# EMPLOYMENT TRIBUNALS

## PUBLIC PRELIMINARY HEARING BY HYBRID HEARING (Heard in Private)

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| **Claimant** | **Ms D Yockney** |
| **Respondents** | **1) City of York Council**<br>**2) K (by her litigation friend, Hill Dickinson LLP)**<br>**3) R**<br>**4) Salvere Social Enterprise CIC** |

**Heard at Sheffield:** By hybrid hearing by video and in person (in private) **On:** 8-12 November 2021

**Before:** Employment Judge Stephen Shore

**REPRESENTATION:**

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| **Claimant:** | In Person |
| **Respondents:** | Mr A Mugliston, Counsel [R1]<br>Mr B Gray, Counsel [R2]<br>In Person [R3]<br>Mr C Bourne [R4] |

## RESERVED JUDGMENT AND REASONS

The judgment of the Tribunal is that:

1. The second respondent did not show that she did not have mental capacity to enter into a contract with the claimant.

2. The employer of the claimant at all material times was the third respondent, R.

3. This case shall be listed for an in-person preliminary hearing to make further case management orders. A separate Notice of Hearing will be issued.

## REASONS

### Brief Background and History of this hearing

1. The second respondent, K, is a woman who was 36 years old at the start of this hearing. It was agreed by all parties that K has a learning disability ("LD"), although the extent of the LD was the subject of some disagreement. During the whole of the period of time covered by this case, K has required support from care providers. That care has been mostly funded by the first respondent, City of York Council, with some contribution from K.

2. The claimant was one of the Personal Assistants (PAs) who provided care to K. She was employed in that capacity from 2007 to 13 October 2019, when she resigned. The claimant has brought a claim of constructive unfair dismissal, which is relatively clearly defined, and claims of discrimination related to the protected characteristics of age and disability, which are not. The period of the claimant's employment that is relevant to this case is the period from 1 September 2013, when K entered into an Individual Budget agreement with the first respondent. This meant that, rather than the first respondent contracting with an agency to provide care support for K, K was given a budget that she was supposed to exercise control over to source her own care arrangements.

3. The second respondent does not have capacity to litigate this matter on her own behalf, so appears through her litigation friend, Hill Dickinson LLP. I was reminded by Mr Gray that he was unable to take instructions from the second respondent and was acting as litigation friend, not legal representative in the usual sense. I was mindful of that fact at all times during the hearing and in the writing of this reserved Judgment and Reasons.

4. The third respondent, R, is K's mother.

5. The fourth respondent is a not-for-profit community interest company that assists people with disabilities organise care and support. It was retained to organise matters such as payroll; tax; and employer's liability insurance related to the second respondent's care since 2016.

6. There have been a large number of preliminary hearings in this matter since the ET1 was presented in 2019. I do not think that it is necessary for me to catalogue all of them.

7. From early in the proceedings, it was identified that the question of who employed the claimant would be a central issue in the case. Another central issue that was identified was the question of whether the claimant had mental capacity to enter into a contract of employment with the claimant.

8. The two things that I am required to determine at this hearing were set out in the case management orders of EJ Davies dated 17 December 2020, and are:

    8.1. Who employed the claimant; and

    8.2. Did the second respondent have mental capacity to enter into an employment contract with the claimant?

**Housekeeping**

9. The parties had agreed and prepared a bundle of over 2000 pages that was divided into six sections (A-F) that largely related to pleadings (section A) and the documents provided by each of the parties (sections B-F). I was told that the reason for this was in anticipation of filleting the bundle by removing the documents of any respondent who may be removed from the case as a result of my decision in this hearing.

10. I am grateful to Mr Gray for providing me and the other parties with a version of the bundle that split it into its six constituent sections, which made navigation much easier and sped up the process of finding documents.

11. I heard evidence via video link from (in the order that they gave evidence):

    11.1. Dr Dina Gazizova, Consultant Psychiatrist in Intellectual Disabilities, who was instructed by the second respondent's litigation friend to produce a report dated 8 December 2020 into the second respondent's condition in the form of 11 questions. The report consisted of 17 pages.

    11.2. The claimant, Denise Yockney, whose undated witness statement consisted of 32 pages.

    11.3. Garry Blythe, who at the relevant time was employed as Social Care Manager by the first respondent. His witness statement, dated 25 November 2020 consisted of 5 pages.

    11.4. Gemma Gray, who is employed by the first respondent as an Adult Social Worker within its Learning Disabilities Team. Her witness statement dated 26 November 2020 consisted of 4 pages.

    11.5. R, whose undated handwritten statement consisted of 5 pages.

    11.6. Victoria Worthington, who was employed by the fourth respondent as a Service Manager at relevant times. Her witness statement dated 10 December 2020 consisted of 6 pages.

    11.7. Shayla Kingham (formerly Arnold), who was employed by the fourth respondent as an Independent Living Adviser at relevant times. Her witness statement dated 10 December 2020 consisted of 6 pages.

12. All witnesses gave evidence on affirmation. All parties were given the opportunity to cross-examine witnesses. The representatives were given the opportunity to re-examine their witnesses. The claimant and third respondent were given the opportunity to amplify or clarify any of the answers they had given to cross-examination questions at the end of their evidence, as neither had a representative who could have asked re-examination questions.

13. Unfortunately, I was only notified of my appointment to sit in this case on the afternoon of Friday 5 November 2021. When I arrived the Employment Tribunal in Sheffield on the first morning of the hearing, the Tribunal's file and the hard copy of

the bundle had not been delivered. I was therefore unable to do any reading into the case. I am grateful to the parties and representatives for their patience.

14. I tried to start the hearing at 10:00am to discuss the case with the parties, but there were some connectivity issues for some of the attendees by video. We eventually were able to start at 11:25am, by which time, the file and bundles had arrived. I was handed the witness statements of Mrs Worthington, Mrs Kingham, and R, which weren't with the papers.

15. In the break, counsel had discussed a timetable and suggested that the remainder of the first day be allocated to my completing my reading of the papers. I was grateful to counsel for providing a list of essential reading that was shared with the claimant and R.

16. It was proposed to deal with the expert medical evidence and the claimant's evidence on the second day and the first respondent's evidence on the third day. The fourth respondent's witnesses and R would be dealt with on the fourth day and closing submissions, deliberations and judgment would be dealt with on the fifth day. This timetable was agreed by the unrepresented parties and by me.

17. We stuck pretty closely to the indicated timetable, for which I am grateful to all who attended. It quickly became apparent that I would not have time to deliver an oral judgment and reasons on the fifth day, so I announced that the decision would be reserved.

18. I received written closing submissions from the claimant and Mr Mugliston. Mr Mugliston also made oral submissions. R (the third respondent) chose not to make any submissions. I heard oral submissions from Mr Gray and Mr Bourne.

19. The hearing was conducted as a hybrid hearing. In attendance were the claimant, Mr Mugliston, Mr Gray, Mr Bourne and myself. All the witnesses (with the exception of the claimant) attended by video. The first and fourth respondent's instructing solicitors attended, having been given leave to do so by EJ Maidment. The hearing was held in private by Order of J Bright dated 23 February 2021. Interim Anonymity Orders were made in respect of K and R by EJ Bright on 23 February 2021. On the fourth day of the hearing, Mr Mugliston applied for the extension of those orders, which was granted with the consent of all parties. A separate case management order has been issued.

20. I am very grateful to all who attended for the dignified and calm way in which they gave evidence. This case is highly emotive and clearly raised strong feelings in many of the participants. I am very grateful to the claimant, Mr Mugliston, Mr Gray, R, and Mr Bourne for the way they presented their cases and cross-examined witnesses. All were unfailingly helpful and assisted me greatly. Counsel for the first, second and fourth respondents are to be commended for the calm and considerate way that they conducted difficult cross-examinations whilst remaining focussed on the issues at hand.

21. Mr Gray reminded me that some of the words used to describe mental capacity in the older precedent cases are not words that anyone would or should use today, and that it should be made clear that quotations from such cases should be read as

being representative of the attitudes at time they were made, rather than being indicative of any attitudes held by any of the parties or their representatives. I am happy to endorse his reminder.

**Relevant Law**

**Capacity**

22. Mr Mugliston submitted that the common law position is that if a person (K, in this case) enters into a contract and then alleges and proves on the balance of probabilities that they lacked capacity, the contract may be avoided. The test was established in the case of **Imperial Loan Company v Stone** [1892] 1 QB 599: where Lord Esher MR said (using some words which should be regarded as inappropriate now):

> *"When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it,* ***unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about."*** (Mr Mugliston's emphasis)

23. Mr Mugliston's submission was not contradicted by any of the other parties. Mr Mugliston referred me to the provisions of section 3 of the Mental Capacity Act 2005, but I was reminded by Mr Gray that the relevant test of the mental capacity of K to enter into a contract with the claimant at the relevant time is determined by the common law test as set out in the Rule in **Imperial Loan Company v Stone**. I agree with that analysis and have applied the common law test.

