



EMPLOYMENT TRIBUNALS

Claimant: Mr Naveed Akhtar
Respondent: Provide Community Interest Company
Heard at: East London Hearing Centre
On: 23 & 24 January 2019
Before: Employment Judge C Hyde, sitting alone

Representation

Claimant: Mr A Nicklyn (Counsel)
Respondent: Mr B Jones (Counsel)

PRELIMINARY HEARING JUDGMENT

The Judgment of the Tribunal was that:

1. The Claimant was neither an employee nor a worker as defined in section 230 of the Employment Rights Act 1996.
2. His complaints of unfair dismissal, breach of contract, unlawful deduction of wages, and claim for holiday pay were not well founded and were dismissed.
3. The hearing of the Respondent's counterclaim was fixed to take place on 4 and 5 July 2019 before a Judge sitting alone.

REASONS

Preliminaries

1. Reasons for the above Judgment are provided in writing pursuant to an oral request at the hearing by the Claimant. The reasons are set out only to the extent that the Tribunal considers it necessary to do so, having regard to the principle of proportionality in the overriding objective, and in order that the parties may understand why they won or lost. Further all findings of fact were reached on the balance of

probabilities.

2. This was an open preliminary hearing in which the Tribunal had to determine whether the Claimant was employed under the Employment Rights Act 1996 (“the 1996 Act”) by the Respondent; alternatively, whether he was a worker under the same Act; and finally, whether the Claimant’s status was that of independent contractor. The Claimant worked as a surgeon performing predominantly carpal tunnel depressions and other minor operations for the Respondent from a date in 2009 until the end of January 2018.

3. The Tribunal had an agreed bundle of documents marked [R1] which numbered just under 500 pages but contained another 100 or 150 pages beyond that, although I was not called upon to read all of them.

4. In addition, at the beginning of the hearing, the Claimant’s representative handed up a skeleton argument which the Tribunal marked [C2]. There was then evidence heard from three witnesses as follows:

- a. from the Claimant, and his evidence in chief was in a witness statement marked [C1] which comprised 44 paragraphs over some 10 pages;
- b. from Mr Phillip Richards on behalf of the Respondent, whose witness statement was marked [R2] and comprised of 8 paragraphs over 3 pages; and
- c. from Ms Linda O’Riordan whose witness statement was marked [R3] and comprised of 27 paragraphs over 6 pages.

5. Finally, both Counsel made closing submissions. Mr Nicklyn on behalf of the Claimant relied on the full skeleton which he had provided at the outset and supplemented those submissions orally, and Mr Jones on behalf of the Respondent provided a written closing submission marked [R4] which he also supplemented orally. I noted that the Tribunal was clear that closing submissions or skeletons are not evidence but they are given exhibit numbers for the sake of good order in relation to the documents before the Tribunal. It was also right that the Tribunal should acknowledge the assistance provided by both Counsel.

6. It was agreed that the statement of law as set out first in Mr Nicklyn’s skeleton and then as reiterated to a certain extent by My Jones, was not in dispute and the issue really was the application of the relevant law of to the facts. Also, Mr Nicklyn provided two relevant authorities - the cases of *Autoclenz Ltd v Belcher* [2011] UKSC 41 and *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29. When oral judgment was delivered the Tribunal indicated that if the parties subsequently requested written reasons, the Tribunal would adopt and include in the reasons, parts of the very helpful submissions already referred to. An extract of Mr Jones’ submissions follows:

The Claimant in his skeleton has quoted the relevant statutory provision under **s.230 Employment Rights Act 1996** along with the key authorities of *Ready-Mixed Concrete*, *Autoclenz* and *Pimlico Plumbers*. Respectively these identify the key principles that:

- a. Employment involves an irreducible minimum of control, mutuality of obligation and necessity of personal performance;

- b. The Tribunal is entitled to consider whether an express agreement is a sham by having regard to the reality of the relationship (though the terms of the agreement are relevant when interpreting the intentions of the parties – taking into account their respective bargaining power); AND
- c. Any right to substitution must be genuine if it is to negative the essential requirement of personal performance.

The factors identified in the cited excerpt from *Harvey* in the Claimant's skeleton are accepted to be relevant factors for the Tribunal to consider when assessing whether the nature of the relationship between the parties is accurately reflected in any express agreement.

