EMPLOYMENT TRIBUNALS

Claimant: Mr G Fuller

Respondent: Lancashire County Council

Heard at: Manchester (hybrid (1st day) and in person (2nd day)
On: 22 and 23 September 2022
Before: Employment Judge McCarthy (sitting alone)

REPRESENTATION:

Claimant: Mr MacMillan of Counsel
Respondent: Mr Wood of Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The claimant was not an employee of the respondent.

2. The respondent has not made unauthorised deductions from the claimant's wages. The claim is dismissed.

REASONS

Introduction

1. By a claim form presented on 16 November 2021 (having entered early conciliation and received a certificate against the respondent dated 6 November

2021), the claimant complained of a series of unauthorised deductions from his wages for the period from 21July 2020 to 14 June 2021.

2. By a response form dated 17 December 2021 the respondent resisted the complaint. It says that it had not made unauthorised deductions from the Claimant's wages, and the claimant was not an employee but a casual worker.

Preliminary Issues

3. On the first day of the hearing, the claimant's counsel, Mr MacMillan, was unable to attend the in person hearing as his diary had incorrectly recorded that the hearing was being held via CVP. Mr MacMillan was based overseas so had been unable to travel to the tribunal when he had discovered the error. He requested that the hearing be postponed for one day, with all evidence being heard on the second day or a hybrid hearing arranged for the first day. Arrangements were made for a hybrid hearing but there were technical difficulties with the sound. Having established that all evidence could be heard on the second day of the hearing, I agreed with the parties that the remainder of the first day be used for reading, given the technical difficulties and to allow Mr MacMillan sufficient time to travel to the UK for the second day of the hearing.

4. As noted on the ET3 form, the respondent is a large employer in the North West region of England and employs "*40,000 plus*" people. Before hearing evidence, I disclosed to the parties that, perhaps unsurprisingly, I had a personal friend who worked for the respondent. I disclosed that this friend worked for the respondent's Human Resources function (I explained I had no knowledge how large this function was or what areas she covered) but there was no indication in the agreed bundle, pleadings and/or witness statements that my friend had any involvement in the case before me- she was not one of the named HR representatives referred to in the documents/witness statements. I confirmed that I had no other personal or profession connection with the respondent and believed I could still be fair and impartial. However, as there was one general reference to "HR" discussing whether to utilise the claimant as a casual worker during the investigation, I felt it was appropriate to disclose this connection with the parties. I asked the claimant and respondent whether they had any objections to me continuing to hear the case and gave them time to reflect on my disclosure with their respective Counsel. Counsels for both the claimant and the respondent informed me that their respective client had no objections to me continuing to hear the case and the hearing proceeded.

Claims and Issues

5. The issues to be determined by the tribunal were discussed and agreed at the outset of the hearing. A List of Issues had been discussed at a Preliminary Hearing on 21 March 2022 with Employment Judge Humble and was annexed to the Record of the Preliminary Hearing dated 1 April 2022. The parties' representatives confirmed on the first day that there were no proposed amendments to this list of issues and it was agreed that this reflected all the issues to be determined by the tribunal. The list of issues is annexed to this judgment. The respondent had asserted at this Preliminary Hearing that the claimant's claim was out of time and so the list of issues included issues relating to time limits (issues13-20). On the second day of the hearing, the respondent's counsel, Mr Wood, informed me that the respondent would not now be taking the time point. I explained that as jurisdiction cannot be conferred on a tribunal

by agreement or waiver and it was a live issue, I would still consider whether the Tribunal had jurisdiction to hear the claimant's claim.

Procedure/Documents and evidence heard

6. The first day only was a hybrid hearing. The second day of the hearing was an in person hearing as all parties were now able to attend in person. I heard oral evidence from the claimant on his own behalf. I also heard oral evidence from Ms Jennifer Martin (Assistant Unit Manager at Eden Bridge Children's care home), on behalf of the Respondent.

7. During the hearing I was referred to documents within an agreed bundle of documents which contained 166 pages and provided with written witness statements for both witnesses. I was also provided with a copy of **Agbeze v Barnet, Enfield and Haringey Mental Health NHS Trust 2022 IRLR 115, EAT** and an extract from the IDS Employment Law handbook, Volume1, Chapter 5 "*Are casual staff employees*."

Factfinding

8. The relevant facts are as follows. Where I have had to resolve any conflict of relevant evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents.

9. The claimant, Mr Fuller, was engaged (to use a neutral term) as a Casual Residential Child Care Worker at the Eden Bridge children's care home ("Eden Bridge") from December 2019. Prior to working for the respondent, the claimant had no relevant qualifications or experience of working in a children's care home. At the time of the hearing before me, he remained engaged by the respondent but was working at a different care home.

10. The respondent accepted that the claimant was a worker for the purposes of limb (b) of section 230(3) of the Employment Rights Act 1996 ("ERA"). However, they denied that the claimant was an employee of the respondent from December 2019 onwards and more specifically from 21 July 2020 to 14 June 2021, when the claimant contends that unauthorised deductions were made from his wages.

11. The respondent is a county council. It operates a number of children's care homes with Eden Bridge, being one of these homes. In relation to these children's care homes, the respondent was subject to a number of statutory obligations including under Regulations 31 and 32 of the Children's homes (England) Regulation 2015 ("CHR 2015").

12. The claimant's claim arose from the fact that between 21 July 2020 until 14 June 2021 the respondent decided to *"cease utilising the claimant as a Casual member of staff*" whist there was an investigation into serious allegations regarding his conduct and behaviour and due to the allegation in question. The claimant was not offered any shifts during this period and was not paid any wages during this period. Following the conclusion of the investigation the respondent began offering the claimant's shifts again after 14 June 2021 as can been seen from the rota at page 74 in the agreed bundle.

Offer of Appointment

13. The terms of the agreement under which the claimant provided the respondent with services is at pages 63-64 of the agreed bundle – the offer of appointment letter. This offer of appointment letter provided the framework for the claimant's appointment. He was not provided with, or asked to sign, any further contract with the Respondent regarding his engagement. At paragraph 6 of his witness statement the claimant accepts that he was never provided with a contract of employment or a contract for services. At paragraph 19 of his witness statement the claimant confirmed that he considered the offer of appointment letter to be the "*terms and conditions"* of his engagement.

