



EMPLOYMENT TRIBUNALS

Claimant Ms C Anton

Respondent Candlelight Homecare Services Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Exeter **On** **10 April 2024**
(remotely)

Before: **Employment Judge Goraj**

Appearances

For the Claimant: **in person**

For the Respondent: **Mr J Catley -Day, Managing Director of the
respondent**

RESERVED JUDGMENT

THE JUDGMENT OF THE TRIBUNAL IS THAT: -

The claimant was not an employee of the respondent for the purposes of section 230 (1) of the Employment Rights Act 1996 and/or Article 3 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994/ section 3 of the Employment Tribunals Act 1996 and the Tribunal does not therefore have jurisdiction to entertain the claimant's complaint of breach of contract.

REASONS

Nature of the Hearing

1. This hearing was conducted as a remote hearing to which the parties consented. The hearing was conducted in such a manner as it was in accordance with the overriding objective to do so. The claimant, who describes herself as a Romanian national, confirmed that she was present in England.

BACKGROUND

The claim

2. By a claim form presented on 9 August 2023, the claimant, who worked as a live in carer for the respondent's clients between 18 July 2023 and 28 July 2023, pursued claims for unfair dismissal, redundancy and breach of contract. By the time of this Hearing the claimant's claims for unfair dismissal and redundancy had been dismissed and the only remaining claim was the claimant's breach of contract claim. The claimant is claiming damages (46 days' pay at £160 per day) for the remaining period of her contract, which was due to continue until 12 September 2023, together with further monies in the sum of £436 (relating to the cost of an airplane ticket and hotel) allegedly arising from the wrongful early termination of the claimant's contract by the respondent.
3. The claimant commenced the ACAS Early Conciliation ("EC") process on 31 July 2023 and the EC certificate was issued on 9 August 2023.

The respondent's position

4. The claims are resisted by the respondent including on the grounds that the Tribunal does not have jurisdiction to entertain the claim as the claimant was not an employee of the respondent. The respondent says that it operates as an agency placing self-employed live-in carers with clients in their own homes and that the claimant was registered with the respondent and provided services on such basis. The respondent further contends that the claimant was, in any event, lawfully removed from the placement on 28 July 2023 following a complaint from the clients' representative relating to the claimant's conduct at which time the claimant was paid any accrued monies. The claimant accepted that she had received any monies accrued up to and including 28 July 2023.

The Listing of the matter

5. The matter was listed as a final Hearing to determine the claimant's breach of contract claim. The Tribunal explained to the parties at the commencement of Hearing that the Tribunal would, however, only have jurisdiction to determine the claimant's breach of contract claim if she was an employee of the respondent at the relevant time (as contended by the claimant and denied by the respondent).
6. After discussion with the parties, including whether the Hearing should be postponed and re-listed for a preliminary hearing to determine the claimant's employment status at the relevant time, it was agreed that

the Hearing should proceed including that the Tribunal would determine the preliminary issue of employment status. In order to assist the parties, the Tribunal drew their attention to some of the key principles/ authorities on employment status as referred to below.

7. It was further agreed that the Tribunal would hear oral evidence from the claimant and Mr Catley- Day (who had both provided witness statements) on both the preliminary issue as to employment status and also (in case the claimant succeeded on this point) the merits of the claim in order to avoid the expense/ convenience of any further hearings. The Tribunal also heard evidence from the claimant regarding her attempts to mitigate her loss following the termination of her contract on 28 July 2023(in case this was required). In the end, there was insufficient time for the Tribunal to deal with all of the above and also make its findings/ reach its conclusions and the Judgment was therefore reserved.
8. The clients to whom care was provided by the claimant in this case, are vulnerable/ lack legal capacity for the purposes of the Mental Capacity Act 2005 and it was therefore agreed with the parties that they should be referred to only by initials. They are therefore referred to below as Mr and Mrs A.

Bundle of documents

9. The Tribunal was provided with a bundle of documents which had been prepared by the respondent. The claimant indicated that there were additional documents which she had provided which the respondent had refused to include in the bundle. The Tribunal obtained a copy of the claimant's documents from the Tribunal office. It subsequently transpired however, that many of the documents provided by the claimant (including the key documents) had already been included in the bundle.

FINDINGS OF FACT

10. The Tribunal made the following findings of fact.

The respondent

11. The respondent is a care provider which supports people to remain in their own homes by delivering bespoke packages of care. The respondent employs approximately 180 staff (mainly office and operational/ management staff) across 4 counties and has contracts with local authorities and the NHS.
12. The respondent offers a number of services including domiciliary (home care), hospital discharge and live in care. The live in care

department which is known as “ Candlelight 24” (“ Candlelight”) acts as an agency to introduce carers to clients who prefer to have someone living in their home rather than daily visits.

13. In order for prospective live in carers to join the Candlelight register they are required to undertake a registration process which involves checks relating to identity, the right to work and DBS checks. They are also required to provide references, confirmation with regard to training, supply their Unique Tax Reference (“UTR”) number to confirm that they are registered with HMRC as self employed for tax purposes and confirm that they have their own care worker liability insurance in place.
14. Prospective live in carers provide Candlelight with their availability and when a booking is offered details are provided to the proposed live in carer who has the option to decline/ accept the booking.
15. The live in carer and client work together to write the care plan to meet the needs of the client. Whilst Candlelight continues to be available to provide advice and support, including to resolve any issues arising during the booking, the delivery of the care is normally directed by the client/ their representative and the carer/ Candlelight take their instructions from the client / their representative.

The claimant.

16. The claimant, who as stated above, describes herself as a Romanian national provides care services in England. The claimant is registered with HMRC as self-employed and provides care services via third parties, such as the respondent, and also to clients directly on a self-employed basis from time to time.
17. The claimant first approached the respondent’s Candlelight department for work in 2021. At that time, the claimant completed the respondent’s “Live in care worker registration form” which is at pages 50-58 of the bundle. The claimant completed a declaration at the end of the form confirming that she understood that if she was accepted for bookings through Candlelight she would be working on a self-employed basis and would be responsible for her own income tax and National Insurance. The claimant also undertook to inform Candlelight of any period when she was unable to work. This document was completed by the claimant on 7 September 2021.
18. The claimant also completed, on 8 September 2021, the respondent’s “ Care Worker Memorandum of Understanding” which is at pages 60-61 of the bundle. The claimant confirmed in this document that if she carried out any bookings through Candlelight she would be working on a self-employed basis with responsibility for her own income tax

National Insurance and liability insurance and that no contract of employment or continuity of service would be implied by the arrangement.

19. The claimant also confirmed in particular, that she understood that she would be responsible for using her own judgment in the development of care plans for clients introduced by the respondent, that she undertook to inform the respondent of any period when she was unable to work, and that the gloves and aprons sent to the clients by the respondents were available for her to use but always remained the property of the client. The claimant also confirmed that she had read and understood the Memorandum of Understanding, and also that she had received a copy of Candlelight's live in care agency care worker terms and conditions of registration.
20. Candlelight's Live in Care Worker – Terms and Conditions of Registration (“the Terms and Conditions”) are pages 62 – 74 of the bundle. The Tribunal has had regard in particular to paragraphs 1, (Live in Care Agreement), 4, (Care Worker Payment), 7 (Bookings Cancellations and Amendments) and 18 (Ending these terms and Conditions).
21. The Tribunal has further noted in particular, that it states in the Terms and Conditions that :- (a) the respondent (which it defined in the agreement as the Agency) introduces the care workers to clients for the purposes of providing live in care services/ that in all cases the care worker's contract for services was with the client or their representative from whom the care worker would receive payment without deduction of income tax and National Insurance / that the care worker was self-employed and responsible for their own National Insurance and income tax (b) the respondent recommended that the care worker should in most cases present an invoice to the client on a weekly basis /that the respondent was not liable to the care worker if the client failed to pay the care worker albeit that the care workers should inform the respondent in accordance with the provisions of the terms and conditions if the client failed to make payment and (c) the circumstances in which respondent was entitled to terminate the terms and conditions and the care worker's registration immediately on notice which included if the respondent received any adverse feedback from a client about the conduct of the care worker.
22. The claimant had an interview with the respondent in 2021 but was not offered any work at that time. The Tribunal is however satisfied that the relationship between the parties in 2023 continued to be governed by such contractual documentation /that the parties in any event worked in accordance with such principles.

