Case No: 2304930/2020

EMPLOYMENT TRIBUNALS

Claimant: **Ms T Ruwona**

Respondent: **Guy's and St Thomas' NHS Foundation Trust**

Heard at: **London South Employment Tribunals**
On: **17 May 2022**

Before: **Tribunal Judge Milivojevic acting as an Employment Judge**

Representation
Claimant: Ms G Holden, of Counsel
Respondent: Mr N Caiden, of Counsel

RESERVED JUDGMENT

1. The Claimant's claim that the Respondent has failed to pay her the correct amount as a statutory redundancy payment pursuant to S162 ERA 1996 is well founded. The Respondent shall pay forthwith to the Claimant a further sum of £538 to reflect the shortfall in her statutory redundancy payment.

2. The Claimant's claim that the Respondent has failed to pay her the correct amount as a contractual notice payment taking account of S82 ERA 1996 are dismissed.

3. It is not appropriate to make any additional award pursuant to S163(5) ERA 1996 .

4. The Respondent did not unreasonably fail to follow a relevant ACAS Code of Practice. It was not just and equitable to award an uplift to the Claimant's compensation pursuant to S207A TULCRA 1992.

5. It is not appropriate to make an order under S12A Employment Tribunals Act 1996.

Reasons

Introduction

1. The Claimant's employment with the Respondent terminated on 9 April 2020 by reason of redundancy. The Claimant claims that that the statutory elements of her redundancy and notice payments failed to take into account the correct length of continuous service.

2. The Claimant's relevant work history is as follows:

   Period A – 8 July 2002 to 16 October 2011, when the Claimant was working as a Registered Nurse employed by the Brighton and Sussex University Hospitals NHS Trust "Brighton and Sussex".

   Period B – 17 October 2011 to 17 November 2015, when the Claimant was completing a degree in Dietetics, which included placements at various NHS sites. During this period the Claimant also carried out work for Brighton and Sussex via the bank staffing arrangements, and carried out further work in other hospitals as a nurse, through Mayday Healthcare Plc "Mayday", an employment agency.

   Period C -17 November 2015 to 7 April 2017, when the Claimant was engaged by the Respondent as a Research Dietician on a contract expressed to be through the bank staffing arrangements.

   Period D - 10 April 2017 to 9 April 2020, when the Claimant was employed by the Respondent as a Research Dietician on a series of fixed term contracts, until she was dismissed by reason of redundancy.

3. The Respondent calculated that the Claimant was entitled to a contractual redundancy payment which took account of three full years of service. The Respondent denied that the Claimant was an employee prior to 10 April 2017.

4. The Respondent also paid the Claimant 8 weeks pay in lieu of notice. This was the contractual sum due to the Claimant based on three years of service.

5. By way of an ET1 received on 4 September 2020 the Claimant made claims pursuant to S163 ERA 1996 that her statutory redundancy payment was insufficient, and a claim for breach of contract on the basis that her notice pay failed to meet the requirements set out in S86 ERA 1996.

6. The Claimant's claim was that all of her service from periods A, B, C and D should be included as continuous employment when calculating her statutory redundancy payment and her entitlement to notice pay. The Claimant's claim form made it clear that the claim did not include a claim for breach of contract arising out of the Respondent's failure to pay a contractual redundancy payment. At the time the Claimant filed her ET1, no element of the redundancy payment had been made to the Claimant. The Respondent stated that this was because the Claimant had not completed and returned the required declaration. The Tribunal was informed that the Respondent has now paid the Claimant her contractual redundancy payment which reflects three full years of service. This contractual redundancy payment included an element in respect of the statutory redundancy

payment due to the Claimant based on three years of continuous service.

7. In addition to the increased statutory redundancy pay and notice pay, the Claimant also sought additional losses pursuant to S163(5) ERA 1996, being credit card and other charges in relation to missed payments and debts. The Claimant also sought a penalty in accordance with S12A of the Employment Tribunals Act 1996, and an uplift of 25% to reflect an unreasonable breach of the ACAS Code of Practice.

Procedure, documents and evidence heard

8. The Tribunal received a written skeleton argument from the Respondent prior to the hearing, together with a draft timetable and a draft agreed list of issues. The Claimant's written skeleton argument was emailed to the Tribunal shortly before the hearing. The Tribunal was grateful to both Ms Holden and Mr Caiden for their written skeletons, in addition to their oral closing submissions. In reaching this judgment the Tribunal has taken both the written and oral submissions into account, even where these are not repeated in full.

9. In addition to the written skeleton arguments, there was a short discussion at the start of the hearing to confirm the issues. The can be summarised as follows:

List of Issues

a) The Respondent agreed that it employed the Claimant during Period D. The redundancy and notice pay calculations took account of this as a period of continuous service.
b) The Respondent agreed that it engaged the Claimant during Period C. The Respondent's position was that the Claimant was not an employee, and was engaged through the staff bank. The Tribunal had to determine whether the Claimant was an employee during this period. If so, it was accepted that this would count as continuous service with the Respondent, and be aded to Period D when calculating the Claimant's redundancy and notice payments.
c) The Claimant asserts that she was an employee of another NHS body during Period B, or she was otherwise employed in a manner which then transferred to the Respondent at the beginning of Period C. The Claimant asserted that her NHS funded degree amounted to employment with the NHS and that her bank work with Brighton and Sussex and/or Mayday amounted to employment. The Tribunal therefore had to determine the Claimant's employment status during Period B. If the Tribunal considered that the Claimant was an employee during Period B, it would then have to go on to consider the issue of continuous service for both redundancy and notice pay calculations.
d) Despite what was set out in the Respondent's written skeleton, it was conceded that the Redundancy Payments (National Health Service) Modification Order 1993 SI 1993/3167 "the Modification Order" would apply to the Claimant's claim for a statutory redundancy payment. The effect of this is that continuous employment by appropriate NHS employers (ie those listed in Schedule 1 to the Modification Order) would count as continuous employment by the Respondent for the purposes of the statutory redundancy calculation.

e) The Respondent agreed that the Claimant was employed during Period A by another NHS employer within the meaning of the Modification Order. However, unless the Claimant could demonstrate continuous NHS employment through Period C and Period B, then Period A would not count towards the redundancy pay calculation.

f) The Claimant's case was that because she had been dismissed by reason of redundancy, the Modification Order also applied to her calculation of continuous employment for the purposes of statutory notice. If the Tribunal found that the Claimant was employed during Period B then the Tribunal would then need to determine the issue of whether the Modification Order applied to notice pay arising out of a dismissal by reason of redundancy.

g) In the alternative the Claimant's case was that she was transferred between associated employers pursuant to s218(6) ERA 1996, or that she was undergoing professional training which involves being employed by a number of health service employers, pursuant to s218(8)-(10) ERA. Again, depending on the findings in relation to whether the Claimant was an employee during Period B, the Tribunal would need to determine these issues.

10. The Tribunal was provided with a Hearing Bundle and Supplementary Hearing Bundle with a combined total of 1119 numbered pages. The Claimant provided a written witness statement and gave oral evidence, as did Mr Shaun Holsgrove, the Respondent's Head of Payroll and Pensions within the HR Shared Services Department. The Tribunal was provided with a signed statement of Mr Jeff Brazel, a Research Manager/Research Performance Manager employed by the Respondent. Mr Brazel did not attend the hearing to provide oral evidence.

11. The Respondent stated that Mr Brazel was unable to attend the hearing due to ill health, but did not provide any medical evidence to that effect. Mr Caiden invited the Tribunal to determine what weight should be attached to Mr Brazel's evidence. Ms Holden submitted that the Tribunal should disregard the statement on the basis that there was no medical evidence provided as to why Mr Brazel could not attend. The Tribunal decided that it would determine what weight should be attached to Mr Brazel's evidence after hearing the evidence of other witnesses. The weight attached to that evidence is set out in the facts section of this judgment.

12. It became clear during the hearing that the Claimant's bundle contained additional documents which had not been provided to the Respondent or the Tribunal. Ms Holden made an application to adduce these additional documents which she stated were an updated schedule of loss, further documents detailing the Claimant's credit card charges, and documents detailing the payments made to the Claimant during Period B. Mr Caiden did not object to an updated schedule of loss being provided to the Tribunal and stated that he was not in a position to comment on the other documents which he had not yet seen. In response to a question from Mr Caiden, Ms Holden clarified that it was not the case that the additional documents from period B demonstrated a continuous series of payments to the Claimant without interruptions.

13. Other than provision of an updated schedule of loss the Tribunal refused the application to admit further documents at that late stage. The final hearing

had been listed for three hours and both parties had expressed their desire for the Tribunal to be in a position to reach a judgment in the case. Further, the case was previously listed for a hearing on 27 August 2021 which had then been postponed. The Claimant had not provided any explanation as to why the documents, particularly those from Period B had not been provided sooner. By the time the application was made Ms Holden had also completed her cross examination of Mr Holsgrove, relying on the documents already before the Tribunal.

14. In those circumstances the Tribunal decided that it was not in accordance with the overriding objective to admit the further documents. The documents had not been described as being of significant relevance to the case, and therefore the Tribunal decided that allowing the addition of late documents when the hearing had already commenced would not be a proportionate means of determining the case. Admitting the documents would mean that they would have to be provided to the Tribunal and the Respondent, instructions may have to be taken, and there was likely to be further delay in any event. The hearing, which had already begun, was likely to be delayed with the significant likelihood that it would have to be concluded part-heard, causing further delay and expense to the parties, as well as impacting on the Tribunal's ability to hear this, and other cases in the future.

Facts

15. The Claimant was employed by Brighton and Sussex as a Registered Nurse from 8 July 2002 to 16 August 2011. The Claimant also signed up to the Brighton and Sussex staff bank which enabled her to work additional shifts alongside her substantive role [page 42]. That document made it clear that Brighton and Sussex were not required to offer work to the Claimant under the staff bank arrangements.

16. The Claimant commenced her degree in Dietetics in October 2011. During the course of cross examination the Claimant stated that she recalled resigning from her substantive role with the Brighton and Sussex but that she remained on the staff bank. This was consistent with the Claimant's application form for her role with the Respondent for Period D [page 170]. In that form the Claimant stated:

> *"I left my permanent job to study the Dietetics and Nutrition degree full time. I have remained on the nursing bank for the trust and work a few shifts in addition to nursing shifts on the nursing agency."*

17. The Claimant stated that her degree was funded by the NHS. The Claimant's case was that she worked on placements in the NHS during her degree. These were detailed in the Claimant's witness statement as being placement 1 for two weeks at Ports Avenue Medical Centre Barking, placement 2 for twelve weeks at North East London NHS Foundation Trust in 2014 and placement 3 for fourteen weeks at Central London Community Healthcare NHS Trust between 2014 and 2015. This was consistent with the advertisement for the degree [page 515] which outlined that placements would "primarily be in NHS organisations", and that placement 1 would take place in Year 2, placement 2 in Year 3 and placement 3 in Year 4 of the course.

18. The Claimant did not provide any evidence of a separate contract of

employment for any of her placements. Although the degree was described in the Claimant's evidence as being NHS funded, the Claimant did not provide any documents or other evidence which set out the funding provided by the NHS (other than by facilitating the placements set out above) or any obligations between the Claimant and the NHS arising out of a funding arrangement. The Claimant accepted during cross examination that she did not receive any other payments other than through her work for Brighton and Sussex, and Mayday, and student finance and maintenance loans (ie there were no other payments to her from the NHS).

19. Whilst the Claimant had resigned from her substantive employment with the Brighton and Sussex, she remained on the staff bank working in the region of 49 shifts over the course of her four year degree. The Claimant stated that as her degree was funded by the NHS, she considered that she had an ongoing commitment to work for the NHS. However, during cross examination the Claimant conceded that she had chosen to continue to work on the staff bank in order to maintain her nursing accreditation/registration. The Claimant also stated that she had worked mainly weekends on the staff bank so that she could fit her work around her commitments with her studies and also her agency work. During cross examination the Claimant agreed that she had not been able to work every shift offered to her by the staff bank in this period.

20. The statement of main terms and conditions for bank staff which the Claimant originally signed with Brighton and Sussex made it clear that it was not a contract of employment [page 43] and did not

21. With regard to agency work, the Claimant also worked during her degree studies for Mayday. The Claimant would accept work provided by the agency to work in NHS hospitals such as those at Eastbourne and Worthing. The Claimant accepted that she was paid directly by Mayday . This was consistent with the Claimant's application form for her role with the Respondent for Period D [page 170]. where the Claimant described her employer as Mayday Healthcare Plc. The Claimant stated:

> *"I have worked on a part-time basis whilst studying the Dietetics and Nutrition degree. During the summer periods I was able to work more hours as I had no academic assessments"*

22. During cross examination, the Claimant explained that she preferred to work at the Worthing hospital as this was closer to her than the Eastbourne hospital. The Claimant had held discussions to this effect with Mayday.

23. The Claimant commenced her role as a Research Dietician with the Respondent on 17 November 2015. The Claimant had completed her degree at this stage, and although there may have been a short element of overlap, once she commenced the Research Dietician role, the Claimant ceased to work for either Brighton and Sussex or Mayday Plc.

24. The Claimant accepted that she had applied for a role on the Respondent's staff bank and that the written particulars of her engagement were covered by the StaffBank Registration Agreement for Temporary Workers [page 60]. This stated in bold black font:

"There is no obligation on the StaffBank to offer you work once you have registered and you have the right to refuse any work offered to you. Accordingly, this registration agreement does not constitute a contract of employment between you and the Trust."

25. The Claimant was successful in applying for a fixed term Research Dietician role which she commenced on 10 April 2017 with an end date of 9 April 2018. The Claimant's contract of employment stated that her started date and Continuous Employment Date were both 10 April 2017 [page 217]. That fixed term contract was then extended for a further fixed term of two years until the Claimant was made redundant on 9 April 2020.

26. As set out in her witness statement the Claimant asserts that she was an employee from the date when she joined the StaffBank. This was supported by an email from Catherine Briggs, Reward Manager to the Claimant and copied to Mr Brazel on 6 March 2019 which stated:

"Based on the understanding that you were to all intents and purposes working full time on the Staff Bank from November 2015 before taking up your substantive post, I am prepared, exceptionally, to consider the Staff Bank start date in November 2015 as your continuous service date for the purposes of entitlement to sickness absence. I would stress that this is an exception, Staff Bank service is not routinely counted towards entitlement to sickness absence."

27. This required Mr Brazel to change the dates on the Respondent's HR system to record the new start date for the purposes of continuous service.

28. The evidence provided to the Tribunal by the Respondent did not significantly gainsay the Claimant's position. Mr Brazel did not attend to provide oral evidence. Mr Brazel's written statement referred in general terms to the Staff Bank arrangements, and stated that the Claimant's delegated responsibilities could have been covered by other bank or agency staff if she had refused to work an assigned shift. Mr Brazel very fairly addressed an email chain which he was copied into on 2 December 2015 [page 286]. This chain contained a directive from the Respondent which banned temporary and agency staff from working from 18 December 2015 through to 4 January 2016 unless special approval had been received:

"If your department has temp staff that need to be kept on throughout the Christmas period in order to continue service provision and avoid disrupting service to the point of failure; please send an email to the budget holder..."

29. The response to which Mr Brazel was copied into stated:

"...We currently have 2 members of staff within the Diabetes Research team that are paid via agency and bank (and who we are planning to employ until the end of March 2016 and hopefully continue into the new financial year depending on funding) that we will need over the Christmas period, [another staff member] (Agency) and Tapiwa Ruwona (Staff Bank). We are currently short of 3 band 6 nurses within the department (one has left, and 2 are leaving within the next 2 weeks) and have at least 5 studies that will require visits during the Christmas period due to frequent visits. Due to this we will require both Tapiwa and [another staff member] to continue work from 18th

December to 4th January. Having both [another staff member] and Tapiwa joining the team has just about taken the pressure off the department at a really difficult time and I sincerely hope that you will allow us to continue their employment at this crucial time."

30. The email chain of 2 December 2015 and the email from Ms Briggs in March 2019 were consistent with the Claimant's account of working as a substantive part of the team, that she was working the equivalent of a full-time week and that she had studies and patients assigned to her. Mr Brazel's statement did not offer any explanation as to why he thought that either of these assessments of the Claimant's work were not accurate, and/or why he had not raised any concerns about the accuracy of those assessments at the time. This was particularly the case where Mr Brazel was consulted on the draft of Ms Briggs email which included the question "if you are in agreement" [page 370].

31. Mr Holsgrove's witness statement set out that NHS wide terms and conditions did not set out contractual redundancy arrangements for bank staff and it was therefore for the individual organisation to determine if bank work should be taken into account for continuous and reckonable service. The statement continued that the Claimant was engaged during 2015-2017 to carry out short term assignments and did not work continuously during the period. Therefore this work had not been considered by the Respondent to count towards continuous or reckonable service.

32. Mr Holsgrove accepted during cross-examination that he had not worked with the Claimant, nor had he considered the email chains referred to above when making his statement. He did not have any direct involvement with or knowledge of the Claimant's work. His team was responsible for conducting the redundancy calculations but they were not responsible for making the decisions as to whether additional service should be taken into account for those calculations.

33. The redundancy calculation was requested by Marina Jennings, Senior HR advisor. Initially that took into account the Claimant's start date with the Respondent as being 9 November 2015 and a continuous NHS start date of 8 July 2002. That was then challenged by the Claimant's line manager , who at that point was Ms Okolo. Ms Okolo stated that the Claimant had a four year break in NHS service until 2015 when she came back on the staff bank, and that her continuous service commenced in 2017 [pages 407-414].

34. It was not clear that any of those who were responsible for assessing the Claimant's continuous service for the purposes of the redundancy calculation were made aware of the previous emails, nor was it clear why those individuals were not asked to provide evidence to the Tribunal.

35. In his submissions, Mr Caiden also referred to the Respondent's records of shifts worked by the Claimant on the staff bank. He invited the Tribunal to find that there were significant gaps in the shifts worked by the Claimant which demonstrated that she did not work a pattern akin to that of a full-time employee and that she had clearly exercised her right to refuse to work an assigned shift. The Claimant's witness statement provided examples and referred to documents which demonstrated a significant number of those records of her not working were inaccurate. Mr Caiden invited the Tribunal

to conclude that there were still significant gaps. When asked about this submission, Mr Caiden accepted that the Claimant may have been on a rolled up rate of pay in respect of annual leave and that some gaps may have been due to taking leave, although he maintained his submission that were still have been too many gaps.

36. The Tribunal found that the Respondent's records in relation to when the Claimant had allegedly not worked or declined work could not be relied upon. The Respondent did not provide a witness or any documents which demonstrated that the Claimant had refused to work an assignment. Nor had the Respondent provided any evidence in response to the Claimant's assertions (demonstrated by documents in some cases) that the records were incorrect. Nor had the Respondent provided any evidence setting ou whether the remainder of the record could be considered to be reliable despite these alleged inconsistencies.

37. In light of the difficulties with the Respondent's evidence, the Tribunal accepted the Claimant's account of her work during Period C. The Claimant's evidence accorded with the Respondent's contemporaneous documents such as the emails of 2 December 2015 and 6 March 2019. The Tribunal found Claimant worked an average of a 37.5 hour week, which was akin to that of a full-time employee with the Respondent. The Claimant did not work on any other assignments through the StaffBank other than the research dietician role where she was treated as a full substantive member of the team. She was responsible for various studies, and had patients allocated to her. The Claimant worked with her managers to ensure that her annual leave requests did not disrupt the provision of the Respondent's services to the patients/studies. She was required to work over the Christmas 2015 period to ensure continuity of service provision.

38. The Claimant also asserted that the Respondent had accepted that her work during Period B should be considered as continuous service. This was on the basis that the Claimant's previous NHS service was taken into account when assessing her entitlement to annual leave under her contract of employment for Period D [page 142]. However this was expressed on that document as being "aggregated (non continuous service)" and was expressed as being 9 years and 101 days - ie to reflect Period A.

39. The Claimant's previous nursing experience (both as a substantive NHS employee in Period A, and as a bank/agency nurse during Period B) had been taken into account when setting her salary with the Respondent, However, Ms Brigg's email of 6 March 2019 made it clear that her assessment of the situation was as set out in the Claimant's application form when she applied for the 2015 bank role, the Claimant had been studying since 2011 and whilst performing part-time work, had not been a direct employee of an NHS employer.

40. With regard to the claim for contractual notice pay, it was agreed between the parties that the Claimant's contract provided for a notice period of 8 weeks, or up to one week's notice per year of continuous employment with the Respondent whichever is greater, up to a maximum of 12 weeks [page 218].

The Law -Redundancy and Notice Pay

Statutory provisions

41. The Claimant seeks a determination from the Tribunal pursuant to s163(1) Employment Rights Act 1996 in relation to the amount of a redundancy payment payable under S162 ERA 1996. The dispute in this case arises in relation to S162(1) ERA :

> (1)The amount of a redundancy payment shall be calculated by—
> (a)determining the period, ending with the relevant date, during which the employee has been continuously employed,
> (b)reckoning backwards from the end of that period the number of years of employment falling within that period, and
> (c)allowing the appropriate amount for each of those years of employment.

42. The Claimant also seeks a declaration that her contractual redundancy payment fails to meet the requirements of S86 ERA. That states:
(1)The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—
> (a)is not less than one week's notice if his period of continuous employment is less than two years,
> (b)is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and
> (c)is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.

The Law -Employment status

43. The first task facing the Tribunal was to decide whether the Claimant was an employee during Periods B & C, and if so, an employee of whom. The Tribunal undertook this exercise before considering the issue of whether any employment was continuous.

44. S230 ERA 1996 states:
(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.

45. The key test for whether an individual is an employee is set out in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD;

> '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.

46. The parties in this case agreed that the Claimant was performing personal service whilst working for the Respondent during period C and that the Claimant was subject to control by the Respondent's managers in performing her role. The issue for the Tribunal to determine was whether there was sufficient mutuality of obligation in order for the Claimant to be considered an employee. Although the Respondent was not the putative employer for Period B, it was also agreed that the issue of mutuality of obligation was likely to be determinative to whether the Claimant was an employee during that period.

47. Lord Clark's judgment in *Autoclenz Ltd v Belcher [2011] UKSC 41; 2011 ICR 1157* sets out at paragraph 19:

> i) As Stephenson LJ put it in *Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612, 623*, "There must … be an irreducible minimum of obligation on each side to create a contract of service".
> ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: *Express Page 8 & Echo Publications Ltd v Tanton ("Tanton") [1999] ICR 693,* per Peter Gibson LJ at p 699G.]
> iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg *Tanton* at p 697G

48. The Supreme Court considered the test for employment status in detail in the relatively recent case of *Uber BV and others v Aslam and others [2021] UKSC 5*. Paragraph 126 states:

> The fact, however, that an individual has the right to turn down work is not fatal to a finding that the individual is an employee or a worker and, by the same token, does not preclude a finding that the individual is employed under a worker's contract. What is necessary for such a finding is that there should be what has been described as "an irreducible minimum of obligation": see Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612, 623 (Stephenson LJ), approved by the House of Lords in Carmichael v National Power plc [1999] 1 WLR 2042, 2047. In other words, the existence and exercise of a right to refuse work is not critical, provided there is at least an obligation to do some amount of work.

49. The Supreme Court also endorsed the proposition in *Autoclenz* that a Tribunal is not bound by written contracts which purported to determine the employment status. See for example paragraph 35 of *Autoclenz:*

> "So 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..."

50. Having considered *Autoclenz,* the Supreme Court in *Uber* concluded at paragraph 76:

> "... it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker".

51. Ms Holden submits that the same approach should apply when considering the question of employee status, as it is a question of statutory interpretation and giving protection to vulnerable individuals. Given that in *Autoclenz* the Court ultimately found that the individuals were working under contracts of employment, in the Tribunal's judgment Ms Holden's submission must be correct.

52. In his oral submissions, Mr Caiden invited the Tribunal to conclude that the Claimant's case was not on all fours with cases such as *Uber,* as the Claimant was an individual employee and those cases applied to groups of workers where the contractual documents did not impact the reality of the relationships between the parties. The Tribunal rejected this submission. There authorities placed before the Tribunal did not support this proposition. The task which the Tribunal has to undertake is to assess the reality of the party's relationship as set out above.

53. Mr Caiden submitted that the Tribunal was not bound by any previous concessions by the Respondent in relation to the Claimant's employment status, such as the email of 6 March 2019. Amongst other things it had not been made by an employment lawyer, and the Tribunal's task was to consider the factual situation (of which a concession may form part) as set out by the authorities above. The Tribunal agreed with this submission.

54. The Claimant also invited the Tribunal to consider whether at any time there was an umbrella or global contract. Ms Holden accepted in her skeleton argument that *Clark v Oxfordshire Health Authority 1998 IRLR 125, CA,* the Court of Appeal held that an umbrella contract cannot exist in the absence of mutual obligations subsisting over the entire duration of the relevant period.

Conclusions – Employment Status

Period C

55. The Tribunal concluded that the Respondent's written "StaffBank" terms of engagement did not reflect the true picture of the Claimant's employment status. The Claimant was required to work the equivalent of full-time hours and treated as a substantive member of the team. She was "required" to work over the Christmas 2015 period, and had patients and research studies allocated to her. There was an expectation that she would fulfil these duties and there was no realistic prospect of her refusing these requests to work. Where the Claimant wished to take annual leave, she had to make arrangements within the team to ensure that her work was covered by other

colleagues. Had the Claimant sought to refuse the shifts which had been provided to her by the Respondent, there would have been a significant break in the service to the patients and studies allocated to the Claimant. Although these did not take place, as the Claimant essentially worked as required, it would have been likely that the Claimant's managers would have explained to her that she was required to work in order to maintain continuity of patient service.

56. The Tribunal concluded that the assessment by the Respondent's managers and HR department in March 2019 that the Claimant was to all extents and purposes an employee of the Respondent from 17 November 2015, reflected the true situation.

57. Having considered the *Autoclenz, Uber* and the authorities referred to in that case, the Tribunal concluded that there was mutuality of obligation between the Claimant and the Respondent. There was an understanding and expectation that the Respondent would provide work to the Claimant, and that the Claimant would carry out that work, in order to ensure continuity of the Respondent's service. When considered alongside the other elements of the Claimant's engagement with the Respondent, the Tribunal concluded that the Claimant was an employee of the Respondent during period C.

Period B

Dietetics Degree

58. The Claimant's pleadings and evidence referred to her degree as being "NHS funded". However, the Claimant did not provide any documentary evidence of this, other than the degree outline which referred to the facilitation of the placements in NHS hospitals. The Claimant had resigned from the substantive role with Brighton and Sussex, which she held for Period A, in order to commence her degree studies. The Tribunal was not provided with any evidence which set out any obligations (whether in the employment law sense or otherwise) between the Claimant and any aspect of the NHS arising out of the Claimant studying for her degree. The Tribunal concluded that there was no evidence to suggest that any element of the test for a contract of employment was fulfilled by the Claimant's degree studies.

59. To the extent that the Claimant relies on her placements whilst on her degree, the Tribunal was not provided with any evidence which set out the obligations between her and the institutions where she was placed. The Claimant did not provide evidence of the work which she did on these placements, the supervision and control provided by the alleged employers, or the requirements which would satisfy the requirements of mutuality of obligation. Again, the Tribunal concluded that there was no evidence to suggest that there was a contract of employment between the Claimant and her placement providers. The Tribunal concluded that during her placements, the Claimant was a student participating in placements for the benefit of her degree education. There was no employment relationship.

Bank work at Brighton and Sussex

60. The Claimant's bank work for Brighton and Sussex was separate and severable from her substantive employment contract in Period A, from which the Claimant resigned in November 2011.

61. The Claimant carried out this bank work around her degree studies, and

alongside her work for Mayday. The Claimant carried out this work to maintain her nursing registration, and worked when her degree studies allowed it. In contrast to Period C, there was no evidence of ongoing mutuality of obligation. The Claimant carried out a small amount of shifts, some 49 shifts over four years which were at times which suited the Claimant. There was no evidence that she was required to accept all of the shifts offered to her and although no details were provided by the Claimant, it seems that she also registered with an employment agency during this period. In contrast to the detail which the Claimant provided for Period C, the Claimant did not set out any evidence that she was treated as a substantive employee during her bank work at Brighton and Sussex (such as having patients assigned to her beyond the shift in question, or having to plan her future work commitments around pre-booked patient appointments).

62. The Tribunal considered whether the Claimant's work at the Brighton and Sussex on the staff bank gave rise to an umbrella contract of employment. Whilst the staff bank agreement dated 2002 stated that an individual would be taken off the bank if they did not work for 16 weeks, and that there was no automatic right of reinstatement, the Claimant did not provide any detail of how this operated in practice, or detail any process by which she was required to take a certain number of shifts by the Brighton and Sussex staff bank.

63. The Tribunal therefore concluded that there was no evidence of any ongoing mutuality of obligation between the Claimant and the Brighton and Sussex staff bank in order to satisfy the requirement of an umbrella contract or otherwise constitute a contract of employment between the Claimant and Brighton and Sussex.

Work at Mayday

64. The Claimant was engaged and paid by Mayday. The Claimant worked around her degree studies and did more work in the university summer holidays. Mayday were expressed to be an employment agency. The Claimant did not provide any terms of engagement with the agency or say why they were not available. Nor does she say when or why she decided to contact the agency, or why this took place. Again, in contrast to Period C, the Claimant provided very little detail of the work that she did for Mayday or why she considered herself to be an employee as a result. The Claimant also confirmed that she did not accept every shift offered by Mayday. On the basis of the information available, and noting that Mayday were not a party to these proceedings, the Tribunal concluded that the Claimant was not an employee of Mayday.

65. To the extent that the Claimant submitted that all of her work during Period B was as a result of an ongoing commitment which she has with the NHS arising out of her degree, the Tribunal rejected this submission. The Claimant did not explain why it was necessary to seek out agency work in order to provide services to NHS hospitals, for example why this could not be provided directly to an NHS hospital via bank staffing arrangements. Further, if there was some continuing commitment between the Claimant and the NHS arising out of her degree, then the Claimant did not explain why she had to seek agency work rather than the NHS providing her with sufficient work directly so that the Claimant could make good on that commitment.

66. As Mr Caiden set out in his closing submissions, this was not a case where

the Claimant made any arguments that in fact her engagement with the agency (whether employment or otherwise) should be implied to be a contract between the Claimant and the end user NHS hospital.

The Law - Continuous employment

67. Having found that the Claimant was an employee during Period C it is necessary to consider the issue of "continuous employment" as required by both s162 ERA and S86 ERA. "Continuous employment" is defined by Part XIV of the ERA 1996. S211 ERA states:

> (1)An employee's period of continuous employment for the purposes of any provision of this Act—
>
> (a) (subject to subsection 3) begins with the day on which the employee starts work, and
>
> (b) ends with the day by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision.

68. S212 also states:

> (1)Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.
>
> [...]
>
> (3)Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is—
>
> (a)incapable of work in consequence of sickness or injury,
>
> (b)absent from work on account of a temporary cessation of work,
>
> or
>
> (c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose,
>
> [...]
>
> counts in computing the employee's period of employment.

69. The parties' closing submissions also invited the Tribunal to consider further provisions in relation to continuity of service in relation to both the redundancy and notice payments. A detailed consideration of the Modification Order is not required given that Tribunal has already concluded that the Claimant was not employed by another NHS employer during Period B.

70. However, so far as the Claimant sought to rely on S218 ERA the relevant passages relate to "associated employers" and special provisions in relation to NHS training as set out in S218(6) and S218(8-10) ERA:

> (6)If an employee of an employer is taken into the employment of another employer who, at the time when the employee enters the second employer's employment, is an associated employer of the first employer—

(a)the employee's period of employment at that time counts as a period of employment with the second employer, and
(b)the change of employer does not break the continuity of the period of employment.

(8) If a person employed in relevant employment by a health service employer is taken into relevant employment by another such employer, his period of employment at the time of the change of employer counts as a period of employment with the second employer and the change does not break the continuity of the period of employment.

(9) For the purposes of subsection (8) employment is relevant employment if it is employment of a description—
(a) in which persons are engaged while undergoing professional training which involves their being employed successively by a number of different health service employers, and
(b) which is specified in an order made by the Secretary of State.

(10)The following are health service employers for the purposes of subsections (8) and (9)—
(za) the National Health Service Commissioning Board,
(zb) a clinical commissioning group established under section 14Dof the National Health Service Act 2006,
(a)...
(b)Special Health Authorities established under section 28of the National Health Service Act 2006 or section 22 of the National Health Service (Wales) Act 2006
(bb)….
(c) National Health Service trusts established under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006
(ca) NHS foundation trusts,
(cb) Local Health Boards established under section 11 of the National Health Service (Wales) Act 2006,
(cc) the National Institute for Health and Care Excellence,
(cd) the Health and Social Care Information Centre.

71. S231 ERA 1996 defines associated employer as follows:

For the purposes of this Act any two employers shall be treated as associated if—
(a) one is a company of which the other (directly or indirectly) has control, or
(b)both are companies of which a third person (directly or indirectly) has control;
and"*associated employer"* shall be construed accordingly.

Conclusions – Continuous Employment

Period C

72. As set out above, the Tribunal has concluded that the Claimant was an employee of the Respondent for the period from 17 November 2015 to 9 April 2017. Due to the nature of the Claimant's work, that entire period

counts as continuous employment as the Claimant worked for the Respondent continuously as a full-time employee, save for periods of agreed annual leave which did not have the effect of terminating any continuity of employment.

73. Further, the Claimant continued to work for the Respondent from Period C to Period D without any break in service and therefore for the same reasons, continuity of employment was maintained from Period C to Period D.

Period B

74. The Tribunal has concluded than the Claimant was not an employee of any organisation during period B. If the Tribunal's conclusions in relation to Mayday are incorrect and the Claimant was in fact an employee of that agency, then the Claimant has not provided any details of how her alleged employment had transferred from that agency to the Respondent. In particular she has not set out how the Respondent and Mayday meet the definition of associated employers, particularly given the requirement of S231 ERA 1996 for one employer to have control of the other, or be controlled by the same third party.

75. Similarly, with regard to S218(8-10), even if she had been found to be an employee of the organisations which she was on placement with, those placements were short term in nature, and split over three years. The Claimant did not provide any submissions on how those placements would satisfy the requirements for "being employed successively" by a number of different health service employers.

Period A

76. Although it was accepted that the Claimant was employed by a relevant NHS employer in Period A, this cannot be counted for continuous service under the Modification Order or otherwise. This is because Period B constitutes a clear break in continuous service for the reasons set out above.

Remedy

77. The Claimant's statutory redundancy pay and notice pay calculations should be calculated on the basis of her continuous employment being from the period 17 November 2015 to 9 April 2020. This is four full years of service.

78. The statutory element of the Claimant's redundancy payment sum should therefore have been £2,152 rather than £1,614 (the claimant being aged 40 at the time of her dismissal and her weekly salary exceeding the statutory cap).

79. The contractual notice pay paid to the Claimant, being eight week's pay, was correct. This also exceeds the statutory minimum. No further payment is due in respect of contractual or statutory notice pay.

80. The Claimant invited the Tribunal to make an award pursuant to S163(5) ERA 1996 in respect of debt penalties and credit card charges incurred by the Claimant as a result of the Respondent's failure to pay her the correct redundancy sum. The Claimant's witness statement put these as being in the region of £1,900 at the time when the statement was finalised. The

Tribunal is mindful of the wording of S163 (5) which states:

> Where a tribunal determines under subsection (1) that an employee has a right to a redundancy payment it may order the employer to pay to the worker such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the non-payment of the redundancy payment.

81. The Tribunal was mindful of the requirement that any compensation under this provision must be "attributable to the non-payment of the redundancy payment". The Claimant's Particulars of Claim were explicitly clear that the claim was solely for the statutory rather than contractual element of the redundancy payment. Ultimately that statutory claim succeeded in the sum of £538. In the Tribunal's judgment it is not appropriate to award compensation for debt charges which significantly exceed the sum awarded to the Claimant. Even if the Tribunal were to consider this claim on the basis that the Respondent did not pay any element of the statutory redundancy payment to the Claimant until some time shortly before the postponed hearing of 27 August 2021, the Tribunal does not consider that it would be appropriate to award further compensation to the Claimant. The charges and penalties debts are of the same magnitude of as the total statutory redundancy payment which was due to her. The Claimant has not provided details of how the debts were incurred, whether she had sought to restructure or otherwise reduce the payments arising.

82. The Claimant sought an uplift to her compensation of 25% for the Respondent's failure to follow the ACAS Code on Discipline and Grievance, pursuant to S207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). Although there were documents in the bundle which referred to the Claimant's grievance in relation to her redundancy payment, which was raised after her employment had been terminated, the Claimant did not address this in her witness statement, nor was the point dealt with in Ms Holden's skeleton argument. In her oral submissions Ms Holden submitted that the Respondent should have conceded continuous employment for Period C. Given the lack of evidence provided by the Claimant in relation to the grievance process, it was not clear to the Tribunal whether those considering the Claimant's grievance were aware of the documents which were now before the Tribunal, or the full basis of which the Claimant's case was being advanced. It also appeared from some of the documents (albeit without the benefit of witness evidence addressing these points) that the Claimant's grievance included a request that her contractual redundancy payment include all of her aggregated NHS service giving rise to a total payment of £45,022.25 [page 481]. Matters as set out in the grievance did not appear to be so straightforward as to make it clear that the Respondent should concede Period C.

83. In the circumstances the Tribunal did not consider it just and equitable to increase the sum due to the Claimant. The Tribunal did not hear evidence from the Claimant on the material which was before the decision makers, and the basis on which she sought to advance her grievance. Nor did the Respondent have the opportunity to respond to those points.

84. The Claimant also sought an order under S12A of the Employment Tribunals

Act 1996 on the basis that the Respondent has breached the Claimant's rights and that this breach has one or more aggravating features. The aggravating features were not set out in the written skeleton, but in closing submissions Ms Holden summarised these as being essentially on the same basis as the request for an uplift for failing to follow the ACAS Code of Practice. In essence, Ms Holden submitted that the Respondent should have accepted the Claimant's continuous service in respect of Period C. As set out above the Tribunal was not provided with detailed evidence on this point as to how the Claimant conducted her grievance, and what documents were placed before the decision makers. In those circumstances, together with the fact that the Claimant's claims for payments in respect of Periods A and B have been unsuccessful, the Tribunal considered that there were no aggravating features which justified the ordering of a penalty under S12A ERA.

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Tribunal Judge Milivojevic acting as an Employment Judge

30 June 2022

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.