EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms M Suleyman	**AND**	North Bristol NHS Trust

OPEN PRELIMINARY HEARING

HELD AT Bristol **ON** 26 January 2017

EMPLOYMENT JUDGE Pirani

Representation

For the Claimant: Mr N Bindall-Edwards, counsel
For the Respondent: Mrs J Smeaton, counsel

RESERVED JUDGMENT ON PRELIMINARY ISSUES

1. The claimant was employed by the respondent within the meaning of section 230 Employment Rights Act 1996.

2. The claimant has sufficient continuity of service to bring an unfair dismissal claim against the respondent.

RESERVED REASONS

1. By a claim form received at the Employment Tribunal on 16 September 2016 the claimant, who was born on 28 February 1968, brought claims for:
   i. Unfair dismissal
   ii. Failure to pay outstanding holiday pay

2. The dates on the ACAS certificates are 8 July – 19 August 2016.

3. The claimant says she was employed by the respondent as a Bank Healthcare Assistant from 14 May 2012 until she was dismissed on 11 May 2016. She says she was employed under a "zero hours" contract but would work at least 30 hours every week.

4. In a response, received at the Employment Tribunal on 31 October 2016, the respondent:
    i. denied that the claimant was an employee; and
    ii. disputed the holiday pay claim, saying holiday pay was paid on a rolled up basis to all bank staff

5. The Employment Tribunal wrote to the parties on 12 November 2016 indicating that Employment Judge O Harper had directed that the case be listed for a preliminary hearing. Subsequently, on 2 December 2016 a notice of hearing went out directing the parties that the preliminary hearing would determine:
    i. whether the complaint of unfair dismissal should be dismissed because the claimant is not entitled to bring it if she were not an employee of the respondent as defined in section 230(1) and (2) of the Employment Rights Act 1996
    ii. whether the complaint of unfair dismissal should be dismissed because the claimant is not entitled to bring it if she was employed by the respondent for less than two years

Bundle and evidence:

6. I had an agreed bundle which ended at page 85.

7. For the claimant I heard evidence from the claimant herself.

8. For the respondent I heard evidence from Vicky Packer, a Temporary Staffing Operations Manager.

Facts

9. I found the following relevant facts.

10. The claimant worked for the respondent as a Bank Health Care Assistant from 14 May 2012 until 11 May 2016.

11. Her role for the respondent included various tasks ranging from assisting with individual patient's personal hygiene needs to, among other things, taking patients to x-rays.

12. She was provided with a written "contract of employment" which she signed on 14 September 2012 (56-57).

13. It provided that the claimant's hours of work were "as and when required" and that there was no requirement to give notice, although the trust would wish to be informed should the claimant withdraw from the arrangement.

14. The contract also stated: "This contract provides for an individual who is prepared to make themselves available for work from time to time. The parties to the contract accept that there is no obligation either way and that the terms of this contract apply to a mutually agreed period of work. Normal terms and conditions of employment of any particular staff group do not apply other than provided within this contract.

Trust policy and procedures will apply to periods of employment as will rules of conduct".

15. The document was headed "staff contract of employment" and under a sub-heading "special conditions of employment" was the following: "As NBT eXtra staff are used to fill gaps in staffing caused by sickness, vacancies etc. it is essential that staff are reliable. NBT eXtra staff who cancel at short notice or fail to attend for booked shifts may find that they are not asked to work again or could ultimately face disciplinary action or dismissal, as their action could jeopardise patient care or clinical safety".

16. The signed document provided that it was a schedule issued, as part of the contract of employment.

17. The document which is agreed to be the contract between the parties is also headed "contract of employment" and said to constitute particulars required under part 1 of the Employment Rights Act 1996 (47).

18. Clause 16 of that document provides that the trust has a grievance procedure. Clause 17 refers to the trust disciplinary and appeals procedure. Clause 18 provides that breaches of confidentiality will result in disciplinary action, and may result in dismissal. Clause 20 provides that if the post requires registration with the statutory and/or professional organisation then continuation of employment is conditional upon continuing to be registered.

