Case No: **2406160/2019 (V)**

**EMPLOYMENT TRIBUNALS**

**Claimant:** Miss L Reside- Robb

**Respondent:** Breathe Therapies Eating Disorder Help & Wellbeing Services

**Before:** Employment Judge Sharkett

Held: Manchester : 7 September and 9 November 2020

**REPRESENTATION:**

**Claimant:** Mr Passman - Consultant
**Respondent:** Mr Morton - Solicitor

**JUDGMENT ON PRELIMINARY HEARING**

1. The claimant was not an employee of the respondent under s230 (1) ERA

2. The claimant was a 'worker ' as defined in s230(3)(b) ERA 1996

**REASONS**

3. This was a Preliminary Hearing to consider the employment status of the claimant. It was originally listed for one day on 7 September 2020 but due to technical difficulties experienced with the Ms Perry's internet connection it was not possible to conclude the hearing within the anticipated time frame. It was relisted for a further day on 9 November 2020 when at the request of the parties Judgment was reserved.

4. The issues to be determined by the Tribunal were identified as:

   a. Was the claimant working under a contract of employment and therefore an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996?

b. If not an employee, was the claimant a worker for the respondent within the meaning of section 230(3)(b) of the Employment Rights Act 1996 [*or equivalent provisions]* in that:

i. they worked under a contract whereby the claimant undertook to do or to perform personally any work or services for the respondent, and

ii. the respondent was not by virtue of that contract a client or customer of any profession or business undertaking carried on by the individual?

5. Mr Passmore an Employment Law Consultant appeared on behalf of the claimant and called claimant to give evidence

6. Mr Morton, solicitor called Ms Perry to give evidence on the part of the respondent.

7. All witnesses gave evidence in chief by way of written witness statements which had been exchanged and had been read by the Tribunal prior to hearing oral evidence. The Tribunal was also provided with a joint bundle of documents consisting initially of 194 pages to which further pages were added at the reconvened hearing. All references and page numbers within the body of this judgment are references to pages in the bundles provided unless otherwise stated.

**Findings of Fact**

8. Having heard all the evidence, both oral and documentary, and having regard to the submissions of the parties, the Tribunal makes the following findings of fact on the balance of probabilities. This Judgment is not a rehearsal of all the evidence heard, but is based on the salient parts of the evidence on which the Tribunal has based its decision.

9. The respondent is a clinic specialising in treatments for persons suffering from eating disorders, mental health and weight management issues. At the time of the claimant's claim it had two employees, and a number of independent therapists working as part of a multidisciplinary team within the respondent and provided services on a self-employed basis. Ms Shelley Perry was the clinical director and safeguarding officer of the respondent with thirty years' experience of working in field of mental health

10. The claimant initially became known to the respondent through her work as a volunteer with SEED, a registered charity specialising in support for people affected by eating disorders. Whilst the two organisations are separate entities they share common management and premises. SEED is staffed by volunteers and students on placements, and offers care and advice including support groups and low cost

counselling. The respondent offers clinical services for which clients are charged and is seen as the treatment arm of SEED which will refer clients to the respondent as required and visa-versa.

11. The claimant was studying psychotherapy at the University of Central Lancashire and as part of that course she was required to undertake one hundred clinical hours in order to qualify. It was for this reason that she commenced a voluntary placement as a student psychotherapist (p5), with SEED in December 2017. The volunteer's contract which explained her role and services to potential clients describes her as a 'student counsellor at SEED' (p151). The contract also advises potential clients of the information that will be held on them and that in addition, she (the claimant), will keep minimal notes at the end of all counselling sessions in order to monitor her work which will be kept in a secure location and destroyed after 7 years.

12. The written agreement with SEED (p60) also set out the obligations of the parties whereby SEED agreed to provide induction and training free of charge, (subject to certain conditions), and provide supervision and support to enable the claimant to develop her skills and experience whilst volunteering with them. Ms Perry was named as the person who would be supervisor for the claimant. In addition SEED reimbursed travel expenses up a maximum of £5 per day and provided insurance cover for voluntary work approved and authorised by SEED. SEED also agreed to fund the cost of a CRB/DBS check to be arranged by the volunteer and afforded volunteers access to the SEED disciplinary and grievance procedures in the event of an issue arising. In return, amongst other matters, the volunteer would meet the time commitments and standards agreed and where exceptional circumstances prevailed, would give reasonable notice so that other arrangements could be made. The agreement specifically states (p62) that it was of a morally binding nature only and that there was no intention to create a legally binding or employment relationship.

13. It is not disputed that during her time as a volunteer there were discussions, not necessarily formal, about the possibility of the claimant working for the respondent once she had qualified. It was also agreed that Ms Perry had indicated that she would be happy to offer the claimant work following qualification. There has been some dispute about the claimant's qualification and her right to see paying clients during the course of this hearing, however that is not an issue for determination by this Tribunal. In oral evidence the claimant explained that it was common knowledge that she had been offered a job by the respondent following qualification and it was agreed by Mr Perry that there had been discussions of this nature; she explained that whilst a formal offer had not been made, when the need arose for another therapist with the claimant's skills she was approached by the respondent with a view to work being made available to her.

14. It is the claimant's case that, without her knowledge, started to see clients who were registered with the respondent and subsequently charged by it for the services the claimant had performed. It is the claimant's case that this was in October 2018 and that it was at this stage that the relationship with the respondent

began and that the relationship was one of employee/employer. The respondent argues that the claimant provided her services in the same way as the other therapists on its books, that is as an independent contractor.

15. During the course of oral evidence the claimant explained that in October 2018 she had been booked in to see client Z, who she had assumed was a client of SEED and therefore that her attendance upon her was as a volunteer. She explained that it was only later on 8 November 2018, when Ms Perry told her that she would need to attend meetings, (something that she had not been required to do as a volunteer), that she realised that she had seen a client of the respondent and asked for confirmation from Ms Perry that she had attended on the client in that capacity. The claimant was inconsistent in her explanation of how she would not have known it was one of the respondent's clients she was seeing when there were separate calendars for each organisation, but it was clear from the evidence heard that there was an overlap between SEED and the respondent's clients. It was also clear that clients seen by SEED could be and were referred to the respondent and if so they would then pay for the services they received. It is the claimant's evidence that it would not be unusual for her to be booked to see a client only to find that when she arrived they had not been entered on the system. In these circumstances she explained she would simply add the client appointment into the SEED calendar herself. Irrespective of the booking system in place the Tribunal finds, on the balance of probabilities, that because of the close nature and overlap of the two organisations, the claimant was unaware when she first saw Z that she was attending upon a client of the respondent. It follows that the Tribunal finds that the claimant was unaware that she was carrying out work for the respondent at that time.

