EMPLOYMENT TRIBUNALS

Claimant: Mr R Nadeem

Respondent: University Hospital of South Manchester

HELD AT: Manchester **ON:** 27 June 2017

BEFORE: Employment Judge T Ryan

REPRESENTATION:

Claimant: Mr J Mitchell, Counsel
Respondent: Mr N Siddall, Counsel

JUDGMENT ON APPLICATION TO AMEND

The judgment of the Tribunal is that the claimant's application to amend his claim to include a contention that he was an employee or a worker for that Trust within the provisions of section 230 of the Employment Rights Act 1996 is granted.

REASONS

1. By a claim presented to the Tribunal on 2 October 2016 against University Hospital of South Manchester ("UHSM") as first respondent and Pennine Acute Hospitals Trust ("PAT") as second respondent, the claimant alleged that he had been subjected to a detriment by reason of having made protected disclosures to the General Medical Council. He refers to the Pennine Acute Hospital Trust as the lead employer, and it is common ground that at the material times he was employed by that Trust although apparently that employment has now been determined. The claimant was placed in the UHSM hospital at Wythenshawe as part of his training in the surgical discipline.

2. The claimant had contacted ACAS in respect of this claim on 4 August 2016 and an early conciliation certificate was issued on 4 September 2016.

3. The respondent disputed that the claimant was an employee or a worker for University Hospital South Manchester, and disputed the disclosure claims: both that the claimant had made protected disclosures and secondly that he had been subjected to the detriment by reason of those disclosures by anybody.

4. The claimant's case is that he made disclosures to the GMC on 25 February, 16 and 24 March 2016 and he submits that because of those he was stopped working at UHSM on 6 May 2016 i.e. the detriment was a termination of placement. If he was in any sense an employee of UHSM he may have a claim under section 103A for unfair dismissal, but clearly not otherwise.

5. It is perhaps useful to set out the history briefly.

6. At the outset of the claim, and indeed all the way up until a comparatively recent date, the claimant was acting as a litigant in person, and whilst he is a medical professional he is not a lawyer.

7. He came before EJ Howard here on 7 December 2016. She recorded that the claim against PAT was dismissed on withdrawal and listed a preliminary hearing to consider whether the claimant was a worker for UHSM for the purpose of section 43K and Part IVA of the Employment Rights Act 1996; that is to say the part covering protected disclosures.

8. On 24 February 2017 at the preliminary hearing on that day EJ Porter stayed the case for two months pending determination in the Court of Appeal of the case of **Day v Lewisham & Greenwich NHS Trust and Health Education England**.

9. On 5 May 2017 the Court of Appeal handed down its reserved judgment in **Day**. Helpful insight has been given to me in relation to that case since Mr Siddall who appears before me was junior counsel in that case also.

10. On 25 May 2017 the claimant's solicitors who act for him now, having as I understand it been instructed through the auspices of the BMA, informed the respondent and the Tribunal that they were acting for the claimant. Having regard to the fact that the case no longer needed to be stayed pending the decision of the Court of Appeal, a Notice of Hearing was sent out for this hearing as recently as 14 June 2017.

11. On 20 June 2017, having acted with reasonable expedition it seems to me, the claimant's representative wrote to the Tribunal applying to add additional issues to the preliminary hearing, namely whether the claimant was an employee or a worker under section 230; proposing re-listing this hearing as a one hour case management hearing by telephone in order for the Tribunal to give directions and to re-list it for what was thought then to be a 1½ - 2 day hearing on all the issues.

12. On 20 June 2017, the same day, the respondent wrote in objecting to the addition of other issues and in the alternative objecting to the case being converted to a preliminary hearing for case management and said, I note, that no further evidence would be required with regard to the section 230(3) employee issues.

13. On 21 June 2017 the claimant's representative wrote in reply.

14. On 22 June 2017 the Tribunal wrote to the parties at EJ Porter's direction refusing the postponement, saying that employment/worker status can be determined on the same evidence, and whether the employment status could be decided or should be decided would be decided at the outset of this hearing, as I have indeed done.

15. On 23 June 2017 the respondent wrote saying that if there was an application to amend the claim, as both parties agree it is, there would now need to be further evidence and disclosure and, having spoken to counsel, that one day would be insufficient. The parties then engaged in further correspondence the same day. The claimant's representative renewed the postponement application and the respondent wrote objecting to the contents of the claimant's solicitor's last letter.

16. At the start of this hearing, perhaps unsurprisingly given the history, the parties were still in dispute.

17. Mr Mitchell for the claimant submitted that all three forms of status, that is section 230(1)(a) known as a "limb A classic contract of service employment status" should be determined, together with "limb B", which is the normal or non-extended definition of worker which applies in both the Employment Rights Act and in, fo example, other leigslation such as Working Time Regulations 1998, and also the section 43K issue which is the extended definition of worker for the purposes of protected disclosure. He referred to the fact that the claimant was not represented. He had made no informed concession before EJ Howard, and that the case, he said, could proceed today on both limb B and section 43K. He did not accept on behalf of the claimant further disclosure was necessary, and he described the respondent as attempting to restrict the scope of the claimant's case on a technicality and it was not consistent with the overriding objective.

18. In reply Mr Siddall pointed out that the respondent had only given disclosure pursuant to EJ Howard's order with regard to the section 43K issue, and he drew my attention to that order and it is clear that was what was ordered by EJ Howard. The argument he put forward against allowing the claimant to proceed was that the section 43K issue is different from the section 230 issue and that the claimant had accepted that the application was to widen the need for disclosure and additional witness evidence. I am not sure much turns on that latter point since the parties seem to have taken at various points of this short history diametrically opposing views and sometimes adopting the views of the other on a preceding occasion.

19. Mr Siddall also submitted that the prejudice were I to allow this application was the fact that the issue could not be determined today, there would have to be further disclosure, further witness evidence, and the prejudice was cost and could be met by an order for costs if that was what the Tribunal thought was appropriate.

20. Mr Mitchell invited me to look at the skeleton arguments that had been prepared for EJ Porter's preliminary hearing, although they had not been argued before her. It is common ground they were not exchanged prior to the hearing and the claimant was not represented, and whilst the claimant does seem to have, as it were, directed his main attack to the section 43K line of argument, he does leave open at least, or suggest some understanding, that he thought he was also raising issues under section 230, and particularly perhaps in relation to those of being a worker.

21. The respondent's argument was that although Mr Mitchell's submission was that it was implicit in determining section 43K that the Tribunal had to consider the limb B argument, that would be a good point if it were not for the context.

22. I had regard to the contracts issued by PAT in the bundle before me, and what was called an honorary contract or a contract of honorary employment, issued by the UHSM as well.

23. Although Mr Siddall did not admit that the claimant could not give informed consent to the limits on his case prior to being represented, and he referred to the fact that the claimant had certainly as a layman in legal terms attempted to engage at considerable length with the legal issues in setting them out, he could not assert positively that the claimant had been informed or had representation to make informed consent as to what issues should go forward and what should not. He submitted that the respondent reasonably came before me on the basis of the section 43K allegation. He explained why the respondent had updated its witness statements recently, because one witness was not available today, and he drew attention to the witness evidence that he had prepared today, indicating that it had only listed what contractual matters were reserved to PAT and it did not descend into such matters as whether there was day-to-day control of the claimant's work and matters of that sort, or ancillary matters such as leave, compassionate leave, sickness arrangements, working time.

24. It seems fairly clear to me from what the respondent says that matters of pay and assignment to various Trusts or hospitals remains within the province of PAT, as what is called the “lead employer”, and PAT certainly appears on paper to reserve disciplinary and grievances to the lead employer. I do not know at this stage whether in fact some matters might be addressed at a local level by UHSM without referring them all back to PAT. Certainly it is clear that the UHSM appears to refer to the termination of the claimant's engagement at its hospital back to PAT and it was at a meeting with PAT that that engagement was determined.

25. Mr Mitchell makes it clear that he seeks to raise limb B, worker status, because it may be that the claimant gets home under that, and it could be the case that he would fails on section 43K. If that issue were not before the Tribunal an injustice might be done if in the course of the evidence it came out that the claimant was a worker but on a different legal basis. He makes it clear that he only raises section 230 limb A in relation to the argument in **Day** and the issue as to whether each of the putative employers were substantially responsible for setting terms and conditions.

26. The extent to which that occurred and what “substantial” means Mr Siddall says is a matter for further investigation, and he bemoans the fact that the Court of Appeal has not told us what “substantial” means.

27. The issue really is one of whether the claim should be amended, as Mr Mitchell concedes it would need to be.

28. I do not refer in terms to the decision in **Selkent** but I note that in the Presidential Guidance issued in 2014 the then President effectively mirrored the issues at paragraphs 4 and 5 of that part of the Guidance:

> “In deciding whether to grant an application to amend the Tribunal must carry out a careful balancing exercise of all the relevant factors having regard to the interests of justice and the relative hardship that would be caused to the parties by granting or refusing the amendment.

> The relevant factors include the amendment to be made, time limits, the timing and manner of the application."

29. It is not suggested, I think, that time limits effectively arise here. The claimant's claim is in time and an amendment would date back to the time of presentation.

30. The amendment really is a hybrid one, in my judgment. It is by way of the addition of labels for facts described. It is not really one of making entirely new factual allegations but I accept the fact that the factual allegations the Tribunal has to determine will be widened if I grant the amendment.

31. As to the timing and manner of the application. It is noted that an application can be made at any time and allowing the application is an exercise of discretion and the party will need to show why the application was not made earlier and why it was being made at that time. The history shows that the claimant obtained representation from professional lawyers who within very short order of being instructed, as I have already indicated, put in the application to amend.

32. It is not an application to add or substitute a new claim which is entirely unconnected to the original claim. It is really adding a status argument arising out of the same facts of the original claim. Nothing that is allowed or not allowed in this application to amend will alter the fact that the Tribunal will have to go on to decide whether the claimant made protected disclosures and whether he was subjected to any detriment by anybody as a result of that. All those matters remain live.

33. I have gone, as I must do, to the overriding objective in rule 2, and it seems to me that that really is where the clue to the answer in this case lies. The history suggests that if I do not grant the amendment then I would not be ensuring the parties are on an equal footing, for the reasons that I have adumbrated, namely that the claimant has not made this point either at all or as clearly as he should have done at an earlier stage and was not at that stage on an equal footing in terms of representation.

34. Allowing the amendment would enable the claim to be dealt with in a way which is proportionate to the complexity and importance of the issues. Clearly the termination of the engagement at UHSM was an important matter. It raises, as this judgment shows, complex issues and further matters of complexity would have to be dealt with whether I allowed the amendment or not. Granting the amendment would be consistent with avoiding unnecessary formality and seeking flexibility. It would not avoid delay but delay is only to be avoided so far as compatible with a proper consideration of the issues. I do accept there will be delay and this case will have to he re-heard as a preliminary issue in October, and there will be some further expense both on the claimant's side and to the respondent.

35. I have indicated that the respondent's application for costs should be reserved to the conclusion of the issue.

36. In my judgment, the application of the overriding objective requires that to deal with this case fairly and justly the amendment must be granted. It is a matter that could have been agreed between the parties and the costs at least of today avoided or reduced by having a telephone case management conference, as indeed

the claimant suggested. The respondent resisted it, they are entitled to do that, but I make those remarks because anybody considering the issue of costs may want to give attention to that when deciding whether the costs of this hearing, or at least the full costs of this hearing, should be borne by one party or the other or left equally to share.

37. In terms of the additional work that now needs to be done then that is a matter in respect of which it seems to me the respondent must put their case forward at a further hearing if the parties cannot come to some agreement about it.

38. So in those circumstances I have made further Case Management Orders which are explained in a separate document. I have re-listed this hearing before any Employment Judge on **11 and 12 October 2017**. At this stage it is not possible that I can hear it because of other work but should that position change and should the parties wish me to hear it in those circumstances, which is not impossible but as I say unlikely, they may make application for that if they wish to do so.

Employment Judge Tom Ryan

Date 29 September 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
29 September 2017

FOR THE TRIBUNAL OFFICE