EMPLOYMENT TRIBUNALS

First Claimant: **Ms Tracy Evans**
Second Claimant: **Ms Celine Coyne**
Third Claimant: **Ms Jane Haraglova**
Fourth Claimant: **Ms Beth Stevens**

Respondent: **Solace Womens' Aid**

Heard at: London Central Employment Tribunal (by video)

On: 22, 23 August 2022

Before: Employment Judge Adkin

Appearances

For the claimant: Mr C Devlin, Pupil Barrister
For the respondent: Mr T Perry, Counsel

JUDGMENT

(i) All four Claimants were workers within the meaning of section 230(3)(b) of the Employment Rights Act 1996. They may therefore pursue their claims for holiday pay.

WRITTEN REASONS

Claims

1. All four Claimants are pursuing claims for holiday pay.

The issue

2. This Preliminary Hearing was listed to deal with a single issue, namely was each Claimant a worker within the meaning of s.230(3)(b) of the Employment Rights Act 1996 ("ERA 1996")

The evidence

3. I received a witness statement from each of the four Claimants, and from the Respondent from Ms Jennifer Cirone, Interim Director of Services, and from Ms Emma Brooks, Head of HR. I heard oral evidence from each of these six witnesses.

4. Counsel's questions on both sides were commendably succinct and to the point.

5. I found all six witnesses were doing their best to honestly assist the Tribunal based on their knowledge.

6. Where there were apparent conflicts between the Claimants and the Respondent's witnesses, such as the provision of specific equipment I had no hesitation in preferring the evidence of the Claimants, entirely because they naturally had direct experience of these matters and were therefore much closer to the detail on these points. The Respondent's witnesses, through no fault of their own were somewhat removed from the detail of for example specific equipment that are been issued to the Claimants. This is not a criticism of the Respondent witnesses.

7. The is an agreed bundle of 535 pages. I'm grateful to the Respondent's solicitor for swiftly providing a hard copy for my benefit at my request on the first morning.

Submissions

8. I received opening written submissions from both counsel, together with an authorities bundle. These were very helpful.

9. Counsel for both sides made succinct oral submissions at the conclusion of day two of the hearing.

Findings of Fact

The Respondent

10. The Respondent is a charity which is the largest provider of services to those affected by different forms of violence against women and girls ("VAWG") in London and has been providing services for over 48 years. Solace has over 50 different services and these are arranged thematically and geographically. Solace provides supported accommodation (emergency refuge and 2nd stage accommodation), advice and support to survivors in the community, services for women experiencing multiple forms of disadvantage in addition to VAWG, services for children and young people, an advice line, therapeutic services and also runs the North London Rape Crisis service.

11. Within Therapeutic Services, the Solace Counselling team offer one-to-one counselling sessions to women, creating a "safe space" for them to explore the impact of violence on their lives. Through this team the Respondent offers one-to-one counselling to victims/survivors of domestic abuse and all forms of VAWG.

12. The Respondent engages people in several ways with the majority of our workforce made up of employees. There are between 200-300 employees and 80 volunteers, of whom something in the region of 3 – 4 are honorary therapists perform similar services to the Claimant. The Respondent often has students on industrial placements who are learning about therapy.

The Claimants

13. All four Claimants are counsellors who provide assessment and counselling for women who have been the victim of violence. These are described as "service users" or alternatively "clients".

14. The Respondent describes the basis of engagement for these four individuals as self employment. It is the contention of the Respondent that the Claimants are professionals for working as a business for the Respondent as a client or customer within the wording of section 230(3)(b). I have used the Respondent's terminology "Self-employed counsellors" to distinguish the Claimant from those with another status, for example employees. As should be clear from my eventual decision however I do not consider that this terminology is in itself determinative of the issue of worker status. I have used this terminology for convenience, in particular when setting out the Respondent's position.

15. The Claimants contend that they are workers, and therefore entitled to receive holiday pay.

16. Confusingly the Claimants' witness treatments are set out on the basis that Ms Stevens is the first claimant. I have adopted the numbering set out in the Case Management Order made on 12 April 2022 by Employment Judge Street, that Ms Evans is the first claimant.

Holiday

17. It is agreed that the Claimants have never been paid holiday, although they are required to give notice to take holiday and their contracts provide that they are expected to work 46 weeks per year. The number of days that they work each week is different and has varied from time to time in the case of each individual.

First Claimant: Ms Tracy Evans

18. Ms Evans commenced working on 1 April 2012, purportedly as a self-employed contractor for a fixed term until 31 March 2016. Thereafter she was engaged on an open-ended basis.

19. Ms Evans has worked different number of days from time to time. Her evidence was that she had at different stages worked 3, 2 or 1 day a week. She stopped working altogether at one stage for several months when she worked for Watford General Hospital.

20. Ms Evans also has a small private practice which she started almost 3 years ago, which coincided with reducing number of days she worked for the Respondent. She only ever has a maximum of five clients. At the time of the hearing she only

had 4 such clients. She works with these clients on Monday evenings and Tuesday afternoon. These are individuals who have come to her as part of this practice rather than Ms Evans working with them on behalf of some other organisation. These are not necessarily women and there is less of an emphasis on trauma work than is the case for the individuals referred to her by the Respondent. She is a member of the UKCP a professional body. She historically used PayPal for clients to pay her. Now she uses her private bank account. This is a personal account rather than a business account. She does a tax assessment every year.