The claimant's work with Mr and Mrs A

23. On 10 July 2023, the claimant contacted the respondent informing it of her availability for an eight week placement from 18 July 2023 and asked the respondent to let her know if something was coming up (page 82 of the bundle). The upshot of the contact was that the claimant was advised that the respondent had a placement coming up from 18 July 2023 to 12 September 2023 with Mr and Mrs A.
24. The claimant was provided with further details of the placement and the respondent asked her to let it have her thoughts. In addition to the further information provided relating to Mr and Mrs A (which indicated that they were both very vulnerable with complex needs) the respondent confirmed an applicable care worker daily rate of £160. The respondent also stated that it was the responsibility of the live in carer to create the care plan with the clients, and that the carer could take a full 2.5 hour daily break from the clients who could be left on their own during that period.
25. The respondent confirmed that the claimant would be required to give an invoice to Mr A for the daily rate of £135 for signature and that this should then be sent by the claimant to the clients' solicitor/ representative, Ms Dyer together with a separate invoice for a further £25 and other expenses which also needed to be invoiced to Ms Dyer on the clients' behalf.
26. There was a further exchange of emails between the claimant and the respondent on 11 July 2023 (page 83 of the bundle) in which the claimant acknowledged that Mr and Mrs A had serious health issues, agreed to take on the placement from 18 July 2023 and sought clarity as to the role of Ms Dyer and why separate invoices were required. In response, the respondent provided further details of the arrangements including that Ms Dyer was the solicitor who had power of attorney for Mr and Mrs A and paid the carer's invoices together with a further explanation of the nature of arrangement.
27. The claimant was not issued with/ was not required to sign any further documentation with the respondent at this time. The respondent arranged for the claimant to have refresher training for which she was not charged.

Commencement of role with Mr and Mrs A

28. The claimant commenced her role as a live in carer with Mr and Mrs A on 18 July 2023. The claimant utilised the care plan/ associated documentation which was already in place together with the equipment namely, the gloves and aprons, provided by the respondent to Mr and Mrs A for the claimant to use. The respondent's operational staff had

daily contact with the claimant to ensure that Mr and Mrs A and the claimant were alright. The delivery of the care was however the responsibility of the claimant. The claimant had a good working relationship with Mr and Mrs A. Mr and Mrs A had a daughter who lived abroad.

29. The claimant was not paid any wages or other monies by the respondent at any time during the period of her live in role with Mr and Mrs A.

The respondent's charge to Mr and Mrs A

30. The respondent charged Mr and Mrs A (via their representative/ power of attorney, Ms Dyer) a daily fee of £18 for the services provided by the respondent to them in respect of Mr and Mrs A.

Invoices

31. On 20 July 2023 the respondent sent an e-mail to the claimant asking how things were going with Mr and Mrs A and confirming the position with regard to the claimant's invoices for payment including, the steps that needed to be taken in order to protect Mr A (page 88 of the bundle). The claimant confirmed in response that she was aware of the position with regard to the invoices and that she had been in contact with Mr and Mrs A's daughter who had also explained the position with regard to her father.

Events leading up to the termination of the claimant's involvement with Mr and Mrs A.

The events of 26 July 2023

32. At 10.25am on 26 July 2023, the claimant sent an e-mail to the respondent requesting gloves and medication charts. The claimant further advised the respondent that she had sent an invoice to Ms Dyer at 10:00 am the previous day which had not been paid and that the claimant needed money to buy food that day (page 98 of the bundle).
33. The respondent replied at 15.14pm on 26 July 2023 saying that she had called Ms Dyer however she was in a meeting and was not available. The respondent also advised the claimant that she was aware that Ms Dyer was sometimes in meetings and couldn't therefore access the clients' bank account to pay money but that she would pay as soon as she was able to do so. The respondent acknowledged that this was of no immediate assistance to the claimant and said that she would see what she could do to help.

34. There then followed during the course of the afternoon and evening, multiple exchanges of emails between the parties including in particular between the claimant and Ms Dyer in which the claimant complained vociferously about Ms Dyer's failure to make payment of her invoices which she said had meant that she was unable to buy food for herself. The claimant's emails to Ms Dyer were disrespectful and assertive in nature (and continued as such after Ms Dyer informed the claimant that she had made part payment of the invoices). The full exchange of emails on 26 July 2023 is set out in the respondent's Critical Incident Report at pages 15- 25 of the bundle.
35. Ms Dyer sent an e-mail to the respondent on 26 July 2023 (timed at 7.47 pm) (page 90 of the bundle) forwarding an email which she had received from the claimant. Ms Dyer advised the respondent that the claimant's e-mail was not acceptable and further that Mr and Mrs A's daughter had received at least 7 messages demanding payment.
36. Ms Dyer sent further e-mails to the respondent on 26 July 2023 (timed at 8.29pm and 8.35pm) complaining about the claimant's conduct. In the first e-mail (timed at 8.29pm at page 94 of the bundle) Ms Dyer advised the respondent that the last email which the claimant had sent to her "was beyond rude" and that if it was the case that carers had to be paid the same day they needed to address their contract with the respondent to amend this. Ms Dyer also advised the respondent that she was aware that Mr and Mrs A's daughter had been bombarded by the claimant all evening as the respondent could see from the emails.
37. In the further email to the respondent timed at 8.35pm on 26 July 2023 (page 92 of the bundle) Ms Dyer advised the respondent that Mr and Mrs A's daughter had had to block the claimant because of "more unfriendly messages". Ms Dyer further stated that she did not feel that the messages were appropriate or warranted (the email with attachments in which the claimant was critical of Mrs Dyer in particular) are at pages 92- 93 of the bundle).

The events of 27 July 2023

38. The respondent emailed Ms Dyer on the morning of the 27 July 2023 apologising for what had happened and stating that it was totally unacceptable on all levels. The respondent further stated that carers were told that Ms Dyer was not always able to access the client bank account straight away and that they may therefore have to wait until she was able to make payment. The respondent also made comments about what she perceived to be money mis - management

on the part of the claimant. The respondent concluded the e-mail as follows:-

“ I personally want to remove Carmen from the package due to her rudeness and attitude towards both you and L... . (the daughter) I will be guided by you, but I can assure you that once she leaves, she will be removed from our register, we will not tolerate this kind of behaviour towards our clients, their families and POA”.

39. Ms Dyer spoke with the respondent on 27 July 2023 and asked for the claimant to be removed from her post (the respondent’s Critical Incident Report at page 26 of the bundle)

The respondent’s email to the claimant dated 27 July 2023

40. The respondent emailed the claimant on 27 July 2023 (page 96 of the bundle). advising the claimant that she would receive her payment from Ms Dyer but that it could take up to 2 days as Ms Dyer was a professional with many clients on her books and did not have access to the clients’ bank account at all times. The respondent also stated that the situation could have been avoided if the claimant had set some money aside. The respondent advised the claimant that they had had to apologise for the way in which the claimant had dealt with the matter which had been unprofessional and, whilst they appreciated that the claimant had been stressed, the making of threats and demands was not what they expected from their carers as it was totally inappropriate to talk to the families or powers of attorney of clients in an abrupt and rude manner. The respondent further advised the claimant that they had decided having discussed the matter with the team and also Ms Dyer, to remove the claimant from the package the following day as the relationship had broken down between Ms Dyer/ the clients’ daughter and the claimant. The respondent advised the claimant to have no further contact with Ms Dyer or the daughter of Mr and Mrs A apart from submitting her invoice to Ms Dyer. The respondent concluded the email by saying that it was a shame as the claimant’s care standards had been very good and that they had received excellent feedback on this aspect of her work.
41. There was further correspondence between the claimant and the respondent concerning/ confirming the claimant’s removal from the placement with Mr and Mrs A and further culminating in the claimant’s removal from the respondent’s register. These emails are at pages 27 – 34 of the bundle.
42. The claimant challenged the decision to remove her from the placement with Mr and Mrs A (the email on 27 July 2023 timed at 13.01 at page 29 of the bundle). The claimant stated that the clients

were very happy with her, that there were therefore no grounds to remove her, and refused to leave the premises the following day. The claimant also stated that her solicitor had told her that she had a contract with Mr and Mrs A until 12 September 2023, that there were no grounds to remove her and that if Ms Dyer was unhappy she must pay the entire contract until 12 September 2023. The claimant also challenged the respondent's right to remove her without any notice and asked the respondent to review its position.

The respondent's letter to the claimant dated 27 July 2023

43. The respondent wrote to the claimant at 14.31 on 27 July 2023 (pages 32 – 34 of the bundle) confirming the removal of the claimant from the placement with Mr and Mrs A and also of the removal of the claimant from the respondent's register with effect from 28 July 2023. The respondent stated in the covering email (page 32) that the claimant had informed the client of the situation notwithstanding that they had requested her not to do so as he was unable to process such situations because of his lack of capacity and anxiety.
44. The respondent stated in the attached letter (which is erroneously dated 18 January 2024 on the bundle copy) that following feedback received, the claimant was being formally removed from the Candlelight register from 28 July 2023. The respondent further stated that it was entitled to remove the claimant from its register in accordance with the Candlelight Terms which the claimant had confirmed that she had read as part of the signed copy of the Carer Memorandum of Understanding. The respondent set out in the letter the provisions of paragraph 18.1 of the Terms and Conditions upon which it relied. The respondent stated in the letter that the claimant must refrain from contacting the clients /their families with whom they had been placed through their agency and that any failure to do so could be treated as a breach of GDPR/ harassment. The respondent further stated that as Mr and Mrs A did not have the necessary mental capacity to make decisions concerning their health and well-being the decision had been taken by their POA who had requested that the claimant should be removed from the placement because of her conduct.
45. The claimant was advised that if she refused to leave the property the following day it could result in the police being involved. The claimant was further advised that a copy of the respondent's complaint procedure was available on request.

46. The claimant subsequently left the premises of Mr and Mrs A after further exchanges of emails and payment by Ms Dyer of accrued monies to date of leaving.

SUBMISSIONS

47. The principal submissions of the parties are set out below

THE LAW

48. The preliminary issue in this case is whether the claimant was an employee of the respondent for the purposes of section 230 (1) of the Employment Rights Act 1996 (“the Act”).

49. The Tribunal only has jurisdiction to entertain claims of breach of contract if the claimant was an employee (Articles 3 &4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

50. Section 230 (1) of the Act defines an employee as “an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment”. Section 230 (2) provides that a contract of employment means “a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing. The Act does not however provide any further guidance.

51. There is extensive case law in this area. As explained, and shared with the parties, the Tribunal has had regard in particular to the legal authorities of **Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968]1All ER 433, QBD, Nethermere (St Neots Ltd and Carmichael and anor v National Power plc [1999] ICR 1226 HL, Hall (Inspector of Taxes) v Lorimer [1994] ICR 218, CA and Autoclenz Ltd v Belcher and ors [2011] ICR 1157 SC.**

52. Having reviewed the above guidance the Tribunal has reminded itself in particular that: -

- (1) The authorities have established that in order for a person to be an employee there is a “irreducible minimum” without which it will not be possible for a contract of service to exist. This is comprised of three main elements namely:- (a) personal service (b) mutuality of obligation and (c) control.

- (2) Overall, the Tribunal is required to balance the relevant facts against the key principles contained in the case law in order to determine whether the claimant meets the statutory definition for the purposes of section 230 of the Act. It is for the claimant to satisfy the Tribunal, on the balance of probabilities, that she meets the statutory definition of an employee.
- (3) In this case, the Tribunal has had regard in particular to the helpful guidance contained in the judgment in **Ready Mixed Concrete** (referred to above) the continuing relevance of which has been subsequently confirmed by the Supreme Court in **Autoclenz v Belcher** (also referred to above).
- (4) In essence, the “multiple test” contained in **Ready Mixed Concrete** case involves 3 questions namely:-
- 1) Did the worker agree to provide his or own work and skill in return for a wage or other remuneration.
 - 2) Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee.
 - 3) Were the other provisions of the contract consistent with its being a contract of service.

THE CLOSING SUBMISSIONS OF THE PARTIES

The submissions of respondent

53. In brief summary, the respondent contended as follows:-

53.1 The claimant joined the respondent on a self-employed basis pursuant to the respondent's terms of registration on 18 July 2023 for a period of eight weeks. The claimant's self-employed status was confirmed during the registration process.

