EMPLOYMENT TRIBUNALS

Claimant: Mr V Mihailescu

Respondent: Better Lives (UK) Ltd T/A Bluebird Care Ipswich

HEARD AT: BURY ST EDMUNDS **ON**: 26th May 2017

BEFORE: **Employment Judge Laidler**

REPRESENTATION

For the Claimant: In person (Ms Durrant Interpreter)

For the Respondent: Mr Soutter-Green (Counsel)

JUDGMENT

1. **The Claimant was an employee working under a contract of employment.**

2. **The Tribunal therefore has jurisdiction to determine complaints requiring employee status.**

3. **In the alternative the Tribunal would have found the Claimant to be a 'worker' and entitled to bring claims under the Employment Rights Act 1996 requiring that status.**

4. **A Preliminary Hearing will be listed to clarify the claims and list the full merits hearing.**

REASONS

1. The proceedings in this matter were issued on the 24th October 2016 in which the Claimant brought claims for notice pay, holiday pay, arrears of pay and other payments. In it's response received on the 25th November 2016 the Respondent denied that the Claimant was an

employee or a worker of the Respondent asserting that he was self employed. It therefore stated that the Tribunal did not have jurisdiction to consider any of the claims being brought by the Claimant.

2. A Preliminary Hearing was listed to determine the Claimant's status, clarify the claims and determine whether the Tribunal had jurisdiction to hear any or all of the claims. That hearing was listed for the 16th February 2017.

3. On that day the Claimant failed to attend and applied for adjournment on medical grounds. In accordance with Orders made on that day in his absence the Claimant submitted medical evidence that he had been hospitalised and undergoing tests and had been unable to attend. This hearing represented the re-listed hearing.

4. For this hearing the Tribunal was presented with a bundle of documents running to 428 pages. Evidence was heard from the Claimant and from Atul Dhir, Director of the Respondent. Those witnesses had prepared typewritten witness statements which the Tribunal read and upon which they were then asked further questions. In view of the amount of evidence and the time allocation it was only possible for the Tribunal to hear the evidence on the issue of the Claimant's status. The claims were not further clarified and the matter needed to be reserved.

5. From the evidence heard the Tribunal finds the following facts.

THE FACTS

6. There is no dispute that the Claimant entered into a contract agreement with the Respondent which is signed and dated the 30th April 2015. The Claimant is at all times described as an employee and Mr Dhir in oral evidence accepted that this amounted to a contract of employment. Indeed the clauses in the document are consistent with a contract of employment.

7. In recording the start date the contract states at Clause 5 that no period of employment with a previous employer counts to a period of continuous employment with the Respondent. The employee warrants he is entitled to work in the UK.

8. The contract contained a probationary period of 3 months and during that period either the employee or the Respondent could terminate on one weeks notice.

9. In Clause 7 it was made clear that in view of the role of Domiciliary Care Worker the location of work could vary. As such the employee had no fixed place of work but would be expected to perform duties "at any location that is within reasonable travelling distance of the employee's home as determined by Bluebird Care".

10. The Claimant was to be paid the amount set out in the Respondent's "Carer's Schedule" and reserved the right to the employer to deduct any monies due to it from the salary to be paid. There is also a clause with regards to repayment of training costs.

11. Clause 10 dealt with hours of work and provided as follows:-

"This is a 'zero hours' contract". The employee will work such hours and at such times as are agreed between the employee and Bluebird Care. The company is not under an obligation to offer the employee any work and has specifically reserved the right to reduce the employees working hours whenever necessary. There is emphatically no guarantee of work or of minimum hours under this contract".

12. The contract then contained clauses about holiday pay, sickness and absence from work, termination and the notice period. In addition there is a post termination restrictions clause stating that the employee for a period of 6 months post termination, shall not:-

"a seek to contact or influence in anyway existing employees of the company or to solicit them to change their employment or for any other reason.

b contact any existing customer or their family, friends or other stakeholders for any reason.

c set up as a director, partner or owner of a competitor organisation.

d accept a post involved in the delivery of any form of care service from an existing customer of the company even if the customer should approach the employee."

13. Not only is the term employee used throughout, but there are numerous references to "terms of employment" for example Clause 28 'Changes to Terms of Employment' and Clause 30 'The Terms'.

14. The Claimant was required to undertake a CRB check and the fee in relation to that and for provision of his uniform was repaid to the employer through the payroll.

15. It is the evidence of Mr Dhir that "a matter of days of the Claimant commencing with the Respondent he approached me and requested to go self employed" (Paragraph 4 of his witness statement). He asserts that the Claimant believed it would be more profitable for him and provide him with greater flexibility then he would enjoy under a zero hours' contract. Mr Dhir states that thereafter the Claimant was paid gross with no deductions for Income Tax and National Insurance. He states that he explained to the Claimant he would not be entitled to paid holiday. The Claimant he asserts was still adamant he wished to go self

employed. It is the Respondents case, clarified at this hearing that as a result the Claimant was neither an employee nor a worker.