Second Claimant: Ms Celine Coyne

21. Ms Coyne commenced working for the Respondent on 7 March 2019. In 2019 she increased to 2 days per week. In 2020 she added an additional day of week. In 2020 during lockdown she reduced back down to 2 days. In 2022 she reduced down another day. She currently works one day per week.

22. In her witness statement Ms Coyne describes a difficult period towards the end of 2021 when she contacted her "line manager" at the Respondent. She is somewhat critical of the support that she was given at this time. She changed supervisors and reduced the number of days that she was working.

23. Ms Coyne explained that during lockdown a practice began whereby she was seeing clients arranged by the Respondent on the Zoom video platform almost back to back with 10 minute intervals between sessions which was ultimately overwhelming, given the very intensive nature of the problems being by clients. The agreed bundle contains an email from Ms Coyne on 25 January 2022 when she wrote to Ms Asalet Tulaz at the Respondent to ask if she could "shuffle" her allocations so that she would only be doing one half assessment of one the assessment in her working week.

24. Ms Coyne was not the only individual at this time who requested that this very intensive scheduling of clients changed.

25. Ms Coyne gave relatively short notice of a lack of availability because of annual leave on 25 August 2021 she notified the Respondent that she would not be available on 1 and 2 September. She apologised for not letting the Respondent know. In response Alice Robb acknowledged the leave and asked if more forewarning for leave could be given in future to avoid administrative time being taken up and upset to clients.

Third Claimant: Ms Jana Haragalova

26. Ms Haragalova commenced working for the Respondent on March 2017. Initially she worked one day a week. In 2021 she increased to 2 days a week, having been through a further recruitment process requiring an interview.

27. Ms Haragalova deals with the question of "substitution" in relation to work status in the following way in her witness statement:

> 3. I would like to emphasise that for me the substitute concept only came to light through this claim. The whole idea of substitution

> contradicts the best practice and ethical framework for therapists as determined by regulatory bodies the British Association for Counselling and Psychotherapy ("BACP") and/or the UK Council for Psychotherapy ("UKCP"). Specifically, I believe that substitution would compromise the Values point 3 principle of "ensuring the integrity of practitioner-client relationships" (Bundle, p. 368).
>
> 4. Also, the possibility of substitution does not feature in the counselling agreements we have with service-users of the Respondent. If this principle were to be a reality it would need to be part of the counselling agreement with clients otherwise it breaks another principle of the BACP Code of Ethics, Respect point 26: "We will work with our clients on the basis of their informed consent and agreement"

28. Ms Haragalova gave evidence about being threatened with disciplinary action if she failed to "check out" following the Respondent's lone working policy in relation to working later on in the day. In her oral evidence it seemed that she seemed to think that this was unnecessary given that she was in a building with other people there, albeit that they were not engaged by the Respondent. She conceded that really she was being threatened with a talking to rather than any serious disciplinary action.

29. Ms Haragalova also has a small private practice, with in the region of 1 – 3 clients per week. She worked for a local authority in London in the period December 2018 – October 2020 for 2½ an days a week then left that employment and commenced part time employment for a Mental Health NHS Trust for two days a week. She uses a personal bank account for payment. Ms Haragalova has a professional website which describes her offering individual therapy, groups and workshops, her fees, what happens in sessions. I have also been provided with a printout of her LinkedIn profile.

30. On 3 April 2020 Ms Haragalova wrote to Pavlina Skoutela in the following terms:

> "1/ first of all I would like to ask you to include this email address: [private professional email address] whenever you are forwarding or sending crucial information about any major changes to counsellors work (I leave it to your discretion to decide what is such an urgent information which should be communicated or actioned immediately). I am not an employee of Solace. I work as a freelancer one day per week. Following your own advice(Clinical meeting some months ago) I do not check my Solace emails outside the working hours for safeguarding reasons. I therefore cannot access any important information before my next working day on Friday. If there is any urgent action required or any major change impacting my client work please email me on the address where I can actually access such information and action them in a timely manner.
> In the last couple of weeks if it was not for either kindness of my colleagues who texted me or for me proactively breaking the above mentioned practice and accessing my email outside my working hours I would have not known about: Solace closure, solace moving sessions online, Solace changing access to all its operating systems.

31. She also complained that following some system changes she was not able to access relevant documentation on the OASIS system and requested to be removed from all company circulation email lists, due to the number of emails she was receiving.

Fourth Claimant – Ms Beth Stevens

32. On 8 October 2018 the Fourth Claimant Ms Stevens commenced working for the Respondent. She started off working one day per week. In November 2018 she increased to 2 days per week. In July 2019 she increased to 3 days per week. In March 2021 she increased to 4 days a week. She ultimately ceased working for the Respondent in December 2021.

33. In an email exchange in November 2018 it was confirmed to Ms Stevens that she would not attend a particular two-day induction course, given that this was for employees.

34. Ms Stevens was given a "tablet" to enable her to connect electronically to the Respondent's system. Later on she found that this was too slow and she was given instructions on connecting her own equipment because this was too slow. She denies that this was purely because of the Covid-19 pandemic which appears to be the position adopted by the Respondent.

35. At the time that she began working for the Respondent Ms Stevens worked as an administrator for the Citizens Advice Bureau. This was unrelated to her counselling work. It follows that her work for the Respondent was the only place that she was working as a counsellor.

36. Ms Stevens had some difficulty in arranging to be supervised by one of the list of external counselling supervisors approved by the Respondent. This seems to been simply due to logistical difficulties. She asked if she could be supervised by someone else. She was told to use someone on the list and ultimately she did manage to do this.

