EMPLOYMENT TRIBUNALS

Claimant: Mr C Edefah

Respondent: All Saints Hatchem Community Centre

RECORD OF AN OPEN PRELIMINARY HEARING

Heard at: Ashford (In person) **On:** 24 November 2021

Before: Employment Judge Nash (sitting alone)

Appearances
For the claimant: Mr Ross, Counsel
For the respondent: Mr Johns, Counsel

JUDGMENT

The Claimant worked for the Respondent under a contract of employment.

REASONS

1. Following ACAS Early Conciliation from 5-16 November 2020, the Claimant presented his claim to the Tribunal on 19 November 2020.

2. At the hearing the Claimant gave oral evidence. The Respondent relied on two written witness statements of Mr Livingstone-Leacock, a caretaker, and Ms Sabina Masimova, a manager; neither witness attended the tribunal. The tribunal had sight of a bundle to eighty-three pages. All references are to this bundle unless otherwise stated.

The Claims

3. It was agreed that the claims were:-

   i. Breach of contract;

   ii. Unfair dismissal for assertion of a statutory right under section 104 Employment Rights Act

   iii. Unauthorised deduction from wages (National Minimum Wage) under section 13 of the Employment Rights Act;

   iv. Annual leave under reg 14 Working Time Regulations;

   v. Failure to provide itemised payslips under Section 8 of the Employment Right Act;

   vi. Failure to provide a written statement of terms and conditions under Section 1 of the Employment Rights Act; and

   vii. Victimisation in respect of age under section 27 of the Equality Act 2010.

Preliminary Issue

4. The Respondents informed the tribunal that a witness who was subject to a witness order had not attended. The parties were invited but did not wish to make submissions on this point and it was agreed that this would be dealt with, to whatever extent was necessary, after the substantive hearing. The parties were invited to make any written representations.

The Issues

5. The issues for this hearing were agreed as follows:-

   i. Is the Claimant an employee?

   ii. If not, is the Claimant a so-called “limb b worker” or an employee for the purposes of the Equality Act 2010?

The Facts

6. The Respondent is a charity which leases out its premises to community groups and local people. It has an employed manager, Ms Masimova. There were some others who worked for the Respondent although the Tribunal made no findings as to their employment status. The Respondent is run by a board of Trustees.

7. The Claimant originally volunteered for the respondent. The existing caretaker, Gary, recommended him to the Respondent when it was looking for a second caretaker.

8. The Claimant duly had a meeting with Ms Masimova and Gary on 17 November 2018. Some parts of this meeting were agreed, some were not.

9. All parties agreed that it was agreed that the claimant would start work in January 2019 as the second caretaker. It was agreed that they discussed his hours. It was agreed that he showed his passport and his driving licence, and that he had the right to work in the United Kingdom. It was agreed that the manager said that she wanted someone with commitment for the role.

10. What was not agreed was what was said about the Claimant's employment status. The Respondent said that the Claimant was told in terms that he would work as an independent contractor. The Claimant said that nothing was discussed about employment status and he assumed, in effect, that he was an employee, if indeed he thought about it.

11. There was also a dispute about whether payment was discussed. The Claimant said that he was not told anything specific about payment. He was told that the pay might not be very good, but it was reliable, and it would be paid directly into his bank account, and he would be given regular days of the week to work.

12. The Respondent's case was that he was told to register with HMRC as an independent contractor as he would be liable to tax. It was agreed that he would be paid £650 for 74 hours work.

13. The claimant did not deny that the Respondent suggested that the Claimant take a trial period in the role.

14. The tribunal made findings of fact as to what happened at the meeting. The Tribunal preferred the claimant's account for the following reasons.

15. The Respondent relied on the written statement of the first caretaker as to what happened at the meeting. However, the Tribunal attached very little weight to this statement for the following reasons. The language in the statement was typical of a solicitor or a manager, for instance there were references to "caretaker services" rather than setting out what the role involved. Further, the first caretaker was not before the Tribunal, did not give evidence on oath and was not subject to cross examination.

16. The claimant's account that the question of employment status was not discussed was consistent with the lack of contemporaneous documents as to his working for the respondent. It was consistent with the respondent not providing documents going to this question whilst the claimant was attending and carrying out his work. The claimant gave consistent and detailed evidence under cross examination. It was plausible that a small community organisation might start someone working in such a way, rather than, say, a large company with a well-resourced HR department. Ms Masimova's evidence was not given before the tribunal, was not on oath and was not subject to cross examination.

17. After the meeting it was agreed that the Claimant would start work in the New Year on 7 January 2019. Apart from his first short month, his wages were regularly

about £650 a month. This was recorded on the Respondent's document and the Claimant agreed this was correct. The claimant was paid directly into his bank account and no tax or National Insurance were deducted. The Claimant, who was retired, did not provide the Respondent with a P45. Nothing else was given to the Claimant in writing when he was paid. The Respondent provided records of payments made which were marked 'caretaker services'.

18. The Claimant did not register his earnings with HMRC. He said that as a pensioner he thought his wages were too low to incur tax and there had been no suggestion from the Respondent that he had to register with HMRC.

19. The parties gave different accounts of the claimant's hours and working pattern. The Claimant said that his main hours were 4.00pm to 10.00pm, Monday to Tuesday, plus 8.30am to 4.30pm on Saturday and Sunday. There might be extra time if the centre had functions, usually on a Saturday night, for instance, until 11.00pm. He said that he always worked from 4.00pm to 10.00pm as he had to arrive at work by 4pm before the administrator, Maria, left at the end of her shift, so they could do a hand-over. He said on Wednesday and Thursdays, Gary did the same thing, that is, he attended by 4pm to ensure that he could do the hand-over with Maria. On Fridays the manager attended. He said on Saturdays he arrived by 8.30am to open up the premises and would work (unless there was a function) until 4.00pm. He said that he covered about 37 functions in total during his time with the Respondent. The Claimant said that he simply did the amount of work that was necessary, and his pay did not vary.

20. The Respondent's evidence as to the claimant's hours was somewhat different. It said that typically he worked about three hours on Mondays and Tuesdays. He worked Saturdays mostly from 10.00am to 4.00pm and occasionally he worked Sundays. The Respondent said that the Claimant would be paid separately for any extra work such as functions.

21. The tribunal resolved this conflict as follows. In respect of the Claimant's pattern of work, the only legible rota available to the Tribunal fitted better with the Claimant's, rather than the Respondent's, case, because it included him being rostered on a Sunday. There was no legible rota for the Claimant which did not show him working Sundays. Further, the Claimant's account of his working pattern was detailed and internally consistent and plausible under cross examination. Accordingly, the Tribunal preferred his account of his working pattern. The tribunal thus found that the Claimant worked about 117 hours per month.

22. The Claimant gave the following account of his duties which the tribunal accepted as it was internally consistent, plausible and not materially challenged :-

    i. He was responsible for opening up or closing, as appropriate, the premises, checking that everything was in working order, including for instance the toilets;

    ii. He managed the premises for users; for instance, Alcoholics Anonymous hired a room and he set up the room and cleared up as appropriate;

iii. He dealt with issues with the building as they arose;

iv. He checked the cleaning was being done;

v. He introduced, during his employment, a system to improve hiring of the halls. He introduced a document for clients to complete when they applied to hire the halls. This ensured that client enquiries were managed properly and not overlooked. This system was put into practice and worked well;

vi. He checked clients in and out at the end of functions, signing them off to make sure the premises were left in an acceptable condition.

23. In respect of supervision, Gary, his fellow caretaker, started by explaining what to do. He said that as his responsibilities grew, they did not need to supervise him. He said that the manager, Ms Masimova, did instruct him on certain things such as cleaning things up. The Tribunal had sight of a number of texts when Ms Masimova instructed the claimant to carry out certain tasks.

24. The Claimant also gave unchallenged evidence that he came in on his days off and did cleaning, if he felt it was needed or the manager was unhappy about the state of the building. He received no extra pay.

25. The claimant's evidence was that if Gary, his colleague, wanted time off, the claimant would cover for him. The tribunal accepted this evidence which seemed plausible and is common practice in the sector. The tribunal accepted the respondent's evidence that if the claimant needed time off for a medical appointment, the respondent would fit around this.

26. All appeared to go well between the claimant and respondent until Covid, lockdown and furlough. On 23 March 2020, as the country went into the first lockdown, the centre stopped operating. The manager emailed the Claimant telling him to close down the premises.

27. The respondent did not put the claimant on furlough as an employee. The manager said that she had emailed the Claimant about his access to the Self-employed Government Furlough Scheme on 11 April, but the Tribunal was not taken to any document. The Respondent said that the Claimant had complained that he was not put on furlough as an employee and there was a phone conversation when the parties clarified their disagreement about this.

28. In the event, the centre was hired out to an NHS Blood Transfusion Service on 16 April, and the Respondent asked the Claimant to go in. He went in beforehand and found that the centre was not in an acceptable condition. He said that he asked a friend to accompany him and help tidy up. The manager was not aware of this arrangement and found him and the friend on site on 16 April. The Claimant said that he did not pay his friend and his friend was doing him a favour.

29. The NHS session duly went ahead. On 17 April, the NHS asked to use some extra space at the centre and the Claimant agreed. Ms Masimova was displeased because this was contrary to her agreement with the NHS.

30. The Claimant said that Ms Masimova was very angry and dismissed him from his job. Ms Masimova denied this. Her account was that she was displeased about the use of the extra space and viewed it as a matter to be dealt with going forward but, in the event, Covid and lockdown prevented this.

31. Ms Masimova emailed the NHS explaining that they were not permitted to use the extra space and stated that the Claimant was, 'now under disciplinary investigation' as a result.

32. Ms Masimova asked the Claimant to come into a meeting. He refused because he believed he was subject to a disciplinary procedure. Ms Masimova told the Claimant that he was not subject to a disciplinary procedure because this procedure only applied to employees. Essentially, this brought the underlying tension between the parties about the claimant's employment status into the open.

33. On 2 June 2020 the Respondent invited the Claimant to a meeting. Ms Masimova asked him to sign a written contract which was backdated to 7 December 2019 describing him as an independent contractor. The Claimant failed to sign and the parties, in effect, continued to disagree about the Claimant's employment status. The claimant applied to the tribunal.

<u>The Law</u>

34. Section 230(1) Employment Rights Act, defines an employee as

    'an individual who has entered into or works under a contract of employment'.

    Section 230(2) provides that

    'a contract of employment means a contract of service or apprenticeship whether express or implied and if it is express, whether oral or in writing'.

    There is no further definition of "contract of service" in the Employment Rights Act.

35. In respect of what might be termed as the money claims, Regulation 2(1) Working Time Regulations states:-

    ""worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under)–
    (a) a contract of employment; or
    (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; (This is known as a "limb b worker".)

36. The definition of a worker in Regulation 2(1) is identical to that contained in the National Minimum Wage Act 1988 and Section 230(3) of the Employment Rights Act.

37. In respect of the Equality Act, the definition of employment is found at section 83(2). This provides, for the purposes of part 5 of the Act that employment means

    '*employment under a contract of employment, a contract of apprenticeship or a contract personally to do work'.*

38. In *Windle and anor v Secretary of State for Justice 2016 ICR 721, CA*, and *Pimlico Plumbers Ltd and anor v Smith 2018 ICR 1511, SC*, we see that the scope of the term "employee" in the Equality Act aligns with that "worker" under section 233 of the Employment Rights Act .

Submissions

39. Both parties made oral submissions and the Claimant provided written submissions. The Respondent stated that the Claimant's submissions as to the law were agreed between the parties.

Applying the Law to the Facts

40. The first issue was whether the Claimant was an employee, which would be determinative of all issues, in that the tribunal would then have jurisdiction over all his complaints.

41. The Tribunal viewed the written contractual document as of little assistance. This was because it was retrospective. It was not suggested as an option until the Claimant had stopped coming into the centre and stopped working. The Claimant refused to accept this retrospective characterisation of the working relationship. Therefore, it was not a reliable guide to the parties' intentions or actions as to the working relationship at the material time.

42. The Tribunal found that there was a contract between the Respondent and the Claimant for the following reasons. There was an agreement between the manager and the Claimant which started in December 2018 and which was evidenced by the Claimant working. Consideration passed both ways in that the Claimant was paid and he provided work. There was an intent to create legal relations as the Claimant was paid for what he did.

43. The Tribunal went on to consider what type of contract this was. Was it a contract of employment?

44. The Tribunal firstly applied what is known as the multiple test of employment status as set out in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD* and confirmed by the Supreme Court in *Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC*:-

    - did the worker agree to provide his or her own work and skill in return for remuneration (including whether there was a requirement of personal performance as opposed to a right of substitution)?

- did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?

- were the other provisions of the contract consistent with its being a contract of service?

45. The tribunal also considered if there was what is usually referred to as an "irreducible minimum" of an obligation to provide and to accept work (see *Nethermere (St Neots) Ltd v Gardiner and anor 1984 ICR 612, CA*, and *Carmichael and anor v National Power plc 1999 ICR 1226, HL*).

46. The tribunal firstly considered mutuality of the obligation, that is, was there a bare minimum or a reasonable amount of work that the Claimant agreed to provide and was felt obliged to provide and that the Respondent felt obliged to offer? The Tribunal found that there was mutuality of obligation for the following reasons. The most important factor was that the Claimant worked to a rota. He worked regular hours. He worked the same hours in the same place every week.

47. The only variation to the claimant's regular hours was a reasonable amount of what might be termed overtime. However, working overtime does not mean that a person is not an employee. Many employees have regular hours with the option of overtime on top. The claimant's overtime was also at the same time every week – Saturday nights.

48. In the view of the Tribunal, the centre could not have functioned effectively if there was not mutuality of obligation. The centre had a number of clients who were dependent on the centre being open and closed on time. There was no suggestion that Ms Masimova or anyone else was in the habit of contacting the Claimant to ask if he would go down to open or close the centre. The tribunal found that she did not need to do this because the respondent relied on the claimant being present as per his rota and long term working pattern. The Claimant gave detailed evidence of how the rota operated, in practice, and of how he had to attend in good time, at 4.00pm, to carry out the handover. The Tribunal had accepted this evidence. It was true that the NHS April 2020 arrangement was specifically arranged between Ms Masimova and the claimant. However, this was unusual. It was during the COVID lockdown when the centre was otherwise closed.

49. The Claimant had given up voluntary work to start work for the respondent, which was consistent with his understanding that the Respondent was obliged to give him regular work.

50. The Tribunal found that the Claimant was integrated into the Respondent's functions. His function as caretaker was essential to the respondent's ability to hire out the premises.

51. The Claimant's evidence was that he never took time off. Accordingly, there was no direct evidence as to whether the claimant believed that if he did not feel like going into work, he had the right not to turn up to work. However, the Tribunal found that this would be implausible. He was on the rota.

52. There was a bare assertion in Ms Masimova's witness statement that alternative caretaker provision could be made if the claimant did not attend. The Tribunal did not accept this evidence for the following reasons. There were no details. It was not said for instance, that if the Claimant did not want to come in one day, the respondent would ask Gary, or she would close the centre for the day, or she had a back-up list of caretakers she could call for cover. If the Claimant was not obliged in practice to attend, if he could simply not turn up, the centre would not have been able to function unless there were back up arrangements. If not, Alcoholics Anonymous , for instance, would be waiting at the door unable to get in or out.

