



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Murray

Respondent: London Borough of Lewisham

Heard at: London South Croydon

On: 1 November 2019

Before: Employment Judge Tsamados (sitting alone)

Representation

Claimant: In person with support from Ms Masters

Respondent: Mr S Brittenden, Counsel

OPEN PRELIMINARY HEARING

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

The Tribunal has no jurisdiction to hear the Claim. It is therefore dismissed.

REASONS

Claim and issues

1. The Claimant presented a Claim Form to the Employment Tribunal on 5 May 2018 in which she brought complaints of unfair dismissal, race discrimination, entitlement to a redundancy payment, notice pay, holiday pay and arrears of pay against the Respondent, her ex-employer. The Claim was presented following a period of early conciliation commencing on 12 March 2018 and ending on 12 April 2018.

2. In its Response received by the Tribunal on 5 July 2018 the Respondent denied all of the complaints in their entirety. In particular, the Respondent submitted that the Tribunal has no jurisdiction to deal with the Claim on the basis that the Claimant was neither an employee nor a worker and that the Claim was presented out of time.
3. A preliminary hearing on case management was set for 2 August 2018 but was postponed and relisted for 14 June 2019, to deal with those matters set out at paragraphs 41-54 of the Respondent's grounds of resistance.
4. Employment Judge ("EJ") Freer conducted the preliminary hearing on 14 June 2019. His Case Management Order indicates that there was insufficient time to complete the preliminary hearing and sets out a number of orders that were made. In particular, the Claimant was required to provide to the Respondent her full written witness statement addressing the relevant issues for determination at the preliminary hearing. These are set out at paragraphs 1-7 of EJ Freer's Case Management Order. In essence, these matters related to the Claimant's employment status and whether the Tribunal has jurisdiction to hear the various complaints. In addition, the Claimant was required to provide to the Respondent written witness statements for any other persons who are to attend the preliminary hearing and give evidence on her behalf relevant to the issues to be determined. Further, the Respondent was required to provide, if so advised, any supplementary statement by its witness Mr Connor to address any of the matters raised in the Claimant's witness statements. Provision was also made for disclosure of documents and a further preliminary hearing was set for today.
5. In addition, I noted that there were time limit issues in respect of the complaints of race discrimination which had been previously raised in the Tribunal's letter to the parties dated 19 July 2018. At the start of this hearing I asked the Claimant if she had dealt with this in her witness statement given that it was not contained within EJ Freer's order. However, she was not clear as to what I meant and so I said I would take a view after reading the documents.

Evidence

6. The Respondent provided me with a bundle of documents containing 297 pages which I will refer to as R1, as well as written submissions and supporting case law. The Claimant provided additional documents, namely the disciplinary and grievance procedures for workers and managers in the Shared Lives Service. Mr Brittenden did not object to the late disclosure and I will refer to them as C1 and C2 when necessary.
7. The Claimant provided a written statement for herself and the Respondent provided two written statements from Mr Sean Connor, the second one being a supplementary statement. I heard evidence from both the Claimant and Mr Connor by way of the statements and in oral testimony.
8. I explained the issues that I had to determine and the procedure that would be followed as well as the timetable of events, mainly for the benefit of the

Claimant who was unrepresented. I then adjourned to read the witness statements and the documents.

Findings

9. I set out below the findings I considered relevant and necessary to determine the issues I am required to decide. I do not seek to set out each detail provided to me, nor make findings on every matter in dispute between the parties. I have, however, considered all the evidence provided to me and have borne it all in mind. I have focused on those findings relevant to the preliminary issues before me so as not to tread on the toes of any future Employment Tribunal dealing with the full hearing should that follow from my Judgment.

Essential background

10. The Claimant was a Shared Lives Carer with the Respondent from 1996 until 2017. Her husband, Mr Murray, was a joint Carer with his wife for the same period. He is employed by the Respondent as an Information Management Team Manager.
11. The Claimant and her husband live in a four bedroom three-storey private house. The Claimant was approved by the Respondent for three long-term placements at the family home. Up until 12 July 2017, the Claimant provided care in her home for two service users (as they are called) both female, one from 1997 and the other from January 2006. The first service user had learning disabilities and was profoundly hearing impaired. The second service user had limited speech, required full support with her personal care and has no contact with her family.
12. Mr Sean Connor has been the Shared Lives Team Manager in the Respondent's Shared Lives Service since 8 February 2016. He had dealings with the Claimant and her husband in their roles for the Shared Lives Scheme. He was not their line manager, but his role was as Shared Lives Co-ordinator to the Shared Lives Carers. His management responsibilities are to his relatively recently appointed staff within the Shared Lives Service. In his absence, Michele Oliver-Lockwood, who is the Care Quality Commission ("CQC") registered manager for the Scheme, had provided support to carers. Now that Mr Connor has his own staff, they provide support to the carers if he is not available.
13. Whilst the Claimant claims she was supervised by the Respondent, she relies on one document which is 11 years old dating from the days when the scheme was known as Adult Placement and was managed by the social work team.
14. On 12 July 2017, the Claimant ceased carrying out any caring for service users in her home and there have been no placements made since that date. The notice to end payments to her expired on 30 November 2017.
15. In broad terms, the Respondent had raised concerns as to the conditions within the Claimant's home and safeguarding issues which led to the

placements being ended. It is fair to say that the Claimant disputes these matters.

The Shared Lives Scheme and employment status

16. Shared Lives Schemes operate across the UK and in England and are regulated by the CQC. They were formerly known as Adult Placement Schemes. Shared Lives Schemes are operated through registered providers, in this case the Respondent, and are subject to independent scrutiny and quality assurance by Shared Lives Panels. Shared Lives Carers share their home and their family life and where necessary provide accommodation to vulnerable adult individuals using or living in a Shared Lives arrangement (the service users). The Respondent currently has 22 Shared Lives Carers on its books.