14. On 15 October 2019, the respondent provided the claimant with a Conditional Offer of Appointment as a Casual Residential Child Care Worker on a pay rate of £10.97 per hour working for FARY Residential Services, part of Lancashire County Council.

15. The offer of appointment was conditional on certain conditions (set out in the offer of appointment letter) being met. These conditions included satisfactory written references, enhanced Disclosure and Barring Service (DBS) clearance and documentary evidence of the claimant's right to work in the United Kingdom. The letter confirmed that once all the clearances have been received the claimant would receive confirmation that his appointment has been finalised and he would be contacted separately by the service to arrange for him to undertake casual work.

16. The offer of appointment letter stated that the claimant "*will received payment for the actual hours you work*." It also detailed how the claimant would "*also receive 12.07% holiday pay plusage on any hours worked*". There was no entitlement to take holiday.

17. The offer of appointment letter also stated "*Please be aware that casual work is provided on an ad hoc basis and there is no obligation on the County Council to provide work, or for you to agree to undertake work if it is offered.*" (63)

18. The offer of appointment letter was very brief. It contained no entitlement to regular or guaranteed hours, did not refer to a right to "suspend" the claimant with/without pay or contain any express term entitling the claimant to pay during any period of suspension. It also did not contain any provisions regarding substitution, exclusivity, notice and/or termination, sick leave and was silent as to disciplinary and grievance procedures.

19. There was a reference in the offer of appointment letter to the respondent providing "*automatic membership of the Local Government Pension Scheme to employees aged under 75 and who have a contract of employment of is for at least three months.*" The offer of appointment letter did not say that the claimant specifically or non- employees were entitled to a pension. There is no evidence that the claimant was automatically enrolled in the pension scheme or opted out. His payslips include no deductions for pension and in the "*Year to Date*" section on the payslip, they show zero against the references to pension (78-92).

Training

20. Whilst the offer of appointment was with effect from 1 November 2019, the first time the claimant was engaged by the respondent was on 18 December 2019, when he attended his induction training for the Casual Residential Child Care Worker role.

21. Due to the nature of the claimant's work, caring for children and young people in residential care, the claimant was required to undertake a full induction with the care home manager, (Mr Russell Work) before he could undertake any shifts. All employee and casual workers received this induction training regardless of their employment status as Regulation 33(1) of the Children Homes Regulation 2015 requires that an appropriate induction be provided. The induction included safeguarding training, driving at work training, a meet and greet with the children, answering questions in relation to the children and their individual care needs, shadowing contracted staff and reading the children's files and risk assessments. The claimant was informed about the standard of behaviour and conduct expected of him when working with vulnerable children and young people, in line with the respondent' safeguarding obligations. In this regard he was provided with, and asked to sign, two documents which explained such standards.

22. The first document was labelled "*Professional Standards*" (77). Paragraph 4 included an expectation that the claimant would be "*reliable to earn the trust and confidence of children, young people and their families that the provision is effective, of a high quality and meets the needs of service users*."

23. The second document was a "*Contract between residential care staff and adults who were formally in their care*" (75-76). The content of this document was referred to as "*guidance*" which was "*not intended to eliminate supportive and appropriate contact outside our professional lives with care leavers. It is intended to promote thoughtful and transparent arrangements to minimise the risk of exploitative or harmful relationships developing. The starting point is that our behaviour as LCC employees must always be consistent with our Code of Conduct*."

24. The claimant was also provided with the respondent's Code of Conduct (50-55) which "*sets out the behavioural standards that must be upheld by employees of the Council". S*ection 3, headed "*Status of the Code*" states that "*The Code sets out the minimum standards of conduct and forms part of the Council's terms and conditions of employment*." As with the Contract between residential care staff and adults who were formally in their care there are references within the document to "*employees"* and employee compliance. Section three of the Code of Conduct headed "Application of the Code" states that "*This Code applies to all employees of the Council, except those employed in delegated schools".*

25. I accept the evidence of Ms Marsden (who also acted as the claimant's manager) that these three documents were provide to all individuals recruited to work in Eden Bridge regardless of their employment status. Given the nature of the work the claimant would be undertaking, and the respondent's safeguarding obligations, I find it would be appropriate and necessary to ensure that all individuals (regardless of status) were made aware of the standards of conduct and behaviour expected of them when working with children and young people.

The Claimant's Role

26. As a Casual Residential Child Care Worker the claimant's work involved attending a residential care home for children and young people aged 11-17 years and providing care for them to ensure their physical and emotional needs were met. The included general household maintenance such as cleaning and shopping, driving children to school or to visit their family as well as promoting their well being via key work sessions and the undertaking of daily activities.

27. I find that there were some duties that only employees were permitted to undertake at Eden Bridge, and could not be undertaken by casual workers, including the claimant. The claimant accepted in evidence that as a casual worker he was not permitted to undertake certain duties such as drafting risk assessments for vulnerable children, attend multi-disciplinary meetings in respect of a child or young person and did not draw up the timetable of activities to be undertaken by the children and young people to undertake (although sometimes he may offer ideas for activities).

28. I find that the respondent had significant control over the way in which the claimant did his work. The claimant was not able to decide the things to be done when he was on shift, he had to adhere to a timetable of activities provided to him at the start of his shift. He was subject to the direction and supervision of the respondent's employee's (such as Ms Martin and Mr Work), in how such work should be done and when and had little power to do things without first obtaining permission and/or approval from employed staff and managers. The respondent accepted that the claimant was closely monitored due to his lack of experience and qualifications and to ensure the respondent could comply with its safeguarding obligations.

29. The claimant was provided with training, such as safeguarding training during his induction, and was required to undertake the NVQ Level 2 childcare course. Some of this training was mandatory. In the bundle were a number of training certificates for training undertaken by the claimant (123-142). I accept Ms Martin's evidence that the NVQ course was offered to the claimant as he did not hold the relevant qualifications to undertake his role and it was a statutory requirement that anyone working in the care home to have the relevant qualification or be working towards them. This training required some level of observation when he was on shift, there was a dispute as to how much, but this did not oblige the claimant to undertake particular shifts or accept work that was offered.

30. I did not find that the provision of training, including training over a number of months (such as the NVQ course), was determinative in this case. I accept that training must be provided to people who care for vulnerable children and young people, regardless of their employment status, to ensure the health and safety of those children/young persons and to ensure legal compliance. Given the claimant's lack of relevant qualifications when he commenced his engagement, he required a significant level of training to ensure he could undertake his role properly and that the respondent met its legal obligations.

31. I find that the true terms of the agreement were that the claimant was required to carry out the work personally in exchange for remuneration and had no right to substitute. The offer of appointment letter did not contain any right to substitution. When the claimant was unavailable to work, for example, when he was sick with Covid-19, it was the respondent who organised alternative cover for the shifts he had previously agreed to undertake.

32. The claimant was expected to form close and supportive relationships with the children and young people he worked and build trust, as made clear in the first paragraph of the Contract between residential care staff and adults who were formally in their care- "*good quality residential care is based on care staff building close and supportive relationships with young people in their care*". In evidence Ms Martin confirmed that all staff (both casual and employed) should look to build a relationship with the children and young children in their care and become an adult that the children and young people could trust.

33. Due to the respondent's regulatory obligations, the claimant could not undertake shifts until he had undertaken a full induction, which included safeguarding training, and had obtained enhanced Disclosure and Barring (DBS) clearance (which involved a personal check on the claimant's history and such clearance applied to the claimant only). I accept Ms Martin's evidence that given the nature of the claimant's role and the respondent's statutory obligations it would have been inappropriate for the respondent to give the claimant a right to substitute in the offer of engagement or during the course of the engagement. Regulations 32(2) and 32(3) of CHR 2015 require a registered manager of a children's care home that the individual's recruited meet certain criteria to ensure safety of children, such as integrity and good character, appropriate skills and fitness to perform the role. In order to meet its legal obligations, I find the respondent need be retain control of who provided services at its care homes.

Mutuality of obligation

34. Casual staff were used by the respondent to cover annual leave, sickness, training and sometimes to ensure that risk management is adhered to. For example, the risk assessment for one vulnerable young person had required a higher number of care workers to be on shift for safeguarding reasons and this meant the respondent was able to offer the claimant additional shifts. I accept that if the respondent had a full complement of staff, casuals were not used (117). The respondent had a pool of casual staff who they could call on. The claimant referred in evidence to at least two occasions when a shift he had previously agreed to undertake, when the rota was prepared, was cancelled by the respondent as it had a full complement of staff to meet its legal obligations.

35. The Offer of appointment letter stated that "*Please be aware that casual work is provided on an ad hoc basis and there is no obligation on the County Council to provide work, or for you to agree to undertake work if it is offered.*" I find that offer of appointment letter reflected the reality of the working arrangements. It was the true agreement between the parties. I find that there was no obligation on the County Council to provide work to the claimant and no obligation upon the claimant to accept work that was offered to him.

36. The claimant accepted in evidence that the terms set out in his offer of appointment letter "*had turned out to be the case in real life*". He also confirmed this in his "grievance" letter to Mr Walker dated 2 November 2020 (sent during the investigation into his conduct). At paragraph three of his letter (98) the claimant said "*I acknowledge that LCC is not required to offer myself hours and that I am not required to work any hours offered to me. Irrespective of this agreement, I meet several of the criteria that typically distinguishes an employee from a worker*".

37. I was referred to the rotas at page 67- 73. These were only rotas for the casual workers as the rota for employees was in a separate area of the A3 sheet in the rota booklet. The claimant's rota was in the casual workers rota. These rotas had typed and handwritten entries, handwritten amendments (crossed out/changed hours) and comments on them, showing they were fluid and that the changes were made to the rota that had originally been drawn up (what the claimant referred to as "planned" shifts. I find the planned shifts on the rota were put together after the casuals had been provided with details of the shifts that needed cover and were asked whether they were wished to accept any of the available shifts. I was referred to what app messages showing this process. In one of the messages, Mr Walker has sent a screen shot of shifts that the respondent needed to cover and asked the casual workers to "let me know ASAP as need to get the rota out". There are two further messages sent by Mr Walker within a minute of the original message "*we need cover for the following shift* if *anyone can help: Sleep weds 8th Late thurs 9th Late 10th"* and "*Gemma* [who was on the casual rota] *added you 3-11 on 17th-thank you x.* These messages do not suggest that the casuals (including) were obliged or expected to accept shifts offered or put under any pressure to accept work that was offered. (120)

38. Having considered the rota The rota's show that one of the standard shift times offered to casual workers was 11am-11pm, however, the claimant worked shorter shifts from 8-4pm on a number of occasions in April, June and July (27, 28 April, 8,10,11,22, 24, 26 June and 2, 6, 13, 14 and 15 July 20). The claimant said that he had regularly worked Wednesday, Thursday and Sunday shifts and I accept that there is evidence of this in relation to a few weeks in the rota. However, the claimant accepted that these were the days that he had told the respondent that he was available and that he was not available to accept work on other days "*as he had prior commitments on other days*" of the week. On 11 June 2021, once the investigation into the claimant's conduct had concluded, Mr Walker had a return-to-work meeting with the claimant. The note of this meeting (109) records that Mr Walker asked the claimant "*what his availability looked like*" to provide services. The claimant informed Mr Walker that he was not "*available to work due to holiday being booked 9-16 August 2021, other than that this he [was] flexible*." I find that the claimant only accepted shifts that fitted in with his other commitments and knew he was not required to work any hours offered to him.

39. The claimant said he had never refused a "planned" shift other than when he had Covid- 19, but I find there was no obligation upon him to accept work.

40. The claimant was free to work at other care homes and for other companies. He worked as a delivery driver for 8 weeks whilst the investigation into his conduct was being conducted and was under no obligation to inform the respondent that he was undertaking work for a third party. The claimant confirmed in evidence that he did not inform the respondent that he was going to take up this work with a third party. He also worked for other children care homes.

41. I accept Mr Wood's submission that the claimant had no recourse if he was not offered work by the respondent.

42. The claimant was required to complete a timesheet with the hours he had worked and was required to log in and log out when working to ensure he was paid the correct number of hours by the respondent.

43. I find that the contract between the claimant and respondent would not satisfy the irreducible minimum of mutuality of obligation. I also find that there was no mutuality of obligation during the time that the claimant was not working.

Wages

44. I find that the claimant was not entitled to pay when he did not work. The claimant referred to at least two occasions when the respondent had cancelled his shifts on the rota with short notice as they had sufficient staff on duty. On these occasions the claimant did not receive, and was not legally entitled, to any wages. When the claimant left a shift early for personal reasons, he was only paid for the hours he had worked, rather than the whole shift. He was not paid when he was sick on a day when he was due to work on the rota – such as when he tested positive for COVID whereas employees were entitled to sick pay in accordance with the respondent's sick pay policy.

45. He was not paid when he wished to take holiday. If he wished to take holiday, he just did not accept/work any shifts during his holiday period. Employees are the respondent were entitled to take paid holidays in line with their holiday entitlement.

46. The claimant was paid for any shifts he had undertaken one month in arrears. For example, for he would receive his pay for any shifts he had worked in June 2021, at the end of July 2021. I was referred to the claimant's pay slips within the bundle (78-92). Included on the payslip is an "employee number", Lancashire County Council is referred to a "Employer" and the year-to-date section of the payslip is titled year to date totals (This Employment).

47. The payslips show how that the claimant received variable levels of pay each month and did not work a regular number of hours each month. For example, the claimant's payslip at page 79 and dated 28 February 2020, shows that he worked 76 hours of basic shifts, nine hours of night shifts and 26 hours of overtime. His gross pay was £1694.10. The claimants pay slip for the following month (dated 31 March 2020) (80) shows he worked 12 hours during February and 28 hours of overtime. His gross pay was £658.71 for this month. The claimant's gross pay fluctuated from month to month due to the variable hours he worked (78—92).

Payment date	Claimant's gross pay
31/01/2020	£0
28/02/2020	£1694.10
31/03/2020	£658.71
29/5/2020	£2631.12
30/6/2020	£2010.70
31/07/2020	£1549.15
31/08/2020	£1482.01
30/9/2020	£168.93

48. The claimant's gross pay fell to zero in his payslip processed from 30 October 2020. He was not paid any wages until his payslip processed on 30 July 2021 (apart from a "*one off comp*" payment of £60.09 processed on 28 February 2021.

Investigation into allegations regarding claimant's conduct

49. The claimant was informed on 21 July 2020 (95-96) that an investigation would be undertaken to "*consider serious allegations regarding [his] conduct and behaviour]" in relation to an incident which it was alleged had placed two "young people at significant risk of harm*." Two employees at Eden Bridge were also subject to investigation in relation to this incident and were suspended on full pay during the investigation and subsequently subjected to disciplinary proceedings and sanction. The claimant was informed in the letter that "*as you are a Casual member of staff, the Disciplinary Process does not typically apply to you. Giving the safeguarding nature of these allegations, however, we are duty bound to conduct an investigation in order to make a determination regarding your fitness to work with children and vulnerable young people. Consequently, the investigation undertaken will broadly follow the same process as our disciplinary process, a copy of which has been enclosed for your information"*.

50. The claimant was also informed in this letter that "*During the course of the investigation, and due to the allegations in question, the decision had been made to cease utilising you as a Casual member of staff*. *Re-engagment will depend on the outcome of the investigation."*

51. The claimant was not informed in this letter that he was being suspended. On the 11 September 2020, the claimant sent an email to respondent "*with reference to my current suspension from my position as Casual Residential Child Care Worker."* He said that his letter of employment did "*not state that if I were to be suspended I would NOT be paid, therefore I find the position to be that I am entitled to be paid"* and "*irrespective of the outcome of the external investigation I find that I should be paid whilst on suspension*." (165).

52. Ms Gwen Monk, (Assistant Senior Residential Manager) responded to the claimant's e-mail on 17 of September 2020 and stated "*As you are a casual member of staff, you do not have the same entitlements as members of staff who hold a contract with LCC, nor do our employment policies (including the disciplinary and grievance policies)" apply to you in the same way. The nature of your employment is transient, and as such there is no obligation for us to offer you work just as there is no obligation for you to accept work that we may offer to you. You do not have a regular pattern of work or any guaranteed work from us. Consequently, you are not currently suspended from work we are purely ceasing to offer you any further casual shifts whilst we look into the matter in question. You are not entitled to any pay during this period*". Ms Monk also confirmed that the respondent "*had not terminated the casual working arrangement with the claimant as yet, and [were] continuing to investigate the issue". (97)*

53. On 2 November 2020, the claimant wrote to Mr. Walker. he explained that he'd been notified that he did not have the same entitlements as members of staff who holds a contract with the respondent, that he was not suspended and informed *"that casual workers are not employees of LCC as per guidance from LCC intranet."* The claimant wrote that *"I acknowledge that LCC is not required to offer myself hours and*

I am not required to work any hours offered to me. Irrespective of this agreement, I meet several of the criteria that typically distinguishes an employee from the worker". The claimant listed a number *of "examples"*- that he could join the pension scheme *"as outlined in his offer of employment",* that he worked at an address specified by LCC, that the disciplinary policy applied to him that he worked for LCC regularly and there was a continued demand for this work to be conducted, and that he was required to book holidays to take uninterrupted time off work. He said he had not consented to suspension without pay and referred to the suspension provisions in the respondent's disciplinary procedures. He said that "*As an employee I am entitled to paid suspension*" and believed he should receive pay for the full duration of his suspension, calculated on the basis of his "*average pay for the three full working months prior to his suspension*". The claimant asked that his letter be viewed as a "*letter of grievance*."

54. The bundle contains a draft response to the claimant's letter of 2 November 2020, but it is not clear whether this letter was sent to the claimant. However, I find that the claimant was not invited to a grievance meeting to discuss his "*letter of grievance" and the respondent's grievance procedure was not followed".*

55. On 4 November 2020, the claimant was informed that the allegations for the investigation had been altered and was informed of the updated allegations (101). On 14 April 2021 the claimant was sent a letter by the Mr Simpson (Senior Manager, Children's Residential Service) "Re: *Review of Suspension*" (100). It stated "*I refer to your current suspension from your post from 22 July 2020*. *In accordance with the requirements of the Council's disciplinary procedure, I write to advise you that I have reviewed your situation in order to determine if suspension is still necessary or is in need of amendment"*. Mr Simpson confirmed that he believed that the claimant's continued suspension was necessary". A further "*Review of Suspension*" letter was sent to the claimant on 10 May 2021 confirming that "*continued suspension"* was necessary.

56. The claimant was sent an "*invite to a disciplinary hearing*" on 13 May 2021 by Mr Simpson (105-106). The letter stated that the claimant was "*required to attend a Disciplinary Hearing*" on 1 June 2021. However, within the invite letter was the following paragraphs:

> *"I note your position with Lancashire County Council is a casual RCCW worker. As you are not an LCC Employee, the outcome of this investigation Is not to determine if there is an appropriate sanction to be issued. However, it is important that this matter is concluded in order for the council to determine whether or not to engage your services in the future as a casual worker. Additionally, as part of this process com at the senior designated officer will determine if there is any safeguarding concerns relating to a child and if a referral to the Disclosure and Barring Service (DBS) is appropriate*
>
> *As such it is our intention to proceed and conduct this matter in line with the council disciplinary procedure. "*

57. The claimant was provided with a "*Disciplinary Hearing Outcome*" in a letter dated 4 June 2021 from Ms Barbara Bath (Head of Service (FARY)). The letter stated "*As explained in the letter inviting you to attend the hearing, as you are not an LCC employee, the outcome of this investigation was not to determine if there is an*

appropriate sanction to be issued. However, I stated that it is important that this matter is concluded in order for the council to determine whether or not to engage your services in the future as a Casual worker". Ms Bath informed that claimant that she did not feel there is any safeguarding concern and as such she would not be making any referral to the Disclosure and Barring Service (DBS) and that "*In conclusion, I can confirm that due to the above evidence and mitigation presented, I am happy for the Service to continue to engage your services in the future and would like to welcome you back to work in your role as RCCW at Edenbridge". (108)*

58. The claimant was not given a sanction but the two employees who were also being investigated in relation to the same incident (and who had been suspended and not permitted to work for anyone whilst suspended) were subject to disciplinary action. I agree with Mr MacMullan submission that the decision not to sanction the claimant is not determinative of the claimant's status as it is possible that a sanction could have been considered inappropriate in any event, due to the claimant's evidence and his mitigation.

59. The claimant attended a return-to-work meeting with Mr Walker on 11 June 2021 and confirmed that "*he would like to return as a casual to Eden Bridge*". As referred to above, the claimant was asked what his "availability looked like" and he said he was not available to work from 9-16 August 2021 due to booked holiday, other than that he was flexible (110). The claimant undertook his first shift following the conclusion of the investigation on 15 June 2021.

60. I find the respondent conducted the investigation in line with the respondent's disciplinary procedure, but the respondent was clear with the claimant throughout the process that he was a casual worker, that the disciplinary procedure did not typically apply to him as he was not an employee, but explained why, due to the nature of the allegations, they were conducting their investigation in line with the respondent's disciplinary procedure. I find that the fact the respondent conducted the investigation in line with the disciplinary procedure and sent inconsistent messaging around whether the decision not to use his services was a "suspension" or not, did not entitle the claimant to be paid during this period or point to him being an employee. Section 1 of the respondent's Disciplinary Procedure (44-47) expressly states that "*the procedure is designed to clarify the rights and responsibilities of management, employees, and trade unions to ensure consistent and fair treatment throughout to maintain standards of conduct.* Section 1 also confirms that "t*he procedure applies to all* ***employees*** *of the county council"* (my emphasis) subject to a list of excluded employees. There is no reference to it applying to any type of worker, such as casual workers. Throughout the Disciplinary Procedure, the reference is to "*employees*" only.

61. Section 3 of the disciplinary procedure (45) deals with Suspension: "*Suspension is not to be regarded as prejudging the matter and is not to be considered a disciplinary measure. Where suspension is appropriate the employee will be suspended from work on contractual pay i.e. pay inclusive of payments which would have been made in respect of the employee's normal working arrangements whilst the matter is investigated."*

62. I find the claimant was not "*suspended from work*" as the respondent was not obligated to provide him with work and he was only entitled to pay for hours that he had worked. The claimant did not have consistently regular or guaranteed hours – he

did not have "*normal working arrangements*" unlike a salaried employee. The claimant had no ongoing right to receive a monthly salary, unlike a salaried employee.

63. On 23 August 2021 the claimant sent a letter to Mr Walker to "*outline his grievance*" (113). His concern related to not being paid whilst he was under investigation and claimed that he was entitled to be paid whilst he was "suspended". He formally requested that he was back paid all wages that he should have received during "his suspension". The claimant was invited to a meeting on 27 August 2021 (114), but was told that as an casual employee he was not entitled to raise a grievance. Mr Walker and Mr Martin confirmed that he was not entitled to be paid during the investigation period as he was a casual worker and not an employee and that a decision had been made that "we could not offer [him] any shifts whilst staff were being investigated." An email was sent to the claimant confirming what had been discussed. (115)

64. I agree with Mr MacMillan's submission that despite Mr Walker meeting with the claimant and reiterating the respondent's position, his grievance was not dealt with under the respondent's grievance policy and his concerns regarding status were not investigated.

ID Card

65. The claimant was provided with a photo ID card (93-94), it makes no reference to the claimant's employment status. The card gave the claimant access the respondent's County Hall building, where training often took place. It also let the let the public and police know that he worked for the respondent when he was outside of the children's home.

LAW

Employee status

66. An "employee" is defined under section 230(1) Employment Rights Act 1996 (ERA) as being "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." "Contract of employment is defined under section 230(2) ERA as meaning "a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing".

67. Whether an individual works under a contract of service is determined according to various tests established by case law. A tribunal must consider relevant factors in considering whether someone is an employee. An irreducible minimum to be an employee will involve a sufficient degree of control, mutuality of obligation and personal performance but other relevant factors will also need to be considered. ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD***; ***Nethermere (St Neots) Ltd v Gardiner and anor 1984 ICR 612, CA***; ***Carmichael and anor v National Power plc 1999 ICR 1226, HL***,

68. The most common judicial starting point for the multiple test is set out by Mr Justice MacKenna J in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD***. ("RSW")

"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."

69. In ***Hall (Inspector of Taxes) v Lorimer 1994 ICR 218, CA***, the Court of Appeal cautioned against using a checklist approach (in which the court runs through a list of factors and ticks off those pointing one way and those pointing the other and then totals up the ticks on each side to reach a decision).

70. In ***Revenue and Customs Commissioners v Atholl House Productions Ltd 2022 EWCA Civ 501, CA*****,** the Court of Appeal held that there is no conflict between the **RMC** test and the line of authorities, including ***Hall (Inspector of Taxes) v Lorimer 1994 ICR 218, CA***. and it was wrong to treat them as representing two separate tests. "*Both approaches have a common core: mutuality of obligation and a right of control are necessary, but not sufficient, conditions for a contract of employment, and if those conditions are satisfied it is necessary to go on to consider a range of other factors".*

Determining the true terms of the Agreement

71. In ***Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC ("Autoclenz 2011")***, the Court held that in the context of employment, 'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part'. The essential question was: "*what was the true agreement between the parties?"*

Unlawful deduction from wages

72. Section 13(1) ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless:

> **(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision in the worker's contract; or**
>
> **(b) The worker has previously signified in writing his agreement or consent to the making of the deduction."**

73. A relevant provision in the worker's contract is defined by section 13(2) ERA as:

> **"(a) One or more written contractual terms of which the employer has given the worker a copy of on an occasion prior to the employer making the deduction in question; or**
>
> **(b) In one or more terms of the contract (whether express or implied) and, if express, whether oral or in writing, the existence and effect, or combined effect, of which in relation to the worker the employer has notified the worker in writing on such an occasion."**

74. A deduction is defined by section 13(3) ERA as follows:

> **"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."**

75. Wages are defined by section 27(1) ERA as follows:

> "**any sums payable to the worker in connection with his employment including**
>
> **(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract of employment or otherwise…."**

76. Section 23 ERA provides that a worker has a right to complain to an employment tribunal of an unlawful deduction from wages. However, pursuant to section 23(2)ERA

> "**Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with-**
>
> **(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or**
> **(b) ….**
> **(3) Where a complaint is brought under this section in respect of –**
> **(a) A series of deductions or payments, or**
> **(b) …..**
>
> **The references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.**
>
> **3A Section 207(B) (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).**
>
> **(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it was presented within such further period as the tribunal considers reasonable.**

Payments during "suspension"

77. In ***Gregg v North West Anglia NHS Foundation Trust 2019 ICR 1279, CA***, the Court of Appeal offered guidance on pay during disciplinary suspension in relation to employees. In the absence of any contractual right to suspend without pay, it was necessary to consider the common law principles. An employee who does not work must show that he or she is ready, willing and able to perform work to avoid a deduction from pay. If the employee is ready and willing, and the inability to work is the result of a third-party decision or external constraint, any deduction may be unlawful depending on the circumstances. Where the contract does not address the issue of pay deduction during suspension, the default position is that an interim suspension should not attract a deduction of pay subject to exceptional circumstances.

78. ***Agbeze v Barnet, Enfield and Haringey Mental Health NHS Trust 2022 IRLR 115, EAT*****,** dealt with the case of a worker whose contract expressly obliged the Trust to pay him only in respect of periods in respect of which work had been offered and accepted. On these facts, The EAT held that there was no basis to imply a term that the worker was entitled to be paid his average wages during suspension so long as there was work available. The EAT rejected the worker's claim for unlawful deductions from wages, relying on such an implied term. The EAT held that, on consideration of the authorities, the proposed implied term was not one that arose from an application of the common law principles of implication of contractual terms. The EAT also held that the decision in Gregg "*was not in point as it concerned the position of a suspended permanent employee, whom the employer was obliged by the contract to continue to pay, so long as he fell to be treated as ready, willing, and able to work. The claimant's contract, by contrast, only expressly obliged the employer to pay him in respect of a period during which work had been specifically offered and accepted".*

Discussion and Conclusions

79. Mr MacMillan and Mr Wood provided me with oral submissions on employment status and the claimant's contractual entitlement to pay when the claimant was not working which I have considered and refer to where necessary in reaching my conclusions.

80. This was a claim for unlawful deduction from wages pursuant to Part II ERA 1996. It could only succeed on the basis that average wages was "properly payable" to the claimant during the period of 21 July 2020 to 14 June 2021 within the meaning of section 13(3) ERA. As held in **New Century Cleaning Co Ltd v Church [2000] IRLR 27** for wages to be properly payable, the claimant had to have a legal entitlement to them. As Mr Wood submitted it was a "*question of whether the claimant was entitled to be paid in the period he didn't work (put neutrally)".*

81. The claimant alleged he had a contractual entitlement to average wages during the period in question. He argued that he was an employee of the respondent rather than a worker and alternatively, if he was a worker, the source of his entitlement was an implied term.

Employment Status

82. The first issue I considered was whether the claimant was an employee from December 2019 onwards , and more specifically during the period from 12 July 2020 to 14 June 2021, as defined in section 230(1) ERA. Both Mr Wood and Mr MacMillan referred me to the test in ***RSW*** (which I have summarised in the Law section above), which is also reflected in the paragraph 2 of the agreed list of issues and ***Autoclenz 2011***. Mr Wood referred me to the commentary of a number of cases on the IDS Employment Handbook Extract headed "*Are Casual staff Employees." Mr MacMillan referred me to* ***Wilson Circular Distributor 2006 IRLR 38 and Airfix v Footware Ltd v Cope [1978] ICR 1210*** but I did not find these cases of assistance due to the differences in facts to the present case.

83. Mr Wood submitted that two of the essential features of a contract of employment, personal service and control, were "*as good as agreed*", but, as Mr MacMillan reminded me, even if these two matters were not really contentious, I

needed to make my own determination on these matters. On the basis of my findings of fact, having determined and evaluating all the relevant admissible evidence (both documentary and otherwise) and reminded myself of the principles in ***RSW*** and ***Autoclenz 2011***, I make the following conclusions:

Personal Service

84. I conclude that there was a requirement for the claimant to personally carry out the work. The claimant was working with vulnerable children and young people in a regulated environment. He was expected by his managers to personally "earn the trust and confidence" of the children, young people and their families. The respondent also had to be satisfied of the suitability of anyone who worked at the children's care home for safeguarding reasons and to meet their legal obligations under Regulations 32(2) and 32(3) of CHR 2015. This involved anyone working in Eden Bridge to have DBS clearance, appropriate induction training and meet certain criteria as set out in the CHR 2015.

85. It was not in dispute that there was no genuine right to substitution, and I accepted Ms Martin's evidence that, to provide an open right of substitution to the claimant would not have been appropriate in a children care home setting where the respondent had safeguarding obligations. I accept Mr MacMillan's submission that there was no right of substitution for legal reasons, and it is "inarguable" that the claimant was personally required to carry out the work.

Control

86. I conclude that the respondent retained a sufficient degree of control over the claimant. Given the nature of his role, the respondent's legal obligations regarding safeguarding and his lack of relevant experience and qualifications when he was first engaged, I found that the claimant was closely observed and supervised. The respondent had significant control over the tasks the claimant undertook when on shift, and how and when he undertook tasks once he had agreed to work a shift. The claimant could not decide what to do when he one shift, he was provided with a timetable of activities which he was expected to follow when he came on shift and he had little power to do things without first obtaining his managers permission/approval. Given the nature of the claimant's role working with vulnerable children and young persons, his lack of prior experience and the respondent's legal obligations in relation to safeguarding the children and young persons in the care home, it is not surprising that there was close control of the claimant's activities.

Mutuality of obligation

87. In this case there are undoubtedly factors which point towards the conclusion that the claimant was an employee. However, I conclude that mutuality of obligation, one of the essential pre-requisites for the existence of a contract of employment is missing.

88. Under the clear express terms of the offer of appointment letter, the respondent was not obliged to offer the claimant any work at any time and the claimant was not obliged to accept any assignment offered to him. It stated, "*please be aware that*

casual work is provided on an ad hoc basis and there is no obligation on the County Council to provide work, or for you to agree to undertake work if it is offered."

89. Reminding myself of the principles in ***Autoclenz 2011,*** I was satisfied that the offer of appointment letter reflected the reality of the working arrangements. It was the true agreement between the parties. It stated, "*please be aware that casual work is provided on an ad hoc basis and there is no obligation on the County Council to provide work, or for you to agree to undertake work if it is offered.*"

90. I find that there was no obligation on the County Council to provide work to the claimant and no obligation upon the claimant to accept work that was offered to him. I accept Mr Wood's submission that the claimant had no recourse if he was not offered work by the respondent. I conclude that the claimant was hired under successive contracts of service and there was no mutuality of obligation during the periods when he was not working. There was no guarantee of work, work was only offered if there wasn't the full complement of staff on any shift to meet regulations. There was no evidence that the claimant was obliged or expected by the respondent to accept work, or put under any pressure to accept work when offered. Instead, I find the claimant chose to accept work that was offered that fitted around his other commitments.

91. As the case of ***Revenue and Customs Commissioners v Atholl House Productions Ltd 2022 EWCA Civ 501, CA*****,** recently reiterated *mutuality of obligation and a right of control are necessary, but not sufficient, conditions for a contract of employment, and if those conditions are satisfied it is necessary to go on to consider a range of other factors".*

92. I agree with Mr Woods submission that even if the necessary condition of mutuality of obligation had been satisfied there were other factors which were not consistent with the claimant being an employee. For example, he was not entitled to sick pay or holiday, he was permitted (and did) work elsewhere. He was reminded during the investigation period that he was free to work elsewhere, and that internal process didn't apply to him (but in relation to the disciplinary process, the respondent was following process in line with them). His grievances were not dealt with under the respondent's grievance process. In contrast, the employees subject to suspension were not permitted to work elsewhere during their suspension period. The claimant did not carry out work which was restricted to employees only, he did not have the monthly 1 to 1 sessions with managers. Employee and casual worker rotas were kept separate, with casual workers used to "cover" the gaps once employees allocated.

93. As the necessary condition of mutuality of obligation has not been satisfied there cannot be a contract of employment between the claimant and respondent. Having regard to all the relevant circumstances I conclude that the claimant was not an employee and am satisfied that the claimant worked on a casual basis.

Unauthorised deduction from wages

94. I conclude that the claimant was entitled under the terms of his contract to pay only in respect of assignments offered to and accepted by him. He was only entitled to pay for the actual hours he worked.

95. As I conclude that the claimant was a worker (and not an employee), the next issue I had to determine was whether the claimant was legally entitled to be paid wages for the period from 21 July 2020 until 14 June 2021 (the period when the respondent decided to not to use the claimant's services whilst the investigation was ongoing). Having particular regard to the principles in **Agbeze** (which was relied upon by both Mr MacMillan and Mr Wood), I conclude that the claimant was not legally entitled to be paid wages for the period from 21 July 2020 until 14 June 2021.

96. I find that there was no express term in the claimant's offer of appointment letter entitling the claimant to pay during any period of "suspension" or when the claimant had decided not to utilise him as a casual work. I also find that the terms of the suspension clause within the respondent's disciplinary procedure was not incorporated into the claimant's contract and that the use of the term "suspension" in some of the correspondence sent to the claimant was suspension in a different sense to that in section 3 of the Disciplinary Procedure for salaried employees. The respondent made clear that what was contemplated was that the claimant would not be offered work during the investigation period.

97. Mr MacMillan argued that the claimant was entitled to average pay for the period of 21 July 2020 until 14 June 2021 by virtue of an implied term. I conclude, having particular regard to the principles in **Agbeze**, which are binding on this Tribunal that there is no basis to imply the term contended for into a Casual worker's contract or into the claimant's contract.

98. I conclude that the claimant was not entitled to pay during the period of 21 July 2020 until 14 June 2021 unless he was offered work and chose to accept it. The offer of appointment letter would not have conferred on him a right to be paid wages during some or all of that period. That would only have arisen had the respondent elected to offer the claimant such work (which the offer of appointment letter did not oblige it to do) and had the claimant taken up that offer (which he was not obliged to do). This was not a period when he would normally be entitled under his contract to be paid for working as there was no obligation for the respondent to offer him work during this time and no obligation on the claimant to accept any such offer of work.

99. **Agbeze,** held that the creation of an implied term, as contended by the claimant, would go significantly beyond that which could be rationalised as a necessary incident of all worker relationships, or even a reasonably necessary one and cannot be supported by the principles of implication taken from **Societe Generale London Branch v Geys [2013] ICR 117**. **Agbeze** also held that the common law principles do not support the implication of such a term in all worker contracts of the zero hours or bank types and that the introduction of such a term would materially alter the nature of the contractual relationships of this type. The claimant had this bank type of contractual relationship with the respondent. As the claimant was only entitled to pay when he was offered work and accepted it, I conclude that to imply the contended term would " fly in the face" of the apparent purpose of the casual contract in this case. I did not accept Mr McMullan's submissions on para 53 of Agbeze.

100. Mr McMillan referred me to **Rice Shack Limited v Obi UKEAT/0240/17** and **Kent County Council v Knowles UKEAT/0547/11**, I did not believe these cases were of significant assistance as Mr Knowles was an employee rather than a worker and in Obi, the EAT considered a much narrower point as it was conceded by the employer that Obi was entitled to pay during suspension.

101. As I conclude that no wages were properly payable to the claimant from 21 July 2020 until 14 June 2021, I conclude that the respondent did not make a deduction (as defined by section 13(3) ERA) from the claimant's wages. The claimant's claim for a series of unauthorised deductions from his wages therefore fails and is dismissed.

Time limits

102. The complainant complained about a series of deductions between 21 July 2020 to 14 June 2021. I conclude that the last payment of wages in the series of alleged deductions was payable no earlier than end of July 2021. The claimant notified ACAS under the early conciliation procedure on 26 September 2021 and the ACAS early conciliation certificate was issued on 6 November 2021. The claim was presented on 16 November 2021. The claim of unauthorised deductions from wages was presented in time.

103.

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Employment Judge McCarthy

Date: 2 December 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
Date: 5 December 2022

FOR THE TRIBUNAL OFFICE

Annex
Complaints and Issues

Employment Status

1. It is accepted that the claimant was a worker for the purposes of limb (b) of section 230 (3) Employment Rights Act 1996.
2. The tribunal will determine whether the claimant was an employee of the respondent from December 2019 onwards, and more specifically during the period from 12 July 2020 to 14 June 2021 when he contends that unauthorised deductions were made from his wages. The tribunal will have particular regard to the following:

    2.1 The requirement for personal service whether there was a genuine right of substitution or whether the claimant was personally required to carry out the work;
    2.2 The degree of control exercised by the respondent;
    2.3 Mutuality of Obligation, whether there was an obligation on the respondent to provide work or pay, and on the claimant to accept any work provided; and
    2.4 Whether other factors were consistent with the existence of a contract of employment.

Unauthorised deduction of wages

3. What were the terms of C's contract with R in respect of pay?
4. If the claimant was a worker (and not an employee) then was C entitled to be paid wages for the period from 21 July 2020 until 14 June 2021 when R decided to suspend/ceased using C's services, having particular regard to the principles in Agbeze v Barnet Enfield and Haringey Mental Health NHS Trust [2022], IRLR 115, EAT?
5. If so, or if the claimant is held to be an employee, was the deduction from his wage required or authorised to be made by virtue of any statutory provision or any relevant provision of C's contract?
6. If not, did C previously signify in writing his agreement or consent to the making of the deduction or payment?

7. If not, what amount is properly payable to C? If an amount should have been paid but has not been the Tribunal shall make a declaration to that effect.
8. What amounts if any has R paid to C?
9. If C is found to be an employee, has R failed to follow the ACAS Code of Practice on Disciplinary and Grievance procedures by not affording C the opportunity to have his grievance heard?
10. If so, was that failure unreasonable?
11. If so, should an uplift be made to any compensation awarded to C?
12. What amount is C entitled to?

Time Limits

13. C commenced ACAS Early Conciliation on 26 September 2021 and a certificate was issued on 6 November 2021. The C's claim form was presented on 16 November 2021. On that basis any claims that arose or before 27 June 2021 are out of time.
14. The R asserts that the claim is out of time. C asserts he is in time because he returned to work on 17 June 2021 and the wages he did not receive for the month of June 2021 would have been paid at the end of July 2021. The last deduction is therefore said to have taken place on 31 July 2021.
15. When did the first deduction from wages take place?
16. When did the last deduction from wages take place?
17. Did this amount to a series of deductions with less than a three-month gap in between each of the deductions that had been made?
18. If so, was the claim submitted within three months of the last deduction or payment in the series or to the last of the payments so received?
19. If not, was it reasonably practicable for C to have presented to the claim within this period?
20. If not, was the claim presented within a further period that the Tribunal considers to be reasonable?