EMPLOYMENT TRIBUNALS

Claimant Ms Agnes Timbreza

Respondents (1) Ms Lathangi Kathirkamathamby and (2) Rose Quartz (London) Ltd

HEARD AT: Watford (by Cloud Video Platform) **ON**: 24 and 25 January 2024

BEFORE: Employment Judge J Lewis KC

Representation

For the Claimant: Cameron Wallis (Free Representation Unit)

For the Respondent: Muneeb Akram (Counsel)

RESERVED JUDGMENT

1. The Claimant was not employed by either Respondent under a contract of service within s.230(3)(a) of the Employment Rights Act 1996 ("ERA") or section 171 of the Social Security Contributions and Benefits Act 1992.

2. The Claimant was a worker of the First Respondent (and not of the Second Respondent) within the meaning of s.230(3)(b) ERA and regulations 2 of the Working Time regulations 1998 and an employee of the First Respondent (and not the Second Respondent) within the meaning of s.83 of the Equality Act 2010.

3. Accordingly:

    3.1 As against the First Respondent, the following claims are dismissed:
        (a) Automatic unfair dismissal due to pregnancy (s.99 ERA);
        (b) Wrongful dismissal; and
        (c) Non-payment of statutory maternity pay.
    3.2 All claims against the Second Respondent are dismissed.

REASONS

Introduction

1. This was a hearing to determine issues as to the Claimant's employment status and her identity of the employer. I heard evidence from the Claimant and the First Respondent and, on behalf of the Respondents, from the husband of the Respondents' client ("Client X"). For the purposes of these Reasons I refer to Client X's husband as "KD". I also had the benefit of helpful written and oral submissions by both parties which I have carefully considered.

2. At a case management preliminary hearing on 28 September 2023 this preliminary hearing was listed to address the following preliminary issues as to employment status:
   2.1 Was the Claimant an employee of the Respondent within the meaning of section 230 Employment Rights Act 1996 ("ERA")?
   2.2 Was the Claimant a worker of the Respondent within the meaning of section 230 of the ERA?
   2.3 Who is the Claimant's employer.

3. In the course of the hearing I raised with the parties the issue the fact that there were also claims that had been brought relating to employment status under other provisions than s.230 ERA and whether it should encompass the employment status issue in relation to those claims. The agreed position between the parties was that those should also be determined and would follow from my findings in relation to s.230 ERA. Specifically the agreed position was that:
   3.1 Whether the Claimant was an employee for the purpose of s.230(3)(a) ERA is also determinative of whether she was an employee for the purposes of the claim for statutory maternity pay (under section 171 of the Social Security Contributions and benefits Act 1992), such that if she was not the claim would fail and should be dismissed.
   3.2 If the Claimant was a worker for the purposes of s.230((3)(b) ERA, she was also an employee for the purposes of s.83 of the Equality Act 2010 ("EqA), and it not she was not.
   3.3 Although not specifically mentioned in the preliminary issues, I should also determine these employment status issues on that basis.

4. There is also a claim under the Working Time Regulations 1998 ("WTR"). The definition of a worker under reg 2 WTR is the same as under s.230(3)(b) and it follows that my finding in relation to s.230(3)(b) worker status is also determinative of the issue as to worker status under the WTR.

Material facts
(1) The Respondents

5. The First Respondent ("R1") runs the Blue Crystal Care Agency ("BCCA") which provides domiciliary care social care for elderly persons. She has at

all material times been registered under that trading name, as a sole trader, with the Care Quality Commission ("CQC").

6. R1 is also a director of the Second Respondent ("R2"). R2 was incorporated in February 2020. At that time R1 was already engaged in providing both consultancy and domiciliary services, with BCCA being the domiciliary care side of the business. R2 ceased trading in April 2023.

7. Although in R1's witness statement she asserted that R2 is also registered with the CQC, that is not the case. In her oral evidence, R1's position was instead that she had been advised that it sufficient for her to be registered with the CQC as registration of R2 would take a long time to go through.

8. It was the Respondents' ("Rs") case that as well as being a trading name of R1, R2 also traded as Blue Crystal Care Agency. I am not satisfied that was the case. There was no document placed before me supporting that contention. As to this:

    8.1 It was not referred to as such in the document entitled "Agreement for Services" which R1 asserted was sent to the Claimant and referred to R2 without adding that trading name.
    8.2 The Risk Assessment included in the bundle merely referred to Blue Crystal Care Agency without any reference to R2.
    8.3 The Claimant's engagement was ultimate terminated by a letter dated 6 December 2022, with effect from 9 December 2022. The dismissal letter referred at the foot of the page to "Blue Crystal Care t/a Rose Quartz London Limited", which would indicate that Rose Quarts was a trading name of BCCA rather than the reverse. R1's evidence was that this was an administrative error. However if R2 traded as Blue Crystal Care I would have expected there to be headed paper on hand referring to Blue Crystal as a trading name of R2, rather than the need to type this out.
    8.4 In the correspondence with Maternity Action (who took up the Claimant's case after the termination of her (to use a neutral term) engagement), R1 signed off her email of 14 December 2022 as Blue Crystal Care Agency, followed by her own name and her role as Care Manager, without reference to R2.
    8.5 In her witness statement, R1 stated that Blue Crystal Care was the name that she used "on my headed paper".
    8.6 KD's evidence was that the care was provided though an agency called Blue Crystal Care but that she did not mention any other company.

9. Consistently with this R1 also held out the Claimant as working for her. In a message of 26 April 2022 she asked that if anyone of the family asked how long the Claimant had "worked for me" the Claimant should say that she had done so on and off for two years, and that she had worked with a private client but they went into a care home so she came back. In response the Claimant confirmed that she had said that she had worked with a private client and that she had just started again "with you". There are other instances of the Claimant referring to staff working "for me" (pages 37 and 38

of the Claimant's bundle).

(2) Recruitment of the Claimant

10. R1 recruited the Claimant to work for BCCA on either 29 March 2022 (as contended by the Claimant) or 1 April 2022 (as contended by Rs). Nothing turns for present purposes on the difference between the parties as to those dates. The Claimant had been recommended to R2 by a relative of the Claimant who had worked for her as a carer and who gave the Claimant R1's contact number. Whilst little turns on this, I note the inconsistency between this and R1's contention that the Claimant had previously worked for her on and off for two years. Had that been the case there would have been no need for a relative to give the Claimant R1's contact number. I accept the Claimant's evidence that she had not previously worked for Rs; she had previously worked as a housekeeper.

11. Whilst they were in R1's car, R1 outlined some key points about the role. She explained that the Claimant would be self-employed and would be paid £100 a day or £200 on bank holidays and that she would be paid on a weekly basis. It was explained that she would not be paid on days off or receive holiday pay or sick pay. She also explained that if she wanted to have a day off she needed to give a week's notice, or two weeks' notice to take longer than a week, but that having the time off depended on whether there was someone who could cover her shift. If no one could be found it would not be permissible to take the time off. There was no specific discussion about how many days off she could have. Since it was a core part of the role, it is also likely, as R1 contended, that she told her about the log book and the need to send a copy of it to her every day.

12. During the journey R2 told the Claimant that she ran her business out of her home, where she had an office. There was a difference of recollection as to whether R1 mentioned Blue Crystal Care Agency or whether the Claimant first picked up that name from it being stated on the log book. Little in my view turns upon this, since merely referring to the name of the R1's care agency's name did not objectively indicate that the employer was a different legal entity. As noted above, Blue Crystal Care was a trading name of R1. There was no mention in the call of R2.

(3) Registration as self-employed

13. R1 also explained, either during that journey or subsequently, that her accountant would register the Claimant as self-employed. I do not accept R1's evidence that the Claimant told her that she was already set up as a self-employed contractor with HMRC. In a message to the Claimant of 5 May 2022, R2 noted that the accountant needed to register her and set out information needed in relation to this. In her oral evidence R1 suggested she had asked for the information only so that the accountant could check that she was registered. However the text was specific that the accountant needed to register the Claimant. Ultimately the accountant told the Claimant herself to register for self-employment through HMRC, which the Claimant

then did.

(4) Assignment to care for Client X

14. R2 dropped the Claimant off at Client X's house for her to shadow the carer who was working there for an hour. She was shown what to do by the other live in carer (Jho). From 30 March 2023 the Claimant carried out care for a different client. On Monday 3 April 2022 R1 messaged the Claimant to ask her to go to Client X's house just for that week. She explained that it was a live in role and that there always needed to be two carers there. The Claimant continued at Client X's house beyond and week and then, on or around 18 April 2022, R1 informed the Claimant that she was to remain in the role with Client X on an ongoing basis.

15. The live-in carer role with Client X involved working from 8am to 8pm, as one of two live-in carers, with a two hour rest period in the afternoon, and a night shift (8pm to 8am) every other day, during which she was required to sleep in the same room as Client X. The hours of work were set by R1, framed around what was needed to meet the client's requirements. In a phone call in around May 2022 R1 gave instructions that the Claimant and the other carer should alternate night shifts. R1 also gave verbal instructions that care who did not sleep in the rook with Client X would be responsible for preparing the meals for the day.

16. In addition to the pay of £100 per day (or £200 on bank holidays) it was common ground before me that the right to live there formed part of the consideration. The Claimant was however required to leave the premises when she was off duty as there could not be more than two carers on site.

(5) Document headed Agreement for Services

17. It was Rs' contention that the terms on which the Claimant was engaged were set out in a document headed Agreement for Services which Rs contend was posted to the Claimant. This was in the standard form used by Rs for live in care arrangements, modified on or about 1 April 2022 to insert the Claimant's name and address. It was signed by R1 on 3 April 2022. It was not signed by the Claimant.

18. I accept the Claimant's evidence that she did not see the draft agreement prior to its disclosure in these proceedings. Rs contention was that it was likely she had not seen it because she moved out of the address which she had given to R1. Whilst she did not move out until July 2022, one possibility is that the fact it was not seen was related to the disruption in her personal life at that time. However, the Claimant's partner did inform her of other post that was received. I consider that the more likely explanation is that, probably due to an administrative error, the agreement was not sent out. Although R1 stated in her written statement that she had sent out the letter in the first-class post, in her oral evidence she clarified that she had not done so personally. She had left it in the out-tray and it was her administrative assistant who she contended would have done so. However the usual

assistant was absent from work at around this time. Instead there was a temporary administrative support by way of maternity cover from 4 April 2022. That may account for the administrative error. In any event I accept that it was not received or seen by the Claimant prior to disclosure in these proceedings, following which the issue as to non-receipt was promptly raised by her representatives in correspondence.

19. R1's contention was that she asked the Claimant after about two weeks if she had received the contract and that the Claimant stated that she had not gone home. She contended that she was asked again within the first two months, but still said she had not gone home and was asked to check with her husband. In all she contended that she asked about it four times over the first two months but due to an oversight did not follow it up after that.

20. I do not accept that evidence. If there had been such a conversation it would have been a crucial point to make both in R1's written evidence and in the correspondence when the Claimant's representative stated that the Claimant had not seen the Agreement for Services. It would have evidenced that the Claimant was aware of the contract and ought as such to have made her own checks about it. However in that correspondence it was simply asserted on behalf of Rs that it was likely that the Claimant had not seen it due to changing address. R1 did say in her witness statement that she asked the Claimant on several occasions to sign the Agreement and send it back. There was however no mention of the Claimant having stated she had not gone home, and so not yet seen it. It was alleged that the Claimant had said that she was willing to sign the Agreement, yet she could not have known what it was she was signing if she had not seen it because she had not gone home.

21. Tellingly, in my view, despite being in frequent direct contact by WhatsApp, there was no message either notifying the Claimant that the contract had been sent out or chasing for its return. R1's contention was that she preferred to speak to the Claimant directly so that she could make sure the Claimant understood rather than saying she did not receive a text. I do not regard that as credible. Setting out the point in writing, by way of follow up or confirmation of any such discussion, was an obvious course so that there could be no dispute that it had been raised and given its importance. That was all the more important if the Claimant was saying that she had not seen the document, and all the more so if there was repeated prevarication despite having had to ask on four occasions. Indeed an obvious course would have been to send over a copy of the draft agreement (which ran to only three pages) for the Claimant to review by phone. It is clear there was a facility to do so given that the Claimant was sending to R a copy of the relevant logbook page on a daily basis. Nor do I regard it as plausible that, if R1 initially chased for the document to be returned, as alleged, that there would then have been no further reference to it. It is more likely that the absence of any reference to it in the messages between R1 and the Claimant indicates that it was not followed up, consistently with the Claimant's contention that it was not mentioned to her and she did not see the draft agreement.

22. In circumstance where the draft Agreement was not received by the Claimant, and where I do not accept that was any confirmation sought or obtained that it had been received or communication that it had been sent, or any verbal acceptance of its terms, I do not accept that the fact the Claimant continued to work without objection can properly be regarded as having amounted to acceptance of the terms.

23. Whilst I have found that there was to agreement to the draft Agreement of Services in the bundle, there are a number of respects in which in any event that agreement either did not reflect the reality of the agreement between the parties. As to this:

    23.1 Under the hearing of mutuality of obligations it was said that the R2 would offer work to the Claimant on an ad hoc basis and that she was under no obligation to offer or decline such work. That was correct if it related to the offer of a particular assignment, such as the live in position with Client X. But it was not the case that there were then any further offers as such, save to the extent that this applied to the change from an initial placement for a week to an ongoing basis. Indeed it was conceded on behalf of the Respondents, in the course of oral closing submissions, that the obligations to work and to make payment met the minimum required for mutuality of obligation in relation to that assignment.

    23.2 The statement that Claimant was not required to work under the direction and control of "the Contractor" did not reflect the reality. As addressed below, the Claimant was subject to direction by R1, and this was essential in order for her to be able to discharge her regulatory obligations such as to ensure that the care was appropriate and in accordance with the client's preferences.

    23.3 I note that he right to substitution provided only that this applied if the Claimant was "unable" to perform the work but also that there was an unfettered right to send a suitable qualified substitute. However R1 was able to and in some cases did refuse proposed substitutes and was entitled to limit the pool, and exercised that right from September 2022 so as to accord with the client's preferences. It was also incorrect to say that the Claimant was responsible for payment to the relief carer.

    23.4 The statement that the Claimant was responsible for provision of the equipment necessary to carry out the work did not accord with the reality. R1 provided the uniform and gloves. Other equipment, such as the hoist, was provided by the Council. The Claimant was not required to provide any equipment other than her services.

    23.5 The statement that the fees were to be paid on receipt of an agreed invoice also did not accord with the reality. Payments were made weekly, in advance of any invoice (or remittance note) drawn up by the accountants, and nor was the Claimant required to provide such an invoice. I address this further below. The statement that the fee was £700 per week (equating to £100 per day for a seven day week) was also an inadequate statement of the position. It ignored the different rate for bank holidays.

23.6 The draft terms stated if it was necessary to "rectify" any work performed by the Clamant ("or her delegate") she was responsible to ensuing the work was rectified and would bear any costs of doing so. That was ill-suited to a term related to the provision of care services. In any event I am satisfied that it did not reflect the reality. The carers who provided cover on days off were retained by and paid by Rs for that work. There was no discussion of the Claimant being responsible for their work and I do not accept that it reflected the reality of the mutual expectations of the parties.

23.7 As to exclusivity of service, I accept that there were no restrictions imposed which prevented the Claimant accepting other work provided that (as was necessarily implicit) this did not conflict with the provision of the services. That would prevent her taking other work whilst on shift. As R1 accepted, to take an extreme example, it would prevent her taking another role which disabled her for a long period from being able to work for Client X. That would be inconsistent with the assignment that she had accepted of being one of the two live in carers assigned to Client X.

(6) Payment by R2 and alleged related discussion

24. Payments to the Claimant were made by R2. At the Claimant's request they came to be split between two bank accounts. R1's evidence was that this was requested at the time of the Claimant's engagement. I note however that the practice only started from the week of 12 August 2022 (when £350 was paid to one account on 12 August 2022, and the other £350 paid to the other account on 16 August 2022).

25. In her oral evidence R1 stated that, although she had not mentioned R2 during the discussion in the car, this had been raised in the first week of the engagement when the Claimant had called to query the payment by R2. R1 said that she had then told the Claimant that she would not see Blue Crystal Care on the payments, but that it would be R2 trading as Blue Crystal Care. I do not accept that evidence or that there was any mention of R2 other than in the record of payment. There was no mention of this discussion in R1's witness statement or at any point before it was raised during the course of cross-examination. It was not put to the Claimant during her evidence despite her having set out in her witness statement that they had never spoken about the company. The identity of the Claimant's employer was one of the three issues to be determined at this hearing. It was of obvious importance, given that R2 is no longer trading. Had there been such a discussion it is to be expected there would have been some reference to it in R1's statement.

(7) Invoices

26. Rs disclosed a set of invoices which it was contended were sent to the Claimant because she did not have the facility to produce her own. The position in relation to the invoices was unsatisfactory. Upon disclosure of the invoices, the Claimant's representatives noted that they had never been

received (which was also the Claimant's evidence). In response to a request to produce the metadata of various documents which it was said had not been received, Rs provided a sheet with metadata information for various documents, but not the invoices. At the start of the hearing, in response to an application to provide the documents in their native form, with the metadata, Rs agreed to produce this voluntarily. This showed that the invoices had all been produced on 11 October 2023. In response to this point being highlighted, on the second morning of the hearing, Rs produced a letter from their accountants explaining that files had been corrupted when they moved to their new offices on 28 September 2023 and that all invoices for their customers had to be recreated for the years 2021 and 2022.

27. Put at its lowest it is regrettable that there had not been any such explanation earlier despite the correspondence over the authenticity of the invoices. I also note that from the start the invoices record "Remitted to your different bank accounts of Mrs Timbreza". Yet that could not have been stated in any original invoice from April to July 2022 because the practice did not start until mid-August 2022. R1 stated that she arranged for the invoices to be prepared by the accountants so that there was no delay in payment, that they were for "paper trail purposes" and should have been headed "Remittance". However on any view payment to the Claimant was not made at the time of the invoices or against or by reference to the invoices, since they refer to monthly amounts and are dated at the end of the month, whereas the Claimant was paid on a weekly basis. Further R1 stated that she did not receive a copy of the invoices, whereas if they had been sent out I regard it as surprising that she was not sent a copy for her records. Nor was there anything produced at this hearing directly from the accountants to record that they were sent to the Claimant, and neither was this indicated on the face of the invoices produced.

28. In all, I am not satisfied that invoices were sent out the Claimant. In any event I accept the Claimant's evidence that these were not documents that she saw prior to disclosure in these proceedings.

(8) The regulatory context and power of control and monitoring

29. I accept, as submitted on behalf of the Claimant, that part of the relevant context in determining the applicable terms of engagement, is the regulatory context. As R1 accepted, the provision of care to Client X was a Regulated Activity within the meaning of Schedule 1 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (SI 2014/2936) ("the 2014 Regulations"). As the care manager and registered person, R1 was under a statutory obligation, amongst other matters, to comply with the requirement that care and treatment of service users must (a) be appropriate, (b) meet their needs and (c) reflect their preferences (Sch 2 para 9 of the 2014 Regulations. The 2014 Regulations set out more specific instances of this, such as:

    29.1 the requirement that the nutritional and hydration needs of service users must be met (Schedule 2 para 14);

29.2 in relation to investigating and taking necessary and proportionate action in relation to any compliant received (Schedule 2 para 16);
29.3 establishing systems and processes to assess monitor and improve the quality and safety of the services provided and maintaining securely an accurate, complete and contemporaneous record in respect of each service user of the care and treatment provide and decisions taken in relation to care and treatment provided (Schedule 2 para 17); and
29.4 a requirement that sufficient numbers of suitably qualified, competent, skilled and experienced persons are deployed to meet the requirements (Schedule 2 para 18).

30. As such I consider that it was necessarily implicit in C's terms of engagement that R1 had the right to give instructions to procure compliance with steps required to meet those obligations. The evidence of the dealings between the parties indicates that this was the case in practice.

31. One illustration of this was in relation to the uniform (a blue overall) which R1 provided to the Claimant. R1 also provided gloves for the cares to wears. R1 herself referred to the overalls as a "uniform". The Claimant's understanding was that it was implicit in the fact that the uniform had been supplied to her that she was required to wear it, and she did so other than on the day it was washed. I consider that it is more likely that the uniform was worn when doing housework but not when caring for Client X. R1's evidence that Client X did not like staff wearing the uniform was confirmed by KD who stated staff work the overalls for doing the housework but not when looking after Client X as Client X did not like staff wearing them. That requirement was conveyed to R1. R1 accepted that she was entitled to give instructions as to when the uniform was worn. That was necessary in order to be able to procure that the care met the client's preferences. More broadly R1 accepted that she had the right to give instructions to the Claimant to do what was required to meet the client's needs.

32. Similarly it was necessarily implicit that R1 had the right to give instructions as to what food was or was not given to Client X. Consistently with this, there are instances of such instructions being given in the WhatsApp exchanges. On 20 April 2022, R1 noted that she had instructed the other carer not to give more rice as Client X was putting on weight. In a further text R1 gave instructions not to give large portions.