53. The Respondent's fitting the claimant's work around medical appointments was not incompatible with mutuality of obligation and is very common in employment relationships.

54. The Tribunal considered if the claimant provided personal service or if there a right of substitution. The respondent's case on this point appeared to centre on the allegation in the ET3 that the Claimant was found on the premises with a friend helping him to do his job. However, there was no evidence that this was anything other than a one off or had happened at any other time. This incident occurred at an unusual time. The centre was closed during the Covid lockdown and then the centre needed to be got up and running quite quickly. In any event, the claimant did not have his friend substituting for him, the friend was assisting him. In the view of the Tribunal, the presence of a friend was more relevant to the question of whether the Claimant was hiring his own helpers.

55. Further, the fact that the Respondent wanted to see the Claimant's passport and driving licence before he started work was not consistent with a right to substitute.

56. The Tribunal found that the respondent had a sufficient right to control the Claimant's work for the following reasons.

57. The Claimant's job was as a caretaker. The Tribunal found it hard to see how a centre hiring out rooms could function well if it did not have effective control over how its caretakers carried out their work. The claimant was often the only respondent representative on site. The claimant prepared the rooms for hiring, opened up or shut down the centre and was the point of contact for client during the hire. In addition, there was some written evidence that the manager did on occasions give the claimant specific instructions, for instance as to cleaning or opening up at a particular time.

58. The Tribunal went on to consider whether there were any other factors consistent or inconsistent with employment status.

59. The Claimant did not provide his own equipment.

60. In respect of the Claimant hiring, the Claimant's unchallenged evidence was that he did not pay his friend who attended on 16 April. It was an unusual situation. The centre was opening up to help the NHS at a time when the country had been asked to pitch in to support and help the NHS. It was therefore credible that the

friend was prepared to give his time for free on this occasion. Accordingly, on the balance of probabilities, the Tribunal found that the Claimant did not pay his friend.

61. The Tribunal considered if the Claimant was at financial risk or was in business on his own account. The tribunal found that the claimant was at little or no financial risk. Was he in business on his own account? The Tribunal could not see that he had any meaningful opportunity to make a profit. He could increase his hours by doing overtime. However, whether the Claimant was not paid overtime (on his case) or received a separate payment (on the Respondent's case), in the view of the Tribunal, that was of no account. Employees are not in business for themselves simply because they do overtime. The Claimant did not price the job himself but worked to a flat hourly rate.

62. The Claimant did not receive holiday pay which was inconsistent with being an employee. In the view of the Tribunal, the significance of this was somewhat reduced by the fact that the Claimant was working part-time, and he was retired.

63. The Respondent did not deduct tax and national insurance at source and this was an indicator of his not being an employee. However, in the view of the Tribunal, was a somewhat less weighty factor because the Claimant was a pensioner.

64. Whilst the Tribunal did not view it as a weighty factor, it considered if the Claimant was subject to a disciplinary policy. The only mention of a disciplinary was to a third-party. Employers (not using the word as a term of art) do sometimes give out to third-parties that they will discipline those who carry out work for them. This is not necessarily the same thing as subjecting a person who works for them (in whatever capacity) to a formal disciplinary process. In any event, events intervened before any disciplinary procedure might have been undertaken.

65. Finally, the Tribunal reminded itself of the guidance in *Hall (Inspector of Taxes) v Lorimer 1994 ICR 218, CA*. The overall effect as to whether someone is an employee or contractor can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance, by making an informed, considered qualitive appreciation as a whole. It is a matter of the evaluation of the overall effect of the detail. Not all details are of equal weight or importance in any given situation.

66. In the view of the tribunal the factors consistent with employee status were more numerous and weightier than those not consistent with employee status.

67. Accordingly, the tribunal found that the claimant was an employee and the tribunal had jurisdiction to consider all his complaints on this basis.

Employment Judge Nash
Dated: 6 January 2022