53.2 In July 2023, the claimant provided (unsolicited) her availability to the respondent and in response to which the respondent gave her the opportunity of a placement, with relevant details, which the claimant freely accepted albeit that she was under no obligation to do so.

53.3 Following some incorrect invoicing/ minor delays in payment, the power of attorney for Mr and Mrs A requested that the claimant be removed because of her behaviour and all of which was done in accordance with the respondent's terms of registration.

53.4 The claimant freely registered with the respondent and was under no illusion as to the self-employed nature of the relationship.

53.5 There was no obligation upon the respondent to offer work or for the claimant to undertake it.

53.6 The claimant had self-direction over her daily work within the framework of the clients' specific needs.

53.7 The claimant was ultimately asked to leave the placement early because of her conduct.

53.8 the claimant only challenged her self-employed status after she was no longer working with the respondent.

The claimant

54. In summary the claimant contended as follows:-

54.1 She was employed by the respondent for a fixed period of 9 weeks to work with their clients at their fixed rate of pay and under their supervision.

54.2 The claimant could not leave the placement and worked 22 hours daily with no other carers covering her breaks.

54.3 The claimant waited 60 hours to be paid with no food and because she asked to be paid she was removed from the placement by the respondent and only paid for accrued hours worked.

THE CONCLUSIONS OF THE TRIBUNAL

Was the claimant an employee of the respondent ?

55. The Tribunal has considered first the preliminary issue of whether the claimant was an employee of the respondent for the purposes of section 230(1) of the Act because, as explained above, the Tribunal would not otherwise have jurisdiction to determine her breach of contract claim for damages in respect of lost earnings/ associated expenses for the remaining period of her placement with Mr and Mrs A (which was due to expire on 12 September 2023).

56. The Tribunal has considered this issue in accordance with the guidance contained in the authorities referred to above including in particular, **Ready Mixed Concrete**.

Did the claimant agree to provide her work/ skills as a carer in return for a wage or other remuneration.

57. The Tribunal has considered first whether the claimant agreed to provide her work/ skills as a carer in return for a wage or other remuneration.
58. The Tribunal is satisfied on the facts that the claimant did provide her work/ skills as a live in carer to Mr and Mrs A in return for payment namely, a daily rate of £160 plus other expenses (paragraphs 24 and 25 above.) Such monies were however payable (and paid) by Mr and Mrs A/ their representative/ power of attorney (Ms Dyer) directly to the claimant following the submission of an invoice by the claimant. Ms Dyer also paid to the respondent a daily fee of £18 for the services which the respondent provided in respect of Mr and Mrs A.
59. The Tribunal is further satisfied on the facts, that there was no agreement (written or oral) between the claimant and the respondent whereby the claimant was entitled to be paid/ receive any monies from the respondent in return for the care services which she provided to Mr and Mrs A.
60. The Tribunal accepts that the respondent provided the claimant (in response to her enquiry regarding a possible placement) with the basic terms of the placement with Mr and Mrs A including the length of the placement, and rates of pay together with information regarding Mr and Mrs A, the method of payment for the claimant's services and guidance on how the invoices requesting payment should be prepared (paragraphs 24 – 26 above). The respondent however, made it clear, in accordance with the terms of the contractual documentation which had been entered into by the claimant with the respondent in 2021 when the claimant originally registered with the respondent (paragraphs 20- 21 above), and, in its subsequent dealings with the claimant in 2023 when facilitating the placement with Mr and Mrs A, that the placement was offered on the basis that Mr and Mrs A /their representative / power of attorney Ms Dyer would be responsible for paying the claimant for the live in care services provided by her (paragraphs 25 – 26 above). The placement with Mr and Mrs A in July 2023 was accepted by the claimant on such basis and the claimant was paid (notwithstanding any delays in payment) accordingly (paragraphs 31 – 38 above).
61. Further, there was no suggestion in any of the contractual documentation/ any correspondence relating to the offer/ acceptance of the placement with Mr and Mrs A in July 2023 that the respondent would be responsible to the claimant for any other payments such as

holiday pay or sick pay as would normally be associated with a contract of service.

Did the claimant agree (expressly or impliedly) to be subject to a sufficient degree of control by the respondent for the relationship to be one of employer and employee?