16. The Claimant was emphatic in his denial that there was any such conversation. His evidence was that he had no intention of becoming self employed. His wife already worked for the Respondent and he had found out from her what it meant to be self employed. The Claimant who is from Romania had worked as a manager in his own country and had experience of what being self employed meant. The Judge specifically asked the Claimant what his qualifications were from his home country and accepts that he had graduated in 1982 specialising in accountancy. He understood that employment law rights were similar in Romania to in the United Kingdom. He had therefore understood that being self employed would not give him the usual employee protections.

17. The Tribunal accepts the evidence of the Claimant. It was entirely convincing that he understood that being self employed would not give him the relevant employee status that he required. There is no documentation produced by the Respondent of this conversation and no documentation produced to evidence any change to the Claimant's contract of employment. In evidence Mr Dhir accepted that. In answer to a question from the Judge he stated that when the Claimant became self employed the office staff should have sent him a self employed contract to sign but it looked as if they had not done so.

18. The Tribunal heard no evidence about the appropriate Appendix 1 Pay Schedule to the Contract and makes no findings on that for the purposes of this decision.

19. In the Tribunal bundle were seen documents headed "Visits for Mr Vasilica Mihailescu from Monday 20th April 2015 to Sunday 25th December 2016. The header to this document states it was printed by the Respondent on 13th December 2016 and it therefore appears it was printed for the purposes of these proceedings. It shows each visit the Claimant was allocated and the time of each visit. From this it can be seen that the Claimant worked virtually continuously from the time he commenced working for the Respondent. It was put to him in cross examination that he had had 3 days off and the Claimant confirmed that had been for his wife's Birthday. It was not suggested to him by reference to this document that his work with the Respondent had been anything other than continuous.

20. In his questions to the Claimant Counsel for the Respondent relied upon various clauses in the contract as not having been complied with in the Claimants case and that therefore in his submission that amounted to evidence that the Claimant was not an employee.

21. The first clause relied upon was that of the Probationary Period. The Claimant was clear however that he did have weekly meetings with the

Care Coordinator. There is no documentation about the probation period.

22. Counsel then relied on Clause 7, the place of work, stating that the Claimant was entitled to refuse work if it was not within a reasonable travelling distance of his home. The fact is however from the evidence as stated above that the Claimant did not refuse work on that basis.

23. Counsel also relied upon the fact that the Claimant was not subject to the Disciplinary Procedure referred to in the Contract. As the Judge pointed out that might be because there were no disciplinary matters. Counsel then sought to suggest that the Respondent had in fact received complaints about the Claimant's work. There was no evidence before this Tribunal about those. There was reference to the Claimant's use of language and chain smoking, but the Tribunal was not directed to any specific complaints nor how the Respondent had chosen to deal with these.

24. It was then put to the Claimant that he did not receive paid holiday. That did not appear to be determinative of the issues bearing in mind that that is one of the claims to this Tribunal that he did not receive adequate holiday pay.

25. The Claimant was then taken in the bundle to page 364 onwards, which were copies of documents headed "Gross Pay Advice". These show the gross pay and then list each of the Clients that the Claimant attended and was paid for in the relevant period. They are shown at the top as having been printed on the 13th December 2016 which goes to confirm the Claimant's evidence that these were only produced to him by the Respondent's Solicitors in December 2016 and that he did not receive them at the time.

26. It was further suggested to the Claimant that his wife had been sent in his place on occasions. There was no evidence of this having occurred and the Claimant was adamant that that had never happened. The Tribunal accepts that evidence in the absence of anything to contradict it. As already stated the Claimant's wife was a carer with the Respondent and it may have been that she chose to undertake certain work rather than the Claimant, but that is different to saying that the Claimant having accepted an assignment was then able to send his wife to it.

27. The Tribunal accepts the Claimant's evidence that he was sent a schedule of his work for the following week. This was prepared by the Care Coordinator. Mr Dhir did not deal with this on a daily basis and the Claimant is therefore in a better position to give evidence as to how the work was allocated to him than Mr Dhir.

28. The Tribunal was also taken to correspondence passing between the Citizen's Advice Bureau and the Respondent once the Claimant sought

advice. In response to the first letter Mr Dhir replied on the 29th July 2016 that the Claimant "works for us through an Agency, was paid by the Agency so the question of underpay does not arise". He also stated the Claimant was working as self employed "and has the right to accept and refuse work which he has been doing and he understands that being self employed the holiday pay does not arise". He stated the Claimant was responsible for his own Income Tax and National Insurance.

29. The Citizen's Advice Bureau responded stating that the Claimant was not paid by an Agency, but by the Respondent and was not self employed but employed by them. They made reference to the contract agreement. In response to that letter the Respondents stated they were seeking advice. Mr Dhir's position in cross examination was that he did not check their records before writing his letter and that they do have some Agency workers.

SUBMISSIONS

30. For the Respondent, it was argued that the Claimant was self employed and that he was neither an employee nor a worker.

31. The main consideration must be mutuality of obligation namely for the employer to provide and the employee to accept work. Without that there can be no employment relationship. It was submitted from the evidence that the Claimant says he entered into an employment contract which accurately reflected the true position. The Respondent says however that it did not as a few days later the Claimant asked to become self employed. The evidence does not support that the Claimant was either an employee or a worker.

32. The clauses within the contract were not enforced and did not apply to the Claimant.

33. There was no probationary period as set out in Clause 6. Although the Claimant says he had weekly meetings these were not evidence of probation.

34. With regard to mutuality of obligation the contract is clear that the employee must undertake work at different locations specified by the employer within a reasonable distance of his home. The Claimant was free to turn down work. He was not obliged to accept work. It was his choice. When the Claimant did not want to do the waking nights anymore he asked to change and the employer did not tell him he had no choice but offered the Claimant different work. In the letter at page 427 the Respondent had offered work to the Claimant to work with his wife and again the Claimant was entitled to and did turn this down.

35. The Claimant was paid gross. That is not disputed. No Income Tax and National Insurance were deducted, and no pension deductions. The Claimant was responsible for making his own Income Tax and National Insurance payments. The proposition put forward by the Claimant that for over a year he did not realise he was being paid as self employed is implausible.

36. At no point was the Claimant dismissed it was simply a matter of him turning down work as he was self employed.

37. The notice provisions were not applicable to him. The post termination restrictions were not enforced because they did not apply.

38. With regard to the suggestion that the Claimant was alternatively a worker the Respondent's evidence is that the Claimant did not have to perform the work personally. The evidence of Mr Dhir was that the Claimant's wife covered for him on occasions. He went further, and said that as long as someone had been checked by the Respondent and known to them they could undertake the work.

39. It is a balancing act and a difficult one that the Tribunal has to undertake. It was submitted the evidence of the Claimant was not clear. It was confusing as he did not request pay slips and was aware that others in the Respondent were self employed. That adds credence to the Respondent's position as Mr Dhir recalled a conversation with the Claimant and his wife about changing to self employed status. She had been self employed and still works for the Respondent.

40. Counsel for the Respondent did accept that the initial contract document is a contract of employment. Without mutuality of obligation however the relationship cannot be one of employment. The Judge reminded Counsel that his client and he had accepted that the original contractual document was that of a contract of employment. He acknowledged it was difficult to go behind that evidence as that had been accepted by Mr Dhir and it was therefore up to the Tribunal to determine what the relationship was.

41. For the Claimant it was submitted that from the very beginning he wanted to be an employed person and always behaved as such. He had no conversation with the manager and signed no documents changing his status from employee to self employed. No one told him that he was considered anything other than an employee. He never worked for any other third party agency.

42. In his opinion it is wrong to suggest that his wife or any other person did or could have replaced him on his duties. If it is suggested that occurred, when did it occur? His evidence is clear that no one replaced him either his wife or anyone else.

43. He did not miss work at all. No one called him to ask him if he agreed to do the jobs but he was issued with a programme to follow for the next week.

44. There were no complaints against him.

45. When he had been offered work with his wife he had already "fired" by the Respondent and was no longer working for them.

46. He did not get a copy of his contract until December 2016 when given access in these proceedings.

RELEVANT LAW

47. The Tribunal must consider the provisions of Section 230 of Employment Rights Act 1996 which provides: -

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

(c) in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly.

48. No relevant law was referred to by Counsel acting on behalf of the Respondent. He did make regular reference to the need for mutuality of obligation for there to be a contract of employment. It is now well established however that in order to determine whether such exists it is necessary to look at the working periods themselves taking into account their frequency and duration. The Tribunal may be able to infer from the parties conduct the existence of a continuing overriding arrangement amounting to a contract of employment where there has been a regular pattern of work over a period of time.

49. The issue of personal performance is also relevant and was made much of by the Respondent. It was made clear in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 all ER433* that the employee must have agreed to provide his or her own work and skill. As was stated there the classic description of a contract of employment:

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

(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.

(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.

(iii) The other provisions of the contract are consistent with its being a contract of service ...

Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be.'

50. The issue of control is also relevant, namely that ultimate authority over the employee and the performance of his or her work rests with the employer.

51. The Tribunal may also look at how integrated into the organisation the relevant worker was.

52. Of relevance will also be the financial considerations although the payment of Income Tax and National Insurance will only be one of the factors to be considered. Thus the fact that the Claimant was paid gross is not conclusive proof that there was a contract for services rather than of employment.

53. The Supreme Court in *Autoclenz v Belcher* [2011] IRLR 820 made it clear at paragraph 35 that:

> *"…the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."*

54. Giving the judgment of the Supreme Court Lord Clarke referred to the Court of Appeal decision and stated:

> *"With characteristic clarity and brevity Sedley LJ described the factual position as follows:*
>
> *'104. Employment judges have a good knowledge of the world of work and a sense, derived from experience, of what is real there and what is window-dressing. The conclusion that Autoclenz's valeters were employees in all but name was a perfectly tenable one on the evidence which the judge had before him. The elaborate protestations in the contractual documents that the men were self-employed were odd in themselves and, when examined, bore no practical relation to the reality of the relationship.*
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> *105. The contracts began by spelling out that each worker was required to "perform the services which he agrees to carry out for Autoclenz within a reasonable time and in a good and workmanlike manner" – an obligation entirely consistent with employment. Notwithstanding the repeated interpolation of the word "sub-contractor" and the introduction of terms inconsistent with employment which, as the judge found, were unreal, there was ample evidence on which the judge could find, as he did, that this was in truth an employment relationship.*
>
> *106. His finding did not seek to recast the contracts: it was a finding on the prior question of what the contracts were. Rightly, it was uninfluenced by the fiscal and other consequences of the relationship, which were by no means all one way.'*

55. Lord Clarke stated that he entirely agreed with those conclusions.

THE TRIBUNAL'S CONCLUSIONS

56. Neither of the parties sought to argue that they entered into anything other than a contract of employment when the Claimant was first recruited. That document clearly reflected the intention of the parties at the outset. Mr Dhir expressly accepted that this was an Employment Contract. That is the basis upon which the Claimant was employed.

57. The Tribunal does not accept on the facts that the Claimant ever agreed to self employed status. It has no documentary evidence from the Respondent of either the conversation or that there was any change to the relationship.

58. The Claimant was sent work to undertake on a weekly basis. Although his hours varied he worked continuously for the Respondent. He did not refuse to undertake work and neither did he ever send a substitute. The Tribunal had no evidence before it that that was a practice that was accepted by the Respondent, either in relation to the Claimant or other members of staff.

59. The Respondent tried to suggest that the Claimant could send and had indeed sent his wife in his place, but again there was no evidence of that. She works for the Respondent and if that was the case it must have been possible to provide documentary evidence that that was the case.

60. The Tribunal did not find the arguments advanced on behalf of the Respondent to be persuasive in any way whatsoever. To go through the contract stating that various clauses did not apply did not seem to answer the relevant questions. The fact that the Respondent did not enforce post termination restrictions and had not used a disciplinary procedure maybe because they chose not to do so and/or had no cause to do so. It is certainly not determinative of employee or worker status.

61. The Claimant gave convincing evidence that he understood the concept of self-employment and that it was similar in his home country of Romania to in the United Kingdom. He did not ever intend to be self employed, he intended to be a worker or an employes and that is the contract he entered into.

62. The Tribunal is therefore satisfied that the Claimant was an employee working under the contract he entered into on the 30th April 2015. As already noted the Tribunal has not made any findings with regard to the rate of payment and the appropriate Appendix 1 as it was not taken to evidence on that point. Further it has made no findings with regard to how this relationship ended. Those matters will be for the substantive hearing.

63. It follows that the Claimant has the requisite employee status to bring claims under the Employment Rights Act 1996 that require him to be an employee. The claims were not further clarified at this Preliminary Hearing and a further Preliminary Hearing will now be listed to clarify the issues and list the matter for hearing.

64. If the tribunal were wrong in its conclusions as to employment status it would have found that the Claimant was a worker within the meaning of section 230(b).

65. There was a contractual relationship which despite the submissions to the contrary the Claimant undertook to perform work personally. That is the reality of what occurred. There is no evidence to the contrary. This would be particularly important in the highly regulated care sector where workers are dealing with vulnerable individuals. If the Respondent did not require personal service then it had to explicitly make this clear and the conditions that would be required to be satisfied. It is not sufficient for Mr Dhir to say to this tribunal that the Claimant could have sent another carer known to the Respondent when there is no evidence of that being the practice.

66. The Claimant was not 'a client or customer of any profession or business undertaking' carried out by him. It was not even put to the Claimant that he was running his own business. It is not clear to this tribunal how and why the Respondent sought to argue that the Claimant was not a worker.

67. In the alternative therefore the Claimant would have been entitled to pursue claims requiring worker status.

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Employment Judge Laidler, Bury St Edmunds.
Date: 15 June 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS