EMPLOYMENT TRIBUNALS

Claimant:	Mr S Afful	
Respondent:	R1	(First Respondent)
	R2	(Second Respondent)
	London Borough of Haringey	(Third Respondent)

Heard at: Watford Employment Tribunal (in public; by video)

On: **28 January 2021**

Before: Employment Judge Quill

Appearances

For the claimant: Mr Allan, consultant
For the respondents: Mr Onyekwelu, solicitor (for First and Second Respondents)
Mr Jones, counsel (for Third Respondent)

This was a remote hearing with the consent of the parties. The form of remote hearing was [V: video fully (all remote)]. A face to face hearing was not held because it was not practicable and no-one requested the same. The documents that I was referred to are in a bundle of 140 pages, the contents of which I have recorded. The orders made are described at the end of the summary.

RESERVED JUDGMENT

(1) The Claimant was not an employee of either First Respondent or of the Third Respondent. All claims against those respondents are dismissed.

(2) The Claimant was an employee of the Second Respondent and the claims continue against that respondent.

REASONS

Introduction

1. This hearing was to decide, in relation to each respondent, whether that respondent was the claimant's employer. The first two respondents will be referred to as R1 and R2 because I am also making an order under Rule 50, as set out separately.

The Claims

2. The claims are for unfair dismissal, arrears of pay, and notice pay.

3. The claim was presented on 7 October 2019 against R1 only. After the response to that claim was submitted, by letter dated 10 December 2019, the Claimant applied to join R2 and London Borough of Haringey ("R3"). This was on the basis that the Claimant still alleged that his employer had been R1, but that it was appropriate to add R2 and R3 because of certain comments made in the response.

4. By order sent to the parties on 7 January 2020, Employment Judge Manley agreed to add R2 and R3.

5. By Notice of Hearing dated 29 June 2020, the parties were informed that there would be a public preliminary hearing.

The Issues

6. As I clarified with the parties at the outset of the hearing, I could make a decision at this hearing that the Claimant was employed by exactly one of the respondents, or by any two of them, or by all three of them, or by none of them.

7. For each respondent, the issues were:

   7.1 Was there a contract between that respondent and the Claimant?

   7.2 If so, then, as per section 230(3) of the Employment Rights Act 1996 was it:

      7.2.1 a contract of employment: limb (a)? or

      7.2.2 not a contract of employment, but within limb (b)? or

      7.2.3 not within either limb (a) or limb (b)?

8. In relation to the first of these issues, the existence or otherwise of a contract, then that always potentially requires a judge to make decisions in relation to any relevant sub-issue raised by the parties. In other words, if raised, then I have to determine such common law issues as illegality or the capacity of the parties, which are always relevant to the issue of whether a contract has been formed. Regardless of whether such sub-issues are expressly mentioned in a Notice of Hearing, the fact that such sub-issues might have to be decided is sufficiently explained by the case management decision to decide, as a preliminary issue, whether a respondent is the employer of a claimant.

The Hearing and Evidence

9. There were some technical issues which caused some delays during the hearing. All the evidence and submissions could be heard, and I would like to express again my thanks to the parties, representatives and witnesses for their co-operation and patience.

10. Because of the delays, it was close to 5pm by the end of submissions, and I therefore reserved my decision. I also informed the parties that it would be my recommendation that any future hearings in the litigation take place in person.

11. I had an electronic bundle of 140 pages. Each of the Claimant, R2 and Mr Raj Darbhanga, Team Manager employed by R3 gave evidence. They had each prepared a written statement and answered questions from the other parties and from me.

The findings of fact

12. There are four parties to these proceedings. R1 is the adult son of his mother, R2. They live at the same address. The address is within the geographical territory for which R3 has statutory responsibilities in relation to social care.

13. Prior to March 2015, the Respondent had accepted that (a) R1 had care needs due to physical and mental health conditions and that (b) R3 was responsible for assessing those needs, and ensuring that appropriate care was available. Prior to March 2015, the necessary care had been provided by agencies which were directly engaged by R3.

14. For many years, legislation has provided that service users have a choice. If the local authority has accepted that the service user has care needs then either: (a) the service user can accept the care provided by the local authority (which the local authority might provide directly by its own employees, or else by contracting with a third party) or (b) the service user can choose to use the "direct payment" option instead. At times relevant to this dispute, the legislation governing the direct payment option was the Care Act 2014 and the Care and Support (Direct Payments) Regulations 2014/2871. However, direct payment was not an option newly created in 2014.

15. In broad brush terms, by exercising the direct payment option, the service user receives a budget from the local authority. The size of the budget is determined based on what the user's care needs are believed to be, and on the estimated cost of obtaining that care on the open market. It is the service user's choice as to which people (or which organisations) will actually provide the care, and the service user's responsibility to make arrangements/payments for that care.

16. If a service user informs R3 that the service user wishes to take the direct payment option, then R3 does not have a simple right of veto. However, the Respondent is obliged to consider whether the service user does have capacity (in which case the request is considered under section 31 of the Care Act 2014) or else does not have capacity (in which case the authority must take into account the provisions of section 32). R3 can - and must - refuse to move to direct payments where the legislation requires it to refuse and – therefore – it must assess any request for direct payments as satisfying either section 31 or else section 32 (which are mutually exclusive) or of satisfying neither.

17. If direct payments are approved under section 32, then they can be made to an "*authorised*" person, as defined in that section. If direct payments are approved

under section 31, then they can be made either to the service user or to a "*nominated*" person as defined in that section. (My italics.)

18. On or around 13 March 2015, R2 visited the premises of R3 (a drop in centre) to ask about direct payments. She was not accompanied by R1. R3's employee gave her some information about the direct payment scheme. She was advised that a specific bank account was required for the payments to be made to, and that approval would first have to be granted and an agreement entered into. R2 said that she wanted to have it in place by 16 March 2015, and was told that that could not be guaranteed. Her request was logged by R3 on its systems, and forwarded to relevant decision-makers.

19. R2 does not have power of attorney for R2. However, it is she, R2, who makes most decisions on a day to day basis on R1's behalf. R2 cares very greatly for R1 and her only reason for seeking to speak to R3 about the possibility of direct payments was that she believed that – in all the circumstances – she thought it was in R1's best interests. She thought about it carefully, including consulting R1's medical advisers and social services. Neither R1 nor R2 were placed under pressure by R3 to instigate direct payments. I infer that there had been prior discussions with R3 before 13 March, but it is clear that on 13 March it was R2 telling R3 that she wants direct payments to be put in place, not the other way round.

20. In 2015, either shortly before or shortly after 13 March, the Claimant and R2 were put in touch with each other through mutual acquaintances. The two of them agreed that the Claimant would provide care to R1. I do not accept that the process was as formal as the Claimant implies in paragraphs 3 and 4 of his statement, but there were discussions between the Claimant and R2 about what the work would entail, what the hours would be, and what the pay would be, and they each believed that they had, in principle, an agreement, that the Claimant would commence providing care if and when the direct payments were approved by R3 and subject to what the size of those payments would be. R3 played no part in selecting the Claimant. The choice of the Claimant was acceptable to R1.

21. Following the 13 March meeting, R2 set up a bank account. This was in R2's name rather than R1's, which is perfectly in order. As per R3's instructions, she was intending to use the account solely in connection with the Direct Payment arrangements, and to keep the funds separate from her own.

22. On 27 March 2015, R2 and the Claimant attended R3's premises. R1 did not go with them. R1 had signed the document "Direct Payment Agreement" which R2 had obtained from the drop in centre on 13 March. I am satisfied that this was a full 5 page document when everybody signed it, although only pages 1, 2 and 5 were put into the bundle (pages 102 to 104).

    22.1 R1 signed it as "Direct Payment User" and dated it 27 March 2015.

    22.2 The section "Arrangements for a nominated person to receive my Direct Payment" was completed with R2's details.

    22.3 R2 signed it as "Nominated Person".

22.4 A named employee of R3 signed it on behalf of R3 as “Adult Services”

23. The agreement said, amongst other things:

23.1 "’Direct Payment’ means the money that the Council will pay to you so that you can arrange and pay for your own care and support services instead of the Council arranging them for you”

23.2 "’Support Plan' means the plan of care support and outcomes identified by the Council as a result of its assessment of your needs for community care services.”

23.3 “I agree that I (or my Agent) will provide Adult Services with details of how my Direct Payment has been Spent and conform with Haringey Council's personal budget auditing policy. I understand that the current policy is se' out in the document entitled ‘Help With Managing Your Personal Budget’ (a summary of which has been provided to me). I understand that the policy may be amended from time to time.”

23.4 “I agree that I will meet all legal requirements and obligations relating to the services I pay for using my Direct Payment, including the payment of Tax and National insurance to Her Majesty's Revenue and Customs (HMRC).”

23.5 “I agree that if I will inform Adult Services if I intend to directly employ an individual to assist me, Adult Services may purchase Employer‘s and Public Liability Insurance on my behalf and deduct the cost from my Direct Payment.” (sic)

23.6 “I agree that I will not use my Direct Payment to employ …” [list of spouse and close relatives]

23.7 “I understand that Adult Services strongly recommend that i should ask for appropriate checks to be made through the Criminal Records Bureau on all my prospective employees.”

24. R3’s employee’s signature was added to the document during the meeting on 27 March 2015. As mentioned, the Claimant was present (and R1 was not), but the Claimant was not a signatory. After the meeting, R3’s employee made a note on the file (not seen by the Claimant or R2 at the time) which said:

> Visit to drop-in by [R2] (mother). Wants to employ worker who also attended. She wants to pay £12.50 an hour for 30 hours a week. start date 30/03/2015. Direct payments agreement signed. BACS [form] completed and proof of bank account provided. HMA form completed. Responsibilities of being an employer explained and job description/contract info from shared drive provided. ACTIONS: I) Send off HMA form. 2) Set up insurance. 3) Process vendor form.

25. The reference to the BACS form was to the bank account details provided by R2 for receipt of payments, which R2 signed and submitted on 27 March 2015.

26. The reference to insurance was to the employer's and public liability insurance mentioned in the Direct Payment Agreement which R3 arranged, and for which it made deductions from the direct payments which were subsequently made.

27. The reference to standard contract and job description is a reference to some documents which R3's employee printed off and handed to R2 on 27 March 2015. I have not seen these documents.

    27.1 I do accept that R3 stated, in the presence of R2 and the Claimant that the effect of the documents would be to make R1 the employer of the Claimant. However, I do not know if R3's employee added in the relevant names so that all the details were completed when the documents were printed, or if they were pro forma which left spaces for relevant details to be handwritten.

    27.2 My inference from what both R2 and the Claimant said in oral evidence, and from what R3's employee entered into the computer, and from Annex C (page 107 of the bundle, which records the details given to R3 on 27 March 2015) that R3 did not print a document which said that the hourly rate was to be £15. If the number of hours and hourly rate were included in the template document printed by R3 then they were 30 and £12.50 respectively. Alternatively, they might have been left blank, with details to be added by hand.

    27.3 I do not know if any of C, or R1 or R2 signed the template employment documents printed on 27 March 2015. However, I am satisfied that R3 did not sign them, and was not party to the contract.

    27.4 I do not accept that the document at 108 to 111 of the bundle is the same document printed on 27 March 2015. Each of the Claimant and R2 stated that the document at pages 108 to 111 is the relevant contract of employment that existed from March 2015 onwards. My finding of fact is that it is not.

        27.4.1 R2 does not claim to have a copy of this document in her own records. She alleges that the document at pages 108 to 111 must have been produced by R3 in March 2015 and given back by the Claimant to R3. She says she is surprised at (some of) the contents and does not admit that she (or R1) agreed those contents (in March 2015).

        27.4.2 The Claimant says that he does not have a signed copy of the document at pages 108 to 111, because he signed and returned it in March 2015. However, he must be mistaken about that, because it does not match what was discussed between the Claimant, R2 and R3 on 27 March 2015.

    27.5 The document at 108 to 111 of the bundle was created some time later, no earlier than 2016 when a variation in hours from 30 to 45 was agreed.

28. A copy of Annex C was printed and handed to R2.

29. The Claimant commenced providing care to R1 from around 31 March 2015. The Claimant completed time sheets. R2 used a payroll provider who paid the Claimant monthly based on the time sheets. The Claimant received payslips which showed all the appropriate information, including PAYE deductions, and referred

to R1 as his employer. The correspondence/invoices which the payroll provider sent named R1 as the Claimant's employer, but payments to that payroll provider were taken from the account set up by R2 (in her name) for receipt of the Direct Payments.

30. At first, the payments made were calculated at £12.50 per hour, but the Claimant spoke to R2 who liaised with the payroll provider and the subsequent payments were changed to £15 per hour.

31. Originally, the Claimant worked 30 hours per week. In 2016, R2 informed the Claimant that she wanted his hours to be 9am to 6pm, Monday to Friday. The Claimant agreed to that.

32. In 2017, R2 signed documents so that the Claimant could be auto-enrolled into a pension scheme.

33. The Claimant's opinion of R1 is that he is able to communicate effectively and that his disability improved while the Claimant supported him and he was able (for example) to go to college and do school/college activities by himself, and that he was also able to travel independently on public transport.

34. As of 2015, R2 wanted the Claimant to provide assistance to R1 with personal hygiene, building up confidence, support with eating and drinking, etc (I take this from page 104, where the carer's duties have been listed, albeit in the wrong place in the document).

35. R2 was not present throughout all of the hours that the Claimant was working. For the majority of the time, the Claimant was responsible for providing assistance to R1 in the absence of R2.

36. On 22 May 2019, an alleged incident occurred and, amongst other things, it was suggested that R1 had received an injury during the time that the Claimant was responsible for looking after him. The details of the allegation do not matter and the Claimant denies all wrongdoing. Because the alleged incident occurred on the territory of LB Newham, it was referred to them as a safeguarding concern. Newham wrote to the Claimant to say that it had investigated and no further action was necessary. According to Newham's letter, having spoken to R2, Newham had formed the view that R2 regarded herself as the Claimant's employer. It also says that it will pass onto R3 information that the Claimant might require training in safeguarding and risk assessment; the letter does not make clear if Newham is intending to tell R3 that it, Newham, believes the Claimant requires training, or if it is simply telling the Claimant that it will be informing R3 that those were R2's views. I give this document very little weight, but I mention it for completeness, as R2 relies on it as supporting her contention that R3 is the employer.

37. There were discussions between R2 and R3 about the alleged incident. On 6 June 2019, the same reviewing officer who had signed the 27 March 2015 agreement sent an email to R2. This email stated:

> During the review you raised some concerns about the support that Stephen is providing to your son, and you said that he requires training. You also stated that he is not always carrying out tasks that you require him to, such as providing support with personal care when out in

the community and providing information about what he has been doing with [R1] when he takes him out.

As you employ Stephen, you are responsible for managing him, making clear what tasks he needs to carry out and taking any appropriate action if any issues arise with any of this. You have employer's insurance with a company called Mark Bates Ltd. They provide a helpline for any legal/HR issues that arise in relation to employing a worker, and I would strongly advise you to contact this helpline for advice.

As an employer, you are also responsible for providing Stephen with training.

There are some steps that you should take now in order to try and address the situation:

1) I understand that Samuel (nurse) has sent you some information regarding social care training. It is important that you utilise this in order to ensure that Stephen receives training.

2) Introduce a daily log for Stephen to complete every time that he supports your son, including details of where they have been and what they have been doing.

3) You could devise a weekly plan of activities for Stephen to support your son with.

4) Make clear what support Stephen is expected to provide.

5) You may find it useful to have regular meetings with Stephen, to make clear what is required of him and to discuss any issues which may arise.

Please note that the above is not a substitute for seeking advice from the insurance company.

If Stephen is using his car to transport your son around, please ensure that he has the correct insurance to cover this.

Please do not hesitate to contact me if you need to discuss this further.

38. In an internal email dated 4 June 2019 (not copied to R2), the reviewing officer also stated that he had told R2 that same day that she was the Claimant's employer.

39. I do not intend that my findings about termination should be binding on a tribunal that might have to consider the exact circumstances more fully.

39.1 It seems to be common ground that the trigger point was an incident on 19 July 2019, the exact details of which are no doubt in dispute.

39.2 Precisely who investigated and what form the investigation took is a matter for another tribunal to decide. However, it seems to be common ground that it was R2 who informed the Claimant that he would no longer be providing care to R1. R2 spoke to R3 about this, and R3 informed her termination was a decision that could be made.

39.3 On 12 August 2019, R2 wrote to the Claimant. The Claimant was on annual leave at the time. Amongst other things, the letter says:

39.3.1 "I informed you that I will be taking my son … to a different care provider after your annual leave".

39.3.2 "I offered you [R1's] care to you believing that he will be safe, empowered and be protected from abuse and to leave a meaningful life in the community. I also trusted you that [R1] will not be risk of harm to self and to the public."

39.3.3 [Following alleged incident in 2017] "We had a conversation about this and you mentioned that it won't happen again".

39.3.4 [Following alleged incident in 2018] "I informed you that [R1] needs to be supervised at all times to prevent risk of causing dangers to people and to him. You stated that that won't happen again."

39.3.5 [Following allegations about 2019] "I think it's enough now"

39.3.6 "I strongly feel that [R1] is not safe in your hands, if I continue to put him under your care again, I might even lose him one day/ something bad could happen. We have all been kind and supportive to each other and I think it's time for us all to move on".

39.3.7 "You will receive your full payment in August. I have Informed Pay packet that you will no longer continue to work with my son"

40. A P45 was issued which named R1 as the employer. This corresponded to the P60 issued for the year 18/19 (and, I accept, previous years, even though I only saw the 18/19 document).

The Law

41. Section 230 of the Employment Rights Act 1996 reads (so far as is relevant):

> 230.— Employees, workers etc.
> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
> (a) a contract of employment, or
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
> and any reference to a worker's contract shall be construed accordingly.
>
> (4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
>
> (5) In this Act "employment"—
> (a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and
> (b) in relation to a worker, means employment under his contract;
>
> and "employed" shall be construed accordingly.

42. Thus to meet either the definition in section 230(1) (a definition repeated in s230(3)(a)) or the definition in section 230(3)(b), there has to be a contract between the alleged employee and the alleged employer. It does not have to be a written contract, necessarily. An oral contract is sufficient. Furthermore, it does not have to be an express contract; an implied contract would suffice. However, as made clear by James v Greenwich LBC [2008] EWCA Civ 35, a contract will only be implied where it is necessary to imply the existence of a contract in order to give business reality to the relationship between the parties.

43. Outside the field of employment law, the ability of courts to look behind the written terms of a signed contract is limited to situations where (there is a mistake that requires rectification; something which is not argued in this case or where) the parties have a common intention to mislead as to the true nature of their rights and obligations under the contract. Ie where the contract is a "sham" in the sense described in Snook v London and West Riding Investment Ltd 1967 2 QB 786, CA. ("Snook")

44. In the field of employment law, a claimant does not necessarily have to demonstrate a common intention to mislead in the Snook sense (although, if the Claimant can show the written contract is a "sham" in the Snook sense, the tribunal can determine the true agreement). In the field of employment law, potentially there might have been unequal bargaining power between the claimant and the alleged employer and that it might be the latter who decided upon all of the terms of the written document(s). This is a principle addressed by the Supreme Court in Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC ("Autoclenz") (and more recently in the Uber decision). A tribunal faced with an allegation that a written document is a "sham" must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them. Determining the true intentions of the parties does not mean that a tribunal should base its decision on what one (or each) party thought privately to itself; rather it requires the tribunal to determine what was actually mutually agreed – in reality – between the parties.

45. In assessing whether a person is an employee, Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497*,* [1968] 1 All ER 433, suggests that there are three questions to be considered:
    (1) Did the worker undertake to provide their own work and skill in return for remuneration?
    (2) Was there a sufficient degree of control to enable the worker fairly to be called an employee?
    (3) Were there any other factors inconsistent with the existence of a contract of employment?

46. However, no single test to be applied to a contract, or one single feature of a contract, determines the issue of whether it falls into the definition of "contract of employment". A multi-factorial approach must be adopted, whereby various different features of the contractual relationship are analysed, some of which might

point to the person being an employee and some others might point in the opposite direction or be neutral. The significance of each feature must be weighed and a decision made as to whether, in all the circumstances, the individual contract is a contract of employment.

47. In accordance with the Employment Tribunal Extension of Jurisdiction Order 1994, only people who were employees (and whose employment has terminated) can bring breach of contract claims in the employment tribunal. Similarly, only "employees" can bring claims of unfair dismissal under Part X of the Employment Rights Act 1996.

48. However, to bring a claim under Part II of the Employment Rights Act 1996, alleging deduction from wages, it is sufficient for a claimant to prove that they are a "worker" (under either of the limbs in s230(3)) and that the respondent was their employer in that wider sense.

49. Since section 230(3)(b) refers to any <u>other</u> contract, it is clear that a contract cannot fall within both s230(3)(a) and also s230(b). It can fall within the former (so limb (a), a contract of employment) or the latter (so limb (b), which a "worker contract"), or, of course, it could fall into neither.

50. In <u>*Byrne Brothers (Formwork) Ltd v Baird and ors*</u> 2002 ICR 667, the EAT gave guidance on section 230(3) and, in particular, on the factors that might help a tribunal to decide whether a particular contract fell into the definition in limb (a) or the definition in limb (b) or into neither. It held that the intention was to create an intermediate class of protected "worker" made up of individuals who were not employees but who could not be regarded as carrying on a business. Factors to consider could include the degree of control exercised by the alleged employer, the exclusivity of the engagement and the typical duration(s) of assignment(s), the extent to which the individual is integrated in the alleged employer's organisation, the method of payment, who supplies equipment, and how risk is apportioned.

Submissions

51. R3 was largely neutral as to whether either of R1 or R2 might have been the Claimant's employer, so long as it was decided that R3 was not the employer. Mr Jones made some reasonable observations that in all the circumstances, I should approach with caution the suggestion that R1 might lack capacity. These circumstances included, but were not limited to, the fact that no expert evidence on the subject had been adduced.

52. R1 and R2 submit that R3 was the employer of the Claimant, stating in particular that R3 had the power to bar the Claimant from providing care to R1 (either indefinitely or temporarily, pending investigation) and that – in their submission – all the documentation was created by R3.

53. The Claimant's primary submission was that R1 was the employer, based on its position about what the contract said (relying on pages 108 to 111 in the bundle) and on the payslips, P45 and P60. However, in the alternative, I should find that either R2 or R3 was the employer.

Analysis and conclusions

54. I am satisfied on the evidence that the Claimant had no contract at all with R3.

    54.1 R3 did not "find" the Claimant and appoint him. It was R2 who "found" the Claimant and decided that he would provide care to R1.

    54.2 The statutory direct payments scheme, and the document "Direct Payment Agreement" signed by R1, R2 and R3 both make clear that the arrangement is that R3 will cease providing care directly (whether by its own employees or via contractors) and will instead supply funding.

    54.3 R3 had no direct involvement in telling the Claimant what his precise duties would be, or what his hours of work would be, or what his hourly rate would be. R3 did have a statutory responsibility: (a) to assess what R1's care needs were, and to fix a budget based on those needs and (b) to monitor that the funds were not used for an improper purpose and (c) for the Claimant's safeguarding. However, it had the safeguarding responsibility for the Claimant regardless of who was providing care and the other two responsibilities only arose because of the exercise of the statutory right to direct payments.

    54.4 While R3 wrote, on Annex C, what the Claimant's hours (30) and hourly rate (£12.50) were, this was written on R2's instructions (or, at least, the reviewing officer's understanding of her instructions. R2 (or R1) and the Claimant were not prevented from agreeing something different and, in fact, they did agree something different. The arrangement became 45 hours at £15 per hour without R3's involvement.

    54.5 R3's recommendation of payroll provider, and/or its arrangement of insurance cover (on behalf of R1) do not demonstrate any agreement between R3 and the Claimant. These were just things which R3 agreed with R2.

    54.6 Local authorities have a general statutory power (and obligation) to investigate safeguarding issues. These powers are separate to, and different from, its rights and abilities as an employer to (say) conduct a disciplinary investigation or to suspend/dismiss one of its employees.

55. There was no express contract between the Claimant and R3 (either oral or written) and nor is it necessary to imply a contract between them in order to fully explain all the interactions between the Claimant and R3.

56. I am satisfied that there was a contract between either R1 or R2 and the Claimant. I have not actually seen the document printed by R3 in March 2015, but each of the Claimant and R2 believe that each of them saw it. I am satisfied that that particular document did <u>not</u> name R2 as the employer. It might have named R1, or it might have left the employer details blank to be completed, but – as printed – it did not specify the employer would be R2.

57. To the extent that R3 addressed its mind to the issue (and there was no direct evidence on the point, and Mr Jones did not have instructions on the point), the documents signed on 27 March 2015 indicated that it regarded R1 as having the necessary capacity to opt for direct payments in accordance with s31 of the Care

Act. The paperwork is consistent only with R2 being a "nominated person" under section 31 of the Care Act, and not an "authorised person" under section 32. However, R3's policy (at least the 2020 version that was in the bundle; see section 3.3 on page 137) was neutral as to whether it would be the service user or the nominated person who would "sign" a contract of employment. Furthermore, of course, the actual person providing the care might not be an employee of either the service user or nominated person. They could– for example – be an employee of an agency, or a person in business on their own account.

58. Ultimately, the fact that each of the payslips, P45 and P60 name R1 as the employer are not separate and independent pieces of evidence. They just reflect that the payroll provider was told that R1 was the employer and so, naturally, all the documents produced by the payroll provider named him as such. I am satisfied that there was no intention to mislead on the part of R2 or the Claimant or anyone else when the payroll provider was given the information that R1 was the Claimant's employer. However, information given to another party is not conclusive evidence of what Claimant and/or R1 and/or R2 agreed with each other.

59. I am satisfied that there was no contractual agreement between R1 and the Claimant. The two of them did not negotiate anything, and did not agree anything, either orally or in writing. To the extent (if at all) that there was a signed document between the Claimant and R1 (and I have not seen one), I am satisfied that it does not represent the true intentions of the Claimant and R1 and R2.

60. It was the Claimant and the Second Respondent who had all the discussions abut every issue.

    60.1 R2 negotiated the hourly rate (agreeing to the Claimant's request for £15 which was higher than the local authority suggestion). R2 fixed the duties, R2 controlled the bank account through which the money for the Claimant's salary passed. R2 decided, in 2016, to change the Claimant's hours.

    60.2 Based on the 12 August 2019 letter, it was R2 who set the standards of work which the Claimant had to achieve, and R2 who told him when he was failing to meet those standards.

    60.3 For what it is worth (which is very little), Newham regarded R2 as the Claimant's employer. Slightly more relevantly, the reviewing officer employed by R3 - who had met both the Claimant and R2 on 27 March 2015 - regarded R2 as the Claimant's employer.

    60.4 However, regardless of what the local authorities thought, I am satisfied both that (i) the Claimant (notwithstanding what he says now) believed in March 2015 that he was entering into an agreement by which he was answerable to R2 and for which he would receive payments from a source controlled by R2 and (ii) R2 (notwithstanding what she says now) believed in March 2015 that she was employing the Claimant to look after her son, and that he was answerable to her, and that she could terminate the agreement if she was not satisfied with the work that he was doing, on her behalf, to look after her son.

61. There was, therefore a contract between the Claimant and R2. Because this contract explains the entire relationship between the Claimant and R1, it is not necessary to imply a contract between those parties in order to explain their course of dealing.

62. The contract between the Claimant and R2 is not within the exception to limb (b). The Claimant was not in business on his own account, and R1 was the only person to whom he was providing care. He does not have his own accounts, and does not advertise (or, at least, he was not in 2015).

63. The contract between the Claimant and R2 is one which the Claimant was required to perform personally. He could not, and did not, send any substitutes.

64. On balance, I am satisfied that there was the necessary degree of control such that the Claimant should be fairly regarded as an employee of R2's. He had fixed hours and his duties were set by R2. Given that R2 was not permanently present and overseeing everything that he did, he had some degree of choice as to exactly how he provided the relevant care at any given point of time during his shift, but that – in itself – is not inconsistent with an employment relationship. Many employees spend their entire working day away from home base, and without their line manager directly observing their every move.

65. Furthermore, this was an indefinite arrangement and not simply a series of short term contracts. It was not "as and when required", but was every week day. My answer to the third of the Ready Mixed Contact questions is "No. There are not any other factors inconsistent with the existence of a contract of employment?"

Outcome and next steps

66. The claims can continue against R2, and will be listed for an in person final hearing. I will issue case management orders separately.

67. The claims against the other respondents are dismissed.

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Employment Judge Quill

Date: 27 April 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

28/4/2021

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FOR EMPLOYMENT TRIBUNALS