Case number: 2602431/2018

EMPLOYMENT TRIBUNALS

and

Claimant	**Respondent**
Ms A Gulliford	1. University of Nottingham 2. Nottingham City Council

At a Hearing

Held at: Nottingham

Before: Employment Judge Legard (sitting alone)

On: Monday 7th and Tuesday 8th October 2019

The Employment Judge gave judgment as follows.

Representation

For the Claimant:	**David Flood of Counsel**
For both Respondents:	**Paul Michell of Counsel**

JUDGMENT

1. The Claimant is and was at all relevant times an employee of the Second Respondent and a contract worker for the First Respondent.
2. Accordingly the claims for unfair dismissal and equal pay against the First Respondent are not well founded and are dismissed.
3. The matter will be listed administratively for a further Preliminary Hearing (by telephone) with a time estimate of 2 hours in order for directions to be agreed and/or given for the final hearing.

REASONS

1. Issues

1.1 The matter came before Regional Employment Judge Swann on 22nd March 2019 and again on 21st May 2019 (both by way of a Telephone Case Management Discussions "TCMDs") and upon the latter occasion REJ Swann identified the following preliminary issues as matters for determination by this Tribunal:

(a) Whether the Claimant was an employee of the First or Second Respondent at the material times or a contract worker for the First Respondent;
(b) Whether the First and Second Respondents were associate employers within the meaning of s.79 EqA so as to enable the Claimant to rely upon her named male comparator, Mr Durbin;
(c) If found to be a contract worker, whether the Claimant is entitled to pursue a claim of Equal Pay given the provisions of ss.70 and 71 EqA.

1.2 As this case developed, the Claimant, through her Counsel, made two important concessions. First, she conceded that, if found to be a contract worker of the First Respondent ('the University'), she could not pursue a claim for equal pay against them because of the ring-fencing provisions of the EqA (ss.70/71). That in turn led onto the second concession, namely that, if found to be a contract worker of the University, she cannot pursue an equal pay claim against the University, irrespective of whether the Respondents could fairly be described as associate employers within the meaning of s.79 EqA. If found to be an employee of the University, there is no need to consider the 'associate employer' provisions. She brings no claim for equal pay against the Second Respondent ('the Council').[1]

1.3 It follows that the only issue that falls to be determined is the status of the Claimant or, more accurately, whether she was, at the material time, an employee of the University within the meaning of s.83(2) EqA? Both parties agree that, in the alternative, the Claimant satisfies the definition of contract worker within the

[1] See also paras 37-39 C's skeleton argument.

meaning of s.41(7) EqA insofar as her relationship with the University is concerned.

1.4 The outcome of this hearing does not affect the Claimant's entitlement to pursue her existing complaints of victimisation and direct sex discrimination.

2. Evidence

2.1 I have been referred to a significant number of documents contained within two lever arch files of documents comprising some 661 or so pages. I have read only those pages to which I have been either directly referred in evidence or which are referenced within the witness statements or skeleton arguments.

2.2 I have heard evidence from the Claimant herself and, on the Respondents' behalf, from Professor McGraw, Ms Heyhoe and Ms Gray. All witnesses were thoroughly cross-examined by Counsel.

2.3 I found all witnesses to have given honest and credible testimony. Although there were some differences as to factual interpretation, ultimately this preliminary hearing did not require a resolution of factual conflict.

3. Relevant law

Status

3.1 s.83(2) EqA provides as follows:

'Employment' means:-

(a) Employment under a contract of employment,…or a contract personally to do work;
(b) …
(c) …
(d) …

3.2 The definition of 'employment' within EqA is therefore wider than that to be found in s.230 ERA. There have been a plethora of cases on the vexed subject of employment status, including the well-worn case of *Ready Mixed Concrete v Minister of Pensions.* Over the years, Employment Tribunals have utilised tests predicated on 'control'; 'organisation' and 'economic reality.' In broad terms, the so-called 'multiple' test has been the preferred latterly. The question is highly fact sensitive. However the starting point in most, if not all, cases is to determine what, if any, contract exists between the relevant parties.

3.3 Elements seen as essential for the formation of an employment contract (often referred to as the 'irreducible core') are:

- An obligation to provide work personally;
- Mutuality of obligation between the parties;
- Sufficient control.

3.4 In terms of the obligation to provide work personally the power to send a substitute in his or her place (whether or not that power is exercised) will, generally speaking, defeat the existence of a contract of employment – *Express and Echo Publications v Tanton [1999] IRLR 367.*

3.5 The second requirement is what is termed, in employment law, as 'mutuality of obligations.' Essentially this means that, for the duration of the contract, the putative employer and employee must owe one another legal obligations (usually an obligation to work and obligation to pay for that work) – and this is often seen as an essential pre-requisite for any contract of employment – *Carmichael v National Power [2000] IRLR 43* and *Clarke v Oxfordshire Health Authority [1998] IRLR 125*.

3.6 The third element is that the putative employer must exercise a sufficient degree of control over the employee. It was in this context that *Ready Mixed* achieved

prominence. What constitutes 'sufficient' control will vary from case to case and it is not necessary that the employee is subject to detailed day-to-day control.