37. On 15 May 2019 Ms Stevens wrote to Ms Williams with her availability/leave. She notified her that she would not be working on 1, 3, 8, 10 July 2019.

38. Having considered the invoices presented by Ms Stevens, it is clear that the majority of payments were for £140, particularly in the period February, March, April, May, June, July, August 2021. There were some other smaller amounts claimed in September, October, November, December 2021. The Respondent suggests that this undermines the Claimant's case that there was a standard rate. Ms Stevens explained in her evidence that these were due to a transition to working on different days.

39. It seems that £140 per day rate was the standard day rate and these other payments were something of an exception. There is other evidence that supports the £140 day rate, not least the email from the respondent confirming that there was an increase from £130 per day to £140 per day.

40. On 4 September 2019 Ms Stevens wrote to Ms Williams under the heading "RE: Ending sessions – The Keel Service":

> I heard from [client/service user name] today, she's cancelling her sessions as she can't do Tuesday's any more. Her day off is on Monday – do we have anyone working on Mondays?

41. It is clear from this email that Ms Stevens anticipated that this particular client would be rescheduled and commenced counselling with a different counsellor. The parties are in dispute as to whether this amounts to substitution or a permanent replacement of counsellor. I discuss this point further below.

Contractual terms

42. I have considered the contract entered into by Beth Stevens in November 2018. It appears to be common ground that this document is materially similar to the equivalent documents entered into by the other Claimants, leaving aside specific details such as names, addresses and dates.

43. The covering letter for this contract dated 5 October 2018 read "We would like to formally offer you the post of Self-employed Counsellor".

44. In this contract, which does not have any numbered clauses, the counsellor Ms Steven is described as a "Service Provider".

45. Regarding what might be described as the personal service/substitution point, the contract contains this wording [77]:

> "Delegation and notification of non-performance
>
> The Service Provider may delegate the services to an appropriately skilled Contractor approved by Solace. The Service Provider must promptly notify Solace in the event of seeking approval of such a contractor for delegation. The Service Provider must promptly notify Solace in any case of absence whether through illness or accident or other reason that prevents the performance of the Services in accordance with this contract. Planned absence requires a minimum of one month's notice."

46. Under the heading "Appointment", the contract provides as follows:

> "With effect from the Commencement Date, the Service Provider is appointed to provide services to Solace [the Respondent] as and when the services are required. Solace normally provides counselling for 46 weeks in each year unless further services are agreed by both parties.

47. Regarding payment, this is described as a fee payable of hundred and £30 per 7.5 hour day "this fee will only be payable if the Service Provider is working the full day". The day is described as having a maximum of 5.5 hours clinical work. By implication the remainder of the day is administration.

48. It is provided that group work is paid at £40 per session and other authorised services are paid at £17.33 per hour, which must be approved in advance by the Service Manager.

49. There is a requirement to submit an invoice. The Service Provider is responsible for all travel, subsistence and other disbursements incurred.

50. There are provisions about confidentiality and data protection which to my mind are unremarkable, and unlikely to have a bearing on the matters material to the issue of worker status.

51. There is a termination provision. Either party has the right to terminate this contract by not less than six weeks' notice in writing. Further provisions are made for summary notice without any payment in lieu in the event of the Service Provider being in material or persistent breach of any of the terms of the contract, and some other eventualities such as bankruptcy, criminal offence, persistent and wilful neglect or incapability.

52. There is a termination date in Ms Steven's contract of 31 March 2019.

53. As to tax there is the following provision:

> "Solace and the Service Provider declare and confirm that it is the intention of the parties that the Service Provider shall have the status of a self-employed Service Provider and shall be responsible for all income tax liabilities and national insurance or similar contributions in respect of the Service Provider's fees. Accordingly the Service Provider hereby agrees to indemnify Solace in respect of any claims that may be made by the relevant authorities against Solace in respect of income tax and national insurance or similar contributions relating to the services provided under this agreement."

54. There is the following provision as to employment status:

> No employment
>
> Nothing in this contract renders the Service Provider and employee or agent of Solace and the Service Provider agrees that she is a self-employed independent provider and not the employee or worker or agent of solace. This contract does not create any mutuality of obligation between the Service Provider and the [sic] Solace."

Job description

55. A job description document dated May 2017 describes the role as "Self-employed counsellor (female)", responsible to Counselling Manager. The requirements for the role included:

    55.1 Providing a short-term counselling service to women affected by domestic or sexual violence;

    55.2 maintaining case files and records calling to monitoring requirements;

    55.3 carrying out clinical assessment;

55.4 ensuring consistent excellence in service provision and abiding by the BACP's ethical framework [British Association for Counselling and Psychotherapy];

55.5 Provide a holistic therapeutic service to women affected by domestic and sexual violence working mainly from a person centred or integrative approach

55.6 attending external clinical supervision in line with BACP requirements;

55.7 attending clinical team meetings 6 per year;

55.8 working flexibly to meet the demands of the service, including working from head office in Islington on exceptional basis;

55.9 carry out other duties appropriate to the post as requested by "your line manager".

56. Under the heading 'Corporate Responsibilities' this document provided the following:

- Ensure that all Solace's policies and procedures in your work area are up to date
- Ensure effective implementation of Solace's Equality and Diversity policies and ensure awareness and integration of an equalities and human rights agenda in all your work
- Ensure that the service user is at the heart of all service delivery and development
- Attend all meetings and training relevant to your role
- Attend regular team meetings, ensuring that you contribute to effective working practice and communication
- Act as an ambassador for Solace

Payment

57. All four of the Claimants are paid the same day rate. This is paid even if a client or clients cancel. The Claimants are expected to do some administration work.

