



# EMPLOYMENT TRIBUNALS

**Claimant**  
Mr Kieron Dominic Scully

v

**Respondent**

Northamptonshire County Council

**Heard at:** Cambridge (by CVP)

**On:** 28 February 2022

**Before:** Employment Judge Tynan (sitting alone)

## Appearances:

**For the Claimant:** In person

**For the Respondent:** Ms Z Wroe, Solicitor

**JUDGMENT** having been sent to the parties on 13 March 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. The Claimant's claim was presented to the Employment Tribunals on 2 December 2020 following Acas Early Conciliation on 20 November 2020. The Claimant claims that he was discriminated against on the grounds of race and disability, and that he is owed arrears of pay and other payments.
2. The matter came before Employment Judge Warren on 30 July 2021 when he directed that the matter should be listed for an Open Preliminary Hearing in order to determine the identity of the Claimant's employer, including whether West Northamptonshire Council should be substituted as a Respondent; Northamptonshire County Council having been replaced by two unified authorities. The latter question only arises if I conclude that the Claimant was employed by Northamptonshire County Council such that its liabilities may have transferred to another Authority. For the reasons that follow, my decision is that he was not employed by the Respondent.
3. I heard evidence from the Claimant who had made a 49 paragraph written statement in support of his claim to have been employed by the Respondent. His mother, Mrs Vera Scully, also gave evidence to the Tribunal. Her statement runs to 51 paragraphs. The Claim centres upon the arrangements for the care of the Claimant's brother. Given that these

written reasons will be a publicly available document, I have not thought it necessary to identify the Claimant's brother by name. I shall refer to him hereafter as 'S'.

4. On behalf of the Respondent I heard evidence from Christopher Hodgson. Mr Hodgson is employed as a Personal Budget Support Service (PBSS) Manager. Mr Hodgson previously worked as a manager at the Northamptonshire Centre for Independent Living (CIL), a charity whose activities were effectively assumed by the Respondent in 2017. Mr Hodgson provided a comprehensive explanation of the direct payment scheme pursuant to which individuals who may be in need of care and support, and their families, have greater autonomy in terms of deciding how their needs should be met, as well as control over the available funds in this regard. Mr Hodgson additionally gave evidence about CIL and PBSS' interactions with the Claimant and his family, including how S's package of care and support was procured from 2013 onwards. He was an articulate and credible witness and I accept his evidence without reservation. The Claimant did not in fact challenge his evidence in any material respects.
5. The issue I have to determine is who the Claimant was employed by. As the Claimant observed in his submissions, the Respondent did not dispute that he is employed to care for S. Accordingly, although I was referred to the long established principles in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2QB497, it is not in fact necessary for me to consider Mackenna J's often cited dicta in any significant detail. The Ready Mixed Concrete case concerned the issue of whether a person is employed or in business on their own account. Mackenna J identified three conditions that would need to be fulfilled in order for there to be a contract of service as opposed to a contract for services: firstly, the 'servant', as he referred to it, would have to provide work and skill in the performance of services for the master; secondly, in the performance of those services, he would be subject to the master's control to a sufficient degree to make the relationship one of master and servant; and, finally, the other provisions of the contract should be consistent with it being a contract of service. In these proceedings, the Respondent has not sought to suggest that the Claimant was in business on his own account.
6. In addition to the witness statements and evidence, there was a Preliminary Hearing Bundle running to 606 pages, though in the course of the Hearing I was referred to only a limited number of documents in the Bundle.
7. At pages 86 – 90 of the Bundle is a Direct Payments Individual Budgets Payroll Service Agreement for CIL holding account users. The Agreement was put in place when S assumed control of his budget and the family began to receive direct payments to fund his care and support. The Agreement was signed by S and entered into between the parties on or around 30 April 2013. In my judgement, given his complex needs, there must be significant doubt as to S's legal capacity to enter into any such agreement. Arrangements of this type often come to the Tribunals' attention; in my experience the individuals concerned, and their families,

frequently fail to fully appreciate, or lack the requisite experience (or even lack essential capacity) to be able to comprehend, the legal implications of having a personal budget. The family's focus is inevitably on securing the best possible package of care and support for a family member, in circumstances where they believe they have a better understanding of that person's needs than the Local Authority. That focus, and their understandable desire to retain greater control over decisions that touch upon a loved one's quality of life, comes at the potential cost of unanticipated employment obligations and liabilities. That is particularly pertinent here where the Claimant took on significant responsibilities in relation to his brother's care and support. I find that little or no thought was given by the Claimant, Mrs Scully or S to the employment law implications of the arrangements put in place from 2013.

8. In the course of her evidence Mrs Scully was asked about a number of emails at pages 96 – 100 of the Bundle. They date from May and June 2013 during the early weeks that the directly managed budget was in place. The emails evidence that Mrs Scully took responsibility for identifying potential carers for S and that she retained control over any decisions as to who should be engaged. She addresses the matter in paragraph 8 of her witness statement. She describes an unhappy experience with S's first carer who stole money from him, and refers to problems and challenges with other carers, including a carer who did not always turn up. I find that these issues and any resulting decisions were taken by Mrs Scully, rather than by the Respondent. For example, there is evidence at page 114 of the Bundle that Mrs Scully was directly involved in the decision to dismiss a carer.
  
9. At paragraph 11 of her witness statement, Mrs Scully refers to CIL having become involved as she did not want the burden of organising payroll, contracts, pension payments and the like. However, the fact that payroll and related administrative tasks were handled by a third party does not itself answer the question of who the employer was. The Claimant does not assert that he was employed by CIL. What the arrangements highlight is a fundamental difficulty in the Claimant's case, because if CIL was responsible for such matters at a time when it was a discrete legal entity operating independently of the Respondent, then it is unclear to me what other additional facts are relied upon by the Claimant to support the existence of an employment relationship between himself and the Respondent. Other than the family's interactions with S's designated Social Worker, which I find were in pursuance of the Respondent's statutory adult social care responsibilities, I have been unable to identify any other interactions between the Claimant and the Respondent, or any evidence, in the period 2013 to 2017 that might support the existence of an employment relationship between them. Over a period of approximately four years, there is nothing to indicate that the Respondent exercised any form of control over the Claimant or which evidences any mutuality of obligation. In the course of his submissions I asked the Claimant when he considered his employment relationship with the Respondent to have commenced. The only uncertainty in his mind was whether this was April, May or June 2013. However, the entirety of the interactions during that period, and in the years that followed, that underpin his claim to have been employed by the Respondent, were with

CIL. If anything, on the Claimant's rationale, they support an employment relationship with CIL, rather than with the Respondent.

10. In paragraph 15 of Mrs Scully's witness statement, she refers to problems and difficulties with holiday cover and that there was limited support available to the family. When asked about these issues, the Claimant's feelings of frustration and exhaustion came to the fore. One could not fail to be moved by what he said about the pressures he was under and the weight of responsibility he felt to ensure that his brother continued to be cared for and supported to live at home, so that the family might stay together. Whilst he has shouldered a significant burden over a number of years, it reinforces that the family took direct responsibility for these matters rather than the Respondent.
11. The same point essentially arises from paragraph 17 of Mrs Scully's witness statement. Although she was provided with a directory by the Respondent in order to source potential carers, it was she who ultimately took responsibility for identifying agency staff who might provide respite or holiday cover, to enable the Claimant to have a break and prevent him from buckling under the weight of his responsibilities. In paragraph 25 of her witness statement, Mrs Scully refers to an individual called David who provided some initial support and then continued to cover some extra hours. She refers to having received several calls from David's agency, Connecting Hands, to say that they had not been paid for his work. The fact that the agency considered this to be a matter for Mrs Scully's attention again evidences that the arrangements were perceived by all concerned to be a matter under the family's control rather than involving the Respondent.
12. Turning then to the Claimant's evidence in this matter, he accepts that there is, and has been, no written contract between himself and the Respondent, and no job description. The only documented contract, albeit for the provision of respite care before the Claimant became his brother's full-time carer, is stated to be between the Claimant and S (pages 70 – 80 of the Bundle). Whilst, as I say, there must be significant doubt as to S's capacity, the Claimant was evidently content in principal to enter into a contractual relationship with his brother. In his evidence the Claimant said of the contract,

*"I signed intending to become an employee"*

Given that his brother was named as the other party, I am clear that the Claimant did not sign the contract with the intention or understanding that he would thereby become an employee of the Respondent.

13. I find that the effect of what happened in 2013, whether it was April, May or June 2013, was that the original respite agreement was varied but otherwise that the agreement has continued to provide the essential framework under which the Claimant has provided care to his brother since 2013.
14. In the course of his evidence, the Claimant confirmed that no training had ever been arranged or delivered through the Respondent. Particularly in

the field of adult social care, where an understanding of safeguarding issues and the maintenance of professional standards is essential, an experienced employer will take responsibility for the ongoing training and development of its staff. The Respondent evidently did not consider itself under any duty to ensure the Claimant's continuing professional development. Nor were there any appraisals or other evidence of the Claimant's conduct and performance being managed by the Respondent; nothing to indicate the direction and control one might otherwise typically expect of an employment relationship. There was no oversight by the Respondent in terms of what hours the Claimant worked and accordingly how much he should be paid. Instead, any pay issues were handled by CIL, I find, as an outsourced provider of services to either the Claimant's brother or mother.

15. There are various copy pay slips in the Bundle, including at page 286. The named employer is S. None identify the Respondent as the employer, something the Claimant might be expected to have challenged at any time over a period of seven years if he believed that he was in fact employed by the Respondent.
16. An email at page 293 of the Bundle confirms that PBSS, which by 2017 had assumed CIL's responsibilities, gave advice to Mrs Scully to implement a redundancy in relation to the Claimant. However, Mrs Scully did not follow that advice. She said in her evidence that she felt uncomfortable about it. If, as the Claimant contends, the Respondent was his employer it is unclear why this task might have been delegated to Mrs Scully, or why she considered herself at liberty to disregard the advice from PBSS and to act as she saw fit. In the face of what was either her opposition to the Claimant's redundancy or her inaction in the matter, I conclude that the Respondent took no action in the matter because it considered that any decision in relation to the Claimant's continued employment rested with Mrs Scully, either as the Claimant's employer or acting on behalf of S, the employer.
17. Similarly, whilst the Claimant said that the Respondent was against him being furloughed in 2020, they were powerless to prevent this from being agreed between the Claimant and Mrs Scully. That is the clearest evidence to me that the Respondent lacked essential control as an employer, the Claimant believing himself free to agree the issue with Mrs Scully either as his employer or as the authorised agent or representative of S, his employer. I do not accept the Claimant's evidence that the furlough arrangements were in any way suggested by the Respondent. To the contrary, all the evidence in the Bundle confirms that the Respondent was not supportive of the Claimant being furloughed, did not encourage it and had not identified it as an appropriate way forward. The decision to furlough the Claimant may have been in response to PBSS's advice to consider making the Claimant redundant, but it cannot sensibly be said to have been suggested by the Respondent.
18. The other relevant evidence in this case, at page 317 of the Hearing Bundle, is an email from Mrs Scully to Claire West at Northamptonshire Adult Social Services, in which she refers to her unease around a draft redundancy letter that had been supplied for her use, specifically that it

was not expressed in her own words. Towards the end of the first paragraph of her email, she refers to the Claimant being a member of a protected class and a member of a Union and that she was concerned therefore that the redundancy process should be done correctly. I find that she was concerned for both her own position and S's. Her comments beg the question why she might have been concerned about how the process was handled if she was not the Claimant's employer or acting as S's agent in the matter. If neither she nor S had employed the Claimant, she would have had no particular vested interest in the matter, except perhaps a concern as the Claimant's mother to ensure he was treated correctly. What the email evidences to me is that Mrs Scully was acting autonomously in the matter, that she regarded any decision as one for the family to take and, in those circumstances, that she was concerned to ensure that the situation was handled in accordance with the Claimant's statutory employment rights. Neither she nor the Respondent considered that the Respondent had a right to be consulted in the matter.

19. In a further email with Claire West at page 329 of the Bundle Mrs Scully wrote,

*"I informed you yesterday that I am proceeding with making the employee redundant"*

Again, these comments confirm that the decision rested within the family. It was not suggested by Mrs Scully that she was proceeding on behalf of the Respondent. Nor did she protest that she was expected to deal with a matter that was in fact the Respondent's responsibility as the Claimant's employer.

20. At page 357 of the Bundle is an email from Mrs Scully to Andy Cheatham, an Employment Law Consultant at Peninsular, in which they debated the most appropriate way forward. Mrs Scully asked Mr Cheatham to look over the terms of what she and the Claimant were trying to agree to make sure they were reasonable from an employer's perspective. In her evidence at Tribunal Mrs Scully sought to distance herself from that comment, stating that the employer's perspective was not her perspective. Again, I ask myself why Mrs Scully took an interest in the matter if in fact it was between the Claimant and the Respondent as his employer.
21. In his evidence, the Claimant sought to suggest that he had been instructed in the course of his employment by the Respondent. However, it amounted to no more than a general assertion on his part since he did not identify when he had been instructed by the Respondent, what those instructions were, or who had issued them. He went on to say that there were times when instructions came through CIL rather than the Respondent. He also acknowledged there were times when S did not have an allocated Social Worker and accordingly that there were periods when there was no contact with the Respondent.
22. In conclusion, the available evidence does not support that there was any form of employment relationship between the Claimant and the Respondent at any time in the period 2013 to 2010. Instead, all the evidence points to the Claimant having been employed by S or by Mrs

Scully acting on his behalf.

23. I invited the Claimant to indicate whether he wished to apply to amend his Claim to name the S or Mrs Scully as the Respondent to his Claim, but there was no such application by him. In the circumstances and on the basis that he was not employed by the Respondent (or any successor organisation) the Claim is struck out on the grounds that it has no reasonable prospect of success.

9 May 2022

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**Employment Judge Tynan**

Judgment sent to the parties on

19 May 2022

For the Tribunal office