3.7 In summary, therefore, if the contract does not impose an obligation upon the individual to provide services personally; or if there is no mutuality of obligation or insufficient control then the contract in question is unlikely to be a contract of employment. If all three elements are present, then it may be such but whether it is or not depends upon an analysis of all the surrounding circumstances.

3.8 All the circumstances of the relationship must be considered and the Tribunal should look behind the labels that the parties may attach to it, in order to ascertain its true nature – the label applied by the parties will only be decisive where the other factors are evenly balanced – *Dacas v Brook Street Bureau [2004] IRLR 358* (a case which, incidentally, also gave some support for the proposition that an employment relationship could evolve over time). This necessarily involves taking a wide-angled approach and looking at the overall picture – see *Market Investigations v Minister of Social Security [1968] 3 All ER 72.* Many decided cases on the point tend to be concerned with whether an individual is an employee or an independent contractor (which is not the case here).

3.9 Where there is no express contract between the worker and host or end-user, it may be possible to imply such a contract through their conduct. However, a contract will only be implied where it is necessary to do so – see *James v Greenwich LBC [2008] IRLR 302.* Neither a lengthy duration of work nor integration into the end-user's business are, of themselves, sufficient to justify the implication of such a contract. Furthermore, an appearance that the parties would have acted in exactly the same way if there had been no contract will generally be fatal to the implication of a contract – see *Tilson v Alstom Transport [2011] IRLR 169*. In general terms, and having regard to the present state of the law, it appears that it will only be in exceptional circumstances that an agency worker or secondee will be held to have a contract of employment with the end-user/hirer or host as the case may be – see *James v Greenwich (supra.); Smith v Carillion [2015] IRLR 467*. In *Smith* (again an 'agency worker' situation) there was no express contract between the putative worker and the end user and the Court refused to imply such

a contract on the principle of necessity, notwithstanding a number of integration and control factors in the Claimant's favour. The Court made the point that there will undoubtedly be cases where senior or relatively senior staff are provided and, in such circumstances, it would not be unusual for the end user to, for example, subject them to an interview process.

3.10 However, in circumstances where the parties intended to paint a false picture of the true nature of their relationship (sometimes referred to as a 'sham' agreement) the Tribunal may look behind the written agreement in order to search for the true nature of the relationship – *Protectacoat v Szilagyi [2009] IRLR 365; Consistent Group Ltd v Kalwak [2008] IRLR 505*; *Autoclenz Ltd v Belcher [2011] IRLR 820.*

3.11 One thing that the parties are agreed on is the apparent lack of caselaw concerned with the status of a secondee; there being a plethora of caselaw having built up around the agency/end-user and employed/self-employed situation.

Equal Pay

3.12 In light of the narrowing of the issues, there is no longer any requirement to set out the law relating to Equal Pay which is both complex and voluminous.

4. Findings of Fact

4.1 I find the following facts on a balance of probabilities. I have been careful to restrict my findings to those matters which are necessary for the determination of the above issues and not to trespass onto territory which may become the domain of a future fully constituted Tribunal. That said, there is inevitably a degree of overlap in such cases and, to that end, any findings I may have made that are not strictly relevant to the preliminary issues are not binding upon any future Tribunal.

Background

4.2 From 2000-2002 the Claimant worked as an Academic and Professional Tutor ('APT') in the University's School of Psychology ('SP') and, for that period, was seconded from her then employer Leicester City Council ('LCC'). In 2002 she was employed[2] as a Senior Educational Psychologist by the Council, presently on a 0.1 Full Time Equivalent ('FTE') basis. In the same year she was seconded to the University where she was, until recently, employed in the role of Programme Director ('PD') in the Educational Psychology Unit ('EPU'), itself a department of the SP, latterly, but not initially, on a 0.9 FTE basis. Since August 2018 the Claimant is once again working for the University on a time-limited secondment contract as an APT, albeit under protest.

4.3 For the PD role, the Claimant was jointly interviewed by senior individuals from both the Council and University, something which, as she describes in her witness statement, *'…reflected a partnership between Local Authority and University..'*

4.4 The University's SP is a national leader and operates over two sites (one in Nottingham and the other in Malaysia). From 2010 until October 2018 Professor McGraw was its Head with overall responsibility for all academic courses (under and post graduate and PhD) as well as staff and student recruitment; financial planning and budgeting and so forth.

4.5 In her role as joint PD, the Claimant's principal responsibility was the effective running of the Educational Psychology ('EP') Group within the SP. She was also jointly responsible for training EPs and delivering doctoral training programmes (Doctorate in Applied Educational Psychology) in accordance with the terms set down by the British Psychological Society ('BPS') and Health & Care Professions Council ('HCPC'). A full range of the Claimant's duties is set out within a tailored job description and summarised at paragraph 6 of her witness statement. It is not disputed that the Claimant occupied a challenging position with a range of important responsibilities. There is no doubting her commitment to the role.

[2] All references to 'employed' or 'employment' are to be interpreted neutrally at this stage.

4.6 Her concurrent 0.1 FTE role with the Council was geared towards consultancy services directed at children and young people.

4.7 In May 2007 the SP advertised for a joint PD. The role was advertised to be same pay scale as the Claimant's then current pay scale and 'up to' 0.9FTE. In October of that year Mr Durbin was appointed. The Claimant played a significant role in his recruitment and was one of those who interviewed him for the role. It is of note that the advert for the role envisages that the applicant will be a secondee, stating as follows:

"It is envisaged that applicants will discuss within their employing LAs the feasibility of being bought in by the University for the advertised proportions of their time. In addition to reimbursing the LA this proportion of salary on the Soulbury scale above, the University will also pay this proportion of the usual employment on-costs and full travel expenses related to the University post. It is expected that by the time of interview, applicants will be able to provide evidence of their LA being willing to enter into such a relationship. The posts will be offered as a three-year renewable contract."[3]

Mr Durbin commenced his appointment as a secondee from his LA (Wakefield Council). Intriguingly Mr Durbin's initial secondment was (unlike the Claimant's) regulated by a written secondment agreement entered into between the University and his LA employer at the time.[4]

4.8 However, before taking up the post and after having relocated both himself and his family at significant expense and inconvenience, his LA terminated his contract of employment, thereby effectively pulling the rug from under his feet. In those circumstances, the University took the unusual step of employing him direct and thereby honouring his appointment to the post of joint PD.

[3] p.131
[4] p.433

4.9 Of the seven staff teaching the EP programme, only one was (at the time material to these proceedings) directly employed by the University (Mr Durbin). The remainder, including the Claimant, were secondees from their respective Local Authorities ('LAs').

4.10 Andy Miller was an Educational Psychologist also seconded to the University from his LA and who spent many years in that role, eventually retiring 'in harness.' Mr Miller was, to all intents and purposes, the Claimant's predecessor and styled himself as both Professor of Educational Psychology at the University and Senior Educational Psychologist with Derby City Council. The creation of joint PDs more or less coincided with his departure from the EP department. Shortly before he left and in an internal email, dated January 2008, Mr Miller sought to tackle the problem of pay disparity as between the Claimant and Mr Durbin:

"Previous costings suggest…there should be a comfortable margin in which to raise [the Claimant's] salary to parity with [Mr Durbin's]. ***[The Claimant] is currently employed by the LA (as I am)*** *and, given the current climate, it may seem preferable for this to remain the case and for any salary increase to be arranged to be paid her via the LA?"*[5]

4.11 In the autumn of 2017 the University commissioned a 'Staffing Review' of the SP from Professor Crout. Amongst other things, the Review recommended the deletion of one of the joint PD roles and included the following:

One member of staff [Durbin] is employed by the University and seconded to Nottinghamshire LEA for 0.1FTE. Two members of staff are employed on a casual hourly basis as required. The remaining staff are employed by their LEA and released back to the University for the fraction of their working time shown above. With the exception of [Durbin] (employed by the University) contractual arrangements with individual staff are unclear and it seems we are simply proceeding on a custom and practice basis. The contractual arrangements with the LEAs are also unclear."

[5] p.133b

It followed that another of Professor Crout's recommendations was for the introduction of formal contracts (as between the University and LEAs) so as to regularise the position for secondees.

4.12 Within the Review were details of the Joint PDs respective rates of pay and it appears to have been this which prompted the Claimant to raise concerns regarding apparent pay disparity and ultimately a grievance (her first concerns being raised in an email dated 23rd February 2018). The University's initial response was essentially that it was the Council, not the University, that was her employer and therefore responsible for her pay and conditions.

4.13 Insofar as the other major recommendation was concerned (the deletion of one of the joint PD roles) the University's position was that, in order to avoid making one of their own redundant, Mr Durbin should be retained at the expense of the Claimant. The reasonableness of this decision was not a matter considered or canvassed within this hearing and, in any event, is a matter outwith the ambit of this Judgment.

4.14 Accordingly, by letter dated 10th May 2018, the Council was informed by the University that the Claimant's services as PD were no longer required and, in the absence of any formal secondment agreement, proposed three months notice.[6] The University also offered, in the alternative, to provide the Claimant with a time-limited seconded role as an APT, albeit one time-limited to 12 months. position. The Claimant was subsequently informed by the Council of the above. The Claimant viewed this as an effective demotion with a resultant loss of status. She nevertheless accepted the role under protest and continues in it to this day. On 2nd July 2018 the Claimant escalated her complaints into a formal grievance and in September and October 2018 entered into early conciliation with both the University and Council respectively.

[6] p.422 – letter addressed to Ms Gray

4.15 By a claim form dated 26th October 2018 the Claimant brought complaints alleging victimisation; sex discrimination; equal pay and unfair dismissal. The ending of her PD secondment forms the basis for her unfair dismissal and victimisation complaints. She also brings direct sex discrimination claims in respect of an alleged failure to provide her with comparable training and equipment.

Pleadings

4.16 In her original ET1 (dated 26th October 2018), the Claimant sought to bring equal pay claims against both the Council and University and, in so doing, described herself as an employee of the former and a secondee to the latter. At paragraph 20 of her particulars of claim she stated:

"There are many indicators of my treatment by [the University] as equivalent to employed staff."

And later at paragraph 31:

"I consider that I count as a "contract worker" in respect of [the University.]

In her first amended grounds of complaint (served 7th December 2018) the Claimant asserted, for the first time, that she was an employee of the University and further amendments were made in a similar vein in April of this year.

Written contractual documentation

4.17 The Claimant's written particulars of employment with the Council are in standard form, containing all the usual terms one is used to finding in a written contract of employment, such as hours and place of work; pay; holiday and so forth.[7] Unlike Mr Durbin's case, there was no corresponding written secondment agreement (as between the Council and University) regulating the terms under which the Claimant was seconded until 2018. Of that, more below. It is clear, however, that

[7] p.96

at no point prior to 2018 was there any suggestion that the Claimant's secondment was time-limited in any way.

Pay

4.18 The Claimant was not paid through the University's payroll nor does she have a University employee number. At all material times, she was a paid via the Council's payroll system.

4.19 The Claimant's pay was graded by reference to what is known as the 'Soulbury' scale. In essence this pay scale determines the salaries and conditions of a number of categories of specialist LA officers, including Educational Psychologists. It is set by the Soulbury Committee which is a collective bargaining forum for LA educational advisory staff. The University is not party to this forum and therefore does not apply the Soulbury pay scale. Instead the University establishes pay scales and awards for its teaching staff through its own national and local collective bargaining process.

4.20 The mechanism for paying the Claimant is as follows. Her full salary is paid by the Council. The Council subsequently invoices the University in respect of her 0.9FTE (or whatever FTE proportion was then in place) secondment contract (which includes on-costs, pension and National Insurance). The actual funding derives from an educational contract held by the National College of Teaching and Leadership (NCTL) which is an executive agency of the Department of Education.

4.21 The Claimant was paid at a level which the University deemed commensurate with the role and, so far as possible, was at par with Mr Durbin. In order to ensure this, the University specifically sought the Council's approval for the Claimant to be paid at a certain level within the Soulbury scale which would best ensure parity as between herself and Mr Durbin. In practice this meant that she was paid at a higher rate for the 0.9FTE University position than she was for her remaining 0.1FTE Council role.

4.22 Over time however, even at the top of the relevant scale and despite the University's best efforts, the Claimant's pay did not keep pace with that of Mr Durbin – and that is essentially the nub of the Equal pay complaint. The disparity in pay arose because, in essence, the Claimant's and Mr Durbin's pay was dictated by reference to two wholly distinct and separately negotiated pay scales. This is a relevant factor in terms of determining employment status as it demonstrates an ultimate lack of control by the University over pay, the single most important feature of an individual's contract. It would also have been an important factor had I been invited to determine the 'single source' issue (which fell away following evidence and argument).

4.23 It is clear that the University influenced the Claimant's pay but they did not ultimately control it. Had the University been able to control her pay then the complaint of Equal Pay is unlikely to have materialised. A request that a seconded member of staff be paid at a certain level commensurate with a specific role and in order to ensure parity between other members of the relevant department is not necessarily inconsistent with secondment status. The University had no influence over let alone participation in the Soulbury pay negotiations.

4.24 The email correspondence on this issue (which was the subject of extensive analysis during the hearing) evidences the fact that the University were doing their best to achieve the dual purpose above. Ultimately, however, the University's aspiration required the agreement and approval of the Council. For example, in 2006, Andy Miller emailed Ms Gray seeking the University's approval for both an increase in the Claimant's rate of pay and an increase in the proportion of her time dedicated to the University (from 0.6 to 0.8FTE). The email reads as follows:

"In addition,…,we would very much like to increase the proportion of [the Claimant's] time that we purchase from yourselves from 0.6 to a new figure of 0.8 again from September 2006.

Can you let me know whether [the Council] would be agreeable to both of these proposals and, if so, what you feel the next steps should be?"[8]

This supports the view that any change in the Claimant's rate of pay or allocated time was, at all times, subject to the approval of the Council and entirely consistent therefore with being an employee of the Council on secondment to the University.

4.25 For the Claimant, Mr Flood has made much of the words set out in the Council's email correspondence with the University and specifically Ruth Illman's (Ms Gray's predecessor at the Council) comment:

'How do you want to proceed; if the University are making that [the stated pay point] a term of [the Claimant's] contract with them then we are ***purely the mechanism*** *by which [the Claimant] is paid.'*

However, the above simply demonstrates that the Council were content to agree with and, where necessary, implement any requests made by the University to increase the Claimant's pay and/or hours provided that the requests were reasonable, justifiable and fell within the Council's power.

4.26 In 2008 the Claimant's rate of pay was increased to Soulbury B (SCP 10) and her secondment to the University was increased to 0.8FTE. This variation is recorded within Council documentation and signed off by her Council 'line manager' with the words:

"This grade has been requested by the University who pay [the Claimant's] salary.

Unsurprisingly this variation was confirmed in writing to the Claimant personally (Mr Flood's suggestion that the Council should have issued the Claimant with a new contract is unrealistic – in almost all cases a simple letter of notification suffices). In that confirmatory letter from the Council to the Claimant, it states clearly:

[8] p.127a

"Other terms and conditions of employment remain unchanged."[9]

There was a further amendment to her terms in 2012 and, once again, these were agreed, confirmed and notified to her by the Council not the University.

Pension

4.27 The Claimant is a member of the Local Government Pension Scheme ('LGPS') whereas University employees belong to the USS pension scheme. That said, the Council recovers the employer pension contributions from the University in much the same way as it recovers the cost of 0.9 of her salary (upon receipt of invoice and on a pro-rata basis).

Expenses

4.28 The Claimant was required to submit a 'non-staff' expense claim form for reimbursement of expenses.[10] It was not made clear as to how these expenses were reimbursed to the Claimant. I understood the expenses to be paid direct to the Claimant's individual bank account and not via the Council. A University employee would have his or her expenses repaid via payroll.

Maternity leave

4.29 The Claimant was absent on maternity leave between December 2002 and July 2003 during which time the Council did not supply nor did the University request a maternity replacement. Her maternity pay was paid by the Council.

Line management and performance review

4.30 In her role as joint PD the Claimant was accountable in the loosest sense of the word to the Head of the SP which, for much of the relevant time, was Professor

[9] p.221
[10] See example @ p.148

McGraw. It is difficult to see how it could be otherwise. The EPU was an important department within the University's SP and anyone occupying the role of PD, whether they were employed, seconded or simply filling in via an agency, would have been accountable in the same way. The 'family tree' to which I was referred[11] does nothing more than state the obvious. From a purely practical perspective, it made eminent sense for the Claimant (or indeed anyone seconded to the SP for any appreciable length of time) to have been subject to some oversight from within the University, if nothing more than to ensure that the individual was delivering on the curriculum.

4.31 There was some evidence of the Claimant having co-responsibility for appraising University staff (for example Ruth Chapman, an administrator) and there was a mild factual conflict as to whether Claimant had in fact been 'appraised' by the University and, specifically, the role played by Professor Ferguson in that regard. I find that the Professor Ferguson participated in little more than a review meeting with the Claimant, the aim and purpose of which was to discuss and support the application process for a doctorate. There was no formal appraisal process recorded or undertaken by the University in respect of the Claimant. Professor Ferguson was not the Claimant's line manager.

4.32 Indeed it is telling that, in subsequent email correspondence with Professor Ferguson, the Claimant puts it thus:

"My view is that the arrangement under which you and I met was to enable me to have some contact with a more senior figure within the School, with formal insight and guidance; not as full line management."[12]

4.33 Otherwise the Claimant conceded that her true 'line manager' (and to whom she referred on all significant matters concerning her work either with the Council or University) remained at all times always Ms Gray or whoever occupied position of Principal Educational Psychologist with the Council.

[11] p.204k
[12] p.350

4.34 Professor McGraw did not conduct any Performance and Development Reviews with the Claimant (PDPRs) during his tenure as Head of School. This is in direct contrast to Mr Durbin who was formally appraised by Professors Ledgeway and Ferguson.

Length of time

4.35 It is an undisputed fact that the Claimant fulfilled the role of PD (whether jointly or otherwise) for a period of approximately 16 years. There is evidence that her 'predecessor' Andy Miller worked for over 20 years on secondment and effectively retired 'in harness', a party being held at the University to 'celebrate' his retirement. This is one of the Claimant's key points. As the longest serving PD at the University and, in the absence of any defined secondment period, the Claimant's expectation was that she would remain in post to retirement if she so chose (and to that end following in the footsteps of her predecessor Mr Miller).

4.36 Under cross-examination, the Claimant accepted that she did not consider herself entitled to a 'job for life' (with the University) but alluded to the 'shock and disbelief' of her colleagues when they discovered that her post was being deleted. It was her position that the length of time that she had dedicated to the University ought properly to have been recognised by the University by them making her an employee.

'Secondment'

4.37 The University has a secondment policy which, amongst other things, provides:

"External secondments are those outside of the University, with other organisations in the UK or internationally. These facilitate partnership working and knowledge transfer by enabling staff to work temporarily at another organisation while their contract remains with the original employer."[13]

[13] p.472

4.38 'Secondment' (almost invariably via a Local Authority) was (and remains) a common method of engagement, particularly for staff employed within the SP. Indeed, the University and Council maintain that this form of engagement is 'standard practice' particularly for this type of educational programme. This assertion was not seriously disputed by the Claimant.

4.39 It is the Claimant's case, however, that the University treated her in a manner that was consistent with an employee as opposed to 'secondee.' In terms she maintains that, over time, she became an employee – in other words, although she may have begun as a secondee, her status developed over time into that of a fully fledged employee. Under cross-examination, she referred to it as a 'gradual transformation.'

4.40 As set out above, following the termination of her PD position, the Claimant was offered (and subsequently accepted under protest) a position as an APT (a role that she had last performed back in 2002). The advertisement for the position clearly describes it as a 'secondment'; on a 'up to' 0.6FTE basis and renewable on a one-year annual basis.

4.41 In light of the recommendations contained within Professor Crout's review, the University and Council then set about drafting a secondment agreement, albeit on this occasion in connection with the Claimant's new APT role. There is no doubt that, had the Claimant remained in her PD role, a similar draft agreement would have been entered into.

4.42 In any event I am informed (and this was not disputed by the Claimant) that the draft secondment agreement was finalised before the Claimant first asserted her status as that of an employee of the University. That said, the final draft was not signed until after she had first made that assertion. The secondment agreement is clearly drafted on the basis and mutual understanding that the Claimant was and remains at all times an employee of the Council and a secondee to the University. The agreement is time limited to one year and unequivocally provides as follows:

"During the period of secondment the secondee will continue to be an employee of [the Council]…"

The final draft describes the Council as 'employer' and the University as 'host' and states as follows:

"The Employer employs [the Claimant] as […] under the Employment Contract. The Employer intends to second [the Claimant] to the Host in order to provide services during the Secondment Period. The Secondee will remain employed by the Employer during the Secondment Period."[14]

PhD application

4.43 In November 2017 the Claimant applied to register for a PhD. She sought the approval and support of Professor McGraw who was more than happy to provide it. On the application form itself (completed by the Claimant) she describes herself as an 'associate' of the University and the Council as her 'employer.'[15] There was no indication or representation on the part of the Claimant or the University that she was an employee of the University.

4.44 However the eligibility criteria for such an application to receive University support is that the applicant must have '…been a member of staff of this university for not less than four years.'[16] In evidence Prof McGraw acknowledged that this was indeed the criterion but stated that the Claimant had approached him and he was eager to assist where he could. He was aware that the Claimant had previously applied for a PhD on 2010 and had been rejected, ostensibly on the basis that she did not fulfil that criterion.

4.45 Nevertheless, and notwithstanding the above and much to Professor McGraw's pleasant surprise, the Claimant's application was, on this occasion, subsequently approved.

[14] p.488
[15] p.149
[16] p.100

Annual leave

4.46 The Claimant does not have access to the University's holiday recording system ('E-days') and records her annual leave with the Council. That said, it is often the case that, for planning purposes, she must coincide her leave within the exigencies of the SP.

Sickness

4.47 The Claimant had an enviable sick record and there was no record of sickness produced or referred to in evidence. However, if she had been sick, the Claimant would have had to record the same via the Council's and not the University's system.

Disciplinary and grievance

4.48 The University has its own disciplinary and grievance policies. It is agreed that neither party ever had reason to discipline the Claimant. That said, under cross-examination, Professor McGraw made clear (and I accept) that, had there been any disciplinary or performance concerns regarding the Claimant, these would have been addressed in the first instance to the Council and her line manager. To use his words, the Council would have been his first 'port of call.'

4.49 As set out above, it was Professor Crout's review that highlighted the pay disparity and brought the same to the Claimant's attention, sparking understandable concern on her part. On 26th March 2018 she emailed Ms Heyhoe, raising her concerns and, in doing so, stated as follows:

"I am a Local Authority (LA) employee, working at the University as an associate member of staff, and have done so since the year 2000."

On 2nd July 2018 the Claimant submitted a grievance to the Council, writing to Ms Gray whom she described as her 'line manager' in the following terms:

"I am writing to you as my employer, recognising that you are not the source of my grievance but that I must register it with you."

4.50 A decision was taken, following receipt of her grievance, that the University would be much better placed to investigate and deal with it. This made eminent sense. The University were far better placed than the Council to lead on the investigation because the facts about which the Claimant complained were all within its domain and concerned University personnel. The University therefore agreed to hear the Claimant's grievance in accordance with their policy although it is important to stress that this agreement was qualified (both at the time and subsequently) by the University writing to the Claimant in the following terms:

"As you are not an employee, the University was under no obligation to treat your complaint as a formal grievance under its Grievance Procedure. However, as a gesture of goodwill,…, your complaint was dealt with…etc."[17]

4.51 An outcome to her grievance (authored by the investigating officer, Professor Anderson from the School of Pharmacy) was produced on 1st April 2019 in which it stated the following:

Although not an employee of the University, it was decided that [the Claimant's] complaint would, for practical purposes, be dealt with in line with the process set out in the University's formal grievance procedure."

The report concluded by criticising the University for its poor communication and the absence of a written (University/Council) secondment agreement but rejected the specific complaints of sex discrimination; equal pay and victimisation. In doing so, it recorded that:

[17] p.583

"It is not in dispute that [the Claimant] is an employee of the [Council] and not of the University. However, it is acknowledged that [the Claimant] has been seconded from [the Council] to the University for a long time and her contribution and expertise have been valued by the University and her university co-workers."[18]

Labelling

4.52 During the course of the hearing my attention was drawn to a number of documents in which one or other or all three parties to this dispute elected to describe themselves and/or their relationship. In doing so, both Counsel acknowledged the trite legal position, namely that 'labelling' is, without more, of relatively limited significance to the question of status.

4.53 That said, I noted the following references:

'I am a LA employee, working at the university as an associate member of staff, and have done since the year 2000.'[19]

'I am glad to hear of the University's willingness to potentially meet with my employer'.[20]

In her letter of complaint dated 2nd July 2018 and addressed to Professor McGraw, the Claimant sets out the background to her complaint stating, inter alia:

"I am writing as a secondee…"

"I have worked at [the University] in an Associate seconded capacity since 2000."

[18] p.180
[19] p.164a (email from C to Ms Heyhoe dated 23.3.18)
[20] Email correspondence from May 2018

"I have been extremely grateful for the support of my line manager, Fiona Gray, and of [the Council]. My concern lies with my treatment by [the University], whom I consider to hold ***de facto employer*** *responsibilities through my 18 years' work for them."*[21]

In a later grievance meeting with the University in October 2018 the Claimant poses a number of questions, including the following:

"How does [the University] justify maintaining workers on long-term secondments, and not offering them employment contracts?"

"Why was I retained on a long-term secondment, as a female manager, rather than being offered a staff contract to protect my position and reflect my experience and skills?"

"Did [the University] believe that by not informing my LA employer of the inequality in remuneration I unknowingly experienced as a secondee would aid [the University] in evading its equalities responsibilities?"[22]

Childcare vouchers

4.54 In 2016 the Claimant entered into an agreement with the Council whereby the latter agreed to substitute part of her gross salary for childcare vouchers in accordance with the government Childcare Voucher Credit scheme (Childcare-Plus). It is important to note that this necessarily resulted in an amendment to her existing terms and conditions of employment, a fact that was recorded in writing:

"This amendment to your terms and conditions means that you agree for your employer to deduct….etc"

[21] p.335
[22] p.347

"I have read and understood this agreement to vary the terms and conditions of employment…."

The Claimant signed the above agreement in November 2016.[23]

Miscellaneous

4.55 The Claimant has 'associate' car parking and library passes and an 'associate' IT account. She has no access to the University's benefits portal (EdenRed).

4.56 I have not commented on the provision of iPads or CPD training allowances/grants as these issues may be the subject of further proceedings; suffice to say I did not find the provision or lack of either of the above to be of any significance to the question of employment status.

5. Submissions

5.1 I am grateful to both Counsel for their professionalism and the careful and succinct manner in which each has advanced their respective clients' positions. Both Counsel have provided written skeleton arguments with supporting caselaw.

5.2 On the Claimant's behalf, and in respect of the question of 'status', Mr Flood argues that the written contractual documentation does not properly or fairly reflect the true intent of the parties and, in support of his arguments, relies on, amongst other things, the dicta of the Supreme Court in *Autoclenz* as well as Elias P (as he then was) in *Kalwak.* Mr Flood points to the fact that the University wielded complete day-to-day control over the Claimant and that, on the facts, the Council was never anything more than a 'sleeping partner' in this tripartite arrangement. He cites, in support of his argument and amongst others, the case of *Farmer v Heart of Birmingham Teaching Primary Care [2016] ICR 1088* which was concerned with a disabled claimant placed with a 'host' organisation by way of a tripartite agreement.

[23] p.217

In that case the Claimant started as an employee of the Council, was a member of its pension scheme and paid through its payroll. The council was also responsible for issuing him with written particulars of employment. However, within the tripartite agreement, the host organisation had been named as the 'employer' with responsibilities for discipline, health & safety and so forth. On a preliminary issue to determine the status of the Claimant, the tribunal held that he was at all times an employee of the Council – a finding upheld on appeal. At first blush, it is not entirely clear how this decision assists Mr Flood (as, if anything, the facts underpinning the decision are not far removed from those in this case). Mr Flood prays the case in aid of his argument, however, by pointing to the fact that the Judge had held that the tripartite agreement did not properly reflect the bargain struck between the parties and was therefore disregarded. He urges me to the same view, albeit with respect to the Claimant's written contract with the Council.

5.3 Mr Flood accepted that, if I was to find that the Claimant was a 'contract worker' and not an employee of the University, she is precluded from bringing an equal pay claim by virtue of ss.70/71 EqA. He also conceded, albeit late in the day, the 'associated employer' argument.

5.4 On the Respondents' behalf, Mr Michell maintained that the Claimant was an employee of the Council but only a 'contract worker' in relation to her PD role at the University. He argued that there was no necessity to imply a contract of employment as between the University and Claimant (see *James*) and the mere passage of time, absent other factors, was of no assistance to the Claimant. 'Secondment,' contended Mr Michell, is a common and well understood type of engagement in this particular, higher education, field and no-one has ever previously sought to elevate it into employment status. It is clear that the Council is the Claimant's employer and no-one can be the servant of two masters – see *Kimberley Group Housing Ltd v Hambley & Os [2008] IRLR 682*, a case with which I am well acquainted.

5.5 Mr Michell argues that no-one can become a 'de facto' employee – a description unknown to the law – one is either an employee or not. Mr Michell also points to the fact that Counsel for the Claimant at the PH held on 22nd March 2019 submitted

to the REJ that her claim for employee status with regard to the University was predicated on the basis that 'she had become an employee [of the University] because of the number of years she has worked there.'[24]

5.6 Mr Michell also drew my attention to see Supperstone J's ruling in *IWUGB v CAC & Os [2019] EWHC 723.*[25] In terms, where an individual has a valid and subsisting contract of employment with A setting out her rights and obligations and which explains the nature of her relationship with B and under which she discharges her activities to B then he or she cannot be deemed also to be in an employment relationship with B simply on the basis that B exercised some form of indirect control or influence over the terms. Although a case ostensibly concerned with TU recognition and 'workers', there is a useful discussion on the concept of employee in circumstances where an individual is employed by a third party (in that case Cordant Security) to work at a University. Amongst other things Supperstone J makes the point that a 'de facto' employer is '…not a known or recognised concept.'

6. Conclusions

6.1 I acknowledge that the definition of 'employment' is more widely drawn in the EqA than the ERA. That said, I am not satisfied that the Claimant was employed under a contract of employment or a contract personally to do work with the University. At all relevant times, the Claimant was employed under a contract of employment with the Council.

6.2 The Claimant conceded that, when she first began working for the University as a PD, she did so as a secondee and not as an employee. Her case, however, was she became an employee at some unidentifiable time thereafter. She was unable to articulate as to when she morphed from being a secondee into an employee or why she underwent that transformation, other than to say that she deserved to be treated as an employee due to the length of time she had dedicated to the University and in recognition of her value to the EPU in particular. I reject the Claimant's core submission, namely that she became over time a 'de facto'

[24] p.75b
[25] See paras 65-66

employee of the University. I agree with Supperstone J that a 'de facto' employee is not a concept known or recognised in law.

6.3 There was no express contract as between the Claimant and University governing their relationship. Furthermore there is no need, in my Judgment, to imply a contract (be that a contract of employment or otherwise) as between the Claimant and University through conduct (*James v Greenwich LBC*) I accept that the Claimant worked at the University, in her PD role, for a significant length of time and, for that period and in respect of her 0.9FTE role, was fully integrated within the SP. I further accept that, to the outside world, she may have appeared, to all intents and purposes, to have been treated no differently to Mr Durbin.

6.4 However, in my Judgment, this does not assist the Claimant. It is common practice for individuals employed in higher education to be seconded in this way from their employing LAs. It makes eminent practical sense for those (many of whom occupy relatively senior roles) to be fully integrated into the institution or department to which they are seconded. As in this case, their status as secondee (as opposed to employee) is entirely consistent with the performance of their role, even if that role lasts a working lifetime. On the evidence before me, there was nothing that would lead one to conclude that it was necessary to imply a contract, let alone a contract of employment or a contract personally to do work. A contract of secondment as between the University and Council, on the other hand, more than adequately explained the terms under which the Claimant performed her role.

6.5 I do not necessarily accept Mr Michell's 'two masters; one servant' argument because it is perfectly possible for an individual to be the 'servant' of two 'masters' in circumstances where there are two separate and distinct roles performed at different times and places and so forth. That said, in this case, the Claimant was, at all material times, a party to a legitimate and valid contract of employment with the Council which properly and clearly set out the terms under which she was employed and which encompassed a full time 37 hour working week. The contract fairly and properly reflects both the parties' respective intentions and the bargain struck. There is no scope for arguing a 'sham.' The contract specifically allows for the Claimant to be '…based at the Sandfield Centre and Nottingham University

or at such other place of employment in the service of the Council as required.' At all times, the Claimant was remunerated and treated in accordance with its terms and conditions. In those circumstances, it is simply impermissible, in my Judgment, to effectively displace or overlay this express contract of employment with another one (be that a contract of employment or contract personally to do work).

6.6 It is clear that the Claimant was a highly respected, much valued and long serving member of the SP. The Claimant also points to the fact that, in her joint PD role, she had a number of important responsibilities to discharge but this is no more than would ordinarily be expected of an individual occupying the role of PD, whether employed, seconded or otherwise. Equally, internal lines of accountability (upon which Mr Flood placed significant emphasis) are essential if the school is to function normally – but, again, adds little to the argument on status.

6.7 Importantly, in my Judgment, the Council exercised ultimate control on pay and conditions. The University may have influenced both the level of pay and the FTE hours allocated to the role but, on each occasion, the University had to seek and obtain the agreement and authority of the Council to effect any change. 'Influence' is not synonymous with 'control.' It was the Council, not the University, who retained line management responsibility for the Claimant and it was the Council to whom the Claimant turned when she needed to formalise a grievance. The Claimant remained, at all times, a member of the LGPS (in respect of her full time Council employment) and her annual leave, childcare voucher salary sacrifice and maternity pay were all administered via the Council.

6.8 Although far from determinative, it is nevertheless relevant that all parties (including the Claimant's predecessor, Mr Miller) consistently referred to the Claimant's status with the University as an 'associate' or 'secondee' and her status with the Council as 'employee.' The Claimant did not seek to present herself as an employee of the University until December 2018 when she amended her claim form.

6.9 In all the circumstances, I unhesitatingly find that the Claimant was, at all times material to this matter, not an employee of the University but an employee of the Council. I also endorse the agreed position between the parties, namely that, at all material times, the Claimant was a contract worker supplied to the University by the Council.

6.10 This matter will now be listed administratively for a further Preliminary Hearing (to be conducted by telephone) with a time estimate of two hours in order for further directions to be provided for the final hearing. I have already ordered that the trial hearing dates be extended to 5 days commencing 17th February 2020.

……

Employment Judge Legard

Date: 18th October 2019

JUDGMENT SENT TO THE PARTIES ON

……

AND ENTERED IN THE REGISTER

……
FOR SECRETARY OF THE TRIBUNALS