17. As most service users have daily activities that address many of their needs, Shared Lives Carers do not normally provide care during the working week. One of the service users placed with the Claimant travelled independently to and from her daily activities and the other used the Respondent's transport facilities.

18. I was referred to the CQC document Supporting Information Shared Lives Schemes at R1 108-129. At R1 109 this defines Shared Lives as follows:

"Shared Lives is an alternative to supported living, domiciliary care and care homes for disabled adults (aged 16+) and older people. It was previously known as adult placement.

In Shared Lives, a Shared Lives carer and someone who needs support get to know each other and, if they both feel that they will be able to form a long-term bond, they share family and community life. This can mean that the person becomes a regular daytime or overnight visitor to the Shared Lives carer's household, or it means that the person moves in with the Shared Lives carer. Some local schemes restrict the number supported at any one time to two. Shared Live schemes have to be registered with the CQC if they provide the regulated activity of personal care.

Schemes employ Shared Lives workers whose role can include recruitment, vetting, training and support of Shared Lives carers. It is the scheme's provision of personal care that is regulated, not individual accommodation which is owned or rented by Shared Lives Carers."

19. The document goes on to define personal care by reference to the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 at R1 110.

20. At R1 113-115 the document sets out how the service is actually delivered and specifically at R1 115 states:

"The Shared Lives scheme is in effect a working partnership between a provider organisation and self-employed Shared Lives carers."

21. The Claimant accepted that part of this duty would mean that the Respondent would periodically hold meetings with her and other carers to monitor the provision of care. Attendance at these meetings was voluntary. The CQC requires that carers are up to date with relevant issues and there are six training sessions each year.

22. At R1 122 the document defines the employment status of Shared Lives carers as follows:

“Shared Lives carers are recognised by HMRC as being self-employed. However, for the purpose of care regulation they are considered to be employees under the definition of employment¹⁰ contained in the Health and Social Care Act 2008 (Regulated Activities) regulations 2010 in relation to Shared Lives carers working under a carer agreement¹¹.”

Shared Lives carers are generally not paid by the hour and do not work to a fixed schedule, but are paid in line with the expectations set out in the Shared Lives agreement.

Shared Lives carers do not employ staff to help them provide personal care.

¹⁰ “Employment” means under a contract of service, an apprenticeship, contractor services or otherwise than under a contract (including under a carer agreement) [The Health and Social Care Act 2008 (Regulated Activities) Regulations 2010, Part one paragraph 2 – Interpretation]

¹¹ An agreement entered into between the person carrying on an adult placement scheme and an individual for the provision, by that individual, of personal care to a service user together with, where necessary, accommodation in the individual’s home. [The Health and Social Care Act 2008 (Regulated Activities) Regulations 2010, Part one paragraph 2 – Interpretation]”

23. The Claimant accepted the definition of employment set out at R1 122. Mr Connor further explained that the CQC treats everyone as employees so they come under its umbrella but there are one or two that do not and one of those is Shared Lives Carers.
24. Shared Lives Carers are paid a weekly fee for providing support to service users living with them long-term. HMRC treats this income in a similar way to that of Foster Carers and has agreed a beneficial tax arrangement with Shared Lives Carers. The payments do not fall for taxation under PAYE. Shared Lives Carers are not paid by the hour and do not work to a fixed schedule. They are not under any obligation to agree to any care or support arrangement offered to them.
25. I was referred to one of the Claimant’s Carer Agreements at R1 130-139 This is headed “AP Carer Agreement” and is dated and signed by the Claimant and her husband on 25 November 2009. It dates back to the time in which Shared Lives was known as Adult Placement or “AP” for short. The document sets out the need for the agreement by reference to the statutory regime relating to Adult Placements. The actual Agreement begins at R1 132 and places a number of obligations upon the carer which arise from the statutory regime. I was referred to paragraphs 7, 9 and 10 at R1 132-133 by way of matters which arise from the regulations. The Claimant accepted that this was the case.
26. I was referred to a more recent Carer Agreement at R1 140-146 which was signed by the Claimant on 13 July 2013. This Agreement is made in respect of the Shared Lives Scheme, as by then it had become known. The Claimant agreed that whilst there were some changes to the content of the agreement reflecting this, it essentially covered the same matters.
27. I was referred to paragraph 30 at R1 142 and the requirement to maintain insurance in respect of public liability, household and motor vehicle cover. The Respondent’s position is that the Claimant took out public liability insurance but the Claimant’s position is that the Respondent did so as the

service users were their clients. Further, she states that she was not required to take out household and car insurance whereas other local authorities paid for this. Mr Connor gave evidence that the Respondent did not provide public liability insurance and that carers had to provide their own, although members of Shared Lives Plus (the national organisation to which all Shared Lives Schemes are affiliated and which set the main policies and procedures as to how Schemes operate and provide support for Schemes as well as for carers) received it automatically depending on their level of membership. On balance I accept the Respondent's evidence.

28. The Claimant's position is that she was obliged to provide care on a personal basis all the time. The Respondent's position is that caring was undertaken by her husband as a substitute or undertaken by a suitable third party, provided that third party had undertaken support carer assessment and had regular Disclosure and Barring Service ("DBS") checks, as required by the CQC regulations. The Respondent's further evidence is that Support carers do not receive a fee, although some carers pay their support carers from their own money. The Claimant denied that she could select support workers but referred to back up workers used for a short period of time in an emergency. Mr Murray said in evidence that the Claimant, in addition to her husband, who provided occasional support at evenings and weekends, did have support carers. She referred to such support provided by her adult daughter and two neighbours during the later De-approval process (at R1 167 and 195c). Although the Respondent had no records that these persons had ever been approved or had DBS checks, it does indicate that in the Claimant's own view care could be undertaken by a substitute arranged by her. On balance of probability I accept the Respondent's position. In any event the Claimant in effect accepts this but simply refers to such support as backup.
29. The Respondent's position is also that the Claimant was entitled to and arranged her own Respite care. Shared Lives Carers are not entitled to paid annual leave as such. However, each carer is entitled to 28 nights respite per year. This is a break from caring responsibilities and is of mutual benefit to both the carer and the service user. The Claimant and her husband had no leave requesting arrangements and usually arranged any respite they needed with another Shared Lives Care and would let Mr Connor know what dates they had arranged. The Claimant and her husband regularly used two very experienced Shared Lives Carers for respite purposes for each of the two service users respectively. Usually this was arranged by the Claimant and her husband, who would let Mr Connor know the dates and arrangements and he would confirm availability with the carers. I was referred to examples of this at R1 236-242. The Claimant's position is that she had to phone Mr Connor and he made the arrangements but since the dispute arose with the Respondent, the Respondent changed the policy.
30. It would appear that the Respondent issued the policy by way of clarification because the Claimant and husband were not notifying the Respondent of their absence. Mr Connor gave evidence that he was not aware of any occasion on which Claimant could not take respite leave and it was refused. He added that it would have been very unusual to refuse a carer.

31. Shared Lives Carers continued to receive their fee during any respite period save for a reduction of £8 per night from the component paid by the local authority if the service user went to another carer's home during that period (to allow for the use of the other carer's utilities). I was referred to the schedule of payments made by the Respondent to the Claimant at R1 243-253 from which I can see that there are respite deductions made on certain dates.
32. The Respondent's position is that the Claimant was not integrated into the Respondent's workforce and was not subject to its disciplinary policy. The Claimant provided the documents at C1 and C2 as evidence that she was integrated and was an employee. The Respondent's position is that they simply do not apply to her. These documents are the disciplinary and grievance procedures issued by the Lewisham Shared Lives Service for workers and managers in the Service. On balance of probability I accept that these policies apply to staff employed by the Respondent within its own department and not to the Shared Lives Carers.
33. The Claimant also relied on Medical Record Sheets ("MARS" sheets) and finance sheets provided by the Respondent to carers as proof of integration and employment status. The Respondent's position is that MARS sheets are provided because this was a CQC requirement and finance sheets to provide for the standard recording of financial transactions across the Shared Lives Scheme. In addition, the Respondent's case is that the policies and procedures to which the Claimant was subjected were also requirements of the CQC. I accept the Respondent's evidence.
34. The Claimant also pointed to social events which took place. The Respondent's case is that these are organised by the carers themselves not its Shared Lives team.
35. The Claimant also relied on having to attend Carers meetings. The Respondent said that whilst these are facilitated by the Shared Lives staff, attendance is voluntary. I accept the Respondent's evidence.
36. The process by which a Shared Lives carer's approval was removed is set out by Shared Lives Plus in its guidance on Shared Lives Approval Panels is at R1 66-98 at page 82 section 19.
37. Shared Lives Carers establish their own routines and house rules and run their own homes as they choose. There is no specific instruction on how they should perform their duties. Each service user has a service user plan but this sets out needs and choices. When a Shared Lives arrangement begins, an arrangements agreement form is completed (at R1 223-235). This sets out the responsibilities of all parties involved, namely the service user, the Shared Lives Carer, the Shared Lives Scheme and the social worker. It demonstrates that the Shared Lives Scheme does not have control of the arrangement as it is an agreement between four parties. There is no day-to-day supervision of the Shared Lives Carers. Their work is providing a 24-hour supportive family environment for the service user which will differ from family to family and is neither possible nor desirable to supervise directly. Whilst the Claimant refers to supervision by the respondent, this is no more than regular

support visits by the Shared Lives Scheme staff. The purpose of these is to discuss issues relating to the Shared Lives arrangement and these visits took place usually on a quarterly basis unless a carer needed more support for a particular reason.

38. The Respondent's Shared Lives Scheme through its staff had limited dealings with carers and did not go into their homes or instruct them on routines, day to day running of the home or the specifics of how the home is run. This was down to the carer based on the daily care arrangements required by the service user.
39. The Claimant claims that she was contacted by the Respondent's HR department. The Respondent claims that the only contact with HR was as to DBS checks which had to be renewed every 3 years. On balance I accept the Respondent's evidence.
40. I was also referred to paragraph 31 at R1 143 which states that the Carer agrees to fulfil their responsibilities as self-employed people for tax and national insurance purposes. The Claimant said that originally tax and national insurance was paid by the Scheme but when CQC took over responsibility they asked the Carers to do this because they were short of staff. However, beyond assertion there was no evidence of this arrangement.
41. Mr Connor gave evidence that the Claimant and her husband had never queried their self-employed status as far as he was aware. There were tax advantages which both were aware of, from discussions he had with them as part of his preparatory work in negotiating an increase in Shared Lives Carers fees which took effect on 1 April 2017. He visited them on 6 July 2016 to discuss finance issues including plans to increase the fee paid and found them very knowledgeable about the available tax concessions for Shared Lives Carers and even gave him advice on how any increase in fees might affect the tax concessions. His further evidence is that the Claimant explained to him that carers were entitled to Qualifying Care Relief which was an additional allowance from income tax of £10,000 per year plus £250 per week for each adult living with her.
42. When I asked the Claimant if she was ever anything other than self-employed, she did not give a clear answer and I was not sure whether she misunderstood my question or was being evasive. She claimed that whilst she did not earn sufficient to pay income tax, the Respondent paid her national insurance contributions. The Respondent denied this. She accepted that she originally submitted invoices and later time sheets to the Scheme. She did not accept that she had no fixed hours of work, stating that she had to work 24 hours a day, 7 days a week and could not choose her time. However, this was at odds with her acceptance that in 2013 she was undertaking bank nightwork working for Outward Care up to 3 to 4 nights per week between 10 pm and 7.15 am and was working for MCCH up to 1 day per week.
43. When she was cross examined on Mr Connor's evidence as to her and her husband's knowledge of the available tax concessions, she was to an extent

evasive in that she expressed surprise and said that she did not know anything about this and wished she did, she never got any tax relief and that all she knew was she paid tax. She accepted that her husband dealt with her tax but only because it was agreed by the Shared Lives Scheme that he could. I did not accept the claimant's evidence and preferred the evidence of the claimant regarding tax status.

44. I was referred to the Lewisham Shared Lives Guidance at R1 47-53 at page 50 which sets out the scheme of payments. Claimant's Carer Agreements at R1 130-146.
45. The Shared Lives Carer fee at the time of this Claim was £360. It comprises of three parts: the care and support element, which is paid by the local authority, here the Respondent, from the Care Placement Budget on a calendar monthly basis; the accommodation element which is paid by Housing Benefit every four weeks; and the food and utilities element which is paid by the service user themselves to the carer, usually on a fortnightly basis to coincide with how benefits are paid. The Claimant accepted that this was the position as to payments. If there is any delay in the assessment of Housing Benefit, the local authority, here the Respondent, makes up the shortfall in the £360 payment on the understanding that once Housing Benefit is paid and any back payment received, the Carer will refund the excess of £148 per week received and the service users pays the Carer the service user contribution for the same number of weeks.
46. I was referred to the minutes of a carers meeting dated 26 July 2016, which Mr Conner attended, at which the finance officer explained the payment system again to the Shared Lives Carers and the circumstances in which the Respondent would pay the full fee pending assessment of Housing Benefit subject to the obligation on the carer to reimburse the excess received once Housing Benefit was in payment (at R1 254-255).
47. The Claimant's case is that her working arrangement is a relationship analogous to that which exists between local authorities and Foster Carers. Whilst the Respondent treated her as if she was self-employed, she is of the view that in reality she was an employee/worker. On this basis she submits that the Respondent's action in removing the service users from her home gives rise to her Claim before this Tribunal which comprises of complaints of unfair dismissal, entitlement to arrears of payments, notice pay, holiday pay, redundancy pay and amounts to unlawful race discrimination.
48. The Claimant states that she was paid a wage albeit the Respondent referred to this as a fee. However she maintains that as it is consistent with having been a wage, she did not have to submit claims for payment in the manner of a self-employed contractor and that whilst the salary comprised of three components, the care and support elements were paid directly by the Respondent automatically on a monthly basis and for which she received a pay advice. She also points to the Respondent's liability to ensure that she receive the full amount of the payment regardless of the fact that it was funded from three separate sources. If one of those elements was not paid, then the Respondent made up the payment to ensure that the full fee was

received. I did not accept the Claimant's interpretation of these payments or that this was conclusive of employment status as an employee/worker.

49. The Claimant also points to her inability to provide a substitute to undertake the care on her behalf as a self-employed contractor could do. She relies on what she calls the Respondent's exertion of a significant control over this area and the need for full assessment and DBS checks to be completed and approval obtained in advance under the Shared Lives Scheme. I did not accept her interpretation of this aspect of the relationship.
50. The Claimant relies on her inability to undertake other paid work. The Respondent denies this and said that carers were able to engage in other work as long as it did not affect the care work provided under the Shared Lives Scheme and some carers do. Indeed, Mr Murray works for the Respondent and the Claimant has part-time work (as detailed above). The Claimant's work was something that was identified as part of the Quality Alert Report for Panel – 2nd August 2017 at R1 159-172 at page 166. In essence, the Claimant was originally told that she should not give up any other work and was assured it was alright for her to engage in other work. I did not accept the Claimant's evidence in this regard and preferred the evidence of the Respondent.
51. The Claimant accepts that there was no mutuality of obligation between herself and the Respondent in respect whether to accept an offer of a new caring agreement. However, she states that once a placement offer is accepted, a Carer is obliged to undertake all of the work required to meet the needs of the service user(s) as required by the Respondent and in turn the Respondent is obliged to pay the Carer for undertaking this work. In addition, the Claimant states that there was an expectation that if the Respondent considered that a reasonable match existed, then the Carer would accept the placement unless a good reason was provided, and in that event the offer could be refused. She further states that this was especially the case with emergency/short-term respite requests and that the Respondent exerted pressure in these circumstances to make her feel obliged to accept such placements. Additionally, the Claimant points to the obligation to continue working in providing care to a service user until such time as the Respondent could accommodate the placement ending or until it had succeeded in arranging respite care that the Claimant might take annual leave. She also points to the fact that she was continuously employed by the Respondent and that she cannot recall a period when she did not have a service user placed with her. The respondent denied that this constituted mutuality of obligation. In the event, I did not find these matters necessarily conclusive of mutually of obligation.
52. The Respondent had concerns as to the state of the Claimant's home and as to safeguarding issues. On 12 July 2017, the Respondent ended the placements of the service users in the Claimant's home. On 1 November 2017 the Respondent wrote to the Claimant and her husband notifying them that payments to them would terminate within 4 weeks of that date, ie by 30 November 2017 (R1 180). At a De-approval panel meeting held on 18 December 2017, the Respondent made the decision to remove the Claimant and her husband's approval as Shared Lives Carers. This followed receipt of

a report by Mr Connor which is at R1 181-193. The decision was confirmed in writing to the Claimant and her husband in a letter from the Respondent dated 20 December 2017 at R1 194-195. This also sets out the reasons for removal of approval.

53. The Claimant and her husband appealed against the decision in an email from Mr Murray dated 19 January 2018 which is at R1 195a-f. Following consideration by an Appeal panel, the Respondent wrote to the Claimant and her husband essentially upholding the decision to take away their approval. The letter is dated 3 March 2018 and is at R1 196-199.
54. There was also a dispute between the parties as to the final fees that the Claimant received.
55. I do not believe it is necessary for me to go into these matters in any further detail in order to determine the issues before me.

Time limits

56. The Claimant's Claim was received by the Employment Tribunal on 5 May 2018, this was following a period of ACAS Early Conciliation which commenced on 12 March 2018 and ended on 12 April 2018.
57. I explained the position to the Claimant as to time limits and asked her questions relevant to those matters given that her witness statement did not address the issue.
58. The Claimant's evidence as to why she waited until 5 May 2018 to present her Claim to the Tribunal is as follows. She was unaware of any time limits or the procedure to follow. She thought she had to wait for the outcome of the appeal and then she telephoned the Citizens Advice Bureau who gave her the telephone number of ACAS. ACAS told her that they would contact the Respondent. She phoned various people and was ultimately told that she could bring a Claim.
59. In clarifying her evidence which I have to say was vague, I established that in essence she did not know about the Employment Tribunal process or the time limits in which to bring claims until she finished the Early Conciliation process, which is what she refers to by contacting ACAS. Further, she was not acting on the termination of the placements or the removal of approval but was waiting on the outcome of the appeal process and that ended on 3 March 2018.

Submissions

60. I heard submissions from both parties. The Respondent's counsel provided written submissions which he spoke to.

The law

61. Section 230 of the Employment Rights Act 1996:

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

(a) a contract of employment, or

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

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

(4) In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act “employment”—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

and “employed” shall be construed accordingly...

62. Section 83(2) of the Equality Act 2010:

“Employment” means—

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work...

Conclusions

63. The Claimant has brought complaints of unfair dismissal, entitlement to a redundancy payment and damages for breach of contract. In order for the Employment Tribunal to have jurisdiction to hear these complaints, the Tribunal has to find that she is an employee under section 230(1) of the Employment Rights Act 1996 (“ERA”).

64. The Claimant has also brought a complaint that the Respondent has made unauthorised deductions from her wages and that she is entitled to annual leave. In order for the Tribunal to have jurisdiction to hear these complaints, the Tribunal has to find (if not satisfied that the Claimant is an employee) that she is a worker pursuant to section 230(3) ERA and regulation 2 of the Working Time Regulations 1998.

65. The Claimant has also brought a complaint that the Respondent discriminated against her. In order for the Tribunal to have jurisdiction to hear this complaint, the Tribunal has to find that she was in employment under section 83(2) of the Equality Act 2010 (“EqA”).

66. The Respondent contends that the Employment Tribunal does not have jurisdiction to determine any of the Claimant’s complaints for the following reasons:

- a. There is no contract; further
 - b. She is not an employee or a worker; alternatively
 - c. Her complaints have been brought out of time.
67. For each of the statutory definitions there has to be a contractual relationship. The Respondent's position is that the Shared Lives Carer arrangement is one prescribed by legislation and that the individual is not employed pursuant to a contract even if there may exist some similarities to what might be included in one.
68. Both parties have pointed by analogy to the status of Foster Carers. The Claimant relies on it to support her Claim. The Respondent relies on it to defeat the Claimant's Claim.

Contractual relationship

69. The need to show a contractual relationship has proved an obstacle to attempts by Foster Carers to claim that they are workers or employees. In **Rowlands v City of Bradford Metropolitan District Council** [1999] EWCA Civ 1116, the Court of Appeal overturned the decisions of an Employment Tribunal and the Employment Appeal Tribunal ("EAT"), that the Claimant was an employee within the meaning of what was then section 78 of the Race Relations Act 1976 (now section 83 EqA), which provided that "employment means employment under a contract of service or an apprenticeship or a contract personally to execute any work or labour and related expressions shall be construed accordingly".
70. Lord Justice Stuart-Smith, who gave the only reasoned judgment, based his conclusion that the foster parent/local authority relationship was not a contractual one on his decision in **W and ors v Essex County Council and anor** [1998] 3 WLR 534, CA (a negligence and breach of contract claim). In that case, he had acknowledged that the agreement between a Foster Carer and the local authority had a number of features typical of a contract, such as the payment of an allowance and expenses, provisions as to national insurance and termination, and restrictions on receiving a legacy or engaging in other gainful employment. However, he did not accept that this made the agreement a contract. He considered that a contract is essentially an agreement that is freely entered into on terms that are freely negotiated, and if there is a statutory obligation to enter into a form of agreement, the terms of which are laid down, there is no contract.
71. In **Bullock v Norfolk County Council** UKEAT 0230/10 the Claimant was asked to attend a meeting with the Council's fostering panel to consider the withdrawal of her approval to foster. She wished to be accompanied by a trade union representative, but the Council refused, taking the view that she was not a "worker" within the meaning of section 13 of the Employment Relations Act 1999 (which refers to the same definition in section 230(3) ERA). An Employment Tribunal agreed with the Council that she was not a worker, and that decision was upheld on appeal by the EAT. It rejected the argument that **Rowlands** and **W** (above) were no longer good law; on the contrary, it held that it was bound by them. The EAT also rejected the

argument that the right to a fair trial in Article 6 of the European Convention on Human Rights required or permitted a different meaning to be given to the term “worker” in section 230(3) ERA and section 13 of the 1999 Act by deleting the requirement of a contract between the parties.

72. More recently, the EAT in **NUPFC v Certification Officer** [2019] IRLR 860 considered these cases and followed the **W** line of authority (at para 43).
73. I also considered the European Court of Justice case of **Sindicatul Familia Constanța v Direcția Generală de Asistență Socială și Protecția Copilului Constanța** (2019) ICR 211, which held that the autonomous, EU-wide meaning of “worker” under the Working Time Directive (which is the same as the definition of “worker” applicable to EU discrimination law) in principle includes foster parents. But, crucially, the ECJ went on to hold that the work done by the foster carers fell outside the scope of the Directive due to its public service nature. This by analogy would apply to the Shared Lives Carers.
74. The Adult Placement Schemes (England) Regulations 2004, since repealed, provide an insight into the nature of the Shared Lives Carer arrangement, then known as Adult Placement Carers I would point out that I was not referred to any earlier statutory basis for the relationship by either party. Regulations 17 and 19 state as follows:

“Carer agreements

17.—(1) *The registered provider shall enter into a written agreement with an adult placement carer (in these Regulations referred to as “the carer agreement”) which complies with the conditions specified in paragraph (2).*

(2) *The conditions are that the carer agreement—*

(a)*defines the respective roles and responsibilities of the registered provider and the adult placement carer;*

(b)*sets out the requirements of the adult placement carer’s working practice;*

(c)*specifies the insurance cover to be maintained by the adult placement carer which shall include household, public liability and, where appropriate, motor vehicle insurance;*

(d)*specifies the procedure to be followed after an allegation of abuse, neglect or other harm has been made;*

(e)*specifies that a service user is not to be subject to physical restraint unless restraint of the kind employed is the only practicable means of securing the welfare of that, or another, service user;*

(f)*specifies that any allegation of a type mentioned in paragraph (d) of this paragraph or the use of any physical restraint upon a service user is to be reported to the registered person;*

(g)*specifies the circumstances in which an adult placement carer may administer or assist in the administration of a service user’s medication; and*

(h)*requires the adult placement carer to notify the registered person within 24 hours of the occurrence of an incident described in paragraph (3), and any such notification which is given orally shall be confirmed in writing.*

(3) *The incidents are—*

(a)*the death of any service user, including the circumstances of his death;*

(b)*the outbreak of any infectious disease which in the opinion of a registered medical practitioner attending a service user is sufficiently serious to be so notified;*

(c)*any serious injury to a service user;*

(d)*any serious illness of a service user;*

(e)*any event within the placement which adversely affects the well-being or safety of any service user;*

(f)*any theft or burglary within the placement;*

(g)*any incident which—*

(i)*occurs in connection within the placement; and*

- (ii) is reported to, or investigated by, the police;
- (h) any allegation of misconduct by a service user or their representative in relation to the adult placement carer or a member of his family;
- (i) any unexplained absence of more than 12 hours of a service user from the adult placement carer's home.

Adult placement carer handbook

19.—(1) The registered person shall prepare an adult placement carer handbook and provide a copy of it to every adult placement carer providing, or intending to provide, a placement for the purposes of the scheme.

(2) The handbook must include a statement as to—

- (a) the aims and objectives of the scheme as set out in the statement of purpose;
- (b) the role and responsibilities of adult placement carers;
- (c) the role and responsibilities of any care manager and any social worker responsible for a service user;
- (d) the complaints procedure;
- (e) the procedure for terminating the agreement;
- (f) the fees payable to the adult placement carer and details of when and by whom such fees will be paid, and the method of payment;
- (g) any other information that the registered person considers necessary to enable the adult placement carer to meet his obligations under the carer agreement.

(3) The handbook must also specify—

- (a) the procedure to be followed where an adult placement carer acts as agent for, or receives money from, the service user;
- (b) the procedure to be followed after an allegation of abuse, neglect or other harm has been made;
- (c) that a service user is not to be subject to physical restraint unless restraint of the kind employed is the only practicable means of securing the welfare of that, or another, service user;
- (d) that any allegation of a type mentioned in paragraph (b) of this sub-paragraph or the use of any physical restraint upon a service user is to be reported to the registered person;
- (e) the circumstances in which an adult placement carer may administer or assist in the administration of a service user's medication;
- (f) the records to be kept by the adult placement carer in relation to the service user's plan."

75. In addition, the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010, which have been revoked by the Health and Social Care Act (Regulated Activities) Regulations 2014 are also of assistance at regulation 2, where the following definitions are included:

"adult placement carer" means an individual who, under the terms of a carer agreement, provides, or intends to provide, personal care for service users together with, where necessary, accommodation in the individual's home;

"adult placement scheme" means a scheme carried on (whether or not for profit) by a local authority or other person for the purposes of—

- (a) recruiting and training adult placement carers;
- (b) making arrangements for the placing of service users with adult placement carers; and
- (c) supporting and monitoring placements;

"carer agreement" means an agreement entered into between a person carrying on an adult placement scheme and an individual for the provision, by that individual, of personal care to a service user together with, where necessary, accommodation in the individual's home;

"chiroprapist or podiatrist" means a person registered as such with the Health Professions Council pursuant to article 5 of the 2001 Order);

"employment" means—

- (a) employment under a contract of service, an apprenticeship, a contract for services or otherwise than under a contract (including under a carer agreement); and
- (b)

*the grant of practising privileges,
and “employed” and “employer” should be construed accordingly;”*

76. The Respondent submits that the definition of employment in this regulation is crucial. Whilst it confirms that carers fall within the regulatory purview of the CQC for regulatory purposes, rather than setting out employment rights, it puts beyond doubt that Adult Placement Carers are not in a contractual relationship. Further, the definition refers to employees, the self-employed and those providing services otherwise than under a contract including a carer agreement. I agree with this submission that this means that carer agreements are not contracts at all.

77. Moving then to the current statutory regime and regulation 2 of the Health and Social Care 2008 (Regulated Activities) Regulations 2014:

“Regulation 2(1)

“employment” means—

(a)

employment under a contract of service, an apprenticeship, a contract for services or otherwise than under a contract, and

(b)

the grant of practising privileges by a service provider to a medical practitioner, giving permission to practice as a medical practitioner in a hospital managed by the service provider,

and “employed” and “employer” is to be construed accordingly;...

“shared lives agreement” means an agreement entered into between a person carrying on a shared lives scheme and an individual for the provision, by that individual, of personal care to a service user together with, where necessary, accommodation in the individual’s home; “shared lives carer” means an individual who, under the terms of a shared lives agreement, provides, or intends to provide, personal care for service users together with, where necessary, accommodation in the individual’s home; ...

Regulations 2(2)

the definition of “employment” in paragraph (1), the reference to otherwise than under a contract includes—

(a) under a shared lives agreement;

(b) under an agreement between the service provider and a temporary work agency for the supply of an agency worker to the service provider;

(c) under arrangements for persons to provide their services voluntarily”

78. These regulations refer to the arrangement as being an agreement not a contract and further the definition of employment underlines this and defines the phrase “otherwise than under a contract” as including “under a shared lives agreement”.

79. I am satisfied that this clearly indicates that Shared Lives Carers whilst falling within the CQC regulatory umbrella are not regarded as being in a contractual relationship. The Respondent submits that this reflects Parliament’s intention that Shared Lives Carers, given the special circumstances of the arrangement, should not be entitled to bring the claims that the Claimant is bringing. Whilst I am not convinced that I can go as far as that, clearly the resultant effect is that the Claimant cannot bring the complaints that she has raised by statute and this is reflected in the case law referring to the analogous position of foster carers.

80. I am strengthened in this view by the CQC Supporting Information – Shared Lives schemes at R1 114 and 115 and the construction of the various Carers Agreements that the Claimant and her husband have entered into over time, the latter being regulated and prescribed by legislation and in particular regulated by regulation 2 of both the 2010 and 2014 Regulations, which presuppose that those who enter into such agreements are not in any contractual relationship at all.
81. I therefore find that the Tribunal has no jurisdiction to hear her claim and it is dismissed.
82. For this reason it is not necessary to go on and to consider the Claimant's position under the various employment law complaints that she has brought although having heard the evidence I will do so for the sake of completeness.

Employment status

83. Looking first at the definitions of employee and worker.
84. In order to claim unfair dismissal (as well as other rights, such as entitlement to itemised pay statements, the right to written particulars of employment, statutory minimum notice of termination and the ability to bring a breach of contract claim in the Employment Tribunal) a person must be employed (ie work under a contract of service). A person who is self-employed (ie working under a contract for services) is not entitled to bring a claim, although she may still fall within the definition of worker under section 230(3) ERA for the purposes of a claim of unauthorised deductions from wages and other claims.
85. There is no clear guidance given by case law by which Tribunals are able to distinguish between those who are employed and those who are self-employed. An 'employee' is defined simply as someone who has entered into, or works under, a contract of employment (section 230(1) ERA). A 'contract of employment' means 'a contract of service or apprenticeship, whether express or implied, and (if it is express), whether it is oral or in writing' (section 230(2) ERA).
86. There is no single test which determines whether a person is employed or self-employed although there have been a large number of cases which have tried to establish the approach to be adopted to determine this issue. The usual approach taken is referred to as the multiple test which requires all aspects of the relationship to be considered and then to ask whether it could be said that the person was carrying on a business on his/her own account (**O'Kelly v Trusthouse Forte plc** [1983] IRLR 369,CA). The multiple test requires the consideration of a number of factors.
87. The first consideration is whether there is a mutual obligation to supply and perform work, ie is the employer contractually obliged to provide work and the person obliged to carry it out? This is the most important single factor. If no such obligation exists, then the person is not an employee (**Carmichael v National Power plc** [2000] IRLR 43, HL).

88. It is also a vital component that the Respondent has a sufficient framework of 'control' over the person, although direct supervision and control is absent in many kinds of employment today (**Montgomery v Johnson Underwood Ltd** [2001] IRLR 269, CA) If the person controls when, where and how she performs the work, this degree of autonomy would suggest that she is self-employed. However, if the employer has the power to tell the person when, where and how to perform, it would indicate that the person is an employee (**Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance** [1968] 2 QB 497).
89. Another factor is that the other provisions of the contract must be consistent with its being a contract of service. We need to consider the purpose of the contract and what the parties intended when they formed it. It is the nature of the agreement and the actual performance of the contract which counts, not simply the label attached to the relationship by the parties. For example, just because a person is told by an employer that she is self employed does not mean that is the true legal position.
90. The method and mode of payment to the person could be a relevant factor. If pay is referable to a period of time rather than productivity, this suggests that the person is more likely to be an employee. She is also more likely to be an employee if she gets paid sick leave and is subject to the usual disciplinary and grievance procedures. However, again this is not necessarily conclusive of employee status.
91. The above assumes that it is clear what the contract terms are, but this may not be the case. When deciding what terms have been agreed between the parties, the first step is to look at any written contract. This can be a problem. People sometimes sign pro forma contracts which are designed to prevent them from being an employee, eg by stating that there is no mutuality of obligations or that they have the right to send along a substitute (see below). However, if there is evidence of the true nature of the agreement this should be considered (**Autoclenz Ltd v Belcher & Ors** [2011] IRLR 820, SC; **Protectacoat Firthglow Ltd v Szilagyi** [2009] IRLR 365, CA; **Consistent Group Ltd v Kalwak & Ors** [2008] IRLR 505, CA; and **Redrow Homes (Yorkshire) Ltd v Buckborough & Sewell** [2009] IRLR 34, EAT).
92. Certain employment rights apply to 'workers'. For example, entitlement to annual leave and holiday pay, the National Minimum Wage and the ability to bring a claim in respect of unauthorised deductions from wages.
93. If the person is an employee then they will also satisfy the definition of worker. But sometimes the problem is to prove that the person is a worker as opposed to self-employed.
94. The definition of worker within section 230(3) ERA (and for other claims reliant on this status) is wider than the restrictive definition of employee. It covers those who have entered into, or work under, a contract of employment and any other contract 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.

95. A worker is different from someone who is self-employed. Self-employed individuals can make their own choices as to what work they do and when and where they do it. They work for themselves. Although the practical realities of getting work mean they must satisfy (often quite stringent) requirements of those who engage their services, ultimately the choices are their own to make (**O'Brien v Ministry of Justice** [2013] IRLR 315, SC).
96. There are 3 key elements to the definition of worker in the legislation: 1) there must be a contract between the individual and the 'employer'; 2) the individual must be required to work 'personally' for the employer; and 3) the individual must not be working for someone who is in reality her client or customer. As long as these apply it does not matter if the individual is in business on his/her own account (**Hospital Medical Group Ltd v Westwood** [2012] IRLR 834 CA.)
97. As a general rule a good distinction will be the difference between an individual who markets his/her services to the world in general and someone who works in a subordinate position in circumstances where she is integrated into the employer's business (**Windle & Anor v SS for Justice** [2014] IRLR 914, EAT). Although there are some borderline situations where it is difficult to determine whether a person is a worker, recent case law has the effect that the definition should widely apply.
98. It is also important to consider the true contractual position. Although any written contract will be the starting point, it may be possible to prove that the document does not reflect the true agreement between the parties. But this will need strong evidence.
99. Turning then to the matter before me.

Employee

100. I do not accept that there is overarching mutuality of obligation but there are elements which indicate that this might exist once a carer agreement is in place, although I am inclined to see this more involving professional and practical considerations given that the carer is providing personal care to a service user.
101. I accept that the Claimant is subject to control by way of the statutory regime and its enforcement through the CQC and the Respondent. But this is not analogous to control in the sense of an employee by an employer. In any event the day to day relationship between the carer and the service user is not under the control of the Respondent and the Claimant had a high level of autonomy in terms of how and when the service was provided and who by.
102. It is clear from the agreements that the intention of the parties was to create a self-employed relationship and this is how it has continued in practice. The Claimant has clearly benefited from this in terms of the tax allowances available and any challenge to the nature of the relationship has only arisen when it came to an end.

103. The Claimant received a payment of a flat rate albeit payable from three sources and with some guarantee in certain circumstances to make up shortfalls by the Respondent. However, I do not accept that the Claimant was being paid wages. The fee received consisted of a flat rate care and support element paid by the respondent from its care placement budget, and accommodation element paid by Housing Benefits and a food and utilities element paid by the service user. The fee is not akin to a payment of wages for work done. It is not linked to time or productivity. It is paid gross of any deductions for tax or national insurance. It is not a wage and is not a payment analogous to a wage.
104. Whilst the Claimant receives respite payments, I do not see these as analogous payments to holiday pay in the circumstances and indeed if they were they are not conclusive of an employment relationship.
105. I do not find that the Claimant was in any way integrated into the Respondent's workforce.
106. The Claimant had the ability to undertake outside work and did so.
107. I have considered all of the evidence as to employee status raised by the parties and taking them all into account I form the view that the Claimant is not an employee for the purpose of her complaints of unfair dismissal, entitlement to a redundancy payment and notice pay even if there were a contractual relationship between the parties.

Worker

108. Turning then to whether she is a worker. Taking into account all of the evidence raised by the Claimant and the Respondent, the key element that defeats the submission that she is a worker is that she was under no obligation to provide personal service. This could be undertaken by her husband or a third party subject to support carer assessment and DBS checks as required by the CQC and by others during respite care.
109. I have taken into account the Respondent's reference in its submissions to **Pimlico Plumbers v Smith** [2018] UKSC 29 in which Lord Wilson considered personal service at paragraphs 28-82. This is of course fact sensitive in every case. I have also taken into account the reference to the guidance given by Sir Terence Etherton in the Court of Appeal in that case (which was not expressly disapproved by the Supreme Court) at [2017] IRLR 323 paragraph 84:

"I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly,

again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

110. I agree with the Respondent that the fourth element above is the key factor which defeats the Claimant's submission that she is a worker.
111. I therefore find that the Claimant is not a worker for the purposes of her complaint of entitlement to annual leave even if there was a contractual relationship between the parties.

Status under the Equality Act 2010

112. Turning then to the definition of employment within section 83 EqA. I rely on my above findings and it follows that if the Claimant is neither an employee or a worker in law then she cannot fall within the definition for the purpose of an EqA complaint particularly those findings relating to worker status and the lack of the provision of personal service, even if there was a contractual relationship between the parties.

Summary

113. As I have found, the Claim fails due to the lack of a contract of employment. For the sake of completeness if I am wrong on this point, I have gone on to find that the Claimant is not an employee or worker and does not fall within employment for the purposes of the EqA.
114. On this basis I do not feel it is necessary to consider whether or not the complaints were presented in time.

Employment Judge Tsamados
Date 12 February 2020