



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4113844/2021**

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**Held via Cloud Video Platform (CVP) on 28 June 2022**

**Employment Judge L Doherty**

10 **Ms Pauline Sanson**

**Claimant  
In Person**

15 **University of Stirling**

**First Respondent  
Represented by:  
Ms J McLaughlan -  
Solicitor**

20 **Forth Valley Health Board**

**Second Respondent  
Represented by:  
Mr R Davies -  
Solicitor**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Tribunal is that:

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1. The claimant is not an employee or a worker of the first respondent for the purposes of the Equality Act 2013 (the EQA) and the Employment Tribunal does not have jurisdiction to consider the claims under the EQA presented against the first respondents.
  2. The Tribunal does not have jurisdiction to consider claims under section 91 of the EQA.
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### **REASONS**

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1. The claimant presents claims of direct discrimination under Section 13 of the Equality Act 2013 (the EQA); and harassment under Section 26 of the EQA. There is outstanding application to include a complaint of indirect discrimination (section 19 of the EQA). The claims are directed against the first and second respondents. At a PH for case management purposes, it was

determined that there should be a PH to consider jurisdictional issues in connection with the claims brought against the First Respondents.

2. As determined at the PH the issues which this PH was fixed to consider were:

5 (1) Whether the claimant is an employee/worker of the first respondent for the purpose of the EQA claims?

(2) Whether the tribunal has jurisdiction to consider claims under Section 91 of the EQA?

10 3. The claimant appeared on her own behalf; Ms McLaughlin solicitor appeared for the first respondents; and Mr Davies, solicitor, observed the proceedings for the second respondent's, but took no part other than that in the proceedings.

15 4. The claimant gave evidence on her own behalf, and evidence was given for the first respondents Ms Lorna Stoppard, Practice Learning Lead for the University of Stirling BSC nursing programme. The parties lodged a joint bundle of documents.

20 5. There were two preliminary issues which the tribunal dealt with prior to the commencement of evidence. The first related to the claimant's application to include further documents, one of which comprised a link to a website. Objection was taken to the inclusion of these documents by Ms McLaughlin on the basis of the lack of notice. After discussion, the claimant indicated she could proceed without the documents being included in the bundle.

25 6. The second issue related to the production by Ms McLaughlin of the case report, *Blackwood v Birmingham and Solihull Mental Health NHS Foundation Trust (2016) EWCA 607* (hereinafter referred to as *Blackwood*). A copy of this case had been sent to the claimant by Ms McLaughlin on the afternoon before the PH. The claimant emailed the Tribunal on the morning of the PH asking the Tribunal to prohibit Ms McLaughlin from referring to this case on the basis that she had had insufficient notice of it, and she required to review it and take advice. She indicated that the production of this case would put her at an unfair advantage.

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7. It was explained to the claimant that Ms McLaughlin could not be prevented from relying on a case report which was relevant to the issues before the tribunal in her legal argument. The claimant was asked if she wanted time to obtain legal advice on her position, having received a copy of this case from Ms McLaughlin. The claimant indicated that she did wish to take advice, but she did not wish the hearing to be postponed for that purpose, and that she wished to go ahead. The hearing therefore went ahead, on the basis that Ms McLaughlin would be allowed to refer to *Blackwood*.

### Findings in Fact

8. The respondents are a university engaged in the provision of education, including the provision of vocational degree courses. One of the courses provided by the university is a Bachelor of Science (BSC) in Nursing, which is the three year ordinary degree. This course has a 50% practical, and a 50% academic content. The degree enables students to achieve an academic award and eligibility to register as a nurse with the NMC. The degree course is validated by the NMC, who require 2,310 practical hours of work to be conducted by the student to allow registration with the NMC on completion of the course.
9. The practical hours are conducted by way of placements with a Practical Learning Provider (PLP), Forth Valley Health Board, the second respondents, and comprise 50% of the course.
10. Placements are allocated to students by the first respondents from a pool of Placements available to them.
11. Students undertake Placements for training and education purposes. They are assigned Mentors by the second respondents, who oversee the students Placements and have responsibility for signing off the student as having satisfactorily completed the placement. The first respondents have no involvement in the Placements other than assigning the student to the Placement. They are not involved in directing the student in their conduct of the work they do on the Placement; no service is rendered to the first respondent by the student in their conduct of the Placement. In the event an

issue arises with the student at the Placement, then the first respondents put in place an action plan for the student, which can involve an extension of the Placement.