16. It is her evidence that it was only on 8 November 2018 when Ms Perry informed her that she would need to attend one of the multi-disciplinary and clinical team meetings that she became aware she had started to work for the respondent. It is the respondent's case that the claimant had asked Ms Perry about working for the respondent once she had fully qualified and that when they were looking for further therapists the claimant was approached. Ms Perry accepts that there was a delay getting a contract out to the claimant due to time constraints and HR resource, but says that the claimant was aware that work was to be offered to her. The Tribunal find that in order for any contract to be created there must as a starting point be an offer and acceptance of that offer. If the claimant was entirely unaware of the fact that she was carrying out work for the respondent when she saw client Z in October 2018, there cannot have been either an offer made on the part of the respondent that had been properly communicated to her or an acceptance on the part of the claimant. It is clear from email correspondence that as late as 1 November 2018, the claimant believed she was attending upon Z as a SEED client because she tried to book a SEED room to see her in and when she found none was available she asked if she could use one of the respondent's rooms instead (p83).

17. The Tribunal find that the claimant may have been confused or misunderstood any purported offer of work made to her by the respondent prior to 8 November but, that from that date she was aware that she would be paid for attending upon clients of the respondent and that she would be required to carry out additional tasks in

respect of these clients in comparison to those she undertook as a volunteer at SEED. The fact that she was subsequently paid for the work she carried out at that time is not relevant if there had not been an offer of work communicated to the claimant when she carried it out, as is her evidence. The Tribunal make the finding that a contract was created no later than 8 November 2018, because it is not disputed that a conversation took place on that date and Ms Perry confirmed the fact of the claimant's part of the team and that she was now invited to attend Multidisciplinary Team meetings (MDTs) and clinical meetings and would be given login access to 'Writeupp'. WriteUpp, is a shared platform on which appointments are booked and confirmed as completed and the therapists providing services to clients of the respondent write up their notes on the particular clients under their care. The purpose of the platform is to share and provide up to date information to all those forming part of the MDT caring for the individual client concerned. This included Ms Perry who as clinical director at the respondent was named as clinical lead for all clients registered with the respondent. On the same day as the claimant was notified of this by Ms Perry she sent a Whats App message to her thanking her for the opportunity of working for the respondent and the part Ms Perry played in making that happen (p84).

18. It follows therefore that on 8 November 2018 at the latest a verbal contract was agreed between the claimant and the respondent. The terms of that contract were then confirmed in an agreement that the claimant signed on 15 November 2018, which is identified as a 'Self Employed Contract for Services' ("the Agreement") (p72). It is the claimant's evidence that whilst she has seen and signed this Agreement it was never explained to her. The Agreement sets out in clear detail the terms upon which work would be made available to the claimant. The first 4 paragraphs set out the main terms as follows:

a. *Breathe agrees to offer the self-employed agent opportunities to work where there is a suitable assignment to which self-employed person as it may elect where that assignment is suitable.*
b. *The role of the self-employed agent is to represent Breathe as a therapist and professional within the context of a wider eating disorder treatment service and to manage/co-ordinate the holistic needs and care/treatment for clients receiving the services thereof*
c. *There is no obligation of "Breathe" to provide work for the self-employed person or for the self-employed person to serve any minimum of, or maximum hour per week*
d. *"Breathe" agrees to pay the self-employed agent* ***£20*** *per hour for work carried out as requested. The fee is a flat, fixed amount and no other fee expense or payment of any kind will be payable. The fee is for time with a client and the planning, communication and report writing (e.g. to GP's(sic),* client notes, CPA's(sic)) required per session. Where more formal reports are required (solicitors or PCT's(sic)) this will be paid at an hour's (sic) work rate.

19. Additional terms in the Agreement also set out the expectations and obligations of the parties to the agreement in that :

*8. The legal status of the self-employed person shall be that of self-employed with no entitlement to payment from 'Breathe' for holidays or absence to sickness or others reasons. The self-employed person shall be responsible for all matters concerned with DBS checks, Personal and Business Insurance, National Insurance, Income Tax and VAT.*

*12. If your sessional house amount to an average of 10 hours or more per week on a regular basis, over a three month period an alternative contract of employment and salary may be consider.*

*13. The self employed person will comply will all reasonable instructions and requests within the scope of the position and its description*

*14. The self-employed person will attend training and management/supervision sessions as and when required wherever possible.*

*15. The self-employed person is required to have the use of a fax or email, laptop/pc and mobile telephone so that the self-employed person is easily contactable for the smooth running of the business/service. The individual must be available to respond to messages left, with regard to the service/clients within a reasonable and appropriate time frame for the smooth running of the service, risk management and overall good communication.*

*16 …….Clinical documentation should only leave the clinic to go to MDT meetings or to the Breathe office for purposes of audit etc. At no time should clinicians /therapists take notes home or keep them on personal devices and work to the legal framework of GDPR*

*19 You will keep up to date with your professional knowledge and competence and eating disorders and registration with your professional body, provide your own insurance for any services you provide.*

*20. You will engage monthly in a clinical handover whereby you will give a verbal handover of the progress of clients you may be treating at that time.*

*21 You are responsible for your own clinical supervision, to be undertaken on a minimum monthly basis specifically with regard to clients you see through Breathe and must provide written evidence of this annually. You should advise the Clinical Director is there are any problems with seeking out a supervisor.*

*22. You may be required to attend multi-disciplinary and/or CPA meetings from time to time. If you are unable to attend a meeting you may ask a suitable and informed representative to attend on your behalf.*

> *23 As a responsible professional you will work so that all verbal and written records shall become and will remain confidential to and owned by the company unless details are required by other health professionals to maintain continuity of best practice in healthcare provision …… All health records must be kept for the current legal requirement period in case of litigation and therefore access to those records is a legal requirement to be accessed by a court of law.*
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> *26. Termination of the contract will be one month's notice by either party.*

The Tribunal notes that provisions within the Agreement also place restrictions on the ability of the person carrying out the work to undertake work for a competitor of the respondent and requires them to refer any suitable clients only to the respondent.

