EMPLOYMENT TRIBUNALS

Claimant: Ms L Clarke

Respondent: Independent Clinical Services Limited

Heard at: Bristol (by video) **On:** 14 September 2021

Before: Employment Judge C H O'Rourke

Appearances
For the Claimant: In person
For the Respondent: Mr J Crozier - counsel

OPEN PRELIMINARY HEARING JUDGMENT

1. The Claimant is not an employee of the Respondent, but a worker.

2. The Claimant's claims of unfair dismissal, entitlement to redundancy pay, breach of contract relating to notice and failure to consult subject to the TUPE Regulations, are dismissed, for want of jurisdiction.

3. The Claimant's claim of breach of the Agency Worker Regulations is dismissed, upon withdrawal.

4. The Claimant's claim of discrimination on grounds of pregnancy/maternity will proceed to hearing, as set out in separate case management orders of the same date.

REASONS

1. This Open Preliminary Hearing was listed, following a case management hearing of 18 February 2021, to determine whether or not the Claimant was an employee of the Respondent, within the meaning of s.230 Employment Rights Act 1996 (ERA)/s.83 Equality Act 2010 (EqA). The Respondent denies such status, but accepts that she was/is a 'worker', within the meaning of s.230.

2. Both parties provided skeleton arguments and made closing oral submissions and I heard oral evidence from the Claimant and on behalf of the Respondent, from a Mr Andrew Burston, the operations team leader.

Employee/Worker

3. This issue is crucial to the Claimant's case, as she seeks to bring claims, the majority of which depend on her being an employee and she also feels, generally that the Respondent is seeking to evade its duty towards her and her employment rights.

4. It is common ground that the Claimant has been engaged by the Respondent as a paediatric nurse, since 2016, providing care predominantly, but not exclusively, to one child ('KHAY') at its family home. The Respondent, which describes itself as an 'employment business' [48], asserts that she did so as an agency worker, not as an employee and that accordingly she cannot bring claims of unfair dismissal, entitlement to redundancy pay, breach of contract in respect of notice, or failure to consult under the TUPE Regulations. It accepts that as a worker, she is entitled to bring a claim of pregnancy/maternity discrimination.

The Law

5. Mr Crozier referred me to the following legislation/authorities (and others, as detailed in his skeleton argument):

    a. S.230 ERA, as to the statutory definitions.

    b. **Ready Mixed Concrete v Minister of Pensions and National Insurance [1968] UKHC 2 QB 497**, which established the three conditions for employment status as mutuality of obligation, control and consistency of contractual terms with employment.

    c. **Carmichael v National Power plc [1999] EWCA 1 WLR 2042**, which referred to mutuality of obligation being '*an irreducible minimum of obligation on each side to create a contract of service'*.

    d. **Cotswold Development v Williams [2006] UKEAT IRLR 181**, which referred to the need for a 'wage-work bargain'.

    e. **Quashie v Stringfellow Restaurants Ltd [2013] EWCA IRLR 99**, as to the possibility of there being an 'umbrella' contract of employment, namely a contract that subsists between individual working engagements.

    f. **Clark v Oxfordshire Health Authority [1988] EWCA IRLR 125**, which considered that for there to be such an umbrella contract, conditions such as an obligation by one party to accept and do work and by the other to pay a retainer, during non-work periods, would be necessary.

g. **Hall (Inspector of Taxes) v Lorimer [1992] UKHC ICR 739**, as to a person's integration into the organisation, being 'part and parcel' of it.

6. The Claimant referred to **Uber B.V. v Aslam and others [2019] UKSC 0029**, as to the principle that a court or tribunal should be prepared to look beyond the contractual documentation, to establish the reality of the working relationship, in particular in view of the unequal bargaining position between employers and employees.

The Facts

7. Contractual Terms. The Claimant entered into a contract with the Respondent in April 2016. That document is entitled '*contract of engagement'* and her name on the contract is described as '*Worker's Name'*. It contains the following clauses [48]:

   a. *1.2 'Assignment' means the services performed by the worker for a period of time during which the worker is introduced by an employment business.'*

   b. *3. The worker agrees to appoint as agent the Agency* (earlier defined as the Respondent), *for the purpose of securing on his/her behalf placements with clients introduced by the Agency …*

   c. *4. The Agency will use reasonable endeavours to obtain suitable Assignments for the worker.*

   d. *5. These terms and conditions shall constitute a contract for services between the parties … No contract shall exist between the parties between Assignments. These terms and conditions shall not give rise to a contract of employment between the parties. The Agency is acting as an employment business.*

   e. *6. The worker will conduct him/herself in the manner of the highest professional and personal standards in the course of his/her duties and will not engage in any conduct detrimental to the interests of the Agency or the client …. The worker will co-operate with the client's staff and accept the control, supervision and instruction of any responsible person within their organisation.*

   f. *12. The worker will report to the Agency as soon as practically possible any mistake or error of judgment on his/her behalf, or accident or incident which may in any way adversely affect the welfare of any patient to whom he/she is administering. The worker will immediately inform the Agency of any event that has resulted in disciplinary action being taken against him or her, any allegations of misconduct, or the worker's suspension or dismissal from any position in which the worker was working in the worker's professional capacity as a result of the worker's alleged misconduct …..*

g. *16.2 The Agency is under no obligation to secure Assignments for the worker and there may not be any work available. The Agency will incur no liability to the worker for not offering work.*

h. *19. …. The worker is not obliged to accept any Assignment that the Agency offers.*

i. *33. The Agency may terminate this agreement at any time without notice.*

8. Subsequently, due to an organisational change within the Respondent, a revised contract was provided to the Claimant in January 2018 which, the Claimant agreed, is not substantially different than the original one [51] and also that her previous working arrangements remained unchanged. One change in the contract included a requirement to '*attend a minimum number of team meetings where this is a requirement of any specific Assignment or package* (clause 6).

9. The Claimant agreed that the Respondent's 'model' was that they entered into contracts with third parties (generally NHS clinical commissioning groups) to provide nursing and other care to individuals in need of such care, in their homes, the groups specifying the type of care needed and the funding available. The Respondent then assigned workers on their books to such assignments. Mr Burston stated that the Respondent had approximately a thousand such workers on their books. The workers were paid per assignment, on an hourly rate. The Claimant stated that nursing equipment was available to her in the patient's home, but she was unsure as to who provided it, but assumed it was the clinical commissioning group (Mr Burston confirmed this to be the case). KHAY had financial provision for 56 hours' professional care a week, over four days and two nights, with the child's parents providing care at other times. The contract for KHAY terminated in February 2020, when the child's family moved home, resulting in another clinical commissioning group becoming involved, who contracted with another agency.

10. Mutuality of Obligation. The Claimant was questioned on this issue and answered as follows:

a. She agreed that, on the face of the contracts, there was no obligation on the Respondent to provide her with assignments, beyond making reasonable endeavours, or if there were no assignments, to pay her.

b. She also accepted, again on the face of the contracts that she had no obligation to accept work and was entitled to refuse assignments. She said, however that that only really applied outside the *'normal package'* she worked on (i.e. her routine care of KHAY, generally on Monday nights). In respect of that 'package' there was '*an expectation'* that she would complete her shifts, apart from when she was on holiday and that if she didn't comply with that expectation, she would lose her place on the package, due to the need for continuity of care. She agreed that there was no documentary evidence to that effect and that nobody at the Respondent had ever said this to her. When further challenged as to whose 'expectation' this was, she said it would have been the 'clinical lead'

at the Respondent, or the family, who worked together. When asked whether this constituted an 'obligation' on her part, or merely an 'expectation' she said she was unsure, but accepted that '*perhaps'* there was a difference.

c. She agreed that when the new contract was completed, it made no reference to her working on any specific package.

d. She agreed that there was nothing in the contracts that prevented her from working for other agencies and that she sometimes did, having had dealings with five in total. When it was suggested to her that if, as she stated, the Respondent was her employer, why would these other agencies not also be her employers, she said that her work with them was not as regular or consistent.

e. When it was suggested to her that the Respondent informed her on a monthly basis as to what shifts were available, for her to confirm her availability [examples 72, 87 & 95], she said that '*I agreed that I was free on all Mondays, less holidays'*, but did agree that she was, nonetheless, being asked by the Respondent to confirm the position, viewing this as the Respondent '*chasing up'*. She agreed that she could have refused such shifts, but said that '*it was not a regular thing to take Mondays off … there being an expectation that I would work every Monday''*.

f. While, initially, she did not accept that her availability '*generally'* varied, she was pointed to records [93] in which she stated that she had only '*sporadic'* availability, at one point. She said this was due to a personal 'run-in' with another carer, which was subsequently resolved. She agreed that that decision on her part had no consequences for her, such as, for example, being disciplined.

g. She also agreed that she stated her non-availability, when she wished to go on holiday [71] and that on those occasions she was not 'asking' if she could take holiday, but simply informing the Respondent of that fact, sometimes at short notice (although she denied any short notice).

h. She agreed that she'd been offered a shift for 11 December 2017 [77] and refused it, but said that that was for a Saturday night which was '*like refusing overtime'* (she agreed subsequently that that date was a Monday). Similarly, on 9 September 2019, she agreed that she had '*pulled out'* of a shift caring for KHAY, without adverse consequence for her, stating that she been ill at the time and had no choice. Nonetheless, she did not '*fully agree'* that she was entitled to turn down shifts as she chose.

i. Also, while she initially denied it, she accepted that while she might have had an expectation as to Monday night shifts caring for KHAY, sometimes such shifts were not offered to her [66 & 75] and that there were no consequences for the Respondent in doing so, although she considered, somewhat as an afterthought that there should have been a '*last-minute cancellation fee'*, but agreed that no such fee was offered or paid.

j. She also sometimes accepted shifts caring for other patients [65], or expressed interest in other packages and agreed that that was up to her. When it was suggested to her that she could have, if she wished, taken on another package and dropped that for KHAY, she that she felt loyalty to the child and the family.

11. Control. The Claimant's evidence on this issue was as follows:

a. She accepted that as a qualified nurse, she was required to be registered with a professional body (in her case the National Midwifery Council) and to keep up to date with her training, which she had to arrange herself. She also accepted that if, instead, she had been working in an NHS hospital, such training would have been organised by that hospital. She was additionally responsible for ensuring she met the appropriate professional standards. She was also obliged to have professional indemnity insurance, which she had to take out and pay for herself, to protect her in the event of any alleged negligence on her part.

b. She was sometimes obliged, as a regular carer for KHAY, to attend team meetings, in relation to the child's care, which, she agreed, focussed on clinical and operational needs. She also might have to occasionally engage in an emergency conference call, as part of her professional responsibilities towards KHAY [119].

c. She was asked about whether there were any other aspects of control, such as appraisals, as there was no evidence of such in the bundle and she said that these were done in person, over the phone. She said that these were '*supervisions'* and contended that they were similar to appraisals received regularly by employees and that she was asked how she was coping with the package.

d. She agreed that there was no formal disciplinary or grievance procedure applicable to her, but said that she was aware of other carers being disciplined, but was unsure of the details, but that they were taken off shifts. She was unsure as to whether any such incidents simply related to perhaps examples of clinical malpractice, rather than say more routine disciplinary matters, such as lateness or disputes between colleagues.

e. She denied that she had complete control of clinical tasks, to the exclusion of the Respondent, stating that there was some level of control required, by checking in with the clinical lead.

12. Integration. It was suggested to the Claimant that while she claimed to be an integral part of the Respondent's team, she was not, in fact, for example not attending the Respondent's staff Christmas party. She agreed that she wasn't based in the Respondent's office, but nonetheless considered herself part of the team.

13. Submissions

a. Mr Crozier made the following submissions, relying also on his skeleton argument:

i. The Tribunal's task is to look at the contractual relationship, taking into account the realities of that relationship.

ii. The core issue seems to be one of considering whether the relationship was one of 'obligations' or 'expectations' and the fact that it was relatively long-term, with some consistency does not imply obligation. The difference is between mutual convenience and mutual obligation.

iii. Clearly, there was some mutuality of obligation between the parties, as there is a contract between them, obliging the Claimant to carry out those duties she made herself available for and obliging the Respondent, in turn, to pay her for such work, but obligations of that nature are not such as to bring the relationship within the employment sphere. Nor can there have been (applying **Clark**) an over-arching umbrella contract without some continuing mutuality of obligation by one or other party and perhaps the payment of a retainer during periods when no assignments were being worked, which didn't exist in this case.

iv. The Claimant had no obligation to offer herself as available, or to accept work and 'told' the Respondent when she was taking holidays, rather than asked. There was no consequences for her doing so, neither contractually nor in the reality of the situation. The circumstances of this case are 'on all fours' with the **Clark** case and the Tribunal must reach the same conclusion, that the Claimant is not an employee.

v. In respect of 'control', the Respondent didn't control if the Claimant worked, or when, or how she worked. In respect of the latter point, the commissioning group/the family set the requirements, in response to which the Claimant carried out her professional duties and which were not dictated to her by the Respondent. She was required to have her own indemnity insurance, which, if she were an employee, would have been provided by the Respondent.

vi. The contractual terms are inconsistent with employment and none of the trappings of employment, such as supervision or disciplinary and grievance procedures exist, with the Claimant simply carrying out her professional duties.

vii. In terms of economic and operational realities, if the Claimant was not offered a shift, or was unable to accept one, she suffered the economic consequences, not the Respondent. The Respondent

did not provide her equipment, insurance, training or professionally register her.

viii. She was not 'integrated' into or 'part and parcel' of the business, despite the longevity of the relationship, but remained detached.

b. The Claimant referred to her skeleton argument. She stated that the Respondent did pay for her training (although this had not come out in evidence) and also provided her with the necessary paperwork to carry out her role. The Tribunal should consider the Respondent's motive in setting up this relationship and be prepared, applying **Uber**, to look beyond the contractual paperwork, to the reality of the situation.

Conclusion

14. I find that the Claimant was not an employee of the Respondent, but instead, a worker, under the terms of s.230 ERA, for the following reasons:

a. I concur with Mr Crozier that mutuality of obligation is the core issue in this case – the '*irreducible minimum'* (**Carmichael**) necessary to establish an employment relationship and it simply does not exist in this case. It is crystal-clear from the Claimant's own evidence that despite the longevity and relative consistency of the relationship with the Respondent, they were never obliged to offer her work (and did on some occasions decline to do so) and she was, in turn, under no obligation to accept such work as was offered, which again, she exercised on several occasions, without penalty for either party in doing so. Had she been an employee, the Respondent would have been obliged to offer her work and if they failed to do so, would have had to pay her nonetheless, or compensate her in some other way. Had she, in turn, as an employee, refused to carry out work, she would have risked disciplinary proceedings and if such refusal persisted, without good reason, faced dismissal. No such consequences existed for either party in this case. Similarly, no employee can dictate to an employer when they will take holiday, but must seek the employer's agreement to any such request, which the Claimant was not required to do.

b. While she may have felt that there was an 'expectation' that she would perform her routine shifts, no such expectation was documented or ever, she agreed, expressed by anybody at the Respondent and as stated, when she didn't, on occasions, meet that expectation, there were no consequences for her. While she, no doubt and quite properly, felt a professional duty to the child and the family that does not amount to a contractual obligation on her. The fact is that the relationship between her and the Respondent was mutually convenient, as she could pick and choose her duties and take holiday when she wished and clearly such convenience 'rubs both ways'.

c. The contractual terms are clear, are entirely inconsistent with an employment relationship and match the realities of the relationship, as practised over several years.

d. While, clearly, the Claimant was obliged to work on shifts that she had agreed to and the Respondent was obliged to pay her for such shifts, there is no 'umbrella' contract of employment overarching these events, as, between shifts, there was no continuing mutuality of obligation on either party, or any retainer paid by the Respondent.

e. There is no evidence of any effective control exercised by the Respondent on the Claimant. While she referred to the involvement of a 'clinical lead' at the Respondent, no corroborative evidence was provided as to any direction to her, or control of her, by such person. It is clear that the relevant commissioning group dictated what care was to be provided, at what funding level and the Claimant, when on shift, simply carried out her professional duties as a nurse, as a lone worker, with no evidence of any direction by anybody else. Her sole commitment, beyond her shifts, was to attend very occasional staff meetings, to discuss the clinical needs of KHAY, an entirely legitimate professional expectation. Nor was there any corroborative evidence, whatsoever, as to the Respondent exercising any disciplinary control over the Claimant, beyond the obvious necessity of them being aware of and reporting clinical incidents. The Claimant did not, as she asserted, have appraisals, in anything like the sense an employee might, enquiring as to her personal situation, her ambitions in the business, her training needs, any needs she had for support or of any concerns, but simply instead, as she said, informal conversations as to how she was '*coping with the package'* and which discussions were not recorded.

f. She organised her own training (and despite her late assertion to the contrary, there is no evidence that the Respondent paid for it), arranged and paid for her own indemnity insurance, did not use the Respondent's equipment and maintained her professional registration, the first three tasks, at least, being routinely the responsibility of an employer, if such a relationship had existed.

g. There is no evidence of her being integrated into, or being part and parcel of the business. She did not work from the office, as, as Mr Burston explained, the Respondent's employees do and nor was she invited to such routine events as a staff Christmas party.

15. I understand, from the Claimant's perspective that she may consider herself as perhaps a 'second-class' employee, lacking the rights afforded to 'full employees', focussing, as she has, on the recent **Uber** case, in which the Supreme Court found drivers to be workers, not self-employed contractors, despite dense contractual documentation to the contrary. However, in that case, as in this one before me, the Court looked at the reality of the situation in reaching its conclusion. I have done likewise, but conclude that the reality is not inconsistent with the contractual arrangements. As to the Respondent's motive

in entering into such arrangements, it is self-evidently that it values the flexibility they provide, in being able to supply agency workers, as and when needed, without the responsibility of maintaining an employment relationship with those workers and as noted above, such flexibility works both ways in this case. Parliament has legislated widely in respect of such agency relationships and therefore can be assumed to both approve of them and see the utility of them for the economy as a whole.

Employment Judge O'Rourke
Date: 16 September 2021

Judgment sent to the parties: 07 October 2021

For the Tribunal Office