EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4121802/2018

Preliminary Hearing Held at Aberdeen on 7 March 2019

Employment Judge: Mr A Kemp (sitting alone)

Mr B Cochrane	**Claimant** **In person**
Inspire (Partnership Through Life) Limited	**Respondents** **Represented by:** **Mr D Gorry** **Solicitor**

JUDGMENT

The Claimant was not an employee under section 230 of the Employment Rights Act 1996 and his claim under section 103A of that Act is dismissed.

Introduction

1. This Preliminary Hearing was arranged to consider whether or not the Claimant was an employee and thus could pursue a claim for constructive dismissal for making protected disclosures under section 103 A of the Employment Rights Act 1996 ("the Act").

2. The Respondents conceded that the Claimant was a worker, and as such was entitled to pursue his claims for detriment under the Act. Following the hearing into the issue of employment, there was a discussion as to case management recorded separately.

3. The Tribunal heard evidence from the Claimant, and from Mr Ross Hutchison and Mrs Toni Smith for the Respondents. There were documents spoken to by the witnesses that each of the parties had lodged. All witnesses gave evidence honestly, and save in one respect as set out below I accepted it. There was little real dispute over facts, the issues focussed on what were two competing arguments.

Facts

4. The Tribunal found the following facts established:

5. The Claimant is Brian Cochrane.

6. He saw an advertisement online for posts with the Respondents in about March 2018, and applied.

7. The Respondents are an organisation that provides care for adults with disabilities, ranging from general support to provision of care 24 hours per day for those with severe disabilities, in the North East of Scotland. The posts advertised were to provide care to such adults.

8. The advertisement referred to their need for “staff” and to putting “all new employees through a six day induction and training programme before their first shift”.

9. Further online documents from the Respondents also referred to that training programme, and that the hours were up to 39 per week.

10. The Claimant attended at one of the Respondent's locations, and then attended for interview with Ross Hutchison the Resourcing Team Leader, and Caroline Stuart from HR. He was asked about how flexible he could be and explained that he was a student at Robert Gordon University and was to be on placement full time between June and July 2018, during which period he could only work one shift per week. Mr Hutchison suggested that he work a relief contract, which the Claimant agreed to. Neither Mr Hutchison nor Ms Stuart stated specifically that the Respondents treated such staff as not being employees.

11. The Respondents have three categories of staff being full-time, part-time and relief worker. They consider that someone is part-time who works between 16 and 39 hours per week, that someone is full-time if they work 39 hours per week or more, and that a relief worker is someone who works less than 16 hours per week. A further distinction is that both full time and part-time staff must work the hours contracted for on shifts they are allocated to, but that relief workers neither have an entitlement to any shift, nor an obligation to work any shift offered to them.

12. Full-time and part-time staff are contracted on the basis of a contract of employment for which the Respondents have a set template.

13. Relief workers are contracted on the basis of a Relief Worker Agreement.

14. On 17 May 2018 the Respondents wrote to the Claimant with the heading "Relief Worker – Carolines Crescent". The reference to Carolines Crescent was to a facility at which the Respondents provide care. The letter included "we are pleased to confirm that Inspire wishes to make you a provisional offer of employment"; it had reference to the cost of a check for Protection of Vulnerable Groups in the context of an employee, the requirement for proof of eligibility to work in the UK for all employees, and to signing and returning a duplicate of the letter "to indicate whether you wish to accept this offer of employment". If that was done, subject to conditions being satisfied, the

Respondents would "then be in touch to organise a suitable start date, and send a contract setting out the full terms and conditions of your employment".

15. The Claimant did return the duplicate letter duly signed and dated on 17 May 2018, and on the same day received a message regarding the induction training required.

16. On 13 June 2018 the Respondents wrote to the Claimant with a Relief Worker Agreement. It confirmed that all necessary checks had been undertaken. It included the following provisions:

> "….you will be included on Inspire's Relief Worker Register…..If relief work becomes available it may be offered to you, although Inspire is under no obligation to do so and you are under no obligation to accept any work offered…..
>
> Your work is on a casual "as and when required" basis……
>
> .
>
> As part of the Government's initiative to automatically enrol eligible employees into a workplace pension, if you have been assessed as an eligible jobholder, you will be enrolled into Inspire's pension scheme…..
>
> [Under the heading "Data Protection – Declaration] The Employee acknowledges that Inspire will process data relating to the Employee for a variety of purposes and that this may include sensitive personal data relating to the Employee…."

17. At the end was a space for signature by the person, with a date, above which space was "I accept the offer of relief work on the terms set out above". The Claimant signed in that space to accept the offer so made.

18. During the Claimant's induction he was sent a pack that included a disciplinary and grievance procedure which were written in terms for employees.

19. The Claimant worked only one shift for the Respondent, after which his employment terminated.

20. When planning shifts, the Respondents considered a rolling period of six weeks, and first arranged the shifts of their full-time and part-time staff. If there were shifts then not covered an email was sent to the relief workers, of which there were 9 at the time of the Claimant's working with them, setting out which shifts were available. The shifts would then be allocated according to the replies received.

21. No relief worker was required to work any shift offered. In the event that there was a lack of reply for a period of about three months HR would be contacted and a check undertaken to see if the person wished to remain on the Register of the relief workers. That had not however happened.

22. No meeting took place under either the disciplinary or grievance procedures.

Submissions for Claimant

23. The Claimant submitted that he was an employee, and that that was what he had been told from the advertisement, to the letter of provisional offer and the agreement itself. The disciplinary and grievance procedures would only be given to employees. Although he had worked only one shift there was an abundance of work and advertising for staff continued. There was no legal requirement for a threshold of 16 hours to be part-time, or an employee. A part-time employee could do 2 hours per week. Nowhere did it state that the Claimant was a worker and not an employee.

24. He was doing the same job as everyone else and had no reason to think otherwise than that he was also an employee. He met the test in section 230 of the Act. He referred to section 230(3(b).

25. In relation to the point on mutuality he argued that there was an implied term that he would work hours offered. The discussion at the interview had been about the shifts he could work, and they were trying to get him to do more. The phrase in the contract about mutuality was a sham to avoid rights as an employee. He met the tests of control and personal service.

Submissions for Respondents

26. Mr Gorry for the Respondents argued that section 230(3)(b) was not relevant as the Respondents accepted that the Claimant met the definition of worker. The Claimant did not meet the requirement of mutuality of obligation. The wording of the Relief Worker Agreement was as clear as it can be that there was no mutuality. The Claimant had accepted that this was the main document. The term "employment" or "employee" had been used in a generic sense, according to Mr Hutchison's evidence, although the Respondents accepted that it could have been set out more clearly.

27. The distinction between relief worker and part-time status was discussed at interview, and was in the contemplation of the parties. That relief worker status was appropriate given the Claimant's university commitments. It provided flexibility. The Claimant only worked for one shift, but the evidence was clear on how matters were regulated in practice. There was no adverse consequence for not carrying out shifts offered to a relief worker.

28. The provisional offer could not be read in isolation, and when considered with the Agreement itself the position was clear. The lack of mutuality was sufficient to supersede other considerations, and reference was made to the case of ***Carmichael***, set out further below. He invited the Tribunal to find that the Claimant was not an employee.

Law

29. Section 230 of the Act sets out the test for whether someone is an employee.

“230 Employees, workers etc

(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

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

30. As the point was made in submission, it is also relevant to note the terms of the following provision of that section:

“(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly”

31. The provision found in section 230(1) and (2) of the Act does not however provide much practical assistance. The starting point for consideration of who is an employee is normally found in the judgment of McKenna J in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 49*** where he said as follows:

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service …".

32. A number of tests were developed in authority to seek to resolve the matter, including those as to control, organisation and economic reality but that which is used most frequently currently is the "multiple" test, considering all the circumstances, which was applied in ***Hall (Inspector of Taxes) v Lorimer [1994] IRLR 171***

33. One of the issues as to whether there is consistency with employment is found in the case of ***Carmichael v National Power plc [2000] IRLR 43***, where the House of Lords held that mutuality of obligation was an irreducible minimum for employment, such that without it the person was not an employee. The Lord Chancellor in his speech stated the following:

> "If this appeal turned exclusively – and in my judgment it does not – on the true meaning and effect of the documentation of March 1989, then I would hold as a matter of construction that no obligation on the CEGB to provide casual work, nor on Mrs Leese and Mrs Carmichael to undertake it, was imposed. There would therefore be an absence of that irreducible minimum of mutual obligation necessary to create a contract of service."

34. He later went on to hold that the tribunal had been right to find that there were no facts that led to mutuality of obligation, adding:

> "In my judgment, therefore, the industrial tribunal was well entitled to infer from the March 1989 documents the surrounding circumstances and how the parties conducted themselves subsequently that their

> intention neither in 1989 nor subsequently was to have their relationship regulated by contract whilst Mrs Leese and Mrs Carmichael were not working as guides. The industrial tribunal correctly concluded that their case 'founders on the rock of absence of mutuality."

35. The lack of mutuality of obligation was also the principle founded on by the Court of Appeal in ***Clark v Oxfordshire Health Authority [1998] IRLR 125***, which held that a bank nurse was not an employee, even though she had been engaged by only one Authority over a period of three years (with only 14 weeks off).

36. Similarly, in ***Hafal Ltd v Lane-Angell UKEAT/0107/17*** (8 June 2018, unreported) it was held in the EAT that a person working under a bank system was not an employee, particular emphasis being placed on an unambiguous contractual provision that there were no mutual obligations to provide or undertake work).

37. As always, however, there is a need to consider all the facts, and it can be that those facts change the analysis as occurred in ***Younis v Transglobal Projects [2006] All ER (D) 227***, an EAT case, in which there was no set work, but the individual had been finding business for the firm for three years on a retainer-plus-commission basis and that was held to be sufficient to establish employment.

38. How the parties themselves label their relationship is a relevant but not conclusive consideration. The status of the worker is to be decided by an objective assessment of all the factors, and the label attached by the parties is but one of those factors. The parties cannot change the nature of the contract by attaching the 'wrong' label, such that if on reviewing the whole of the evidence the tribunal concludes that the worker is definitely an employee (or, as the case may be, definitely an independent contractor), then it will so hold, despite the fact that the parties themselves may have agreed the

opposite: see for example ***Young and Woods Ltd v West [1980] IRLR 201***, and ***Narich Pty Ltd v Pay-roll Tax Comr [1984] ICR 286***.

39. The position was stated to be this by Ralph Gibson LJ in ***Calder v H Kitson Vickers Ltd [1988] ICR 232***,

> "It is trite law that the parties cannot by agreement fix the status of their relationship: that is an objective matter to be determined by an assessment of all the relevant factors. But it is legitimate for a court to have regard to the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain it can be decisive…"

Discussion

40. I have not found this an easy case to decide. There are competing arguments for the parties, each strong from their own perspective. For the Claimant, there is the reference in several documents produced by the Respondents to "employment" and "employee". The Relief Worker Agreement does not state in terms that the person is a worker, and not an employee. Whilst it does refer to the person being a worker, and has the provisions as to mutuality referred to, it has a section with regard to data protection that uses the term employee. That was not explained by either of the Respondent's witnesses. The nearest an explanation came was from Mr Hutchison, not the author or signatory of either of the two letters, that terms had been used "generically" at earlier stages, as the applicant may have become either an employee or worker on processing the application. That did not however explain the reference in the letter of offer to employment, or the Relief Worker Agreement to employee as by that stage the prospective status of the applicant, the Claimant, was clear.

41. On the other hand, the terms as to lack of mutuality were clear on the Relief Worker Agreement, and the evidence was also clear that they operated in that manner in practice. I did not accept the Claimant's arguments over sham, or that the term had been deliberately worded thus simply to avoid employee

rights, and in any event that had not been put to either of the Respondents witnesses. It appeared to me that the use of such relief worker contracts, for 9 of the staff, was simply to have a resource available when covering shifts from those with full-time or part-time contracts could not be achieved. There had been a cut off of 16 hours per week chosen for operational reasons (the Claimant is correct that there is no legal requirement to do so, but equally no legal impediment preventing that being done), and in practice those working such hours were rostered with the full-time employees first, such that they could be required to work hours when given under the terms of the relative contracts. That meant that there was mutuality of obligation for such staff, and that if someone was not able to commit to working 16 hours per week at hours dictated by the Respondent, they were offered the relief worker arrangement.

42. The question became one of whether the mutuality term prevailed over the use of language inconsistent with worker status. I have concluded that it should. It appeared to me that the language of the terms as to the working of shifts, and the lack of mutuality, was clear. It has been described as an irreducible minimum such that its absence leads to the conclusion that there is a failure of the third of the ***Ready Mixed*** tests. I did not consider that the Claimant's argument of an implied term that the hours were to be worked was correct. It was not a point put to any witness in sufficient detail, such evidence as there was was that there would be no adverse effect if shifts were routinely turned down, and it was not necessary to imply such a term to give the contract business efficacy. It was also in contradiction to the express term.

43. Whilst it would have been preferable for the agreement, or earlier correspondence or meetings, to have clarified that there was a difference between the status of a part-time person and a relief worker, the former being an employee, the latter not, I did not regard that as determinative. Equally, whilst terms were used which were not consistent with being purely a worker, I did not regard that as determinative. It appeared to me to be more the result of somewhat loose terminology being used. Neither the author or signatory of the two material letters gave evidence, but it does appear to me from the

circumstances overall that the use of such terms is not sufficient to counter-balance the strong weight of the clear terms that meant that there was no mutuality of obligation.

44. There was only one shift worked, and therefore no real evidence of a pattern of work being conducted which could form the basis for a finding to the contrary. It is however entirely clear why someone in the Claimant's position would have held the view that the terms offered were of employment, and Mr Hutchison's refusal to accept that there could have been confusion by reference in the provisional offer to employment, or to the term employee in the Relief Worker Agreement itself, was difficult to understand. It appeared to me that it was likely to cause confusion at the least, and that was confusion that the Respondents were, and are, in a position to remedy.

Conclusion

45. I have therefore found that the Claimant was not an employee, and his claim under section 103A of the Act must be dismissed.

Employment Judge: **Alexander Kemp**
Date of Judgment: **10 March 2019**
Entered in register: **12 March 2019**
and copied to parties