Legal Issues

- a. Was the Claimant an employee under **s.230(1) ERA**:
 - i. Was there a real requirement of personal performance/was there a genuine right of substitution?
 - ii. If there was not a genuine right of substitution: on a consideration of relevant factors was there a level of subordination and control of the Claimant to the Respondent such as to indicate employment?
- b. If not, having regard to those same factors, was the Claimant a 'limb (b) worker' under **s.230(3)(b) ERA**?

The Claimant's Status

7. The starting point for the Tribunal was determining what the terms of the agreement were. It was not in dispute that there had been a few changes in the identity of the organisations which preceded this Respondent. Unless it is necessary to distinguish this respondent from its predecessors, in these reasons, the Respondent and/or its predecessors will be referred to as "the Respondent".

8. I agreed with Mr Nicklyn that the working relationship with the Respondent should be considered through the lens of how it began. As the Claimant himself described in his witness statement, he started performing this role for one of the Respondent's predecessors really by virtue of the fact that he was a G.P in a surgery in which the senior G.P partner was also the Medical Director of the Respondent's predecessor. He then continued doing that work, by dint of his position in the surgery, and with the approval of the Medical Director. There was no application or selection process on the evidence before the Tribunal. Initially there was a contract not between the Claimant and the Respondent but it would appear between the surgery and the Respondent.

9. The Claimant subsequently moved practices to his current practice. His case was that there was no difference in terms of the way in which the arrangement worked when that happened. At some point, at that time, the Claimant also set up a personal services company and payments were made through that company and the company paid the Claimant by way of dividends. Thus, there was always at least one intermediary organisation between the Claimant and the Respondent.

10. Further, in relation to the earlier arrangement, it was not in dispute by the end of

the hearing that the surgeries would receive the money for the Claimant's services from the Respondent having billed them for those services; then the surgery would pay the Claimant after PAYE deductions etc. So, there was no direct contract between the Respondent and the Claimant prior to 2011.

11. From 2011 onwards, the position was ascertained from the terms of the contracts of 2011 and 2014 which were signed by the parties. The contracts did not substantially change the arrangements and it also appeared to me to be important to bear in mind that the context against which these services were provided was the provision of health services to the NHS. The name of the Respondent gives no clue as to the nature of the services provided. Given the nature of the Respondent's business and the services offered by the Claimant, it was unsurprising that many of the terms of the agreement were concerned with ensuring that the necessary standards in terms of healthcare were met.

12. Another finding in terms of the overall position was that, on no occasion between certainly 2011 to the end of the contract when the Claimant's status was described as that of an independent contractor did the Claimant challenge that even though it was clearly and unambiguously set out as such in the contractual documents (e.g. p130). There was no suggestion that the position was any different before that either.

13. These contracts were originally for fixed terms of two years with the option to renew for a further 12 months, and this happened back to back.

14. It appeared to me to be relevant that the Claimant was a very skilled person, a highly qualified medical doctor whose position was described as a 'G.P with Special Interests' ("GPwSI"). He had obtained the necessary additional qualifications to enable him to perform minor surgical procedures. In Sched 1 to the 2014 contract, such a practitioner was described as "*...first and foremost a generalist [who] has developed a level of skill or competence that exceeds the core competences of the individual's normal professional role. They are accredited to deliver specialist clinical services directly to patients and are able to act without direct supervision.*"

15. I reviewed all the now well-known, relevant authorities from *Ready Mixed Concrete* through to the more recent cases of *Autoclenz Ltd v Belcher* and *Pimlico Plumbers Ltd*.

16. Against the legal and factual background set out above, I considered the main points that were made in Mr Nicklyn's submission in support of the Claimant's case.

17. In relation to the question of control, it appeared to the Tribunal that whilst there was some control over the service that was provided by the Claimant, this was largely directed to the administration of that service and it would have been a nonsense really for such provisions not to have been in place if a professional healthcare service was being provided by the Respondent. These were for example, matters such as requiring the Claimant to give six weeks' notice in relation to his holiday (p139), and organising when the patients were to come in to be operated upon. There was in this Tribunal's view, nothing inconsistent with the suggestion that the agreement reflected the status of an independent contractor.

18. Further, if the Claimant had been an employee, it would have been far more likely that he would have had his practice monitored in terms of his clinical competence and there was no evidence that such was in place within the Respondent. Linda O'Riordan

who was his manager carried out the occasional observation. She held the position of Podiatry Clinical manager and Manager to Minor Operations. Her professional background was as a podiatrist. She was not a medical specialist of the same sort as the Claimant and there was no suggestion that she was a professional peer of the Claimant's who supervised him or monitored his performance as a doctor. This was consistent with the description of the role of the GPwSI above.

19. A further point was made about annual leave. I considered that the requirement of the Claimant was to specify when he would be unavailable, which was in effect what the reference to annual leave meant. The provision was in a Schedule to the contract, which dealt with the provision of the services. Such provisions were necessary for the sensible delivery of the service and it was not in dispute that Sch 1 to contract provided that six weeks' notice should be given and there was nothing that suggested that this was not a requirement in practice. However, the further argument that the Claimant was entitled to six weeks leave during the year was rejected. There was no evidence whatsoever to support that contention. The minimum service that was required to be given by the Claimant according to Sch 1 (p137) under the sub-heading "GP Availability" was 42 sessions per year. A session amounted to a four-hour slot. Indeed, the Claimant could not point to any evidence to corroborate his contention that he was only entitled to six weeks leave during the year under this contract or arrangement.

20. I also accepted Mr Jones' general points in closing that the Claimant ended up doing a considerable amount of work for the Respondent and, given the service that was provided to the public, the Respondent was happy to accommodate this as far as they could, subject to their other resources. However, the amount of work done by the Claimant simply reflected the fact that the Claimant liked the work. I had no reason to believe that he was not a highly skilled professional who took the opportunity to earn money at the Respondent's facility, as he was fully entitled to do. This was not a factor which indicated that he was not an independent contractor. The amount of work he did, above the low annual contractual minimum specified above, was his choice.

21. I considered the point about who made decisions about patients. It did not appear to me that there was any suggestion that the Respondent intervened in terms of any clinical decisions or judgements that the Claimant made during the course of his work. The only occasions on which there was a difference in views as to whether a patient could be treated was when there was no clinical reason for the Claimant to have declined to see a patient and therefore the Respondent insisted on this. These were rare occasions. It appeared to me that this did not detract from the contention that the Claimant had self-employed contractor's status because the Respondent had after all contracted with the Claimant for the provision of a service and if the service needed to be delivered on an occasion on which the Claimant had attended for work then it was simply a case of the Respondent asking for the Claimant to comply with his contractual obligations.

22. As to the Claimant being bound by the Respondent's policies and being expected to observe them, it appeared to me that those were matters which could point to the Claimant being an employee. However, apart from the references to the social media policy, these policies concerned medical service compliance issues. It was quite clear in the emails in which these policies were brought to the attention of the Claimant and the other GPwSIs who were working within the Respondent's premises, that the majority of the recipients were the Respondent's employees.

23. The next point was about the reference to gross misconduct and that being a

basis of termination of the contract. It was correct that this was the ground given for termination, and that this term is usually used in an employment situation. It was however also an express category in the April 2014 contract between the Respondent and the Claimant which entitled the Respondent to terminate the contract (p128).

24. The valid termination of a contract of employment even for gross misconduct, would usually entail compliance with some sort of process. There was no process identified in the agreement. On one occasion when there had been the potential of a serious incident, the Respondent conducted an investigation into whether the circumstances amounted to that. It was not in dispute that this was a situation in which the Claimant's clinical practice could have been challenged. I agreed with the Claimant that this was an occurrence which would tend to point towards him being an employee.

25. I considered the issue of mutuality of the obligation. This was very closely linked with the consideration of the need for personal performance and the power of substitution. The agreement unambiguously expressed that the Claimant was an independent contractor. I agreed with the submissions of Mr Jones as to personal performance and the powers of substitution. It was not in dispute that the Claimant did not ever ask to use a substitute but I did not consider that the power to do so in the agreement was not genuine. This was a situation in which the Claimant could have arranged for one or more people who had the specialism that he had, to be available to take up any of these shifts. The contract anticipated that apart from giving undertakings in relation to confidentiality, the Claimant could provide a substitute who was appropriately qualified and who could then conduct the operations and that the Claimant would be the one who would sort out payment of the person. So, that again appeared to be an arrangement which was fully consistent essentially with the Claimant running a business in which he could take part of the benefits even though he was not actually conducting the operations himself. It tended to reflect the arrangement in the early days when the surgery supplied the Claimant's services, was paid by the Respondent, and then in turn paid the Claimant.

26. There was also a need for the person who was to be the substitute to be accredited. Anyone carrying out that work, be they employee or independent contractor, needed to be accredited. This was therefore in my opinion a neutral provision and was not a provision which failed to reflect the agreement between the parties.