19. The trust also had a Standard Operating Procedure for temporary workers which was applicable to the claimant (36-46).

20. Clause 7.6 of that document provides as follows: Attendance and cancellation - Once temporary workers have agreed to undertake a duty/assignment, they are expected to attend the agreed location on time and be prepared for work. Workers who fail to attend for work when booked and give no advance notification of cancellation, will be advised that any re-occurrence will result in no further offers of work and removal from the bank register. Likewise repeated short notice cancellations will result in removal from the bank register (43).

21. Clause 7.7 provides: Temporary workers may vary their offers to work either by telephone or electronically as appropriate. The temporary worker is required to keep information about availability for work as up-to-date as possible.

22. Clause 10.1 provides that temporary workers are subject to the same levels of induction and training "as all other North Bristol Trust employees" (45).

23. Clause 11.1 provides that that the trust reserves the right to remove individuals from the bank register if reliability, performance or standards of work compromises the trust's ability to provide a quality service (46).

24. Clause 11.2 provides that temporary workers who do not work for a period of 3 months and do who do not contact the NBT eXtra team will be contacted in writing regarding non-availability. Failure to work for a period of 6 months will result in automatic removal from the register and payroll. It goes on to say

the onus is on the temporary worker to keep the trust updated about reasons for non-availability. The clause ends by saying the trust is committed to treating all workers fairly and so the reason for de-activation will be logged so that no worker will be disadvantaged.

25. If the claimant did not work a bank shift for 6 months she would be automatically "be de-activated and removed from the database" (52).

26. The respondent is a publicly funded National Health Service Trust, providing general medical and surgical care and maternity services for the local population of about 900,000 people. The trust uses bank workers to fill both short-term vacancies, which may arise due to inability to recruit a role, as well as sickness absence and holiday cover and any other unforeseen staffing absences. Periods of work filled by bank workers are known as assignments. An assignment may be a single shift or may be as long as six months.

27. The trust fills vacancies in staffing when they arise from two databases of experienced health professionals.

28. In practice, vacancies are notified to bank workers through an online electronic notification system. Typically vacancies are notified six weeks prior to the gap to be filled although for periods of sickness the notice will be much shorter.

29. Mrs Packer explained that the work was allocated on a "first-come first-served basis". Work was not always available on weekends and nights because this was particularly popular due to enhanced payment rates being available for these times.

30. There are about 4,500 individuals on the temporary staffing database who are able to accept an assignment providing they are available and suitably qualified.

31. The claimant was paid a salary by the respondent and did not raise any invoices for work carried out. She was not responsible for the payment of income tax and national insurance (see 79 and 85). Bank workers are paid in arrears.

32. While engaged on assignments on the bank the claimant worked in various locations across the trust and had no fixed place of work.

33. The claimant would regularly work at least 30 hours every week. Her preference was to work at nights and weekends.

34. She was required to use the equipment and resources of the trust when completing assignments.

35. The only obligation on the claimant to contact the trust, should she be absent because of sickness, was in the event that she had accepted a bank assignment. There was no obligation for the claimant to notify the trust of her intention to take holidays. However, the claimant would only accept bank assignments when she was able to work.

36. The claimant was under no obligation to accept any offers of assignments. However, once the claimant agreed and commenced work she was under an obligation to complete the assignment.

37. She wore a uniform provided by the respondent and complied with their dress code.

38. While at work the claimant was subject to the respondent's day-to-day direction, rules, policies and procedures.

39. Once the claimant accepted an assignment she had no control over what work she did and could not refuse to carry out tasks.

40. The claimant was able to refuse assignments and also cancel assignment she had agreed to do at relatively short notice (69).

41. The respondent had no control or influence over which of the eligible bank staff accepted any single assignment. If the claimant did not accept a shift, or subsequently cancelled a shift, another worker would be found.

42. The claimant was not guaranteed a minimum amount of work and was not specifically sought out to undertake assignments. She could refrain from working for up to 6 months before being removed from the bank.

43. While registered for the bank the claimant was free to work for any other organisation, although she did not do so. The claimant was entitled to statutory sick pay only, and then only if she was assigned to a period of work of more than five days and had been absent for sickness from more than five days. Holiday pay was rolled up.

44. She would attend regular staff meetings while at work and also mandatory training events.

45. The claimant was provided with an NHS email address and her name would appear on the internal telephone directory.

46. Originally Mrs Packer's statement provided that there were some 13 absences of in excess of a week over since February 2014.

47. In the event, this was reduced to 6 after cross-referencing. The agreed periods when the claimant was not engaged on an assignment for in excess of one week from 2014 were:
    i. 12 - 25 February 2014
    ii. 17 - 23 February 2014
    iii. 7 -13 April 2014
    iv. 12 May - 2 June 2014
    v. 9 - 15 June 2014
    vi. 17 - 25 May 2015

48. In the two years prior to the claimant's removal from the bank she took no holidays.

49. There were occasions when the respondent had a recruitment drive which increased the numbers of both regular staff and bank staff. On these occasions

the claimant would find it more difficult to find shifts which suited her availability.

50. This was the reason why she did not work for the respondent during these six periods for the two years prior to her removal from the bank.

51. On 11 May 2016 Miss Packer emailed the claimant saying because she had failed to arrive on time again the trust had "no other option but to withdraw your right to work" (83).

52. Subsequently the claimant was sent a letter dated 23 May 2016 confirming that the agreement was terminated (84). She was then sent a P45.

Outline of Relevant Law

53. Section 230(1) Employment Rights Act 1996 ("ERA") defines "employee" as "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment". Section 230(2) provides that a "contract of employment" means "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

54. The purpose of this definition is to distinguish between individuals dependent upon an employer for their livelihood on the one hand, and self-employed individuals, or independent contractors, on the other; between those working under a "contract of service" and those working under a "contract for services"; between those who are paid to do the job and those who are paid to get the job done. However, the statute does not set down the circumstances in which an individual may be said to work under a contract of employment.

55. In the absence of any comprehensive definition of a contract of employment, courts and tribunals have developed a number of tests over the years aimed at helping them identify such a contract. It is now accepted that no single factor will be determinative of employee status and a number of factors must be looked at.

56. One of the earliest formulations of the test is to be found in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD*, in which Mr Justice MacKenna set out the following three questions:

    i. did the worker agree to provide his or her own work and skill in return for remuneration?

    ii. did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?

    iii. were the other provisions of the contract consistent with its being a contract of service?

57. In *Hall (Inspector of Taxes) v Lorimer 1994 ICR 218, CA*, the Court of Appeal cautioned against using a checklist approach in which the court runs through a list of factors and ticks off those pointing one way and those pointing the other and then totals up the ticks on each side to reach a decision.

58. Although the courts have moved away from using the "control test" as the sole means of identifying a contract of employment, it remains an essential part of the "multiple test" approach. Control requires that ultimate authority over the purported employee in the performance of his or her work rests with the employer.

59. Another relevant financial indicator of employment is the incidence of income tax and national insurance contributions - deductions at source point to employment; gross payments suggest self-employment. However, this factor is not generally regarded as strong evidence and the opinion of HM Revenue and Customs (HMRC) on a worker's employment status for tax purposes will never be conclusive as to his or her status for employment law purposes.

60. The parties' stated intention as to the status of their working relationship in law may be a relevant factor but the courts will always look to the substance of the matter, even if the parties expressly agree on a label with the approval of HMRC.

61. It is well established that a contract of employment cannot be altered merely by attaching a different label to it.

62. The House of Lords in *Carmichael v National Power PLC* [2000] IRLR 43 held that the irreducible minimum in a contract of employment is mutuality of obligation; an obligation on the part of the Claimant to do work and an obligation on the part of the Respondent to provide work.

63. The mutuality of obligation test is most often relevant where an individual has carried out work on a casual, irregular or sporadic basis over a period of time. Such work may be variable but fairly constant; or it may be periodic with long gaps between each "stint", as in the case of seasonal workers.

64. The question is whether mutuality of obligation subsists during those periods when the individual is not working, giving rise to a continuous "global" contract of employment spanning the separate engagements. The required obligation is generally seen to consist in an exchange of mutual promises of future performance.

65. In order to determine whether such mutuality of obligation exists, it is necessary to look at the working periods themselves, taking into account their frequency and duration.

66. Where there has been a regular pattern of work over a period of time, a court or tribunal is more likely to infer from the parties' conduct the existence of a continuing overriding arrangement, itself amounting to a contract of employment, governing the relationship, despite the absence of any express agreement.

67. Even if no global contract exists, there may be a contract of employment in relation to each individual engagement. If so, the worker may be regarded as an employee in respect of each engagement, even though the employment relationship ends when the engagement is completed.

68. In the case of a so-called "global" or "umbrella" contract, the question will be whether there is an obligation to provide and perform any work which becomes available and whether that obligation continues during non-working periods; in other words, whether mutual promises as to future performance have been made.

69. For example, in *Clark v Oxfordshire Health Authority 1998 IRLR 125, CA*, the Court of Appeal held that a nurse who was retained by a health authority to fill temporary vacancies in hospitals did not have a global employment contract spanning her various individual engagements because there was no mutuality of obligation during the periods when she was not working. The fact that the claimant was bound by an ongoing duty of confidentiality even during non-working periods was insufficient, since any such obligation would have stemmed from previous single engagements, and no continuing obligation whatever would have fallen on the health authority. However, the Court did accept that the mutual obligations required to found a global contract of employment need not necessarily consist of obligations to provide and perform work: for example, an obligation on the one party to accept and perform work and an obligation on the other party to pay a retainer during periods when work was not offered would be likely to suffice.

70. Terms conferring mutual obligations cannot usually be implied into a contract contrary to obvious express terms.

71. The Court of Appeal reviewed the requirements for the existence of a global contract in *Stringfellow Restaurants Ltd v Quashie 2013 IRLR 99, CA*. There, Lord Justice Elias held that for a global contract to exist, it is necessary to show that there is at least "an irreducible minimum of obligation", either express or implied, which continues during the breaks in work engagements. He pointed out that the significance of the irreducible minimum is that it determines whether a contract exists at all during the periods of non-work. There must be something from which a contract can properly be inferred

72. The parties have also referred me to an earlier judgment of Mr Justice Elias, as he then was, in *St Ives Plymouth Limited v Haggerty UKEAT/0107/08* in which the tribunal found that there was a duty to be offered and to work a reasonable number of shifts (see at para 16). The EAT held, by a majority, that a course of dealing, even in circumstances where the casual worker was entitled to refuse any particular shift, may in principle be capable of giving rise to mutual legal obligations in the periods when no work is provided.

73. Where there are breaks in the employment relationship of more than a week that are not governed by a contract of employment, continuity will be broken unless it can be established that those weeks are covered by one of the statutory exceptions set out in section 212(3) ERA.

74. Section 212(3) applies where the employee is:
    i. incapable of work in consequence of sickness or injury - S.212(3)(a)
    ii. absent from work on account of a temporary cessation of work - S.212(3)(b), or
    iii. absent from work in circumstances such that, by arrangement or custom, he or she is regarded as continuing in the employment of the employer for any purpose - S.212(3)(c).

75. "Week" in this context means a "statutory" week ending with a Saturday (*i.e.* a week running from Sunday to Saturday), as defined by section 235(1).

76. Section 212(3)(b) preserves continuity during any week when the employee is absent from work on account of a temporary cessation of work. There are three essential elements to S.212(3)(b):
    i. there must be a cessation of work
    ii. the cessation must be temporary
    iii. the reason for the employee's absence must be the cessation of work

77. The ERA does not give a definition of "cessation of work".

78. Section 212(3)(c) provides that where an employee is absent from work in circumstances such that, by arrangement or custom, he or she is regarded as continuing in employment for any purpose, his or her continuity of employment will be preserved. An "arrangement" is an arrangement by which an employee is regarded as remaining in employment for any purpose, even though his or her contract has terminated. In order for section 212(3)(c) to apply, any "arrangement" upon which a claimant seeks to rely must have been made *before* the absence began. The cases indicate that in order for continuity to be preserved under section 212(3)(c) there will need to be some evidence of a mutual expectation or assumption that the absence from work will only be temporary.

Conclusions

79. The first dispute for me to determine is whether or not the claimant was an employee while she was engaged on an assignment for the respondent.

80. The claimant's case is that during each assignment the claimant plainly satisfied each element of the tripartite test in *Ready Mix Concrete*. In particular, during each assignment there was an obligation to work personally, mutuality of obligations and control.

81. No issue arises that the claimant was required to render personal service for the assignments. It is also not in dispute that she was required to wear respondent's uniform and comply with its policies.

82. Mutuality of obligation in relation to the duty to provide and do work is not in dispute for these periods.

83. Although not determinative, it is relevant that the respondent itself referred to the claimant as an employee in its self-designated "contract of employment". Further, as I have found, tax and national insurance was dealt with by the respondent.

84. In contrast, the respondent says the claimant was not an employee during these times because:
    i. references to "employment" in the contract are not reflective of the reality of the situation
    ii. the respondent had no control, influence or preference over which of the eligible bank employees accepted a single assignment
    iii. the respondent could not tell the claimant when to work and had no control over the claimant when she was not undertaking assignments
    iv. a requirement to wear uniform is not determinative
    v. there is a difference between the obligation to offer/accept work generally and the obligation to turn up (and on-time) once the offer of work is been accepted
    vi. the claimant was entitled to, and did in fact, cancel shifts when she had agreed to work from
    vii. the claimant did not work a regular pattern in respect of hours or location every week (72-76)
    viii. the claimant was free to work for any other organisation whilst registered on the bank
    ix. there is no requirement to provide notice
    x. she was not entitled to the terms and conditions of the Agenda for Change framework and there was a limited entitlement to statutory sick pay

85. I am entirely satisfied that while the claimant was engaged on a particular assignment she was employed by the respondent.

86. No dispute arises as to mutuality of obligation during these periods. The contract itself makes reference to assignments and work which has been mutually agreed. During the assignment the claimant was obliged to work for the respondent and the respondent was obliged to provide work and pay the claimant. No issue arises as to control during this period.

87. Further, many other factors point to an employment relationship. These include, but are not limited to, being subject to the respondent's grievance and disciplinary procedure, apparent integration into the workforce and attendance at staff meetings and training. Payment was made as if the claimant was an employee and she was even referred to as an employee in the contract of employment and accompanying schedule.

88. The arguments of the respondent are seemingly directed to periods when the claimant was not engaged on an assignment.

89. As set out above, section 212(1) ERA provides that 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.

90. The respondent says that there were breaks of over a week during the two-year period prior to termination. Accordingly, the respondent says the tribunal does not have jurisdiction to consider the claim of unfair dismissal due to insufficient qualifying service.

91. An issue therefore arises as to whether during these weeks the claimant's relationship with the respondent was governed by a contract of employment.

92. The respondent says there was no contract of employment during these periods. The claimant says there was, in the form of a "global or umbrella contract". This is however pursued as a secondary argument by the claimant. The claimant's primary position is that section 212(3) ERA 1996 applies to ensure continuity.

93. As set out above, in the case of a global contract, the pertinent question is normally considered to be whether there is an obligation to provide and perform any work which becomes available and whether that obligation continues during non-working periods; in other words, whether mutual promises as to future performance have been made.

94. In this case there were no mutual promises as to future performance.

95. It is argued on behalf of the claimant that a global or umbrella contract arises nonetheless because, in particular, the facts are analogous to those in *St Ives Plymouth Ltd v Haggerty UKEAT/107/08*.

96. In that case, which is discussed above, Elias P held at para 26 that "In our judgment, it follows that a course of dealing, even in circumstances where the casual is entitled to refuse any particular shift, may in principle be capable of giving rise to mutual legal obligations in the periods when no work is provided."

97. The Employment Tribunal in that case placed reliance on the fact that the claimant's services were valued and frequently called on.

98. However, in this case although it is clear that the claimant was doing important work for the respondent there is no evidence that the claimant was particularly important to the respondent employer. Had she not selected the shifts she wanted to do it is likely that other bank workers would have chosen those shifts.

99. During these periods there was no obligation on the claimant to accept any assignment offered by the respondent. Further, there was no obligation on the respondent to offer any work to the claimant.

100. Although there were relatively very few weeks during which the claimant did not work the written terms of the agreed contract are that the parties to the contract accept that there is no obligation either way and that the terms of this contract applied to a mutually agreed period of work. The hours of work are set to be "as and when required". Terms conferring mutual obligations cannot usually be implied into a contract contrary to obvious express terms.

101. In *Haggerty*, unlike the present case there were no written terms governing the overall relationship and the respondent took steps to try and ensure that each bank worker was offered a reasonable amount of work directly.

102. Accordingly, I am not satisfied that there is any such global or umbrella contract in this case.

103. The claimant seeks, as her primary case, to rely on section 212(3) ERA. This section applies, and applies only, where there is a period during which there is no contract of employment. As set out above, an employee may count towards a period of continuous employment any week during which, or during part of which, he or she is "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" even though there was no contract of employment subsisting during the week or weeks in question (ERA 1996 s 212(3)(*c*)).

104. It is sufficient that the employee was so regarded for some but not all purposes.

105. Authority provides that there must be some *arrangement* or *custom* whereby the employee is regarded as an employee notwithstanding his or her absence and despite the fact that he or she has no contract of employment with the employer during the period of absence. In effect, what is required to be shown is a custom or arrangement whereby the employee is treated as “on the books” of the employer during the period(s) in issue (see judgment of Elias P in *Vernon v Event Catering Management Ltd* at para 27).

106. The Court of Appeal’s decision in *Curr v Marks & Spencer* makes three points clear; whilst expressed in relation to arrangements, the points seem equally applicable where it is a custom which is in issue. The points made are: (i) that the arrangement must be understood by both parties to have the requisite effect; (ii) that the requisite effect is that the employee is regarded as *continuing in the employment* of the employer; and (iii) that it is sufficient if he or she is so regarded for *any* purpose, not necessarily for all purposes

107. Originally, both parties made submissions on this issue on the basis that the claimant was absent during the relevant periods on account of holidays. However, it transpired that the claimant took no holidays during the relevant periods.

108. Further, the respondent originally maintained there were 11 relevant gaps in the two years leading up to the termination which would each act so as to break continuity of employment. It is now agreed that there are only 6 such gaps. It is also noteworthy that the claimant completed her last year with just one short gap from 17-25 May 2015.

109. Among other things, the claimant now relies on the following which are said to occur during the relevant gaps:

i. the claimant was provided with access to her work email
ii. she was provided with access to a website by which she could apply for relevant assignments
iii. the documents made reference to her as an employee
iv. while not working the claimant was obliged to keep the respondent updated about reasons for non-availability (46)
v. the claimant had a duty to keep in contact with the respondent when not working (46)

vi. the claimant was required to keep information about availability for work as up-to-date as possible (46)
vii. obligations arose with respect to the cancellation or non-attendance for shifts (see at 56)

110. The respondent denies that there was any arrangement or custom in place. I am reminded that there must have been some discussion or agreement between the parties.

111. The facts of this case seem almost to be the very definition of being "on the books" when not working or covered by a contract of employment. The claimant was a regular worker who did not take holidays. She worked a fairly consistent shift pattern. There was at the very least a mutual expectation or assumption that her absences from work would only be temporary.

112. The agreement between the parties was that the claimant was to be referred to as an employee (see at para 3 at 48). The "employee" was expected to advise the Trust as to their availability for work. This obligation would apply during breaks between assignments when there was no contract of employment.

113. When not covered by a contract of employment the claimant was able to maintain and use her work email account as well as access and the online electronic notification system which alerted her to upcoming assignments. Absence from work in of itself would not lead to any further training or induction.

114. Although the "contract of employment" was signed by the claimant on 14 September 2012 and the Trust on 10 September 2012 (57), it provides that the date of "continuous employment" with the Trust began on 14 May 2012 (56). Her tax records also showed a start date of 14 May 2012 (79). She did not work shifts every week between these dates. Her first shift, after four days of training between May and August 2012, did not take place until 7 September 2012 (see at 64).

115. In addition to the contract the Standard Operating Procedure deemed that when the claimant was not working she was required to keep the respondent "updated about reasons for non-availability" (46).

116. It seems to be agreed that even when not covered by a contract of employment the respondent was committed to treating the claimant and others in her position "fairly" (46).

117. During the relevant breaks there were ongoing obligations on the part of both the claimant and the respondent (see at 43 and 46). In my judgment, obligations were afforded to the claimant as someone who was an employee "on the books".

118. As was the case in *Vernon v Event Management Catering Ltd* UKEAT/0161/07 the effect of the arrangements between the claimant and the respondent were that the claimant would not be prejudiced by failing to work shifts for periods of less than 3 months.

119. The way the trust operated was that work was allocated on a first come first serve basis and it was expected that the claimant would apply for shifts which suited her needs. Instances when the claimant did not work complete weeks were rare. Further, it seems that the written contract agreed between the parties envisaged treating the claimant as an employee during these periods.

120. The contract provides that cancelling at short notice or failing to attend for booked shifts may lead to disciplinary action or dismissal in line with the respondent's disciplinary procedure (56). Although the respondent's disciplinary policy would not ordinarily apply to individuals who are not workers or employees it seems that it did apply to the claimant during these periods when she did not have a contract of employment with the respondent.

121. I note the comments of Elias P in *St Ives* (see above) about disciplinary proceedings applying to casuals. The tribunal judge held that disciplinary action was supporting evidence of continuing obligation between the parties (see at para 9). Elias P held that no weight would have been given to the fact that the employer in that case was choosing to introduce disciplinary proceedings. This was because "it is wholly consistent with the fair treatment of a true casual, who is not subject to an umbrella contract, that he should not be struck off the bank of casuals unless he has had an opportunity to meet the charges against him" (see at para 32). Elias P concluded that the fact that the employer affords such a fundamental right of natural justice ought not to weigh against him when determining the true nature of the relationship.

122. In this case the disciplinary procedure could be applied when there was no contract or employment, including no global contract (see at para 2 at 48, para 17 at 49 and 56).

123. However, even discounting the application of the disciplinary procedure, the claimant was subject to some duties and obligations during weeks she did not work for the respondent, even if this did not relate to an obligation to accept work.

124. The relevant provision provides only that she be regarded as continuing in employment for "any purpose". The claimant understood that she was to be treated as an employee during these periods. I am also satisfied that the respondent understood that the claimant was to be treated as an employee for some purposes during these periods.

125. As a further alternative the claimant also seeks to rely on section 212(3)(b) ERA which provides that any week during the whole or part of which an employee is absent from work and account of a temporary cessation of work does not count.

126. The claimant says her preferred shifts were not available during these weeks and this amounts to a "cessation". I have not been presented with any evidence to indicate that there was any less work available at nights and week-ends during these periods. Rather, the evidence is that the claimant was not able to secure the work on a first come first serve basis. It does not seem to be in dispute that there would have been other shifts available during these periods which the claimant could have obtained were she to apply for them.

The reason she did not apply for such shifts was because she was not able to combine such shifts with her other personal commitments.

127. Were the case to turn on this issue I would have been against the claimant. There was no temporary cessation of work. Work was still being done at week-ends. I am satisfied that during these periods work was offered to the claimant which she did not do because it did not fit in with her preferred working pattern. This does not, in my judgment, amount to a temporary cessation of work.

Further Directions

128. The parties are instructed to write to the tribunal within 14 days from the date this judgment was sent out with a joint list of proposed draft directions for the substantive hearing in this case.

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Employment Judge Pirani
2 February 2017