24. It was agreed that the case of **Hart v O'Connor and others** [1985] AC 1000 is authority for the principle that a contract is not voidable for unfairness unless such unfairness amounts to equitable fraud that would have allowed the contracting party (K in this case) to avoid the contract, even if she had had capacity.

25. I accept the authority of the case of **Fehily v and another v Atkinson and another** [2016] EWCH 3069 (Ch) (§85) that the question in assessing capability is what understanding K would be capable of having if given the advice and assistance she needed. The fact that a person may need help to understand the transaction did not prevent them from having capacity to do so. A point that was made several times in cross-examination and final submissions is that many employers do not understand all the details of the legal implications of an employment contract (including implied duties; tax; National Insurance; pensions; health and safety; discrimination; and other employment protection legislation), but often delegate those issues to experts within the business, or contract the issues out to a third party.

26. There was a dispute between the position expressed by Mr Gray and Messrs Mugliston and Bourne about whether knowledge of a lack of capacity could be constructive: i.e. could the claimant (or anyone else who contracted with K) be **held to know** that she lacked capacity because of the circumstances at the time, rather than K being under the obligation to prove that the claimant knew that she (K) was

not capable of understanding what the contract was about. The dispute centred around the judgment of Lady Hale in the Supreme Court case of **Dunhill v Burgin** [2014] UKSC 18, which expressed the Rule in **Imperial Loan Company Ltd** in wider terms than the original judgment had appeared to do. Lady Hale's observation (§25) was:

> *"In Imperial Loan Co Ltd v Stone [1892] 1 QB 599, [1891–4] All ER Rep 412, the Court of Appeal held that a contract made by a person who lacked the capacity to make it was not void, but could be avoided by that person provided that the other party to the contract knew (or, it is now generally accepted, ought to j have known) of his incapacity."*

27. I am mindful of the fact that Lady Hale's words are the Judgment of the Supreme Court, but I find that her words are obiter dicta (not relevant to the matter that was decided in the Supreme Court) and are therefore not binding on subordinate courts such as this Employment Tribunal. In making this decision, I adopt the rationale contained in the latest edition of Chitty of Contract (§§ 11-078, 11-079 and 11-084). I have therefore applied the **Imperial Loan Co Ltd** test when deciding this case and have not considered the impact of constructive knowledge.

**Identity of Employer**

28. I accept the argument submitted by Mr Mugliston that it is accepted that the written documentation that evidences a contract of employment might not reflect the reality of the respective obligations and that it is necessary to determine the parties' actual agreement by examining all the circumstances, as per **Autoclenz Ltd v Belcher** [2011] I.C.R. 1157, particularly at §29.

29. The claimant made reference to the case of **South Lanarkshire Council v Smith** [2000] WL 429 as authority for the proposition that the first respondent has a statutory duty to care for K, and that it may therefore be the employer in this case. For the reasons set out in paragraph 51 of Mr Mugliston's skeleton argument, I find that **South Lanarkshire** does not apply in this case.

30. I considered the Supreme Court case of **Uber BV v Aslam and others** [2021] UKSC 5.

31. I also considered the case of **Clark v Harney Westwood & Riegels 7 4 Others** (UKEAT/0018/20/BA), in which Choudhury J summarised the relevant case law, including:

    31.1. **Dynasystems for Trade and General Consulting v Moseley** UKEAT/0091/17/BA;

    31.2. **Clifford v Union of Democratic Mineworkers** [1991] IRLR 518;

    31.3. **Secretary of State for Education and Employment v Bearman & Others** [1998] IRLR 431, and

    31.4. **Autoclenz Ltd**.

**Findings of Fact**

32. All my findings of fact were made on the balance of probabilities. If a matter was in dispute, I will set out the reasons why I decided to prefer one party's case over another. If there was no dispute over a matter, I will either record that with the finding or make no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine. It may well be that matters that are not relevant to the decisions I have had to make will become relevant later in these proceedings. I should therefore stress that I have not dealt with large parts of the written evidence, oral evidence and documents for that reason.

33. I would comment that I found all the witnesses who gave live evidence struck me as being credible and honest. They all seemed to have the best interest of K at heart, even if there were differences between them in how some of the witnesses believed that the best interests of K should be achieved.

34. Some of the facts in this case were never disputed. Indeed, much of the factual evidence of matters such as dates and events seemed to be agreed by all the parties who could give evidence on a particular point. The key disputes of evidence in this case were around opinions about K's capacity, including the evidence of Dr Gazizova.

**Agreed Facts**

35. There was relatively little disagreement between the parties as to what happened in respect of the issues I had to determine in this case. I find that the following facts were either agreed or never disputed:

    35.1. The second respondent, K, is a 36-year woman.

    35.2. It was agreed by all parties that K has a learning disability ("LD"), although the extent of the LD was the subject of some disagreement in this hearing.

    35.3. It was also agreed that K has epilepsy and anxiety.

    35.4. During the whole of the period of time covered by this case, K has required support from care providers. That care has been mostly funded by the first respondent, City of York Council, with some contribution from K.

    35.5. In the early part of her life, K lived with her mother, R (the third respondent). As an adult, K's care was provided by a third-party provider, Avalon. During this time, K lived with R and the claimant was part of the team of PAs employed by Avalon to provide care.

    35.6. The claimant was employed in that capacity from 2007 to 13 October 2019, when she resigned her employment. For most of her employment, the claimant was acknowledged as being the "lead PA".

35.7. It was agreed by all parties (including the third respondent) that many decisions about K's case were taken by R and that R delegated some of the decision-making to the claimant.

35.8. It was not disputed that, on 12 June 2013 [C22], there was a meeting between R, and a member of the first respondent's staff at which R indicated that she was thinking about an Individual Budget for K.

35.9. An Individual Budget would mean that rather that the first respondent making payments to a third party (Avalon in this case) to provide care for K, that K herself would be paid monies, from which she would source and pay for her own care.

35.10. By a letter dated 5 August 2013 [C23], the first respondent confirmed to Avalon that its contract to provide care to K was to end, and that K's "…support will be managed by an Individual Budget" from 1 September 2013.

35.11. It was agreed that the first respondent had legal responsibility for considering K's care needs and for setting the budget that was allocated and paid to her to fund those care requirements.

35.12. The new arrangement was variously and interchangeably referred to as an "Individual Budget" or "Direct Payments" or "Personal Budget". The scheme is contained in The Care Act 2012 and The Care and Support (Direct Payments) Regulations 2014.

35.13. At pages C24 to C30 of the bundle was a part-completed, but unsigned, Direct Payments Agreement (DP1) and a document titled "Direct Payment/Personal Budget" – Terms and Conditions" between K and the first respondent.

35.14. At pages C31 to C37 was a copy of a signed version of the above documents, which had been signed by R in the space marked "Recipient" and by Garry Blythe on behalf of the first respondent. Both signatures were dated 29 August 2013.

35.15. The first respondent completed a document titled "Core Assessment LD" that was dated 4 November 2013 by Mr Blythe [C38-C61]. This document is a thorough assessment of K's needs across a wide range of categories. Its contents were not disputed.

35.16. The first respondent asked a company called Independent Living Service (ILS) to provide comprehensive support services to K. R was also part of the support mechanism, as was the claimant.

35.17. The claimant had been employed by Avalon, but her employment and continuity of service was transferred under the TUPE Regulations.

35.18. It was Mr Blythe's uncontested evidence in chief (§4) that "Nobody raised any concerns about [K] being the employer, but what was clear was that [K] wouldn't be able to carry out the role of being an employer on her own without support."

35.19. It was not disputed that K's independence increased after she began to receive Direct Payments and she moved into her own accommodation.

35.20. The role of providing support to K with the practical matters such as payroll etc. passed from ILS to the fourth respondent, Salvere Social Enterprises CIC in 2016.

35.21. It was not disputed that the claimant would provide the fourth respondent with details of the hours worked by staff, in order that Salvere could calculate wages etc.

35.22. It was not disputed that the claimant resigned on 13 October 2019.

36. The claimant, first respondent, third respondent and fourth respondent had few differences between them in their submissions of fact and law. Mr Gray, as counsel for the second respondent's litigation friend, presented a view of the evidence and authorities that was very different to those of the other parties. There was disagreement about the expert medical report of Dr Gazizova and of the interpretation I should place on the evidence relating to the second respondent's capacity.

