



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms E Ayiwe  
**Respondent:** Allcures Plc  
**Heard at:** East London Hearing Centre (by CVP)  
**On:** 12 December 2023  
**Before:** Employment Judge R Russell

## Representation

**Claimant:** Mr N Toms, Counsel  
**Respondent:** Mr N Caiden, Counsel

# RESERVED JUDGMENT

1. The Claimant was not an employee of the Respondent at the relevant time. The complaints of unfair dismissal and wrongful dismissal are therefore dismissed because the Tribunal does not have jurisdiction to determine them.
2. The Claimant was a worker of the Respondent at the relevant time. The complaint of unlawful deductions from wages relating to holiday pay will therefore proceed.

# REASONS

## Introduction

1. By way of a claim form presented on 20 July 2023 the Claimant brings a claim of unfair dismissal, wrongful dismissal, and unlawful deductions from wages relating to holiday pay. By way of a response dated 24 October 2023 the Respondent defends the claim.
2. This has been a preliminary hearing to determine the Claimant's employment status with the Respondent, her length of service, and whether the Tribunal has jurisdiction to hear the Claimant's complaints.

3. This was a video hearing, which was consented to by the parties. There were some connectivity issues with the Claimant at the start of the hearing. Following a break in which the Claimant reconnected using her computer rather than her phone, there were no issues with connectivity for the remainder of the hearing.
4. I received witness statements from the Claimant and, for the Respondent, from Kirandeep Cheema, Managing Director. Both were questioned on their evidence.
5. I had a bundle spanning 507 pages and skeleton arguments. References below to page numbers are to page numbers in the bundle. I explained to the parties at the outset of the hearing that I would only consider those pages to which I was directed. I admitted into evidence certain additional documents (a redacted pharmacist contract and template pharmacist contract) disclosed by the Respondent. I explained my reasons for doing so during the hearing. There was no objection from the Claimant to their inclusion in the bundle.
6. I was assisted by written and oral submissions from counsel. Judgment was reserved.

#### **Issues to be determined**

7. The issues for me to decide were agreed with the parties at the start of the hearing. These were:
  - a. Is the Claimant an employee within the meaning of section 230(1) of the Employment Rights Act 1996?
  - b. If the Claimant is an employee, what period of continuous service does she have?
  - c. If the Claimant is not an employee, is she a worker within the meaning of section 230(3) of the Employment Rights Act 1996?

#### **Findings of fact**

8. I have considered all the oral evidence and the documentary evidence to which I was referred. Applying the balance of probabilities, and to the extent necessary to decide the issues in the case, I make the following findings of fact.
9. The Claimant is a pharmacist. The Respondent is a business operating around 45 high street pharmacies. It has two categories of pharmacists: (i) 30-40 employed pharmacists; and (ii) a pool of around 20 self-employed locum pharmacists.
10. The Claimant relies on the period from July 2016 onwards for the purposes of these proceedings. She had been engaged by the Respondent as a locum pharmacist before then but stopped to care for her children. The

Claimant did no work at all for the Respondent between 29 December 2012 [252] and 28 November 2015 [271]. It was accepted by the Claimant that there was no requirement for her to return to the Respondent following this three-year gap.

11. The Claimant's engagement with the Respondent ended on 13 March 2023 when the Respondent concluded that it would no longer offer her any shifts. This followed an incident where the Claimant had closed the pharmacy without the Respondent's knowledge or approval. The lawfulness of the Respondent's actions has been challenged by the Claimant. This hearing is not concerned with the substance of the Claimant's claim or the reasons behind her no longer being engaged. It is solely concerned with the preliminary issues of whether she was an employee (and, if so, her length of service) or a worker.
12. The terms and conditions of the employed pharmacists are set out in a contract of employment, a template copy of which was provided to the Tribunal. The template contract in the bundle is for a Trainee Dispensing Assistant [499]. The template produced during the hearing for a Pharmacist Manager is the same in all material respects.
13. The Claimant was in the Respondent's self-employed locum pharmacist pool. She referred to herself as a locum in her dealings with the Respondent [223]. There is no written agreement between the Claimant and the Respondent.
14. To the outside world, the two categories of pharmacist may appear identical. The Respondent operates in a highly regulated healthcare setting. Community pharmacy arrangements with NHS England require the Respondent to open its branches for certain hours. During those hours, the Respondent must appoint a registered pharmacist in a branch as the 'Responsible Pharmacist'. Details of who this is must be displayed at the pharmacy. The Responsible Pharmacist may be a locum. If the branch is not open for the prescribed hours, a complaint may be brought against the Respondent and the Responsible Pharmacist regardless of whether that pharmacist is an employee. The pharmacy is open to inspections by the relevant regulator, with expected minimum service requirements. The Claimant was not subject to day-to-day supervision in the branch. She would oversee the pharmacy as the designated Responsible Pharmacist during the period of engagement. However, when engaged by the Respondent, she would be expected to comply with its practices and its standard operating procedures. Many of these are not bespoke to the Respondent but general regulatory requirements.
15. All the Respondent's branches have minimum required equipment including the British National Formulary (BNF) for dispensing, access to the dispensing system, and access to a laptop. The Claimant was integrated into the Respondent's workforce in several practical aspects. When at work she had full use of the BNF provided by the Respondent, used the laptop and dispensing system, and was a branch key-holder. There was no requirement for her to act as a key-holder but she was happy to undertake

- this role. She would disarm the alarm on arrival at work and therefore had access to the pharmacy outside of opening hours.
16. The Respondent offered its flu vaccine training scheme to locums alongside employees and the Claimant participated in this [82, 85]. There was no requirement for her to attend. She participated in a commission scheme alongside employees where she would be paid a fee based on the number of vaccines delivered [98]. The Respondent operates a staff discount but does not maintain records of who uses it. The Claimant would therefore be free to purchase items using the discount should she wish to do so.
  17. The Claimant was included in emails sent to pharmacists/pharmacy managers. She did not have an 'allcures' email address [137]. She used her personal email address for correspondence with the Respondent [115]. She was included in the Respondent's relevant WhatsApp group as a convenient way for the Respondent to inform all those who need to know of any relevant updates.
  18. There is a large degree of overlap between the duties that are carried out by an employed pharmacist and those undertaken by a locum. In addition to checking prescriptions and dispensing them, both would order stock using an automated system. A form must be completed on a monthly basis showing the amount of items prescribed, those where a patient has paid, those exempt from the patient charge, and the total number of hours worked by staff that month [133]. This is to ensure that the Respondent can be paid the appropriate fee under the community pharmacy arrangements. The Claimant did not need to complete this but would, in practice, do so.
  19. There is also some overlap between being the Responsible Pharmacist who oversees others who are working in the branch that day and managing staff. Had a locum not overseen the work of others and done the bare minimum when engaged, Kirandeep Cheema told the Tribunal that the Respondent would likely conclude that the locum was not very good and would find another one. In practice, the Claimant was involved to some extent in staff management. In May 2018 the Claimant gave what she described as a 'verbal warning' to a colleague in a branch 'due to her lack of respect for authority' [79]. The Respondent was unaware of what the Claimant had done until she informed it. She was not told that this was inappropriate. The Respondent's response was to acknowledge the Claimant's email and explain that the concern would be noted in the relevant employee's record. In June 2018 she had emailed the Respondent with suggestions for how staff in a branch may be used. Kirandeep Cheema replied to say that the Respondent would consider her thoughts and revert [80]. One colleague was subsequently moved [83]. On another occasion she interviewed for counter staff in November 2020 [183, 215].
  20. The Claimant was at all times self-employed for tax purposes. From 2016 onwards she completed her own self-assessment tax returns having previously used the services of an accountant to do so. She was responsible for her own tax and national insurance contributions. She claimed business expenses for items such as uniform, phone, using her home as an office, and a home laptop. She paid her own General Pharmaceutical Council fees. In her self-assessment return for the tax year 06 April 2021 to 05 April 2022

the Claimant recorded a turnover of £30,317 and business expenses of £2,177 [457]. For the tax year 06 April 2022 to 05 April 2023 the Claimant recorded a turnover of £33,161 and business expenses of £3,580 [473].

21. Unlike those whose relationship was governed by the Respondent's standard terms and conditions of employment, the Claimant did not have contracted set hours of work [501], she was not paid a monthly salary by BACS [501], and she was not in the Respondent's pension scheme [502]. She did not receive holiday pay, maternity pay, or sick pay. She did not question this during her time with the Respondent. The standard contract of employment provides that employees are not permitted to take any other employment while working for the Respondent without the prior written consent of their line manager [505]. The Claimant accepted that she did not have to work for the Respondent exclusively although said that she did so. The Respondent's provisions regarding notice and post-employment activities did not apply to the Claimant [505]. The Claimant was not subject to the Respondent's appraisal, grievance, or disciplinary process. When the Respondent became aware (because of complaints from doctors and patients) that the Claimant had to close the branch early on 12 October 2022 [181], she was not subject to the Respondent's disciplinary process in circumstances where the Respondent's case was that employees may have been.
22. The Claimant's case, as set out at paragraph 8 of her witness statement, is that: *'From 2015 to 31 August 2021, I exclusively worked for the respondent, full time. I worked covering over ten branches, as mentioned above, and was provided with regular work'*.
23. The Claimant accepted under cross examination that full time hours would be around 40 hours per week, with the average pay for a full time pharmacist being around £50,000 before deductions of tax and national insurance contributions.
24. I find that the Claimant was not working full-time hours for the Respondent across this period. The number of hours worked is not relevant to the question of whether one is employed. However, it may be relevant to the question of whether the Claimant was offering her services elsewhere.
25. I relied on the following evidence to find that the Claimant was not working full-time for the Respondent across the whole of this period. First, the Claimant's self-assessment tax returns for the period relevant to these proceedings show that she paid the following in tax:
  - a. £56 for year ending 05 April 2016 [490]
  - b. £179.08 for year ending 05 April 2017 [491]
  - c. £306.42 for year ending 05 April 2018 [493]
  - d. £245.11 for year ending 05 April 2019 [494]
  - e. £206.34 for year ending 05 April 2020 [495]
  - f. £710.48 for year ending 05 April 2021 [496]
  - g. £5,686.08 for year ending 05 April 2022 [497]
  - h. £6,129.58 for year ending 05 April 2023 [498]

26. Under cross-examination, the Claimant initially maintained that she worked full time across the whole period. She later accepted that these figures would not support the claim that she was working full-time hours for the Respondent. She clarified that she had meant that she worked only for the Respondent, albeit not on a full-time basis. She later further clarified that she worked full time from around September 2021 until March 2023.
27. Furthermore, on 17 April 2018 Jagdeesh Cheema, Operations Director and Superintendent Pharmacist, emailed the Claimant and cc'd Kirandeep Cheema. He said that the Claimant would be 'employed full time from Monday 23<sup>rd</sup> April' at the ETR branch [75-76]. Kirandeep Cheema said that this was a poor choice of words. It was not the parties' intention that the Claimant would be an employee. The intention was that she would be used as long-term locum relief in one branch. She was not issued with an employment contract. To all intents and purposes, nothing changed in the relationship between the parties save for the fact that during this period she provided long-term cover in one branch.
28. On 13 December 2018 the Claimant emailed the Respondent to say that she would be stepping down as manager of the ETR branch in January 2019. She wrote that 'relief pharmacist work will suit me much better and would be grateful if I'm kept on the locum list' [97].
29. In a letter to the Respondent of 17 March 2023 following her engagement being terminated, the Claimant refers to working as a Locum Pharmacist and acting as Branch Manager/Pharmacist for the Respondent's ETR branch from April 2018 until 04 January 2019 . She said that she left that role as her son was very young and 'locuming suited me better at that time' [204].
30. I have also considered the monthly timesheets completed by the Claimant and submitted to the Respondent for payment. The timesheet asked for details of the 'locum name' and contact details. The Claimant provided her personal email address. The Claimant completed details of the branch where she had worked, the date of work, start and finish times, a summary of total hours worked, her hourly rate, travel costs, and the grand total claimed. She was paid for the hours she worked. Against 28 September 2021 for example, she noted on her timesheet that she 'had to leave work after an hour due to family emergency' and claimed one hour's pay for that day [136].
31. The timesheets show a mixed pattern where, in some months, the Claimant would be engaged regularly and other months she would do no work. In March 2021 for example, the Claimant worked on 10 March, 15-17 March, 19 March, 22-26 March and 29-30 March [113-4]. She did no work for the Respondent between 1-15 August 2021 [131] or during December 2021 [308] until 19 January 2022 [309, 150]. She would usually not work for 1-2 weeks around the time of her children's birthdays. On some months she would work across different branches. Between February - May 2021, she was engaged for around half the month [107-108, 112-113, 116-117, 122-123]. During the summer of 2021, the Claimant worked more regularly for the Respondent. In June and July 2021, she worked for the Respondent for

almost the whole months across various branches [125-126, 128-9]. In August 2021, the Claimant worked the last two weeks of the month [131-132]. In September and October 2021, she worked the whole month for one branch [135-136, 140-141]. She was engaged by the Respondent for three weeks in November 2021 [143-144] and for most of February to May 2022 in the same branch [153-154, 156-157, 159-160, 162-163]. Between June-November 2022 she worked mostly full months for the Respondent at the same branch with only a few days off including a week in August 2022 [166-167, 170-171, 173-174, 176-177, 181-182, 185-186]. The branch ("ETR") was convenient for the Claimant and it also suited the Respondent to have long-term locum cover due to a vacancy there.

32. In sum, the Claimant was not consistently working full-time for the Respondent over the relevant period albeit that there would be periods where she would be engaged to provide long-term relief for one branch.
33. Turning to the issue of whether the Claimant provided services to the Respondent exclusively, the Claimant accepted that she could provide her services elsewhere but in practice did not do so. In oral evidence the Claimant initially said that the Respondent was her main employer but later explained that it was her only employer. In the letter from the Claimant to the Respondent on 17 March 2023 following the termination of her engagement, she wrote: 'During the times in which I was contracted to work, in the mornings, I worked exclusively for the company' [205]. In oral evidence she said that the reference to 'in the mornings' was a mistake and that she did not work elsewhere. Kirandeep Cheema's evidence was that he had heard that the Claimant did work elsewhere, which he considered she was entitled to do as a locum. Her LinkedIn profile mentions only working for the Respondent until 2012. From 2015 she lists her professional experience as being CEO of a hair care company [507] although she told the Tribunal that this was a hobby. In sum, while the Claimant may have been entitled to work elsewhere and I found that Kirandeep Cheema had been told that this was the case, the evidence before me did not support a finding that she was, in fact, providing services for others during the relevant period.
34. The Respondent has a locums coordinator, Harsimran Cheema. He is the main point of contact for locums and would message locums to ask if they are available to provide cover. For example, on 01 May 2020 Harsimran Cheema messaged the Claimant to ask: 'are you available 15/5 to work in Southend?' She replied that she was unavailable due to childcare. He replied 'no worries' [219]. The Claimant accepted that she did not have to accept shifts that were offered to her. She did not, however, like to refuse shifts as she did not want the work to be offered to other pharmacists. She also wanted the Respondent to view her as a serious worker.
35. The Respondent introduced a new locum bookings system in 2020. The Claimant was worried about how this would affect the shifts she would be offered. On 17 June 2020 she sent the following message to Harsimran Cheema: 'Hey Harsi...I'll be available to cover Basildon, Grays, East Tilbury and Southend from the 3<sup>rd</sup> of August...I'm just concerned that this new system will reduce work for loyal locum staff like myself as it'll be the first

*person that responds ie is online when the job availability is posted who gets the job. I need clarification please' [219].*

36. He replied to say 'don't worry', that he had a 'select few that I will go to first', and that 'yourself and a couple others' would be approached before entering the locum shifts on the group portal [219]. The following day he asked if she was available for a shift that Saturday. She said 'thanks for asking' but that she would be free from 03 August 2020. Harsimran Cheema replied 'No problem' [219].
37. On 05 February 2021 the Claimant messaged Harsimran Cheema to say: *'I just wanted to let you know I'll be available to work full-time if the opportunity arises. The pandemic has drastically reduced work for us locums...so please if there's an opening for a branch manager let me know' [223].*
38. On 10 February 2021 the Claimant messaged Harsimran Cheema to say 'more dates please!' He reiterated what he said before about the Claimant being the first port of call and provided further available dates should she be interested [224].
39. On 03 March 2021 the Claimant sent the following message to Harsimran Cheema: 'Sorry Harsi, can't cover today due to other commitments'. He replied 'No worries' [224].
40. The Claimant would tell the Respondent when she was unavailable. She did not ask permission to take time off. The Respondent has several rules regarding when annual leave may be taken. These are set out in the contract of employment. They include:
- 'Holidays cannot be booked without the prior agreement of your line manager. You are required to provide 8 weeks notice if you wish to take a holiday of one week or more.*
- No more than 2 weeks annual leave is permitted to be taken off at any one time. This will only be granted in exceptional circumstances and must be approved by your line manager.*
- No annual leave will be approved for the calendar month of December' [502-3].*
41. These rules did not apply to the Claimant. She could, and did, take more than two weeks off at a time and during December. The Claimant told the Respondent when she would be unavailable. On 08 September 2020 she wrote to Harsimran Cheema telling him 'Just to let you know, I've booked two weeks off in December' [222]. She did not ask permission. She subsequently told him that she would be available to work until 10 December 'as I'll be travelling to Nigeria. In the new year I'll resume locuming on the 18<sup>th</sup> of January as I'll need to self-isolate for two weeks on return from my holiday' [222]. On 11 November 2020 she asked if she could cover different branches on her return in January (rather than being based in one place) as 'covering different branches (locuming) suits me better' [222].



42. The Claimant was unavailable again in December of the following year. In response to a request made on 12 October 2021 about her availability during November 2021, she replied: 'I can cover November but not the first week...from the 6<sup>th</sup> of December-14<sup>th</sup> of January I'll be away in Nigeria...I'll be available for work again on the 17<sup>th</sup> of January' [229]. She did not request permission. She was not informed by the Respondent in either 2020 or 2021 that she could not travel overseas during a period of Covid restrictions. She told the Respondent when she would be available for work and when she would not be.
43. The Claimant contended that there was an expectation that she would return to work. There was a message exchange between the Claimant and Harsimran Cheema on 24 November 2021 in which the Claimant complained about a member of staff. Harsimran Cheema told the Claimant to leave the issue 'with us' and commented about the possibility that the colleague would not be there when the Claimant returned to work in January [233]. Viewed objectively, this comment was made in the context of the Claimant having been engaged by the Respondent over a period of years and following the Claimant having told the Respondent that she would again be available for work from mid-January. I find that there was no requirement for the Claimant to return to the Respondent then or at all.
44. On 05 December 2021 the Claimant sent a message to Harsimran Cheema. In it she explained that Nigeria had been put on the Covid red list. She asked that he prepare a letter on company headed notepaper explaining that the Claimant 'works at Allcures Pharmacy...as a Pharmacist' so that she would not need to quarantine. She provided her personal email address for this [234]. Harsimran Cheema prepared the letter as per the Claimant's request. He said that the Claimant 'works in the capacity of a Clinical Pharmacist/Manager' and, as an essential worker, would be exempt from quarantining [145].
45. The terms of the quarantine exemption letter provided to the Claimant differ from those provided to employees. In an email prepared for the purposes of permitting an employee's child to attend school, it is written '[ ] is an NHS key worker employed by Allcures Pharmacy Group' [100]. In another letter in respect of an employee, it is written 'Please accept this letter as confirmation that the above-named member of staff is a key frontline health worker...' [101].
46. In respect of the requirement to offer and decline work, I find the following from an objective reading of the various exchanges between the Claimant and Harsimran Cheema to which I was referred:
- a. The Claimant, together with a few others, would be given first refusal of work before the work was offered more widely to the locum pool.
  - b. There was no obligation on the Respondent to offer shifts to the Claimant. The Claimant was clearly concerned by the lack of work generally available and by the risk that a new portal system would mean that whoever accessed it first, would be given most shifts. She

acknowledged in oral evidence that the work would go to others in the pool if she was unavailable.

- c. There was no obligation on the Claimant to accept work. There were no repercussions if she refused to work. She did not need to explain why she was refusing work. She could refuse work for any reason. She could turn down work on the day that she was booked to work.

- 47. The Claimant accepted that if she was unavailable, the Respondent would engage another locum. If she is unable to attend a shift, substitutions can be made from the locum pool. There has been one occasion some years ago when the Claimant sent someone she knew to cover and was told not to do this again. Kirandeep Cheema did not deny that this had happened as he was not privy to that discussion but said in oral evidence that he was fairly certain that if the Claimant put forward a suitable replacement, the Respondent would accept this. It would be a convenient solution to the Respondent's issue of having to find cover. The Respondent would need to satisfy itself that the person suggested is suitable for the role. In practice, the Respondent has a coordinator and a pool of locums from which to draw. The Claimant would ask the Respondent to arrange cover if she was unavailable [196, 198].

## Law

- 48. Section 230(1) of the Employment Rights Act 1996 ("ERA") defines an employee as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'. 'Contract of employment' is defined in section 230(2) ERA as 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.
- 49. What constitutes such a contract of service has been left to case law to define. It requires the application of a mixed or multi-factorial test as set out in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* 1968 2 QB 497 and more recently endorsed by the Supreme Court in *Autoclenz Limited v Belcher* [2011] ICR 1157. In *Ready Mixed Concrete* [at 515], it was held that three conditions are necessary for there to be a contract of service:
  - “(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’.
- 50. In *Autoclenz* Lord Clarke [at 1163] noted:
  - ‘Three further propositions are not I think contentious: (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 & Echo Publications Ltd v Tanton* [1999] ICR 693, 699 g , per Peter Gibson LJ. (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 the Tanton case, at p 697 g’.

51. With regards to mutuality of obligations, the purported employer is obliged to provide work and the employee to undertake it (*Carmichael and anor v National Power Plc* [1999] ICR 1226, HL [at 1230]). The requirement to offer or accept work cannot be one-sided (*Thomson v Fife Council* EATS/0064/04). The legal obligation to offer and accept work may arise over a course of dealing (*St Ives Plymouth Limited v Haggerty* EAT/0107/08). An employee need not accept work every time it is offered but there must exist an obligation to do some work. Lord Leggatt in *Uber BV v Aslam* [2021] ICR 657 put it [at 690] as follows:

‘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”:...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.’

52. In the more recent Supreme Court judgment of *Independent Workers Union of Great Britain v Central Arbitration Committee* (“Deliveroo”) [2023] UKSC 43, the ability to reject offers of work, work for competitors, and make oneself unavailable for work was considered ‘fundamentally inconsistent with any notion of an employment relationship’ [at 72 per Lord Lloyd Jones and Lady Rose].
53. The requirements of control, mutuality of obligations, and personal service are necessary minimum conditions, but not necessarily sufficient conditions, to determine that a contract of employment exists (*Revenue and Customs Commissioners v Atholl House Productions Limited* [2022] ICR 1059). What is required is a holistic evaluation of all the factual circumstances of the case (*Clark v Oxfordshire Health Authority* [1998] IRLR 125, CA).
54. The definition of worker is set out at section 230(3) ERA. A 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’.

55. In short, the following are necessary constituent elements for a finding of worker status (*Bates van Winkelhof v Clyde & Co LLP* [2014] ICR 730, SC):
- (i) a contract between the individual and putative employer (*Sejpal v Rodericks Dental Limited* [2022] ICR 1339);
  - (ii) to perform work personally (in *Pimlico Plumbers Ltd and anor v Smith* [2018] ICR 1511, SC it was held that a limited right of substitution is not inconsistent with the requirement to perform services/work personally);
  - (iii) for the benefit of the other party who must not be the individual's client or customer (*Manning v Walker Crips Investment Management Ltd* [2023] ICR 1265).
56. In *Byrne Bros (Formwork) Limited v Baird* [2002] ICR 667, the EAT observed that 'the essence of the intended distinction [in section 230(3)(b)] must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects' [at 677].
57. Insofar as the requirement for personal service is concerned, a key factor is whether the individual must provide work or services herself or whether she can substitute another. This factor has been subject to extensive discussion in the case law, which was reviewed in *Pimlico Plumbers*. In the Court of Appeal, Sir Terence Etherton MR summarised the principles that may be derived from the case law as:
- 'Firstly an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance' ([2017] ICR 657).
58. The guidance provided by the Court of Appeal in *Pimlico* amounts to two principles and then three further examples of how the principles might apply but these examples are neither definitive nor exhaustive. It is the role of the Tribunal to determine whether any right to substitute existed and, if so, what

the precise nature of any restriction or fetter on the right to substitute is (*Stuart Delivery Limited v Augustine* [2021] EWCA Civ 1514). In the Supreme Court in *Pilmico*, it was suggested that there may be cases where it would be helpful for the Tribunal to ask what the dominant purpose of the contract was in order to consider the extent of any right to substitute. However, this does not negate the need to focus on the language of the statute.

59. Relevant considerations as to whether someone is a client or customer include whether a person agreed to provide services exclusively to that other party or to the world in general, and the degree to which the person is integrated into the other's operations (*Hospital Medical Group Limited v Westwood* [2013] ICR 415, CA).
60. The Supreme Court in *Uber* considered that the following factors are relevant to the question of whether an individual is in business on her own account: the degree of control the putative employer has, how dependent the individual is on the putative employer, and whether an individual is free to develop her own business. In evaluating the extent to which an individual is 'integrated' into the business, it can be helpful to consider whether an individual actively markets herself to the world in general or whether she has been recruited by the business to work as an integral part of its operations (*Cotswold Developments Construction Limited v Williams* [2006] IRLR 181).
61. The unfair dismissal protection does not to an apply to an employee unless she has been continuously employed for a period of not less than two years ending with the effective date of termination (section 108(1) ERA). Where there are gaps in the employment, the relevant provisions for calculating weeks that count in computing the period of continuous employment are found at section 212 ERA.

## **Conclusions**

62. I am grateful to both counsel for their comprehensive and helpful written and oral submissions.
63. I consider first the issue of whether the Claimant is an employee. There is no written agreement in this case. For a finding of employment (and worker) status, there must first exist a contract between the parties. The Respondent does not dispute that there is an agreement but it argues that it cannot properly be characterised as one of employment.
64. Dealing briefly with the question of control, I concluded that in this case control cannot be the decisive factor. There is no need for day-to-day supervision to find that control exists. In the present case, the relationship was conducted in the context of a highly regulated healthcare environment where there was a necessary degree of control to ensure that the regulator's requirements were met.

65. As part of the 'irreducible minimum' to form a contract of employment there must be an obligation on the part of the Respondent to offer work and a corresponding obligation on the part of the Claimant to accept it. She need not accept every shift that is offered to her provided, as Lord Leggatt put it in *Uber*, there is at least an obligation to do some amount of work.
66. The Respondent operated two categories of pharmacists. One group are employed pharmacists whose terms are governed by a written contract of employment. The other group form part of a bank or pool of locums. The Claimant was part of this locum pool. She had a longstanding relationship with the Respondent and would regularly be engaged by it. The question for the Tribunal is whether there was a requirement on the part of the Respondent to offer some shifts and for the Claimant to accept these.
67. In practice the Claimant would be asked if she was available for shifts and she could accept or decline them. This was the process up to 2020 when the Respondent introduced a new portal system for making shifts available. However, even when the new system was introduced the process altered little for the Claimant. This was because she, and a few others, were approached first with offers of work before available shifts were offered more widely to the pool. It is clear from the contemporaneous written evidence that the Claimant understood that the Respondent had no obligation to offer work to her. In response to the introduction of the new booking system, she wrote *'it'll be the first person that responds ie is online when the job availability is posted who gets the job'*.
68. Even if, as I find, the Respondent would in practice offer shifts first to the Claimant and a 'select few' others, there was no requirement for a minimum amount of work to be offered. There would be periods when work would not be offered at all such as when the Claimant wrote to the Respondent about how the pandemic had *'drastically reduced work for us locums'*.
69. There was no requirement on the part of the Claimant to accept any work offered to her. She accepted that this was the case. She did not like to turn down work and she regularly did accept work. Equally, she would also make herself unavailable for work, including at times when employees of the Respondent were contractually prevented from taking annual leave (during December and for more than two weeks). She could say no to any work that was offered to her. She need not give an explanation. She was entirely free to say when she would be available for work and when she would not be. She could cancel work already offered to her. What is needed for a finding of mutuality of obligations is that the Claimant is obliged to do some work, not merely that she felt morally that she should work out of courtesy, or concern that the work would go to others.
70. I find that there was no mutuality of obligations present. There was no requirement on the part of the Respondent to offer work and no requirement on the part of the Claimant to accept it. As mutuality of obligations is part of the irreducible minimum of what is required in an employment relationship, it follows that the Claimant was not an employee of the Respondent. There is no need to consider other factors as the lack of mutuality of obligations is fatal to a claim for employment status. Notwithstanding this, I concluded that

there were several other factors that were inconsistent with there being a contract of employment. These included the Claimant being responsible for her own tax arrangements including the claims she made on her tax return for work expenses, telling the Respondent when she would be unavailable for work (including for more than two weeks and during December when employees cannot take leave), being paid gross on completion of timesheets/invoices, not being entitled to sick pay or maternity pay, and being able to tell the Respondent where she would work.

71. Having found that the Claimant was not an employee, there was no need for me to consider whether she has sufficient qualifying service to bring a claim of unfair dismissal. As she is not an employee, her claims of unfair dismissal and wrongful dismissal cannot proceed.
72. Turning to the issue of whether the Claimant was a worker, has the statutory requirement for personal service been met? In this case, there is no written provision for the right to substitute. The Respondent's case is that there is no requirement for personal service. So long as a suitably qualified and experienced locum pharmacist is available to cover a shift, that is all that matters. The Claimant also accepted that if she were unavailable to work, the shift would be given to another locum. As I have concluded above, there was no requirement for the Claimant to accept work that was offered to her. I reminded myself that while the ability to work as and when she chose to was not irrelevant to the question of personal service, it was a matter that more properly fell to be considered under mutuality of obligations.
73. Could the Claimant send a substitute in her place? The Respondent's case was that if the Claimant was unable to carry out a shift and could provide the locums coordinator with the name of a suitably qualified replacement, there would be no reason in principle why the coordinator would not be happy to use this person. Insofar as there is a right to substitute, it would therefore be a conditional one with the Respondent needing to be satisfied (as one might expect in a highly regulated healthcare setting) that the substitute was suitable.
74. Any conditional right to substitute was used rarely. On the Claimant's evidence, she had used it only once during her time with the Respondent and was told not to do this again. The Respondent did not deny that this may have happened some years ago. The fact that the right is not used is not determinative of the matter but it is relevant to the question of whether any right to substitute is a genuine one. In practice, the Claimant did not provide a substitute if she was unable to work. The locums coordinator was considered best placed to find a substitute. When the Claimant was unavailable, she would ask the Respondent to find cover.
75. On balance, I conclude that there was a limited and rarely used right to substitute, which was subject to the Respondent being satisfied as to the substitute's suitability. The Respondent had an unqualified right to withhold consent to substitution. Any right to substitute was not sufficient to negate the requirement for personal service. Turning back to the language of the statute and considering the history of the relationship, I conclude that there

was an undertaking for the Claimant to perform personally work or services for the Respondent.

76. Finally, I have considered whether the Respondent was in reality a client or customer of any profession or business undertaking carried on by the Claimant. There was no express agreement that the Claimant would provide services exclusively to the Respondent. While she had for a period until early 2019 been based in one branch, at her request this stopped and she returned to providing relief locum work across several branches as and when. This changed again throughout 2021-2022 when she was working for long periods at one branch. There was, however, nothing to stop her from offering her services to the world in general or working as a locum elsewhere either directly or via locum agencies. This was accepted by the Claimant.
77. The Claimant was free to choose her hours of work (although I acknowledge that pharmacies need to be open for set hours) and periods of absence. She was also free to develop her business while marketing herself independently. That said, it was clear that the Claimant predominantly saw herself as integrated into the Respondent's business and I concluded that she was in many ways. The Respondent exercised a large degree of control over how she worked, but this was often driven by the need to adhere to standard operating procedures for NHS England purposes. This control was exercised in the context of the Claimant also enjoying freedom and responsibility in running the branch in which she was placed. She was a key holder. I also take into account the fact that the Claimant, at times, reported back to the Respondent concerns she had about members of its staff and that action was taken in response to this. She helped interview for new members of staff. The Respondent extended its offering of training to her and she participated in its flu vaccine commission scheme.
78. The Claimant bore the responsibility for many business expenses and assumed the financial risk insofar as she would not be paid if she did not work. It was equally clear that for some stretches of time while engaged almost on a full-time basis, the Claimant appeared to be largely dependent on this particular relationship. Indeed, her request for more work from the Respondent may be read as indicative of a degree of dependency.
79. In reaching my conclusion on this element of the worker status test, I weighed up carefully the huge degree of flexibility enjoyed by the Claimant against the level of integration into the business of the Respondent to whom she provided personal services. The level of integration coupled with the degree of dependency and control leads me to conclude that the Respondent is not the Claimant's client or customer.

### **Overall conclusion**

80. The Claimant was not an employee of the Respondent at the relevant time. The complaints of unfair dismissal and wrongful dismissal are therefore dismissed because the Tribunal does not have jurisdiction to determine them.



81. The Claimant was a worker of the Respondent at the relevant time. The complaint of unlawful deductions from wages relating to holiday pay will therefore proceed.

**Employment Judge R Russell  
Dated: 5 January 2024**