33. Again it was necessarily implicit that R1 could give instructions relating to other aspects of the care provided. One instance of this was a text from R1 requesting that the Claimant put "Vickes" on Client X's feet, back and chest before she went to bed. Whilst framed as a request, in practice it amounted to an instruction, which it would was not permissible for the Claimant to ignore. Again the contrary would not have been consistent with the regulatory regime and, I am satisfied, the mutual understanding of the parties.

34. Consistently with the regulatory requirement, R1 was required to send a copy of the log each day. A further illustration of R1's power to give instructions is

that on 20 April 2022 R1 noted she had told the other carer that it would be the Claimant who would be writing in the logbook and not to do things herself but always call the Claimant. R1 also had the right, which she exercised, to give instructions as to the manner in which the log book was completed. Again, such a power was necessary implicit to accord with the regulatory requirements, and was the basis on which the parties operated. Instructions were given as to this on two occasions. R1 explained the need to shorten what was written down. On the second occasion, after about six months, the Claimant and her co-carer were given (verbally) a list of five specific matters that had to be written down; what kind of breakfast was give, what lunch, if something happened of which R1 needed to be informed, what kind of exercise was given, and details of any medication given.

35. The log book entries had to be sent by R1 to the CQC and were also reviewed by R1, which was an important element in monitoring the service provided by the Claimant and the other carers. Some entries were also required to be sent to R1's brother, Ram Thamby, who was engaged as field manager. A further form of monitoring was that Mr Thamby and another carer also attended the premises on a weekly basis to check all of the forms and logbook entries were up to data and the mediation records. After one visit Mr Thamby reported back to R1, who relayed to the Claimant, that she and her then co-carer were looking after Client X well. There was also monitoring outside of those visits. One instance is that on 26 April 2022 and 29 April 2022, R1 asked the Claimant to report back on what her co-carer at the time prepared for the meals that day and required photographs of this.

36. The documents produced for these proceedings by Rs include a Confidentiality Policy. Whilst Rs maintained that there was a copy kept at the client's premises, the Claimant disputed that she saw a copy of this. It is unnecessary to resolve that dispute for the purposes of the issues before me. I note however that the policy provided that contractors were required to consult their "immediate supervisor or manager" if they were unclear on any asked of the policy. As R1 accepted in the course of her oral evidence, she was indeed the Claimant's line manager.

37. There was also a disciplinary and a grievance policy which applied to the carers. R1 explained that in the first instance misconduct could lead to a verbal warning and the next step would be termination of the engagement.

38. There was some dispute between the parties as to the extent of discretion afforded to the Claimant. One instance was as to whether the Claimant required permission before calling a doctor. I accept that in practice if there was a matter of urgency the Claimant might call a doctor and then report back to R1. In other cases she would discuss with R1 in advance that she was doing so. In any event, as addressed further below, what matters is R1's right of control.

(9) Replacement carers and time off

39. When the Claimant wanted time off she made a request of R1. As noted above, the notice requirements had been agreed at the outset and also made clear that time off could be refused if no relief carer could be found. One instance where time off could and was refused was also if both of the two regular live in carers requested time off at the same time [**C29**]. Whilst R1 had the right to refuse time off if sufficient notice was not given, in practice there was some flexibility such that upon request R1 was willing (as a matter of discretion) to allow time off if someone to cover could be found.

40. Over the time that the Claimant was engaged, cover was provided by two carers provided by R1, and 5 or 6 who were introduced to R1 by the Claimant, though each of them also had other jobs. Those who were found by the Claimant were paid directly by R1 (or R2) for the shifts that they worked. Indeed on one occasion the Claimant was paid a bonus to thank her for carers introduced.

41. The need for suitable carers, and to comply with client wishes, did however necessitate that R1 retained a right to place limits on who could provide cover when the Claimant took days off. During the course of the engagement R1 could and did place limits on the number in the pool who could cover and who they could be. In September 2022 KD complained that there were too many carers coming to see Client X. As a consequence when the Claimant put forward another friend who she said could come as her reliever, R1 refused, saying it had to be Virgie (another carer who had previously covered for her) otherwise the family would complain. In another case R1 took exception to certain comments made to her by one of the prospective carers who the Claimant had introduced (Sheila) and told the Claimant that Sheila would never work for R1 again.

Relevant legal principles in relation to employment status

42. So far as material, s.230(1) to (3) ERA provides:

> "(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."

43. As set out above, the definition of a worker in the WTR is that same as in s.230(3) ERA. It is unnecessary to set out the definition of employment and employee under s.83 EqA in the light of the agreed position that the position will be the same as whether the Claimant was a worker for the purposes of s.230(3) ERA. The same applies to the definition of employee under s.171 of the Social Security Contributions and Benefits Act 1992 in the light of the parties' agreement that my finding as to the whether the Claimant was an employee under s.230(1) ERA will be determinative of that issue.

Contract of employment

44. There are necessary but not necessarily sufficient requirements for an employment contract that:
    44.1 There is mutuality of obligation, usually in the form of an obligation on the employer to provide work or pay a wage or other remuneration and the obligation on the employee to accept and perform work; and
    44.2 An obligation of personal service; and
    44.3 The employer must have a sufficient right of control to be consistent with an employment relationship:

    See **Ready Mixed Concrete Ltd v Minister of Pensions and National Insurance** [1968] 2 QB 497 at 515A-F.

45. If those conditions are satisfied there must still be a multifactorial evaluation as to whether standing by to consider the position as a whole, there was a contract of employment. The above necessary requirements are part of that overall assessment together with all other circumstances pointing towards or against a contract of employment, subject to being matters which were known or could reasonably be known to both parties and would be admissible for the interpretation of contracts: see **Revenue and Customs Commissioners v Atholl House Productions** [2022] ICR 1059 (CA) at [123].

46. In **Uber BV v Aslam and others** [2021] ICR 657 Lord Leggatt (with whom the other Lordships agreed) noted (at [76]) that it is wrong to treat the written terms as even a prima facie starting point since the efficacy of the statutory

provisions would be undermined if, even where an employer is in a position to dictate contract terms, a putative employer could determine whether a person was prime face to be classified as a worker by the way the terms were framed. Instead, even where there is a formal written agreement, the tribunal must make its finding on the basis of (a) the language of the agreement, (b) the way in which the relationship operated and (c) the evidence of the parties as to their understanding of it (paras [84,85]). He added (at [85]) that:

> "This does not mean that the terms of any written agreement should be ignored. The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other. But there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties_ true agreement just because an individual has signed it. Furthermore, as discussed, any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded."

47. In **Ter-Berg v Simply Smile Manor House Ltd and others** [2023] EAT 2, the EAT summarised the effect as being that in a case where the true intention of the parties in reality is a live issue, it is necessary to consider all the circumstances of the case which may cast light on whether the written terms truly reflect the agreement, and to do so having regard to all the circumstances (including any unequal bargaining power) rather than being confined to conventional principles of contractual construction (see at [32, 40-47). The guidance in **Uber** was in the context of whether a person is a worker but it is also applicable to whether a person is an employee: **Ter-Berg** at [47].

48. The EAT also considered that whilst a term stating that a person is not a worker or employee will not make a difference if other features indicate that as a matter of law the relationship is one of employment, in a scenario where the parties could properly have chosen to form an non-employment relationship, and there are factual features that point both ways, the clause may be relevant or tip the balance (see at [65-70]

49. As to mutuality of obligation, there must be an obligation on the employee at least to do some work, and a corresponding obligation on the employer to pay for that work. The fact a purported employee is entitled to refuse work is not necessarily inconsistent with mutuality of obligation, or an obligation of personal service, provided that there is an obligation to do at least some amount of work personally: see eg **RyanAir DAC and another v Lutz** [2023] EAT 146 at [180]. This may though call for a factual assessment of whether any refusal is so extensive that there is no obligation even to do a minimum of work.

50. If there are a series of engagements, the offer and acceptance of work in relation to a particular engagement is sufficient: see eg **Sejpal v Rodericks Dental Ltd** [2022] ICR 1339 (EAT).

51. Mutuality is closely related to the obligation of personal service (as is apparent from the formulation in **Ready Mixed Concrete**. As to the obligation of personal service, as explained in **Stuart Delivery Ltd v Augustine** [2022] ICR 511 (EAT) at [39-46, 56-67]:

    51.1 The focus must remain on the statutory language of whether the Claimant was under an obligation personally to perform the work or provide the services.
    51.2 If a person has an unfettered right to substitute another person to do the work of perform the services that is inconsistent with an undertaking to do so personally.
    51.3 A conditional right may or may not be inconsistent with personal performance depending on nature and degree of the fetter on a right of substitution. The fetter may for example arise from the grounds on which a substitute could be sought or a limit on the pool from which the substitute could be sought. That was the case in **Stuart Delivery** where there was only the hope that someone from a limited pool would fill a slot that the worker sought to release, and the employer's model was reliant on the worker turning up for work to which they had signed up. The dominant feature of the contract was an obligation of personal service and the facility to appoint a substitute subject to significant limitation did not negate that.
    51.4 The assessment as to the effect of the fetters on substation is one of fact and degree in the particular circumstances of the case.

52. In **RyanAir** the EAT noted, at [186], that the fact that a fetter on the right to substitute arose from regulatory requirements did not make it any less a fetter. As noted above, the regulatory context is also in my judgment material when assessing the obligations that were necessarily implicit in the agreement.

53. The fact that an agreement can be terminated, or that this can be done without notice, does not prevent there being the requisite obligation in the period prior to termination: **Nursing and Midwifery Council v Somerville** [2022] ICR 755 (CA) at [55].

54. As to the issue of control:

    54.1 In **Ready Mixed Concrete** it was said (at 515F) that:

> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted."

54.2 The key question is whether there is to a sufficient degree a contractual right of control over the worker, rather than whether in practice the worker had day to day control over his own work. All aspects of control are relevant to the question, and the focus is on the terms of the contract, express or implied.

54.3 The extent of control remains relevant to the overall assessment, even there the putative worker establishes sufficient control to satisfy the pre-condition for an employment relationship: see **Atholl** at [76] (referring to **Augustine v Econnect Cars Ltd** UKEAT/0231/18/OO, 20 December 2019 where the worker's autonomy in choosing whether, when and how often to work for the company pointed away from a contract of service despite being subject to a high degree of control in the way in which he carried out his duties).

Worker status?

55. Under section 230(3)(a) ERA the requirements for a worker relationship are that:
    55.1 There is a contract between the parties (whether express or implied or in writing or oral).
    55.2 Under the contract the individual undertakes "to do or perform personally any work or services" for the putative employer.
    55.3 The status of the putative employer under the contract was not that of a client or customer of any profession or business undertaking carried on by the individual. I refer to this, by way of shorthand only as the client or customer exception.

56. In relation to the client or customer exception, whilst keeping sight of the statutory wording, two factors that have typically been regarded as material are:
    56.1 The extent of subordination/ dependence of the putative worker and the degree of control exercised by the putative employer over the work or services (see **Uber BV v Aslam** [2021] ICR 657 (SC) per Lord Leggatt at [87]).
    56.2 Whether the putative worker actively markets her services as an independent person or whether to the contrary she is recruited by the principal to work for that principal as an integral part of the principal's operations: see **Hospital Medical Group v Westwood** [2013] ICR 415 (CA).

Discussion

(1) Identity of the employer

57. I am satisfied that the Claimant's employer was R1, and not R2 or any other company. The agreement was made with R1 and there was insufficient said or done to communicate that R1 was acting only as agent for any other

entity. In so far as she mentioned working for BCCA, that does not alter the position given that it was how she registered herself as a sole trader with the CQC, and there was nothing communicated to the Claimant to indicate it was the trading name of any limited company or other entity. I refer also to my findings at paragraphs 7 to 9 above. In communication with the Claimant, R1 did not draw a distinction between herself and any other business in asking the Claimant to tell the client that that Claimant had worked for her on and off for two years or in referring to other staff as working for her (or not being willing to have them work for her). Further, the Claimant was working on behalf of BCCA (the business under which R1 was registered with the CQC), as indicated to her by the name on the log book, again without anything to indicate that was a trading name of R2, and KD was also aware of any other company involved. The fact that payment was made by R2 is not sufficient to lead to a different conclusion. The mere fact of using a company to make payment does not necessarily entail that the agreement was with that company, and is insufficient to do so in this case. In the light of my findings as to the draft agreement, it is unnecessary for me to determine whether the position would be otherwise if she had received, or communicated (by words or conduct) her acceptance of, that draft agreement. The same applies to the invoices.

(2) Was the Claimant employed under a contract of employment?

58. I turn to the issue of whether the Claimant was an employees in the sense (as in s.203(1) ERA) of being employed under a contract of employment.

(b) Mutuality of obligation

59. In his oral closing submissions, Mr Akram for the Respondent accepted that the requirement for mutuality of obligation was satisfied in relation to the engagement with Client X, though he submitted that the low level of obligation upon the Claimant was relevant to the overall determination of whether the Claimant was an employee. I agree both that there was sufficient mutuality of obligation, and that an assessment of the extent of the obligation is a relevant factor for me to take into account in relation to whether there was an employment relationship.

60. Although the Claimant was not told of any limit on the days off she could take, she was recruited as one of the two carers to provide regular live in care for Client X, initially for a week and then for an indefinite period. At least one of the two regular carers had to be on duty together with any replacement carer. I am satisfied that it would be inconsistent with that arrangement for her to be under no minimum obligation to provide her services. It would have been in conflict with her role as one of the two regular live in cares, taking into account the context of the for continuity and certainty of care, for her days off to be so extensive that she would in reality not be one of the two regular live in carers.

(c) Personal service

61. The above considerations are also material to whether there was a sufficient obligation of personal service. This was not a case where there was an unfettered right to substitute another person to do the work or perform the services. Further the restrictions and nature of the obligations were such that in my judgment the requirement of personal service was satisfied. In addition to the factors noted in the previous paragraph, R1 was entitled to (and in the course of the engagement did) limit the pool of carers from whom there could be a replacement, or to object to particular carers for reasons that were not limited to their qualification to do the job. It was not the case that when replacements came they were carrying out part of the Claimant's obligations on her behalf. Rather the position was that if the Claimant gave due notice of time off and a replacement was available, or if in her discretion R1 allowed the Claimant time off despite not giving sufficient notice, that it was no part of the obligation under the contract for the Claimant to work on those days. Further the replacements, even where introduced by the Claimant, were then engaged directly by R1 and paid by R1 (or any payor company on her behalf).

(d) Control

62. I am also satisfied, having regard to my findings at paragraphs 29 to 38 above, that there was a sufficient right of control to be consistent with a contract of employment. Indeed this was essential in order for R1 to be able to comply with her regulatory obligations. In closing submissions emphasis was placed on behalf of Rs upon various other aspects relating to the detail of the Claimant's work in which it was said that the Claimant had discretion, such as in relation to doing housework or in exercising judgment over how and when to check the client's blood pressure. I do not regard this as of particular assistance on the issues for this hearing. What matters is the extent of R1's right of control, as to which as noted above the regulatory context is material. Whether the Claimant could decide herself on matters such as the order in which to do housework, or whether to take a blood pressure reading or could exercise some discretion as what to food to cook, takes matters no further. R1 monitored and was able to give instructions on the key aspects of the service, so as to ensure the care provided was appropriate, met the needs of the client reflect the client's preferences.

(e) Multi-factorial assessment

63. I turn to consider whether, standing back and looking at the accumulation of detail relating to all the aspects of the engagement, there was a contact of employment.

64. It is the case that it was made clear that the Claimant was being engaged on a self-employed basis, and that she would be responsible for her own tax and holiday pay and would not be paid on day's off). However the description of the relationship (and the consequent treatment such as in relation to tax and holiday pay) is not determinative; at most it may be

material if other factors are equally balanced. Nor do I regard it as material one way or another than R1's accountant was involved in arranging the registration as self-employed (or that ultimately it was done by the Claimant).

65. Factors pointing towards an employment relationship include the following:
    65.1 The extent of the element of integration in the business including the provision of a uniform and the holding out the Claimant as working for R1;
    65.2 The application of a disciplinary and grievance procedure,
    65.3 the elements of monitoring and giving feedback on whether the job was being done well (and by implication the right to give feedback over whether it was being done badly);
    65.4 The fact of being paid on a weekly basis for the time worked rather than payment only being made against an invoice and that the Claimant was not required to submit invoices;
    65.5 That the Claimant was in a live in role, where the accommodation provided formed part of the consideration for the role. I accept that his forms part of the picture in assessing the overall nature of the relationship. It is indicative of an added element of dependence or vulnerability in that termination of the assignment would also meant that the Claimant would lose her accommodation, albeit that she Claimant was in any event not permitted to be there on days off.

66. I regard the above factors as being relatively marginal in the overall assessment. Of greater weight, in my judgment, is the extent of the right control over the Claimant's work. I am satisfied that the right of control was high in relation to the periods when the Claimant was working. That was necessarily so because the right to given instructions as to how the care was provided was necessary to comply with the regulatory requirements. That was not merely a matter of regulatory obligation, and it was necessarily implicit in the agreement and this was reflected in practice in instructions given such as in relation to food and how the log book should be completed, and in R1 in substance acting as the Claimant's line manager.

67. However this is not a case where it is possible to regard each shift or period of shifts as separate engagements and to consider whether there was an employment contract in relation to them. There was not a separate offer and acceptance amounting to a distinct contract in relation to each shift. There was an agreement in relation to the engagement as a live in carer for Client X, initially for a week and subsequently (and at the relevant time in relation to the present claim) on an ongoing basis. It is therefore an important issue in my judgment is the extent of control over working hours, and the extent to which when the Claimant worked was within her own control.

68. In relation to this the hours of work for a shift was within the control of R1. The shifts were set by R1 according to the client's needs. There was also the right to direct when the shift would include a night shift in the sense of sleeping in the same room as Client X, and that when this was done the other carer would prepare the meals. There was also some control in relation to time off work in the sense of the notice requirements (subject to the discretion to allow time off if the requirements were not met) and the

ability to refuse time off when a replacement was not available.

69. However there were no set limits on the amount of time off that could be taken subject to it being consistent with the implicit requirement of being consistent with the role undertaken as one of the two regular live in carers for Client X. The point at which the extent of time off taken was so extensive as to be inconsistent with or in conflict with that role was not clearly defined. The effect was to leave the Claimant with considerable control over the days on which she would work, subject to a replacement being available and subject to not crossing the line, which was difficult to draw with precision, that it was in conflict with the minimum obligation required as one of the two regular live in carers. The Claimant's own evidence as to her understanding that she could take as many days off as she wanted was in my judgment reflective of this. Further, whilst time off was dependent on replacements being available, and they were drawn from a limited pool (as came to be required to meet the client's needs), she was able to supply people to that pool (subject to any objection by R1). In practice, finding a replacement was not problematic, though whether that would have been the case if the Claimant had taken to take more extensive periods off was not tested.

70. In all I accept that the considerable flexibility which was afforded to the Claimant as to when she would work is an important indicator against the relationship being one of employment. Provided she gave notice and a replacement was available she had considerable scope to vary the periods during which she worked. Nor was she under restrictions on what she did on her time off. The extent to which in practice she made use of that flexibility, and the extent of time she did in fact take off, is not to the point.

71. Standing back, I consider that having regard to that substantial element of flexibility and control which the Claimant retained as to her hours of work, and considering this alongside the other elements and features of the relationship, and despite the level of control necessarily implicit in the regulatory context, the contract was not one of service within the meaning of s.230(1) ERA.

72. In reaching that conclusion I have not found it necessary to rely on the fact that it was agreed that the Claimant would be self-employed and the associated factors such as being responsible for her own tax. However had I concluded that taking into account the Claimant's control over her working time the position was still only marginal as to whether there was or was not a contract of employment, those factors would have tipped the balance away from an employment contract.

73. It follows from this conclusion, and the agreed position between the parties that the Claimant was also not an employee for the purposes of the claim for statutory maternity pay.

(3) Worker status

74. I am however satisfied that the Claimant was a worker within the meaning of

s.203(3)(b) ERA. In the light of my findings above, I can address this relatively briefly. Clearly there was a contract (which I have found was with R1). It also follows from my findings above that the contract one in which the Claimant undertook to do or perform personally work or services for R1. I am satisfied that R1 was not a client or customer of a profession or business undertaking carried on by the Claimant. There was no evidence before me that she carried on any other business or marketed her services to others during the period of the engagement. She was held out as one of the two regular carers working for R1, having come back to work for R1 having done so on and off for two years. R1 had the right to exercise control to a high degree in relation to how the work was carried out, as was necessarily to fulfil the regulatory requirements.

75. I add that, having regard to my findings as to the reality of the position as noted at paragraph 23 above, I would have reached the same conclusion as to worker status had I found that the Claimant had received and agreed to the terms of the draft agreement of services.

76. It follows from this conclusion, and the agreed position between the parties, that the Claimant was an employee for the purposes of s.83 EqA. The same also applies to being a worker for the purposes of reg 2 of the WTR.

Conclusion

77. Since the Claimant was not employed under a contract of service, the claims dependent on that status, namely for breach of contract (notice pay), unfair dismissal and maternity pay, must be dismissed against both Respondents. The remaining claims against the Second Respondent must also be dismissed in the light of my finding that the employer was R1. The remaining claims, which depend upon worker status, or being an employee under the EqA, will continue.

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Employment Judge J Lewis KC
Date: 8 February 2024

Sent to the parties on:
9 February 2024

For the Tribunal Office: