IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

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Judgment of the Employment Tribunal in Case No: 4108350/2021 Issued Following Open Preliminary Hearing Heard on the Cloud Based Video Platform (CVP) at Edinburgh on the 15th of November 2021

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Employment Judge J G d'Inverno

Mr D McIntyre — **Claimant In Person**

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Cornerstone Community Care — **Respondent Represented by: Mr E Stafford, Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is:-

(Firstly) That the claimant, as at **1st** March 2021 being the date of cessation of his contractual relationship with the respondent ("the relevant date"), was a "worker" in terms of section 230(3)(b) of the Employment Rights Act 1996, and accordingly lacks Title to Present, and the Tribunal lacks Jurisdiction to Consider, his complaint of Unfair Dismissal.

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(Second) Separately and in any event, let it be assumed that the Tribunal had held that, as at the relevant date, the claimant was an employee in terms of section 230 of the Employment Rights Act 1996 ("the ERA") which it has not, as at that date the claimant would have lacked the period of service, requisite in terms of section 108 of the ERA, such as to entitle him to complain of, and confer upon the Tribunal Jurisdiction to consider, his complaint of Unfair Dismissal.

(Third) The claimant's claim is dismissed for want of Jurisdiction.

Employment Judge: **J d'Inverno**
Date of Judgment: **25 November 2021**
Entered in register: **26 November 2021**
and copied to parties

I confirm that this is my Judgment in the case of McIntyre v Cornerstone Community Care and that I have signed the Judgment by electronic signature.

REASONS

1. This case called for Open Preliminary Hearing, via the Cloud Based Video Platform ("CVP") at Edinburgh on the 15th of November 2021. The claimant, who had previously enjoyed the benefit of professional representation appeared on his own behalf. The respondent was represented by Mr Stafford, Solicitor.

The Nature of the Claim

2. This case is one in which, in terms of his initiating Application ET1 first presented on 12th March 2021, the claimant bears to give notice of a complaint of Unfair Dismissal in terms of section 98(4) of the Employment Rights Act 1996 ("the ERA") arising from the determination of his contractual relationship with the respondent effective as at 1st March 2021 .

The Respondent's Position

3. The respondents, who had entered appearance resisting the claim, assert that at the material time for the purposes of his claim, that is the 1st of March 2021 the Effective Date of Determination of their contractual relationship with the claimant, the claimant was not an "employee" in terms of section 230(1) and (2) of the ERA but rather was a "worker" in terms of section 230(3)(b) of the 1996 Act. Thus, they contend that the claimant lacks Title to Present and the Tribunal Jurisdiction to Consider, his complaint of Unfair Dismissal which in its turn fell to be dismissed for want of Jurisdiction.

4. In the alternative and let it be assumed that the Tribunal were to hold that the claimant was, at the material time 1st March 2021, an "employee" in terms of section 230(1) and (2) of the ERA, which is denied, as at that date the claimant, separately and in any event lacked the period of qualifying service, requisite in terms of section 108 of the ERA such as to entitle him to complain of and to confer upon the Tribunal Jurisdiction to Consider, the complaint of section 98(4) Unfair Dismissal which is given notice of; and that the claim fell to be dismissed for want of Jurisdiction, on that additional basis.

The Issues requiring investigation and determination at Open Preliminary Hearing

5. In terms of the Notice of Hearing issued to parties under cover of the Tribunal's email of 20th September 2021, the Preliminary Issues before the Tribunal for investigation and determination at Open Preliminary Hearing

were:- As at the material time for the purposes of his complaint that is the 1st of March 2021 being the date of determination of the claimant's contractual relationship with the respondents, was the claimant:-

5 (a) An "employee" in terms of section 230(1) and (2) of the ERA or alternatively a "worker" in terms of section 230(3)(b) of that Act

(Second) Let it be assumed that the claimant was an "employee" as at 1st March 2021, which is denied by the respondent, had the

10 claimant, separately and in any event, accrued at that date the minimum two year period of continuous employment requisite, in terms of section 108 of the ERA, to confer upon him Title to Present and upon the Tribunal Jurisdiction to Consider, his presented complaint of section 94 and section 98(4) Unfair Dismissal.

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Sources of Oral and Documentary Evidence

6. All witnesses gave their evidence on oath or on affirmation.

20 (a) The claimant gave evidence on his own behalf.

(b) For the respondent the Tribunal heard evidence from:-

- Ms R McGeoch, HR Officer of the respondent, and,

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- Ms C Masterton, the respondent's Service Manager

7. Parties lodged a Joint Bundle of Documents extending to 67 pages, to some of which the Tribunal was referred in the course of evidence and submission.

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Findings in Fact

8. On the oral and documentary evidence presented, the Tribunal made the following essential Findings in Fact restricted to those relevant and necessary to the determination of the Preliminary Issue of Jurisdiction.

9. The respondent is Cornerstone Community Care, a charity based in Scotland providing care and support for children, young people and adults within the local community.

10. The claimant has been engaged by the respondent under multiple contracts and in different capacities.

11. The claimant was first engaged by the respondent between 20th November 2015 and 31st March 2017, as a Relief Support Assistant, under a zero hours contract and was a "worker" under that engagement, in terms of section 230(3)(b) of the ERA. The terms and conditions of the Relief Contract under which the claimant worked during that engagement are copied and produced at page 31 of that Joint Bundle (J31). Under those terms the respondent was under no obligation to offer work to the claimant and the claimant, for his part, was under no obligation to accept any offer of work made by the respondent. The terms of the Relief contract neither created nor imposed upon either party, mutuality of obligation. The claimant was a "worker" in terms of section 230(3)(b) when working for the respondent under that engagement.

12. The claimant was further engaged by the respondent between 1st April 2017 and 30th June 2017 again as a Relief Support Assistant under a zero hours contract and was again a "worker" in terms of section 230(3)(b) of the ERA during that engagement. The terms and conditions of the Relief contract under which the claimant worked during that engagement are copied and produced at page 31 of that Joint Bundle (J31). Under those terms the respondent was under no obligation to offer work to the claimant and the claimant, for his part, was under no obligation to accept any offer of work made by the respondent. The terms of the Relief contract neither created nor imposed upon either party mutuality of obligation. The claimant was a "worker" in terms of section 230(3)(b) when working for the respondent under that engagement. The claimant continued in that period to work under the same terms and conditions of Relief contract copied and produced at page 31 of the Joint Bundle.

13. The claimant was next engaged by the respondent under a “Contract of Employment” as a Support Assistant on 1st July 2017 with 25 contracted hours per week. The terms and conditions of employment (the written Contract of Employment) under which the claimant commenced working on 1st July 2017 are copied and produced at J33-38 of the Bundle. Those terms and conditions created and imposed upon both the claimant and the respondent mutuality of obligation. The claimant was an “employee” in terms of section 230(1) and (2) of the ERA when working for the respondent under the engagement commenced by him on 1st July 2017.

14. By email dated 23rd of September 2020, copied and produced at pages 46-47 of the Joint Bundle and sent to the respondent’s Managers including Carol Masterton, the claimant gave notice of a requirement and an intention, on his part, to reduce his worked hours from 25 to around 16 hours per week and stating that he would like the same to be effective in November of that year and indicating that he looked forward to hearing from the respondents about the agreement of the same.

15. In the week preceding 15th November 2020, the respondents’ Manager Carol Masterton, spoke with the claimant and proposed that what the claimant wished to achieve by way of reduction of hours and increased flexibility to accommodate certain other work which he was undertaking, would be for him to return to working under a zero hours relief contract. The claimant stated that he wished to do so with immediate effect and the respondents’ Manager Carol Masterton agreed to that change in the claimant’s terms of contractual engagement with effect from 15th of November 2020.

16. The claimant’s so doing constituted his giving notice of termination of the Contract of Employment under which he had commenced working for the respondents on 1st July 2017. That intimated resignation was accepted by the respondent effective as at 15th of November and the Contract of Employment was acceptilated by the parties (that is brought to an end by mutual agreement) on the 15th of November 2020.