**Capacity**

37. Applying the relevant test in **Imperial Loan Co Ltd**, as set out above, the burden is on K to show she did not have capacity at the relevant times:

    37.1. At the making of the contract on or around 1 September 2013; and

    37.2. During the contract, until its termination on 13 October 2019.

38. My task in applying that test has been made more difficult by K's lack of capacity to participate in these proceedings. I should here express my thanks to Mr Gray, who discharged his role as representative of the litigation friend with great skill and sensitivity, given that he is unable to take instructions from K.

39. I read and heard a lot of evidence about K's history, which was useful background, but was not relevant to the two decisions I had to make in this hearing. The brief background to the decision that K ought to move to an Individual Budget was agreed to have been that K's mother (R) was unhappy with aspects of the service provided by Avalon, the agency appointed by the first respondent to deliver K's care and support. I make this finding because paragraph 2 of Mr Blythe's evidence on the point was unchallenged.

40. I find that it is clear that the driver for change was R, because Mr Blythe's evidence in chief (§3) was unchallenged on the point, and a Record of Meeting on 3 July 2013 [C22-23] provides corroboration.

41. It is a concern to me that Mr Blythe's witness statement (§3) deals with the question of how the proposal for K to go onto an Individual Budget was discussed with her consisted of one line: "…I can recall meeting with [K] and talking to her about [R's] proposal. K was fine with the proposal…".

42. I find that to be inadequate for the purposes of determining the capacity of someone with an LD diagnosis who Mr Blythe had known for some time.

43. Mr Mugliston, in his submissions, submits that the claimant's evidence demonstrates that the proposed change to K being her employer was "discussed repeatedly" with K and that this was discussed and retained prior to K making a considered decision. I have to say, with respect to the claimant, and an acknowledgment that she is a Litigant in Person with no legal expertise, much of her witness statement was not relevant to the issues I had to determine.

44. Paragraph 5 of the claimant's statement stated that K was always treated with dignity and respect over becoming her employer. She went on to state:

> *"She was not always present at meetings towards the end as believe (sic) she had a meeting with [Mr Blythe] separately to seek her thoughts on this matter."*

45. I therefore find that Mr Blythe had one discussion with K about Individual Budgets and that the meeting was not recorded in her notes. I find that the evidence does not meet the standard of proof to show that there was an adequate assessment of capacity before she entered an Individual Budget agreement. That does not mean, however, that she lacked capacity to do so.

46. I found that the evidence that the claimant, first and fourth respondents (the third respondent was passive on the point) sought to glean from cross-examination questions of witnesses was that K was able to understand and retain information if it was explained to her in a straightforward way and that abstract concepts were not used.

47. Mr Gray, on the other hand, sought to glean evidence from the witnesses of K's inability to deal with concepts of employment law, health and safety, tax, pensions and other complex matters that all employers must deal with.

48. I find neither approach was particularly helpful in the context of this case. My reason for that finding is that the first part of the test in **Imperial Loan Co Ltd** as applied in this case is whether K was not capable of understanding what [she] was about. I take judicial notice that many employers who have mental capacity do not understand the details of their obligations under employment law, Health & Safety legislation, tax, and so on. It is uncontroversial that K lacked and lacks understanding of such matters.

49. On the other hand, the nature of the evidence of the witnesses who sought to persuade me that K was capable of understanding and retaining matters if they were explained in straightforward language was vague, non-specific and did not address the question of the contract that was entered into by the claimant on 1 September 2013.

50. The evidence in chief of the claimant herself was more about the unfairness of the concept of capacity (§9) and that she had no thought that capacity would be an issue (§10). I find that the claimant gave no thought whatsoever as to the capacity of K to enter into a contract with her in September 2013, until the issue was raised in these proceedings. Her evidence (§13) is an assertion of an abstract concept of K's understanding, not evidence of an occasion when she witnesses K understanding and retaining a proposition.

51. Under cross-examination, the claimant was asked about K's understanding. Her evidence on the point was far more expansive than her written evidence. She said that K she had "a long series of conversations with Mr Blythe and [K]." None of those conversations appear in the first respondent's records, which are otherwise meticulous in recording discussions relating to K. The claimant's oral evidence is in conflict with her written evidence and Mr Blythe's evidence.

52. The cross-examination questions were put in the abstract and no dates or details were given of conversations between the claimant and K.

53. The claimant gave evidence about K signing off time sheets for PAs referred to K's pride in the task, but did not indicate that she understood what she was doing and there was no evidence that the process was explained. When the claimant was asked about Dr Gazizova's report findings, her response was that there were "some inaccuracies, but [K] can retain information with the right people". She went on to accept that K would not have been able to answer some of the questions put to her by Dr Gazizova "because of the terminology used." I reject that proposition, as Dr Gazizova is an experienced Consultant in LD medicine and well-used to interviewing people with LD.

54. The second part of the **Imperial Loan Co Ltd** test is whether K (in this case) can prove further that the person with whom [she] contracted knew her to lack capacity to understand. The claimant is the person with whom K contracted. I therefore concentrated on Mr Gray's cross-examination of the claimant on this point.

55. Mr Gray took the claimant through Dr Gazizova's report at some length and in great detail. That is not a criticism of him. He also examined K's medical history and reports at some length. Again, I offer no criticism of him for doing this either.

56. Given my findings in these Reasons, I am, not going to go into the detail that Mr Gray did on K's history. I find that the claimant was not aware of all the medical issues that had been raised over the years, other than to the extent that she had witnesses incidents and their consequences. I find that K exhibited challenging behaviour and was recorded as lacking capacity to undertake tasks such as buying large value items at various times.

**Medical Report**

57. No party disputed Dr Gazizova's professional expertise. I find that it was not disputed that Dr Gazizova is a Consultant in Psychiatry of Intellectual Disabilities and is a member of an number of professional bodies relevant to her specialism. Her description of her qualifications and professional history at paragraph 1.1 of her report was not challenged. I find that she is qualified to deliver an opinion on the

claimant's mental capacity to enter into a contract with the claimant. I find that Dr Gazizova understood her duties to the Tribunal as an expert witness because her statement to that effect in her report was not challenged.

58. I find that some of the questions asked by K's litigation friend, as set out in paragraph 1.3 of the report were more appropriate in assessing whether or not K met the definition of 'disabled person' in section 6 of the Equality Act 2010 (questions 1, 2, 3, 4, and 5).

59. However, I find questions 6 to 11 as being appropriate to ask in an attempt to determine the issue of K's capacity:

*"6. In your medical opinion, at the time of your assessment does [K] lack capacity within the meaning of section 2 of the Mental Capacity Act 2005?*

*7. In your medical opinion, did [K] lack capacity at the time Denise Yockney commenced employment (allegedly) with [K] on or around 23 May 2007?*

*8. If [K] did not lack capacity as at 23 May 2007, did [K] lack capacity at any stage during the alleged employment relationship which terminated on 13 October 2019? If so, please confirm the point at which [K] lacked capacity and, if [K] regained capacity after that date, the period for which she lacked capacity?*

*9. In your medical opinion, is [K] capable of understanding and entering into a contract of employment as an employer?*

*10. If the answer to question 9 is in the positive, would [K] be capable of understanding the consequent obligations and responsibilities incumbent upon her as an employer?*

*11. If the answers to question 9 and 10 are in the positive, would [K] be capable of understanding, assessing and dealing with any issues or complaints that were brought to her in her capacity of an employer, such as those which Denise Yockney raises in her ET1 Claim Form?"*

60. I find the key question that Dr Gazizova was asked to be question 7 concerning K's capacity on or around 23 May 2007. Dr Gazizova's response to that question can be summarised as follows:

    60.1. There was no evidence that K was given a capacity test (referred to as a Functional Test) around May 2007;

    60.2. Dr Gazizova found no record of mental illness or symptoms that could affect her capacity;

    60.3. Dr Gazizova could not comment on K's epilepsy;

    60.4. K did not have sufficient intellect to comprehend the contract of employment as an employer. She was barely able to read and write…and would not be able to comprehend…her responsibilities as an employer; and

60.5. On the balance of probabilities, K did not have capacity to employ around 23 May 2007.

61. I find that Dr Gazizova was faced with a very difficult task: she was unable to interview K in person, but I do not find that this devalues the interview. She had to work with the information she had been given and the access to K that was possible. I find her conclusions were made in good faith and are plausible.

62. However, that is not the task I have undertaken here. I find that it is entirely possible that K did not have capacity to enter into a contract with the claimant in September 2013 for the reasons set out in Dr Gazizova's report, the documents in the bundle and the arguments submitted by Mr Gray.

63. My decision, however, is that I find that K has not met the standard of proof (the balance of probabilities) to meet the burden of proof that is on her to establish that she was mentally incapable at the time and that the claimant was aware of this. I find she fails to satisfy either leg of the test in **Imperial Loan Co Ltd**. My reason for this decision is that whilst I have some empathy with the argument put with skill and tenacity by Mr Gray, the evidence that would have carried K's case as put by her litigation friend over the threshold to victory was not sufficient to meet the standard and burden of proof.

**Identity of Employer**

**City of York Council (First Respondent)**

64. I can deal with the position of the first respondent relatively briefly. I make the following findings:

64.1. It was agreed that the first respondent set K's budget, but it was agreed that issues of tax and National insurance were dealt with by Avalon, ILS and the fourth respondent.

64.2. It was not challenged that the first respondent had no control over the claimant's hours of work, annual leave, or sickness cover.

64.3. It was not disputed that there was no obligation between the first respondent and the claimant for care to be provided by her, as opposed to any other PA. There was no expectation that the claimant would attend any shift personally, or at all.

64.4. It was agreed that the provision or approval of substitutes for the claimant was not a matter upon which the opinion or decision of the first respondent was sought or required.

64.5. It was not disputed that the first respondent had no involvement in determining the claimant's duties (or the duties of any other PA).

64.6. It was agreed that the first respondent had no input into the recruitment of the claimant.

64.7. It was agreed that the first respondent had no input into the terms and conditions of the claimant's employment or any amendments to them.

64.8. It was agreed that after the claimant's resignation that her replacement was recruited with no input from the first respondent.

64.9. When the claimant raised a grievance, it was dealt with by the fourth respondent [C604-C607].

65. In the light of my findings above and the guidance in **Autoclenz Ltd**, I find that the first respondent was not the employer of the claimant at any time. For the avoidance of doubt, I also find that the claimant was never a worker for the first respondent.

**Salvere Social Enterprise CIC**

66. I am also able to deal briefly with the position of the fourth respondent. I agree with Mr Bourne's submission that there is even less of a case that the fourth respondent was the claimant's employer than there was in respect of the first respondent.

67. I make the following findings:

67.1. It was agreed evidence that the fourth respondent exercised no real control over the claimant.

67.2. The fourth respondent and its predecessor only appeared after the first respondent had agreed that a Direct Payment Agreement was appropriate for K.

67.3. It was agreed evidence that the first respondent set the rates of Direct Payments after taking advice from the fourth respondent on market rates.

67.4. The fourth respondent had no power to discipline the claimant.

67.5. The fourth respondent provided HR support for K by employing a specialist company, as would many SMEs.

67.6. The fourth respondent exercised no real control over the claimant. There was no mutuality of obligation.

68. In the light of my findings above and the guidance in **Autoclenz Ltd**, I find that the fourth respondent was not the employer of the claimant at any time. For the avoidance of doubt, I also find that the claimant was never a worker for the fourth respondent.

**K (Second Respondent) and R (Third Respondent)**

69. I am therefore left with the options of the second and third respondents as the employer of the claimant at the relevant times. I find that there are no other potential candidates as employer of the claimant.

70. I am mindful of the fact that the third respondent is a Litigant n Person and that the second respondent lacks capacity to participate in these proceedings. I did not factor into my decision the fact that the third respondent chose to make no closing submissions as any admission of liability.

71. I start by repeating my finding that K had capacity to enter into a contract with the claimant and did not show that she had lost capacity. During the period from 1 September 2013 to 13 October 2019, K's capacity appeared to improve, if viewed as a curve over time.

72. I therefore will not consider the capacity issue (which was one of Mr Gray's two main planks of his submissions on the employer issue) in making my decision.

73. I considered the cases of **Autoclenz Ltd** and **Dynasystems for Trade and General Consulting v Moseley** UKEAT/0091/17/BA, both of which were succinctly summarised by Choudhury J in **Clark v Harney Westwood & Riegels 7 4 Others** (UKEAT/0018/20/BA). I took note of the fact that **Autoclenz Ltd** was approved and applied by the Supreme Court in **Uber BV**.

74. I make the following findings (most of which were never disputed) in respect of the second and third respondents' employment relationship with the claimant:

    74.1. It was agreed that the claimant's contract of employment and job description dated 1 September 2013 [B77-B91] named K as the claimant's employer and was signed by K [B91].

    74.2. It was agreed that R was the instigator of the move to put K on an Individual Budget [C23].

    74.3. It was agreed that the Direct Payments Agreement (DPA) dated 29 August 2013 [C31-C34] named K as the 'customer', but was signed by R.

    74.4. I find that the first respondent was comfortable in allowing R to sign the document on K's behalf.

    74.5. I find that the first and fourth respondents were comfortable that R made all the decisions about K's care, although some of the decisions were delegated to the claimant by R. That evidence was not in dispute.

    74.6. I find that at all material times in this case (including the period before 1 September 2013), R was in de facto control of K's care, which included delegating some authority to the claimant.

    74.7. After the claimant's resignation, R took on more direct responsibility.

    74.8. R selected the fourth respondent to provide payroll and other services.

    74.9. The documents ([C605-C606] is a good example) show that third parties regarded R as the employer.

    74.10. R dealt with standing down staff, pay, holidays and instructing staff on their duties.

    74.11. The PAs wanted a layer of management installing between themselves and R, which indicates to me that the PAs saw R as their de facto employer.

    74.12. It was agreed that letters were sent in the name of K as "employer' without her knowledge or input.

    74.13. I find that the evidence of the claimant demonstrated that K had little control over her. I find that the claimant saw R as her 'boss'.

75. Applying my findings to the case law, I start with Choudhury J's Judgment in **Clark** (§ 52):

*"In my judgment, the following principles, relevant to the issue of identifying whether a person, A, is employed by B or C, emerge from those authorities:*

1. *Where the only relevant material to be considered is documentary, the question as to whether A is employed by B or C is a question of law:* ***Clifford*** *at [7].*
2. *However, where (as is likely to be the case in most disputes) there is a mixture of documents and facts to consider, the question is a mixed question of law and fact. This will require a consideration of all the relevant evidence:* ***Clifford*** *at [7].*
3. *Any written agreement drawn up at the inception of the relationship will be the starting point of any analysis of the question. The Tribunal will need to inquire whether that agreement truly reflects the intentions of the parties:* ***Bearman*** *at [22],* ***Autoclenz*** *at [35].*
4. *If the written agreement reflecting the true intentions of the parties points to B as the employer, then any assertion that C was the employer will require consideration of whether there was a change from B to C at any point, and if so how:* ***Bearman*** *at [22]. Was there, for example, a novation of the agreement resulting in C (or C and B) becoming the employer?*
5. *In determining whether B or C was the employer, it may be relevant to consider whether the parties seamlessly and consistently acted throughout the relationship as if the employer was B and not C, as this could amount to evidence of what was initially agreed:* ***Dynasystems*** *at [35]."*

76. The relevant material to be considered in this case was documentary and oral.

77. In this case, there is a mixture of documents and facts to consider, so the question is a mixed question of law and fact. This requires a consideration of all the relevant evidence, which I have undertaken above.

78. The contract drawn up at the beginning of the relationship is the starting point and I have to determine the true intentions of the parties. In this case, as the claimant's employment contract at the beginning of the relationship is the one dated 1 September 2021 [B77-B91].

79. It is asserted on behalf of K that R was the employer, so I have to consider whether there was a change from K to R at any point, and if so, how.

80. I find that it is relevant to consider whether the parties acted seamlessly and consistently throughout the relationship as if R was the employer, not K, as this could amount to evidence of what was originally agreed.

81. I find that that the fact that K was named as employer on the claimant's contract and signed the contract of employment is starting point that indicates that she was the claimant's employer, but that point is outweighed by the subsequent evidence that I have summarised in paragraph 73 above. I find that evidence points to K being employer in name only and that the irreducible fundamentals of the employer/employee relationship existed only between R as the employer and the

clamant as employee for the entirety of the claimant's employment between 1 September 2013 and 13 October 2019.

82. I find that the parties (including the first and fourth respondents) acted seamlessly and consistently throughout the relationship as if R was the employer. I find that this reflects the truth of what was envisaged by R and the claimant when K moved to Independent Payments.

**Implications of my Judgment**

83. At the end of the hearing, I discussed with the parties what the next steps would be. My Judgment has obvious implications for the parties that I have found were not the employer of the claimant.

84. The claimant's claims of discrimination have not been precisely described.

85. I have therefore made a separate case management order of my own motion to consider what the next steps should be, including:

    85.1. Determining the future participation (if any) of the first, second and fourth respondents);

    85.2. Defining the claimant's discrimination claims;

    85.3. Making orders for any additional disclosure of documents;

    85.4. Considering whether the existing bundle of documents could/should be edited;

    85.5. Considering judicial mediation;

    85.6. Listing the case for a final hearing; and

    85.7. Making any other case management orders that are appropriate.

Employment Judge S A Shore

Date 20 December 2021