

Neutral Citation Number: [2025] EAT 83

Case No: EA-2022-000632-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 June 2025

Before:

THE HON. LORD FAIRLEY, PRESIDENT

Between:

MR KIERON DOMINIC SCULLY

Appellant

- and -

NORTHAMPTONSHIRE COUNTY COUNCIL

Respondent

Mr K D Scully, the Appellant, in person
Miss N Ling, of Counsel (instructed by Pathfinder Legal Services) for the Respondent

Hearing date: 3 April 2025

JUDGMENT

SUMMARY

Contract of employment for the provision of care; direct payments; identity of employer.

The appellant brought complaints of race and disability discrimination, and claims for arrears of pay and other payments said to be due to him as an employee. In each case, he submitted that his employer was the respondent. The complaints arose from the arrangements for the care of the appellant's brother, ("S"), an adult with a learning disability. The appellant provided care and support to S. He was paid for that work using sums provided by the respondent in the form of direct payments under the **Care Act, 2014** ("the Act"). There was no dispute that, in providing care and support to S, the appellant worked under a contract of employment. The respondent denied, however, that he did so at any time as its employee. Following a preliminary hearing at which it heard evidence, the tribunal concluded that the respondent was not the appellant's employer and dismissed all of his complaints.

The appellant submitted that the tribunal had erred in law in failing to consider (i) the underlying statutory purpose of the care arrangements, including the purpose of the Act; or (ii) the possibility that his employment contract with S might have been vitiated due to S's lack of capacity to contract.

Held: The tribunal had not erred in law. It was entitled, on the basis of the evidence it accepted, to reach the conclusion that there was no contract of employment – express or implied – between the appellant and the respondent in the period to which the complaints related. The appeal was, therefore, refused.

THE HON. LORD FAIRLEY, PRESIDENT:

Introduction

1. This is an appeal against a judgment of an employment tribunal at Cambridge (Employment Judge Tynan, sitting alone). The judgment was sent to the parties on 13 March 2022 following a hearing on 28 February 2022. Written reasons were sent to parties on 19 May 2022.

2. The appellant brought complaints of race and disability discrimination, and claims for arrears of pay and other payments said to be due to him as an employee. In each case, he submitted that his employer was the respondent.

3. All of the complaints arose from the arrangements for the care of the appellant's brother ("S") between 2013 and the date when the claim form (ET1) was presented in December 2020. S is an adult with a learning disability. Between 2013 and 2020, the appellant provided care and support to S. He was paid for that work using sums provided by the respondent as direct payments under the **Care Act, 2014** ("the Act"). There was no dispute that, in providing care and support to S, the appellant worked under a contract of employment. The respondent denied, however, that he did so at any time as its employee.

4. Following a Preliminary Hearing at which the tribunal heard evidence from the appellant, his mother, and a witness for the respondent, Mr Christopher Hodgson, the tribunal concluded that the respondent was not the appellant's employer at any time to which his complaints related. It therefore dismissed all of his complaints.

Legislative context

5. As a local authority, the respondent has statutory duties under the Act. The general duty is to promote the well-being of individuals who require care and support (section 1). Where it appears to a local authority that an adult may have needs for such care and support, it must carry out an assessment, known as a “needs assessment” (section 9). If the needs assessment discloses care and support needs, the authority must then determine whether or not those satisfy the “eligibility criteria” (section 13(7)). To the extent that they do, the local authority is subject to a duty to meet them (section 18).

6. Section 8(1) contains a non-exhaustive list of what may be provided to meet relevant needs. The list includes accommodation in a care home, care and support at home or in the community, counselling and other types of social work, goods and facilities, information, and advice and advocacy.

7. Section 8(2) provides a non-exhaustive list of the ways in which needs may be met by a local authority. These include: (a) arranging for a person other than the local authority to provide a service; (b) the local authority itself providing a service; and (c) making direct payments in terms of sections 31 or 32.

8. Once a duty has arisen under section 18, the local authority must prepare a “care and support plan”, tell the adult which (if any) of the needs may be met by direct payments, and help the adult to decide how to have the needs met (section 24(1)). Section 25 specifies the matters to be included in the care and support plan. One of these is the “personal budget” for the adult in terms of section 26. This sets out *inter alia* the cost to the local authority of meeting the adult’s relevant needs and any contribution towards that cost that must be made by the adult.

9. Adults with capacity may, if certain conditions are satisfied, ask the local authority to meet some of all of their needs by a direct payment either to the adult or to a person nominated by the adult (section 31). One of those conditions (condition 3) is that the adult or nominated person is capable of managing direct payments either alone or with whatever help the authority is satisfied the adult or nominated person is able to access.

10. In the case of adults without the capacity to request direct payments, an “authorised person” may request that some or all of the adult’s needs are met by making direct payments to the authorised person (section 32). Again, certain conditions must be satisfied, one of which (condition 3) is that the local authority must be satisfied that the authorised person will act in the adult’s best interests in arranging for the provision of the care and support for the adult using the direct payments. Condition 4 requires a local authority to be satisfied that the authorised person is capable of managing direct payments alone or with whatever help the local authority thinks the authorised person will be able to access.

11. Where no other person is authorised under the Mental Capacity Act, 2005 to make decisions about the adult’s needs for care and support, an “authorised person” for the purposes of section 32 is a person who is considered by the local authority to be a suitable person to whom to make direct payments.

The tribunal’s findings of fact and conclusions

12. Based principally upon the evidence of the respondent's witness, Mr Hodgson, the tribunal made the following findings of fact:

- a) From around April 2013, S assumed control of his budget and S's family began to receive direct payments to fund his care and support (ET § 7).
- b) From April 2013 onwards, that arrangement was the basis on which the appellant provided care to S (ET § 13) in terms of a contract between him and S which bore to be a contract of employment (ET § 12).
- c) The appellant received payslips for his duties in caring for S which named S as his employer (ET § 15).
- d) S's family took responsibility for arranging cover for S's care when the appellant was on holiday (ET § 10).
- e) S's mother ("V") was provided by the respondent with a directory to assist her in sourcing potential carers. V took responsibility for identifying agency staff to provide respite or holiday cover for S's care. Issues which arose about payment for such work were raised with V (ET § 11).
- f) V retained control over decisions as to who should be engaged to care for S and, on one occasion, took a decision to dismiss a carer (ET § 8).
- g) V did not want the burden of organising a payroll, so that function was carried out by a third party. Initially, between 2013 and 2017 this was by a charity called the Northamptonshire Centre for Independent Living (CIL). From 2017, the functions of CIL were assumed by the respondent (ET § 4 and 9) and described thereafter as the respondent's Personal Budget Support Service ("PBSS").
- h) The appellant did not receive any training, continuing professional development or appraisals from the respondent, nor was his conduct or performance managed by the respondent (ET § 14).

- i) At some point, PBSS gave advice to V about how to make the appellant redundant, but V did not follow that advice (ET § 16 and 18).
- j) In 2020, during the Covid-19 pandemic, V and the appellant agreed the appellant should be furloughed (ET § 17).
- k) The appellant was not able to identify any specific occasion when he had received instructions from the respondent in relation to his provision of care and support to S (ET § 21).

13. In these circumstances, the tribunal concluded (ET § 22) that:

“...the available evidence does not support that there was any form of employment relationship between the claimant and the respondent at any time in the period 2013 to 2010 (*sic*). Instead, all the evidence points to the claimant having been employed by S or by [V] acting on his behalf.”

The tribunal’s reference to “2010” can only have been intended to mean “2020”.

14. Within his reasons, the judge expressed reservations about S’s capacity to enter into the arrangements that were put in place from 2013:

“In my judgment, given his complex needs, there must be significant doubt as to S’s legal capacity to enter into any such agreement...I find that little or no thought was given by the claimant, [V] or S to the employment law implications of the arrangements put in place from 2013.”

15. It does not appear, however, that any medical or psychological evidence was led about S’s cognitive abilities. Specifically there was no evidence as to whether or not S had the capacity to enter into the contract of employment with the appellant in April 2013. Correctly, therefore, the judge made no finding on the issue of capacity.

The grounds of appeal

16. The grounds of appeal as originally presented were lengthy and wide-ranging. Following a Preliminary Hearing, at which the appellant was assisted by ELAAS, the grounds were permitted to proceed having been amended to a single paragraph in the following terms:

“EJ Tynan erred in his order of 28th February 2022...by failing to consider, properly or at all, the underlying statutory purpose of the arrangement whereby the claimant was paid for his caring services provided to S, in particular the Care Act, 2014, as well as the possibility of how the employment contract with S might have been vitiated due to lack of capacity. Had he done so, he would have concluded that the respondent was the claimant’s employer given that control over S’s care was always a function of the respondent’s statutory duty (however it chose to discharge that duty).”

The Appellant’s submissions

17. The appellant represented himself at the full hearing. He presented what were, at times, complex arguments with confidence and skill. Some of those were not easy to relate to the particular grounds of appeal for which permission was given. Considerable time was spent at the full hearing in identifying the particular propositions of law relied upon. Following the oral hearing, the appellant also submitted further lengthy written submissions which I have considered.

18. Ultimately, I understood the appellant to rely upon the following propositions (some of which were presented as alternatives):

- i. The respondent was not able to discharge its statutory duty to provide care and support by making direct payments. A recipient of a direct payment was no more than an agent of the respondent. Inevitably, therefore, any care provided to S by the appellant as an employee must have been as an employee of the respondent;
- ii. The payments purportedly made as direct payments in respect of S did not satisfy the requirements of the Act, and were not, as a matter of law, “direct

payments” at all. They were simply payments made by the respondent to assist it to discharge its statutory duties. Again, the inevitable conclusion was that they were payments made by the respondent to employ the appellant;

- iii. If the respondent had properly made direct payments, it had not done so either to S or to V. Rather, it had made them to itself (or, alternatively, to CIL as its agent) and had thereafter engaged the appellant as an employee either directly or through the agency of CIL;
- iv. It was necessary to imply a contract of employment between the appellant and the respondent because S did not have the capacity to enter into such a contract;
- v. It was necessary to imply a contract of employment between the appellant and the respondent because it would have been unlawful for the appellant to have provided regulated care services to S other than as an employee of the respondent; and
- vi. It was necessary to imply a contract of employment between the appellant and the respondent because S and / or V had received direct payments in the capacity of trustee.

19. In developing those propositions, the appellant submitted that nothing within the Act suggested that a recipient of direct payments was an employer. In **South Lanarkshire Council v Smith** UKEAT/873/99 – a case which related to direct payments made under **The Social Work (Scotland) Act, 1968** – the EAT had upheld a decision by an employment tribunal that the employer was, in fact, the local authority. The tribunal was found not to have erred in law in concluding that overall control of the way in which the care was provided never left the local authority and thus remained with the local authority despite the fact that direct payments were made.

20. The written employment contract between the appellant and S did not reflect the reality of the situation (**Autoclenz Limited v. Belcher and Others** [2011] ICR 1157). The respondent was required by the statute to make decisions as to which needs were to be met. That had to be communicated to the appellant to allow him to know what work to perform. Where that work was performed by the appellant to enable the respondent to discharge its section 18 duties, it could only be seen as having been undertaken as part of a contract of employment between the appellant and the respondent.

21. If the payments made by the respondent had purportedly been made to S pursuant to section 31 of the Act any resultant employment contract between the appellant and S was void and a “legal fiction” because S did not have the capacity to enter such a contract (**PF and JF’s Application** [2011] NIQB 20). It followed that direct payments had not been paid lawfully or at all. S’s lack of capacity undermined S’s purported contractual relationship with the appellant such that the respondent can only be taken to have fulfilled its statutory duties by means of the employment of the appellant.

22. Alternatively, if the payments were said to have been made to V as an authorised person under section 32, the conditions in that section had not been met. V had never requested that payments be made to her as was required by section 32(1)(c). There was no evidence that V was an authorised person in terms of section 32(4)(c), or that any of the conditions in subsections 32(7) to (9) had been met. It followed that the respondent had not proved that it had met S’s needs by making any direct payments pursuant to section 8. It must therefore be taken to have discharged its section 18 duty in a different way. The only other possible explanation was that it discharged that duty by employing the appellant directly, which it had done by

making direct salary payments to the appellant, initially through an agent – CIL – and then later, through its own in-house provider, PBSS.

23. The registration requirements for the provision of paid care would, in any event, have made it unlawful for paid care to have been provided by the appellant other than as an employee of the respondent. The provision of care to S was a regulated activity under section 8 of the Health and Social Care Act, 2008 and the Health and Social Care Act 2008 (Regulated Activities) Regulations, 2014. It followed that the only way that the appellant could lawfully have provided care to S was as an employee of the respondent as a body authorised to provide that care.

24. Separately, the provisions of the Act by which direct payments could be reclaimed by the respondent if they were not used for the purpose of providing relevant care had the effect of creating a trust in which the recipient of the payments was a trustee. This precluded the recipient from being an employer. Reference was made to section 12(3) of the Trustee Act, 2000, upon which reliance was placed.

Submissions for the Respondent

25. Counsel for the respondent submitted that many of the arguments now advanced had not been raised before the employment tribunal. They depended upon factual matters which had not been explored in the evidence and could not, therefore, be raised for the first time on appeal. The only two points raised in the amended ground of appeal for which permission had been given were (a) statutory purpose; and (b) the capacity of S to enter into a contract of employment.

26. On the issue of statutory purpose, once a duty to provide care and support has arisen under section 18, the local authority has to produce a care and support plan and a personal budget (sections 24 to 26). Section 8(2) identifies three ways in which the care needs of an individual may then be met. These are: (a) arranging for a person other than the local authority to provide a service; (b) itself providing a service; and (c) making direct payments.

27. The purpose of making direct payments is to provide the individual whose needs are being met with control and autonomy over how their care and support is provided. The statutory purpose is to place control with the adult or the adult's authorised person. The provision of a direct payment in terms of section 8(2)(c) discharges the local authority's duty to provide care and support in one of the ways expressly envisaged in the statute. The proposition that a direct payment had that effect was accepted as correct in **Calderdale MBC v. AB and others** [2021] EWCOP 55.

28. Even if, however, the local authority could be taken to have retained some residual or ongoing non-delegable duty, the execution of that duty by a third party would not necessarily result in the creation of an employment relationship between the third party and the local authority. In **Woodland v. Swimming Teachers' Association** [2014] A.C 537, for example, a non-delegable duty of care owed by the local authority was found to have been breached by employees of an independent contractor.

29. Counsel submitted that the reasoning of the tribunal and the EAT in **South Lanarkshire Council** had been overtaken by subsequent development of the law on implication of contracts, including **James v. Greenwich London Borough Council** [2008] ICR 545. **South Lanarkshire Council** was, in any event, decided on its own facts and should be distinguished.

In particular, it was clear that the local authority there had, in fact, retained a significant degree of control over the provision of the care in question.

30. There was no evidence before the tribunal which would have allowed a conclusion to be drawn that S lacked capacity to enter into a contract of employment with the appellant. Absence of contractual capacity cannot be either implied or inferred, but must be proved by evidence. There is no reason, in principle, why a person receiving care cannot be an employer of the carer, even in a situation where a direct payment is provided pursuant to section 32. Even if there had been evidence of incapacity to contract, that could only have made the resultant contract voidable at the instance of the person who lacked capacity (**Dunhill v. Burgin** [2014] 1 WLR 933). It would not have rendered the contract void. In any event, it was not necessary to imply a contract between the appellant and the respondent to explain or give business efficacy to the arrangements if there was some alternative explanation for them such as, for example, the employment of the appellant by V.

31. The appellant's submissions about the effect of section 8 of the Health and Social Care Act, 2008 and the Health and Social Care Act 2008 (Regulated Activities) Regulations, 2014 were wrong in law. In terms of regulation 3 of the 2014 Regulations, read with paragraphs 1(3)(c) and 13(3)(c) of Schedule 1, the services provided by the appellant to S were not regulated activities.

32. Even if the making of direct payments had the effect of creating a trust, that did not preclude the recipient of a direct payment from becoming an employer, or lead to a conclusion that the respondent must be the employer.

33. In summary, nothing in the findings of fact made by the tribunal supported the existence of an express or implied contract of employment between the appellant and the respondent. Neither the tribunal's reasons nor its conclusions showed any error of law.

Analysis and decision

34. I do not accept the appellant's submission that the respondent could not, in appropriate circumstances, discharge its statutory duty to provide care and support by making direct payments. That is one of the three methods of meeting care needs expressly identified in section 8(2) of the Act which is clearly concerned with the ways in which a local authority may discharge its statutory duty to provide care and support. For the reasons set out more fully below, **South Lanarkshire Council** does not represent binding authority to the contrary.

35. I also, therefore, reject the related submission that the appellant was employed by the respondent either directly or through an agent. The making of direct payments neither requires nor implies such a structure, and there is no basis for the existence of such a relationship in the tribunal's findings on the evidence. Rather, on the findings of fact made by the tribunal, S took control of his own budget from 2013 (ET § 7). From that time, S's family received direct payments to fund his care and support. The direct payment arrangements that were in place from and after April 2013 funded the provision of care by the appellant to S (ET § 13). That care was provided under an express contract between the appellant and S which bore to be a contract of employment (ET § 12). The arrangements for the care and support of S were fully and accurately reflected in that contract of employment and were consistent with the statutory scheme.

36. The appellant does not seek to challenge any of the tribunal's findings of fact. It is not, therefore, open to him to argue – as at times he appeared to seek to do – that direct payments relating to S were, in fact, made by the respondent either to itself or to CIL. The tribunal made no such finding, and to have done so would have contradicted the express findings made by it at ET § 7.

37. I also reject the appellant's argument that the payments made in respect of S were not direct payments as a matter of law. The basis for this submission was that there was no evidence that all of the provisions of section 32 had been satisfied in relation to the monies provided to V. Even if the ground of appeal for which permission was granted can be read as including this point – which I doubt – the difficulty with it is that the burden of proving any irregularity in the direct payment arrangements was on the appellant. On the findings of fact made by the tribunal he did not discharge that burden. The tribunal made clear findings that direct payments were made from April 2013, and the presumption of regularity applies to that arrangement.

38. A separate question which may arise from the grounds of appeal is whether, on the findings of fact made by the tribunal, a contract of employment must be implied between the appellant and the respondent. That question has to be answered by reference to the common law test of necessity as a means of explaining the actions of the parties (The Aramis [1989] 1 Lloyd's Rep. 213; James v. Greenwich London Borough Council [2008] ICR 545).

39. The appellant places reliance on the decision of the EAT in South Lanarkshire Council. It does not appear, however, that the EAT was referred to The Aramis, and its reasons do not mention the question of necessity. Its focus, instead, was upon the issue of control. That approach has, however, now been overtaken and superseded by James. It is also important to

recognise that **South Lanarkshire Council** was concerned with a different statutory framework under which, on the tribunal's findings of fact, the local authority retained a substantial level of involvement in how care was ultimately provided. In particular, the tribunal found that the local authority "took the initiative". It framed and placed the advertisement for a carer, organised the interviewing and selection process, arranged the short list and the appointment of the carer, and organised her training. In these circumstances, I do not consider **South Lanarkshire Council** to be of assistance in determining the issues with which this appeal is concerned.

40. On the issue of S's capacity to enter into a contract of employment, I agree with the submissions for the respondent. The issue of capacity was one for medical opinion evidence rather than mere assertion. If the appellant had wished to prove that S lacked the capacity to contract, he was free to do so and could have led evidence to that effect. In the absence of such evidence, however, it was not open to the tribunal to make any finding on that issue. In any event, and as counsel for the respondent correctly submitted, absence of capacity would not have made the express contract of employment void. At best for the appellant, the contract would have been voidable. Further, and as the respondent also correctly submitted, a factual finding that S lacked capacity would not have made it necessary to imply a contract of employment between the appellant and the respondent. The tribunal's extensive findings of fact about the role that V played in arranging care for S removed any need to imply such a contract.

41. The appellant's submission that the provision of care by him other than as an employee of the respondent would have contravened the provisions of the Health and Social Care Act, 2008 and the Health and Social Care Act 2008 (Regulated Activities) Regulations, 2014 is not correct. In terms of regulation 3 of the 2014 Regulations, read with Schedule 1 (in particular,

paragraphs 1(3)(c) and 13(2)(c)), the services provided by the appellant to S were excluded from the scope of regulated activities.

42. Finally, the relevance of the appellant's submissions about the law relating to trusts was not apparent. Reliance was placed upon section 12(3) of the Trustee Act, 2000 which states:

“The trustees may not under section 11 authorise a beneficiary to exercise any function as their agent (even if the beneficiary is also a trustee).”

That section has no obvious relevance, however, to the legal relationships under consideration in this appeal. Even on the hypothesis that the receipt of a direct payment can cause the recipient of the payment to become a trustee, that would not (a) preclude the trustee from becoming an employer; or (b) necessitate a conclusion that that the local authority was an employer.

Conclusions and disposal

43. The findings of fact made by the tribunal are not challenged in this appeal. The appellant has nevertheless sought to advance arguments that were not made before the employment tribunal on the basis of factual assertions that are not supported by the tribunal's findings of fact. It is not, however, the role of this tribunal to re-try the case. The role of the Employment Appeal Tribunal is limited to correcting errors of law.

44. The tribunal was entitled, on the basis of the evidence it accepted, to reach the conclusion that there was no contract of employment – express or implied – between the appellant and the respondent in the period to which the complaints related. No error of law is apparent in its approach. The appeal is, therefore, refused.