62. The Tribunal has gone on to consider the second question relating to the degree of control exerted by the respondent over the claimant. The claimant contends that she was subject to a high level of control with regard to both the terms and conditions of her placement and the delivery of her care services. This is denied by the respondent.
63. The Tribunal is satisfied on the facts that the claimant was subject to some degree of control by the respondent including with regard to such things as her daily break, the provision and use of equipment (aprons, gloves and medication charts) and the termination of her placement with Mr and Mrs A/ her registration with the respondent (paragraphs 28 and 43 – 44). The claimant was not however, under any obligation to accept the placement with Mr and Mrs A and the delivery of care to Mr and Mrs A was the responsibility of the claimant including the agreement of the care plan with the clients / their representatives (paragraph 24). Further, any decisions regarding the placement of the claimant with Mr and Mrs A / the termination thereof were taken in conjunction with / at the direction of Ms Dyer (paragraphs 35 – 40 and 44 above).

Were the other provisions consistent with the claimant's contract being a contract of service.

64. The Tribunal has given careful consideration to the remaining provisions of the contract agreed between the claimant and the respondent as contained in the respondent's standard terms of engagement which the claimant accepted in 2021(paragraphs 17 – 21 above) together with the further matters agreed between the parties in 2023.
65. The Tribunal has noted, on the one hand, that under the terms of the written agreement entered into by the parties in 2021 the claimant was required to provide personal service - there was no provision whereby the claimant was permitted to provide a substitute if for example she was unable to attend for work or fulfil a booking (paragraph 7 of the Terms and Conditions at page 67 of the bundle).
66. Other provisions of the 2021 documentation were however inconsistent with there being a contract of service between the respondent and the claimant. It is clearly stated in such documentation (the Terms and Conditions (pages 64 – 74)) that the

role of the respondent (which is defined as the “Agency”) was to introduce care workers to clients for the purposes of providing live in care services and further, that in all cases the care worker’s contract for services was with the client or their representative who would be responsible for/ from whom the care worker would receive payment. Further, the 2021 documentation (including the Terms and Conditions) provide that the care worker would be self employed and would receive payment from the client/ their representative without deduction of tax and national insurance for which the care worker would be responsible. The Terms and Conditions further recommended the submission of a weekly invoice and stated that the respondent would not be liable if the client failed to pay the care worker (paragraph 21).

67. The Tribunal is satisfied that the claimant’s engagement in 2023 was consistent with the above provisions relating to self-employment. The claimant had an HMRC UTR number and was treated as self employed for tax and national insurance purposes/ submitted invoices to the clients’ representative Ms Dyer which (when paid) by Ms Dyer were paid without deduction of income tax / national insurance (paragraphs 23 – 26).

Overall conclusion

68. Having carefully weighed all of the above factors, the Tribunal is not satisfied that the claimant was an employee of the respondent for the purposes of section 230 of the Act.

69. When reaching such conclusion, the Tribunal has taken into account its findings/ conclusions regarding the matters referred to at paragraphs 57 – 67 above. The Tribunal accepts that some of the factors identified above (such as that relating to personal service) point in the direction of a contract of service. However, having weighed all of the factors identified at paragraphs 57 – 67 above including in particular, the respective responsibilities of the respondent and of the representative /power of attorney (Ms Dyer) of Mr and Mrs A (including for the payment of the claimant’s invoices which were submitted by the claimant and paid on a self-employed basis) the Tribunal is not satisfied that the claimant was an employee of the respondent for the purposes of section 230 of the Act.

70. The Tribunal therefore does not have jurisdiction to entertain the claimant’s complaint of breach of contract.

Employment Judge Goraj

Date: 10 May 2024

JUDGMENT SENT TO THE PARTIES ON
29 May 2024 By Mr J McCormick

FOR THE OFFICE OF THE TRIBUNALS

Online publication of judgments and reasons

The Employment Tribunal (ET) is required to maintain a register of judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>

The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in anyway prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness

Transcripts

1. Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge.
2. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings. You can access the Direction and the accompanying Guidance here:

[Practice Directions and Guidance for Employment Tribunals \(England and Wales\) - Courts and Tribunals Judiciary](#)