RESERVED JUDGMENT **Case Numbers: 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

Heard at: Manchester **On:** 19 March 2019

Before: Employment Judge Slater

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

UPON APPLICATION made by letter dated 14 December 2018 to reconsider the judgment sent to the parties on 6 December 2018 under rule 71 of the Employment Tribunals Rules of Procedure 2013

JUDGMENT

The judgment sent to the parties on 6 December 2018 is confirmed.

REASONS

The application for reconsideration

1. This was an application for reconsideration made by the respondent. The grounds for the application were set out in a letter dated 14 December 2018, written submissions provided to me at this reconsideration hearing and additional oral submissions from Mr Nutman. The claimants responded to the application in writing on 13 February 2019 and 7 March 2019 and by oral submissions made by Mrs Mather on behalf of all the claimants.

2. One of the grounds for the application for reconsideration was that I had referred in my judgment to cases without having informed the parties I would be considering these and inviting submissions on those cases. That omission has been made good by this reconsideration hearing at which the parties have had the opportunity to make submissions on those cases as well as any other points they considered relevant.

3. The respondent's application for reconsideration evolved in some respects during the course of oral submissions.

4. I summarise my understanding of the main arguments made on behalf of the respondent as follows.

4.1. That it was not the claimants' case that the issue of a rota amounted to a period of engagement which could, itself, amount to a contract of employment; the claimants' case was that they were all employed under a continuous employment contract. The tribunal went further than permitted, having regard to the overriding objective of dealing with the case fairly and justly, by deciding that the claimants were employed during the period for which a rota was issued. The tribunal should have dismissed the claim since the judge rejected the contention that the claimants were employed under a continuous contract.

4.2. That each rota could not, on the basis of the facts found by the judge, amount to a period of engagement under a contract of employment. The respondent argued that two necessary elements for there to be a contract of employment were lacking:

4.2.1. Mutuality of obligation; and

4.2.2. The obligation to provide personal service.

4.3. The judgment should be varied to find that the claimants were employees when working on an assignment under the rota but not for the period for which a rota was issued. The respondent will say that this means the claimants would not have continuity to claim unfair dismissal or a

redundancy payment.

4.4. In relation to the finding of unfair dismissal, if the judgment is varied so that the claimants were employed during individual assignments under the rota, but not for the for the period in respect of which a rota was issued, the ending of each contract would be not because of a reduction of work but because there was no overarching contract of employment. The reason for dismissal should not be redundancy, but "some other substantial reason". A dismissal for this reason would be fair. The judgment should be varied to conclude that the complaints of unfair dismissal were not well founded.

4.5. Alternatively, if the judgment about the contract of employment being the duration of the rota was not varied, the dismissals should be held to be fair because the respondent acted fairly in not following normal redundancy processes because of a genuine and mistaken belief that the claimants were not employees.

Conclusions

Whether the tribunal was entitled to consider the argument that the claimants were employed during the period for which a rota was issued

5. In relation to the first argument, I set out in paragraph 72 of my reasons why I considered it appropriate that I consider not only whether there was a global contract of employment but also whether there were separate contracts of employment for each assignment. I did not address in that paragraph what, in the context of this case, would constitute an assignment. That was dealt with later in my judgment. Mr Nutman submitted that *O'Kelly v Trusthouse Forte plc [1983] ICR 728* was not authority for the proposition set out in paragraph 72. It would, perhaps, have been clearer if I had put in quotation marks the proposition which I took from the Court of Appeal decision in *McMeechan v Secretary of State for Employment [1997] ICR 549.* I reproduce this now, from page 564 of the ICR report at paragraphs A-B:

> *"In O'Kelly v Trusthouse Forte plc [1983] ICR 728 the industrial tribunal reached, fortuitously, a decision that both the general and the specific engagement failed to give rise to a contract of service. The importance of the case, however, is that the tribunal did give independent consideration to both heads of engagement, and was held to have been right to do so. Indeed it seems to me to be an irresistible inference from the remarks of Sir John Donaldson MR at pp 763-764, that the tribunal was regarded as being under a positive duty so to do. Whether or not employee status should, or should not, be so allocated in any particular case will of course need to be resolved as a question of fact according to the particular circumstances of each case."*

6. In the *McMeechan* case, the claimant's case was understood and proceeded on the basis of a claim that a contract of employment had arisen under his general

engagement until, during the course of argument in the Court of Appeal, Waite LJ write as page 562 of the ICR report at paragraph E:

> 6.1.1. *"As the argument proceeded, it appeared to the members of this court that the relief for which the applicant was really and primarily asking was that the relief for which the applicant was really and primarily asking was to be treated as an employee of the contractor in respect of the stint he served with their client Sutcliffe Catering."*

7. The Court of Appeal then proceeded to consider whether the claimant was employed during that "stint" which, it appears from elsewhere in the judgment, amounted to four days' work for the client, for which he was claiming £105 of unpaid wages.

8. It seems to me, based on what is said in that quote, and on the approach taken to proceedings in the *McMeechan* case, coupled with the overriding objective, that I was entitled to consider whether the claimants were employed during the course of an assignment and not just during the overarching relationship, even though the unrepresented claimants had not addressed their arguments specifically to the issue of whether there was a global contract of employment and/or separate contracts of employment for each assignment.

9. The claimants were saying that they thought they had been employees since they started working for the emergency dental service, since they committed themselves to work for this by signing up for shifts on rotas; they distinguished this from a more typical "bank" arrangement where a nurse would be called on at short notice to cover for absence.

10. The list of issues which was agreed at a preliminary hearing did not specifically identify the period during which it would be considered whether the claimants were employees, stating merely, as an issue: "Are the claimants workers or employees?" This left open the possibility of considering whether they were employees under a global contract, or during a particular assignment (however that was to be properly identified). As noted in paragraph 3 of my reasons, since the issue of whether, if the claimants were employees, they had sufficient continuous employment to qualify for the right not to be unfairly dismissed and for a statutory redundancy payment had not been identified prior to the final hearing, I decided that the issue of continuity should be decided at a further hearing, if it became relevant. As I recorded in paragraph 72, Mr Nutman, on behalf of the respondent, confirmed at the previous hearing that he was in a position to address me on the issue of whether there had been a contract of employment in relation to the global arrangement and/or the specific assignments and did so. I had informed the parties that I would be considering whether an engagement was the duration of a rota or a particular session.

11. It also appears to me that the *McMeechan* case and other authorities do not preclude me from considering whether an assignment was the duration of a rota rather than just an individual shift on the rota. The assignment or "stint" in

McMeechan was more than an individual shift.

The decision that the claimants were employed during the periods for which a rota was issued

12. The respondent submitted that an assignment did not start, and a claimant was not employed, until the claimant started work on a shift on the rota; they were not employed from the start of the rota.

The mutuality of obligation issue: the obligation on the claimants

13. I dealt with this at paragraphs 74 and 75 of my reasons, concluding that there was mutuality of obligation during the period for which a rota was issued. The respondent argued that this conclusion was inconsistent with the finding of fact at paragraph 22 that 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. The respondent argues, based on this evidence, that not only could staff swap shifts, even on the day of the shift itself, but there was a mechanism for the respondent to help find cover and the manager would cover if needed. Therefore, the respondent argues, there cannot have been an absolute obligation on the claimants to perform the work personally after a rota was issued; they could still withdraw from doing the work on the rota.

14. I did not repeat in my conclusions all the findings of fact relevant to the conclusion that, once the rota was issued, the nurse was committed to work the shifts on the rota or to find another bank nurse to do the shift in her place. The evidence of Ms Pearce is but part of the picture. Her evidence does indicate that, in Ms Pearce's experience, the manager would provide assistance in trying to get cover, if the nurse had been unsuccessful in finding cover and would on occasion cover the shift themselves. Her evidence is consistent with the evidence of the claimants that there was an obligation on the nurse to find cover if they could not do a shift on the rota. This is consistent with the statement in documents that were signed by two of the claimants in March 2009 to which I referred in paragraph 14 of my reasons: *"Once the Out of Hours rota has been issued, it will be your responsibility to find cover for these shifts."* I referred in my findings of fact and conclusions to the evidence of Mrs Tiffin who took a break from the service rather than work on Christmas Day (her name having been pulled out of a hat to do that unpopular shift) since she did not feel she could just refuse to do the Christmas Day shift but continue to work other shifts (paragraph 23 of my reasons). If a bank worker failed to attend for 2 shifts, after having said they were available, they were removed from the scheme (paragraph 24 of my reasons). This suggests a level of obligation on the claimants to attend for work sessions allocated to them on the rota.

15. I do not consider that the willingness of the manager to help in finding cover, and, providing cover themselves, **only after** the nurse had tried themselves

unsuccessfully to find cover, means that there was no obligation on the nurse to work shifts allocated to them or find cover for those shifts. Mr Nutman says Ms Pearce's evidence shows there was no absolute obligation on the claimants to work. I consider this sets the bar too high for the level of obligation required to establish mutuality of obligation. I conclude, on reconsidering this part of my decision, that the level of obligation on the claimants to perform the work or arrange cover (albeit with help if they had difficulty doing so) once a rota was issued is sufficient for there to be a contract of employment for the period for which a rota was issued.

The mutuality of obligation issue: the obligation on the respondent

16. Mr Nutman submitted that it was an error of law for me to rely on a lack of evidence 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 (paragraph 74 of my reasons) because I did not ask the respondent's witnesses about this and this was not an argument raised by the claimants. The respondent asserted in correspondence prior to this reconsideration hearing that shifts could be cancelled during the shift itself and the claimants paid only for time worked up to the point of cancellation. The claimants, in correspondence in reply, denied that this was possible or had ever happened. At this reconsideration hearing, I was informed that it was not the respondent's intention, if I revoked the judgment, to call any evidence to the effect that the respondent could send a nurse home during the course of a shift. In oral submissions, Mr Nutman said there would be no need to call such evidence. He said that it was right, on the case law, that, an employer being able to stop an assignment once started does not prevent there being a contract of employment for that assignment. Even if the respondent is correct that I made an error of law by referring to lack of evidence on this point, it does not, therefore, provide a reason for me to reach a different conclusion on mutuality of obligation.

17. It was common ground that, during the period of a rota, the respondent could cancel a session, before it started, without pay (paragraph 26 of my reasons). I confirm my conclusions, as set out in paragraph 75 of my reasons, that the fact that the respondent could cancel a session, without needing to pay the dental nurse, did not prevent there being the necessary mutuality of obligation during the period for which a rota was issued. Given the respondent's agreement on the legal principle that an employer being able to stop an assignment once started does not prevent there being a contract of employment for that assignment, it is not necessary for me to seek to distinguish the factual situation of the claimants from that of the hospital porter in *Little v BMI Chiltern Hospital.* On reconsideration, I place no reliance on the absence of evidence about whether the respondent could send a nurse home during the course of their shift without payment for the remaining hours of the shift.

The obligation to provide personal service

18. The respondent noted that I did not refer to the Court of Appeal decision in *Halawi v WDFG UK Ltd (t/a World Duty Free) [2014] EWCA Civ 1387,* and submitted that, applying that judgment, the tribunal should have concluded that the ability to send a substitute to fulfil an assignment on the rota, meant that the necessary obligation to provide personal service was missing during the period for which a rota was issued. I had referred to and relied on the decision of the Supreme Court in *Pimlico Plumbers Ltd v Smith [2018] UKSC 29,* in concluding that the limited right of substitution in this case 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 (paragraph 78 of my reasons). Mr Nutman submitted that the claimants' right of substitution was like that in *Halawi.* Mr Nutman notes that *Halawi* was expressly considered in *Pimlico Plumbers* but he did not refer me to the expressed view of the Supreme Court on that case. Re-reading *Pimlico Plumbers,* I am reminded that Pimlico Plumbers Ltd relied heavily on the *Halawi* decision in challenging the tribunal's conclusion that the right to substitute another Pimlico operative did not negative Mr Smith's obligation of personal performance. However, the Supreme Court did not agree with their argument. I note that Lady Hale, at paragraph 31, for reasons which she explains in paragraphs 30-31, concludes *"In my view Mrs Halawi's case is of no assistance in perceiving the boundaries of a right to substitute consistent with personal performance."* Mr Nutman did not explain in his submissions on what basis it would be right for me to place the reliance he sought on *Halawi* in the light of the comments of Lady Hale. On reconsideration, I confirm my conclusions as to personal service, considering that I was correct not to place weight on the decision in *Halawi,* given the view taken of that case by the Supreme Court; it was unnecessary for me to refer to *Halawi.*

Conclusions on the reconsideration of my decision that the claimants were employed during the periods for which a rota was issued

19. For the reasons above, I confirm my previous decision that the claimants were employed by the respondent during the periods for which a rota was issued.

The decision that the complaints of unfair dismissal were well founded

20. I have not varied my judgment to find that the claimants were employed during individual assignments under the rota, but not for the period in respect of which a rota was issued. The respondent's argument, predicated on such a variation, that the reason for dismissal should not be redundancy, but "some other substantial reason" and that a dismissal for this reason is fair cannot, therefore, succeed.

21. The respondent's alternative argument, if the judgment about the contract of employment being the duration of the rota was not varied, was that the dismissals should be held to be fair because the respondent acted fairly in not following normal redundancy processes because of a genuine and mistaken belief that the claimants were not employees. The respondent relied on the decisions of *Klusova*

v London Borough of Hounslow [2007] EWCA Civ 1127 and *Ely v YKK Fasteners Ltd [1993] IRLR 500* in support of this argument. Mr Nutman submitted that I had failed to consider the respondent's submissions in paragraphs 53-59 of its skeleton argument from the final hearing in this respect. I did not address these parts of the respondent's submissions in my conclusions because I understood, from the structure of that skeleton argument, (where these paragraphs appear under the heading "some other substantial reason") that they only had application if I had decided that the reason for dismissal was not redundancy, but "some other substantial reason". Mr Nutman says I was wrong to understand this to be the case but it still appears to me from the structure of that skeleton argument that this is the natural reading of his argument.

22. Whether or not I was wrong to understand Mr Nutman's previous submissions in the way that I did at the final hearing, I now consider, on reconsideration, the application of the authorities to which he refers to the fairness of the dismissal for redundancy.

23. Neither of the authorities to which Mr Nutman refers relates to a dismissal by reason of redundancy. Both are cases where the employer's reason came under the category of "some other substantial reason" capable of being a fair reason in the circumstances.

24. The *Klusova* case involved a situation where the employer relied on misleading official advice as to the employee's immigration status in deciding to dismiss the claimant. The *Klusova* case related to the time when the statutory procedures in what was then section 98A Employment Rights Act 1996 (ERA) applied. That section has since been repealed. The respondent had failed to follow those statutory procedures. The statutory procedures did not apply if s.98(2)(d) ERA applied, which the respondent genuinely but mistakenly thought to be the case. The Court of Appeal allowed the employer's appeal on the point that the dismissal was for "some other substantial reason". Mr Nutman writes, in paragraph 54 of his original skeleton argument, and repeats in paragraph 20 of the submissions for this reconsideration hearing, that this was a fair dismissal. The case did **not** decide that. The Court of Appeal, at paragraph 73, held that the outcome was that the dismissal was unfair by reason of non-compliance with the prescribed dismissal procedures. I find the *Klusova* case to be of no assistance in deciding s.98(4) fairness or unfairness in this case.

25. The *Ely v YKK Fasteners Ltd* case involved an employer mistakenly construing an equivocal expression of an intention to resign by an employee as a resignation. The Court of Appeal upheld the decision of the employment tribunal and the EAT that the reason for dismissal was "some other substantial reason". The only appeal point related to whether "some other substantial reason" could be the reason for dismissal in the factual circumstances of the case. Although the employment tribunal had decided the dismissal was fair, there was no issue before the Court of Appeal about the fairness of the dismissal under the equivalent in the Employment Protection Consolidation Act 1978 of s.98(4) ERA. I do not consider that any general principle can be drawn from this authority which would require me to find

a dismissal to be fair, applying s.98(4), when the respondent follows no proper procedures before dismissing the claimants for a reason found to be redundancy, due to a mistaken belief that the claimants were not employees.

26. The respondent has not drawn my attention to any authorities which I consider would lead me to reach a different conclusion on the fairness of the dismissals as set out in paragraphs 85-94 of my reasons. I confirm my decision on the fairness of the dismissals.

Overall conclusion

27. For the reasons I have given, I confirm my judgment sent to the parties 6 December 2018.

Next steps

28. At this reconsideration hearing, Mr Nutman informed me that, if the judgment was confirmed, the respondent accepted that the claimants had sufficient continuous service to claim unfair dismissal and be entitled to statutory redundancy payments. The only remedy to be awarded to the claimants is a declaration that they were entitled to be paid statutory redundancy payments by the respondent, identifying the amounts due. The respondent had prepared calculations of the redundancy payments. The claimants were only given these on the morning of the hearing, so were not in a position to say whether they agreed that the calculations and information on which they were based were correct. If the amounts of the statutory redundancy payments can be agreed, I will issue a judgment by consent on remedy, without the need for a further hearing. If the amounts cannot be agreed in correspondence, a further remedy hearing will be listed.

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Employment Judge Slater

Date: 22 March 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

27 March 2019

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FOR THE TRIBUNAL OFFICE