20. It is the claimant's case that notwithstanding the express terms of the Agreement she entered into, the reality of the situation is that she did not agree to work on a self-employed basis and that she has always considered herself to be an employee of the respondent. The Tribunal does not accept that the claimant was totally unaware of the fact that she was offered work on the basis of being self-employed because the terms of the Agreement leave no doubt that that is the intention. In addition there is reference to being self-employed in an email exchange between the clinical co-ordinator Ms Lukhman, and the claimant, which the Tribunal notes is not commented upon or challenged by the claimant (p97). The Tribunal finds that when the respondent offered work to the claimant it was on the basis that she would be a self-employed contractor. Based on the evidence before it including the fact that the claimant submitted invoices to the respondent for payment for her services, (p124, 133 & 164), the Tribunal find that the claimant was aware that the respondent intended her to be retained on a self-employed basis. In oral evidence the claimant agrees that she accepted what was offered by the respondent because as she said *'[she] needed the money to be honest'*. She also accepts that the content of the Agreement was clear. What the reality of the contract was, given the dispute between the parties, is the issue to be determined by this Tribunal.

21. The Tribunal find, from both the terms of the Agreement and oral evidence that the nature of the agreement between the claimant and the respondent was one where she would provide a personal service. There was no right of substitution save for clause 22 which provides for a suitable and informed representative to attend MDTs if the claimant was unable to attend. The Tribunal did not hear evidence of any occasion on which this clause was exercised and, in any event, it does not allow for substitution in relation to the main work carried out by the claimant i.e. as a professional therapist.

22. It is the claimant's case that she was not in business of her own account because she did not have any financial risk and was unable to negotiate the rate of pay she received. It is her case that had she agreed to being self-employed she would never have agreed to work for the sum of £20 per hour as that was less than

half the rate she would have commanded had she been self-employed. The claimant explained that clients were charged at the rate of £80 per hour for her services and that the respondent paying her only 25% of that rate was not a fair wage. She maintains that whilst she was not actively looking for work at the time she was grateful of the work offered and that is why she did not turn it down. She accepts that she signed the Agreement, but says she was left with the choice of either taking £20 per hour or not being paid at all. Ms Perry accepted in oral evidence that she knew the claimant wanted to be paid more but explained that the respondent was a not for profit organisation and that the price charged reflected the respondent's overheads. The respondent was responsible for invoicing the clients not the clinicians and they were not expected to chase clients for payment, save on rare occasions they might be asked to chase bad payers during a session with them. Ms Perry explained that this was never the case with any of the clients seen by the claimant and that she was offered the rate of £20 per hour on the basis of her qualification and experience. She explained that whilst other more experienced therapist earned a higher hourly rate, there were other therapists on the respondent's books, who were more experienced that the claimant, and also earned £20 per hour. It is not disputed that the claimant also worked elsewhere whilst carrying out work for the respondent but the Tribunal understands that this was in an employed capacity at GP surgery. Whilst Ms Perry's evidence is that the claimant intended to set up a business where she saw client's client s of her own in addition to those she was asked to see by the respondent, there is no evidence that she did or intended to do this, even if other therapists on the respondent's books did.

23. The claimant also maintains that she was not self-employed because she had no control over the amount of work she was given or the hours she worked. In addition she maintains that had she been self-employed she would not have had to attend meetings and would have been free to decide how to treat her own clients. By contrast she says that Ms Perry gave her instructions that she had to carry out when she saw clients of the respondent. It is her evidence that she was told what to do and what she was or was not to talk about. It is also her case that if she had been self-employed she would not have been required to share her notes with other professionals carrying out work for the respondent with the same client.

24. The claimant accepts that her work with SEED was as a volunteer. She further accepted in oral evidence that her role of a therapist in one to one sessions did not change once she started to attend upon clients of the respondent; the difference she says related to additional duties she was required to undertake outside the clinical session with the client. In respect of respondent clients, her evidence is that she was required to attend multidisciplinary and clinical meetings for which she would receive additional pay. In addition, it is not disputed, that as part of her standard hourly rate of pay she was required make and enter her notes on WriteUpp. She explained that although she had made notes on the clients she saw at SEED only she had access to these notes. The Tribunal find that this would have been in accordance with the terms of the volunteer's agreement she entered into. However, in contrast to the status of the notes she kept as a volunteer when she started to be paid for her work the notes she was required to make and enter on the WriteUpp system were shared with all relevant staff at the respondent and she had

no ownership of them. The Tribunal find that under the new terms of agreement signed by the claimant it clearly sets out the claimant's responsibilities in relation to note keeping and what was expected of her. The Tribunal find that the claimant was aware of her responsibilities under this Agreement because she makes reference to her responsibility to comply with the same in an email to Ms Luchman the clinical co-ordinator (p123). It became clear in oral evidence that the claimant did not seem to fully grasp the concept of being part of a multidisciplinary team, and the part her notes played as a member of that team. This may well have been because of her inexperience in the practical work of this field and working as part of a multidisciplinary team as opposed to working in isolation. The Tribunal make this finding because the claimant did not seem to accept that access to her notes would be needed by other members of the multidisciplinary team who were also seeing the same clients as the claimant. It is clear that access would be needed to so that team members could be aware of the progress of the client in all respects and plan their care accordingly and in the client's best interest. Instead of making her notes available to the other team members the claimant password protected her notes so that no one could access them and, as she explained in oral evidence, when she stopped working for the respondent she removed them from the system and destroyed them.

25. In respect of the work received and the hours worked, the Agreement at paragraph 3 makes clear that the respondent is not obliged to provide the claimant with work or for the claimant to serve any minimum or maximum hours per week. Clients would be signed up by the respondent and Ms Perry as lead clinician, would determine the type of care needed for a particular client and identify an appropriate clinician/s for them. The claimant initially provided her availability and an indication of the ideal number of clients she would like to see, to SEED in her role as a volunteer. When she started to see clients of the respondent the role changed because there were also meetings that she was required, although not compelled, to attend and there was an intention that support would be given under the guise of supervision in addition to the supervision the claimant was required to arrange personally. It is clear however that it was for the claimant to control the hours that she was prepared to offer the respondent. On 13 November 2018, she was asked if she was able to offer any more availability but declined because she had a paid job that she needed to keep to pay her rent (p85). There is also evidence of the claimant updating availability and Ms Lukhman arranging dates and times when she would be available to see clients (p88). There is further evidence of this in the Whats App message between the claimant and Ms Perry (p91) The Tribunal finds that the claimant did have control over the hours she worked and the amount of work that she took on, albeit she could not take on more than the respondent offered but it was open to her to take on less. The Tribunal accepts that the claimant may have felt pressured from a moral or professional point of view to see clients whose needs were urgent, but this nonetheless remained her choice, she was free to refuse to see clients if their needs did not coincide with the claimant's availability. The fact that the claimant did accept the work does not show that she was compelled to do so as it is clear that she did have a choice.

