EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110584/2019 & 4114949/2019 (V)

Held via video conference on 10 August 2020

Employment Judge R Gall

Ms L Monaghan	**Claimant** **Represented by:** **Mr W McParland - Solicitor**
ASA International Ltd t/a ASA Recruitment	**Respondent** **Represented by:** **Mr G Stevenson - HR Manager**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

(1) The claimant was, at the relevant time, disabled as defined in Section 6 of the Equality Act 2010, her physical impairment being endometriosis. Her claim of discrimination, the protected characteristic being disability, will therefore proceed.

(2) The claimant was not an employee of the respondents as defined in Section 230 of the Employment Rights Act 1996. Her claim of (constructive) unfair dismissal is dismissed.

REASONS

1. This Preliminary Hearing ("PH") took place on 10 August 2020. It took place by video conference through CVP. This was as it was not practicable to hold an in-person PH due to the coronavirus pandemic. Parties consented to proceeding by CVP.

2. The claimant was represented by Mr McParland, solicitor. The respondents were represented by Ms Stevenson, their HR manager. I heard evidence from the claimant, Ms Stevenson and Mr Gary Burns, Operations Director for the respondents' Glasgow office. A joint file of documents, referred to in this Judgment as the file, was prepared and lodged for the PH. Witness statements were submitted in advance and were taken as read. The witness statements comprised the evidence in chief of the witnesses.

3. The claimant has brought two cases. Those are now conjoined. In one claim she seeks compensation as she maintains that she was, at the relevant time, disabled in terms of the Equality Act 2010 ("the 2010 Act"). She argues that there was a failure to make reasonable adjustments. In her second claim the claimant seeks compensation as she maintains that she was an employee of the respondents and resigned in circumstance where she was constructively unfairly dismissed.

4. The PH was set down to determine two preliminary points. Firstly, was the claimant at the relevant time (June 2019) disabled in terms of the 2010 Act? Secondly, was the claimant an employee of the respondents?

5. It was accepted by the respondents that if the claimant was disabled at the relevant time, her status (even if not that of an employee) was such that she was able to proceed with her claim of disability discrimination. The claimant accepted that if she was found not to have been an employee then her claim of constructive unfair dismissal could not proceed.

6. Medical records and information had been passed to the respondents prior to the PH. The respondents had confirmed that they accepted that the claimant had a long-standing medical condition, that condition being endometriosis. Their position was that the claimant had had a hysterectomy in 2017. That operation had been undertaken in order to try to address the issue of endometriosis. Although the claimant had health issues since that time, the respondents maintained that there was no reference to those being attributable to endometriosis. The respondents referred to medical information as to other elements affecting the claimant, the menopause and

HRT treatment, for example. The claimant's position was that although it had been anticipated that the hysterectomy would resolve the problems caused by endometriosis, those problems had continued and other related issues had occurred. She referred to bleeding continuing and to that being heavy. She had severe pain, mood swings and irritability. She was affected by anxiety and was reluctant to go out given the risk of bleeding. She took regular and substantial medication.

7. Ultimately there was a lot of agreement on the facts in relation to the question of disability. The issue boiled down, in reality, to whether the claimant's health issues after her hysterectomy in 2017 were appropriately regarded as constituting an impairment, that impairment being endometriosis.

8. In relation to employment, again there was a large amount of common ground on the facts. The claimant said mutuality of obligation, control and the reality of the working situation, for 3 ½ years with East Renfrewshire council ("ERC"), should all lead to the conclusion that the claimant was an employee. Any provision to the contrary in the agreement between the parties should not be definitive. The respondents pointed to the introduction on their part of the claimant to ERC and to the claimant's working situation from then on with ERC. Whilst the respondents paid the claimant, there was no obligation on their part to provide work to the claimant and no obligation on her part to accept that work.

9. The claims themselves are resisted by the respondents. This PH was not however concerned with matters such as knowledge or otherwise on the part of the respondents of the claimant's health, any requirement to make adjustments which may have existed or events which were said to have led to the decision on the part of the claimant to resign.

Facts

10. The following were found to be the relevant and essential facts as admitted or proved. The two areas for decision by the Tribunal are dealt with separately.

Disability

11. As at November 2017 the claimant was affected by a long-standing health condition. That condition was endometriosis. The impact of this upon the claimant was substantial. It caused her severe pain and bleeding. The position was described in a letter from the consultant, Dr Yousef, to the claimant's GP of 27 September 2017, a copy of which appeared at page 125 of the file, in the following terms:-

"Unfortunately, she is still experiencing symptoms of heavy bleeding for 2 days a month, in addition to abdominal pain, bloatedness, fluid retention and pre-menstrual tension syndrome. Unfortunately all the treatments we tried before, including NovaSure and Mirena, did not work and she is "at the end of her tether" and really wants a hysterectomy, which is understandable."

12. The high level of pain which the claimant experienced before her hysterectomy was very debilitating. It caused her to be angry and irritable. It affected her family relationships. Her relationship with her partner broke down in 2016. Her relationship with her daughter was difficult. For a time her daughter moved out due to the bad moods of the claimant. The claimant was affected by anxiety and depression around this time, reaching *"the end of her tether"* due to the pain and bleeding caused by endometriosis.

13. Endometriosis causes tissue similar to womb tissue to grow in other places within the abdomen. In the claimant's case it caused tissue to grow on her bladder and bowel. Bleeding and pain result from endometriosis. In the claimant's case both of those have been extensive.

14. The claimant had a hysterectomy carried out on 7 November 2017. The consultant, however, informed the claimant that he was unable to remove all the tissue growth. This was, he said, as part of the claimant's cervix had adhered to her bladder and bowel. The letter from the consultant to the claimant's GP at page 118 of the bundle, dated 10 November 2017 confirms that there were *"bowel adhesions to the anterior wall of her uterus"*.

15. The claimant was referred by her GP to a consultant in November 2018 due to concern given heavy bleeding.

16. On 12 December 2018, in light of increasing pelvic pain and vaginal bleeding the claimant's GP referred her once more to a consultant. The letter sent appeared at page 81 of the file.

17. At page 71 and 72 of the file the letter prepared by Dr Yousef after the consultation in December 2018 appeared. It referred to the fact that the claimant had recently seen a community psychiatric nurse because of the mood swings. The letter went on to say:

"I feel her bleeding is coming either from the part of the cervical epithelium, which sometimes responds to the oestrogen or HRT or her pain can be due to endometriosis, which again responds to the oestrogen or HRT."

18. The claimant has, therefore, continued to be affected by bleeding and pain, both at times severe, despite having gone through a hysterectomy. Her issues of irritability and anger have remained. She has taken prescribed painkillers and other medication, such as co-codamol, diclofenac and laxido. She has also been prescribed Mirtazapine, Progynova, Trimethoprim, and Ferrous Fumarate. But for taking those painkillers and other medication she would have been more severely affected by endometriosis. The claimant has continued to take prescribed medication to relieve these symptoms, in particular pain, during the period prior to 2017 and also in the period from then until June 2019, the relevant date for assessment of disability having regard to this claim. The claimant has been prescribed tranexamic acid tablets to try to help with the bleeding. She continues to take two 500mg tablets three times per day. She takes co-codamol every day, starting the day by immediately taking some of that drug. She has taken co-codamol since 2015. Without medication the claimant would have struggled to continue with any form of normal life.

19. Pain and bleeding also continued and remained present in June 2019, the relevant date as mentioned. An incident occurred on 2 June 2019 when the claimant was visiting a client. The claimant was affected by extensive

bleeding. She required to attend Royal Alexandra Hospital in Paisley on an emergency basis. She was treated and given medication. Relevant medical records appeared at pages 66 and 67 of the file.

20. During this time the claimant continued to attend work regularly. She is a single mother and felt responsible for providing for her daughter. She found attending work difficult, however did carry out her work. She was regularly tired and remained in constant pain.

21. Bleeding the claimant has experienced, and fear of bleeding, means that she has restricted going out. When she did, she took to carrying a change of clothes so that she had fresh clothes available if a bleeding episode occurred. That has happened on occasion. She also carries body wash, sanitary products and a towel. The claimant considers and plans her travel arrangements taking account of the possibility of bleeding. She wears darker clothing in case bleeding occurs and she is unable to change before encountering someone. The claimant worries that there will be a bleeding incident when out and that others may then smell blood. On occasion she has been able to smell blood after a bleeding incident. Her socialising is restricted to a major extent due to these worries and concerns, which are based on bad experiences of bleeding and its consequences.

22. As a result of these experiences and her concern as to repetition of a bleeding incident the claimant's self-confidence is very low. Her quality of life has been significantly affected by the pain, bleeding and worry of that as well as by her moods. She finds it difficult to get up some mornings and has had to obtain assistance in some instances with personal care or in getting washed and dressed. Her relationships have been adversely affected, those with her now former partner and her daughter being specifically damaged.

23. The claimant continues to be affected by irritability. She has undergone HRT to try to address menopausal type symptoms.

Status

24. The claimant became aware of a role which involved the respondents in October of 2015. She was working in full time employment with a health care company. It was mentioned to her by a colleague with whom she had worked that the respondents had a full time position for a home support worker working at ERC. The claimant was told that the shifts involved were guaranteed and that they were 4 on, 4 off. The claimant made contact with the respondents.

25. The claimant met with Ms McNaughton who worked with the respondents. Discussion took place. The claimant was not given specific information that the position was a temporary one. She was not specifically informed that she was to become an agency worker.

26. The claimant signed the final page of document entitled *"Terms of Engagement for Agency Workers (contract for Services)."* A copy of that document appeared at pages 272 to 281 of the file. Her signature is on the document at page 281 of the file. The claimant does not recall whether she received a copy of the document. She may therefore have received a copy. The respondents were, as a matter of practice, not prepared to enter into any dialogue with a potential worker as to possible changes or modifications to this document. It was a *"take it or leave it"* option for any such worker, including therefore the claimant.

27. The following clauses appear in the document:-

> *"2.1 These Terms constitute the entire agreement between the Employment Business and the Agency Worker for the supply of services to the Hirer and they shall govern all Assignments undertaken by the Agency Worker. However, no contract shall exist between the Employment Business and the Agency Worker between Assignments. These Terms shall prevail over any other terms put forward by the Agency Worker*

2.2 During an Assignment the Agency Worker will be engaged on a contract for services by the Employment Business on these Terms. For the avoidance of doubt, the Agency Worker is not an employee of the Employment Business although the Employment Business is required to make the Deductions from the Agency Workers pay. These Terms shall not give rise to a contract of employment between the Employment Business and the Agency Worker, or the Agency Worker and the Hirer. The Agency Worker is supplied as a worker, and is entitled to certain statutory rights as such, but nothing in these Terms shall be construed as giving the Agency Worker rights in addition to those provided by statute except where expressly stated.

3.1 The Employment Business will endeavour to obtain suitable Assignments for the Agency Worker to perform the agreed Type of Work. The Agency Worker shall not be obliged to accept any Assignment offered by the Employment Business.

4.1 The Agency Worker Is not obliged to accept any Assignment offered by the Employment Business but if the Agency Worker does accept an Assignment, during every Assignment and afterwards where appropriate; s/he will:

4.1.1. co-operate with the Hirer's reasonable instructions and accept the direction, supervision and control of any responsible person in the Hirer's organisation;

4.1.2. observe any relevant rules and regulations of the Hirer's establishment (including normal hours of work) to which attention has been drawn or which the Agency Worker might reasonably be expected to ascertain;

4.1.3. take all reasonable steps to safeguard his or her own health and safety and that of any other person who may be present or be affected by his or her actions on the Assignment and comply with the Health and Safety policies and procedures of the Hirer;

4.1.4. not engage in any conduct detrimental to the interests of the Employment Business and/or Hirer which includes any conduct which could bring the Employment Business and/or the Hirer into disrepute and/or which results in the loss of custom or business by either the Employment Business or the Hirer:

4.1.5. not commit any act or omission constituting unlawful discrimination against or harassment of any member of the Employment Business' or the Hirer's staff;

4.1.6. not at anytime divulge to any person, nor use for his or her own or any other person's benefit, any confidential information relating to the Hirer's or the Employment Business' employees, business affairs, transactions or finances;

4.1.7. on completion of the Assignment or at any time when requested by the Hirer or the Employment Business, return to the Hirer or where appropriate, to the Employment Business, any Hirer property or items provided to the Agency Worker in connection with or for the purpose of the Assignment, including, but not limited to any equipment materials, documents, swipe cards or ID cards, uniforms, personal protective equipment or clothing.

4.3 If the Agency Worker is unable for any reason to attend work during the course of an Assignment s/he should inform the Employment Business within 1 hour of the commencement of the Assignment or shift. In the event that it is not possible to inform the Employment Business within these timescales. the Agency Worker should alternatively inform the Hirer and then the Employment Business as soon as possible.

7.5 If the Agency Worker wishes to take paid leave during the course of an Assignment s/he should notify the Employment Business of the dates of his/her intended absence giving notice of at Ieast twice the length of the period of leave that s/he wishes to take. In certain circumstances the Employment Business may require the Agency Worker to take paid annual leave at specific times or notify the Agency Worker of periods when paid annual leave cannot be taken. Where the Agency Worker has given notice of a request to take paid annual leave in accordance with this clause, the Employment Business may give counter-notice to the Agency Worker to postpone or reduce the amount of leave that the Agency Worker wishes to take. In such circumstances the Employment Business will inform the Agency Worker in writing giving at least the same length of notice as the period of leave that it wishes to postpone or reduce it by.

9.1 Any of the Employment Business, the Agency Worker or the Hirer may terminate the Agency Worker's Assignment at any time without prior notice or liability."

28. The respondents operate in this area of business by supplying personnel to clients where those clients have a gap or shortfall in employees and require such personnel. When asked by a client to supply such a person in those circumstances the respondents will visit the premises of the clients to assist them to understand the basic requirements of the post and to be able then to brief the person who is to be asked to undertake the assignment in question. The respondents may, on those occasions, make suggestions to their clients as to facilities which they would wish to see or as to what should in their view be involved with the post. These are of the nature of potential compliance points. It is then up to the client as to whether or not any alterations are made. If appropriate the respondents might say, in reply to a refusal to make such an alteration, that they were not prepared to supply a worker to the client due, for example, to a health and safety issue.

29. The claimant attended the respondents' premises for one day prior to commencing work with ERC. She was there to undertake training in manual

lifting, and matters related to the abilities required in the post she was to fill with ERC. This is also to ensure that someone in the position of the claimant is aware of appropriate procedures and compliance required. She did not otherwise attend the offices of the respondents once she had entered into her working relationship with them. There was an induction process undertaken by ERC with the claimant when appeared to commence her role with them.

30. The claimant worked with ERC personnel throughout the period from November 2015 until her resignation, submitted on 26 August 2019, took effect. The only assignment she fulfilled between those dates was that as a Home Support Worker with ERC. Her shift pattern was always 4 on, 4 off. The claimant regarded herself as working for ERC.

31. When the claimant carried out the role for ERC it involved her travelling to homes following upon discharge of individuals from hospital. She was a Home Support Worker.

32. The claimant was informed by ERC of where she was to go to fulfil her duties. She had the option of wearing a uniform with ASA (the respondents) branding on it. She wore that uniform. She was supervised by ERC personnel and accountable to them in her role. ERC provided PPE. The claimant had a works van provided by ERC.

33. Each week the claimant completed a timesheet confirming the hours and any overtime worked by her. This was countersigned by an ERC employer and then submitted to the respondents. The respondents paid the claimant, deducting tax and national insurance as appropriate. The rate at which the claimant was paid was governed by the regulations affecting Agency Workers. After an initial period, the claimant was paid at the ERC rate. The respondents paid the claimant SSP if she was absent through ill health. They paid holiday pay to the claimant when she was on leave. The claimant received a P45 from the respondents following termination by her of the relationship with the respondents.

34. The claimant gave “notice” of her resignation. That resignation was treated by the respondents as the claimant informing them that she was ending the

relationship. No notice was required under the agreement. It could be terminated without notice. The respondents decided to accept the final date as the date specified by the claimant as the final date.

35. The claimant lodged a document with the respondents in July 2019. She regarded it as a grievance. The respondents treated it as a complaint.

36. If there was any issue with the work, behaviour attendance or timekeeping of the claimant ERC were to contact the respondents who would deal with it. There were no such instances, however.

37. If the claimant was sick and unable to attend work, she would phone the respondents. If she wished to take a holiday she approached the respondents to obtain clearance and then informed ERC as a courtesy. The respondents were responsible for arranging a replacement person to cover the shifts of the claimant if she was ill or on holiday. The claimant could not arrange a substitute in those or in any other circumstances.

38. The arrangement between the respondents and clients, and in this particular case ERC, is that the respondents will supply someone to the client to fulfil a role as and when that client requires that. That results in the person involved being given an assignment. That requirement of the client may vary from time to time. The assignment may therefore be short or long or may be intermittent. In the claimant's case, the assignment with ERC was lengthy, lasting 3 ½ years.

39. Clients, including ERC, will sign timesheets for the person supplied to them. This enables the person to be paid at the appropriate level and enables the respondents to charge the client the appropriate amount to cover those costs. The contract for services document is one which the respondents intend to present to all potential agency workers to be supplied by them to a client.

40. The contract for services document is one which the respondents look to apply to every person with whom they have the working relationship where they "supply" that person to a client of theirs. Although that document includes the provision at clause 7.5 set out above as to notice of holidays being given

in advance, in practice those taking holidays often do not give any notice. People in the position of the claimant are able to decline to work or to choose not to work as they wish, and when they wish. There is no obligation on them to accept work, whether at times of proposed holiday or otherwise, and no obligation on the respondents to offer work.

41. The claimant was in a relatively unusual situation where the assignment, her role with ERC, was consistent and long term, although there was no evidence of there being any commitment given to her that it would be so. There was no guarantee of work for the claimant with ERC. Had ERC not required her attendance to work, there may or may not have been a different assignment which the respondents might have offered to the claimant and which the claimant had the right to accept or not to accept. There was no obligation on the respondents to provide work to the claimant.

The issues

42. The issues for the Tribunal were those set out above, namely:

(1) was the claimant, at the relevant time, disabled in terms of Section 6 of the 2010 Act?

And;

(2) was the claimant an employee of the respondents?

Applicable Law

Disability

43. The relevant legal provisions are to be found in Section 6 of the 2010 Act and in *Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)*. Appendix 1 to the EHRC Code of Practice on Employment 2011, which is headed *"The meaning of disability"* is also of significance. Any aspect of the Guidance and Code which appears to the Tribunal to be relevant must be taken into account by it.

44. Section 6 of the 2010 Act provides:-

"A person (P) has a disability if-

(a) P has a physical or mental impairment, and

(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

45. The case of *Goodwin v Patent Office* 1999 ICR 302 (***"Goodwin***") provides a helpful reminder of the approach an Employment Tribunal should follow is considering this question.

46. One of the elements it highlights is that Tribunals should adopt a purposive approach to the interpretation of the legislation — i.e. give effect to the stated or presumed intention of Parliament. Regard must also be had to the ordinary and natural meaning of the words. Tribunals have been given assistance in this by the Guidance.

47. *Goodwin* confirms that, when considering the requirement that a physical or mental impairment is substantial and long term, the Tribunal must take the Guidance into account, and where it is clear that the person is disabled within the meaning of the DDA, the Tribunal must not search the Guidance for new hurdles over which the claimant has to jump.

48. A Tribunal need not always identify a specific 'impairment'. This is particularly so if the existence of one can be established from the evidence of an adverse effect on the claimant's abilities. The case of *J v DLA Piper UK LLP* 2010 ICR 1052 ("*J*") confirms this.

49. There may also be cases where a claimant's symptoms make it clear that she has an impairment, even if the underlying disease or trauma cannot be specifically identified. The case of *College of Ripon and York St John v Hobbs* 2002 IRLR 185, EAT ("*Hobbs*") is relevant in that regard.

50. Appendix 1 to the EHRC Employment Code confirms in paragraph 7 that *'There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause'.* The case of *Ministry of Defence v Hay* 2008 ICR1247 ("*Hay*")

reflects that. It held that an 'impairment' under S.1(1) DDA, the predecessor to the 2010 Act, could be an illness or the result of an illness. There was no need to determine a precise medical cause of an impairment. The Employment Appeal Tribunal ("EAT") said that the approach was to be *"self-evidently a functional one directed towards what a claimant cannot, or can no longer, do at a practical level".*

51. *Walker v SITA Information Networking Computing Ltd* EAT 0097/12 ("*Walker*") saw the EAT again confirm that there is no requirement under the 2010 Act to concentrate on the cause of an impairment. It may, of course, be of significance if there is no suggested cause of an impairment. That situation might result in a Tribunal concluding that although someone appears to be disabled, given that there is no evidence of a recognised cause of any such disability, the claimant does not in fact genuinely suffer from what is said to be an impairment.

52. Section 212 (1) of the 2010 Act confirms that *"substantial"* means *"more than minor or trivial".*

53. Whether effect is substantial can be assessed by looking at the overall impact and possible adverse effect of an impairment rather than necessarily only having regard to impact on one activity. The Guidance at paragraph B4 confirms that.

54. Any medication taken or coping mechanisms adopted are to be disregarded in assessing impact.

55. Under the 2010 Act the effect of an impairment is long-term if (relevant to this case) it has lasted for at least 12 months.

56. Normal day-to-day activities are activities carried out by most men or women on a fairly regular and frequent basis. (paragraph 14 of the Code).

57. In paragraph D3 of the Guidance, examples are given of the type of activity which might be regarded as a normal day-to day activity. The examples given are shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and

eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.

Status

58. Section 230 of the Employment Rights Act 1996 ("ERA") provides a definition of what an employee is. It states that an employee is an individual who "*has entered into or who works under a contract of employment*". A contract of employment may be verbal or written. It is referred to a contract of service.

59. There are some well-known cases which have been determined in this area of law. They have laid down principles which an Employment Tribunal properly has regard to when considering this question.

60. *Ready Mixed Concrete v Minister of Pensions & NI* [1968] 2 QB, 497 ("*Ready Mixed Concrete*") is one such case. That case directs an Employment Tribunal to consider whether there is an agreement that someone will carry out work in exchange for payment from the person for whom the work is carried out, whether there is a sufficient amount of control by the payer for there to be a relationship of employer and employee and whether the other terms of the contract are consistent with there being a contract of service.

61. It can be tricky to determine if there is a contract of service. Personal service is significant in the assessment. The degree of control is also of importance. Mutuality of obligation is another key factor.

62. Written documentation is properly considered. The case of *Autoclenz v Belcher and others* ("*Autoclenz*") 2011 ICR 1157 confirmed, however, that an Employment Tribunal could "look behind" a written document which defined the working relationship between two parties. This is as the circumstances in which a contract in this area is entered into are different to those in which a commercial bargain may be struck. The "power" is with the employer. There is almost certainly little bargaining power with the employee. Employment Tribunals can therefore consider "*whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to*

be gleaned from all the circumstances of the case, of which the written agreement is only a part".

63. It is often of significance to consider whether the purported employee can arrange a substitute to take his or her place when he/she is on holiday or absent through illness.

64. The issue of control is perhaps an adjunct of the point just mentioned. An Employment Tribunal must have regard to the areas over which it said that the "employer" has control and those over which it is said that the claimant, or perhaps a third party, has control.

65. The question of whether there is an obligation on the "employer" to provide work and on the "employee" to accept work in exchange for payment is also a relevant consideration in the assessment by an Employment Tribunal.

66. Other relevant matters are arrangements for pay, notice and the continuity of work. Sometimes there can be shorter contracts, however an overall "umbrella contract". In the circumstances of this case there was continuity of engagement with the claimant on the same shift pattern throughout the 3 ½ years involved.

Submissions

Submissions for the claimant

67. Mr McParland helpfully submitted written submissions. He spoke to them.

68. I was urged by Mr McParland to find that the claimant was disabled at the relevant time and that she was an employee of the respondents.

69. The claimant was, he said, credible and reliable on all points. There was, in reality however, little by way of disputed evidence. The medical records were not challenged. Similarly, the claimant's account of the impact of her illness was not challenged.

70. The respondents accepted that the claimant was affected by a long-term condition, endometriosis.

71. I clarified with Ms Stevenson at this point that my understanding of the respondents' position was correct in relation to disability. I understood that the respondents accepted that the claimant was affected by endometriosis and as a result had had a hysterectomy in 2017. They did not however accept that any health issues which the claimant may have had after that operation were linked to the condition of endometriosis. Ms Stevenson confirmed this as correctly reflecting the respondents' position. She said that the medical information made no reference to endometriosis after the 2017 operation.

72. Mr McParland set out the statutory and regulatory provisions in relation to disability. He referred to *Hobbs* which said that a person has a physical impairment if they have something wrong with them physically. That was the case in this instance, he said.

73. The evidence of the claimant was clear as to the impact on her normal day-to-day activities. She had referred to constant pain, tiredness, low motivation, mood swings and anxiety. She had to take a bag with her when going out so that she had a change of clothes and washing capability. Her relationships had suffered. The effect on her could be viewed when everything was taken together as confirmed in paragraph B4 of the Guidance. Impact of endometriosis itself and of other symptoms cumulatively had had the required "substantial effect" on normal day-to day activities.

74. The claimant's behaviour had also been affected. She had modified her behaviour, however that approach of coping with things did not mean that she was not disabled. The claimant had also taken medication. She said that without it she would not be able to function at all.

75. The condition affecting the claimant was clearly long-term, Mr McParland submitted. He referred to the claimant's evidence of events before 2017 and after that until time of June 2019, the relevant date.

76. It was difficult, it appeared for the doctors to understand exactly why the symptoms the claimant had had continued after 2017. They did however continue. They were all part of the condition affecting her, endometriosis.

77. Turning to status, Mr McParland referred me to *Ready Mixed Concrete* and the elements detailed in that case. He also referred me to *Market Investigations Limited v Minister of Social Security* 1968 All ER 732.

78. No single element was determinative in deciding if someone was an employee. Personal service, mutuality of obligation and control were the three irreducible minimum elements. I was referred to *Carmichael v National Power plc* 1999 1 WL 2042 and *Nethermere (St Neots) Ltd v Gardiner and another* 1984 ICR 612**.**

79. In this case, Mr McParland submitted, the evidence confirmed personal service was involved. The respondents would arrange cover if the claimant was off ill or was on holiday. The claimant could not do that.

80. The claimant had provided her services in exchange for payment from the respondents. They had interviewed her and had provided work to her. They had paid her. The obligations continued unless one party gave notice to the other. *Stephenson v Delphi Diesel Systems Limited* 2013 ICR 471 was authority for these obligations confirming there was a contract in place. Whether that was a contract of employment involved consideration of all relevant factors.

81. There was sufficient control of the claimant by the respondents, Mr McParland said. He highlighted the offer of the position to the claimant by the respondents. They had given the claimant training. They checked to see that clients had the necessary facilities for workers placed with them. The claimant wore a uniform with ASA badging.

82. Further, the claimant had worked regular shifts. She had understood the post to be a full time one. Mr Burns had referred in evidence to the claimant returning after absence from work to “her normal shift pattern/working hours”. The claimant was not in a position to negotiate her terms. She could however terminate the contract by giving notice and had done that when resigning. The respondents paid her. They paid sick pay and holiday pay. They deducted tax and national insurance.

83. The Tribunal should keep *Autoclenz* in mind and look at the reality rather than just the written terms of contract. The written terms were not a "one size fits all" provision. There were various ranges of possibilities. This was not, despite any suggestion of it, a situation where each day, or even each week, the claimant wondered if she had a role for the following day/week. Businesses could not in any event work like that.

84. The claimant was an employee, Mr McParland submitted.

Submissions for the respondents

Disability

85. Ms Stevenson lodged written submissions the day following the PH. Those essentially followed the line of her oral submission. At the PH she urged that I conclude that the claimant was not at the relevant time disabled as defined in the 2010 Act. The claimant being affected by endometriosis after 2017 was not supported by the medical evidence, she said.

86. The respondents accepted that the claimant had health issues in the lead up to and at the relevant date. There were references to menopause, HRT medication, unexplained bleeding, investigations, mood swings, anxiety, but there was not said to be a link to endometriosis. In June of 2019 the claimant had worked various shifts. There was no sign of illness. It was difficult to know what the claimant was saying.

87. The proposition that the claimant being was affected by endometriosis in June 2019 was unsubstantiated.

Status

88. There was no doubt, Ms Stevenson submitted, that the claimant was an agency worker. There was a clear contract for services in place. Ms Stevenson referred to the Terms of Engagement contract.

89. In relation to supervision and control, that was the role of ERC, Ms Stevenson said. The payments made by the respondents of holiday pay, sick pay and the pay rate applicable were all elements stipulated in legislation as being

requirements for the respondents to follow. The respondents also had a responsibility to ensure that the person they provided to ERC to do the work had a proper understanding of relevant regulations and was able to comply with them. That was why the one-day training course was in place.

90. These factors did not lead to the claimant being an employee of the respondents. The documentation had been prepared by a federation of which the respondents were members. The claimant had sent documents to the respondents said to constitute a grievance and said to constitute notice. The respondents had been clear that these were a complaint rather than a grievance and intimation of ending of the agreement rather than notice under an employment contract.

91. Reference was made by Ms Stevenson to information which appeared on timesheets and on assignment details. There had however been no evidence on those matters and I had not been taken to any such documentation during the PH. I raised this with Ms Stevenson and confirmed I could not have regard to those documents or associated points.

92. The claimant was a temporary worker, Ms Stevenson said. When she could not be at work with ERC the respondents supplied a further different temporary worker to ERC. I should find that the claimant was not an employee of the respondents.

Brief reply for the claimant

93. I gave Mr McParland the opportunity to address me on any points which arose from Ms Stevenson's submission which had not already been covered by him.

94. Mr McParland said the statutory provisions imposing obligations on the respondents were as they were. They were however consistent with a relationship of employer/employee.

95. It was pointed out to me that the respondents were in large measure not able to challenge the evidence of the claimant in relation to her health and the impact of the condition affecting her. Insofar as there was any competing evidence, I was urged to accept the evidence of the claimant.

Discussion and Decision

96. As Mr McParland commented, there was substantial agreement on the relevant facts. The conclusions that Mr McParland and Ms Stevenson drew from those facts were, however quite different.

Disability

97. In relation to disability, Mr McParland said that the claimant met the requirements of Section 6 of the 2010 Act. Ms Stevenson said she did not. As recorded above, Ms Stevenson disputed that the claimant was disabled at the relevant time (June 2019) as there was no evidence or documentation, as she saw it, supporting the view that the claimant was affected by endometriosis at that point.

98. Ms Stevenson accepted that the claimant had a long-standing medical condition, endometriosis. It was the respondents' position that the majority of issues arising from endometriosis as explained by the claimant, related to the period prior to 2017. In 2017 the claimant had had her hysterectomy.

99. On the evidence from the claimant, as tested by cross examination, and the documentation to which I referred and which was therefore before me at this PH, I concluded that the claimant was disabled in terms of Section 6 of the 2010 Act at the relevant time.

100. The claimant was affected by endometriosis in the time leading up to her hysterectomy. Endometriosis causes pain and bleeding. It results from tissue, similar to womb tissue, growing in the abdomen i.e. outwith the womb. The claimant had tissue growth on her bladder and bowel.

101. When the claimant had her hysterectomy not all tissue growth could be removed. This was as part of the claimant's cervix had adhered to her bladder and bowel.

102. In considering the question of disability, the current position of the claimant's health is not of relevance. I mention that as in referring to the period to June

2019 I wish to be clear that I am not regarding the claimant's health difficulties as having ended at that point.

103. There is no doubt that the claimant was, both before June 2017 and in the time up to June 2019, affected by severe pain and bleeding. She was also affected by irritability and low mood. Her relationships suffered significantly. On occasion the claimant struggled to get out of bed in the morning. She was unable to leave the house without planning her day to ensure she had replacement clothing and washing products, together with access to washroom facilities for herself. She, in effect, pushed or forced herself to keep going to work as she had a daughter and felt the need to earn money to keep a roof over their head as she put it. The claimant took medication, painkillers and other medication, throughout this period. She said that without her medication she would not be able to function at all. Her evidence was that the first she did every morning was to reach for the painkiller co-codamol. She has been on that medication since 2015.

104. The respondents did not, in reality, challenge the impact of illness on the claimant. Their challenge was on the basis that after the claimant's hysterectomy in November 2017, any further health issues were not supportive of the claimant being affected by endometriosis.

105. It is true that the claimant has had other health difficulties since November 2017. She has been affected by the menopause. She has received HRT.

106. Nevertheless, the two elements consistent with endometriosis, bleeding and pain, have remained. There are medical reasons for those symptoms being related to endometriosis given the inability of the surgeon to remove all excess tissue growth. In his letter of 19 December 2018 (Page 71 of the file), written over a year after the hysterectomy, Dr Yousef stated that the pain could be due to endometriosis. It is apparent from this that the hysterectomy did not therefore preclude or prevent endometriosis and resultant pain. That pain remained present at June 2019, as did severe bleeding. The incident in June 2019 where the claimant attended the Royal Alexandra Hospital due to bleeding reflects that.

107. The pain and bleeding have been present despite painkillers and "anti-bleeding medication" being taken. If that medication was not taken, the impact of the impairment would be far greater than it is.

108. The effects of both the continued bleeding and pain on the claimant's normal day-to day activities have been substantial, as that term is defined in the 2010 Act. The disruption to the claimant's relationships and to her ability to socialise, the need for her to plan her day with regard to washing and changing facilities and to take a change of clothes and personal washing products with her have all had a real impact on her normal day-to-day activities.

109. The cases of *Goodwin, J, Hobbs, Hay* and *Walker* all assisted me in my deliberations on the question of whether the claimant was affected by an impairment, looking to the test under Section 6 of the 2010 Act. The concession, appropriately made in my view, by the respondents that the claimant was affected by the long-standing condition of endometriosis, at least until June 2017, was also helpful.

110. I was in no doubt that the clamant was affected as at the relevant date by a long-standing impairment which had a substantial and long-term adverse effect on her normal day-today activities.

111. I was satisfied on the evidence, in particular that as to her pain and bleeding, that the impairment could properly be regarded as endometriosis. Her symptoms after her hysterectomy were, in those areas, in line with her symptoms before her hysterectomy. Her low mood and irritability were also present both before and after her hysterectomy. Endometriosis is not a condition necessarily resolved by hysterectomy. That is seen in the case of the claimant. Growth tissue remained, as did the bleeding and pain. It is true that other elements occurred after the claimant's hysterectomy. The menopause and HRT treatment given to her perhaps complicated the picture to a degree.

112. I considered the claimant's evidence and the medical evidence. While the medical evidence post hysterectomy did not specifically identify

endometriosis as the cause of the claimant's continuing health issues, at the very least the letter from Dr Yousef at page 71 of the file, confirms in December 2018 that the pain could be due to endometriosis.

113. The claimant was, at the relevant date clearly suffering a physical impairment given her symptoms. *Hobbs* and *J* in particular are of note in confirming that I can, in that situation find the impairment to have existed.

114. The claimant was in my view, applying what I regard as the appropriate tests, disabled in terms of Section 6 of the 2010 Act at the relevant date by reason of the physical impairment of endometriosis. Endometriosis impacted upon the claimant in that it caused bleeding and pain in particular. In turn it led to low mood and irritability.

115. In those circumstances the claim of discrimination, the protected characteristic being disability, may proceed.

Status

116. The claimant was accepted by the respondents as having capacity to bring a claim of disability discrimination, if disabled. The respondents maintained however that she was not an employee and therefore had no rights to bring an unfair dismissal claim. The claimant maintained that she was an employee and had that right.

117. The claimant signed a sheet of paper (page 281 of the file) which contained paragraphs numbered 12-15. She said that she did not ever see or have explained to her those paragraphs or any document of which those paragraphs were said to form part. The respondents did not lead contradictory evidence. Their position was that someone always went over the document and gave a copy to someone such as the claimant who was signing it. The claimant said she could not remember whether she had been given a copy of the document.

118. I accepted the claimant's evidence that no-one went over the document with her to explain that its terms proceeded on the basis that she was becoming an agency worker by signing it and was not becoming an employee. The

claimant was leaving full time employment to take up this role. An explanation that she was not to be an employee as the respondents saw it would have been likely to have been recalled by the claimant given that she was in full time employment with a different employer at this point.

119. Assessment of status always involves weighing the various elements of fact and assessing their legal implications. An agreement such as that which was in the file starting at page 272 is not determinative. It may not reflect the reality of the working relationship between the parties. An Employment Tribunal is entitled to have regard to that reality *(Autoclenz)*.

120. The contract for services document is one which forms the basis of engagement by the respondents with all those personnel supplied by them to clients.

121. The agreement set out of the working relationship as being a contract for services and not a contract of service. The arrangements between the parties were in my view on the evidence, reflected in the agreement, save for arrangements in respect of holidays as noted below.

122. Thus, the respondents paid tax and national insurance relative to the claimant. They paid her sick pay and holiday pay. They paid her salary in respect of hours verified by the hirer, ERC in this case. Those practices are consistent however with both employee and Agency Worker status.

123. The claimant was to work with ERC and to comply with their health and safety policies. She was to inform the respondents (she also informed ERC) if she wished to take a holiday. Others working on the same basis as the claimant did not adhere to the provision of the contract and would often take holidays as and when they wished without prior notice.

124. The claimant was to inform the respondents if she could not attend work with ERC for any reason. If the claimant was not to be at work the respondents supplied a replacement or substitute worker to ERC. The claimant had no ability to do that and no responsibility so to do.

125. The claimant worked with ERC personnel. She received information from ERC as to the specific duties which she would have for that day as part of the Home Services Team, the claimant being in the Hospital Discharge Team carrying out home visits. She was supervised by ERC personnel, although if there was a performance or attendance issue this would be taken up by ERC with the respondents. The claimant was given PPE. This was arranged by ERC. She was provided with a works van by ERC. She wore however the uniform which had ASA branding on it.

126. In re-examination the claimant described herself as working for ERC when asked what level of supervision there was from ERC. I did not regard that as determinative, however.

127. There was no evidence before me that the claimant waited to be told if she was needed every day or every week. She worked a regular shift, 4 days on, 4 days off. There was an expectation that she would continue with that arrangement with ERC. It continued until she terminated the working relationship between herself and the respondents by resigning. She did that by giving notice, although the agreement referred to there being no notice required.

128. There were therefore many factors present, some consistent with employment (such as the duration of the role and what appeared to be the absence of interaction to confirm the offer and acceptance of the role for the next day or week), others not so (such as the role of ERC in relation to working arrangements and provision of the van).

129. To reach a conclusion on this point I applied the tests set out above as being applicable law in this area. I applied them to the relationship between the claimant and the respondents as I found it to be on the evidence and relevant documentation.

130. There were two points which Mr McParland said pointed to an employment relationship but which I did not regard as so doing. The claimant attended the respondents' premises for a day of training in manual handling matters. The respondents also visited the premises of ERC to understand more about the

environment into which they would be placing the claimant. Mr McParland argued that those two elements were instances of control of the claimant by the respondents.

131. In my view these actions were not examples of the respondents controlling the work of the claimant. The respondents were ensuring that claimant had the necessary basic skills to perform the role which she was to be asked to fill. They were also ensuring that they knew about the work situation into which they were placing the claimant. Whilst they could make suggestions to ERC as to changes in relation to, for example health and safety, they were not in a position to insist on alterations in working conditions within ERC. These were matters concerned with compliance, being concerned, it appeared from the evidence, with regulatory issues.

132. There was certainly an argument that the claimant was employed by the respondents. The fact that the Contract for Services was said to have been drafted by lawyers at the respondents' professional organisation did not determine the matter.

133. There was doubt as to exactly what the claimant had been given when signing a document. It did not appear that any clear explanation was given to her. She had duties to the respondents under the agreement. They paid her.

134. It required however to be kept in mind that this was not a case where the debate was as to whether the claimant was self-employed or employed. She was either an employee of the respondents or an agency worker with the employment business, the respondents. Obligations as to payment, including of holiday and sick pay, apply in the situation where someone is an agency worker as well as when someone is an employee.

135. The situation was not as clear as would sometimes be the case for an individual given that the claimant had been on a long-term assignment, lasting some 3 ½ years. She had worked a constant shift pattern, it appeared. She had not therefore experienced any element of "stop/start arrangement" where she might have been looking to the respondents to see where and when her next role was to be, or indeed if there was contact to offer her such a role. I

accepted the evidence from the respondents that there was no obligation on them if that circumstance arose, to offer the claimant work, nor any obligation on her part to accept any work which might be offered to her.

136. Ultimately my view was the elements of the "irreducible minimum" which were not present were those of control and mutuality of contract.

137. In relation to control, the claimant was, to all intents and purposes, part of the ERC workforce. Her daily tasks came from them. She had a van supplied by them. She did wear an ASA branded uniform, it is true. That, from the respondents' evidence, was not a requirement. It was said that ERC preferred that as it enabled them to be aware of whether someone had been supplied by the respondents. Work standards, time keeping, attendance and supervision were matters dealt with by ERC, however. If there was any issue with those, ERC would let the respondents know if they did not wish the claimant on site again.

138. The element of control which the respondents had was, in fact inconsistent with an employment relationship. The respondents in particular could simply terminate the relationship and then not offer any further work.

139. This shades into mutuality of contract. On the evidence I accepted, the claimant could terminate the relationship at any point without notice and was not obliged to accept any assignment which the respondents might offer to her.

140. I understood Mr McParland's well-thought out and well-presented argument as to there being an employment relationship having regard to the long-standing nature of that relationship, the expectation of continuing work and the way in which the arrangement worked in practice. Looking however to the evidence as to the degree of control involved and as to the obligation to provide/accept work, I concluded that there was insufficient evidence to support the conclusion in law that the relationship between the claimant and the respondents was one of employee/employer.

141. The claim of constructive unfair dismissal made under ERA cannot therefore proceed.

142. In relation to progress in the case of disability discrimination, it seems appropriate to me to set down a case management PH to last an hour and to be conducted by telephone. The purpose of that will be to make arrangement for the hearing, including determination of whether that is by way of CVP or in-person. The Clerk to the Tribunals is requested to identify an appropriate date for that and to issue hearing notices to respective parties.

Employment Judge: R Gall
Date of Judgment: 26 August 2020
Entered in register: 28 August 2020
and copied to parties