



EMPLOYMENT TRIBUNALS

Claimant

Ms Clare Smith

v

Respondent

Norfolk County Council

Heard at: Norwich

On: 4 December 2019

Before: Employment Judge Postle

Appearances

For the Claimant: Mr Horan, Counsel.

For the Respondent: Mr Brett, Solicitor.

RESERVED JUDGMENT on a PRELIMINARY HEARING

The Claimant was neither an employee, worker or a public officer / personal officer entitling her to bring a claim under the Equality Act 2010.

RESERVED REASONS

1. This is a preliminary hearing to determine the status of the Claimant, whether an employee, worker or public officer under Section 50 / personal officer under Section 49 of the Equality Act 2010, to enable her to bring a claim before the Tribunal for the protected characteristic of disability; namely Asperger's Syndrome.
2. In this Tribunal we heard evidence from the Claimant through a prepared witness statement and in accordance with the reasonable adjustments agreed at a previous Case Management Hearing, the Claimant had been provided seven days in advance of the Hearing the questions Mr Brett, Solicitor for the Respondent, wished to put to her in cross examination.
3. The Respondents gave evidence through Mrs T Walton who became the Autism Commissioning Manager from 6 June 2018, again through a prepared witness statement.

4. The Tribunal also have the benefit of a bundle of documents consisting of 284 pages, together with additional documents provided by the Claimant entitled 'HM Government (Department of Health) Statutory for Guidance for Local Authorities and NHS Organisations to Support the Implementation of Autism Strategy 2010 and 2015'.
5. Written submissions on behalf of the Respondent, together with the Respondent's list of Authorities, namely X v Mid-Sussex CAB and Another 2013 ICR 249.
6. On behalf of the Claimant written submissions together with Authorities of:
 - Britlif v Birmingham City Council UKEAT-0291-18-BA;
 - Allonby v Accrington and Rossendale College [2004] ICR 1328;
 - Lawrie-Blum v Land Baden-Wurtemberg [1987] ICR 483; and
 - Extracts from: The United Nations Convention for Persons with Disabilities.
7. The Claimant seems to be asserting that she was employed between 30 April 2018 and 8 February 2019.
8. It would appear, previously in 2017, the Claimant was describing herself in correspondence (page 12) as Director Asperger's Training Services; an organisation not involved at the time or connected with the Respondents.
9. On 23 June 2017, a meeting took place involving Norfolk County Council Care Commissioning Groups which resolved to re-draft the strategy to meet the requirements of the Autism Act 2009 and statutory guidance and particularly engage a professional to re-draft the strategy required to comply with the necessary legislation and guidance. It would appear Zandra Stewart was employed by the Respondents in the capacity of Assistant Director for Learning Disabilities and Autism. Details of that meeting, what was resolved / decided appeared to have been circulated to wider stake holders having experience in mental health and Autism issues and that is confirmed by a workshop of the Norfolk All Age Autism Strategy and Autism Partnership Board meeting on 18 August 2017 (page 25). At that meeting some 40 organisations were involved, including the Claimant.
10. On 6 October 2017 (page 33) Alistair Corrigan, Director of Health and Integration, sent an email on behalf of Catherine Underwood (Adult Social Services Norfolk County Council) referring to the appointment of Miss Z Stewart and goes on to list the objectives and notes from the workshop held on 18 August 2017. Page 39 following Session 2 of that workshop contains a discussion on which organisation should be involved, the role of the Chair and Membership of the Autism Partnership Board which was being set up, (page 39). That was going to consist of a wide variety of stake holders including Norfolk and Suffolk Mental Health Trust, Norfolk Community Health and Care, East Coast Community Health and Care, Health Watch sub-group Leeds, Norfolk Constabulary, Housing,

Department of Work and Pensions, the Acute Hospitals, independent providers, Home Care Supporting Living, residential care etc. and voluntary sector providers. Miss Stewart's role was going to oversee and develop the Norfolk County Council's strategic plan and strategy for Autism. The Norfolk Autism Partnership Board was an integrated strategic planning forum that was to be responsible for developing Autism provision across health and social care and multi-agency forums, bringing together agencies and stake holders to identify local commission and priorities and enable a more strategic approach to develop better outcomes for people with Autism.

11. At page 73, under the draft terms of reference for the Norfolk Autism Partnership Board, it makes it clear it is being set up in response to the 2009 Autism Act and the 2010 Autism Strategy. The Board was to be inclusive and ensure active participation of service users, parents and carers. The purpose of the Board was to inform the creation and implementation of an action plan to develop the National Autism Strategy in Norfolk,

"The Board influences NHS and Local Authority Commissioners with the aim of developing improved services for children and young people and adults who have, or may have, Autism. It will raise awareness of Autism within the wider community and work to enable people with Autism to be fully included in society."

12. It is clear from those draft terms of reference, the Norfolk All Age Autism Partnership Board is not part of Norfolk County Council. In terms of the reference to the Autism Act which states,

"Local Authorities and NHS bodies must take account of strategic guidance and be mindful of this when considering recommendations of the Norfolk Autism Partnership Board."

13. Even in February 2018, in an email by the Claimant to Miss Stewart it refers to a previous email in which she had considered withdrawing from further involvement with the Norfolk Autism Partnership Board, describing herself as Director of Asperger's Training Services. There was no suggestion that the Claimant is resigning any position within Norfolk County Council.

14. In an email of 20 February 2018, the Claimant to Alistair Corrigan and Miss Stewart, the Claimant refers to,

'The Chairs will hold office for two years and will be elected by the Norfolk Autism Partnership Board core membership.'

Clearly this is not in keeping with some employment relationship with Norfolk County Council.

15. The Claimant is writing on 10 March 2018 to the Director of Adult Services (page 83) on behalf of the Norfolk Autism and Asperger's network acknowledging the terms of reference of the Board that still need to be ratified.
16. On 14 March 2008, minutes of the All Age Autism Partnership Board were still discussing the terms of reference and it was agreed there would be two co-Chairs (page 91), one from the statutory bodies and one from those with Autism. There was to be six people with Autism on the Board and two from the All Age Group. Page 93 confirms the membership of the Board, including participants from NHS voluntary sector providers, Health Watch, Norfolk Constabulary, the Care Commissioning Group etc.
17. Finally, (page 95), there appear agreed terms of reference of the Norfolk All Age Autism Partnership Board following a meeting on 14 March 2018. At page 98 it refers to the review of membership every 12 months. It was further agreed that Miss Stewart would send out an email inviting statements of interest by 21 March 2018 from people wishing (page 91) to stand for the vacant posts on the Board. The posts of Autistic co-Chairs and co-Vice Chairs, they would be subject of an election every two years. There was then an election set up by Senior Stake Holder Miss Tansley Thomas, where members of the Board it would appear would cast their vote (page 101). The Claimant was successful in being elected as co-Chair together with seven other Autistic people and their family members and carers had also been elected by the Autism community to sit on the Board (page 132). It is clear the task of the new Board was to write up the Autism Strategy for Norfolk from which an Autism plan would be developed (page 132).
18. It is also clear from the content of emails sent by the Claimant on 27 June 2018 (page 135), she makes it clear that she and the board are separate / independent from Norfolk County Council. Again at (page 183) there is a list of those persons / membership of the Norfolk Autism Partnership Board which lists a number of diverse individuals and organisations involved, not being part of Norfolk County Council other than representatives from the Norfolk County Council on the Board such as the Norfolk County Council Autism Commissioner.
19. On 14 September 2018 (184a) the Claimant writes to a Mr Bullion at the Respondent's tendering her resignation as,

“Autistic co-Chair of the Norfolk Autism Partnership Board”

The Claimant goes on to say in that email,

“I felt an extraordinary honour to have been elected by the Autism community and from the outset have worked to represent the views of that community, even where they were not what I would personally have favoured...”

The email concludes,

"I am therefore resigning as Autistic co-Chair but having been elected as a representative will continue as a Member of the Board and I will leave it to you as to whether I should count as an Autistic adult or an older Autistic person.

*Yours faithfully
Clare Smith"*

20. This is duly acknowledged by James Bullion on 17 September 2018,

*"...
I want to put on record personally that your hard work, commitment and support to the Partnership has made a difference. I am pleased that you are prepared to remain involved in the Board and its working groups. I look forward to continuing to work with you through the Partnership.*

*Best wishes
James Bullion
Executive Director Adult Social Services"*

21. Following a meeting of the Norfolk Autism Partnership Board on 4 October 2018, the minutes were sent out (pages 205 – 206). Under the heading 'Expenses' it sets out the following,

"Please find the information on expenses provided in a previous APG which was agreed by Members..."

Please note that the people on the Autistic spectrum and family carers who attend Board meetings can claim an involvement fee of £20, plus 45p per mile travel expenses..."

22. Again, on 1 December 2018, the Claimant in an email to Tracey Walton signs herself off as Member of the Norfolk Autism Partnership Board', not as an employee or in some way part of the Norfolk County Council's employment structure.

Counsel for the Claimant submission

23. It is being advanced that the Claimant was in some way a public officer and the Respondent was a member of the executive within the meaning of Section 50 of the Equality Act 2010. In the alternative that she was a personal officer and the Respondent who was someone who would have power to make an appointment to a personal officer within the meaning of Section 49 of the Equality Act 2010. The final submission was that the Claimant was in some way an employee of the Respondent.

24. The Claimant's primary submission relies upon the fact that the Claimant was a public officer pursuant to Section 50 of the Equality Act 2010.

25. Section 50 sub-section (2) provides:

“(2) A public office is –

(a) an office or post, appointment to which is made by a member of the executive;

(b) an office or post, appointment to which is made on the recommendation, or subject to the approval of, a member of the executive;

...”

26. Under Section 212(7) of the Equality Act 2010 provides:

“(7) The following are members of the executive –

...

(b) a government department;

...”

27. Mr Horan submits that a government department in its literal meaning includes local government.

28. Mr Horan then goes on to submit in the Appendix to Schedule 6 of Section 2 of the Equality Act 2010 says,

“Political Office –

2(1) An office or post is not a personal or public office if it is a political office.

2(2) A political office is an office or post set out in the second column of the following Table –

Political setting: Local government in England (outside London)

Office or post: An office or post of a county council, district council or parish council in England held by a member of the council.”

29. Mr Horan then goes on to say this has the effect of denying the status of public office to a member of the above councils if it is given to members of the council who are elective members. Therefore, he submits all other local government appointments, recommends or approves, are holding the position of person to a public office under s.50 of the Equality Act 2010.

30. Mr Horan then goes on to consider the United Nations Convention of Rights of People with Disability, particularly Article 1:

“Purpose –

- (1) The purpose of the Convention is to promote, protect and ensure the full equal participation and enjoyment of all human rights and fundamental freedoms by persons with disabilities and to promote respect for their apparent dignity”

31. As to the right of the disabled for equal enjoyment of all human rights, Article 5(2) of the convention states:

- “(2) Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.”

32. Mr Horan therefore submits that if there is any doubt about the literal wording under the Equality Act 2010, a purposive construction of the Equality Act demands that states gives parties effective rights to persons with disabilities for breaches of discrimination on all grounds and, unless the Equality Act is read as so as to give jurisdiction to the Employment Tribunals on the basis that local authorities are covered, the legal system will fail in this regard.

33. Furthermore, the meanings of appointment, recommendation and approval should be sufficiently wide to protect the rights under Article 29 of the convention although it does not use the word appointment as it can only mean that.

34. The Claimant therefore submits that in this case it is obvious that the Claimant was appointed or recommended and / or approved of in a public office by the Respondent.

35. In relation to his second submission, personal office, he submits under Section 49 of the Equality Act 2010 which reads,

- “(2) A personal office is an office or post -
 - (a) to which a person is appointed to discharge a function personally under the direction of another person, and
 - (b) in respect of which an appointed person is entitled to remuneration.”

36. Mr Horan submits that under Section 49(11) it provides:

- “(11) For the purposes of subsection (2)(b), a person is not to be regarded as entitled to remuneration merely because the person is entitled to payments –
 - (a) in respect of expenses incurred by the person in discharging the functions of the office or post, or

- (b) by way of compensation for the loss of income or benefits the person would or might have received had the person not been discharging the functions of the office or post.”

37. The Claimant submits that on the basis of the particular facts that this was not “an involvement fee”, was not by either Section 49(11)(a) or (b) and therefore the Claimant submits if it is not a public officer, she is a personal officer.

38. The Claimant’s final submission under Section 39 as regards an employer in a discrimination context, Mr Horan submits the European Court of Justice jurisprudence in Allonby v Accrington and Rossendale College which in respect of the worker held at paragraph 67,

“For the purposes of that provision, they must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration.”

39. Mr Horan submits that Allonby built on the free movement of worker case in Lawrie-Blum v Land Baden-Württemberg [1987] ICR 483 which interpreted the community concept of worker broadly as,

“That concept must be defined in accordance with objective criteria which distinguished the employment relationship by reference to the rights and duties of the persons concerned. The essential features of an employment relationship, however is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.”

40. Mr Horan submits the Claimant is an employee as a person who does real activities which are to the exclusion of de minimis activities which are under the direction of another and in return for which she receives remuneration.

41. Mr Brett for the Respondents, his submissions were very short and to the point. Simply, the Norfolk Autism Partnership Board is a separate body to Norfolk County Council and the vast majority of its membership do not work for the Council, they are volunteers and stake holders from other organisations. Its remit is to influence the local authority and the NHS commissioner. As regards the Claimant’s status, Mr Brett relies on a case of X v Mid-Suffolk CAB [20013] ICR 249 where it makes it clear volunteers are not protected by the Equality Act 2010.

42. In the Claimant’s case, she was not employed, there was no contract of employment, she was a volunteer which the Claimant freely admitted in correspondence and there was no intention to create legal relationships. The Claimant had no staff parking, she was not entitled to any form of sick pay, holiday pay or access to the Local Government Pension Scheme. She had no regular hours, no wages, she was not integrated into the

Norfolk County Council and there was simply no mutuality of obligations. The Claimant, quite simply was elected to the Norfolk Autism Partnership Board which was not under the control of the County Council and nor was she appointed by either Mr Bullion or Zandra Stewart.

43. As regards the argument that she was a personal office holder under Section 49 of the Equality Act 2010, Mr Brett submits that the Claimant's remuneration was purely expenses, mileage and a very small attendance allowance that could be used for subsistence. Section 49(11) makes it clear that this level of remuneration is not enough. Section 49(11) requires more than expenses and compensation for loss of income could, or would, have been received had they not being doing this function.
44. Furthermore, the Claimant was not appointed to the office, she was elected.
45. In relation to the Respondent's argument that she was a public office holder under Section 50 of the Equalities Act, this is an entirely new case advanced. It was never suggested at the Case Management Hearing, but in any event the Claimant was not appointed as a result of a decision made by a member of the executive. She was quite simply elected and not appointed. The definition of government department also means central government not local government and a member of the executive means a government minister. In this case no government ministers were involved.
46. Mr Brett therefore submits the claim is fatally flawed.

The Tribunal's Conclusions

47. Despite counsel for the Claimant Mr Horan's best efforts to persuade me that in some way the Claimant is holding a position which could be protected under the Equality Act 2010 I am not so persuaded.
48. The Claimant clearly was not a personal office holder under Section 49 of the Equality Act. Any remuneration the Claimant received was merely expenses for mileage and a very small attendance allowance for such matters as lunch and the like.
49. It is clear that to be a personal office holder such sums that the Claimant received is not sufficient to bring her within this section, the section does require more than expenses and compensation for loss of income that could or would have been received, had the Claimant not been attending meetings in connection with the Board. Furthermore, she was not required to discharge any function personally under the direction of another person. She was simply elected as co-Chair of the Norfolk Autism Partnership Board which is an entirely separate body to Norfolk County Council, most of its memberships do not work or are employed by Norfolk County Council and we repeat the remit of the Board is to influence the local

authority and NHS Commissioners in how they assist people in the community who have Asperger's/Autism.

50. Turning to whether or not the Claimant is a public office holder under Section 50, I repeat the Claimant was not appointed, she was elected. That election was not a decision made by a member of the Executive and clearly a member of the Executive means Government Minister who are not involved in any way with the Norfolk Autism Partnership Board. Furthermore, if the Claimant truly was a public office holder she would be in receipt of proper remuneration other than just expenses and in any event the Claimant falls in the definition of volunteer.
51. Clearly volunteers are not protected by the Equality Act given the decision in X v Mid-Suffolk CAB.
52. Turning to the last and less vocal argument of the Claimant's counsel that she must be in some way an employee, clearly the Claimant had no employment relationship with Norfolk County Council. There was no contract of employment, the Claimant admits she was a volunteer. She was not integrated in any way to Norfolk County Council for example there was no staff pass, no regular hours, no pay, no sick, no holiday pay or access to local government pension schemes.
53. There was no mutuality of obligations, clearly Norfolk County Council could not force the Claimant to do anything, it was a matter for the Claimant to decide whether she wanted to put herself up for election and/or join the Norfolk Autism Partnership Board.
54. At the end of the day quite simply the Claimant, a person with autism offered her services on a volunteer basis to the Norfolk Autism Partnership Board being a separate body to Norfolk County Council to implement and assist strategy for Norfolk County Council and the NHS Commissioning body throughout Norfolk.
55. The Claimant is therefore not in any way protected in some form under the Equality Act enabling her to bring a claim against Norfolk County Council for the protected characteristic of disability.

Employment Judge Postle

Date: 07/02/2020

Sent to the parties on: 11/02/2020

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For the Tribunal Office