12. In the BSC Nursing course the first respondents can consider a student's fitness to practice on the basis of proven professional behaviour, a breach of the NMC code, breach of confidentiality, or other serious issues.
13. The first respondents can decide to exclude a student from the BSC course.
14. Students who successfully apply to the first respondents to study the BSC nursing are made an offer of a place to study at the University, which they require to accept that if they wish to undertake the degree course.
15. Students are not paid by the first respondents but receive a bursary from the Scottish government (SASS). Students do not provide services to first respondents as part of their academic study.
16. The first respondents can refer a student to occupational health. They will consider doing so if they are asked by the student for such a referral, or if they consider issues with student's health and well-being is such that it would justify such a referral.
17. The claimant received an offer to study the BSC nursing (Mental Health) in April 2016, which she accepted.
18. The claimant commenced study with the first respondents for the BSC nursing in 2016. As part of her degree course, she required to undertake Placements with Forth Valley, the second respondents. The final Placement which the claimant was assigned to was in Clackmannanshire Community Health Centre (CCHC). The claimant commenced this Placement in September 2021. She was assigned two mentors, Eve Graham, and Lorna Gibb both of whom were staff nurses employed by the second respondents. The claimant considered that she was discriminated against by her mentors.
19. The claimant was not directed or supervised in the conduct of any service she provided in the course of that Placement by employees of the first respondent.

20. The claimant's placement with CCHC was extended after discussion with her Tutor from the first respondents.
21. The claimant was asked to attend a Fitness to Practice hearing 25 April 2022 by the first respondents. A panel considered a number of allegations in relation to the claimants conduct and behaviour. The first respondents concluded that the claimant's behaviour fell short of what could be reasonably expected of the student nurse and that her fitness to practice was impaired by reason of her misconduct. As a result of this the claimant was withdrawn from the BSC course. The claimant at that stage was nearing the completion of her degree course.
22. The claimant acted as a volunteer for a couple of days in a nurse training programme run by the first respondents.
23. At one stage the claimant was offered payment (and in fact paid) by a Health Board for some work which she was unable to undertake.

15 **Note on evidence**

24. Albeit the claimant had a very strong sense of grievance about the manner in which she has been treated by the first respondents, there was not a great deal of material dispute on a number of relevant matters which the tribunal had to reach a conclusion upon. The fact that the claimant had accepted an offer to study with the first respondent; the type of degree she undertook; the fact that she was ultimately excluded from this degree by the first respondents; and the fact that she carried out Placements with the second respondents as part of her degree; and the fact that she was not paid by the first respondents, were not an issue. Although the claimant disputed that she learned anything, or that the purposes of the placements were for learning and education, suggesting rather that they were to provide free labour, she accepted that she did undertake Placements with the second respondents.
25. It was the claimant's position that she carried out a significant workload during the course of placements, and she suggested that the extent of this was such that the NHS relied upon the services provided by student nurses provided by

the first respondents effectively in order to keep functioning. The claimant's suggestion to Mr Stoppard in cross examination was that the first respondent was engaged, corruptly, in supplying an unpaid labour force to the NHS. The tribunal found Mr Stoppard's denial of this unsubstantiated suggestion on the part of the claimant, credible. In any event, what this proposition suggested was that if the claimant was supplying a service, that service was not being supplied to the first respondents, but rather to the learning Placement provider.

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26. The Tribunal also found credible Ms Stoppard's evidence that the first respondents had no involvement in the Placements, other than allocation, or putting in place an action plan which could involve an extension the Placement, if that was required.

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27. Mr Stoppard's evidence to the effect that it was only the claimant's mentors who could sign off of a placement was challenged by the claimant, who suggested that this could be done by a university tutor. Given the context in which the placements took place, and the balance of the degree, which led to registration with the NMC and was contingent on a practical element of study be undertaken by the student, the tribunal was persuaded that Ms Stoppard's evidence on this was to be accepted.

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## **Submissions**

28. Both parties made oral submissions.

### *Claimant's submissions*

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29. The claimant submitted that the first respondents were letting students leave classes early and rushing students through their degree course in order to provide a robotic labour force for the NHS. She submitted that the first respondents 'weeded out' whistle-blowers or those with disabilities in order to achieve this aim. Action plans put in place by the first respondents were not intended to enhance performance but were again aimed at achieving a labour force for the NHS. She submitted that the first respondents work with the NHS to provide this labour force.

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30. The claimant submitted that she was treated as an employee and was subjected to the same types of poor behaviour that employees were subjected to.

5 31. The claimant also refers to the pass mark of 40%, required by the first respondents which she submitted again demonstrated that the first respondents were looking to push students through the degree and provide a labour force.

32. The claimant submitted that the first and second respondents worked together in a partnership.

10 *Respondents' submissions*

33. Ms McLaughlin took the tribunal to what she submitted were the relevant statutory provisions. She submitted that the claimant was not an employee in terms of the Employment Rights Act 1996 (the ERA) and nor did she fall within the definition of those who are covered by Section 83 (2) of the EQA.

15 34. Ms McLaughlin submitted that the claim has to fall within Part 5 of the EQA, which deals with Work in order for the Tribunal to have jurisdiction. She referred the Tribunal to with Section 55 of the EQA which deals with employment service providers and section 56 (5) and (6) of the EQA dealing with exclusions. She also referred to the implications of *Blackwood* in the  
20 interpretation of these sections.

35. Lastly Ms McLaughlin referred to section 91 of the EQA, submitting that the Tribunal does not have jurisdiction to consider a claim under section 91, which is under part 6 of the EQA, pointing out that the claimant could pursue a claim under section 91 in the Civil Courts.

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### **Consideration**

*Is the claimant an Employee/Worker in terms of the EQA?*

36. The first matter which the Tribunal considered was the first question for determination at this PH. That was: *whether the claimant is an employee/worker of the first respondent for the purpose of the EQA claims?*

37. The relevance of this question is that it goes to the Tribunals jurisdiction to consider the claims brought against the first respondent under the EQA.

38. In terms of Section 120 (1) of the EQA the Tribunal has a statutory jurisdiction to consider a complaint relating to a contravention Part 5 (section 39 to 83) of the EQA.

39. Section 13 and 26 under which the claims are brought, (and potentially section 19) of the EQA all define discrimination on the grounds of a protected characteristic. That conduct is rendered unlawful by virtue of sections 39 and 40 of the EQA.

40. Section 39 (2) provides:

“(2) *An employer (A) must not discriminate against an employee of A's (B)—*

(a) *as to B's terms of employment;*

(b) *in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*

(c) *by dismissing B;*

(d) *by subjecting B to any other detriment.*

(3) *An employer (A) must not victimise a person (B)—*

(a) *in the arrangements A makes for deciding to whom to offer employment;*

(b) *as to the terms on which A offers B employment;*

(c) *by not offering B employment.”*



41. Section 40 provides;

*“An employer (A) must not, in relation to employment by A, harass a person (B)—*

*(a) who is an employee of A's;*

5 *(b) who has applied to A for employment.”*

42. There is no separate definition of employee or worker under the EQA. The Tribunal therefore considered if the claimant's relationship with the first respondents fell within the definition of 'Employment' under Section 83 (2) of the EQA, which is the question identified for consideration at this PH. This  
10 definition is broader than the definition of Employee under the Employment Rights Act 1996 (the ERA).

43. Section 83 (2) provides

*“(2) “Employment” means—*

15 *(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;*

*(b) Crown employment;*

*(c) employment as a relevant member of the House of Commons staff;*

*(d) employment as a relevant member of the House of Lords staff.”*

20 44. There was no dispute that as part of her course the claimant required to undertake practical Placements, provided by the second respondents, which were allocated to her by the first respondents.

45. The Claimant submitted that the first and second respondents were working in partnership together and the Tribunal considered the nature of the  
25 relationship between the claimant and the first respondents in light of the factual conclusion that the claimant undertook Placements with the second respondents in the course of her studies with the first respondents. The

Tribunal considered whether it rendered the relationship between the claimant and the first respondent one of employment.

5 46. Ms McLaughlin referred the Tribunal to the *Blackwood* case which she submitted supported the position that there was no jurisdiction conferred on the Tribunal to consider claims against the first respondents by virtue of the fact that the claimant is alleging discrimination in the course of her Placement with a Placement provider. She submitted that the facts in that case were similar to this claim, and the claim against the University in *Blackwood* had been withdrawn; she submitted it was apparent from the judgment in that case  
10 that that was the correct approach.

15 47. The Tribunal agree that *Blackwood* is of some assistance in LJ Underhill's judgment makes clear that if the clam against a university is about access to a placement then it can only be brought in the Civil courts under Section 91 of the EQA. If the claim is about discrimination which is said to have occurred during a work placement then it typically, with some exceptions which are not  
20 pled here, is brought against the placement provider under Section 55 of the EQA . It was recognised by LJ Underhill that a student who wishes to pursue a claim about both discrimination in the course of a work placement and and about discrimination in her or his access to a work Placement may need to pursue those claims in different forums.

25 48. Further, in answer to the question which this PH was fixed to consider, the Tribunal concluded that the fact that the claimant undertook Placements which were arranged by the first respondents with the second respondents, was not capable of rendering the relationship between the claimant and the first respondent one of employment as defined under Section 83 (2) of the EQA. The claimant did not render service personally to the first respondents while on Placement or elsewhere, was not paid by them, and there was no  
30 mutuality of obligations between the claimant and the first respondents; there was no control of direction of the claimant's service while on Placement by the first respondents.

49. In reaching this conclusion the Tribunal had regard to the claimant's evidence that she acted as a volunteer in a nurse training programme for a couple of days, and that at one stage she had been offered payment (and in fact paid) by a Health Board for some work which she was unable to undertake. These were not factors capable of interfering with the Tribunal's conclusion on this point.
50. The Tribunal was satisfied that the claimant was not engaged by the first respondents under a contract of employment, apprenticeship or a contract to personally do work.
51. In order for the tribunal to have jurisdiction to consider a claim under Section 13, 26 or 19 of the EQA, other than in cases of applicants for employment, and some other defined categories, there has to be a relationship of 'Employment' as defined in Section 83. There was no such relationship in this case and the Tribunal does not have jurisdiction to consider these claims against the first respondent.

*Does the Tribunal Have jurisdiction to consider a claim under Section 91 of the EQA?*

52. That then takes the Tribunal to the question of whether it has jurisdiction to consider a claim under Section 91 of the EQA?
53. That question is simply answered. Section 91, which prohibits discrimination by a university; a designated institution; or a college of further education is out with the scope of Part 5 of the EQA.
54. Part 5 of the EQA runs from sections 39 to 83 and therefore a complaint brought under Section 91 is out with the jurisdiction of the Employment Tribunal. That is not to say that claimant wishing to make a complaint under section 91 is without remedy, but such a complaint and would have to be directed to the Civil Courts.

**Further Procedure**

55. A PH will now be fixed to consider further case management arising from correspondence between the claimant and the second respondent and any other issue the Tribunal considers necessary.

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**Employment Judge: L Doherty**  
**Date of Judgment: 11 July 2022**  
**Entered in register: 12 July 2022**  
**and copied to parties**

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