17. The respondents' policies required that in circumstances where an employee was ceasing to work under a Contract of Employment and thereafter was to be re-engaged under a zero hours relief contract as a "worker", that there be interposed between the date of termination of the Contract of Employment and the commencement date of the relief contract, a gap of not less than 7 days for the purposes of section 210 of the Employment Rights Act 1996.

18. The claimant's previous Contract of Employment terminated on the 15th of November 2020. The respondents' subsequent offer to engage the claimant as a "worker" under a new zero hours relief contract was made to and accepted by the claimant effective on 22nd of November 2021 .

19. The claimant first worked under that engagement on the 23rd of November 2021.

20. The claimant did not carry out work for the respondents in the period 15th to 22nd November 2020.

21. By letters dated 18th November 2020 the respondents' HR department wrote to the claimant acknowledging his resignation as an employee and separately communicating to him the offer to engage him from 22nd November 2020 going forward, as a "worker" under a zero hours relief contract. The terms and conditions of employment (the relief contract) under which the claimant worked with the respondents from 22nd November 2020 is copied and produced at page 40 of the Joint Bundle. The contract imposes no obligation upon the respondent to offer the claimant work and no obligation upon the claimant to accept any offers of work made. The contract does not create or otherwise impose upon either party mutuality of obligation. The claimant worked for the respondent in the capacity of a "worker" in terms of section 230(3)(b) of the ERA under the engagement which commenced on the 22nd of November 2020.

22. The claimant continued to work under the 22nd November 2020 relief contract until 1st March 2021 when the claimant was processed as a leaver by the respondent in consequence of his asserted "failure to contact the respondent". The 22nd November 2020 relief contract was terminated by the respondent on 1st March 2021.

23. Let it be assumed that the Tribunal had found in fact that the 22nd November Relief Worker contract was in reality a Contract of Employment under which the claimant worked as an employee in terms of section 230(1) and (2) of the ERA, which it has not, the elapse of a period of 7 days during which the claimant did not work for the respondent, in the period between 15th and 22nd November 2020 would have operated to break continuity of employment for the purposes of section 108 of the ERA with the claimant beginning to accrue continuity of new with effect from the 22nd of November 2020.

24. The claimant did not countersign and return to the respondents, as requested by them, either his Contract of Employment which commenced on the 1st of July 2017 upon the asserted continuation of which he founds or his subsequent zero hours Relief Worker contract which commenced on the 22nd of November 2020.

25. While it is the respondents' policy to request that Relief Workers and or "employees" countersign and return the offers of engagement which are issued to them, it is not uncommon for "employees" and or "workers" to fail to do so, as did the claimant on those two occasions. In such circumstances where an "employee" or "worker", notwithstanding, reports for and works under and in response to the offer of engagement the respondent recognises that act as acceptance of the offer of engagement and the "employee" or "worker" is deemed to thereafter work under the relevant terms and conditions incorporated or otherwise referred to in the offer.

26. In respect of the offer to engage the claimant as an "employee" issued by the respondents and effective as at 1st July 2017 and the offer to engage the claimant as a "worker" under a zero hours relief contract effective as at

22nd November 2020, the claimant so communicated his acceptance of those offers by reporting for/accepting offers of work and working in response to and under the terms and conditions of engagement set out and otherwise referred to in the respective offers of engagement.

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27. Immediately following her acceptance of the claimant's resignation from his then Contract of Employment, in her discussions with the claimant in the week prior to 15th November 2020, the respondents' Manager Carol Masterton immediately gave effect to the termination of the Contract of Employment by reviewing the then work rotas and directing an appropriate reduction in the claimant's hours of offered shifts and including the interposing of a period between 15th and 22nd November during which no shifts were offered to the claimant and the claimant did not carry out work for the respondents.

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28. Upon becoming aware of the impact on his potential earnings associated with the imposition of a week of no working between contracts the claimant sent an email to Carol Masterton on 14th November 2020, copied and produced at J-48, in which he highlighted the same and asked that Carol Masterton *"please sort this out.* Carol Masterton did so to the extent that she was able, but was unable to change the requirement that there be a period of 7 days during which the claimant did not work between the termination of his previous Contract of Employment and the commencement of his working under the new relief contract.

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29. On 18th November 2020, a date after which the claimant had resigned and his resignation had been accepted effective as at the 15th of November and his previous Contract of Employment terminated on that date, the claimant wrote to Carol Masterton stating that he was not happy with the situation of not working in that current week. He stated in that communication that he felt he should have been notified about this before his pre-existing contract terminated and, in the circumstances of his not having been, that he wanted *"my contract reinstated as soon as possible because I can't live like this at Christmas. My pay will be less than £320 where I have outgoings of nearly*

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£850 a month ...so I'm going to be more in debt thanks to this situation. I need this to be dealt with as soon as possible. Look forward to hearing from you."

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30. By return of email the respondents' representative proposed that she and the claimant meet at 12 noon on the following day, over Teams, at 12. The claimant, for his part, responded confirming the arrangement to meet.

31. The respondents' Carol Masterton and the claimant discussed the issue of the reduction in his income, at or about Christmas time, on the following day 19th November. In the course of that discussion Carol Masterton was able to reassure the claimant that he was likely to be offered sufficient shifts between that date and Christmas such that, if he accepted and worked them, the cash flow concerns which he had identified could be addressed together with his favoured level of income going forward.

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32. In those circumstances Carol Masterton did not consider that the claimant had changed his mind regarding his earlier intimated resignation from his previous Contract of Employment.

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33. Separately and in any event that previous contract having already been terminated, as was recognised in his email of 18th November 2020 by the claimant's use of the past tense and reference to wanting *"my contract reinstated [1],* the respondent was under no obligation to reinstate the Contract of Employment or to re-engage the claimant under a further Contract of Employment as opposed to under the zero hours Relief Worker contract already offered.

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The Applicable Law

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34. The relevant statutory law is to be found in terms of:-

   (a) section 230 of the Employment Rights Act 1996, which contains definitions of "employee" and of "worker" for the jurisdictional

purposes with which the Tribunal is concerned in this Open Preliminary Hearing;

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(b) section 108 of the same Act which prescribes the minimum period of continuous employment which is a pre-requisite to the acquisition by an "employee" of the right to complain of section 94 and 98(4) ERA Unfair Dismissal; and

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(c) section 210(4) of the 1996 Act in relation to the definition of “a week” which does not count in computing the length of a period of continuous employment and thus, which breaks continuity of employment.

35. The terms of those provisions are respectively as follows:-

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“230 Employees, workers etc.

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(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

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(3) In this Act “worker" (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under) —

(a) a contract of employment, or

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(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not

by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be
5 *construed accordingly.*

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

10 ***"108 Qualifying period of employment***

(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than [F1two years] ending with the effective date of termination."

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"210 Introductory.

(1) References in any provision of this Act to a period of continuous employment are (unless provision is expressly made to the
20 *contrary) to a period computed in accordance with this Chapter.*

(2) In any provision of this Act which refers to a period of continuous employment expressed in months or years —

25 *(a) a month means a calendar month, and*

(b) a year means a year of twelve calendar months.

(3) In computing an employee's period of continuous employment for
30 *the purposes of any provision of this Act, any question —*

(a) whether the employee's employment is of a kind counting towards a period of continuous employment, or

(b) whether periods (consecutive or otherwise) are to be treated as forming a single period of continuous employment,

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shall be determined week by week; but where it is necessary to compute the length of an employee's period of employment it shall be computed in months and years of twelve months in accordance with section 211.

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(4) Subject to sections 215 to 217, a week which does not count in computing the length of a period of continuous employment breaks continuity of employment.

15 *(5) A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous."*

Summary of Submissions

20 36. The claimant, while not expressly denying that he had requested a reduction in his hours and greater flexibility in his work pattern, stated in evidence and founded upon a number of specific matters:-

(a) The fact that while he had countersigned and returned to the
25 respondent as requested his original offer of engagement as a zero hours Relief Worker commencing on 20th November 2015 he in fact had not countersigned and returned the offer to re-engage him on a zero hours contract as a Relief Worker sent to him on the 18th of November and which is founded upon by the
30 respondents and produced at page 40 of the Joint Bundle, inviting the Tribunal to infer from his non-retum of a countersigned copy by way of written acceptance that he had not entered into any such contract and therefore, by implication,

should be regarded as still continuing to work under the previously instituted Contract of Employment;

(b) That he had worked a shift on the 20th of November 2020 and thus that there had not occurred between the alleged termination of his Contract of Employment on the 15th November 2020 and the commencement of the asserted new Relief Worker's zero hours contract on the 18th of November 2020, a one week period during which he did not work such as to break continuity of employment in terms of section 210(4) of the ERA; In this regard the claimant invited the Tribunal to reject as unreliable the copy rotas produced by the respondent because there had been occasions in the past when the rota was found to be inaccurate or not up-to-date at the relevant times.

(c) That he had been unaware, prior to agreeing the termination of the Contract of Employment and the move to a further zero hours Relief Worker contract that there would be interposed between the last date of the first and the first date of the second, a one week period during which he would not carry out work for and thus not be paid by the respondents, with a consequent potential impact on the level of his income at or about Christmas time of that year; and, that had he been so aware before the termination of his pre-existing Contract of Employment he would not have gone forward with the change.

(d) Although not expressly submitted by the claimant the implication arising from his above submission appeared to be that in those circumstances the parties' mutually agreed termination of the pre-existing Contract of Employment, effective as at 15th November 2020, should be regarded as vitiated or having been otherwise reduced thus leaving in place unaltered, the pre-existing Contract of Employment and further,

(e) That he should be regarded as having continued to work under that pre-existing Contract beyond the 15th of November 2020 up to and including the 1st of March 2021 upon which latter date he
5 asserts he was dismissed, and unfairly dismissed, in terms of section 98(4) of the ERA, by the respondent.

37. The claimant did not engage directly with or otherwise respond to the respondents' submission which was to the effect that whereas under the
10 Contract of Employment which parties were in agreement subsisted from the 1st of July 2017 up to and including at least the 15th of November 2020 there existed mutuality of obligation between the parties in relation to the provision of and the carrying out of work, that no such mutuality of obligation existed under the Relief Worker zero hour contracts under which the claimant was
15 engaged and worked in the period prior to 1st July 2017 and, in the respondents' representative's assertion, in the period from 22nd November 2020 up to the date of determination of the contractual relationship on 1st March 2021.

20 **Submissions for the Respondent**

38. Read short the respondents' representative submitted under reference to the various written contractual terms and terms of engagement produced and relied upon:-

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(a) That during the periods 1st July to 15th November 2020 and the period 22nd November 2020 to 1st March 21

(b) The claimant's engagement with the respondents first as an
30 "employee" and then as a "worker" were respectively governed by the written terms and conditions of contract produced and founded upon by the respondent, notwithstanding the claimant's failure to countersign and return a written acceptance of either contract. Having received the respective offers of engagement,

respectively under a Contract of Employment and of engagement under a zero hours Relief Worker contract, the claimant had presented himself for work, had accepted offers of work and had thus communicated his acceptance of those respective terms and conditions.

(c) That the claimant having founded upon his acceptance by actings in respect of the Contract of Employment upon which he relied could not in the same breath successfully maintain that his same actings in respect of the offer of engagement under a zero hours Relief Worker contract had not constituted an acceptance of that offer.

(d) Separately and in any event that it was clear from the respective terms and conditions of contract and the actings of parties, that whereas mutuality of obligation existed under the Contract of Employment, it did not exist under the zero hours Relief Worker contract.

(e) That the existence of mutuality of obligation was one of the irreducible minima absent which a Contract of Employment could not exist.

(f) That the claimant, on his own evidence and the respondent had mutually agreed to the termination of the Contract of Employment with an Effective Date of Termination of 15th November 2021 which termination had occurred as at that date.

(g) That it was only after the termination and the issuing to the claimant of the subsequent offer to engage him on a further zero hours Relief Worker's contract that the claimant had raised the possibility of changing his mind and wishing to have his old Contract of Employment reinstated.

(h) That it was clear from the terms of the claimant's email of 18th November 2020, upon which he founded, and not least by his use of the past tense and of the term "reinstated" that the claimant accepted, as at the 18th of November 2020 that his previous Contract of Employment had been terminated.

(i) The fact was that as at the original contract having been terminated by mutual agreement the respondent was under no obligation to reinstate the same and as a matter of fact had not done so.

(j) That remained the position regardless of whether the Tribunal did or did not accept the respondents' representative's witnesses' explanation as to why, following a subsequent meeting with the claimant on the 19th of November, she understood that the claimant no longer required the respondent to consider reinstatement.

(k) He invited the Tribunal to accept as credible and reliable Ms Masterton's evidence that on the 19th November 2020 she had reassured the claimant, to his satisfaction, in relation to the immediate issue of reduction in his income and the number of hours which he should be able to anticipate being offered going forward,

39. Thus submitted the respondents' representative, the claimant not being an "employee" but rather being a "worker" in terms of section 230 of the ERA as at the 1st of March 2021 the same being the date upon which his contract with the respondent was determined, the claimant lacked Title to Present and the Tribunal Jurisdiction to Consider, his complaint of Unfair Dismissal in terms of section 98(4) of the 1996 Act, which claim fell to be dismissed for want of Jurisdiction.

40. Secondly, and in the alternative let it be assumed that the Tribunal were to hold that in the period between 22nd November 2020 and 1st March 2021 the claimant continued to be an "employee" working under a Contract of Employment in terms of section 230 of the ERA, which the respondent denied, there had in any event occurred, between the termination of the claimant's previous Contract of Employment on 15th November and the commencement of the new Contract on 22nd November, both 2020, a gap of 8 days during which the claimant had not worked and thus that that week was a week which in terms of section 210(4) of the 1996 Act did not count in computing the length of a period of continuous employment and broke continuity of employment. The consequent result was that as at what would fall to be regarded as the Effective Date of Termination of the second Contract of Employment, 1st March 21, the claimant lacked the minimum two year period of continuous employment such as to confer upon him, standing the terms of section 108 of the ERA 1996, the right to complain of Unfair Dismissal, and to confer upon the Tribunal the Jurisdiction to Consider the claimant's complaint of Unfair Dismissal in terms of sections 94 and 98(4) of the 1996 Act.

41. Thus, on that separate and alternative ground the respondents' representative submitted that the claimant's claim fell to be dismissed for want of Jurisdiction.

42. In respect of the above the respondents' representative invited the Tribunal to hold that in the period between 15th and 22nd March, the claimant had not carried out work for the respondent and in particular had not worked the shift which he asserted in his pleadings that he had worked on the 20th of November 2020. In so finding in fact the respondents' representative invited the Tribunal to reject, as unreliable, the claimant's bald assertion in evidence that he had worked a shift on that day, he being unable to provide any evidential basis for that assertion other than the fact that he had "never missed a shift" and therefore must have worked what had been, prior to the 15th November 2020, a scheduled shift which he was due to work. The respondents' representative invited the Tribunal to prefer the evidence of

Ms Masterton which was to the effect that the claimant had not worked a shift in that period and had not been paid for any such shift (a) because the whole purpose of the adjustment of the rota which she had directed, was to put in place a period during which the claimant did not work. Secondly, that it would have been impossible for the respondents' Payroll Department to process any pay for the claimant and further that it would not have been possible for the claimant to have worked in that period without her being aware of it and finally, in the event that the Tribunal felt itself unable to choose between the evidence of Ms Masterton on the one hand and that of the claimant on the other the contemporaneously generated documents, including shift rota and pay roll records, fell to be regarded as the best evidence, the same being documents which all indicated that the claimant did not work a shift on the 20th of November 201 5.

Discussion and Disposal

43. The evidence of both the claimant and of Ms Masterton, the two negotiating parties, was not at large on the question of whether they had discussed and in fact agreed, some time in the week prior to 15th November 2020 that the claimant's then existing Contract of Employment should be terminated and that the claimant would then be re-engaged on a further zero hours Relief Worker's contract of the same type and on the same terms as he had originally worked for the respondent, in order to accommodate the claimant's communicated requirement that he reduce his hours and to deliver to him more flexibility as to when he would be available to accept offers of shifts from the respondent.

44. The principal witness evidence also coincided to the extent of identifying :-

   (a) that the claimant, for his part, had not realised and the respondents' Manager, for her part, had forgotten, that the respondents' policy in such circumstances would require that there be a break of a period of at least one week between the termination of the Contract of Employment and the

commencement of the further zero hours Relief Worker contract for the purposes of breaking continuity of employment in terms of section 210(4) of the ERA;

5 (b) that it was only after the termination of the claimant's Contract of Employment on the 15th of November 2020;

(i) that the respondents' Ms Masterton either remembered or was reminded by HR of the requirement for a one week gap of non-working and gave instructions for the same to be reflected in the shift rota, and,

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(ii) that the claimant, for his part, realised that the interposing of a week of non-working would have an adverse impact upon his level of income at Christmas time the following month; and,

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(c) that it was only on the 18th of November, that is a date after the date of termination of the Contract of Employment that he communicated a desire to have the now terminated previous Contract of Employment reinstated for those cash flow reasons.

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45. All of the above is reflected in the Tribunal's Findings in Fact.

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46. The evidence of parties thereafter diverged in the sense:-

(a) That Ms Masterton's evidence, under reference to the email chain produced, was that in response to the claimant's email of 18th November 2020, she had suggested that she and the claimant discuss a resolution to his concerns on the following day 19th November, that they had that discussion at the end of which she had reassured the claimant, and the claimant had declared himself satisfied with her reassurance, as to the number of hours that he

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might confidently expect to be offered not only in the period between the 19th November and Christmas such as to address his immediate cash flow concerns but also going forward thereafter, and that thus it was not necessary for the respondent to give consideration to the claimant's indicated preference of the previous day to have his now terminated Contract of Employment reinstated.

(b) The claimant's evidence was to the effect, notwithstanding the existence of Ms Masterton's email reply of 18th November 2020, that Ms Masterton had failed to respond to him in any way in relation to his email of the 18th of November and that he and she had not subsequently discussed matters at all on the 19th of November thus, it was his position that he expected the respondents to and that the respondents ought to have informed the Payroll Department that he had *"changed his miner* about *"leaving,* that is about the notice of termination of his Contract of Employment communicated by him previously.

47. I preferred the evidence of Ms Masterton in relation to the question of the proposal and the occurrence of a discussion between the parties on 19th November. That evidence was supported by the email chain and Ms Masterton was unequivocal about the content of the discussion and its outcome, a position which the claimant, for his part, was unable to take issue with given his bald denial that there had been any response from Ms Masterton whatsoever to his email of 18th November. I accepted Ms Masterton's evidence in this regard as both credible and reliable as is reflected in the Tribunal's Findings in Fact.

48. Regardless of whether Ms Masterton's recollection or that of Mr McIntyre was to be preferred it was clear from the terms of Mr McIntyre's email of 18th November 2020, by his use of the past tense and of the term "reinstated" that he understood that his email was being written and communicated "after the event" that is to say after his pre-existing Contract of Employment had

already come to an end by mutual agreement. In those circumstances, and even absent Ms Masterton's explanation as to why she did not do so, an explanation which I have accepted, the respondent was under no obligation to agree to undo the termination or to otherwise agree to the reinstatement of the pre-existing Contract of Employment and, as a matter of fact, did not do so.

49. While in fairness to Mr McIntyre he did not expressly make such a submission, lest he be of the view that the same was the implication arising from what he did say, I reject the proposition that by reason of his not being aware, in advance to his agreeing, that the course of action which he agreed with the respondents' Ms Masterton would result in there occurring a week of non-working between the termination of the Contract of Employment and the commencement of the further zero hours Relief Worker's contract, that the mutual agreement between the parties to bring the Contract of Employment to an end was automatically vitiated or otherwise rendered unenforceable and of no effect.

50. That fact of its own falls far short of what would be required to establish a case of uninduced essential error sufficient to render parties' agreement to terminate the Contract of Employment void *ab initio* that is from its beginning. There was no evidence before me that would go to sustain, nor was there any case pled before me of alleged innocent, negligent or fraudulent misrepresentation such as to render the agreement voidable and separately and in any event to suggest that it had subsequently been avoided.

51. On the evidence presented I was accordingly satisfied, as is reflected in the Tribunal's Findings in Fact, that the pre-existing Contract of Employment under which the claimant worked in the period 1st July 17 up to 15th November 2020 had been terminated on that latter date, by the mutual agreement of the parties.

52. The claimant accepted and relied upon the existence of a pre-existing Contract of Employment but, impliedly rejected the existence of the subsequent zero hours Relief Worker's contract. His explanation for the latter position was that he had not countersigned and returned any copy of the written offer of engagement dated 18th November 2021, a fact which was accepted by the respondent. The claimant, however, had equally failed to countersign and return any copy of the offer of "Employment" dated 1st of July 2017 upon which, of necessity, he required to found and did found for the purposes of his complaint of unfair dismissal. As the Tribunal has found in fact the claimant communicated his acceptance of both those offers by virtue of his subsequent actings and carrying out of work for the respondent.

53. I was accordingly satisfied on the oral and documentary evidence that the pre-existing Contract of Employment which commenced on 1st of July 2017 was terminated by mutual agreement of the parties effective as at 15th November 2020 and ceased to exist. I was equally satisfied that the terms and conditions of contract under which the claimant carried out work for the respondents thereafter, in the period 22nd November 2020 to 1st March 2021, were the written terms and conditions sent to the claimant, and in terms of which the respondent offered to contract on 18th November 2020, and that the claimant communicated his acceptance of that offer by agreeing to undertake work and subsequently working shifts offered by the respondent under them.

54. I am further satisfied that those terms and conditions under which the claimant subsequently worked did not give rise to mutuality of obligation, the same being one of the irreducible minima of or essential requirements, absent which a Contract of Employment cannot exist. Thus, as reflected in the Tribunal's Findings in Fact I was satisfied on the evidence that in that latter period the claimant was not an "employee" but rather was a "worker" in terms of section 230 of the ERA and as such lacks Title to Present and the Tribunal lacks Jurisdiction to Consider his complaint of section 94 and 98(4) ERA Unfair Dismissal, which complaint falls to be dismissed for want of Jurisdiction on that ground.

55. Separately and in any event, and as found in fact, the claimant did not work a shift for the respondent on the 20th of November 2020 and thus further found that in consequence there had occurred between the termination of the pre existing Contract of Employment on 15th of November and the commencement of the subsequent zero hours Relief Worker's contract on 22nd November, both 2020, a week which did not count as continuous employment, in terms of section 210(4) of the ERA and thus broke continuity of employment. In those circumstances and let it be assumed that the Tribunal had found that the claimant was subsequently working under a further Contract of Employment, which it has not, he would not have accrued, as at what he asserts would be the Effective Date of Termination of that second employment, the minimum two years of qualifying continuous service absent which, in terms of section 108 of the ERA, he does not possess title to present and the Tribunal has no Jurisdiction to Consider the complaint of Unfair Dismissal which complaint, on that additional ground, separately falls to be dismissed for want of Jurisdiction.

Employment Judge: **J d'Inverno**
Date of Judgment: **25 November 2021**
Entered in register: **26 November 2021**
and copied to parties

I confirm that this is my Judgment in the case of McIntyre v Cornerstone Community Care and that I have signed the Judgment by electronic signature.