She believed that dentists taking part in the service were initially expected to bring their own nurse with them, although I note, in the respondent's Management report into the collective grievance dated 3 January 2018, that the respondent was unable to corroborate this fact. Whether or not that was the expectation, many of the dental nurses who came to work at the evening and weekend sessions of the EDS were nurses who worked at dental practices whose dentists participated in the scheme. The nurses would not necessarily be rostered to work on EDS sessions with dentists from their own practices.

7. Most of the claimants came to work for the EDS in response to a letter sent to dental practices, which invited them to attend a meeting on a Saturday about the scheme.

8. All the claimants, other than Mrs Tiffin, began working for EDS in 1999. I have been shown forms completed by these claimants in 1999 with their personal details, headed "Communicare NHS Trust, IPS Input Document – Appointment Details". The claimants filled in the section headed "Employee to complete – Section 1 – personal details." In a section headed "Manager to complete", someone has completed the job title as "Bank Dental Nurse (EDS)" and given the number of days worked in a week as "as and when required" as well as completing an hourly rate of pay. The appointment is stated to be permanent, rather than temporary.

9. None of the claimants were issued with any document stated to be a contract of employment or statement of employment particulars. This contrasts with what is stated to be a "Principal Statement of Terms and Conditions of Employment" issued by Communicare NHS Trust to Mrs Mather earlier in 1999 in respect of a part time

post of dental nurse (not the EDS work). The terms of employment included paid annual leave.

10. The appointment details forms indicate that there was to be no paid annual leave in relation to the EDS work in 1999. At some point, this practice changed and the claimants were given paid annual leave entitlement in relation to EDS work. Mr Nutman told me that the respondent treated EDS dental bank nurses as "workers", which brings with it an entitlement to paid annual leave. However, from Mr Nutman's oral submissions, it appears that the respondent might contend, if it were a relevant issue, that the bank dental nurses were not "workers" as defined in the Employment Rights Act 1996 because, Mr Nutman argued, the required element of personal service was not there.

11. Mrs Tiffin began working for EDS on 22 April 2003. If there was documentation relating to her appointment, this has been lost or destroyed.

12. Most of those working evening and weekend shifts for EDS had other substantive posts with a dental practice or with a health authority. They did the work for EDS in addition to their other work. Although, when she started working for EDS, Mrs Blackstock had another job, with an orthodontist, after she had her third child in 2002, her only paid work was for EDS.

13. It appears from the documents that, at some point, the EDS transferred to be operated by East Lancashire Primary Care Trust.

14. I have been shown documents signed in March 2009 by Mrs Blackstock and Mrs Clarke expressing a wish to participate in the East Lancashire Dental Emergency Service at Oak House Dental Centre (which was in Accrington) and accepting and agreeing to the terms and conditions of service set out in those documents which were headed "Terms and Conditions for EDS – Oak House Dental Centre". The document set out various points under the headings, "Professional standards", "Time keeping and work undertaken during sessions" and "Premises and equipment." The document stated that poor performance or breach of rules would be referred to the management team for action and that, if the matter was judged to be serious, further sessions would not be offered until the issues had been resolved to the satisfaction of the management team. The document stated:

> "If you are unable to work any dates throughout the year (sickness, holidays etc) please inform EDS Senior Nurse ASAP. Once the Out of Hours rota has been issued, it will be your responsibility to find cover for these shifts. The substitute EDS nurse must meet all our requirements for professional standards and be fully trained and up to date with our procedures and protocols and computerised systems. Only in exceptional circumstances would a nurse not on the rota be considered as a substitute."

It also provided that, if the nurse failed to attend twice within a 12 month period, "your post will be terminated."

15. The operation of EDS transferred to the respondent, as part of the wider dental service, with a transfer of community services to the respondent from two Primary Care Trusts in June 2011.

16. The respondent has standard terms and conditions for bank workers working for its own bank scheme. These were not issued to the claimants when the EDS transferred to the respondent. The claimants were never issued with the respondent's temporary staffing bank induction pack. However, the claimants accepted in evidence that the description under the heading "Working Hours" correctly reflected the arrangements between them and the respondent. This states:

> "Work through the Temporary Staffing Bank is classed as casual, and as such there are no guaranteed hours of work. Please refer to your Terms of Engagement.
>
> "Work will be offered to you as and when it is available. We will try to give you as much notice as possible when offering work. However, the Trust is under no obligation to offer you work and you are under no obligation to accept any offer of work."

17. The EDS, at least by the time it was operated by the respondent, had weekday daytime sessions as well as evening and weekend sessions. Prior to mid October 2017, dental nurses working on the evening and weekend sessions were engaged on a basis of agreement as to the sessions they would work and payment per session on an hourly rate. I will use the description of "bank dental nurses" which came to be used, even if it was not consistently used to describe the claimants and others working under these arrangements from the start. The Monday to Friday daytime sessions were staffed by dental nurses working in permanent posts with the respondent, with fixed hours, which I will describe as "substantive posts".

18. The hourly rate for bank dental nurses was initially higher than that for dental nurses working in substantive posts. Changes relating to "Agenda for Change" meant that the same hourly rate was paid to bank dental nurses and those in substantive posts, which meant, at the time of the change, a reduction in the hourly rate for bank dental nurses.

19. At first, nurses working for EDS provided information about their preferred shifts and periods of unavailability, for holidays or other reasons. Managers then drew up rotas, taking into account that information.

20. Later on, EDS bank dental nurses would be sent an "out of hours nurse's availability" sheet to complete in respect of a period of a month or more. The nurse was asked to tick dates they were available. The form stated that, if availability was

not sent back by a stated date, the nurse would not be given any sessions. A rota for a month would be drawn up and sent out 6-8 weeks before the start of the month. At the bottom of the rota, at least from February 2017, which is the date on the example rota I was shown, was written:

> "If you would like to swap a session you can continue to do so, however we have had to implement a deadline due to the need to send the staffing details to LCFT on a weekly basis. Therefore the deadline for swapping sessions and informing Claire/Carmen of this is Thursday 4 p.m for the following week, after that time swaps can not occur for that week."

21. The note on the form refers to swaps. The claimants accepted in evidence that it was also possible to give up a shift to another bank nurse, without swapping, provided they informed the respondent about this. I find that they could only arrange for work allocated to them to be done by another bank dental nurse. Although the 2009 terms had referred to the possibility, in exceptional circumstances, of a substitute being a non-bank nurse, I find that, in practice, this did and could not happen because of the checks which anyone working for EDS had to undergo, including DBS checks, which could not have been done in time for someone not already cleared to work as a bank dental nurse to cover for a shift.

22. The claimants confirmed in evidence that they were under no obligation to offer any availability to work and the respondent could not require them to work any particular minimum number of hours. Once the rota was drawn up, however, they had to work the shifts allocated to them or find another nurse to do so. Ms Pearce gave evidence that, if a nurse could not get cover, the manager would text everyone on the bank scheme asking if anyone wanted the shift and normally, at least one person wanted the extra money. In the rare cases where someone could not find cover, usually because of an emergency, the shift would be covered by the manager.

23. Mrs Tiffin gave evidence that, one year, no one wanted to work on Christmas Day, so managers put all the nurses' names into a hat and Mrs Tiffin's name was drawn to be the nurse to work on Christmas Day. Mrs Tiffin had small children and did not feel able to work on Christmas Day so took a break from the service rather than work on Christmas Day; she did not feel she could just refuse to do the Christmas Day shift but continue to work other shifts. Mrs Tiffin thought another nurse, who did not have a young family, did the shift on Christmas Day. She could not remember how that came about; whether the respondent organised this or not. Joanne Pearce confirmed in evidence that, before she became manager, bank nurses were often threatened that, if no one volunteered to work the festive periods, their names would be put into a hat. Ms Pearce said this did not feel right to her and they did not do it again.

24. If a bank worker failed to attend for 2 shifts, after having said they were available, they were removed from the scheme.

25. If a bank worker did not accept any work for 2-3 months, they were usually phoned to check they were okay and to check that they wanted to stay on the scheme.

26. The claimants accepted that the respondent could cancel a session after it had been included on the rota e.g. if there was no demand for the session, and, if this happened, the dental nurse who had been booked for the session was not entitled to any pay for the cancelled session. Given the demand on the service, it was unusual that a session was cancelled.

27. Over time, the respondent reduced the number of nurses it needed on shift. The number of people on the bank scheme reduced. When Ms Pearce started to manage the scheme in 2012, there were around 45 bank nurses. In 2017, prior to the changes which I address shortly, there were 30.

28. The respondent developed a large scale transformation plan to reduce overspend in early 2017. One of the proposals was to develop a workforce model that, amongst other things, minimised the reliance on bank and agency staffing. In particular, there was a proposal to reduce the reliance on bank dental nurses to provide out of hours urgent care nursing support. Other proposals included the potential redundancy of some dental nurses with substantive posts.

29. There was a consultation process with union representatives. Revisions were made to proposals as a result of the collective consultation.

30. The consultation paper was also sent to managers and some affected staff. It was not sent to the claimants and other bank dental nurses because they were not regarded as employees.

31. Sarah Wright, who, at the time, was the Care Group manager with responsibility for services including emergency dental support, gave a series of presentations at different sites, to outline the proposals to affected staff. She also conducted a series of drop-in workshops for staff. The claimants and other bank dental nurses were not directly informed of these sessions, unlike affected staff who were recognised to be employees. Details of sessions were on the respondent's intranet. I accept that the claimants did not have a realistic opportunity to view information on the respondent's intranet. They could only access it when at work for the EDS and they were too busy during sessions to do this. There was no real opportunity, in practice, to go on the intranet after a session finished. Sessions often overran and finished late.

32. On 15 May 2017, the claimants were sent a text inviting them to a meeting on 18 May in Preston, from 6.15-7.30 p.m. The text stated:

> "Hi all you may or may not be aware that Dental Services provided by LCFT across Lancashire will be subject to a tender process later this year. In order to prepare for this process LCFT have been reviewing the dental service and

> have started a consultation with employed staff on Thursday 11 May 2017. We would like to extend this invitation you [sic] to talk about the changes and the implications for staff who work with LCFT, but are not directly employed."

33. The meeting, which was an additional meeting arranged at short notice, was held at the request of the trade union employee representatives.

34. None of the claimants attended the meeting. No other bank dental nurses attended. Two sessional dentists, who were also invited to the meeting, attended. I accept that it was difficult for the claimants to attend at the place and time arranged at the short notice given. I also accept that the claimants did not appreciate, from the text, that their work for the EDS was likely to significantly diminish.

35. The respondent's intention, which was put into effect from mid October 2017, was that dental nurses with substantive posts would staff the emergency dental service at evenings and weekends as well as weekday daily sessions; their working hours would be amended so that they could be rostered to work at any of these times. Bank nurses would only then be used where a session could not be staffed by someone in a substantive post e.g. due to sickness.

36. Dental nurses with substantive posts had to apply for posts in the reorganised service. The claimants were not eligible to apply since they were not regarded as employees. 8 permanent dental nurses were made redundant as a result of the process.

37. On 20 September 2017, Mrs Mather wrote to Ceri Mansell, Service Manager, asking for an update on the future of the EDA operating out of hours at Oak House Dental Centre. She wrote that the current rota had only been completed and allocated up to and including 15 October. She wrote:

> "I am aware that there are and have been many changes taking place recently with the service and staffing and therefore, I am concerned about the future of the Emergency Dental Service and my participation within this service. Is there any intention of requesting availability from the existing members of nursing staff for staffing sessions after 15th October?
>
> "We have developed strong working relationships and established a highly motivated, committed and caring team with the focus on patient care and compassion. We have worked long sessions extending beyond the proposed estimate finish times, unsocial hours, bank holidays, Easter and Christmas periods over 365 days per year. Most of these sessions have been executed autonomously without the presence of a member of management, we have dealt with troublesome situations, undertaking decontamination duties, medical emergencies and been responsible for the security of the building at the end of sessions.

> "I find it difficult to accept that after working within the Emergency Dental Service since its commencement in 1998 – almost 20 years (and I'm sure I speak on behalf of many of my colleagues) that rumours have been allowed to circulate suggesting that we are going to be surplus to requirement to facilitate the operation of the service without consultation or discussion regarding future intentions and proposals, especially when 15th October is only 3 weeks away."

Mrs Mather asked for information relating to her enquiry.

38. Mrs Tiffin also wrote to Ceri Mansell on 21 September 2017, asking for information about the future of the service, writing that she believed they were "in the process of axing the EDS bank staff."

39. Mrs Boothman wrote to Ceri Mansell on 26 September 2017, also asking about the future of the EDS. She wrote that she had asked on numerous occasions fellow colleagues, her line manager, Jo Pearce, and the staff co-ordinator who would normally produce the rota about the rota after 15 October 2017 but no one had any information and she had been advised to contact him.

40. The letters appear to have gone unacknowledged until 16 October 2017, when Mr Mansell acknowledged receipt of the letters and wrote that he would respond in due course.

41. At the end of September 2017, the claimants were sent an email informing them that the new workforce model, with new rotas and teams, would start from 16 October 2017. The email stated:

> "Further to the consultation and the outcome to reduce reliance on bank usage, the EDS out of Hours will be staffed by LCFT employees from the 16th October 2017. This does not mean that the out of hours service will stop using the Bank but it does mean that the number of bank shifts will be significantly reduced. Employees and bank workers will be able to remain on the bank moving forwards to be considered for future bank shifts, with a new 'terms of engagement agreement' being issued to those affected.
>
> "Please advise if you would wish to remain on, or now join the bank."

42. New terms of engagement were sent to at least some of the claimants at the end of September or early October 2017. These were stated to be the terms which would apply to all bank workers who did not hold a substantive post with the respondent. They were asked to sign and return the final page of the new terms. None of the claimants did so.

43. The new terms of engagement were stated to form the terms of engagement of work with the respondent for the period of any "Assignment" which was defined as

"the individual shift or series of shifts during which you are engaged by the Trust (by being registered on the Temporary Staff Bank) to carry out from time to time." Included in the introduction was the statement: "It is the intention of the Trust and you that outside any agreed "Assignment" there is no employment relationship between the parties."

44. The terms stated in the introduction that "There is no mutuality of obligation between the Trust and you. This is defined as a mutual understanding between the Trust and you that there is no contractual obligation on the Trust to offer you work and, equally, there is no obligation on your part to accept the offer of work. **This Agreement does not constitute a contract of employment within the meaning of the Employment Rights Act 1996**."

45. The terms provided for notice which had to be given by the individual when engaged under the Terms of Engagement for a particular Assignment if they wished to terminate the Assignment before its scheduled end.

46. On 13 October 2017, Joanne Pearce sent a text to bank dental nurses, thanking them for all their support on the EDS over the years. She wrote: "I am sorry it's not carrying on as it was."

47. On 16 October 2017, Unison submitted a formal collective grievance on behalf of Unison members working on the staff bank, stating that it was their belief that "these ladies have employment rights due to the length of time they have been working on the bank without a break in service these ladies have been rostered to work on a regular basis, could we please check as unison believes this demonstrates some mutuality."

48. Ceri Mansell invited those who had written to him to meetings. Mrs Boothman and Mrs Blackstock attended meetings.

49. On 20 December 2017, an outcome letter was sent to Unison in relation to the collective grievance. The letter included the following:

> "It is our opinion that individuals working on EDS had been engaged in LCFT under a bank worker arrangement and as such would not be considered as an employee of LCFT, and therefore there would be no employment relationship between them and LCFT for their bank work.
>
> "Individuals were engaged to work on the EDS when it was established in 1999 and the appointing form and subsequent paper work denote that this was a bank position with an ad-hoc, as and when required working arrangement. The service was advertised at this time in this manner and the appointing forms, of which we have examples on file, signed by individuals in 1999, clearly indicate this arrangement."

50. Ceri Mansell wrote to Mrs Boothman, Mrs Blackstock and Mrs Mather on 21 December 2017. Included in the letters was a statement of the respondent's view that the claimants were not employed by the respondent and, therefore, the respondent was under no obligation to formally consult with them about the changes within the service which were effective from 16 October 2017. He wrote that "out of courtesy" they did invite them, on 15 May, to a meeting on 18 May. Mr Mansell wrote:

> "It is important to note that we are not removing or withdrawing the Bank but reducing our use of the bank from 16th October 2017. This does mean that the number of bank shifts would be significantly reduced. Shifts would be sent through the Temporary Staffing office who would contact appropriate bank staff usually by text offering the shift. Staff would confirm they are able to cover the shift, and the shift is offered on a first come basis. Employees and bank workers would be able to remain on the bank moving forwards to be issued with and need to agree and sign a new "terms of engagement agreement" being issued to those affected."

51. From 16 October 2017 onwards, the respondent has sent group texts to those it regards as bank dental nurses, offering available shifts, usually at short notice. The claimants have not accepted any of these offers. Joanne Pearson's understanding is that, if one of the claimants had responded positively to one of the offers of work, she would have had to get the claimant to sign the new terms and conditions to allow them to work, which is consistent with what Mr Mansell had written. Most of the shifts have been offered at short notice, a day or two ahead, at most, unless it is to cover for long term sickness, in which case there may be a few more days' notice.

52. The respondent has had difficulty in covering absences in the emergency dental service since the new arrangements came into effect, both for weekday daytime shifts and evening and weekend sessions, which appears to be due to a reduced number of bank nurses and difficulties for bank nurses being able to work at short notice. The respondent has decided to try to recruit new bank dental nurses; I was told that an advert was due to go out imminently.

Submissions

53. Mr Nutman produced written submissions on behalf of the respondent and made further oral submissions.

54. Mrs Mather made oral submissions on behalf of all of the claimants.

55. I do not seek to summarise the submissions but address the principal arguments in my conclusions.

The Law

56. An "employee" is defined by section 230(1) Employment Rights Act 1996 as being "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." "Contract of employment" is defined as meaning a contract of service or apprenticeship. Whether an individual works under a contract of service is determined according to various tests established by case law. A tribunal must consider relevant factors in considering whether someone is an employee. An irreducible minimum to be an employee will involve control, mutuality of obligation and personal performance, but other relevant factors will also need to be considered.

57. Where an individual is engaged to work for specific sessions or specific assignments, it is possible that there is an overall, "umbrella" contract of employment governing the relationship. However, if this is not the case, it is possible that each assignment could be a separate contract of employment, although this will not necessarily be the case. The Court of Appeal decisions in *McMeechan v Secretary of State for Employment [1997] ICR 549* and *Cornwall County Council v Prater [2006] IRLR 362* are examples where it has been held that the individual assignments were separate contracts of employment.

58. In *Little v BMI Chiltern Hospital EAT 0021/09*, the EAT upheld a decision that a hospital bank porter was not employed, even during individual assignments, because of a lack of mutuality of obligation. Mr Little could be sent home part way through a shift if his services were no longer required and he was then not entitled to payment. He could also leave early himself. The EAT distinguished *Prater* on the basis that Mr Little's work could be withdrawn during his shift. The EAT in *Drake v Ipsos Mori UK Ltd UKEAT/0604/11* commented, in relation to *Little*, that it did not appear that *McMeechan* had been cited. HHJ Richardson commented in paragraph 40 that, "if *Little* were treated as authority for the proposition that a right to terminate the current work at will is inconsistent with a contract of employment it would be contrary to the result and reasoning in *McMeechan* and to the expressed view of the Appeal Tribunal in *Stephenson.* Moreover, for the reasons I have given, I do not think the proposition would be correct. I consider that *McMeechan* (a decision of the Court of Appeal) and *Stephenson* should be followed".

59. The reference to *Stephenson* is to the decision of Elias J (as he then was) in the EAT in *Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471*.

60. Many cases which deal with employment status of individuals who work on a "casual" basis, consider only whether there was an overarching or "global" contract of employment which continues between assignments. They give no assistance in deciding whether there is a contract of employment during the course of an individual assignment.

61. Section 95 ERA defines the circumstances in which an employee is regarded as dismissed by his employer for the purposes of unfair dismissal. The relevant part for the purposes of this case is s.95(1) which provides:

> *"(1) For the purposes of this Part and employee is dismissed by his employer if (and, subject to subsection (2)…., only if) –*
> *a) the contract under which he is employed is terminated by the employer (whether with or without notice),*
> *b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or*
> *c) the employer terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

62. Section 235(2A) ERA defines when a contract of employment is a "limited-term contract" as follows:

> *"(a) the employment under the contract is not intended to be permanent, and*
> *(b) provision is accordingly made in the contract for it to terminate by virtue of a limiting event."*

63. A "limiting event" is defined in s.235(2B) as including "in the case of a contract for a fixed-term, the expiry of the term."

64. Section 139(1) Employment Rights Act 1996 defines when an employee is to be taken to be dismissed by reason of redundancy. The relevant parts of that subsection for the purposes of this case are as follows:

> *"For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*
> *(a)…..*
> *(b) the fact that the requirements of that business –*
> *(i)for employees to carry out work of a particular kind, or*
> *(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,*
> *have ceased or diminished or are expected to cease or diminish."*

65. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (the 1996 Act). Section 94(1) of the 1996 Act provides that an employee has the right not to be unfairly dismissed by his employer.

66. Fairness or unfairness of the dismissal is determined by application of section 98 of the 1996 Act. Section 98(1) of the 1996 Act provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the

reason for dismissal and if more than one, the principal one and that it is a reason falling within section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Redundancy is one of the potentially fair reasons for dismissal.

67. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and this shall be determined in accordance with equity and the substantial merits of the case. In considering the reasonableness or unreasonableness of a dismissal, the tribunal must consider whether the decision to dismiss was within the band or range of reasonable responses.

68. In accordance with principles set out by the House of Lords in *Polkey v AE Dayton Services Limited [1988] ICR 142,* a tribunal may reduce a compensatory award for unfair dismissal by up to 100% if there is evidence to suggest the claimant might have been fairly dismissed, either at the time the claimant was dismissed or at some later date.

Conclusions

Employment status

69. I consider first whether the claimants were employees within the meaning in s.230(1) of the Employment Rights Act 1996. Although the issues as identified at the preliminary hearing identified the issue as “are the claimants workers or employees”, none of the claims brought by the claimants rely on worker status; all require the claimants to have been employees. The respondent had accepted in its responses that the claimants were workers and this was reflected in Mr Nutman’s written submissions. However, in oral submissions, Mr Nutman raised the possibility that, if a claim turned on worker status, the respondent might argue that the claimants were not workers because, he submitted, there was not the necessary element of personal service in the relationship. In these circumstances, I consider it would not be appropriate for me to make a decision on whether the claimants had worker status, if they were not employees.

70. I consider the question of employment status in relation to all the claimants in the same way. There has been no suggestion that there are any features which would distinguish the situation of any claimant from that of the others in relation to employment status.

71. I have to consider a number of possibilities: a) whether there was an overarching or “global” contract of employment which existed between assignments or

engagements, as well as during such assignments or engagements; b) if there was no such global contract of employment, whether there was a contract of employment during each assignment or engagement. In relation to whether there was a contract of employment during each assignment or engagement, was an assignment or engagement the rota for a month at a time or was it each individual session i.e. a single shift in an evening or during the day at a weekend?

72. The claimants, understandably since they are not legally represented, have not addressed their arguments specifically to the issue of whether there is a global contract of employment and/or separate contracts of employment for each assignment. However, I consider it appropriate that I consider both possibilities. In *McMeechan,* the claimant, who was not legally represented, was understood, prior to the Court of Appeal, to be pursuing his claim to employee status on the basis of his general relationship with the employment agency. However, at the Court of Appeal, the members of that Court, identified that the case the claimant wished to put required consideration of whether there was a contract of employment during a particular assignment with a client and allowed the claimant to pursue his claim on that basis. The Court noted, that, in *O'Kelly v Trusthouse Forte plc [1983] ICR 728,* the industrial tribunal gave independent consideration to whether both the general and the specific engagement gave rise to contract of service and was held to have been right to do so. Waite LJ commented that it seemed to him to be an irresistible inference from the remarks of Sir John Donaldson MR, that the tribunal was regarded as being under a positive duty so to do. In this case, Mr Nutman, on behalf of the respondent, confirmed he was in a position to address me on the issue of whether there was a contract of employment in relation to the global arrangement and/or the specific assignments, and did so.

73. I consider first the overarching arrangement and whether this constituted a contract of employment. I conclude that it did not. The claimants agreed that there was no obligation on the respondent to offer them work and they were under no obligation to offer any availability during a particular period and, therefore, under no obligation to accept work in relation to a particular period. For an employment contract to exist, there must be what is often referred to simply as mutuality of obligation or, in the terms preferred by the EAT in *Drake v Ipsos Mori UK Ltd*, referring to a description by Langstaff J in *Cotswold Developments Construction Ltd v Williams [2006] IRLR 181,* "a requirement of mutuality specific to contracts of employment"; the contract has to "necessarily relate to mutual obligations to work, and to pay for (or provide) it: to what is known in labour economics as the "wage-work bargain".' The respondent was not obliged to send out requests for availability to the claimants or to put them on the rota for any shifts at all, or for any particular shifts, although, in practice, the respondent would give the claimants at least some of the shifts for which they had said they would be available. The claimants were not obliged to agree to do any work by offering availability. They could, if they wished, not offer any availability for a particular month or longer. In between assignments, the obligation to work and to provide and pay for work, which are necessary for there

to be a contract of employment, were absent. I conclude there was no contract of employment which continued between assignments.

74. I turn then to consider whether, during the course of an assignment, there was a contract of employment. It is necessary to consider what constituted an assignment. The respondent issued rotas, generally for a month at a time, issuing them, at least in recent years, 6-8 weeks before the start of the rota. Once a bank dental nurse was listed for one or more sessions on the rota, she was committed to work during those sessions, unless she found another bank nurse to work a session in her place (whether as a straight swap or otherwise). The respondent was obliged to pay the nurse for sessions worked. However, the respondent did have the right to cancel a session, in which case it was not obliged to pay the nurse for the cancelled session. I have had no evidence to suggest that the respondent had the right to send a nurse home during the course of a session which had started and not to pay her for the remainder of the session, assuming there was no alleged misconduct on the part of the nurse.

75. I conclude that an assignment is the period for which a rota is issued; usually a month. I conclude that there was mutuality of obligation during such an assignment; the necessary "wage-work bargain" existed for the duration of that rota. The nurse was committed to work the shifts on the rota or to find another bank nurse to do the shift in her place. This obligation is underlined by the fact that Mrs Tiffin, when rostered to work on Christmas Day, felt she had to take a break from the service, rather than simply refusing to work that shift but continuing to work other shifts on the rota. The fact that the respondent could cancel a session, without needing to pay the dental nurse, does not prevent there being the necessary mutuality of obligation. In *McMeechan,* the conditions applicable to each engagement provided that the agency could instruct the claimant to end an assignment with a client at any time without giving a reason. As noted by HHJ David Richardson in *Drake v Ipsos Mori UK Ltd,* at paragraph 36, the fact that the agency could instruct the claimant to end an assignment at any time was treated, if anything, as a factor in support of the existence of the contract of employment. On the basis of the reasoning in *Drake v Ipsos Mori UK Ltd,* to which I have referred in the section of these reasons on the law, I do not consider that the *Little v BMI Chiltern Hospital* case is authority which I am required to follow on the proposition that a right to terminate the current work at will is inconsistent with a contract of employment. In any event, I consider that the claimants' situation could be distinguished from that of the hospital porter in *Little* on the facts; there is no evidence that the respondent could send the claimants home during the course of their shift without payment for that shift, unlike in *Little*.

76. I have, therefore, to consider whether the other necessary elements for there to be a contract of employment existed during the course of the assignment. In addition to mutuality of obligation, there must be sufficient control and personal performance, as well as other factors being consistent with there being a contract of employment.

77. The respondent argues that there was not a sufficient level of control by the respondent over the claimants; they were not controlled or monitored by the respondent, but by the sub-contracted dentist. I heard very little evidence relevant to the issue of control. It appears to me that, in relation to control, the claimants were in no different position to dental nurses with substantive posts who worked on the emergency dental service during the day on weekdays. The claimants acted in accordance with the requirements of the dentist they were assisting. I heard no evidence as to whether the dentists working on the EDS during the day on weekdays were directly employed by the respondent or were dentists sub-contracted to provide the service, as was the case in the evenings and at weekends. Even if the dentist was engaged by the respondent under different contractual arrangements, I conclude that this does not prevent the necessary control by the respondent existing during sessions worked by the claimants. Sessional dentists would be performing their services to patients, and controlling the work of those assisting them, as agents of the respondent. There has been no evidence to suggest that the claimants were not acting in accordance with the instructions of the respondent when performing other duties during shifts which would not have been required of nurses in substantive posts working during the day on weekdays e.g. securing the building at the end of the session. I conclude that there was sufficient control by the respondent of the claimants during sessions worked during the assignments to be consistent with a contract of employment existing during an assignment.

78. The respondent argued that the right of substitution meant that the necessary element of personal service for a contract of employment did not exist during an assignment. I was surprised by this argument, given the respondent had, in its responses and in Mr Nutman's written submissions, asserted that the claimants were workers. There is, of course, the same requirement of personal service for worker status as for employment status. However, given Mr Nutman's oral submissions to the effect that this was not a legal concession, since worker status was not in issue in this case, I must consider whether the necessary element of personal service existed during assignments. There was a limited right of substitution; the claimants could, once rostered to work a particular shift, get another bank nurse to cover that shift, whether as a straight swap or by giving up that shift to the other nurse. This was not an unfettered right of substitution. The substitute had to be another bank nurse. The right of substitution was no wider than the arrangement in *Pimlico Plumbers Ltd v Smith [2018] UKSC 29,* in which case the Supreme Court held that the tribunal was entitled to hold that the dominant feature of Mr Smith's contracts with Pimlico Plumbers was an obligation of personal performance. At paragraph 34, the Supreme Court noted that the substitute had to come from the ranks of Pimlico operatives i.e. from those bound to Pimlico by an identical suite of heavy obligations. At paragraph 28, the Supreme Court noted that the right to substitute another Pimlico operative was not limited to days when, by reason of illness or otherwise, Mr Smith was unable to do the work; he had given an example of being able to substitute when an opportunity arose to accept a more lucrative assignment elsewhere, which the Court said demonstrated the wider reach of the right to substitute. If anything, the claimants right of substitution was more constrained than

that of Mr Smith; the rotas, at least from February 2017, set a cut off date for swapping shifts. I conclude that the limited right of substitution did not preclude there being the necessary element of personal service for there to be a contract of employment during the course of an assignment. The work had to be done by the claimant unless she arranged for it to be done by another bank dental nurse. I conclude that the claimants were required to give personal service to the extent required for a contract of employment.

79. I do not consider that there is evidence of any other factors which point against there being a contract of employment during an assignment. I conclude that there was a contract of employment during each assignment. I conclude that the claimants were employees during the course of each assignment, which I have concluded is the period of an issued rota, on which the claimant is rostered to work, although they were not employees between assignments.

Were the claimants dismissed?

80. The respondent submits that, if the claimants were employees, they were not dismissed because the EDS bank scheme continues and the claimants have been offered shifts on that scheme.

81. I have concluded that the claimants were employed during the course of an assignment, which was the period of an issued rota. The last issued rota was for the first half of October 2017. According to the tables appended to Ms Pearce's witness statement, all the claimants except Mrs Tiffin did some work in October 2017. However, Mrs Tiffin questioned the accuracy of the table relating to her and produced a pay slip which appears, on the face of it, to suggest that she did work in October 2017. Since Mr Nutman did not have an opportunity to take instructions on this matter, I will not make any finding at this stage about whether Mrs Tiffin was on the rota for October 2017. If anything turns on this, and there is a further final hearing, this matter may be raised and determined at that further hearing.

82. I conclude that the expiry of the assignment, without renewal, was the expiry of a fixed term and a dismissal, as defined in s.95(1) ERA for the purposes of unfair dismissal. I do not consider that the offer by the respondent of some continued bank work, offered at short notice and subject to signing up to written terms of engagement, prevents there being a dismissal as defined in s.95(1) ERA.

83. I conclude, therefore, that each of the claimants was dismissed on the expiry of the term of the last rota period in which they did work. For all the claimants except Mrs Tiffin, it is common ground that this was the rota which ended on 15 October 2017. There may be an issue as to whether Mrs Tiffin's last assignment ended on 15 October 2017 or the end of September 2017.

Continuous employment

84. The claimants only had the right not to be unfairly dismissed and to be paid a statutory redundancy payment if they had at least two years' continuous employment ending with the effective date of termination. Any conclusion that a claimant was unfairly dismissed and/or entitled to a statutory redundancy payment is, therefore, subject to the claimant being found to have sufficient continuous service at a further hearing, if the respondent disputes that they have sufficient continuous service.

Were the dismissals unfair?

85. The respondent submits that, if there was a dismissal, it was for the statutory permitted reason of redundancy and/or some other substantial reason and fair.

86. I consider first whether the respondent has shown a potentially fair reason for dismissal.

87. There was no renewal of the claimants' contracts of employment because the respondent decided to change the way the EDS was staffed. The respondent wanted to reduce costs by reducing the reliance on bank nurses, staffing the service, whenever provided, with nurses in substantive posts as far as possible. The number of dental nurses in substantive posts was also being reduced. Dental nurses with substantive posts had to apply for posts in the reorganised service. 8 permanent dental nurses were made redundant as a result of the process. After 15 October 2017, bank nurses were only to be used to fill gaps in the rota, usually at short notice because of sickness absence.

88. I conclude that the respondent has shown that the claimants were dismissed for the potentially fair reason of redundancy. The respondent's need for dental nurses to staff the EDS had diminished.

89. I turn now to the fairness of that dismissal.

90. The respondent consulted with employee representatives, who were union representatives.

91. The claimants were not specifically notified of workshops and drop-in sessions for staff, other than the session arranged at short notice in May 2017, because they were not regarded as employees. The notice of the meeting they were invited to did not alert them to the likely significance of what was to happen. There were no individual meetings with the claimants prior to the ending of their assignment to explain why the arrangements were changing and there would be no offer in a similar form to the past to sign up to sessions on a rota for a month, 6-8 weeks ahead. Requests from some of the claimants for information, having heard rumours about changes to the service, were not acknowledged at all until 16 October 2017, the day after the last rota ended, and no substantive answers were given until

December 2017, several months after the new arrangements had come into effect. The claimants were notified by email at the end of September, approximately two weeks before the changes, in the following terms:

> "Further to the consultation and the outcome to reduce reliance on bank usage, the EDS out of Hours will be staffed by LCFT employees from the 16th October 2017. This does not mean that the out of hours service will stop using the Bank but it does mean that the number of bank shifts will be significantly reduced. Employees and bank workers will be able to remain on the bank moving forwards to be considered for future bank shifts, with a new 'terms of engagement agreement' being issued to those affected.
>
> "Please advise if you would wish to remain on, or now join the bank."

92. The claimants were not invited to apply for the substantive dental nurse posts in the new structure in the same way as those in substantive posts.

93. I conclude that the respondent acted within the band of reasonable responses in not inviting the claimants to apply for substantive posts in the same way as those already in substantive posts. The working arrangements for those in substantive posts were very different from the bank dental nurses; those in substantive posts had ongoing obligations to the respondent and the respondent had ongoing obligations to those employees in a way which was not the case between the bank dental nurses and the respondent where, between assignments, there was no continuing contract of employment.

94. I conclude, however, that the respondent did not act reasonably in the consultation process once the respondent had decided, after the consultation process with the unions, on the form of the restructure and the process to be followed in selecting people for redundancy. It appears that the bank dental nurses were largely forgotten through a mistaken view as to their employment status and a lack of understanding of the nature of the arrangements for staffing the out of hours EDS. The label of "bank" may have led those involved in implementing the process to regard the arrangements between the respondent and the bank dental nurses as much more casual than they were in reality. I conclude, for this reason, that the dismissal were unfair. Subject to the continuity of employment point, the claimants will succeed in their complaints of unfair dismissal. Whether this would result in the claimants receiving any compensation for unfair dismissal is a matter I deal with below, in the section on "Compensation for unfair dismissal - the *Polkey* issue".

Redundancy

95. Since I have concluded that the claimants are employees and that the reason for the dismissal was redundancy, I conclude that, subject to the continuity of employment point, the claimants were entitled to be paid statutory redundancy payments.

Breach of contract – notice pay

96. Mrs Boothman, Mrs Blackstock and Mrs Mather, (but not Mrs Clarke and Mrs Tiffin) claimed breach of contract in relation to failure to give notice of termination.

97. I have found that there was no "global" or "umbrella" contract of employment between assignments. Employment ended on expiry of the term of an assignment. The employment came to an end, in accordance with the contract, at the end of the assignment. I conclude, therefore, that the respondent was not in breach of contract by not giving Mrs Boothman, Mrs Blackstock and Mrs Mather notice of termination of employment.

Compensation for unfair dismissal – the *Polkey* issue

98. Although this is a matter which goes to remedy, I heard submissions on this and I consider it appropriate to give my conclusions on this issue at this stage, since I have heard the evidence relevant to this issue.

99. The respondent submitted that, if the claimants were found to be unfairly dismissed, they would have been fairly dismissed under a fair dismissal process.

100. It is most regrettable that the claimants were so overlooked in the restructuring process, and the procedural failings I have identified have led me to conclude that the dismissals were unfair (subject to the continuity of employment point). However, I conclude that, had the respondent corrected these failings, the claimants would have been fairly dismissed with effect from 15 October 2017. The respondent had decided to reduce its reliance on bank nurses for costs reasons and to restructure the service so that evening and weekend sessions were covered, as far as possible, by dental nurses in substantive posts. These were decisions which the respondent was entitled to make. Even if the respondent had spoken to the claimants weeks before 15 October 2017 about the plans, I consider it highly unlikely that there would have been any change to what happened. The respondent would still have gone ahead with its plans and the only work available for dental nurses not in substantive posts would be occasional shifts, usually on short notice, which could have been during the day as well as in the evenings or at weekends. The respondent would have been able to speak to the claimants at the same time as they were discussing potential redundancies with employees in substantive posts, so no delay would have resulted in the implementation of the new arrangements had procedural defects been cured. For these reasons, I conclude that there would be no compensatory award for unfair dismissal.

101. A claimant may not be paid both a basic award for unfair dismissal (which is calculated in the same way as a statutory redundancy payment) and a statutory redundancy payment. Since I have concluded that the claimants were entitled to be paid a statutory redundancy payment (subject to having sufficient continuous

employment), they would not be entitled to a basic award for unfair dismissal in addition to that redundancy payment.

Employment Judge Slater

Date: 28 November 2018

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

6th December 2018

FOR THE TRIBUNAL OFFICE

ANNEX

The issues

(1) The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

(i) Are the claimants workers or employees?
(ii) Does Mrs Blackstock qualify to bring a claim – is there an early conciliation certificate which covers her case ?
(iii) Are the claimants employees?
(iv) If they are employees, were they dismissed, whether in the terms alleged or at all?
(v) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The claimants assert it was by reason of redundancy
(vi) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?
(vii) Did the claimants unreasonably reject comparable work?
(viii) Are the claimants entitled to a redundancy payment?
(ix) Have the claimants mitigated against their loss?

Remedy for unfair dismissal

(x) If the claimant was unfairly dismissed and the remedy is compensation:

> If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed for redundancy or some other substantial reason had a fair and reasonable procedure been followed or have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604];

Breach of contract

(xi) To how much notice were the claimants entitled, if any? Are they entitled to pay in lieu of notice, or compensation for breach of contract?

a. did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?

b. did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any compensatory award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?