58. In January 2019 there was an increase in the day rate from £130 to £140 p.d.

Equipment

59. Under the contract the Service Provider is expected have access to a basic home office equipment including a shredder, scanner and PC/laptop. In the absence of a shredder a weekly visit to a Respondent site is required.

60. Under the contract a tablet and mobile phone may be loaned.

61. All of the Claimants are issued with mobile phones by the Respondent. They are required to have these mobile phones fully charged and to use them in telephone communication with service users or clients.

62. According to Emma Brooks, in March 2020 around the outset of the pandemic the Respondent "loaned" laptops to some "self-employed" counsellors because the personal laptops which they have been using to access the Respondent's IT system did not have the appropriate technical specification to operate on Microsoft Azure Cloud.

Systems

63. The Claimants had Respondent email addresses. There are examples of emails in the bundle with an email "footer" which reads Counsellor, "Solace Woman's Aid Counselling Service".

64. The Claimants accessed the Respondent's IT systems and in particular the OASIS service user database but were subject to access at certain hours. From the Respondent's perspective this enabled them to check that work was correctly recorded for the purposes of contractual compliance. The OASIS system was set to deny access to "staff" after certain hours to protect staff work/life balance, which Ms Brooks confirmed in her oral evidence. This had an effect on when the Claimants could carry aspects of their duties involving the client database.

Covid-19 pandemic

65. From March 2020 all counselling was delivered remotely due to the effect of the lockdown, social distancing due to the pandemic.

66. In August 2020 the Respondent offered "Premium" Zoom video accounts to support the counsellor's online video working.

67. During the pandemic there were more regular monthly online meetings with a new counselling manager Asalet Tulaz.

Policies

68. A document entitled Self-Employed Counsellor Handbook ("Handbook") was supplied to Ms Stevens. On the balance of probabilities I find that this will supplied to her some time around October 2018 when she commenced working, and very likely before January 2019 when the day rate increased to £140.

69. The Handbook contains guidance about invoicing monthly. It contained the following provisions:

> "Please refer to your job description for list of duties. Please note counsellors are expected to complete the associated administration and attend regular clinical case meetings. Clinical supervision is expected to take place outside of working hours.
>
> As self-employed counsellors we are contracting your services on a sessional basis. We intend to offer you up to 46 weeks work per year. From time to time we may experience service delivery issues such as low referrals or issues with satellite venues. Where this occurs we will offer you administration or associated counselling were such as assessments from head office.

> If you are unwell or unable to attend work you must call the manager of the service before 9 AM and inform all of your client by text. You will not be paid for any days do not work.
>
> If you wish to take time off on one of your contracted days you need to give at least 4 weeks notice to the service manager and your clients. Counsellors are expected to work 46 weeks of the year. The year runs from 1st April till 31st March.
>
> Self-employed counsellors are required to attend the minimum of 6 clinical team meetings per year.

70. The agreed bundle at page 354 contained a "Code of Conduct" document, which was last reviewed on January 2016 and was due to be reviewed again on January 2019. Whether or not this applied to the Claimants was in dispute before me.

71. I concluded that this document *did* apply to the Claimants for the following reasons. First because of the content of the Handbook itself. This appeared in the agreed bundle beginning at page 491 and contained her handwritten additions, which look most likely to be information that the Fourth Claimant Ms Stevens recorded as part of a conversation early on in her engagement by the Respondent, in the later part of 2018. This document contains the following section at 493:

> "**Which Solaces policies apply to Self-employed Counsellors?**
>
> Code of Conduct
> Lone working policy
> Confidentiality
> Data protection
> Safeguarding children
> Safeguarding adults"

72. Second, there is no evidence of a communication which indicates that either the Handbook or the Code of Conduct no longer applies to the Self-employed Counsellors. It was plainly regarded as current in 2018. While I acknowledge the point made by Ms Cirone in her evidence that with the effluxion of time documents eventually become out of date, I do not consider the time elapsed in this case to be so significant as to mean that these documents have obviously lapsed or fallen into disuse. I find that they did apply and were useful, with no more than occasional points which were slightly out-of-date.

73. Third, because the categories of individuals to which the Code of Conduct is said to apply is drawn broadly "Staff, volunteers and students". In my view it would be a curiosity if a volunteer or student were covered by the Code but the Claimants as Counsellors were not. A decision has been made to use the word Staff rather than employees. I read staff in this context as being broad enough to conclude the Self-employed Counsellors.

74. There was a short policy entitled "Extensions for Counselling" dated April 2019 which prescribes that extensions for counselling should be made 4 – 6 weeks before the end of counselling and that the counselling coordinator would approve requests for extensions.

75. Another short guideline document "Guidelines on private practice work with Solace Women's Aid clients contained the following guidance:

> "If a counsellor is contracted by Solace Woman's Aid as self-employed or a volunteer counsellor, is approached outside Solace, via their website, by a client they have ended counselling with, the counsellor is expected to make the professional decision if to work with the client or not. This is on the basis the client has not accessed any Solace Women's Aid Services for at least six months. It would be between the counsellor and client to perform the boundary between Solace counselling and their private practice.
>
> Counsellors who are no longer contacted/volunteering with Solace can accept former clients into their private practice if there has been a gap of 6 months."

BACP guidance

76. The Respondent has placed some reliance on a document entitled "Ethical Framework for the Counselling Professions" produced by the British Association of Counsellors and Psychotherapists (BACP), and in particular the section "Working to professional standards", which contains the following:

> "14.
> We will keep skills and knowledge up to date by:
> a. reading professional journals, books and/or reliable electronic resources
> b. keeping ourselves informed of any relevant research and evidence-based guidance
> c. discussions with colleagues working with similar issues
> d. reviewing our knowledge and skills in supervision or discussion with experienced practitioners
> e. regular continuing professional development to update knowledge and skills
> f. keeping up to date with the law, regulations and any other requirements, including guidance from this Association, relevant to our work.
>
> 15.
> We will keep accurate records that:
> • are adequate, relevant and limited to what is necessary for the type of service being provided
> • comply with the applicable data protection requirements – see www.ico.org.uk.
> 16.

> We will collaborate with colleagues over our work with specific clients where this is consistent with client consent and will enhance services to the client.
> 17.
> We will work collaboratively with colleagues to improve services and offer mutual support – see 56–59 Working with Colleagues and in Teams."

77. The contention of the Respondent that the requirements placed on the Claimants to follow their procedures are no more than or at least little different to professional obligations. I discuss this further below

Diary management

78. There are various examples in the agreed bundle in which the counsellors communicate with administrative staff about rearrangement of appointments. In some cases this is for convenience. In other cases this relates to rescheduling work to manage workload. Generally the Respondent's administrative staff are responsive to such requests.

79. There are also examples where Counsellors are pushing back on an expectation that an initial assessment is carried out in one session, rather than two sessions which was their preference.

Clinical meetings

80. The requirement for counsellors to attend 6 clinical meetings the year is set out in the job description. This is also referred to in an email to all counsellors from Pavlina Pavlina using the email address of Ifeoma Williams, sent on 2 May 2019. She followed up with the request "if you are unable to attend these let me know ASAP so that we can book in 1:1 brief check ins". I find that there was an expectation that the Claimant would attend these meetings or alternatively have a substitute meeting.

81. In an email on 12 June 2019 Ms Pavlina reminded the team of the minimum requirement of 6 clinical meetings per year and stated that one such meeting scheduled on 27 June was an opportunity to meet the new Counselling Services Manager, Maya Walker.

82. On 5 June 2020 Ms Haragalova chased up the May clinical meeting on the basis that this had not happened and requested further communication about the status of these regular meetings.

83. On 28 August 2020 a meeting took place. Ms Asâlet Tulaz, Counselling Service Manager documented with a follow up email which showed that the Respondent had made a decision to continue remote therapy rather than returning to venues because of the ongoing Covid-19 pandemic. Counsellors were being offered a premium zoom account, although the were also given the choice to use a mixture of online and telephone. A decision had been taken about using 2 session slots for introductory assessments. Discretion was given to counsellors as to whether to do this in one go or alternatively have a break in the middle. There was a change to cancellation policy; new clients would no longer be offered replacement

sessions and two cancellations by a client would lead to termination of the counselling altogether.

Claims

84. In March 2021 the United Voice of Workers sent an initial letter claiming worker status.

85. On 2 February 2022 the claims were presented to the Employment Tribunal.

86. There was a preliminary hearing for case management on 12 April 2022 heard by Employment Judge Street.

Law

87. I am grateful both counsel for their written submissions on the law and in particular to Mr Perry for providing an authorities bundle. Although there are slight differences in emphasis and different points are covered, I did not find that counsel were in disagreement on the key principles.

"Worker"

88. Section 230(3)(b) of the Employment Rights Act provides:

> (3) In this Act "worker" … means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
> …
> (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

89. In many of the authorities dealing with this topic this type of work is described as a "limb (b) worker". In this decision for simplicity I use the term "worker" to mean "limb (b) worker)" i.e. a worker falling within section 230(3)(b).

90. The test for a worker it has been confirmed in the case law is a multifactorial test. There are certain essential elements. First the individual must be under an obligation personally to do the work. Whether the individual can substitute another and if so this is in some way restricted is relevant. Mutuality of obligation is another consideration. Third the person for whom the work is done must not be a client or customer of a profession or business being run by the individual.

Distinction between self-employment and worker status

91. Whether or not someone is self-employed does not in itself determine whether they are worker. Lady Hale SCJ said the following giving the leading judgment in

the case of **Clyde & Co LLP v Bates van Winkelhof** [2014] UKSC 32 at paragraph 24:

> 24. …. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.
>
> 25. Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in *Hashwani v Jivraj (London Court of International Arbitration intervening)* [2011] UKSC 40, [2011] 1 WLR 1872 were people of that kind. **The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else**. The general medical practitioner in *Hospital Medical Group Ltd v Westwood* [2012] EWCA Civ 1005; [2013] ICR 415, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a "worker" within the meaning of section 230(3)(b) of the 1996 Act. …
>
> [emphasis added]

92. This approach was recently summarised by the Court of appeal in **Stuart Delivery Ltd v Augustine**, [2021] EWCA Civ 1514, [2022] ICR 511 by Lewis LJ, who held that section 230(3):

> "36 … reflects a distinction between (1) persons employed under a contract of employment, (2) persons who are self-employed, carrying on a profession or a business on their own account and who enter into contracts and provide work or services to clients and (3) persons who are self-employed and provide services as part of a profession or business carried on by others"

93. The **Westwood** decision was one of a pair of medical cases referred to by the parties that feel either side of the line. [FROM HERE]

94. In **The Hospital Medical Group Ltd v Westwood** [2012] EWCA Civ 1005, Maurice Kay LJ gave the a useful summary of the case law at paragraphs 15-20, recognising that there was not one key to unlock the statute, and that there were different approaches, for example considering the degree of "*integration*" of the individual into the organisation may be a useful tool (following Langstaff J in *Cotswold Developments Construction Ltd v Williams*) as is consideration of the "*dominant purpose*" (per *James v Redcats (Brands) Limited*, [2007] ICR 1006, Elias J (President)).

95. Various cases have made it clear that ultimately the wording of is the critical approach.

96. Westwood was followed by **Suhail v Barking Havering and Redbridge University Hospitals NHS Trust** EAT 0536/13 is an examples of the 'integration test' being applied. I am grateful to Mr Perry for the summary that follows. The EAT held that an out-of-hours GP who also provided his services to an NHS Trust through a cooperative was not a worker. The cooperative's members' agreement described Dr Suhail as a self-employed contractor and his invoices were paid without deduction of tax or national insurance. There was no obligation on the cooperative to provide work, nor on Dr Suhail to accept assignments when they were offered. Dr Suhail was free to work for any other organisation, actively marketing himself to whichever locum agency offered the most attractive sessional work. His Honour Judge Peter Clark contrasted Suhail to Westwood in that, although Dr Westwood carried out other work, he had agreed to provide his services as a hair restoration surgeon exclusively to HMG Ltd, he did not offer that service to the world in general and he was recruited by HMG Ltd to work as an integral part of its operations. That exclusivity was wholly missing on the facts of the instant case. Dr Suhail was free to work as often as he chose and wherever he chose, and in those circumstances the cooperative could properly be regarded as his client or customer.

97. This is not a reported case and it is unclear to me whether this case provides any new guidance of wider application, but taken as a pair, the **Westwood** and **Suhail** cases show that professionals working in healthcare settings may fall either side of the worker/non-worker line.

Significance of written contract

98. In the context of employment contracts the Supreme Court in **Autoclenz Ltd v Belcher and ors** [2011] ICR 1157, SC, endorsed a line of cases which stressed that the circumstances under which employment contracts are agreed are often very different from those under which commercial contracts are agreed, with employers largely able to dictate the terms and held that there was less restricted approach to the circumstances in which a court might look behind the wording of a written contract. Relative bargaining power should be taken account of in deciding whether written contract reflects the truth of the agreement.

99. It is not necessary before a court will look behind the contractual documentation that there is a sham or an intention by the parties to deceive others (**Protectacoat Firthglow Ltd v Szilagyi** [2009] ICR 835, CA). In that decision (cited in Autoclenz above) Smith LJ said that a tribunal faced with a 'sham' allegation must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations) not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them. Lord Justice Aikens warned that, when seeking out the 'true intentions' of the parties, tribunals should not concentrate too much on the 'private' intentions of the parties. Ultimately, what matters is what was actually agreed at the time the contract was concluded

100. In **Uber BV and ors v Aslam and ors** [2021] ICR 657, SC, the Supreme Court held that not only is the written agreement not decisive of the parties' relationship, it may not be even the starting point for determining employment status:

> "**it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker"**. To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. **The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker**." (emphasis added)

Personal service & substitution

101. The leading authority on personal service and the significance of substitution is the decision of the Supreme Court in **Pimlico Plumbers v Smith** [2018] UKSC 29; 2018 ICR 1551. In that case the employment judge found that there was not an unfettered right to substitute at will. There was no such right given to Mr Smith by the contractual documents and no evidential basis for such a practice. In practice engineers with the company swapped jobs around between each other, and also used each other to provide additional help where more than one person was required for a job or to do a job more quickly, and there was evidence that external contractors were sometimes required to assist a job due to the need for further assistance or to conduct specialist work, the fact was that Mr Smith was under an obligation to provide work personally for a minimum number of hours per week or on the days agreed with the company.

102. Lord Wilson, giving judgment in the Supreme Court held:

> "34. The tribunal was clearly entitled to hold, albeit in different words, that the **dominant feature** of Mr Smith's contracts with Pimlico was an **obligation of personal performance**. To the extent that his facility to appoint a substitute was the product of a contractual right, **the limitation of it was significant**: the substitute had to come from the ranks of Pimlico operatives, in other words from those bound to Pimlico by an identical suite of heavy obligations. It was the converse of a situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done. The tribunal was entitled to conclude that Mr Smith had established that he was a limb (b) worker – unless the status of Pimlico by virtue of the contract was that of a client or customer of his."

103. At the Court of Appeal below in the same litigation (*Pimlico* [2017] EWCA Civ 51, [2017] IRLR 323) Etherton MR had summed up the case law on substitution clauses in some detail as follows:

> "[84] … In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an

> unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.'

104. The Supreme Court did not disagree with this approach, and indeed subsequently the EAT has followed it.

105. Ultimately, based on **Pimlico**, a limited right of substitution does not preclude the conclusion that a person is a worker.

106. By contrast a genuine and absolute right to substitute would suggest that the individual is not a worker (**Independent Workers' Union of Great Britain (IWGB) v RooFoods Limited (t/a Deliveroo)** [2018] IRLR 84).

