THE EMPLOYMENT TRIBUNALS

BETWEEN

Ms Mercedes Phillips ***Claimant***

AND

1. John Chatfeild-Roberts
2. Universal Aunts Limited

Respondents

JUDGMENT OF THE EMPLOYMENT TRIBUNAL FOLLOWING A PRELIMINARY HEARING

HELD AT: London Central **ON**: 13 and 14 June 2017
EMPLOYMENT JUDGE: Mr Paul Stewart **MEMBERS: sitting alone**

Appearances:

For Claimant: **Ms A Farah, solicitor**

For Respondents: **(1) Mr T Newman of counsel**
(2) Mr S Crawford of counsel

JUDGMENT

The claim brought against the second Defendant is dismissed.

REASONS

Introduction

1. The Claimant is a woman of 52. She was engaged from 12 June 2013 to 6 August 2016 in the role of live-in carer / housekeeper in respect of the first Respondent's very elderly uncle who has been referred to throughout the hearing as either "the Colonel" or by his first name Henry. The Colonel occupied a house at an address in Halsey Street, London SW3.

2. The termination of her engagement has led the Claimant to claim that she was unfairly dismissed and that she is owed notice pay, holiday pay, arrears of

pay and other payments. She has brought these claim against two respondents. The first Respondent named by her is the Colonel's nephew while the second Respondent describes itself as an introduction service. The Claimant had registered with the second Respondent on or around 8 April 2003 and, on or around 12 June 2013, the second Respondent introduced the Claimant to the first Respondent.

3. The day of the Claimant's termination - 6 August 2016 - happened to be her day off. She elected to travel from the Colonel's house in Chelsea to Felixstowe. She was followed by a process server who gave her two letters, one from the first Respondent and one from solicitors acting for the first Respondent. The first Respondent's letter informed her that her employment was terminated and set out the reasons why the first Respondent was terminating it. The first reason related to the Colonel: the first Respondent and his sister believed that, as the Colonel had been diagnosed as suffering from Alzheimer's, his need for specialist care rendered the Claimant's care inadequate. A further five reasons related to complaints that the first Respondent had about the care and the service provided by the Claimant while the final reason cited as inappropriate the relationship between the Claimant and the Colonel.

4. The Claimant disputes the reasons given for termination. In her Particulars of Claim, she contends that the Colonel had not been formally diagnosed either with dementia or Alzheimer's until after her dismissal. She asserts that her dismissal is the direct consequence of the Colonel deciding to alter his will in May 2016 so as to include the Claimant as a beneficiary, an action which she understood the first Respondent and his family to believe was the result of her coercion of the Colonel, something she denies.

5. The Colonel has since died on 4 February 2017 aged 93. The status of his will is the subject of litigation in the High Court.

6. On 5 May 2017, Employment Judge Lewzey conducted a Preliminary Hearing (Case Management). The first Respondent had provided a list of issues which had been agreed. She listed the case for a one day preliminary hearing to determine issues 1 and 2 in that list. These were:

    i) Was the Claimant an employee of the first Respondent?

    ii) Was the Claimant an employee of the second Respondent?

7. The date for the Preliminary Hearing was, after a false start, fixed for 13 June 2017. In the event, the time estimate was optimistic: the hearing took two days. I heard evidence from the Claimant and some evidence of the first Respondent on the first day, while on the second day, I heard the remainder of the first Respondent's evidence and the evidence of Ms Angela Montfort Bebb, the sole witness for the second Respondent, plus submissions.

Facts

8. The second Respondent operates as an agency. It introduces suitable staff, who may come to be referred to as Universal Aunts or Uncles but who, pending engagement were referred to by Ms Bebb as "applicants", to "clients", that is, people or families in need of housekeepers, companions, nannies, Mother's

helps, babysitters, proxy parents, house and pet sitters, drivers, travelling companions, cooks, party staff and admin staff.

9. The second Respondent does not usually advertise for applicants: they tend to make contact either by telephone or email. They are asked to provide a c.v. and an up to date photograph. At that point, an applicant may be invited to interview. If invited, they are asked to complete an application form and are provided with what Ms Bebb described as a pack of paperwork.

10. If the applicants survive face to face interviews, it is explained to them that the second Respondent will make an introduction provided a suitable assignment is identified and the second Respondent receives positive references. Applicants are informed that they are not employed by the second Respondent but are regarded as self-employed, being paid directly by the client a gross sum from which they are responsible for their own tax and National Insurance.

11. Once an introduction has been made and the client engages an applicant, the client pays the second Respondent an agency fee. The rate of pay which the applicant receives is normally set by the second Respondent and is paid by the client directly to the applicant.

12. The Claimant came onto the books of the second Respondent in April 2003. She was prepared to do both daily and residential work. Her interview was successful and she provided three excellent references. Over the next 10 years, she worked for a succession of the second Respondent's clients before, on 12 June 2013, she was introduced by email to the first Respondent's sister, Mrs Essex Close-Smith, as a suitable Aunt to be a live-in carer for the Colonel.

13. In the second Respondent's handbook, the description applied to those who become Universal Aunts or Uncles is "workers". In their terms of business provided to the first Respondent, it was stated that "… Our workers become your employees for the duration of their time with you" although, elsewhere in their documentation, the second Respondent asserted their workers to be self-employed.

14. It appears that, ahead of the engagement, the first Respondent and his sister were concerned that their uncle could be difficult: the first Respondent saying in evidence:

> We had in mind to have someone there 24 hours a day, capable of coping with an irascible old man …

15. The first Respondent was not able to say whether the second Respondent had informed his sister of the rota system operated by the second Respondent whereby there would be a change of carer after a period of some 3 to 4 weeks. Ms Bebb acknowledged that, while that might be usual:

> … in cases where the client is very reluctant to have a change, and an Aunt is happy to remain on an ongoing monthly basis, we continue to charge monthly and provide cover for when the Aunt has breaks.

16. The Claimant received a copy of the job description provided to the second Respondent by the first Respondent or his sister. When she went to the

Colonel's house, she was met by the first Respondent who showed her around the house and spoke to her about the Colonel and what the job entailed.

17. After the Claimant's visit in which she had been introduced to the Colonel, the first Respondent's sister called to find out whether the Claimant could commit to a period of six months. The Claimant, who had experience of providing long term residential care, indicated she could. If Mrs Close-Smith had been informed of the rota system, it is clear that she did not think it suitable for her uncle.

18. The Claimant was told in the first week of her engagement that she was to assist the Colonel with his catheter and to contact a doctor should he become unwell. She was required to issue medication to the Colonel and to provide personal care which included cooking and shopping for him. She was expected to perform various tasks, find and engage plumbers and electricians when need, book and organise medical appointments, accompany the Colonel to such appointments, liaising with medical professionals and keeping the first Respondent informed in such matters. She was instructed to organise birthday parties for the Colonel and was asked, on occasion, to communicate with a Chartered Surveyor and to send material to the Colonel's lawyer.

19. In his evidence on the first day of the hearing, the first Respondent denied that he had asked the Claimant to send material to the Colonel's lawyer saying that was "the last thing on earth I would have asked" the Claimant to do. On the second day when confronted with an email message in which he had asked the Claimant to forward to the Colonel's lawyer an email in which he had summarised a discussion that had involved the Claimant, the Colonel and himself concerning the Colonel's wishes as regards his will, he accepted he had made the request but …

> … this is not within the context of employment - I was trying to get some resolution so as we could all get on with our lives

20. Later, the first Respondent was challenged about his use of terminology in documents that, as above, might indicate he viewed the Claimant's engagement as one of employment. His response was to assert:

> I was unaware of the importance of the use of the proper label "employment" … I was sent this [document at page 278] … – I probably did not read it, I am not an employment lawyer. I am not a lawyer – I do not write emails for the benefit of the legal profession

21. The Claimant kept the first Respondent informed of daily activities, of trips made and developments with house maintenance. On one occasion at the end of June 2016, the Claimant sought some additional assistance to keep the house clean, she was told by the first Respondent that "It is Universal Aunts' policy that you can only have a cleaner once a week" and "It may be Henry's house, but I am your employer and what I say goes." On another occasion when, in response to the Colonel's indication that he wanted the walls of the drawing room painted and the Claimant started that job, the first Respondent told her "That's the last wall you are going to paint. I did not employ you to paint walls".

22. Over the period of her engagement, the Claimant lived in the house and occasionally the first Respondent – who lived in Melton Mowbray but who

worked in the City – would spend the night in his uncle's house. To begin with, the first Respondent would make an effort to visit once a week but that slipped to once a fortnight or every three weeks.

23. After the first year of the engagement when the Colonel reimbursed the first Respondent for the cost of his live-in carer, the first Respondent reached an accommodation with his uncle that the first Respondent would pay for the carer for the remainder of his life, it being anticipated that the first Respondent would be a beneficiary under the Colonel's will.

24. The reduction in the frequency of visits by the first Respondent coincided with his early appreciation of the Claimant's performance in her role. In his statement, he wrote:

> 9. I must admit that I never fully turned my attention to the long-term structure of my uncle's care. Through subsequent communications with Universal Aunts, I learned that residential carers they introduced to their clients are expected to adhere to a rota system whereby each Aunt is only in place for three or four weeks before been swapped for another Aunt. It transpires that Universal Aunts' intention was that my uncle's care would be run on a rota system This is confirmed by the screenshot from their computer system.
>
> 10. My intention on instructing Universal Aunts was that they would provide a full-time care structure for my uncle. Although I was not told about the rota system, I understood they would provide sufficient carers so that my uncle would have full-time care. I also understood that it meant the carers they provided were substitutable. When Mercedes started, it so happens that she never left. It was not my intention at the time that she would never leave, nor was it my intention that she would leave after a certain amount of time. Essex and I have been very worried and under strain about my uncle's well-being in the months leading up to the start the formal care arrangements. We were so relieved when things seem to be going well and my uncle soon settled that we do not want to risk that stability with regular change. It was a huge weight off my mind to see a reliable support system put in place. How the mechanics of that system operated was of little importance to me as long as my uncle was cared for each day and was content with the arrangement.

25. The first Respondent devoted some 8 paragraphs of his statement to the issue of "Control". As he commented in the first of these paragraphs, with him living outside of London and having a full-time job, it was never contemplated by him, his uncle or the Claimant that he would be heavily involved in overseeing his uncle's care in any way.

> Therefore, I expected Mercedes to provide care independently without the need for supervision or oversight. Furthermore, at the beginning of Mercedes' engagement especially, my uncle was capable of giving instructions himself.

26. On the Claimant's day off – she favoured Saturdays – another carer, Rachel, supplied by the second Respondent attended on the Colonel. However, when Rachel stopped providing care services, the Claimant and the Colonel made a decision not to replace her with another hired person from the second Respondent but to have the Colonel's cleaner, Olya, do extra hours on the day she was around. The Claimant was free to choose her working hours without any input from the first Respondent against a background whereby the second Respondent's brochure suggested she worked 12 hours per day with 2 hours respite.

27. The Claimant, when cross-examined by counsel for the first Respondent, commented on the communication between her and the first Respondent / Mrs

Close-Smith as having been partly by email and partly face to face. She understood that her remit in respect of the Colonel was to cover his mobility which required him occasionally to visit hospital and resulted him an Occupational Therapist visiting the house thereafter and leaving exercises which the Colonel had to do. Sometimes, this generated communication but sometimes not. If she did not use her initiative, she explained, she would have been deemed not to be doing her job.

28. Under the heading of "Lack of Personal Service", the first Respondent explained that, during the Claimant's engagement, he continued each month to pay the second Respondent's agency fee of £125 plus VAT. This provided him with reassurance that, should the Claimant cease for whatever reason to provide care on a particular day or at all, the second Respondents could provide an alternative Aunt. He gave as an example the way in which the system coped with the Claimant being called up for jury service in June 2016 with the Claimant informing the second Respondent of the dates of her service and the second Respondent thereupon emailing the first Respondent's sister about replacement carers. The first Respondent would then arrange for the payment of the substitute carer.

29. The first Respondent cited Christmas 2013 as an example of the occasions when, if the Claimant was not available, she would inform the second Respondent and a substitute carer would be provided without the first Respondent being involved. The Claimant cited the period from 6 to 19 January 2014 as being a period of annual leave which she took and for which she was paid. During that period, she visited her sister in California. Again, the second Respondent arranged cover for the period she was away.

30. Under the heading of "Mutuality of Obligation", the first Respondent wrote:

> 29. I was not obliged to provide Mercedes with work and similarly, she was not obliged to accept work. I had approached Universal Aunts in order to acquire full-time residential care from my uncle. My continued monthly payment of the agency fee throughout Mercedes' time at the House demonstrates my continued expectation that my uncle would receive full-time care. If Mercedes had decided that she no longer wanted to be part of that framework, she was free to inform Universal Aunts of that fact and they would have sent a replacement to take her place.

31. For the first year or so, the Claimant submitted invoices and the first Respondent then paid. The rate she invoiced her time at was that suggested by the second Respondent. The Claimant asserts that, after a year, she was never asked for an invoice again and received payment from the first Respondent directly into her bank account. It would appear that the first Respondent experienced a degree of frustration at the Claimant's failure to supply monthly invoices on a regular basis and therefore moved to pay monthly by standing order. It meant that, at times when the Claimant worked overtime, he supplied a cheque for the requisite amount.

32. The sums paid by standing order or by cheque were the gross amounts. The Claimant, in line with what the second Respondent had informed her, accounted for her own tax and national insurance. Although the first Respondent comments that he did not think that paying a regular rate into the Claimant's account suggests that he was her employer, the Claimant was able to point to an email

from the Respondent wherein he described her payment as a "salary".

33. On 23 July 2014, the first Respondent took it upon himself to increase the rate at which the Claimant was paid by 5% because, as he informed the Claimant, he had noticed that the rate quoted by the second Respondent had not gone up since she had started. This took the rate at which the Claimant was paid for a full day to £115, or £690 per week.

34. The first Respondent asserted there to have been no holiday pay arrangement in place for the Claimant. He commented that the Claimant appeared loathe to take holidays and, when he expressed concern to her about her not having time off, her response was that she was "not a holiday person". However, there were four occasions when she did take time off. On each occasion, the first Respondent paid her normal remuneration. The first and third of these occasions were days off at Christmas: four days in 2013 and three in 2014. The first Respondent said:

> On both occasions, I left the payment intact thinking the extra payment would be an appropriate Christmas gift. I saw it as a gesture of goodwill to thank Mercedes for her hard work. In Christmas 2015, Mercedes did not take any time off and so I have her a ticket for a show as her Christmas gift instead.

35. The second occasion was when the Claimant travelled to California in January 2014. The first Respondent explained:

> This continued payment was simply a gesture of goodwill. At the time, we were very satisfied with the care she was providing to my uncle and I wanted to remain on good terms with Mercedes, as I knew she was free to leave at any time. In my mind, this payment was a gift of thanks.

36. The fourth occasion was when the Claimant was required to attend jury service for two weeks starting on 6 June 2016. The first Respondent continued to pay anticipating that, as and when the Claimant received reimbursement from the court for income through completing her service, he:

> would have offset her future pay against this effective double pay. I was aware that losing two weeks' pay would cause Mercedes a cash flow problem so I was happy to wait for the reimbursement. The replacement Aunt, Joanna Dale, sent to cover Mercedes during this time was one of the main catalysts for Essex and I are to come to the decision that Mercedes engagement was no longer terrible. Joanna brought various concerns about the poor standard of Mercedes' care to my uncle (which are not the subject of this hearing) to our attention which led us to decide that Mercedes' engagement was no longer tenable. These new issues meant that the two-week payment and the reimbursement from the court slipped the bottom of my list of priorities.

37. Thus, no reimbursement was sought for payment that was made for the period of two weeks' jury service.

38. There was no expenditure by the Claimant on equipment needed to attend on the Colonel – the house was fully furnished and such items as were needed for his personal care were paid for either by the Colonel himself or by the first Respondent.

39. The letter by which the first Respondent terminated the engagement was one of the two letters given to the Claimant by a process server on 6 August 2016. In his letter, the first Respondent used language which the Claimant asserts was

suggestive of an employee / employer relationship, specifically:

> … traits which do not befit your role …
>
> … Behaviour that is completely out of place for a carer …… known to inadequately hand over your care duties …… the kitchen is not kept clean and tidy, which is expected as part of your role …… egregious breach of your obligations …… carelessness with which you approach your duties …
>
> … accessing possessions in this way is beyond your remit as a carer and a breach of your obligations …

The Law

40. Statutory definitions of relevant concepts can be found in the Employment Rights Act 1996:

> Section 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.
>
> (4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
>
> (5) In this Act "employment"—
>
> (a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and
>
> (b) in relation to a worker, means employment under his contract;
>
> and "employed" shall be construed accordingly.

41. The statutory definition of employee simply incorporates the common law concept of what is a contract of service or employment, traditionally distinguished from a contract for services – or self-employment. There are many decided cases on what will amount to a contract of employment. Ready Mixed Concrete (South East) Ltd. *v.* Minister of Pensions and National Insurance 1968] 2 Q.B. 497, 515 is the source of a well-known summary from Mackenna J:

> A contract of service exists if these three conditions are fulfilled.

> (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
>
> (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
>
> (iii) The other provisions of the contract are consistent with its being a contract of service.

42. Mackenna J added this about (i) above:

> There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service though a limited or occasional power of delegation may not be:

43. Later at page 516 – 7, he commented:

> An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control.

44. This test was quoted with approval by Elias LJ in Quashie v Stringfellows Restaurants Ltd [2013] I.R.L.R. 99. Elias LJ then observed at paragraph 8:

> This approach recognises, therefore, that the issue is not simply one of control and that the nature of the contractual provisions may be inconsistent with the contract being a contract of service. When applying this test, the court or tribunal is required to examine and assess all the relevant factors which make up the employment relationship in order to determine the nature of the contract.

45. Underhill LJ made the same point in Pimlico Plumbers Ltd and another v Smith [2017] I.C.R. 657 where he commented:

> If the position were that in practice the putative employee / worker was regularly offered and regularly accepted work from the same employer, so that he or she worked pretty well continuously, that might weigh in favour of a conclusion that while working he or she had (at least) worker status, even if the contract clearly (and genuinely) provided that there was no legal obligation either way in between the periods of work. The second situation is where the claim directly depends on the claimant's status during periods of non-work, either because he or she has to establish continuity of employment or because the claim itself relates to their treatment during that period: in such a case mutuality of legal obligations is essential.

46. The House of Lords in Carmichael v National Power plc [1999] ICR 1226 confirmed that there is an "irreducible minimum of mutual obligation necessary to create a contract of service. In that case:

> as a matter of construction of the letters exchanged between the parties, there was no obligation on the company (*a predecessor of the respondent*) to provide casual work or on the applicants (*guides for tours of visitors to power stations*) to undertake it, and consequently there was an absence of the irreducible minimum of mutual obligation necessary to create a contract of service; that, in any event, it was only appropriate to determine the issue solely by reference to the documents if it appeared from their own terms and/or from what the parties said or did subsequently that such documents were intended to constitute an exclusive record of the parties' agreement; that the industrial

> tribunal had to be taken to have decided that they were not so intended but constituted one important source of material from which the tribunal was entitled to infer the parties' true intention, along with other objective inferences which could reasonably be drawn from what the parties said and did both at the time the applicants were engaged and subsequently; that the determination of that issue was a question of fact, and the industrial tribunal had been entitled to infer, from the documents and all the surrounding circumstances and how the parties conducted themselves subsequently, that their intention was not to have their relationship regulated by contract whilst the applicants were not working as tour guides.

47. As Elias J in Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471 observed, in dismissing the appeal to the EAT:

> 11. The significance of mutuality was that it determined whether there was a contract in existence at all and the significance of control was that it determined whether, if there was a contract in place, it could properly be classified as a contract of service rather than some other kind of contract.
>
> 12. The issue of whether there is a contract at all arises most frequently in situations where a person works for an employer, but only on a casual basis from time to time. It is often necessary then to show that the contract continues to exist in the gaps between the periods of employment. Cases frequently have had to decide whether there is an over-arching contract or what is sometimes called an 'umbrella contract' which remains in existence even when the individual concerned is not working. It is in that context in particular that courts have emphasised the need to demonstrate some mutuality of obligation between the parties but, as I have indicated, all that is being done is to say that there must be something from which a contract can properly be inferred. Without some mutuality, amounting to what is sometimes called the 'irreducible minimum of obligation', no contract exists.
>
> 13. The question of mutuality of obligation, however, poses no difficulties during the period when the individual is actually working. For the period of such employment a contract must, in our view, clearly exist. For that duration the individual clearly undertakes to work and the employer in turn undertakes to pay for the work done. This is so, even if the contract is terminable on either side at will. Unless and until the power to terminate is exercised, these mutual obligations (to work on the one hand and to be paid on the other) will continue to exist and will provide the fundamental mutual obligations.
>
> 14. The issue whether the employed person is required to accept work if offered, or whether the employer is obliged to offer work if available is irrelevant to the question whether a contract exists at all during the period when the work is actually performed. The only question then is whether there is sufficient control to give rise to a conclusion that the contractual relationship which does exist is one of a contract of service or not.

Discussion

48. In considering the two questions to be determined as set out in paragraph 6 above, I have little difficulty in answering "No" to the question "Was the Claimant an employee of the second Respondent?"

49. The second Respondent, in my view, is an agency who earns income through introducing people like the Claimant to clients, like the first Respondent and his sister, who have a need for the service such people can render. Once the introductions have been made and a working relationship established between those introduced to each other, the second Respondent receives a fee from the client. The Claimant paid nothing to the second Respondent and received no income from that quarter.

50. The terminology that the second Respondent used when describing to their

clients the relationship that would be created upon a successful introduction was somewhat confused: "Our workers become your employees for their time with you" sits uneasily with the assertion that their workers were self-employed.

51. So, I derive little assistance from the documentation supplied by the second Respondent as to the answer to the other question "Was the Claimant an employee of the first Respondent?"

52. I also derive little assistance from the first Respondent's contentions in his evidence as to what should be the correct description of the legal relationship he formed with the Claimant. As he himself acknowledged, he is not an employment lawyer and nor had he ever fully turned his attention to the long-term structure of his uncle's care.

53. I find that there was mutuality of obligation between the first Respondent and the Claimant from the start of the engagement. Mrs Close-Smith enquired through the second Respondent whether the Claimant could commit for six months ahead of the Claimant moving into the Colonel's house and the Claimant indicated she could so commit. During that time, the Claimant presented invoices and was paid. Thereafter, there was no or little discussion about the Claimant committing: the first Respondent had come to rely on the Claimant. I have no doubt that, whatever the documentation provided by the second Respondent might have said about there being no obligation on the part of the client to provide work or the Claimant to do the work, the first Respondent regarded the Claimant as under an obligation to provide her services to the Colonel and the Claimant regarded the first Respondent as under an obligation to continue to engage her to be the principal carer and housekeeper for his uncle.

54. It was understood on all sides that the Claimant was entitled to a day off per week and to annual leave, something that the first Respondent considered the Claimant did not make sufficient use of. The second Respondent provided a regular replacement for the Claimant on her weekly day off and, in anticipation of any longer absence, the second Respondent was approached (mainly by the Claimant) to provide a replacement carer for the duration of the Claimant's absence. I do not regard the Claimant's action in approaching the second Respondent as her providing a substitute for herself. Rather, she was making use of the facility that the first Respondent and his sister had negotiated with the second Respondent and for which they had approached the second Respondent – that of full-time care for their uncle.

55. At different times, the vocabulary used by the first Respondent (see paragraph 21 above) demonstrated how he saw the relationship – as one of employment. What was expected of the Claimant in the discharge of her duties as carer and housekeeper was set at the start of the engagement and she reported to the Respondent either face to face on his visits to the house or by telephone. I concur with the view expressed by the Claimant that the language used in the termination letter given to the Claimant on 6 August 2016 indicated an employer who considered himself to have control over the Claimant in the performance of her duties and was demonstrating that control in a very decisive manner.

56. Self-employment generally denotes a person to be carrying out a business. I discerned nothing in the circumstances of this case that indicated the Claimant was conducting a business. True, she received her remuneration without deduction of tax or national insurance and she was expected to, and did, account to HMRC for both. The second Respondent had advised that such should be the arrangement because, they suggested, the Claimant was self-employed. As I have indicated, the second Respondent's documentation contradicted itself. However, even had it been the case that the Claimant and the first Respondent agreed between themselves that she would be paid gross because she was self-employed, I would not regard their description of her status as determinative.

57. When one digs down beyond the description of self-employment attaching to the engagement because of payment was made gross, Mackenna J's three conditions are all, in my view, satisfied in this case. The Claimant had agreed that, in consideration of remuneration, she would provide her own work and skill in the performance of service at the behest of the first Respondent. She had agreed expressly and impliedly, that in the performance of that service she would be subject to the first Respondent control in a sufficient degree to take him the master. And the other provisions of the contract are consistent with its being a contract of service – and by that I have in mind that one rest day per week was agreed, her absences over and above her day off per week were all paid absences and, while there was stipulation as to the hours for which she was to be paid, she lived in the house and was expected to attend to the Colonel as and when he required attention. She came to be paid by standing order only invoicing for overtime. Her rate of pay, having followed that suggested by the second Respondent, was unilaterally increased by the Respondent. And, importantly, there was nothing about this arrangement which indicated the Claimant was running a business.

58. Thus, my answers to the questions which Employment Judge Lewzey set down are:

    i) Was the Claimant an employee of the first Respondent? Answer "Yes".

    ii) Was the Claimant an employee of the second Respondent? Answer "No".

59. It follows that the claim against the second Respondent must be dismissed.

60. Finally, I apologise to the parties for the length of time it has taken me to produce this decision.

EMPLOYMENT JUDGE STEWART
23 October 2017