EMPLOYMENT TRIBUNALS

Claimant: **BC**

Respondent: **FRIMLEY HEALTH NHS FOUNDATION TRUST**

HEARING on a PRELIMINARY ISSUE

Heard at: Reading, by video, in public

On: 30 July 2025, 31 July 2025 and 11 September 2025

Before: Employment Judge Boyes (sitting alone)

Appearances
For the Claimant: Claimant, representing himself
For the Respondent: Mr J Chegwidden, counsel

RESTRICTED REPORTING and ANONYMISATION ORDER

Made pursuant to The Employment Tribunal Procedure Rules 2024

Pursuant to rules 49(1) and 30 of The Employment Tribunal Procedure Rules 2024, it being in the interest of justice to do so, **THIS ORDER PROHIBITS** the publication in Great Britain, in respect of the above proceedings, of identifying matter in a written publication available to the public or its inclusion in a relevant programme for reception in Great Britain. 'Identifying matter' in relation to a person means 'any matter likely to lead members of the public to identify the complainant or such other persons as may be named in the Order'.

The following person may not be so identified and must be anonymised as follows:

Claimant: BC

The Order remains in force indefinitely unless revoked earlier.

The publication of any identifying matter or its inclusion in a relevant programme is a criminal offence. Any person guilty of such an offence shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

WRITTEN REASONS

1. Oral judgment and reasons were delivered to the parties at the conclusion of the open preliminary hearing on 11/9/2025. My written Judgment, which was dated 14/9/2025 was as follows:

   The Claimant has a disability as defined by section 6 of the Equality Act 2010 as a consequence of Crohn's Disease and Autism.

   The Claimant was not an employee under section 230 of the Employment Rights Act 1996 at the relevant times.

   It is agreed between the parties that the Claimant was an employee of the Respondent under section 83 of the Equality Act 2010 and a worker of the Respondent under section 230 of the Employment Rights Act 1996 at the relevant times.

2. The Claimant exercised his right to request written reasons. These written reasons are provided in compliance with that request. Case Management Orders were issued separately on the 14/9/2025.

3. I apologise to the parties for the delay in providing these written reasons, which has arisen as a consequence of health reasons.

INTRODUCTION

4. The Claimant lodged his Claim with the Tribunal on 31 January 2024 having undertaken ACAS early conciliation from 20 November until 1 January 2024.

5. The Claimant was working for the Respondent as a Consultant Histopathologist from 20 April 2017.

6. Prior to that the Claimant had undertaken work at the Respondent's premises via an agency.

7. At the date that the claim was lodged there was an ongoing grievance appeal. This related to the Claimant's request to continue to work from home after the Respondent decided that staff should return to work at on site for at least some of the time. The Claimant was therefore asked to return to onsite working but declined. The initial request for flexible working was refused on grounds of business need. The Claimant's appeal against refusal to agree his flexible working request has since been determined and was unsuccessful.

THE COMPLAINTS

8. The complaints lodged with the Tribunal were:

   - unfair dismissal;
   - disability discrimination;
   - unauthorised deduction from wages–relating to sick pay and unpaid holiday;
   - unpaid holiday under Regulation 16 of the Working Time Regulations 1998;
   - failure to pay notice pay/breach of contract;
   - failure to pay redundancy pay.

9. The preliminary issues that I was required to decide were (i) the Claimant's employment status and (ii) whether, as a consequence of Crohn's disease, the Claimant has a disability as defined by section 6 Equality Act 2010 ("EqA").

THE PROCEEDINGS/HEARING ON A PRELIMINARY ISSUE

10. There was a delay in starting the hearing on the 30/7/2025 because of issues relating to the CVP platform and because counsel for the Respondent had misunderstood the start time of the hearing. Oral evidence was heard over the remainder of the 30/7/2025 and the 31/7/2025.

11. I clarified with the Claimant what adjustments he sought to enable him to fully participate in proceedings. He confirmed that he would need regular comfort breaks and for there not to be unexpected changes to the hearing schedule. Regular breaks were provided as and when requested by the parties.

12. The Claimant applied for a restricted reporting and anonymisation order given the very personal and sensitive information which would be discussed relating to his Crohn's Disease. He submitted that because of his uncommon surname it was likely that these details would be revealed in the event that anyone carried out an internet search against his name.

13. The Respondent was neutral as to whether or not such an order should be made.

14. I decided that it was appropriate to make a restricted reporting and anonymisation order. This is because the Claimant will be required to give evidence regarding personal and medical matters of a particularly sensitive nature. It may be necessary for the purposes of providing any oral or written reasons to refer to these findings and any written reasons would be a matter of public record. The Tribunal therefore considered that the Claimant's Article 8 ECHR rights are engaged on Private Life grounds.

15. The Tribunal has to weigh the impact on the Claimant's right to a private life against the principle of open justice and the right to freedom of expression. Given the particularly sensitive nature of the medical information that arises in this case, and the potential impact on the Claimant's ability to give that evidence openly if an order were not in place, I decided that it would be appropriate to make an order. The impact on open justice would be limited, on the basis that hearings will take in public, and information in respect of the case, other than the Claimant's identity, would be publicly available.

16. The Claimant adopted his witness statements to be found at pages 498-509, 534 -550, 554-557 and 559-564 of the bundle, as well as his Impact statement [464-474]. Whilst signed copies were not in the bundle, the Claimant provided signed copies to the Tribunal. He gave live evidence and was cross examined and asked questions by me by way of clarification.

17. The Respondent called Lee Tarren as a witness. He is now the Associate Director Medical Workforce, and has been employed by the Respondent since 19/4/2024. He adopted his witness statement at pages 576-583 of the bundle subject to one amendment (at paragraph 19 it should read 'inform HP' not 'inform me'). He gave live evidence and was cross examined by the Claimant and asked questions by me for the purposes of clarification.

18. The parties provided written and oral closing submissions in respect of the preliminary issues.

19. I handed down oral judgment and reasons to the parties on 11/9/2025.

20. I have made further case management orders date 14/9/2025.

Documents

21. I had a bundle before me of 610 pages. The Claimant had provided further medical evidence shortly prior to the hearing and I admitted that evidence as the Respondent had no objection. During the course of the hearing further documents were also admitted. I had written closing submissions from the Claimant and Respondent.

LIST OF ISSUES

22. The Respondent's position is that it concedes disability as to the Claimant's Autism. It does not concede that the Claimant is disabled by reason of his Crohn's Disease diagnosis. It does accept that the Appellant has been diagnosed with Crohn's Disease and that that constitutes a physical impairment for the purposes of the EqA.

23. The Respondent accepts that the Claimant did satisfy the definition of a worker within the meaning of section 230(3) ERA and section 83(2)(a) EqA at the relevant times. However, it does not accept that he was an employee for the purposes of s.230(3) ERA.

24. Therefore, the issues for determination at the preliminary hearing were:

Employment status

i. Was the Claimant an employee of the Respondent within the meaning of section 230 of the ERA?

Disability

i. Did the Claimant have a disability as defined in section 6 EqA at the time of the events the claim is about? The Tribunal will decide:
   - Did the Claimant's Crohn's Disease have a substantial adverse effect on his ability to carry out day-to-day activities
   - If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
   - Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

ii. Were the effects of the impairment long-term? The Tribunal will decide:
   - Did they last at least 12 months, or were they likely to last at least 12 months?
   - If not, were they likely to recur?

THE RELEVANT LAW

DISABILITY

25. Section 6(1) EqA states that:

> *"A person (P) has a disability if—*
> *P has a physical or mental impairment, and*
> *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities […]"*

26. In determining whether a person is disabled for the purposes of the EqA, the Tribunal is required to take into account the Guidance that is issued under section 6(5). The Guidance is entitled *Equality Act 2010 – Guidance on matters to be taken into account in determining questions relating to the definition of disability* ("the Guidance"). Under s15(4) of the Equality Act 2006, a Court or Tribunal must also take into account the *Equality and Human Rights Code of Practice on Employment* (2011) ("the Code") in any case where it appears to be relevant.

27. In *Goodwin v Patent Office* [1999] I.C.R. 302, guidance was provided on the proper approach for the Tribunal to adopt when applying the provisions of the Disability Discrimination Act 1995. It identified are four questions to be answered by the Tribunal. This four-stage approach was recently reaffirmed by the Court of Appeal in *Sullivan v Bury Street Capital Limited* [2021] EWCA Civ 1694, where the questions were listed as follows:

    i. Was there an impairment?

    ii. What were its adverse effects on normal day-to-day activities?

    iii. Were they more than minor or trivial?

    iv. Was there a real possibility that they would continue for more than 12 months?

28. These are questions for the Tribunal. Although it may be assisted by medical evidence, it is not bound by any opinion expressed.

29. The relevant point in time to be looked at by the Tribunal when evaluating whether the Claimant is disabled under section 6 is not the date of the hearing, but the time of the alleged discriminatory act [*Cruickshank v Vaw Motorcast Ltd* [2002] I.C.R. 729 and *All Answers Limited v Mr W(1) and Ms R (2)*, 2021 EWCA Civ 606].

Impairment

What is "substantial"?

30. Section 212 EqA defines "substantial" as being more than minor or trivial.

31. Paragraph 5 of Schedule 1 to the EqA:

> *"An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:*
>
> *- measures are being taken to correct it, and*
> *- but for that, it would be likely to have that effect.*

'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid."

32. This provision applies even if the treatment results in the effects being completely under control or not at all apparent. There are, however, situations where medical treatment may create a permanent improvement or "cure". In such situations it may be necessary to consider whether the effects of the impairment are or were sufficiently "long term". Alternatively, where treatment is continuing it may be having the effect of "masking" or ameliorating a disability so that it does not have a substantial adverse effect. If the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stopped, then the treatment is to be ignored and the effect is to be regarded as likely to recur [C11]. If the final outcome of such treatment cannot be determined, or if the evidence establishes that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment [B13].

33. The Guidance states that the requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people [B1]. Any inconsistency must be resolved in favour of the statute.

34. Appendix 1 to the Code also provides guidance on the meaning of substantial". It says, "Account should… be taken of where a person avoids doing things which, for example, causes pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation."

35. Whether an impairment has a substantial effect is for the Tribunal to decide, taking account of the relevant Guidance.

36. The Secretary of State's Guidance sets out a number of factors to consider including: the time taken by the person to carry out an activity [paragraph B2]; the way a person carries out an activity [B3]; the cumulative effects of an impairment [B4]; the cumulative effects of a number of impairments [B5/6]; the effect of behaviour [B7]; the effect of environment [B11] and the effect of treatment [B12].

What are "normal day to day activities"?

37. Day to day activities" encompass activities which are relevant to participation in professional life as well as participation in personal life. The Tribunal should focus on what a Claimant cannot do, not what they can do.

38. The Guidance provides the examples of what is meant by "normal day to day activities". In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities [D3]. Normal day-to-day activities can also include general work-related activities such as interacting with colleagues [D3].

39. The term 'normal day-to-day activities' is not intended to include activities which are normal only for a particular person, or a small group of people. In deciding

whether an activity is a normal day-to-day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context, 'normal' should be given its ordinary, everyday meaning [D4]. It is not necessary, however, that "most people" carry out the activity. However, if the condition also affects day to day activities to a substantial degree, those will still be relevant.

What does 'long term' mean?

40. Schedule 1, part 1, para. 2 of the EqA defines "long-term" as follows:

The effect of an impairment is long-term if –

i. *it has lasted for at least 12 months,*
ii. *it is likely to last for at least 12 months, or*
iii. *it is likely to last for the rest of the life of the person affected.*

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

41. The Guidance states that conditions with effects that recur only sporadically or for short periods can still qualify as long term impairments for the purposes of the Act. If the effects on normal day to day activities are substantial and are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. The Guidance sets out examples of impairments with effects which can recur beyond 12 months, or where the effects can be sporadic [C5 and 6].

42. The Guidance states that it is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met [C7].

43. The Guidance sets out what should be considered in relation to the likelihood of recurrence. Essentially all circumstances should be taken into account including the way in which a person can control or cope with the effects of an impairment, which may not always be successful [C10].

EMPLOYMENT STATUS

44. Section 230 of ERA states that:

"230 Employees, workers etc.

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) —

(a) a contract of employment, or

(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;

and any reference to a worker's contract shall be construed accordingly".

45. The definitions of 'employee' and 'worker' to be found at section 2 of The Working Time Regulations 1998 are very similar in terms to those found at section 230(3) of ERA.

46. A key principle, accepted by the higher courts, is that in work related contracts, unlike commercial contracts, the Tribunal can look behind the formal terms of an agreement to assess the reality of the situation. This is because there is a recognition that there is the potential for there to be an inequality of bargaining power between the putative employer and putative employee. The Tribunal is required to consider whether the words of the written contract reflect the intentions or expectations of the parties. In essence, the Tribunal should stand back, look at all of the relevant factors and assess the reality of the contractual relationship.

47. In *Autoclenz Ltd v Belcher & Others* [2011] UKSC 41 it was held that, in the context of employment relationships where the written documentation might not reflect the reality of the relationship, it was necessary to determine the parties' actual agreement by examining all the circumstances and identify the parties' actual legal obligations. The relative bargaining powers of the parties is a relevant factor to be taken into account.

48. The landmark case which provides guidance on the status to be attached to a contract in a workplace context is *Ready Mixed Concrete (Southeast) Ltd v. Minister of Pensions and National Insurance* 1968 1 ALL ER 430QBD, more recently confirmed as correct by the Supreme Court in the *Autoclenz V Belcher* case.

49. The test identified in the *Ready Mixed Concrete* case requires the Tribunal to consider three questions:

    i. did the worker agree to provide his or her own work in return for remuneration and in doing so demonstrate mutuality of obligation between the parties and personal performance by the worker?
    ii. did the worker agree expressly or impliedly to be subject to a sufficient degree of control such that the relationship is one of employer and employee?
    iii. were there other provisions of the contract consistent with a contract of service rather than a contract for services?

50. It is also a well established principle that, when assessing employment status, the Tribunal must not adopt a tick box exercise. Every case is unique and the Tribunal has to assess each case on its individual facts. In essence, the Tribunal should stand back, look at all of the relevant factors and assess the reality of the contractual relationship.

51. There is now a long line of case law that establishes that control may exist in the modern workplace even if direct day-to-day control is largely absent. This is particularly so where the individual provides a skill, or expertise, that is not susceptible to direction by anyone else in the organisation. In cases where the putative employer is relying upon the skill or expertise of the individual concerned, what matters is whether the putative employer has control over what the individual does rather than how he or she does it.

MY CONCLUSIONS

52. In reaching my decision I have taken into account all of the documentary and witness evidence before me whether or not referred to in these reasons. I have had regard to the written and oral closing submissions made by the parties, including the caselaw referred to in the written submissions.

DISABILITY

53. The Claimant was diagnosed with Autism on 16 September 2021. The Respondent concedes that he is disabled by virtue of Autism for the purposes of section 6 EqA.

54. The Respondent concedes that the Claimant has a physical impairment by virtue of Crohn's Disease. However, the Respondent submits that his Crohn's Disease does not have a substantial adverse effect on his ability to carry out normal day to day activities.

55. Having considered the oral witness evidence and documentary evidence before me in the round, and having weighed all of that evidence, I made the following findings of fact.

56. The Claimant has a diagnosis of Crohn's Disease. He underwent surgery for this in 1991 and was also treated surgically for an abscess relating to his Crohn's Disease in 1998. He had another episode of an ischiorectal abscess in 2020. He is not presently receiving any medical treatment for his Crohn's Disease. He does not take any medication.

57. In his Impact Statement, the Claimant stated that "*I have fortunately not suffered any primary direct recurrence of intestinal Crohn's Disease in the subsequent 34 years*" (B465). However, he asserts that he does suffer from the consequences of his surgery which he describes as persistent diarrhoea, faecal urgency, and incontinence, associated abdominal cramps, as well as with abscesses which cause discomfort when sitting for longer periods.

58. The Claimant relies upon a letter dated 1/4/2025 from Dr Syed Shaukat, Consultant Gastroenterologist (B600) which records that he presently has symptoms including intermittent flare-ups of bloating, colicky pain, lack of flatulence, vomiting, and temperature, which settle in a few days. He has more frequent bowel movements (2-6 times a day). He stated "*On examination there was certainly a mass in the right iliac fossa in keeping with Crohn's Disease. Perianal examination showed two fistulas on the left. I have explained to [the Claimant] that in my opinion he has active Crohn's Disease with episodic sub-acute obstruction. In addition, he also has got perineal disease. He surely needs to be considered for biologics and I am going to refer him to PCH for an urgent IBD clinic."*

59. Whilst this report was obtained during the course of proceedings and although Dr Shaukat was not treating the Claimant previously, I accept that the report reflects the ongoing symptoms that the Claimant experiences given the previous significant history of Crohn's Disease including surgery and Dr Shaukat's findings. Whilst the Claimant has chosen thus far to manage his Crohn's Disease without ongoing medical intervention, I do not consider that this means that it does not cause the symptoms that he describes or that it does not a significant impact on certain aspects of his day-to-day life.

60. In his Impact Statement, the Claimant's says:

"I plan meticulously when to eat relative to scheduled activity, taking opportunity of brief windows of safety to undertake tasks such as shopping and other essential trips, fasting as necessary to allow prolonged activity. For my entire consultant career, and indeed beforehand, my working day has typically been shifted several hours earlier than normal, to facilitate my needs. Aside from unpleasant bodily functions, this has also allowed me to take advantage of my window of physical stamina, since by the end of a typical working day I am physically exhausted."

"Rather than simply eating normal meals at normal times, I have had to rely upon grazing upon high calorie, low residue food and drink to sustain me. This is particularly true within the workplace, where I will typically avoid eating proper food during normal working hours, except in certain circumstances where I feel in control of the outcome."

61. It was notable that the Claimant mentioned, in passing, during the course of the hearing, that he had been fasting. I later sought further clarification from him regarding what this meant. He explained that this meant that he had not eaten any solid food from waking at 5 am. The only nutritional intake he had during the day was 3 sugary coffees and some sips of water. He ate a burger and roll in the evening after the hearing. He explained that if he had eaten solid food he would have experienced episodes of ongoing diarrhoea over and above that which he normally experiences. His evidence was that, on an average day, because of fear of being caught short, he would tend to start the day very early, which gives him the opportunity to use toilet facilities unimpeded. He would have a simple cereal for breakfast and then he significantly restricts his intake of solid food after that until the evening when he will eat a meal. He does this to reduce the risk of being caught short.

62. I found the Claimant's oral evidence in this respect to be entirely credible and consistent with what was said in his Impact Statement. Given the way in which he manages his condition in this respect I would not have expected it to have necessarily come to the attention of the Respondent or to have been the subject of any request for an adjustment at work. I accept and find as a fact that the Claimant manages his solid food intake during the course of the day to enable him to manage his Crohn's Disease and lessen its impact on his digestive system and bowel movements.

63. The Claimant submits that his Crohn's Disease adversely affects his ability to undertake the activities of driving, sitting down and using the toilet. In broad terms, I agree with the Respondent's submissions that the Claimant has not shown, on the evidence before the Tribunal at least, that his Crohn's Disease

has a substantial adverse effect on his ability to drive, remain seated and use the toilet on a day to day basis. I do, however, qualify this by finding that the minimal impact that his Crohn's Disease now has on these particular day to day activities is because he has become familiar with his long term chronic condition and very adept at managing it in order to minimise its impact and to enable him to work. Similarly, he has also adapted his life to accommodate the impact of the fatigue that I accept arises as a consequence of his Crohn's Disease.

64. The Guidance provides examples of what is meant by "normal day to day activities". One of the examples provided in the Guidance is the activity of preparing and eating food.

65. The Respondent submits that whilst the Claimant may need to monitor his diet carefully on a daily basis, having a specific diet to follow is a feature of many personal regimes without implying disability; and there is insufficient evidence to allow a conclusion that the following of a diet substantially impairs the Claimant from carrying out day to day activities.

66. However, this misses the point. Eating food is, of itself, a normal day to day activity within the scope of section 6 EqA.

67. Having considered all of the evidence before me I am entirely satisfied that in order to manage his Crohn's Disease the Claimant avoids eating solid food during the course of the day in order to reduce the number of bowel movements and diarrhoea that he experiences thus enabling him also to function in day to day life and undertake other day to day activities. I find that this restriction in food intake is substantial. It was clear from the evidence before me that he carefully organises and manages his food intake each day in order to lessen the impact of Crohn's Disease. I find that this is not a minor or trivial effect, it significantly impacts upon how he lives day to day and is substantial. I therefore find that his Crohn's Disease has a substantial adverse effect on when he eats and what he eats each day.

68. I am entirely satisfied, on the evidence before me, that the Claimant's Crohn's Disease does, and did at the relevant time, have a substantial and long-term adverse effect on his ability to take nutrition, that is to eat food.

69. Consequently, the Claimant has a disability for the purposes of section 6 of the EqA as a consequence of both Crohn's Disease and Autism.

EMPLOYMENT STATUS

70. The Respondent concedes that the Claimant did satisfy the definition of a 'worker' within the meaning of section 230(3) ERA and section 83(2)(a) EqA at the relevant times. However, it does not accept that he was an employee for the purposes of s.230(3) ERA.

FINDINGS OF FACT - EMPLOYMENT STATUS

71. The findings of fact I make here are limited to those factors relevant to the issue of whether or not the Claimant was an employee for the purposes of s.230(3) ERA at the relevant time.

72. The Claimant was registered to the locum bank by the Respondent from 8 April 2017.

73. The Claimant has not, at any point since being registered to the locum bank, gone through the requisite AAC process to be appointed as a Consultant by the Respondent. He had applied for consultant posts prior to taking the locum bank role.

74. The Claimant signed the bank contract relating to that work on 12 December 2017. The associated letter of the 12 December 2017 (B125–126), refers to the Claimant being appointed to the Respondent's "*locum bank*" for "*shifts as agreed*".

75. The standard Bank Terms & Conditions (B127–130), include the following:

"Appointment

Employment as a member of the locum bank does not constitute regular continuous employment as you will be offered work on an 'as and when' basis. The Trust is under no obligation to provide you with work and equally you are under no obligation to accept work. Each assignment is treated as a self-contained period of work and employment is only continuous for the duration of that assignment. […]

Hours of Work

Your normal weekly hours of work will be 'as and when required'. […]

Remuneration

Bank staff will be paid an hourly rate in accordance with the grade of the assignment. […]

Notice to cancel shifts/assignments

A minimum of 24 hours' notice are required for you to cancel bank shifts, except in exceptional circumstances. Failure to notify the Trust that you are not able to attend shifts could result in disciplinary action being taken.

The Trust will endeavour to give you a minimum of 24 hours' notice if the need arises to cancel a shift, except in exceptional circumstances.

If the Trust cancels your shift with more than 24 hours' notice you will not be entitled to any pay for shifts that are cancelled. If the Trust cancels your shift with less than 2 hours' notice you will be paid a 2 hour cancellation payment.

Notice Period

You are under no obligation to give us notice that you wish to leave the register and we are not obligated to give you notice should we wish to stop using your services.

Where you have not undertaken bank duties for a period of six months or more, we will assume that you no longer wish to be retained on the register. If you later wish to start working on the bank again you will need to re-register and the NHS standard employment checks will be carried out prior to you recommencing work. […]

Discipline and Grievance

The Trust Discipline and Grievance policies apply to your appointment. […]"

76. The bank worker contractor does not contain a job description for the role. There is no limitation on seeking other work contained within the agreement. There is no requirement in the agreement that the Claimant should request permission to take a period of annual leave. The Claimant's hourly rate is stated to be inclusive of statutory annual leave.

77. The agreement states that bank workers may be entitled to SSP but does not state that there is entitlement to NHS enhanced sickness benefit.

78. The Claimant was paid an hourly rate. Latterly this was a standard rate of £71 and an enhanced rate of £122.

79. The Claimant was contracted subject to the Respondent's 's Temporary Staffing Policy (B78-103) which is separate from the policies applied to Trust employees,

80. A Blank Standard Consultant Contract for Substantive / Fixed Term Staff has been provided (B137-167). This requires either party to give 3 months' notice of termination of employment.

81. Salaried consultants are entitled to a period of full pay during sickness absence which is dependent upon length of service. Salaried consultants are required to give two months' notice or incorporate periods of leave into their job plan

82. The basic hourly rate for salaried consultants ranges from £50 to £67 per hour and £67 to £89 at the enhanced hourly rate.

83. In practice, the Claimant was permitted to assign himself to shifts as he wished so long as he did not exceed 40 hours per week, and, if so, Helen Phillips would approve his time sheets. It was clear from the extensive oral evidence that I heard from both parties on the subject that he had a great deal of freedom and control as to the hours that he worked.

84. The number of total hours worked per month by the Claimant varied considerably over the period in question. Having considered all of the documentary and oral evidence before me in the round, I formed the view that there was no standard pattern over time. It is clear from the evidence before me that the Claimant frequently opted for a large proportion of weekend shifts. I accept the Respondent's submissions and find that that this would not be something that a salaried consultant could routinely opt to do.

85. It is a contractual requirement under the 2003 Terms and Conditions of Consultants that they have a job plan signed off annually, The Claimant had only one job plan from September 2019 (B131-136) which was provided to the Respondent but never signed off as such or agreed. By 2022, the Claimant was working significantly different hours to those than those predicted by the 2019 job plan.

86. The work undertaken by the Claimant included a share of cut-up of samples and associated work, bone marrow reporting and attending or heading up multi-disciplinary meetings ("MDTs").

87. There was a dispute between the parties as to how and when shifts were booked. Having heard oral evidence from both parties I prefer the Claimant's evidence that the work that he did in effect rolled on from week to week. He did not book individual shifts or even groups of shifts on a weekly or monthly basis. He chose

when he worked. Having worked the shifts concerned he then informed the Respondent of the hours that he had worked and was paid for them.

EMPLOYMENT STATUS - APPLICATION OF THE LAW TO THE RELEVANT FACTS

88. The Claimant was expected to provide personal service himself and there was no right of substitution. It is accepted by the Respondent that this criterion was satisfied.

89. It is plain on the face of the written agreement and the other evidence before me that the Claimant could pick and choose when he worked. He could elect to work a significant amount of time at the weekends, which at various points he did, and he was compensated at a higher rate for weekend shifts. He was not guaranteed work. He had the freedom to decline to work. There was only an obligation to give 24 hours' notice on either side if work could not be provided or undertaken. The Claimant was not guaranteed a minimum number of hours or pay each week, month or year.

90. Whilst I accept that the Claimant did not have to book individual shifts, I do not accept that this meant he was therefore engaged to cover a full-time long-term vacancy on an ongoing basis until either he gave notice that no longer wished to occupy the role or until the Respondent decided that his services were no longer required.

91. I accept the Respondent's submission that in the Claimant's appeal against the decision on his flexible working application he describes his own engagement in terms strongly suggestive that he was a worker, not an employee. In that document he states, "*My entire time working for BSPS (at various sites), firstly as an agency locum (2012-2017) and latterly as bank Staff (April 2017 on) has been on a flexible annualized basis. I have worked when it suited me, taking on extra work as and when required, and fitting in with or arranging fixed commitments (such as MDTs and cut-up or reporting urgents) or flexibly covering or swapping with others.*" [260]

92. The Claimant emphasises that the nature of some of the work undertaken, such as regularly attending or heading up MDTs, demonstrates that such was his level of integration that he was de facto an employee. However, there is nothing in the evidence before me to demonstrate that any locum consultant would not undertake such work should it be necessary.

93. In this case I consider that the significant weight should be placed upon the written agreement the terms of which were clear. The agreement expressly negated any obligation to offer or accept work. The nature and terms of that agreement was not disputed by the Claimant whilst he was working for the Respondent. He did not at any point seek to argue that he was an employee or was being incorrectly referred to or classified as a locum Consultant.

94. Placing significant weight on the written agreement, but also considering it in light of all of the other evidence before me and the reality on the ground, I find that there was not mutuality of obligation in this case.

95. In terms of the level of control, I find that the Respondent had a lack of control as to what shifts the Claimant would or would not be available to work. He was not

subject to performance targets, he did not have a job description, or a job plan, except for the one produced, but never officially signed off, in 2019.

96. I turn now to whether other provisions of the contract and other miscellaneous factors are consistent or inconsistent with a contract of service

97. The Claimant was paid an hourly rate. The basic and enhanced hourly rates were significantly higher than the equivalent paid to a salaried consultant. I attach significant weight to this factor. I consider it is indicative of an arrangement that is a different arrangement to that of an employee. The Claimant was also not part of the sick pay, redundancy, holiday or notice arrangements that salaried consultants benefit from.

98. The Claimant did have a written contractual right to raise a grievance. All staff, including also bank and agency doctors, have a right to raise a grievance.

99. Whilst the Claimant did undertake administrative duties, I find on the evidence before me, that these were less than those undertaken by salaried consultants. Whilst he did attend and, at times lead, some MDT meetings he has not shown that this was a task ordinarily only done by salaried consultants. Having considered the evidence before me, I am satisfied that it was the case that this task was also undertaken by locum consultants as and when required.

100. The Claimant had some SPA time allocated (in line with the section on locums in the Consultant Job Planning Policy (B443)). I find on the evidence before me that these provisions were in place to support safe practice by all medical doctors, rather than being indicative of employment status.

101. I have considered the arguments that the Claimant has raised about his level of integration within the organisation but on the facts of this case I do not consider that this was such that it outweighed the clear and express agreement that existed in this case as well as the other factors that I have referred to above.

102. Taking into account all of the relevant factors, I find that the Claimant was not integrated into the organisation to such a degree so as to mean that he is an employee rather than a worker.

Conclusion on employment status

103. Considering all of the evidence before me in the round and taking into account my findings and the conclusions relating to mutuality of obligation, control and other relevant provisions, I find that there was not an employee/employer relationship for the purposes of section 230 of the ERA. Rather the Claimant was a worker for the purposes of that section at the relevant times.

Approved by:

Employment Judge Boyes

Date: 11 January 2026

Sent to the parties on:

12 January 2026

For the Tribunal Office: