



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4121942/2018

Held in Edinburgh on 14 March 2019

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Employment Judge: Ms R Sorrell

15 Miss J Patterson

Claimant:
Represented by:
Mr I Burke
Solicitor

20 Eildon Housing Association Limited

Respondent:
Represented by:
Ms S Macphail
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The Judgment of the Tribunal is that the claimant was engaged as a worker and not as an employee at the time of the alleged protected disclosure and consequently she is not entitled to the protection of Sections 94,98 and 103A of the Employment Rights Act 1996. ("ERA")

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REASONS

40 **Introduction**

ETZ4(WR)

1. The claimant lodged a claim for unfair dismissal, automatic unfair dismissal as a result of making a protected disclosure, notice pay and holiday pay.
- 5 2. A Closed Preliminary Hearing was held on 4 January 2019 at which Employment Judge d'Inverno decided an Open Preliminary Hearing should be scheduled in order to determine if the claimant was engaged as an employee or a worker at the time of the alleged protected disclosure and therefore whether she is entitled to the protection of Sections 94, 98 and
10 103A of the "ERA."
3. In respect to this Hearing, the claimant called one witness, Miss S Webb who was a former colleague. The respondent called two witnesses', Mrs D Taggart, the respondent Human Resources Manager and Mrs L Macleod,
15 the respondent Care Co-ordinator.
4. Parties lodged a joint bundle of productions (JBP) and a joint index of authorities. (JIA)

20 **Findings in Fact**

The following facts have been admitted or found by the Tribunal to be proven:-

5. The claimant's date of birth is 15 April 1989.
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6. The respondent provides housing, care and support services to people across the Scottish Borders.
7. The claimant was employed by the respondent as a Support Worker on a shift basis from 18 January 2016 until 31 August 2017 providing care and
30 support for vulnerable adults.
8. The respondent provided the claimant with a Written Statement of Main Terms and Conditions of Employment which she signed on 18 January
35 2016. (JBP pages 37-41)

9. During her employment the claimant was required to either swap an allocated shift or take annual leave if she was unable to do it. She could cancel any extra shift agreed if it was over and above her contractual hours.

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10. The claimant commenced a full time course in learning disability nursing at Napier University, Edinburgh in September 2017.

10 11. Following discussions between the claimant and the respondent management, it was agreed that the claimant would be engaged as a Relief Bank Worker with effect from 1 September 2017 which would allow more flexibility for both the claimant and respondent.

15 12. As a result of these discussions, on 25 July 2017 the claimant emailed her resignation to Joanne Moore and two other respondent managers, Sheona Muir and Nicola Allan as follows:-

20 *“As you all know I have been accepted to go to University starting on the 4th of September (dates not been 100% confirmed yet). I would like to hand my notice in as a full time member of staff and join onto the relief staff team from the 1st September 2017. This should give sufficient notice from now. Can I ask that my holidays are updated to show the remaining balance and if I have any left over I would prefer to work my notice and take these holidays as extra pay if possible. If not let me know. Please can you inform me of when I will be required to give availability for the month of September and if I need to do anything with regards to the contracts and pay scale changing over. When on relief if I can help out in anyway with last minute shifts etc please don't hesitate to contact me as I am sure as long as I am not*

25 *in University I will be available to help out. Please let me know if there is anything else I have to do next and whether I need to update any training for going onto relief. I hope this is ok to do via email if not*

30 *let me know and I will print one off.” (JBP page 46)*

13. On 17 August 2017 the claimant received a response to her resignation email from the respondent Human Resources Manager, Deborah Taggart as follows:-

5 *“Thank you for your email of 25 July 2017 confirming your intention to resign from the Association’s employment. Taking into account your notice period of one month 31 August 2017 will be your last day of employment with us. Providing you take no further annual leave before this date, our records show that you are owed 6 hours holiday. It is our intention to honour these as monies in lieu. The finance section have been notified of your resignation. Your final salary payment will be made on 31 August 2017 however you will remain on our payroll until September so that we can process any payments or deductions due to you for annual leave, rota hours and sleepovers. A deduction will also be made for the petty cash paid to you at the start of employment. Any further payment due to you will be made on 28 September 2017. Your P45 will be issued as soon as possible after your final payment. I have enclosed a confidential exit questionnaire should you wish to make any comments on your reasons for leaving and your employment with the Association. Unless you notify us otherwise, the Association will provide references to future potential employers. I would be grateful if you could return any Association property you are in possession of. Most importantly, before you leave, could you return your ID card/Door entry swipe card and any keys/mobile phone etc you may have to your line manager. May I take this opportunity to thank you on behalf of the Association for your past service and to wish you well for the future.” (JBP page 48)*

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14. On 29 August 2017 the respondent provided the claimant with a Statement of Conditions for Relief Bank Workers which the claimant signed on 31 August 2017. This stated:-

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“This casual work agreement is made between Jenna Patterson and Eildon Housing Association Ltd (“the Association”) for the provision of

5 *Relief Bank Work ("Work"). There is no intention to create any obligation on either party to offer or accept Work. Whilst this casual contract commenced on 1 September 2017, for the avoidance of any doubt, it is intended that any time in between agreed periods of Work shall not count towards the interpretation of continuous employment for the purposes of any statutory employment rights.*

10 *Your main place of work will be Station Avenue, Duns but you may be asked to work at other Association locations as per the attached Conditions of Service.*

15 *The Association agrees to offer you the opportunity to undertake Work as may be required from time to time. Any hours of Work offered will be subject to the requirements of the business and will vary from time to time at the sole discretion of the Association.*

20 *Due to the nature of the Work we are under no obligation to offer any Work to you at any time. Conversely, you are under no obligation to accept any Work offered. In the event of you declining to accept any offer of Work, for any period, the Contract shall be considered not normally to involve Work for such a period.*

25 *The hourly rate is dependent upon which role you cover. Please see the attached Job Description and Conditions of Service for Support Worker for more information. You will be paid by bank giro/building society transfer by the last Thursday of the month, in arrears, dependent upon submission of timesheets and payroll cut off dates.*

30 *You will be entitled to receive 5.6 weeks (28 days) paid leave per annum. However, due to the variable nature of the work, and as you are under no obligation to undertake work at any particular given date, a payment in addition to the normal hourly rate of pay will be made to reflect the annual entitlement to leave. This is calculated using the number of working days per year (260) divided by the*

statutory leave allowance (28) which works out as 10.8% of the hourly rate of pay. This payment will be made along with payment for hours worked and will be itemised separately on your pay slip.

5 *You are under no obligation to accept any offer of work. However, where work has been accepted you owe the Association the usual common law duties expected as far as they are reasonably applicable including:-*

- 10 (i) *Not to engage in any conduct detrimental to the interest of the Association*
- (ii) *To be present during the specified times, or for the total number of hours during each day or week as are agreed*
- 15 (iii) *To afford faithful service of a standard such as would sustain a Contract of Employment*
- (iv) *To take all reasonable steps to safeguard your own safety and the safety of any other person who may be affected by your actions at work*
- 20 (v) *To comply with any disciplinary rules or obligations in force to the extent that they are reasonably applicable*
- (vi) *To comply with all reasonable instructions and requests within the scope of the agreed services and duties.*

25 *You will not be entitled to Statutory Sick Pay*

There is no requirement from you or the Association to provide any notice to terminate this agreement.

30 *Whilst you are not an Employee, the Staff Handbook should be read in order to comply with the various working procedures and standards set out therein. The Staff Handbook is available for you to consult on the Intranet and a hard copy is available at each location.*

We hope you find this Statement of Conditions for Eildon Relief Bank Workers satisfactory and we would be pleased if you would confirm acceptance by signing the enclosed copy and returning it to us.”
(JBP pages 50-51)

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15. The claimant's status as a Relief Worker was flexible and her hours were variable. Relief workers were asked for their availability after shifts were allocated to employed staff. In the event there were any remaining gaps all staff were emailed for their availability in order to fill them.

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16. The respondent was not obliged to offer the claimant work and if she couldn't do shifts offered to her she didn't have to accept them. Changes to her shift times were accommodated according to her University studies. The claimant was able to and did reject shifts or cancel shifts allocated to her.
(JBP pages 56-102)

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17. The role and tasks of a Support Worker were the same for a Relief Worker as an employee. As a Relief Worker, the claimant was required to personally perform these services and was under the control of the respondent when performing them.

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18. The payslips provided to the claimant as a Relief Worker were different from when she was employed by the respondent in that she did not receive annual leave, sick pay or a salary.

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19. On 2 July 2018, the respondent Director of Housing and Care Services, Amanda Miller emailed the claimant with an attached letter dated 28 June 2018 that states:-

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“As you are aware we are reviewing a range of activities across Station Avenue to ensure we support local managers of the service to deliver improvements and improve how we work together as a team.

5 *During the past few months concerns have been raised with me regarding your relationship with colleagues and in particular the management team at Station Avenue. These concerns relate to your inability to reflect on feedback given to you from managers and during these specific discussions, your attitude towards your managers. Furthermore, several of your colleagues have reported feeling intimidated by your approach to them. I consider these reported behaviours to be inappropriate and contradictory to the expectations set out in our Code of Conduct.*

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Whilst we acknowledge the good work you have done with service users and your commitment to the service, the level and nature of the concerns raised has led to a decision to remove you from our relief bank and to no longer offer you any more relief shifts at Station Avenue.

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The contractual relationship Eildon have with you is outlined in the relief statement of conditions you received when you started your relief role i.e.

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The Association agrees to offer you the opportunity to undertake Work as may be required from time to time. Any hours of Work offered will be subject to the requirements of the business and will vary from time to time at the sole discretion of the Association.

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Due to the nature of the Work we are under no obligation to offer any Work to you at any time.

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Therefore with immediate effect, we will not be asking you to undertake any more shifts at Station Avenue. Finance have been notified and a final payment will be made at the end of July to take account of any work completed this month as well as to calculate holiday pay payments in relation to any sleepovers worked this month.

I would like to thank you for your commitment to the service, and to wish you all the best in your current studies.” (JBP page 109)

5 20. As a Relief Worker, the claimant was engaged as a worker and not an employee.

Submissions

10 21. I have read and digested parties' comprehensive submissions which are referred to where relevant in the Judgment.

Relevant Law

15 22. Section 230 (1) of the 'ERA' 1996 defines 'employee' as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.' Section 230 (2) provides that a 'contract of employment' means 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.'

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23. In determining employment status, a Tribunal will approach it by examining a range of relevant factors, known as the 'multiple test.' In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 ALL ER 433, QBD**, the Court set out the following questions:-

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- (i) Did the worker agree to provide his or her own work and skill in return for remuneration?
- (ii) Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?
- (iii) Were the other provisions of the contract consistent with it being a contract of service?

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24. This test has been subsequently developed in **Nethermere (St Neots) Ltd v Gardiner and anor 1984 ICR 612, CA** and endorsed by **Carmichael and anor v National Power plc 1999 ICR 1226, HL** to introduce the concept of an 'irreducible minimum.' This concept requires the separate elements of control, mutuality of obligation and personal performance to each be present in order for a contract of employment to exist. Whilst control can take many forms, an employer is required to have ultimate authority over the performance of an employee. Mutuality of obligation obliges an employer to provide work and the employee to accept and perform the work offered. Personal performance requires that the employee agrees to provide his or her own work and skill. Other relevant factors to consider are the intentions of the parties', the method of payment used and whether taxes and national insurance contributions are deducted at source.

25. In **Stevedoring and Haulage Services Ltd v Fuller and ors 2001 IRLR 627, CA**, the Court of Appeal held that the worker could not be classified as an employee as he was subject to an express contractual provision that there was no mutuality of obligation between himself and his employer. The case of **Autocleanz Ltd v Belcher and ors 2011 ICR 1157** held that a Tribunal can examine a working relationship between parties to consider the reality as well as the written contract and if the contract is not reflective of that reality, it is open to the Tribunal to decide that it was not conclusive.

Issues to be Determined by the Tribunal

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26. The Tribunal identified the following issues required to be determined:-

- (1) Is the claimant an employee?
- (2) Is the claimant entitled to the protection of Sections 94, 98 and 103A of the Employment Rights Act 1996?

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Conclusion

27. In considering the credibility of the witnesses', I did not find the claimant's evidence credible in respect to her resignation from her employment as a Support Worker on 25 July 2017 and her understanding that she remained an employee when she became a Relief Worker on 1 September 2017 for the reasons I have detailed further below. In respect to the same issues, I did not find the evidence of her former colleague, Suzie Webb to be reliable. However, I did find the claimant's evidence reliable regarding the process involved in being able to obtain, reject or cancel shifts as a Relief Worker as compared to a salaried employee's ability to do so, because it was largely consistent with both of the Respondent witnesses' evidence as well as the evidence of Suzie Webb in that regard.

28. In respect to the respondent witnesses' it was clear from the evidence of Deborah Taggart, respondent Human Resources Manager, who was based at a different site from the claimant, that she was somewhat detached from the operational day to day management of the respondent business. This is because although she acknowledged the claimant's resignation on 17 August 2017 and signed off her Relief Worker Agreement on 29 August 2017, she gave undisputed evidence that she was not involved in the discussions with the claimant preceding her resignation or in the overall management of the staff shift rota. I therefore lent more weight to the evidence of Lisa MacLeod, respondent Care-Co-ordinator as it was apparent that she did have an operational role which included direct responsibility for management of the staff rota in ensuring that all shifts were covered, which was supported by the documentary evidence at pages 56-102 of the JBP.

29. The claimant gave evidence that following discussions with her local management team, Joanne Moore had asked her to email her resignation to her, but that she advised it was simply a paperwork formality to change her contract which did not affect her employment status. She therefore believed that she was manipulated into having her contract changed and that she did not in effect resign as she was asked to do it.

30. In respect to the Statement of Conditions for Relief Bank Workers ('the Statement'), her evidence was that she didn't really read it, although she understood from it that if she couldn't do shifts she didn't have to accept them as her status was flexible and her hours were variable. In cross
5 examination she accepted this was different from her previous contract of employment, as was the respondent's willingness to accommodate her in respect to her shift times in accordance with her studies.

31. Having considered this evidence in the round, I did not find it credible that
10 the claimant was unaware her employment was being terminated in order to become a Relief Worker. This is because there was no indication of her being asked to resign in her email and she clearly states that she was handing in her notice as a full time member of staff in order to join the relief staff team, as well as acknowledging that her contract and pay scale were
15 changing. Her evidence was also unsubstantiated as the respondent witnesses' were not involved in the discussions preceding her email and therefore could not speak to them. Furthermore, it was apparent from Mrs Taggart's letter acknowledging the claimant's email that she resigned from her employment with the respondent in that multiple references are
20 made to that and the exit process that would follow as a result.

32. Moreover, I did not find it plausible that the claimant had not read the Statement. This is because it was not in dispute that she had signed it and she clearly understood the casual and non-obligatory nature of her
25 engagement as a Relief Worker with the respondent as there were numerous instances of her accepting, rejecting and cancelling shifts which are evidenced at pages 56-102 of the JBP.

33. I am also of the view that whilst it was not in dispute the personal service and control essential elements of the 'irreducible minimum' established in
30 **Nethermere Ltd ("supra")** were present, the Statement was entirely clear in its terms that the claimant was no longer an employee, as it expressly stated there was no intention to create any obligation on either party to offer or accept work, no continuity of employment, statutory sick pay entitlement

or notice period required and that the pay structure and annual leave entitlement would be different. Furthermore, in applying **Autocleanz Ltd (“supra”)** to these facts, I found that the Statement reflected the reality of the working relationship between parties and their intentions, as did the letter from the respondent dated 2 July 2018 terminating the claimant’s engagement as a Relief Worker without notice.

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34. For all of the above reasons, I did not find that the term of mutuality of obligation existed between the claimant and the respondent for the period 1 September 2017–2 July 2018 when the claimant was engaged as a Relief Worker. In applying my findings in fact to the authorities of **Ready Mixed Concrete Ltd (“supra”)**, **Nethermere Ltd (“supra”)** and **Carmichael (“supra”)**, an essential element of the ‘irreducible minimum’ was not present and accordingly there was no contract of employment between the claimant and the respondent. I have therefore concluded that the claimant was a worker and not an employee when engaged as a Relief Worker and is not entitled to the protection of Sections 94, 98 and 103A of the Employment Rights Act 1996.

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Employment Judge: Rosie Sorrell
Date of Judgement: 08 April 2019
Entered in register: 12 April 2019
And copied to parties