26. The claimant accepted that she would be paid for attending meetings but would be not be paid for writing up her notes. However in oral evidence she argued that whilst it might be industry standard to attend multidisciplinary meetings this would only be the case if you worked for an organisation not if you were self-employed. Ms Perry explained in oral evidence that as soon as a clinician came on board at the respondent they were invited to clinical meetings irrespective of whether they had clients at that time or not. She explained that it was in the clinician's interest to speak to other clinicians with whom they would be working and take part in peer supervision and support from other clinicians. The meetings also afforded the respondent the opportunity to update the clinicians on any internal changes that may have taken place. In respect of multidisciplinary meetings these are held to discuss the care of individual clients as a team and identify and agree treatment plans. Ms Perry explained that all the clinicians carrying out work for the respondent also worked elsewhere but that they were required to attend MDT meetings where possible. There was however no compulsion to attend these meetings if they were unable to do so but it was felt that attendance whether in person or by other means, was beneficial to the whole team who could share ideas and discuss clients.

27. The Tribunal finds that the respondent offered care to clients dependent on the complete needs of the individual. The care might involve a number of different professionals, doctors, nurses and other health related professionals all working independently of, but alongside, each other. In order to afford the best care to individual clients it was essential that all professionals involved in the care of an individual client would work together in the client's best interest, as would have been their professional obligation. In order to do this it would be necessary for team members to discuss an overall plan of action, identifying the needs of the client and the discipline of professional help that would best assist. Once this was established it would be necessary for those professionals involved in the care to be able to monitor the clients overall progress and identify any areas which were of concern of where a change of strategy may be needed. Multidisciplinary teams exist in many areas of healthcare where more than one discipline is involved with a client's care. It is neither unusual nor unreasonable to expect a member of that team to be actively engaged in the client's treatment and progress irrespective of how they receive payment for their services. Whilst there may be a difference in the way in which healthcare is provided in the private sector, the care, whilst perhaps delivered from practitioners from different organisations, will still follow best practice and guidance. The Tribunal find that the requirement to attend meetings at the respondent and provide written notes via WriteUpp so that they were available to all members of the team, was not a means of controlling the claimant but rather a means of her being able to properly discharge her duties as a professional offering services to a client through the respondent.

28. Given the role of the multidisciplinary team in the treatment plan of individual clients the Tribunal finds based on its knowledge as an industrial jury and the evidence before it, that is not unusual that a team should have a team leader to oversee the proper professional function of the team and to safeguard the best interests of the client. This Tribunal is aware that in the field of healthcare, it is essential that proper governance and safeguarding practices are in place. Given that

Ms Perry was the senior clinician and a full-time employee of the respondent with responsibility for deciding which therapist would be offered work, it is not unreasonable that she would be the leader of the MDTs and would, where deemed necessary, provide further information to team members as it became known if it was likely to affect or influence their treatment of a client.

29. In oral evidence the claimant accepted that it was possible to carry out work for an organisation and still be self- employed, but she says that it was the amount of control that she was subjected to arising out of the MDT meetings that made the difference in her case. The claimant has complained that she was instructed to carry out tasks that she did not want to do and was told what she was and was not to say to clients. In particular she complains that she was instructed to weigh clients when she saw them. This she says was outside the remit of a psychotherapist and a job for nurses or doctors. She explained that she had been taught at university that it was not a task for a psychotherapist. She explained that it relates to physical health which is nothing to do with her. Ms Perry explained the nature of the work carried out by the respondent and how weight was often an important factor in the field of work in which they operated. The Tribunal finds that whilst the claimant might have been taught that weighing patients was not the role of a psychotherapist the reality of life is not always what is advocated in a classroom or lecture theatre. It is clear that monitoring of a client's weight was relevant in the field in which the respondent operated and that incorporating this task into sessions attended by a client would be a reasonable means of being able to do this. Whilst it is correct that clinicians should not operate outside their field of expertise, there is little expertise required to record a reading on a set of scales. The claimant has not said she did not have the expertise to carry out this task, her objection was that it was not her job to do so. The notes of the MDT where all clinicians are asked to take part in recording the weight of an individual client because of concerns about this client, does not record that the claimant objects to doing this task and there is no evidence that she did or did not do it. It was open to the claimant to object to her involvement in weighing this client but given the reasons why it was considered necessary in the circumstances of this client, it perhaps not surprising, given the simplicity of the task asked, that there is no record of the claimant being unhappy to do it.

30. Other examples of the respondent interfering with the way in which the claimant conducted her sessions and therefore she says demonstrates the level of control over her, include an occasion when the clinical co-ordinator emailed her to instruct her to work on a specific direction around self-harm and emotional regulation. The Tribunal note that this communication had come about as a result of the client complaining that her sessions with the claimant appeared to have no direction (p110). The claimant responded with an explanation and accepting that she would not make clients do something that they would not want but that she was happy to change her approach if that would be better for the client. Another occasion involved the claimant being asked to try and confirm a client's appointment with her (p102). In respect of specific instructions of what she was to discuss with clients in session is an occasion when she was asked to see a client specifically around self-harm and emotional regularity (p91), and another where a patient's parent had contacted Ms Perry to tell her about how they were and express their anxieties about

them. Ms Perry told the claimant what she had been told but told the claimant not to mention the parent had called as the client did not know. The Tribunal find that this is a means of communicating important information about client care and a reasonable instruction that would have been asked of any individual so as to preserve the confidentially entrusted to Ms Perry in her role within the respondent. Loss of that trust may have had a detrimental impact both on the care of the client and the relationship between the family as a whole and the respondent. As part of the same message (p99) Ms Parry asked the claimant to carry out a risk assessment on the client due to the apparent high risk of suicide and to encourage him to see other therapists to seek help with his mental health and nutrition, both of which Ms Perry felt would benefit the particular client. The Tribunal finds that these communications fall short of telling the claimant what to do or how to carry out her sessions with claimant, they are communications of further information about clients to bring the claimant up to date with the condition of the client she is about to see and identify areas from which the client might benefit. The Tribunal finds that this is a means of using a multidisciplinary team to communicate information relating to a client's treatment which could assist a clinician in providing the most effective treatment for a client.

31. The claimant also claims that as a therapist working for the respondent she was fully integrated into the organisation because she was given access to WriteUpp, she was required to attend internal supervision groups (p76), and was required to attend and was and paid for attending clinical team meetings. It is her case that she was viewed by services users as part of the Breathe 'team' and it was accepted that she was included on the respondent website as part of the 'team'. Whilst the Tribunal did not see what was included on the website, it was not disputed by the clamant that she had written the information about herself that was to describe her on the website. She also states that the respondent controlled what she was to wear when she carried out sessions with clients. The Tribunal notes that the claimant was not required to wear a uniform and was merely told that she should wear 'office wear. Ms Perry disputes this and explained that the claimant was told that jeans and trainers were not acceptable and she asked to dress professionally. The Tribunal finds that this amounts to no more that would be expected of any professional attending upon a client in a professional setting. The claimant's access to Writeupp was a necessary part of her discharging her duty to enter up notes on clients as part of the MDT. It is accepted that the claimant attended meetings but other than the MDT all other meetings were meant to be for the benefit of the claimant in affording her the opportunity to meet with other clinicians and was in addition to the statutory requirement of supervision which the claimant was responsible for arranging outside her role with the respondent and at her own expense. The Tribunal note that if the claimant was unable to physically attend a MDT she had the option of either joining by telephone or sending a written report.

32. The Tribunal note that the respondent also offered a training opportunity to the claimant, however it is clear that the claimant was responsible for her own professional training and that the training offered on this occasion had been because the respondent had been offered free places. It was not arranged by nor paid for by the respondent. In respect of the tools required to carry out her job, the Tribunal find

that the respondent provided a means of booking appointments through Writeupp and a means of recording attendance at sessions which had been booked. Where sessions were carried out on site the respondent provided the accommodation and furniture by means of the rooms provided. The respondent did not provide the claimant with a laptop to enable her to carry out sessions via skype, which she did on a number of occasions.

Submissions

33. For the respondent Mr Morton submits that this is a case that comes down to the question of what degree of control was exercised over the claimant. He submits that within the particular industry of the respondent there is a great degree of uncertainty about the amount of work that is available as the same is predicated on the demand for the service from clients. It is he says very unpredictable and it is for this reason that the respondent engages the services of professionals on a self employed basis.

34. Mr Morton submits that the evidence of the claimant is based on her somewhat naieve and ill-informed stance about industry practice that arises from the stage she is at in her career and her limited of experience in the industry. Mr Morton reminded the Tribunal of the circumstances in which the claimant had started to carry out paid work for the respondent and all that followed. It is clear, he submits, that the Agreement sets out the terms of the arrangement for self-employment and the claimant was aware of this; not only because of the terms in the Agreement but also because that is the basis upon which all the other clinicians were engaged.

35. Mr Morton submits that there is clear evidence that the claimant had flexibility over the hours that she worked and that she was free to refuse work if she wanted to. He submits that even if self-employed there will be a need in an industry such as this for there to be a certain degree of control over the work which is carried out. He uses as an example a plumber who will plumb the bath in without instruction but will non the less need to know where to put it and what needs doing. He submits that Ms Perry went no further than this in providing information to the claimant and left it to her to decide how to do what was required based on her knowledge and experience of the client. Mr Morton submits that it was necessary for Ms Perry to have some involvement to make sure that statutory obligations were met in what is a regulated environment. He submits that given the flexibility afforded to the claimant and lack of control there is insufficient evidence to find that she is an employee.

36. In respect of whether the claimant was a ‘’worker’ Mr Morton submits that this is a wide-ranging test and that the circumstances of this case do not fit neatly into the standard tests applied for areas such as the hairdressing and beauty industry. He submits that the impact of making a finding that the claimant was a worker would have the potential to remove the availability of a service for vulnerable people because the ability to run a service such as the one run by the respondent would be impracticable if it had to run on traditional levels. The model, he submits, is not adopted in order to avoid the payment of a bit of holiday pay but to ensure that the

respondent has access to a bank of professionals when they are needed to service the particular needs of a client.

37. For the claimant Mr Passmore submits that the Agreement at p76 does not reflect the true relationship between the claimant and the respondent. Mr Passmore submits that the claimant was required to provide a personal service and that she was obliged to take work offered by the respondent and often felt pressured to do so.

38. Mr Passmore draws the Tribunal's attention to the relevant paragraphs of the Agreement signed by the claimant and submits that these clauses are more reflective of an employee relationship than self-employed. He submits that the respondent exercised a level of control over the claimant and provided her with the room to carry out her work and an email address and limited her freedom even to the extent that she was told what to wear.

39. Mr Passmore submits that the claimant had no control over the amount she was paid and was not involved in invoicing clients, or collecting money from them. He submits that the Agreement signed by the claimant is comparable on many levels to that of an employment contract in that it seeks to limit her from working elsewhere and requires her to follow instructions. Mr Passmore submits that if the Tribunal apply a balance sheet approach to the relevant information it weighs in favour of an employment relationship. However if the Tribunal finds that the claimant was not an employee he submits that the claimant satisfies the definition of a worker due to the requirement for personal service and the level of control exercised over her.

**The Law**

40. S.230 ERA, so far as relevant, provides:

> (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.

41. Reg 2(1) WTR 1998 adopts the same definition of worker as the ERA.

42. There are thus three categories of relationship, conveniently summarised in Bates van Winkelhof v Clyde & Co. LLP [2014] ICR 730 (per Baroness Hale at [24] and [25]):

> '24. First, the natural and ordinary meaning of "employed by" is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.
>
> 25. Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in Hashwani v Jivraj (London Court of International Arbitration intervening) [2011] ICR 1004 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else. The general medical practitioner in Hospital Medical Group Ltd v Westwood [2013] ICR 415, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a "worker" within the meaning of section 230(3)(b) of the 1996 Act.'

43. A worker who meets the definition in s.230(3)(b) ERA is now commonly referred to as a 'limb (b) worker' or 'an employee under the extended definition'.

44. The definition of employee in s.230(1) ERA turns on the meaning of the phrase 'contract of service' in s.230(2) which, impliedly, is to be contrasted with a 'contract for services'. The usual starting-point is the passage in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2QB 497 at 515, in which MacKenna J. said:

> 'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance

> of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.
>
> I need say little about (i) and (ii).
>
> As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be: see Atiyah's Vicarious Liability in the Law of Torts (1967) pp. 59 to 61 and the cases cited by him.
>
> As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.'
>
> ……..
>
> I can put the point which I am making in other words. An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control.'

45. In respect of the need for personal performance, the Supreme Court in Pimlico Plumbers v Smith [2018] ICR 1511 endorsed the principles set out by Sir Terence Etherton MR in his judgment in the same case in the Court of Appeal ([2017] ICR 657 at [84]:

> '84. In the light of the cases and the language and objects of the relevant legislation, 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.'

46. No contract of employment can exist in the absence of 'mutual obligations subsisting over the entire duration of the relevant period': Clark v Oxfordshire Health Authority [1998] IRLR 125 at [22]. In Carmichael v National Power plc [1999] ICR 1226 (at 1230) Lord Irvine cited this passage with approval, in support of the proposition that, if there were no obligation on the employer to provide work, and none on the putative employee to undertake it, there would be 'an absence of that irreducible minimum of mutual obligation necessary to create a contract of service.'

47. In Quashie v Stringfellow Restaurants Ltd. [2013] IRLR 99 at [12] Elias LJ held:

> 'In order for the contract to remain in force, it is necessary to show that there is at least what has been termed 'an irreducible minimum of obligation', either express or implied, which continues during the breaks in work engagements: see the judgment of Stephenson LJ in Nethermere (St Neots) v Gardiner [1984] IRLR 240, 245, approved by Lord Irvine of Lairg in Carmichael v National Power plc [2000] IRLR 43, 45. Where this occurs, these contracts are often referred to as 'global' or 'umbrella' contracts because they are overarching contracts punctuated by periods of work. However, whilst the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement, the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee

48. A mere expectation that an individual will undertake a certain amount of work is not the same as an obligation to do so. In Hafal Ltd v Lane-Angell, UKEAT/0107/17 Choudhury P. held at [29] that:

> 'The Tribunal's findings indicate that the Claimant was expected to provide dates of availability to the Respondent. The Claimant would then be placed on the rota. There was an expectation that the Claimant would be able to provide work should she be contacted whilst on the rota. However, there is no finding that the Claimant was obliged to provide any or any minimum number of dates of availability, certainly not for the period before 1 May 2015. It is a trite

> observation that an expectation that the Claimant would provide work is not the same as an obligation to do so. I recognise that there may be cases where, as a result of a commercial imperative or market forces, the practice is that work is usually offered and usually accepted and that such commercial imperatives or forces may crystallise over time into legal obligations. That was the case in Haggerty. However, in that case, there were no express terms negating such obligations. I consider that to be a significant distinguishing feature. On the facts, this case is closer to the situation in Stevedoring and Carmichael than that in Haggerty.'

49. If there is sufficient mutuality of obligation that the contract might be one of employment/service, the next question which falls to be determined is control. Although not the sole means of identifying a contract of employment, control remains an essential element of the test. The question is not whether the employer controls the way the putative employee does the work, rather whether the employer can, under the terms of the contract, direct him/her in what s/he did (Wright v Aegis Defence Services (BVI) Ltd, UKEAT/0173/17/DM at [35]). That is distinct from showing that the employer controls the way that the employee does the work. Even an absence of day to day control may not be relevant, if the employer retains the ultimate contractual power to direct what work should be done (White v Troutbeck SA [2013] IRLR 949, CA).

50. As for the third element of the test in Ready-Mixed Concrete, there is no definitive list of the features of any agreement which point towards, or away from, its being a contract of employment. In Hall (Inspector of Taxes) v Lorimer [1994] ICR 218, the Court of Appeal upheld Mummery J, who in the High Court ([1992] ICR 739) held that it was necessary to consider many different aspects of the person's work activity, and that this was not to be done by way of a mechanical exercise of running through items on a check list to see whether they were present in, or absent from, a given situation. Not all details are of equal weight or importance in any given situation.

51. As to the requirement for personal performance, the principles referred to in the summary of Sir Terence Etherton MR in Pimlico Plumbers v Smith (above at para 168) apply equally to worker status.

52. The individual will not be a limb (b) worker if the status of the party for whom s/he works is 'that of a client or customer of any profession or business undertaking carried on by the individual'. In Bates van Winkelhof, at [34] onwards, Baroness Hale summarised a number of the authorities which have considered that provision:

53. In Cotswold Developments Construction Ltd v Williams [2006] IRLR 181, para 53 Langstaff J suggested:

> "a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus

have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."

35. In James v Redcats (Brands) Ltd [2007] ICR 1006, para 50 Elias J agreed that this would "often assist in providing the answer" but the difficult cases were those where the putative worker did not market her services at all. He also accepted, at para 48:

"in a general sense the degree of dependence is in large part what one is seeking to identify—if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached—but that must be assessed by a careful analysis of the contract itself. The fact that the individual may be in a subordinate position, both economically and substantively, is of itself of little assistance in defining the relevant boundary because a small business operation may be as economically dependent on the other contracting party, as is the self-employed worker, particularly if it is a key or the only customer."

36. After looking at how the distinction had been introduced into the sex discrimination legislation, which contained a similarly wide definition of worker but without the reference to clients and customers, by reference to a "dominant purpose" test in Mirror Group Newspapers Ltd v Gunning [1986] ICR 145, he concluded, at para 59:

"the dominant purpose test is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependent work relationships, or is it in essence a contract between two independent business undertakings? ... Its purpose is to distinguish between the concept of worker and the independent contractor who is in business in his own account, even if only in a small way."

37. The issue came before the Court of Appeal in Hospital Medical Group Ltd v Westwood [2013] ICR 415, a case which was understandably not referred to in the Court of Appeal in this case; it was argued shortly before the hearing in this case, but judgment was delivered a few days afterwards. Hospital Medical Group Ltd ("HMG") argued that Dr Westwood was in business on his own account as a doctor, in which he had three customers: the NHS for his services as a general practitioner, the Albany Clinic for whom he did transgender work, and HMG for whom he performed hair restoration surgery. The Court of Appeal considered that these were three separate businesses, quite unrelated to one another, and that he was a class (b) worker in relation to HMG.

38. Maurice Kay LJ pointed out, at para 18, that neither the Cotswold "integration" test nor the Redcats "dominant purpose" test purported to lay down a test of general application. In his view they were wise "to eschew a

more prescriptive approach which would gloss the words of the statute". Judge Peter Clark in the appeal tribunal had taken the view that Dr Westwood was a limb (b) worker because he had agreed to provide his services as a hair restoration surgeon exclusively to HMG, he did not offer that service to the world in general, and he was recruited by HMG to work as an integral part of its operations. That was the right approach. The fact that Dr Westwood was in business on his own account was not conclusive because the definition also required that the other party to the contract was not his client or customer and HMG was neither. Maurice Kay LJ concluded, at para 19, by declining the suggestion that the court might give some guidance as to a more uniform approach: "I do not consider that there is a single key with which to unlock the words of the statute in every case. On the other hand, I agree with Langstaff J that his 'integration' test will often be appropriate as it is here." For what it is worth, the Supreme Court refused permission to appeal in that case: [2013] ICR 415, 427.

39. I agree with Maurice Kay LJ that there is not "a single key to unlock the words of the statute in every case". There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of "subordination" to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves. As Elias J recognised in the Redcats case [2007] ICR 1006, a small business may be genuinely an independent business but be completely dependent on and subordinate to the demands of a key customer (the position of those small factories making goods exclusively for the "St Michael" brand in the past comes to mind). Equally, as Maurice Kay LJ recognised in Westwood's case [2013] ICR 415, one may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into the other party's operation as to fall within the definition. As the case of the controlling shareholder in a company who is also employed as chief executive shows, one can effectively be one's own boss and still be a "worker". While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker.'

<u>The True Agreement</u>

54. In Consistent Group Ltd v Kalwak [2007] IRLR 560, cited with approval by Lord Clarke JSC in Autoclenz v Belcher [2011] ICR 1157 in the Supreme Court, Elias J. said this:

'57. The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work, in employment contracts, as a matter of form, even where

> such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He said this (p 697 g ) 'Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham it will want to say so.'
>
> 58. In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.
>
> 59. ... Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance ...'

55. In Uber BV v Aslam [2019] ICR 845, the majority of the Court of Appeal held (at para 66):

> 'The effect of Autoclenz Ltd v Belcher [2011] ICR 1157 in our view is that, in determining for the purposes of section 230 of the ERA 1996 what is the true nature of the relationship between the employer and the individual who alleges he is a worker or an employee, the court may disregard the terms of any documents generated by the employer which do not reflect the reality of what is occurring on the ground.
>
> and at para 73:
>
> [...] 'The parties' actual agreement must be determined by examining all the circumstances, of which the written agreement is only a part. This is particularly so where the issue is the insertion of clauses which are subsequently relied on by the inserting party to avoid statutory protection which would otherwise apply. In deciding whether someone comes within either limb of section 230(3) of the ERA 1996 , the fact that he or she signed a document will be relevant evidence, but it is not conclusive where the terms are standard and non- negotiable and where the parties are in an unequal bargaining position. Tribunals should take a "realistic and worldly-wise", "sensible and robust" approach to the determination of what the true position is.'

**Secondary Findings of Fact and Application**

56. The only issue to be determined by this Tribunal is the employment status of the claimant. It is the claimant's case that whilst she was a volunteer from December 2017 to 1 October 2018, she had also become an employee of the respondent. The respondent disputes the same and argues that the claimant undertook work for the respondent as an independent contractor and was self-employed.

57. The matter of determining the employment status of the claimant is not a tick box exercise or indeed one where more ticks on one side of the argument will result in success for the claimant, as not all ticks carry the same weight in determining employment status and the case law that has developed over time is clear in direction that Tribunals are required to look at all the circumstances surrounding the relationship, including the documentary evidence and what the actual working circumstances were in any given case.

58. For the reasons set out in the findings of fact above the Tribunal found that the claimant provided a personal service in carrying out work offered by the respondent. There was no suggestion that she would be allowed or invited to provide a substitute therapist if she was unable to carry out any of the sessions that were booked for her. The Tribunal did not find that the right expressed in the Agreement to send someone in her stead to meetings, (which was in any event not exercised), was sufficient to amount to a right of substitution in respect of the work she carried out as a therapist which was the main purpose for which she was engaged to carry out work.

59. The question then arises as to whether there was a mutuality of obligation between the parties. In other words was the respondent obliged to offer the claimant work, and was the claimant expected to accept and carry out the work offered to her. Carmicheal v National Power plc [1999] ICR 1226, established that a contract of employment cannot exist in the absence of mutual obligations subsisting over the duration of the relevant period. If there is no obligation on the employer to provide work and none on the putative employee to undertake it, there would be 'an absence of the irreducible minimum of mutual obligation necessary to create a contract of service'. Paragraph 3 of the Agreement between the respondent and claimant states:

"*There is no obligation of [sic] "Breathe" to provide work for the self-employed person or for the self-employed person to serve any minimum or maximum hour [sic] per week"*

The claimant's evidence is that she felt pressured to take on all work offered and used as an example that Ms Perry had suggested that a client may die if they were not seen soon. Ms Perry explained in oral evidence that she was trying to establish the claimant's availability only and that if she had been unable to see the client within the time scale required she would have offered the work to another therapist. It is clear from the evidence before the Tribunal that the claimant offered her services when she was available and when asked to provide more she declined, albeit with reasons. There is also email correspondence about the claimant's availability for seeing client's whereby it is clear to the Tribunal that the claimant is very much in the driving seat. It is not disputed that the claimant accepted the work that she was offered, however a mere expectation that an individual will undertake a certain amount of work is not the same as an obligation to do so. The Agreement expressly provides that there is no obligation on the part of the respondent to provide work and the claimant is specifically informed that she is not expected to work any minimum or maximum number of hours. That taken together with the actual working arrangement

whereby the claimant was in a position to decide if, when and where (i.e. by skype or in person) she would see clients is sufficient to find that the irreducible minimum of a mutuality of obligation between the parties was absent in the circumstances of this particular case.

60. In the absence of mutuality of obligation an employment contract does not exist and therefore the claimant is not an employee. However, the Tribunal has also considered the control exercised over the claimant as much of the claimant's case has focused on this and the Tribunal is mindful that the claimant will wish to understand how the Tribunal would have approached control had it found the presence of a mutuality of obligation.

61. Control is an important but not determinative element of the test for determining whether or not the claimant is an employee of the respondent. The question in respect of control is whether the employer can direct her in what she did. That is distinct from showing that the employer controls the way in which the employee does the work. This will be the case even where there is an absence of day to day control by the employer if they retain the ultimate contractual power to direct what work should be done (White v Troutbeck SA [2013] IRLR 949 CA.

62. Paragraph 13 of the Agreement provides that "*The self-employed person will comply with all reasonable instructions and requests within the scope of the position and it's description" and at 14 " The self- employed person will attend training and management/supervision sessions as and when required wherever possible"* In addition the Agreement includes other 'requirements' placed on the claimant, for example record keeping, clinical handovers, and keeping up to date. The Tribunal finds that there was an amount of control exercised in respect of the claimant's work with the respondent but that this was to ensure that professional standards were met and Ms Perry was able to discharge her obligations as the clinical director of a company working in a regulated environment. Ms Perry explained that because she and all the clinicians seeing clients work within a regulated environment there are standards that have to be met by the various regulators. The Tribunal finds that the additional requirements go no further than compliance with professional obligations and was not a retention of a right to tell the claimant what to so. Paragraph 14 refers to training and supervision which again are professional obligations. The claimant was not compelled to attend these sessions and Ms Perry told the Tribunal that any training and supervision offered by the respondent was a means of improving client care in providing a forum to communicate with, and update clinicians. She says they were intended to be offered to benefit the clinicians who carried out work for them in addition to their professional obligations which still had to be complied with.

63. In respect of paragraph 13 the Tribunal notes the wording of the same and the reference to the reasonable instructions being *within the scope of the position and its description*. The claimant offered her services as a therapist and attended upon client's as a member of a multi-disciplinary team of professionals offering different disciplines of 'care' to individual clients. The examples given by the claimant of control being exercised over her included, the requirement that she attended MDT meetings, that she was told to weigh clients, told of areas of discussion to raise with

clients and carry out risk assessments, ascertain appointment intentions of the clients and to keep information confidential in respect of contact made with the family of a client that the client was unaware of. The Tribunal find that such instructions related to and were within the scope of the role she agreed to undertake as a member of a multidisciplinary team caring for a particular type of client, in this particular type of field. In such circumstances it would be inappropriate for the claimant to have worked in isolation to all other members of the team and information that came to light about patients would obviously be brought to a clinician's attention by Ms Perry if it was relevant to their treatment. Client care and ensuring that they received the best and most appropriate care was obviously of paramount importance and given the claimant's inexperience it is also reasonable that Ms Perry would assist and guide the claimant on the needs of clients. However Ms Perry did not tell the claimant how she should do her work these were simply ancillary matters to be addressed for the benefit of the client. There is no evidence that the claimant was subjected to a physical appraisal of her work and while there was one occasion when the claimant was questioned about her work this only arose out of a complaint by a client that the sessions with the claimant seemed to lack direction. Again as part of a multidisciplinary team it is not unreasonable that this would be brought to her attention as a failure to do so would have the potential to impact negatively on the client's treatment. The claimant also complained that she was told what she had to wear to work. The Tribunal find that this was no more than the respondent indicating that there was an expectation that clinicians carrying out work for them would do so at the standard expected of a professional in the field in which the work was offered and that included dressing in a manner commensurate with the role they were undertaking. Overall whilst there was an element of control in respect of the work carried out by the claimant this fell short of the respondent controlling how and what work should be done. The instructions such as they were arose because the claimant was working in a regulated field and as part of a multidisciplinary team where communication between team members and the lead was necessary to ensure the clients received the correct treatment.

64. The next issue to be determined whereby control is also a relevant factor, is whether the claimant was in business of her own account of whether she satisfies the definition of a limb (b) worker under s230 ERA 1996. It was established in Bates van Winkehof v Clyde and Co LLP [2014] ICR 730 that the law draws a distinction between two different kinds of self employed people. As per Baroness Hale *"One are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them……The other kind are self employed people who provide their services as part of a profession or business undertaking carried on by someone else"*

65. The requirement for personal performance is the same in relation to the definition of worker as it is for employee (Pimlico Plumbers v Smith above). For the reasons given above the claimant was required to provide a personal service in carrying out her work for the respondent and did not have a right of substitution such as would obviate that obligation. However the claimant will not be a limb (b) worker if it is found that the relationship she has with the respondent is that of a client or customer of any profession or business undertaking carried on by her. It is the

respondent's case that the claimant was free to see clients of her own outside of the respondent organisation. There is some question about whether she was indeed free to take up work elsewhere given the provisions in the Agreement placing restrictions on what she could do, however there is no evidence that the claimant did or intended to take on other clients even if, as Ms Perry suggests, other therapists did. That may well be the case but it was not the case with the claimant and there is no evidence of the claimant marketing her services elsewhere. She had work at a GP's surgery where she was employed in a non clinical role and the only clients she attended upon in a professional capacity for payment, were clients of the respondent. It is not disputed that she was 'recruited' by Ms Perry as the clinical director of the respondent when the need arose for a therapist with the claimant's skill. Whilst she was not obliged to accept the work offered, there was an expectation that she would do so and in so doing she then became an integral part of the multi-disciplinary team that attended upon the clients of the respondent. The Tribunal find that it is quite clear that the clients were in fact clients of the respondent not the claimant. The client approached the respondent for treatment, the respondent billed the client and the client paid the respondent. The claimant's integration into the team can be seen from the email and text message communication between the claimant and others working for the respondent together with the oral evidence of the claimant.

66. The Tribunal accepts that there may be situations where professionals may set up a business of their own account and source work from organisations or use the facilities of an organisation to see their own clients. For example medical practitioners who use the facilities provided by private clinics or hospitals to see their privately paying patients who have been referred to them from other disciplines. Each case will turn on its own set of facts but it cannot be said in this particular case that the respondent was a client of the claimant, and nor was it a customer of a service she offered to other providers of the same or similar discipline. This was quite clearly a case where the claimant provided her services as part of a business carried on by the respondent. Having been offered work or 'recruited' by the respondent the claimant carried out work only for it, on the basis of the model of delivery of service decided by the respondent. Whilst the Agreement entered into by the parties attempts to reject any obligation to the claimant the terms set out within it are inconsistent with a relationship whereby the respondent is either a client or customer of the claimant. The fact that the claimant has signed the Agreement forms only part of the evidence in determining the true relationship between the claimant and the respondent. In considering all the evidence in this case the Tribunal is satisfied that the claimant satisfies the definition of s230 (3)(b) in that she entered into a contract where she agreed to personally undertake work as a therapist for the respondent and the respondent was not a client or a customer of a business or service she offered to others.

67. In conclusion, the claimant was not an employee of the respondent under s230 (1) ERA. The claimant was a 'worker ' as defined in s230(3)(b) ERA 1996

Employment Judge Sharkett

Date: 16 January 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

20 January 2021

FOR THE TRIBUNAL OFFICE