<u>'client or customer of any profession or business undertaking'</u>

107. Recently HHJ Tayler in **Sejpal v Rodericks Dental Limited** [2022] EAT 91 sitting in the Employment Appeal Tribunal gave guidance on section 230(3)(b) arising from the finding of a judge that the claimant dentist was not a worker. He reviewed various authorities, some of which I have considered above and held at [10]-[11] that for an individual to be a worker within the meaning of s.230(3)(b), the following conditions must be satisfied:

    107.1 i. A must have entered into or work under a contract with B; and

    107.2 ii. A must have agreed to personally perform some work or services for B

    107.3 However, an individual is excluded from being a worker if:

        107.3.1 iii. A carries on a profession or business undertaking; and

        107.3.2 iv. B is a client or customer of A's by virtue of the contract

108. In order for the profession/business exception to be made out both iii and iv must be satisfied.

Conclusions

The issue – worker status

109. There is a single, central issue in this case, namely were the claimants workers of the respondent within the meaning of section 230(3)(b) of the Employment Rights Act 1996?

110. In submissions from counsel it became clear that there were two points in particular that were in dispute between the parties relating to the statutory definition at section 230(3)(b):

111. The first is personal service.

112. The second is whether the profession/business undertaking exception applies i.e. whether the Respondent was a client or customer of any profession or business undertaking carried by the Claimants.

113. Counsel both agree that in principle the Tribunal might find that some of the Claimants fall one side of the line and others do not.

Contract

114. It is clear that there was a contract governing the relationship between the Respondent and the Claimants.

115. The fact that the Claimants were described in the contract as self-employed does not preclude them from being workers. Some of the self-employed are workers, some are not (**Bates van Winkelhof**).

116. As to the terms of this contract, following **Autoclenz** and **Uber**, the statement that the Claimants were not workers of the Respondent is not a definitive statement of the legal position. The exercise that I'm carrying out is one of statutory rather than contractual interpretation.

117. The reality is, I find, that the Claimants had little bargaining power at the time of entering into the contract. The contract amounted to standard terms for self-employed counsellors. I have received no evidence to suggest that different Claimant negotiated terms other than agreeing the number of days per week that they would be working. There was a standard day rate which they all worked to. There was a raise, unilaterally decided by the Respondent applied across the board to all Claimants from £130 to £140 per day.

118. The mutuality of obligation clause is discussed immediately below.

Mutuality of obligation

119. The contract purportedly agrees that there was no mutuality of obligation between the Claimants as service providers and the Respondent. This did not reflect the reality of the situation. The Claimants were in the main working fixed hours for agreed an agreed rate, initially £130 later £140. That day rate was paid irrespective of cancellation by service users/clients. The Claimants agreed to

provide services for 46 weeks per year. The expectation was that they would provide notice if they were going to take leave. Although there is an instance where short notice of leave is given in the case of Ms Coyne, the response of Ms Robb for the Respondent clearly articulated the expectation that notice would be given.

120. In the main the Claimants worked particular fixed days.

121. In short, there were mutual obligations. The Claimants were obliged to work on their fixed days and the Respondent expected them to be available and paid them.

Personal service (and *substitution*)

122. The Respondent points out that there is a substitution clause in the Claimant's contract, in that the contract provides that services may be delegated to an appropriately skilled Contractor approved by the Respondent. The Respondent submits that the Tribunal should reject an argument that the substitution provision is a "sham" or the Claimant's argument that it was unethical for councillors to substitute. The Respondent highlighted that in September 2019 Ms Stevens enquired if there was anyone working on a Monday because a particular client or service user was cancelling the sessions on a Tuesday with Ms Stevens. This is relied upon as evidence of substitution.

123. The Claimant argues that there is no contractual right to substitute. In practice it is argued that there was no substitution, and furthermore given the nature of counselling work substitution was not appropriate.

124. In this case the right to substitute such as it was, was very limited. The contract provided that it would amount to delegation to an *appropriately skilled contractor approved by the Respondent*. I have received no evidence that this occurred in practice at all. This corresponds to the fifth example suggested by Etherton MR in **Pimlico**, i.e. where the 'employer' has an absolute and unqualified discretion to withhold consent, which he suggested was consistent with personal performance. I recognise that Etherton MR's words are merely guidance and not an exhaustive or definitive list.

125. The reality is that once a client had commenced working with a counsellor, I accept the Claimant's case that expectation was that the two would work together over a complete course of therapy. It would not be normal or appropriate for another counsellor to swap in for a session here or there. Whether that was as high as being an "ethical" consideration as has been contended by the Claimants I feel I do not need to decide. I find that the way that the Claimants worked as counsellors was by establishing consistent relationship with the client during therapy over a course of sessions rather than chopping and changing the identity of the counsellor. Substitution did not arise.

126. The September 2019 situation referred to above in my assessment was, I find, an unusual situation. It is the only such example drawn to my attention. In reality this represented cancellation by the client of a course of therapeutic sessions on a Tuesday due to a clash. Ms Stevens was not putting forward her own substitute or seeking to delegate. In fact she was referring the situation back to the

Respondent. From the client's perspective she was having to call into the Respondent and join a waiting list. I would not characterise this as a "substitution" within the terms of the case law.

Financial risk

127. I accept the submission put forward on behalf of the Claimant that the Respondent substantially bore the financial risk in the sense that the Claimants would still get paid if a client cancelled.

Profession or business undertaking exception

128. The Respondent submits that the Claimants are in business on their own accounts. They invoice for services and are responsible for their own tax and professional registrations. In some cases they market themselves and provide the services health elsewhere.

129. It is submitted on behalf of the Respondent that the *integration* of the Claimants into the Respondent's organisation is limited. By contrast, on behalf of the Claimant it is submitted that the Claimants were *tightly integrated* into the Respondent's organisational structure.

130. Without necessarily finding that the Claimant were "tightly" integrated, I find that there was a significant degree of integration for the reasons set out below:

    130.1 Self-employed Counsellors were required to "act as an ambassador for Solace". The Claimants had Respondent email addresses with email sign off themselves as Counsellors for "Solace Woman's Aid Counselling Service". From the service users' perspective the Claimants were counsellors offered by the Respondent.

    130.2 On occasion the contract provided that the Claimants might have to work at the head office in Islington.

    130.3 The Claimants were subject to the Respondents policies. Contrary to the Respondent's case, I find that their policies such as Code of Conduct did apply, based on the express content of the Handbook discussed above. The Respondent expected Ms Haragalova to comply with the Lone Working Policy, albeit I accept that the suggestion that she was going to be subject to a disciplinary sanction was slightly overstated.

    130.4 The Claimants were required to "ensure effective implementation of Solace's Equality and Diversity policies". They were also required to attend all meetings and training relevant to their roles and to "attend regular team meetings, ensuring that [they] contribute to effective working practice and communication". In practice, I find, the six times a year clinical meetings were the principal requirement in this respect.

    130.5 As to the allocation of work, the Respondent staff exercised discretion as to whether initial sessions with clients were one long assessment or divided into two. It seems that, particularly in lockdown, the Respondent was scheduling the sessions with users of the service in a way that caused some

Claimants to request a less intensive approach. The fact of the requests made by the Claimant suggests that it was the Respondent which had control of scheduling, albeit I acknowledge that the Respondent was reasonable and accommodated these suggestions.

130.6 I accept Ms Steven's evidence that if a client cancelled or missed a session, the Claimants were required to send them a letter template setting out that policy. If a client failed twice to notify a counsellor that they would miss a session, the Respondents instructed the Claimants to cancel the session. Additional sessions, would only be provided with the Respondent's permission to provide extra sessions.

130.7 Work using the OASIS system was only possible at certain times, which was in the control of the Respondent.

130.8 The Claimants needed to give notice of "leave".

131. The Claimant, based on authority (**Uber** [paragraph 102] and **Sejpal** [59(d)) submits that the fact that certain aspects of the Respondent's requirements of the Claimants were no more than professional obligations under the BACP does not prevent those matters pointing to a degree of control and therefore in the direction of worker status. I accept that. The fact that a requirement of the Respondent organisation aligns with or is a manifestation of good practice within a profession, does not lessen the fact that the organisation is making this a requirement of its counsellors.

132. The guidance set out by Ms Tulaz in her email of 28 August 2020 is absolutely specific to the Respondent organisation. In that email there is a degree of discretion given to counsellors on minor matters, such as whether to take a break in an introductory assessment with the client, or whether to have a fully online or mixture of online and telephone consultation. Overall "policy" matters such as deciding not to have in-person sessions and the cancellation policy are decided by the Respondent.

133. In conclusion, I recognise that there are some features of the working arrangement which point away from the Claimant being workers. The payment arrangements such as submission of invoice, the tax treatment, the way that the arrangement is described in the contractual documents, the fact that the Claimant's needed to have their own office from which they worked, all point in the direction of this not being a employee: worker relationship.

134. Stepping back and considering the whole picture however, I find that there was a significant degree of integration into the Respondent organisation. From the end user (service user or client) point of view the Claimant were Solace counsellors. The Claimant's had to use the Respondent's systems and processes. The allocation of work and the way this was structured was under the Respondent's control, albeit that on occasion the Claimant's requested that this was structured somewhat differently.

135. Ultimately I find that the "undertaking" within the meaning of section 230 was that of the Respondent, not an individual profession or business undertaking carried

out by the Claimants. I do not find that the Respondent gets the benefit of the exclusion. Service users, who received the therapy, were clients of the Respondent organisation. The Claimants, I find were integrated into that organisation and were providing services in its name and on its behalf.

Remedy

136. This is a case that ought now to be capable of settlement. As far as I am aware the only outstanding issue is quantification of remedy. It may be that there are other matters that the parties can identify.

137. I have given directions for a full merits hearing below.

CASE MANAGEMENT ORDERS

(1) A 1 day hearing by CVP (video) to determine all outstanding issues (including remedy) is listed on **Wednesday 18 January 2023**.

(2) In the event that this date is not suitable for the parties, and/or a longer listing is required, the parties should write to the Tribunal by **21 October 2022**, with dates to avoid, for the attention of Employment Judge Adkin in the subject line of the email address.

(3) By **28 October 2022** the Claimants shall provide to the Respondent updated schedule of loss, or confirm that existing schedules represent their loss and provide a draft list of the outstanding issues in the case (this may simply be the quantification of holiday pay).

(4) By **11 November 2022** the Respondent shall provide to the Claimants a counter schedule of loss and any proposed amendments to the outstanding issues in the case.

(5) In the event that the figures cannot be agreed, by **25 November 2022** the Respondent shall file with the Tribunal the list of issues (agreed as far as possible) and the parties shall exchange lists of documents and copies of documents relevant to the outstanding issues.

(6) By **9 December 2022** the Respondent shall produce an electronic bundle of documents in relation to the outstanding issues.

(7) By **6 January 2023** the parties shall exchange any additional witness statement on which they rely, or confirm that they do not rely on any additional witness statement.

(8) By **10 January 2023** the parties shall each confirm to the Tribunal that they are ready for hearing. The Claimants shall email the Tribunal with all documents (including the Respondent's documents) required for the hearing on 18 January 2023.

Employment Judge Adkin

17 October 2022

Sent to the parties on:

17/10/2022
For the Tribunal Office: