RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr S Ukegheson**

Respondents: **(1) London Borough of Newham**
(2) Mr Mohammad Baulackey
(3) Mr N Pratt
(4) Laurel Leaf Homes Limited

Heard at: **East London Hearing Centre**

On: **6 & 7 September 2018**

Before: **Employment Judge Barrowclough**

Representation

Claimant: In person

Respondents: Mr Kolarele Sonaike (Counsel)

JUDGMENT

The judgment of the Tribunal is that all the Claimant's complaints are struck out as having no reasonable prospects of success, pursuant to Rule 37(1)(a) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013; and the Claimant is ordered to pay a contribution towards the Respondents costs of £500, pursuant to Rules 76(1)(a) & (2).

REASONS

1 The Claimant advances a number of complaints in his two ET1 claims against the various Respondents listed in these proceedings. They include automatic unfair dismissal for making a protected disclosure (s.103A Employment Rights Act 1996), direct race discrimination (s.13 Equality Act 2010), disability discrimination, harassment and victimisation (ss.26 & 27 of the 2010 Act). There was a preliminary hearing in this case on 28 March 2018 before Employment Judge Hallen, when the Respondents' application for

strike out or deposit orders in relation to all of the Claimant's complaints was adjourned to be determined at this two-day Open Hearing upon consideration of evidence. In addition, the Employment Judge then helpfully set out the issues to be considered and determined at the restored hearing, and went on to give directions for the future conduct of the proceedings. These included orders concerning disclosure and the preparation of an agreed hearing bundle, but also that the Claimant should provide further and better particulars of his claim, clarifying his various complaints, by no later than 25 April 2018; and that the parties exchange witness statements on or before 27 June 2018. The Claimant did not in fact prepare a witness statement, apparently on the basis that he was not required by law to do so, and therefore no such exchange took place; and only served the further and better particulars so ordered by email on both the Respondents and the Tribunal at 11.30 pm on 5 September, the day before the commencement of this hearing. At the outset of the hearing, it appeared that the Claimant was not minded to give evidence; but, following discussions, he decided that he did in fact wish to do so, and, with the agreement of Counsel for the Respondents, he adopted the recently served further and better particulars of his claim as his witness statement. Accordingly, I heard oral evidence from the Claimant and from the Second Respondent, together with closing submissions from the Claimant and from Mr Sonaike of Counsel, who appeared for and represented all four Respondents.

2 The Claimant identified himself as being black British, of Nigerian ethnic origin, and stated that he has been diagnosed as suffering from thyroid cancer, which is the disability he relies upon and which was not disputed. He is also a qualified lawyer, being a Nigerian solicitor/barrister (it appears that the profession is fused in that country), and a member of the Chartered Institute of Legal Executives in the UK. It was also not disputed that the Claimant worked as the registered manager of a children's residential care home at 362, Romford Road, London E7 8BS, which is owned and operated by the Fourth Respondent and of which company the Second Respondent is the sole director, from 5 April to 22 September 2017, when that arrangement was terminated with immediate effect by the Second Respondent on behalf of the Fourth Respondent. The Third Respondent, Mr Nick Pratt, is the Local Authority Designated Officer (or 'LADO') who carried out an investigation on behalf of the London Borough of Newham, the First Respondent in these proceedings and the relevant Local Authority, into an allegation that the Claimant had during that period assaulted a child who was a resident (in fact at the time the only resident) at the children's home of which he was then manager. I address the issues to be determined more or less in the order listed in the Preliminary Hearing order.

3 The first such issue is whether the Tribunal has jurisdiction to hear and determine the Claimant's complaints against the London Borough of Newham and Mr Pratt, respectively the First and Third Respondents. The Claimant helpfully clarified that he does not assert or allege that he was ever an employee of either Respondent, so the complaints in question in relation to those Respondents are limited to the discrimination and related claims arising under the Equality Act 2010 ('the Equality Act'). The First and Third Respondents contend that the Claimant was neither their employee (now accepted), nor a worker or someone contracted personally to undertake work for them, who would therefore fall within s.83 of the Equality Act. The Claimant disagreed, and submitted that his case falls within part 5 of the Equality Act, which deals with the issue of work being undertaken by one person for another, so far as all the Respondents are concerned, and that accordingly the Tribunal has jurisdiction by virtue of s.120 of the same Act. The basis

of the Claimant's claims against the First and Third Respondents was that Mr Pratt, in his capacity as the LADO and on behalf of the London Borough of Newham, was intimately involved in and connected with the manner in which the Claimant was investigated and treated, following his alleged assault on a child at the children's home. It was not disputed that that allegation against the Claimant was ultimately not proceeded with, and was accordingly dismissed: the Claimant contends that the complaint against him should never have been brought in the first place, let alone pursued, and that the First and Third Respondents must answer to him for their actions, either before this Tribunal or in the County Court.

4 Additionally, the Claimant submitted that his case and circumstances were analogous to those in *Michalak v General Medical Council and Others [2017] UKSC 71,* where the Supreme Court held that, where possible, it was convenient and sensible that all disputes arising out of a particular set of factual circumstances should be heard and determined at the same time and before the same forum. Accordingly, since the Claimant submitted that s.29 of the Equality Act applied to the facts of his case against the First and Third Respondents, he invited the Tribunal to accept jurisdiction, failing which he would pursue his claim against them in the County Court. *Michalak* was a case where a successful Claimant brought proceedings against the General Medical Council, in its capacity as a qualification body within s. 53 (and therefore part 5) of the Equality Act, for having conducted an investigation into her professional capacity, following a referral by Ms Michalak's former employers, against whom her complaints of unfair dismissal and discrimination were upheld.

5 Mr Sonaike submits on behalf of the Respondents that the critical document in relation to this and all of the other issues in the case is the *'Consultancy Agreement'*, a copy of which is at pages 122 – 127 of the bundle. That agreement is dated 4 April 2017, and is between the Fourth Respondent (of which company the Second Respondent, as already noted, is the sole director), identified in the agreement as *'the company'*, and 'New Dawn Resources (UK) Limited' (identified in the agreement as *'the consultant'*), of which the Claimant and his wife are, as he informed me, the directors, and on behalf of which the Claimant signed that agreement. The Claimant is identified in the agreement as being *'the manager'*, whose services will be supplied by the consultant to the Fourth Respondent to work at its residential children's home - it only has one such home, as the uncontested evidence before me established – in the role of registered manager, subject to registration with Ofsted. The most important clauses in the consultancy agreement seem to me to be as follows: -

> *"2.1 Subject to the express provisions of this agreement, the consultant shall provide the services as a registered manager to the company from the commencement date and will continue subject to registration with Ofsted.*
>
> *6.1 The consultant warrants and represents to the company that it is an independent contractor. Nothing in this agreement shall render the consultant or the manager an employee of the company and the consultant will not and shall procure that the manager will not hold themselves out as such.*
>
> *10.2 This agreement will terminate automatically without any requirement for notice or payment in lieu of notice in the event that the consultant becomes unable*

to procure the availability of the manager to provide the services, whether by reason of his death, permanent disability, resignation or for any other reason whatsoever.

12.1 ***Entire agreement*** *this document contains the entire agreement of the parties. It may not be changed by oral agreement but only in writing, signed by both parties and in the case of the company no such agreement shall be binding upon it unless signed by a registered director".*

6 I also note as being significant the provisions in clause 2.2, which allows for a considerable degree of flexibility in the Claimant's normal hours of attendance at the home, and that there will be days when he does not attend at all and arranges cover instead; clause 2.3, which permits the Claimant to undertake legal work and training as part of his CPD on giving the Fourth Respondent one week's notice; clause 3.1, which stipulates that all payments in respect of the Claimant's services shall be made as consultancy fees to New Dawn Resources (UK) Ltd, rather than to the Claimant; clause 6.2, whereby that company undertook to be responsible for and to pay all tax and national insurance contributions that became due; and finally clause 13, which records that the Claimant has been diagnosed with thyroid cancer, and also has childcare responsibilities for his two sons, both of which give rise to the agreed flexible working arrangements, and that the Claimant is at liberty to further alter his working hours on notifying the Second Respondent.

7 The Claimant's job description is at pages 128-131. That provides that he as registered manager would report to the Second Respondent; that he would be responsible for all staff working within or from the children's home, and for managing all aspects of running the home; and the first duty and responsibility specific to the post listed is to achieve good results from Ofsted inspections.

8 It was not suggested by any of the parties that there was any other contract or agreement between any of them, or that the consultancy agreement was ever varied by agreement, and the Claimant during the course of his evidence repeatedly adopted and relied upon the consultancy agreement, specifically disavowing any suggestion that it was a sham. Mr Sonaike submits that the effect of s.83 of the Equality Act is that the Tribunal will only have jurisdiction where an individual is employed under a contract of employment with, or a contract personally to do work for, the relevant party. There is therefore no possible basis, he suggested, for any claim that the Claimant was a worker, or someone contracted to personally undertake work, for the First or Third Respondents, and none had been identified in the further and better particulars belatedly provided by the Claimant, and which he confirmed as being accurate, or in his oral evidence. Mr Sonaike further submitted that the Claimant's reliance on the Supreme Court's decision in *Michalak* was misconceived, in that s.53 covers discrimination by qualification bodies, and neither the First nor the Third Respondent falls into that category. Finally and in relation to the Claimant's reliance on s.29 of the Equality Act, that falls within Part 3 of the Act and concerns discrimination in the provision of services, which falls within the exclusive jurisdiction of the County Court.

9 In my judgment, Mr Sonaike's submissions are correct. There simply was no employment contract or other contractual or employment relationship, either alleged or

established, between the Claimant and the First or Third Respondents, who were not parties to the 4 April 2017 consultancy agreement, which would bring them within the ambit of s.83 of the Equality Act, which gives the Tribunal jurisdiction over Part 5 of that Act. Secondly, the position in this case is very different from that in *Michalak,* since neither the First nor the Third Respondent is a 'qualification body' within s.53, which was the basis of liability relied upon in that case. Thirdly, s.114 of the Equality Act provides that the County Court, not the Tribunal, has exclusive jurisdiction in respect of alleged discrimination in the provision of services within Part 3 of the Act, within which s.29, on which the Claimant relies, falls. Accordingly and for these reasons, all the Claimant's complaints against the First and Third Respondents will be struck out as having no reasonable prospect of success. Whether or not the Claimant wishes to pursue those matters before the County Court is of course a matter for him.

10 It is convenient, albeit not in the order of issues in the preliminary hearing summary, to turn to consider whether the Claimant was an employee of, or engaged under a contract personally to undertake work for, either the Second or Fourth Respondent. The Claimant's case and evidence can be summarised as follows. Whilst he continued to rely on and assert the validity of the 4 April 2017 consultancy agreement, the Claimant submits that because he personally, rather than his company, was registered with Ofsted as the manager of the children's home, and since he was responsible for undertaking the work and duties required to meet Ofsted's standards, it must follow that he was an employee. The Claimant submitted that, once he became the registered manager of the children's home, that fundamentally changed the nature of the legal relationship between himself and the Second and Fourth Respondents. Secondly, that it is a legal requirement of registration with Ofsted that the manager is an employee of the home's owner, rather than simply a consultant. Finally, the Claimant prayed in aid the recent judgment of the Supreme Court in *Pimlico Plumbers Ltd & anor v Smith [2018] UKSC 29*, and submitted that his position was comparable to the successful respondent in that case, and that he was under an obligation of personal performance of his duties to the Second and Fourth Respondents as the registered manager of the children's home.

11 In reply, Mr Sonaike asserted that there was no evidence that the Claimant was either an employee, or employed under a contract personally to do work, or a contract worker within s.41 of the Equality Act. The Fourth Respondent entered into an agreement with New Dawn Resources (UK) Ltd for the provision of a registered manager; and no other contract, whether oral or in writing, was entered into by any of the parties, or had even been alleged to exist. It was clear from the 4 April 2017 agreement that it was the parties' express common intention that no employment contract, or status or capacity of employer and employee, should come into being. Additionally, the Claimant had not established that he was a contract worker within s.41, since there was no evidence, written or oral, of any contract of employment between him and New Dawn Resources (UK) Ltd. The consultancy agreement, on which the Claimant himself relies, provides for payment to the Claimant's company, rather than to him, for the provision of his services; specifically states that he is an independent contractor and not an employee of the Fourth Respondent, and that he could provide alternative cover when he was unavailable (a real rather than a fanciful possibility, since the agreement itself envisages the Claimant being absent and otherwise engaged, including in undertaking legal studies); records that the Claimant's company would be responsible for any tax and National Insurance contributions due in relation to his work, and would also obtain the appropriate public

liability insurance cover; and makes no provision for any sickness or holiday pay to the Claimant.

12 The Second Respondent's unchallenged evidence had been that the Claimant had made clear to him, in their discussions about the possibility of his becoming the registered manager, that he did not want the status of an employee; that he (the Claimant) would not be able to commit to constant attendance at the children's home, due to his continuing legal studies and childcare and other ongoing commitments; and that he would have control of where and when he undertook his work duties, sometimes working from his home or other locations. All these stipulations had been reflected and included in the agreement signed by both of them. Mr Baulackey said, and it had not been disputed, that it had been the Claimant who had provided the draft consultancy agreement, the ultimate terms of which had been agreed between them with little amendment.

13 Mr Sonaike submitted that, since there was no jurisdiction for the Claimant's claims against the Fourth Respondent, the claims against the Second Respondent must be struck out as well because the Claimant was not an employee of the Fourth Respondent, which would be required in order to found an agent's liability under s.110 of the Equality Act.

14 Finally, Mr Sonaike submitted that, whilst it is possible to imply the existence of a contract where the only ostensible or apparent agreement is between one company and another, as here, the Court of Appeal had made clear in *Smith v Carillion (JM) Ltd [2015] !RLR 467*, confirming the Court's decision in *James v Greenwich London Borough Council [2008] EWCA Civ 35*, that (a) the onus is on the Claimant to establish that a contract should be implied; (b) a contract can be implied only if it is necessary to do so; (c) no such implication is warranted simply because the conduct of the parties was more consistent with an intention to contract than with an intention not to do so; and (d) whilst to outward appearances an individual would or could be perceived as being an employee, due to a significant degree of integration into the management structure, that was often the case with agency staff, and did not on its own justify the inference of a contract. Applying those principles to the circumstances of this case, Mr Sonaike submitted that no evidence had been led by the Claimant, and there was no basis for arguing, that a contract between himself and the Fourth Respondent must be implied, since what had actually happened in the period between April and November 2017 in terms of the Claimant acting as the registered manager of the children's home was perfectly consistent with the terms of the consultancy agreement which he himself had put forward, and which he specifically accepted was valid.

15 I accept Mr Sonaike's submissions, and I reject the contentions advanced by the Claimant. The relationship between the parties was fundamentally governed by the terms of the consultancy agreement of 4 April 2017, the Claimant starting work on the following day, which agreement both the Claimant and the Second Respondent accept as being genuine and in accordance with whose terms their relationship was conducted, and there is no requirement or need to imply any other contract or agreement between any of the parties. It is correct that no evidence of any contract of employment between the Claimant and New Dawn Resources (UK) Ltd was put before the Tribunal, so the Claimant has not

established that he was a contract worker, falling within s.41 of the Equality Act. Since it was specifically envisaged in the consultancy agreement that the Claimant would become the children's home registered manager, and register with Ofsted as such, the Claimant's argument that such registration fundamentally altered the nature of the relationship between himself and the Second and/or Fourth Respondent makes little sense, and I reject it. Indeed, had successful registration of the Claimant with Ofsted not been achieved, it would be difficult to see how the Claimant (and his company's) involvement with the children's home could have continued. There is simply no evidence to support any suggestion that, once the Claimant was registered with Ofsted, either he or the Second/Fourth Respondents asserted that the earlier basis of their existing relationship had come to an end or been fundamentally altered. Secondly, and despite the Claimant's being repeatedly asked to identify where in the Ofsted application, a copy of which is in the agreed bundle, it is stipulated that in order to be a registered manager he had to be an employee, the Claimant was unable to do so. In fact, and as is clear from the Ofsted form at pages 175 and 191, the Claimant actually stated in his application for registration that he was acting and working in the capacity of a consultant, rather than an employee; yet his registration with Ofsted was still successful. It is also significant that in the First Respondent's investigation report into the alleged assault at the children's home, at page 270A in the bundle, the Claimant is listed as a consultant provided by his company and not as an employee.

16 The Claimant contends that there are various indices in the manner in which he undertook work whilst the registered manager which are consistent with the existence of a contract of service. These include, he suggests, an obligation to provide personal performance, control over what he did, integration into the Fourth Respondent's business, and the overall commercial reality of the situation. In so far as those factors exist, I find that they are equally consistent with the existence of a contract for services as a consultant, as with the existence of a contract of service as an employee. For example, a degree of integration into the Fourth Respondent's business as registered manager of the children's home, in agreeing work rotas and undertaking overtime when necessary and in giving instructions to more junior staff members, was inevitable, given the Claimant's role and irrespective of his working status. Secondly, whilst a degree of personal performance was required and inescapable, given the legal responsibilities in the role of manager of the home registered with Ofsted, the consultancy agreement made clear the limitations of the Claimant's involvement, that he had other commitments, and that he could (and did) provide cover in his absences and also worked from home; as well as the limited degree of control which the Second Respondent had over the Claimant's working hours and activities. I bear in the Court of Appeal's guidance that, whilst there may be features present in a commercial relationship which are consistent with and may well be found in a contract of employment, such a contract will only be implied when it is necessary to do so; and, for the reasons Mr Sonaike suggests, it is not necessary in these circumstances. Accordingly and for these reasons, I find that the Claimant was not an employee, a worker or employed under a contract personally to undertake work for either the Second or Fourth Respondents, and nor was he a contract worker, and that there is therefore no reasonable prospect of success of any of his complaints against either Respondent: those complaints must be struck out as well.

17 In the circumstances, it is unnecessary to determine the 'out of time' points identified by Judge Hallen in the Preliminary Hearing Summary; but, for the avoidance of

doubt and in case I was wrong in coming to the conclusions set out above, I will do so. The position in relation to when the relevant time limits for presentation of a claim expire is not straightforward. Despite the Claimant having finally provided further and better particulars of his claim, it is far from certain from those particulars when the last act relied upon in respect of the individual complaints is said to have occurred. Additionally, there are two separate ET1 claims, the first presented on 21 December 2017, the second on 2 January 2018; and the identified respondents to those claims are not identical, in that the Fourth Respondent is only included in the later claim. Finally, there are a number of separate ACAS early conciliation certificates in the bundle, and it is not particularly clear to which proceedings the individual certificates relate.

18 Doing the best I can, I find that the last act complained of by the Claimant was the termination by the Fourth Respondent of its consultancy agreement with New Dawn Resources (UK) Ltd, by virtue of which the Claimant worked as registered manager of the children's home, on 22 September 2017. Since the 'ordinary' time limit for presentation of a claim therefore expired on 21 December 2017, and the ACAS certificate at page 350 was issued on 22 December 2017, I agree with Mr Sonaike that there is no extension of time for presentation pursuant to s.207B of the Employment Rights Act 1996. That means that the Claimant's unfair dismissal complaint against the Fourth Respondent is prima facie out of time. In my judgment, it has not been shown by the Claimant that it was not reasonably practicable for him to present that claim in time. No evidence or explanation was put forward by him as to why there had been significant delay on his part in presentation, or of any problems or obstacles that prevented him doing so earlier; and I bear in mind that the Claimant is himself a qualified lawyer who, as he said, wishes to undertake cases in this country. I would therefore find that the Claimant's unfair dismissal complaint against the Fourth Respondent was not presented in time and in accordance with s.111(2) of the Employment Rights Act 1996, and that the Tribunal would not have jurisdiction to hear and determine it. For what it is worth, the Claimant's unfair dismissal complaints against the other three Respondents are in time, since the relevant ET1 was presented on 21 December 2017.

19 In relation to the Claimant's discrimination complaints against all the Respondents which are set out in his second and later claim, presented on 2 January 2018, I would have been minded to hold that, although they are strictly speaking out of time, it would have been just and equitable to extend time, pursuant to s123(1)(b), had the Claimant provided any reason or explanation for his failure to do so earlier. However, since he failed to do so, and there is no presumption in favour of an extension of time, I would hold those complaints to have been presented out of time. Once again, however, the discrimination complaints contained in the Claimant's first claim would be in time, it having been presented before the expiry of the relevant three-month period.

20 Following the delivery of the Tribunal's ex tempore judgment on 7 September 2018, Mr Sonaike applied for a costs order in the sum of £2,000 against the Claimant, pursuant to rule 76 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. The Claimant opposed the application, albeit contenting himself in simply stating that he would be pursuing an appeal in any event, and that a costs order against him would not be just and equitable. I decided to make a costs order against the Claimant, limited to £500. That order was made on the stated basis that the Claimant had failed to provide and exchange any witness statement, as ordered by the Tribunal at the

Preliminary Hearing on 28 March 2018, and had in fact refused to do so; and secondly that he had failed to provide the further and better particulars of his claim, which the Tribunal ordered to be served no later than 25 April 2018, until literally the night before the first day of the hearing, and had provided no good reason for those repeated failures to comply. The third basis for the costs order was that in my judgment, whatever the alleged position between the Claimant and the Second and Fourth Respondents, the complaints against the First and Third Respondents were wholly unreasonable and should not have been brought. The costs order was therefore made under both rule 76(1) and (2).

Employment Judge Barrowclough

4 October 2018