EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104642/2018

Held in Glasgow on 20 September and 16 October 2018

Employment Judge: Rory McPherson

Mr G Westoby	**Claimant** **Represented by:** **J Hamlett - Advisor**
PAM Wellbeing Ltd	**Respondent** **Represented by:** **J Murphy - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that;

1. the claimant's claim that he was an employee of the respondent within the meaning of section 230(1) of the Employment Rights Act 1996 does not succeed; and

2. the claimant's claim that he was a "*worker"* within the meaning of section 230(3) of the Employment Rights Act 1996 Act, or otherwise within the meaning of s 54 of the National Minimum Wage Act 1998, does not succeed; and

3. the claimant's status in relation to the respondent was that of a self employed contractor.

REASONS

Introduction

Preliminary Procedure

1. The claimant's ET1 asserts that he was unfairly dismissed by the respondents, he was not paid wages, he was paid below the National Minimum Wage and further seeks compensation for what is described as underpayment as compared to a standard hourly rate paid by the respondents, together with a redundancy payment.

2. The respondent in the ET3 sets out that they consider that the claimant was not an employee but rather a self employed contractor and dispute all the claims made.

3. This preliminary hearing was appointed on 27 August 2018 to consider as a preliminary issue - *whether the claimant was an employee of the respondent and if not, to determine the capacity in which the claimant worked for the respondent*- in the context of the claims asserted, namely whether the claimant was an employee for the purposes of the unfair dismissal claim and or whether he was a worker in the context of his claim regarding national minimum wage or was otherwise a worker.

4. The Tribunal heard evidence from the claimant, Miss Jennifer Underwood Human Resource Advisor for the respondent and Mr William Telfer who is presently an Employed Counsellor with the respondent.

5. The Tribunal was also referred to a set of documents prepared by the respondent's representative Mr Murphy. The Tribunal was also referred to a supplementary set of documents prepared by the claimant's representative Mr Hamlett who was assisted throughout by Ms Westerbury.

6. Both representatives provided written submission supplemented by oral submissions at the conclusion of the hearing.

7. The respondent suggested that an appropriate list of issues for the Preliminary Hearing were:

a. Was the claimant an employee of the respondent;
b. Was the claimant a worker;
c. Was the claimant a self employed contractor engaged by the respondent.

Findings in fact

8. The claimant is a qualified counsellor with a number of professional qualifications including MSc Counselling & Psychotherapy from the University of Stirling in 2013; A Certificate in Advanced Professional Training in Emotion Focused Therapy (level 1 and 2) from the University of Strathclyde obtained 2011 and 2012; A Certificate in Advanced Professional Training in Person Centred Counselling Practice – Person Centred Groupwork from the University of Strathclyde in 2012; A Postgraduate Certificate & Diploma in Counselling from the University of Strathclyde obtained 2010 to 2012; BTEC Level 4 Instructional Techniques 2007, Prince Practitioner in 2007 and a BSc (Hons) Biology from the University of Nottingham in 2001.

9. He is a member of British Association for Counselling and Psychotherapy (BACP) and a member of the Executive Committee of BACP's Private Practice Division. The claimant pays his own membership dues to BACP and requires to undergo, and pay for, annual continuous professional development through BACP to maintain his BACP membership.

10. The respondent provides a twenty four hour, seven day a week telephone based Employee Assistance Programme (EAP) which includes a facility for telephone counselling on request to employees of other companies.

11. The claimant was employed by The Validium Group (Validium) from 2011 to 2014 providing telephone-based counselling support during the day to

eligible individuals as part of its EAP service provided as a service to other employers. This was a role carried out within the offices of Validium.

12. Validium provided its EAP service through qualified counsellor employees. In addition, and for some periods supplemented that service by engaging the services of individuals with appropriate professional qualifications who, as non-employees, were known as Affiliates.

13. The role of a qualified telephone counsellor within an EAP service is highly sensitive as the person seeking telephone assistance may be doing so in exceptionally distressing circumstances.

14. The claimant met and became friends with William Telfer in 2012 a fellow qualified counsellor who is also a member of BACP, and who was at the time also an employee of Validium in 2012. They were both employed to provide telephone counselling support as part of Validium's EAP service.

15. The claimant's first private direct counselling for an individual client was in 2012 and he continued to provides private direct counselling to individuals referred through a faith group from 2013 to 2014.

16. The claimant elected to leave his then employment with Validium to take on additional childcare responsibility following the birth of his child. In, or around, the summer of 2014 the claimant established a private counselling and psychotherapist practice marketed and operating as West of Scotland Counselling and Personal Development (WOSCAP) in Bridgeton in Glasgow operating as a sole trader. The claimant operates a shared overhead arrangement for the premises in Bridgeton with a fellow professional counsellor Janice Arbuckle and worked on separate days and shared the cost of the premises and the WOSCAP website although the claimant and Ms Arbuckle do not operate as partners.

17. The claimant has received, and continues to receive, client referrals in his capacity as a private counselling and psychotherapist practitioner from other EAP service providers. Where client referrals are received from other EAP's the chargeable cost is set by the EAP referrer. The claimant has continued to provide counselling and psychotherapy to private individual clients secured through marketing to the public generally including through his premises and the operation of WOSCAP, such chargeable cost in those situations is set by the claimant and may be varied according his own assessment.

18. The claimant is responsible for his own tax arrangements.

19. After leaving Validium the claimant and William Telfer continued to meet up socially. William Telfer who also subsequently left Validium secured employment with the respondents initially as an EAP counsellor and latterly as an EAP Manager. William Telfer had no managerial experience prior to being appointed as an EAP Manager with the respondent.

20. William Telfer's responsibilities as EAP Manager with the respondent included the recruiting, resourcing and managing the respondent's EAP including its nightshift operation.

21. William Telfer, who was aware of the claimant's professional and family situation including the operation of WOSCAP, considered that the claimant would be interested in a non employee consultant ad hoc role known as an Associate Counsellor within the respondent EAP night shift pool of qualified telephone counsellors. In a telephone conversation in early February 2015 (prior to 12 February 2015) William Telfer explained in broad terms how much work was involved in the role of Associate Counsellor, although not the specific status of the role, nor what additional benefits would be available to someone who was an Employed Counsellor. The claimant expressed interest in the role as described to him.

22. Subsequently Mr Telfer followed the claimant's interest up with an e-mail to the claimant to the claimant's WOSCAP work e-mail address (the claimant's WOSCAP e-mail) dated 12 February 2015 *"Hi Guy! Have a wee read over- any trouble/questions just give me a shout. As always counselling is most important factor, IT and all can get amended*". The e-mail provided the telephone number which employees of companies to whom the EAP service was provided would phone to seek EAP support together with the weekday shift pattern of 8pm to 8am with an indication that the payment structure for same was *"£50 + £25 a call"* with the weekend shift pattern being *"£60 +£25 a call".*

23. The claimant responded to that e-mail "*Cheers... It all looks straightforward…"* and made an informal comment to the effect that if he required assistance during a night shift that he would contact William Telfer.

24. Subsequently the claimant issued from his WOSCAP e-mail on 15 February 2015 to William Telfer *"Hi Will, Here's a copy of my CV*". This e-mail also provided what was the claimant's new home address. The claimant's CV set out his qualifications, as set out above, and his experience including as *"Counsellor & Psychotherapist in private practice"* and identified a personal non work "*gmail*" e-mail address.

25. On 20 February 2015 the respondent's People Manager Lisa Morley issued an e-mail to the claimant's WOSCAP e-mail "*Hi Guy, Further to your recent discussions with William Telfer, please find attached details of your Associate Contract"* accompanying the Associate Contract (the Associate Contract) was a letter from Ms Morley addressed to the claimant at his home address which stated *"I am pleased to confirm your Associate contact for services. Please sign and return a copy, to myself… if you require any further information or clarification please do not hesitate to contact either myself or William Telfer".*

26. The claimant responded to the respondent's e-mail from his WOSCAP work e-mail on 20 February 2015: "*Hi Lisa, many thanks for this, Guy".* The claimant did not sign and return the contract to the respondents. He did not contact either Ms Morley or Mr Taggart for any information or clarification. The claimant subsequently operated with the respondents as set out below.

27. The respondent's Associate Contract was headed ***"****Contract for Services*" and was addressed to the claimant at his home address and provided that "*the company wishes to engage the services of the supplier for the purpose of carrying out certain occupational health and Wellbeing services work and which engagement the Supplier has agreed to accept on the terms set out in this agreement.".* The claimant was identified throughout the Associate Contract as a supplier. The Associate Contract made no reference to WOSCAP or the claimant's business address.

28. The Associate Contract provides at clause 2.1:

Mutuality of Obligation. *Within the agreement the supplier will provide the services or ensure that a suitable and qualified person is provided to carry out the services. Where the supplier chooses to use a deputy to carry out the services the supplier agrees to advise the company prior to the work being undertaken. The company will not unreasonably withhold its consent to a suitably qualified deputy being provided. Services shall be provided at a PAM Wellbeing or client site."*

29. The Associate Contract further provides at clause 3:

"***Fees.*** *The supplier will submit invoices to the Company by the 5th day of the month in respect for the previous calendar month. The Company will make payment on the 20th day of the months for the previous months accurate invoices received. Fees include labour costs and any rolled up holiday pay to which the supplier may be come entitled. The supplier agrees that they are responsible for all employment costs, and to include travel costs, related*

to the labour provided. Each invoice will detail the days of work, client, location, rate of pay and be accompanied by a copy of reports provide to the client. The Supplier agrees that some of the Wellbeing services are exempt from VAT any charges detailed will include VAT unless otherwise stated. Invoices will be received in line with satisfactory completion of the assigned work. Where work is incomplete or failing to meet reasonable client expectations then payment will be withheld until the matter is resolved."

30. The Associate Contract provided at schedule 1 that the position offered was that of *"EAP Counsellor*" with a commencement date of 20 February 2015. It identified that a sum (known as an engagement fee) of £50 (the retainer sum) would be paid for each weekday night shift allocated to the individual (with £60 paid as a retainer sum for weekend night shifts) and the person would be paid a fixed sum of £25 for each call (the call sum) provided during the shift.

31. The Associate Contract, as above, explicitly covered night shift working. It did not preclude the claimant, in fact, from operating as a private counsellor during the days on which he chose to market and operate his services through his own business WOSCAP.

32. Despite the explicit request in the respondent email of 20 February 2015 for the claimant to sign and return the Associate Contract, he did not do so. This was however an oversight and he had simply forgotten to do so against the background that he was also dealing with additional childcare responsibilities and was operating his own business WOSCAP when he received the Associate contract via e-mail.

33. The claimant did not consider there was anything wrong with the Associate Contract sent to him although he had anticipated that it would also be sent in hard copy by post. He did not take issue with any of the terms of the contract when he received it. Had he remembered to do so, he would have signed and returned it. He felt comfortable about the arrangement with the

respondents as William Telfer had already spoken to him about it. The claimant considered the actual work involved was similar to the work carried out at Validium.

34. The respondent did not issue a follow up request for return of the signed Associate Contract.

35. The relevant night shift periods were identified as weekday nights; Monday to Friday 8pm to 8am and weekend nights; Saturday and Sunday 5.00 pm to 8 am.

36. The Associate Contract further provided at Schedule 1, Service Description

Agreed Availability	*Ad Hoc*
Additional Availability	*Hours & Days to be agreed as dependent on client requirements. reporting to EAP Team Leader*

37. Although not expressed in the contract the claimant was not required to attend any specific location to take a referred call. It was however a shared professional expectation that the claimant would be working from his own home and not at the WOSCAP premises and would be able to find a quiet space or room to take calls referred to him by the respondent's Spiers Warf Glasgow (on site) based occupational nurse assessor.

38. The claimant started with the respondents on 20 February 2015 being the start date identified on the Associate Contract, initially electing to be available on call for the Friday night shift 8pm to 8 am and subsequently around September 2017 electing to offer to be additionally on call for some Tuesday night shifts 8pm to 8 am (the on call night shifts).

39. The claimant was expected for reasons of business planning to make the respondents aware of an offer to provide on call cover around one month in advance of a specific calendar month. The decision as to which days the

claimant wished to volunteer to provide on call cover was a matter for the claimant.

40. While the claimant had anticipated that he would receive calls on those, on call night shifts, he had offered and agreed to provide cover for there was no requirement that any calls would be transferred to him.

41. The respondents operated a call protocol system which was in effect a triage system whereby a caller to the respondents EAP service would speak to an onsite qualified occupational nurse (nurse). If the nurse assessed that the individual should receive immediate telephone counselling, the nurse would pass the call through to a counsellor who was on call. During the day those calls were handled by employed counsellors who were on site.

42. Reflecting a lower volume of calls to the EAP service in the night shift, the respondent identified that appropriate support could be provided through retention of employed onsite nurses for the night shift who could act to, in effect, triage or otherwise assess the need of the caller. Where assessed as appropriate the caller would be transferred by nurse to counsellor from the respondent's pool (the pool) and who had agreed to be available to receive such calls for that nightshift. The pool consisted of both Employed Counsellors and others who were not regarded, by the respondents, as employees and were described as Associate Counsellors.

43. Associate Counsellors in the pool had been previously identified by the respondents as appropriately qualified counsellors who had agreed to be available to receive referred calls on a specific night shift. They were familiar with the respondent's own protocols some of which did not reflect all other EAP providers but were professionally appropriate for a qualified counsellor. The respondent's protocols included a requirement that notes be made of the call.

44. It was the expectation of the both the respondent and the Associate Counsellor that the Associate Counsellor would operate from their own home. The Associate Counsellor could, however, operate from any location without seeking the respondent's permission, including that of their home, that the Associate Counsellor considered suitable, subject to be being able to receive a call and in practice having a "*quiet room*" to be able to take such a referred call. When the claimant agreed to be on a specific night shift it would practically limit his ability to socialise or invite friends to his home as he required to be confident that he would have a quiet room available to take a referred call which were referred. He however anticipating that any night shift would be carried at, or in the vicinity of, his home and would not take place at his WOSCAP workplace.

45. Beyond a single piece of software required to facilitate a counselling referral known as Ohio which acts as a secure database, an Associate Counsellor was not provided with any equipment by the respondent. The Associate Counsellor was responsible for their professional fees and all and any overheads incurred by them. The Associate Counsellor was not required to attend the respondent's office. An Associate Counsellor was expected to follow some limited protocols for the respondents EAP system including a brief consistent welcome statement to a referred caller and the recording of some notes as further described below.

46. The claimant could request a swap for the allocated date with another trained counsellor within what the respondents had identified as a pool Associate or Employee Counsellors. William Telfer as manager supported the claimant in identifying alternate night shift cover from the pool when the claimant required to absent himself from agreed night shift following the death of the claimant's father. Once a night shift was transferred to an alternate qualified counsellor, no connection with or responsibility for any aspect of that night was retained by the qualified counsellor who had originally volunteered for, and had been allocated to that night shift.

47. If the Associate Counsellor, such as the claimant, had agreed to be available to receive calls on a specific night shift was not able to, or otherwise did not, take the call referred by the nurse, it would be transferred to an alternate counsellor. There was a separate pool of back-up night time qualified counsellors who were paid a higher per call sum of £50 for such infrequent back up call cover. Once a call was transferred to a back-up night time qualified counsellor, the on call night counsellor, who had not accept the call had no responsibility for or control as to the transferred call.

48. The respondent's anticipation was that calls referred through the nurse for an immediate telephone consultation service may last with an allocated Counsellor up to 50 minutes and they assumed each call could have a 10 minute administration time.

49. While the respondents expected notes to be prepared on the respondent's secure Ohio database they did not require details of the duration of a call for payment. The respondent paid a rate of £25 per call to an Associate Counsellor on the night shift regardless of whether the professional judgment of the counsellor was that it was appropriate to conclude a call within a shorter period than the respondents anticipated call time. The claimant was of the view that it was established good professional practice for a qualified counsellor to seek to support a focused discussion during such and the claimant did not regard the anticipated call period as professionally or ethically inappropriate.

50. The claimant as Associate Counsellor had, in effect, complete professional and personal autonomy as to the length of time and manner as to which it was appropriate to deal with any specific call which was referred. The majority of calls referred to the claimant were appropriately concluded within 1/2 hour and while the claimant identified that some calls did last more than 1 hour to complete no call ever took 2 hours to complete.

51. Where the claimant considered it appropriate, he could arrange for a separate Counsellor (who could be either Employed or an Associate) to make a follow up call to the individual in the morning. This was a matter of his discretion and he had complete autonomy on this matter.

52. Beyond a very brief scripted introductory statement, it was a matter of the claimant's autonomous professional judgment, to decide an appropriate series of questions, such as those which would be professionally relevant to a qualified counsellor for assessing the Impact of Event Scale. The claimant had complete autonomy to thereafter identify whether there was a further suitable support service which should be identified to the caller. The claimant had complete autonomy to decide whether the individual should be advised to stay in contact with the respondent EAP service. While notes would not be always required for other professional counselling such notes, confirming on a confidential basis, the identity of the employer and information such as the individual's age, as the respondent expected would be recorded on their secure Ohio database were not considered inappropriate by the claimant. Such notes could be of assistance for the EAP service for further support to an individual.

53. The claimant and other Associate Counsellors would receive information by e-mail relevant to their nightshift role from William Telfer such as the occurrence of a significant and tragic incident at a workplace covered by the respondent EAP service, in order to ensure that they had relevant contextual information in the event that a call was referred to them during a nightshift. This contextualised information was designed to support, but did not detract from the autonomy of, the Associate Counsellor. They were not directed by the respondent as to what steps to take in relation to a caller from such a workplace.

54. The respondent provided a Red Flag system designed to support both the caller and the Associate (or Employed) Counsellor in the event that a caller identified thoughts of serious self-harm. The claimant had effective

professional autonomy to decide on whether to operate the Red Flag system. The Red Flag system would bring the matter to the attention of the manager on call, such as William Telfer, who although a manager, was also an experienced and qualified counsellor and would identify what further support was appropriate.

55. As a member of BACP the claimant had access to appropriate continuous professional development and training and required to meet the costs associated with same personally. The claimant and other Associate Counsellors were not provided with free access to the respondent's training programmes, which were provided to its Employee Counsellors without cost. Subject to the claimant maintaining his professional accreditation he had complete autonomy as to what continuous professional development he regarded as professionally appropriate. The claimant was invited, but not required, to join a support group providing support to counsellors operating within the respondents EAP service.

56. While the claimant received occasional e-mails regarding informal social events he was not invited to social events operated by the respondents. The claimant did not attend informal social events while an Associate Counsellor.

57. The claimant offered and subsequently agreed to be on call for 34 night shifts in the period 5 July 2017 to 22 December 2017 (the last 6 month period of 2017).

58. The majority of the claimants on call night shifts in the last 6 month period of 2017 occurred on a Friday and a lesser number occurring on Tuesday or Wednesday.

59. The total number of calls of calls provided by the nurse to the claimant across the 34 night shifts in the last 6 month period of 2017 was 29.

60. The claimant was provided with no calls at all on 18 (the majority) of his on call night shifts in the last 6 month period of 2017; 5 July, 2 August, 11 August,1 September, 8 September, 13 September, 22 September, 28 September, 29 September, 6 October, 11 October, 13 October, 24 October, 25 October, 27 October, 3 November, 7 November and 21 November.

61. The claimant was provided with only one call during 6 of his on call night shifts in the last 6 month period of 2017; 7 July, 17 October, 10 November, 22 November and 28 November and 22 December 2017.

62. The claimant was provided with only 2 calls during 7 of his on call night shifts in the last 6 month period of 2017; 4 August, 15 September, 31 October, 17 November, 5, 15 & 19 December.

63. The claimant was provided with 3 calls in the last 6 month period of 2017; on 20 November and 5 calls on 8 November 2017.

64. The claimant did not work on Christmas Eve 2017.

65. The claimant did not generally decline calls which were referred to him during his on call night shifts as an Associate Counsellor. On the two sole occasions identified by the claimant on which he either did not answer his phone or was unable to speak to a caller due to loss of phone signal after having been contacted by the respondent's nurse, William Telfer his manager subsequently sought clarification as to what had occurred. However, no sanction was imposed and no sanction was suggested by William Telfer on either of those occasions.

66. An Employee Counsellor who declined calls could ultimately be placed under a performance management regime but no equivalent system operated for Associate Counsellors.

67. For the on call night shifts agreed to, the claimant could have requested a substitution of another similarly qualified counsellor known to William Telfer as being familiar with the respondent's protocols. On the few occasions when the claimant requested such a swap or substitution take place, he would not have received the on call sum.

68. The claimant did not offer to operate as back up cover on any of the night shifts he volunteered for and thus did not receive the higher per call sum.

69. For each night shift the claimant had agreed to operate as on call, he submitted an Invoice, in his own name, in accordance with the Associate Contract to William Telfer the respondent's EAP Manager identifying the calls received and handled. William Telfer would review and approve the Invoice and transfer it with a Purchase Order to the respondents Central Accounts Department. In consequence, the claimant was paid both the retainer sum for each night shift on call and the call sum in accordance with the Associate Contract via the respondent's accounts department. No payments were sought by the claimant or offered by the respondents for any outlays or any payments other than as set out in the Associate Contract.

70. An Employed Counsellor would receive payment of wages, including any relevant overtime, for working night shift together with pension contributions, holiday pay, employee cash plan, employee health plan through the respondent's monthly payroll system.

71. On 11 October 2017 the claimant responded to an e-mail from Ann Kelly within the respondent's EAP service. Anne Kelly although initially engaged as a contractor under an Associate Contract had become an employee of the respondent working within their offices on the day shift. The claimant responded from his WOSCAP work e-mail in the following terms *"Re Tuesday shift. Hi Anne, That's no problem. I was under the impression that there was some who will take over the shift at some point and that I am*

keeping the seat warm for them. I am happy to cover the shifts for a couple of months, say up to Christmas but don't really see it as a permanent thing".

72. On 12 December 2017 William Telfer issued an e-mail to all those who provided night shift cover regarding the operation of back-up protocol regarding the night shift of 11 December 2017. On the night shift of 11 December 2017 two of the respondent's employee's and a different contractor to the claimant were on call as counsellors. This email was issued to the claimant at his WOSCAP e-mail, to other Associate Counsellors identifiable by their non-respondent e-mail addresses together with respondent employees including Employed Counsellors. That e-mail sought confirmation that those who had agreed to operate on the back-up list were "*willing and able to stay on it"* and confirmed the higher pay per call. The claimant, as noted above, had not agreed to act as back up and although a redesign of that back-up protocol was mooted by William Telfer such a redesign was not within his authority.

73. The claimant in his evidence asserted that he primarily operated to provide on call on Tuesday nightshifts with the occasional Thursday and Friday. The claimant was mistaken in his evidence, the majority of the night shifts which the claimant had ben on call were Friday evenings.

74. While the claimant asserted that he had called for support from his manager William Telfer arising from a call referred to the claimant on Christmas Eve 2017. The claimant was mistaken in his evidence, he did not operate on night shift with respondents on this date.

75. Between 8 and 19 January 2018 the respondent undertook a redundancy consultation with its employees at its then EAP site in Glasgow following upon the respondents' identification that the provision of the EAP service would move to Warrington, Cheshire. The claimant was not included in that consultation as the respondent did not regard the claimant as an employee.

76. William Telfer advised the claimant of this consultation process by 10 January 2018 advising that it was anticipated that the EAP service would relocate and that there would be no further requirement for Associate Counsellors such as the claimant. The claimant did not raise concerns with William Telfer or the respondents during the consultation process.

77. On 16 January 2018 William Telfer issued an e-mail to the claimant and others both Employees and Associate Counsellors who provided the night shift cover "*Guys I've had the confirmation below that the Glasgow EAP will stop at 17.00 this Friday. I'm really sorry for the short notice for those of you covering the night shifts and not with us a contract. The EAP service in Glasgow will end at 17.00 on Friday and will simultaneously be picked up by Warrington then*."

78. The claimant responded to William Telfer's e-mail on 18 January 2018 from his WOSCAP e-mail *"Hi Will. How's it going in there? Do you know when you finish up yet? I've just had my last shift, just one call it's a bit weird ending like this but I think I'll be relieved not to have overnights. What reference number should I use for my fin al invoice? Cheers Guy".*

79. William Telfer, as EAP Manager at the respondent Speirs Warf premises in Glasgow, was included in the respondent redundancy consultation. He, however, secured alternate employment as an Employee Counsellor with the respondent after the EAP service was moved from Glasgow to Warrington. He was not made redundant. Prior to receiving notification that he was not being made redundant William Telfer discussed the possibility of operating the WOSCAP Bridgeton premises one day a week to provide a private counselling service.

Submissions

80. The claimant provided written submissions supplemented by oral submissions. It was argued that the applicable law for considering the status

of an employee is set out in the Employment Rights Act 1996 (ERA 1996) s230.

81. The claimant argued that the correct approach was to consider 6 tests set out below.

(a) The first question was to consider what degree of control the respondents had over the claimant, and relying on Ready Mixed Concrete (South East) v Minster of Pensions and National Insurance [1968] 1 All ER 433 (Ready Mixed Concrete) the claimant argued that there were 4 subsidiary questions each of which it was argued could be answered in the affirmative on the evidence;

(i) did the claimant or respondent set the rate of pay; it was argued that the respondent set the rate of pay; and

(ii) sourcing replacements for shifts which the claimant was unable to perform fell, it was argued to the respondent; and

(iii) the claimant had a regular pattern of shifts, further by reference to the Court of Appeal in Pimlico Plumbers v Smith [2017] EWCA Civ 51 control by the respondent as to when the work would take place was a significant factor and was evident in the present case; and

(iv) the level of autonomy the claimant had, was it was argued, limited. Where he missed a call, he would be questioned by his manager. While the Associate Contract at 2.1 stated that "*Where the supplier chooses to use a deputy to carry out the services the supplies agrees to advise the company prior to the work being undertaken. The company will not unreasonably withhold its consent to a suitably qualified deputy being provided"* this did not reflect the true position; and

(b) on the question as to whether there was mutuality of obligation, again by reference to Ready Mixed Concrete, both the evidence and the terms of clause 2.2 of the Associate Contract set out above demonstrated that

respondent required to pay for the claimant's provision of skills, the claimant required to accept the work offered as part of his obligation to the respondent and when taken together with the claimant's argument that he could not *"just turn down work"* together with the regularity of the shift pattern supported the claimant assertion that he met this test; and

(c) on the question of whether claimant had to personally perform the services or was he able to outsource the work to a third party, it was argued that the evidence supported the view that claimant could not delegate any part of his service to another individual, despite the suggestion in the Associate Contract that he could so. Reference was made to Autclenz Ltd v Belcher [2011] UKSC 41 (Autoclenz) which indicated that it was not sufficient to look at a written contract; the reality here was that the claimant could not delegate a shift to any other counsellor. By reference to Byrne Bros (Formwork) Ltd v Baird & Others [2002] IRLR 96 (Bryne Bros) the claimant argued that the reality of the situation was that the claimant was expected to personally provide his service without substitution and that the evidence of limits to the claimant's delegation to another counsellor again supported the claimant position; and

(d) on the question of whether the claimant integrated within the company, the claimant argued that his position was consistent with the factual and legal analysis set out by the EAT in Uber BV v Aslam [2018] IRLR 97, (Uber) in which Judge Eady at 106 and 107 referring to the Employment Tribunal's finding of fact noted that the ET had identified that the suggestion that *" 30,000… might be operating as businesses on their own account.. did not reflect the reality"* regardless of the wording of the agreements in that case. In the present case, it was argued that while not operating through an app, calls were referred via a nurse and the claimant, in effect, shared a platform with others on the night shift. Further and again consistent with the factual matrix in Uber, if a colleague was unable to

take a call, another colleague on the night shift would be contacted to take that call; and

(e) on the question of whether the claimant was business on his own account, while the claimant accepted that he operated a business WOSCAP, the arrangement between the claimant and respondent was in the claimant's individual personal capacity as demonstrated by the Associate Contract having been addressed to the claimant personally; and

(f) on the question of whether he responsible for paying his own tax, the claimant argued that the evidence, to the effect that he took responsibility for his tax affairs, was not conclusive and referred to the Autoclenz case where it was considered that both the substance of the contract and the economic reality required to be considered. In the present case, if the claimant was not able, for any reason, to take a call, he would not receive the call sum set out above and thus he was not fully in charge of his own finances.

82. The claimant argued that taking the arguments they set out above cumulatively the reality of the working arrangement was that of an employee and not one of a self employed contractor and the Tribunal should make that finding.

83. However, the claimant argued that if the Tribunal did not accept that he met the tests set out for an employee, the correct analysis was that the claimant was a worker and not a self employed contractor

84. The respondent also provided written submissions supplemented by oral submissions.

85. The respondent argued in their submissions that the claimant was engaged to supply counselling services on an emergency basis if the respondent's nurses required his support, which was usually on a Friday night.

86. The respondent argued that the claimant was not limb b worker.

87. The respondent argued that the claimant was an independent contractor who was engaged and agreed to a contract for service and that at no point prior to the present claim had the claimant raised any issue around his status.

88. The respondent argued that the claimant was committed to providing services through WOSCAP and referred to Langstaff J in the EAT Cotswold Developments Construction Ltd v Williams [2006] IRLR 181 (Cotswold) para 53 "*... a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls'.*

89. The respondent argued that the Associate Contract set out the terms which applied, there was no obligation on the claimant to provide the services personally, the claimant was free to undertake work for others and was only engaged by the respondent for specific periods when he was paid for the actual hours worked.

90. The respondent argued that the claimant was paid by invoices submitted and was free to perform the work at any location or to delegate the work. The respondent further argued that if the claimant had been an employee, it would have been in the respondent's interest to have him work from their premises. As he was an Associate Supplier the respondent's control was significantly less than would have been the case for an employee.

91. The respondents pointed to the claimant's acceptance of responsibility for tax. In addition, they again argued that he was free to decline any work offered and while the respondent planned work this did not create integration.

92. The respondent further argued that the evidence did not support an assertion that the claimant and respondent had operated in a manner contrary to the Associate Contract such as to establish that the claimant was a limb b worker.

93. The respondent argued that there were significant differences between the benefits afforded to employees and to those subject to Associate Contract.

94. The respondent argued that the Associate Contract provided that the claimant agreed to be a supplier of services. It provided that there was no mutuality of obligation and further there was no obligation of personal service.

95. The respondent argued that they had "*very little control over the claimant compared to the control it exerts over its employees"* and referred to Pimlico Plumbers v Smith [2018] IRLR 872 (the Supreme Court Pimlico case) in which Lord Wilson at para 48 identified a number of factual findings by the Tribunal in that case which, it was suggested did not arise here (such as wearing of branded uniform) and which were "*inconsistent with his being a truly independent contractor".* Thus, in effect, absent those factual findings in the present case the Tribunal should accept that the claimant was a truly independent contractor.

96. The respondent argued that as the claimant had accepted that he was a sole trader (albeit in the context of WOSCAP), that was evidence that he was person in business, as a business, arguing that the claimant marketed to other EAP provides and operated from his own premises. The respondent further argued that the claimant would not seek to argue that he was an employee or had worker status in relation to the clients of his WOSCAP business.

97. The respondent argued that they had undertaken a fair consultation process after it *"decided to relocate its 24/7 EAP helpline from Glasgow to Warrington to allow it to take on expansion",* it had consulted with its Glasgow employees

who were either offered suitable alternative employment or made redundant. The claimant was not included as he was not an employee.

98. The respondent pointed to, what it said, was the absence of any documents or communications which contradicted Associate Contract operating as it was described. The respondent further argued that while the claimant now sought to make the present claims he had not previously raised this (during the currency of the arrangement).

99. The respondent suggested the claimant was unreliable in that he had used an e-mail address in the ET1 which was not identifiable as his WOSCAP e-mail, the claimant was uncertain as to the year he had established WOSCAP, the claimant had suggested that he worked on Christmas Eve 2017 when the documented evidence demonstrated that he had not.

100. In summary the respondent argued, so far as the claimant may have sought to rely on the Supreme Court Pimlico case, that they could distinguish the present case on the facts. They argued that the claimant was primarily employed in his own business and provided to the respondent as a client. The respondents argued that the evidence was that the claimant had multiple clients including other EAP providers and that in each case the claimant provided his services to those clients as an independent supplier. Further the respondent argued that any inference of integration simply reflected measures the respondent was required to take for reasons of professional responsibility. The respondent further argued that reliance could be placed on what they suggested was the time which was spent by the claimant on providing services to the respondent which was significantly less than in his private practice. The respondent argued that the reality was that the claimant was self employed and either carried out the Associate Contract work in addition to his daytime practice for additional income, although they conceded that time spent is not a factor in determining whether a person is a worker or not it was suggested to be a persuasive indicator in assessing the total construction of the arrangement and was an indicator of why the claimant would accept the Associate Contract.

101. The respondent argued that the claimant evidence was insufficient to demonstrate that he was an employee or a limb b worker and that the correct analysis was that *"he was always an independent suppler legitimately employed in his own business and providing services to the respondent as a client".*

Employment Status

Applicable Law

102. Section 230 of ERA 1996 provides as follows:

"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.

(3) In this Act "worker" (except in the phrase "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 out by the individual;

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

103. I also had regard to **Section 54 National Minimum Wage Act 1998** (NWA NWA 1988) which sets out the meaning of "*worker"* as follows:

"(3) In this Act "worker" (except in the phrases agency worker and 5 home 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…"

104. I was referred to the comments of McKenna J in the Ready Mixed Concrete case where he said

"'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 …'."

105. I am reminded that subsequent authority considering both ERA 1996 and NWA 1988 has recognised that the practical difficulties in applying this approach and although it remains the approach to have regard to same, while also having regard to the statutory framework set above and indeed the multiple tests which been subsequently suggested to assist in arriving at the correct conclusion.

106. The EAT in Cotswold set out 4 questions, which it considered may be helpful for a Tribunal to ask:

(*1) was there one contract or a series of shorter assignments;*

(2) if one contract, was it the natural inference from the facts that the claimant agreed to undertake some minimum, or at least some reasonable, amount of

work for the company in return for being given that work, or pay (i.e. was there sufficient mutuality of obligations to establish a contract at all?);

(3) if so, was there such control as to make it a contract of employment;

(4) if there was insufficient control, or any factor negating employment, was the claimant nevertheless obliged to do some minimum (or reasonable) amount or work personally (and so qualify as a worker).

107. I was referred to the Autoclenz case where the Supreme Court upheld a decision that the claimants in that case on the Findings in Fact by the Employment Tribunal were workers. However, the key aspect of that decision, was that all relevant evidence must be examined, and the practice of the parties may demonstrate the true obligations of the parties rather than the written documents. In Autoclenz at para 24 it was recognised that fettering of substitution may not amount, on the facts, to a sham.

108. I have, however, also reminded myself of the comments of Lady Hale in Bates van Winkelhof v Clyde and Co LLP and anor 2014 IRLR 69 (the van Winkelhof case) at para 31 that employment law distinguishes between three types of people:

(i) those employed under a contract of employment;

(ii) those self-employed people who are in business on their own account and undertake work for their clients or customers; and

(iii) an intermediate class of workers who are self-employed (often referred to as "the limb b worker") but do not fall within the second class; however, and as Lady Hale comments at para 38

> *"Maurice Kay LJ pointed out (at paragraph 18) that neither the Cotswold 'integration' test nor the Redcats 'dominant purpose' test purported to lay down a test of general application. In his view they were wise 'not to lay down a more prescriptive approach which would gloss the words of the statute'. Judge Peter Clark in the EAT had taken the view that Dr Westwood was a limb (b) worker because he had agreed to provide his services as a hair restoration surgeon exclusively*

to HMG, he did not offer that service to the world in general, and he was recruited by HMG to work as an integral part of its operations. That was the right approach. The fact that Dr Westwood was in business on his own account was not conclusive because the definition also required that the other party to the contract was not his client or customer and HMG was neither."

I consider that the fact specific nature of the Uber decision does not materially detract from Lady Hales comments in Van Winkelhof.

109. Similarly, and while noting the terms of the decision in Bryne Bros, I note that the Supreme Court decision in Pimlico Plumbers held that a conditional right to provide a substitute may not, on the facts of that specific case, be inconsistent with an obligation to provide services personally where the substitute is under an identically heavy suit of obligations, and at para 34, Lady Hale stated that

"The tribunal was clearly entitled to hold, albeit in different words, that the dominant feature of Mr Smith's contracts with Pimlico was an obligation of personal performance. To the extent that his facility to appoint a substitute was the product of a contractual right, the limitation of it was significant: the substitute had to come from the ranks of Pimlico operatives, in other words from those bound to Pimlico by an identical suite of heavy obligations. It was the converse of a situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done. The tribunal was entitled to conclude that Mr Smith had established that he was a limb (b) worker - unless the status of Pimlico by virtue of the contract was that of a client or customer of his."

110. The Supreme Court in Pimlico suggested that it could be helpful to assess the significance of any right to substitute by reference to whether the dominant feature of the contract remained personal performance on the part of the worker and what the limitations on that right to substitute were.

Discussion and Decision

111. The respondent elected to deploy the term Associate Counsellors rather than more straightforwardly the term Contactor Counsellor to denote non employee contractors. The word Associate can have several meanings, and indeed is different from the (equally inspecific) term Affiliate deployed by Validium at which both the claimant and Mr Telfer had previously worked as employees. That however does not preclude the Associate Contract which is actually headed "Contract for service" and which refers to the claimant throughout as "the supplier" operating effectively as between the respondent and the claimant as one of business and contractor on the specific facts set out above.

112. William Telfer did not set out in terms, in his original telephone discussion in early February 2018 with the claimant, that the proposal from the respondents was that of a contractor. However, against the subsequent issue to the claimant of the Associate Contract, his acknowledgment of same and both the claimant and the respondent operating in manner conform to the Associate Contract, that omission did not preclude the Associate Contract operating effectively. The claimant is a sophisticated individual, he operates his own business and has a role on his professional body's private practice committee. It is not accepted that the claimant had any material confusion as to his status.

113. While that the respondent did not press for return of a signed copy of the Associate Contract that does not preclude the agreement operating effectively on the specific facts set out above, the claimant acknowledged receipt and while he did not return the Associate Contract that was a simple oversight and did not denote any rejection of its terms. The claimant operated conform to the Associate Contact during the period of the arrangement.

114. While the claimant offered to cover certain night shifts and those offers were accepted for consistent days of the week, against the nature of the business including the respondent's requirement to plan the provision of the service

this does not amount to integration into the respondent's business and does not preclude the Associate Contract operating effectively as one between a business and a contractor.

115. The claimant accepted the Associate Contract as being straightforward and operated, effectively, conform to that contract until after the redundancy consultation process for the respondent's employees had concluded.

116. The Associate Contract did not, in fact, restrict the claimant from operating as a private counsellor either as a private individual in any capacity, or through his marketing and operational device of WOSCAP.

117. Had the claimant not accepted the position as being one of contractor and business he had a long period in which he, as a professional and experienced business person could have invited the respondents to redefine the relationship as one of employee and employer. He did not do so. The arrangement was not a sham the arrangement of contractor reflected both the Associate Contract and the economic reality. His colleague, Anne Kelly had previously operated as an Associate Counsellor and had subsequently become an Employed Counsellor. It would have been open to the claimant to seek to follow this route.

118. In Autoclenz it was observed that substitution which although fettered may, on the facts, not amount to sham. In the present case, it was reasonable given the nature of the calls which would be referred, for the respondents to be satisfied that the any substitute was not only a qualified counsellor but was also aware of the respondents' protocols. This limited restriction of the power of substitution did not amount to a sham. There was not a suite of heavy obligations on either the claimant or any substitute. On the facts, substitution at the allocated night shifts could and did occur. Indeed, and beyond those night shifts, if the claimant did not accept a call, for any reason, the call would be transferred to the Back Up Counsellor in substitution of the

claimant, and responsibility for the handling of that call transferred to the Back Up Counsellor.

119. While the respondent had sought to argue that they had contracted with the claimant in his capacity as a sole trader operating as WOSCAP, I consider reflects a misreading of the approach addressed in Van Winklehof. The Associate Contract was with the claimant in his private capacity, as demonstrated by the agreement being addressed to him an individual and sent to his home rather than his work address. That the claimant also operated a business as a sole trader (or in any other capacity) from a business address does not preclude an agreement also being entered into by that individual in a private capacity. If the respondents had intended to contract with the claimant's trading entity WOSCAP they ought to have taken steps to set that out in the Associate Contract. Equally, however, the fact that the respondent had entered into the Associate Contract with the claimant in his personal capacity does not preclude the claimant, in his personal capacity, as being properly identified as a contractor.

120. On the question of whether the claimant was a worker engaged by the respondent again the position in fact was as set out in the Associate Contract which both parties operated conform to. The claimant was not a worker. The claimant was a self employed contractor. The tests set out demonstrate that the claimant had a high degree of autonomy and could within reasonable limits seek substitution. The was no requirement of minimum number of hours and in fact on a significant number of night shifts on which the claimant had volunteered and was allocated to, no calls were referred to the claimant. The claimant was not restricted in his capacity to market his professional counselling services beyond the arrangement he elected to enter into with the respondent. The claimant continued to act as a private counsellor offering his services in his personal capacity to the public generally whether as private individual or otherwise through the marketing and operational device of WOSCAP.

121. While recognising the comments of Lady Hale in Van Winklehof, as to the limits of the usefulness the questions suggested in Cotswold; the response to those 4 questions is as follows:

I. On the first question, on the facts in the present case there was a series of short assignments which the claimant volunteered to undertake although these were encompassed within the single governing Associate Contract. There was one contract.

II. On the second question, the answer on the facts is that there was no natural inference that the claimant agreed to undertake some minimum amount of work. He received a retainer simply for being retained, should the respondent have decided to refer a call. The retainer reflected, in effect, an incentive offered to a highly qualified professional counsellor to agree to be on call through a night shift when in fact the level of calls was such that on a significant number of nights no calls would be referred and as such there would have been no reason to continue to volunteer.

III. On the third question, on the facts the level of control was extremely limited and indeed insufficient to meet the worker test. Where the claimant did not answer a referred call while the respondents, as part of their service, would seek reasons they did not impose a sanction. Indeed, the respondent operated a back up system allowing precisely for the non answering of a call. The respondent did not materially direct the claimant on how to deal with a call, that appropriately being a matter of his professional judgment**.**

IV. On the fourth question, the claimant was not obliged to do any minimum amount of work. The claimant carried out no work at all on a significant number of the on call night shifts and limited work on other on call night shifts.

122. Having regard to the comments of Lady Hale in Van Winklehof, and while the claimant did operate a business in his own account it is recognised that that of itself was not conclusive. However, he had not agreed to provide his services exclusively to the respondents. He provided the service either

personally and or through his device of WOSCAP to the world in general. He was not recruited by the respondents as an integral part of its operation, if the claimant did not volunteer for a shift, another Counsellor would be allocated that night, if he did not accept a call, the call would be transferred to another Counsellor, and when transferred he had no continuing responsibility in reaction to that call. He was not directed in any meaningful way as as to how to engage with a caller operating appropriately autonomously within his own professional judgment and was not required to attend the respondent's premises. He could, and did, work from his own home. He was not provided with free training by the respondents. He was not in any sense integrated within the respondent's business.

123. Having regard to the approach of the Supreme Court in Pimlico Plumbers in the present case the dominant feature of the contract, both as set out in the Associate Contract and, as applied in practice on the facts of this case, was not one of a restricted performance by the claimant, and while some practical limitations on the right of substitution existed these were not significant.

124. In these circumstances it is not necessary in the present case to imply a different contract to that sent by the respondent and which the claimant accepted and operated conform to. The business reality reflected the Associate Contract between the claimant and the respondent and it is not necessary to imply a contract contrary to the contract that did exist between the claimant and respondent.

125. While the respondent sought to argue that the claimant, in in his evidence was deliberately unreliable and indeed sought to draw conclusions from the use of different e-mail addresses, I consider that while mistaken on a number of factual matters, such as the date on which he commonly acted on call, the claimant had simply been mistaken in his evidence. On the use of e-mail addresses, it is perhaps sometimes overlooked by individuals that an e-mail which ought properly to be sent from a personal account is sent from a business account or vice versa. It is not, in practical terms, wholly

comparable to sending a letter on headed notepaper, the implications of which ought to be immediately apparent to the sender. I do not consider it is appropriate to draw any conclusions on those issues.

126. The Claimant has however not established that a contract different to that set out in the Associate Contract should be implied in the circumstances of this case.

Conclusion

127. The claimant was not an employee of the respondent, within the meaning of section 230(1) of the Employment Rights Act 1996.

128. The claimant was not a worker within the meaning of section 230(3) of the Employment Rights Act 1996. He was not *a* worker within the meaning of s54 of the National Minimum Wage Act 1998.

129. The claimant's status in his dealings with the respondent was that of a self employed contractor.

Employment Judge: Rory McPherson
Date of Judgment: 02 November 2018
Entered in register: 06 November 2018
and copied to parties