27. As to personal service, as set out above, it did not appear to me that it was necessary that the service was carried out by the Claimant. I had regard to the circumstances in which the Claimant got the position initially and as he himself describes in paragraph 2 of his statement that initially the service was run in Braintree and was headed by Dr Patterson. He was asked to fill in when Dr Patterson was on holiday and then when Dr Patterson went on long term sick leave, he covered Dr Patterson's shift and then when Dr Patterson retired he took over the operating lists. That did not appear to me to suggest a background in which it was essential to the Respondent that it was the Claimant himself who carried out those roles. I had no doubt whatsoever that as matters progressed the Respondent was perfectly happy with the Claimant's performance and with his provision of the service. However I was also satisfied that the agreement permitted other arrangements to be in place whereby the service was provided by another.

28. A point was made about the Claimant only being able to work on set days and for set sessions. Again, it appeared to me that this was simply a matter of ensuring good

order in terms of the administration and provision of the service. The Claimant was free to provide the dates on which he was available. He may have had concerns that if he provided a substitute, the Respondent might decide to use their services instead of his. That did not appear to me to be something that undermined the genuineness and authenticity of the written agreement. As with other factors considered above, the Tribunal was satisfied that it was a genuine provision even though it was never actually used, as in this case.

29. The Claimant also addressed certain other features of the arrangement. One of these was the issue about the indemnity insurance. By the end of the submissions, the position in relation to this was agreed between Counsel. I found that the Claimant was required under the agreement to have his own professional insurance to cover his own potential liability in terms of the work he did whilst with the Respondent. I took into account here also that the contract governed the provision of healthcare services by a medical professional.

30. As to the issue of training, it appeared to me that this was neutral given the areas the training covered, such as training the Claimant on new equipment that he used in his work. One would have hoped that such training would occur if anyone was being asked to carry out operations on people using a particular machine, regardless of their employment status.

31. It appeared that the auditing only started around the latter stages of the Claimant's employment in 2017. Comments that were made in relation to the Claimant's performance were very superficial in the Tribunal's view. Further the audits were done by Ms O'Riordan who is not a specialist in the area the Claimant worked in and also included matters like feedback from patients afterwards as to whether they would recommend the service to friends and family. Other than that, they were largely questions about compliance with regulations etc.

32. Similarly, there were a few occasions on which the Claimant's input was invited into the creation of leaflets and materials to go out to patients. I was satisfied that the Respondent wanted the Claimant to deal with this at work and not in his own time. Indeed, there were some difficulties caused when the Claimant sought to claim payment for time spent out of hours on this work. The Respondent made it clear to the Claimant at the time that they wanted this done at work, if it was going to be done by him. This was in any event a minor part of the work the Claimant did. The Tribunal took into account the context that the Claimant and Respondent were jointly providing a health service to the public, and that it was consistent with the Claimant's professional obligations, and with the underlying objectives of the Respondent to ensure that the patients had good information before they came for their operations.

33. This issue was not determinative of employment status.

34. Similarly, in relation to the Claimant's contention that he was involved in negotiating an order on behalf of the department, I was not satisfied that the Claimant was asked to do this as he initially suggested. He was clearly involved in the process and indeed it appeared he secured a discount from the supplier of the equipment. He relied on this as evidence of being integrated into the Respondent's workforce. However, it was also clear from the contemporaneous documentation that a member of the Respondent's administrative staff was charged with dealing with this Order. I did not consider that the Claimant's apparently voluntary involvement in this transaction on a single occasion was of any assistance in establishing that he was an employee of the

Respondent.

35. As to equipment used and clothing worn by the Claimant, given that this was a clinical service relating to the treatment of patients, with hygiene considerations, it made sense that the Respondent should supply the equipment and clothing, and for the Respondent to arrange for those to be cleaned and sterilized as appropriate.

36. It was initially said that the Claimant was told to hold himself out as an employee of the Respondent. The name badge which is in the documents clearly describes the Claimant as what he was, a G.P with Special Interests. I was not shown any evidence of substance which showed that he was held out as a Service Lead. There was simply evidence of him chasing up a certificate in relation to some short training on behalf of himself initially and then on behalf of others. That did not appear to me to amount to being held out as a Service Lead.

37. A further point was made about the treatment by the Respondent of the Claimant as an employee and this related to various forms which the Claimant was asked to complete such as a DBS form. Again, it appeared to me obvious from the context that these were forms which the Respondent had created and which were largely directed at employees but this was information which they would need from anyone carrying out work on their premises and therefore it was given to the Claimant as well. I did not consider that this was an indicator of the Respondent treating the Claimant as an employee.

38. References were made also in the authorities and indeed by counsel to the relative bargaining positions of the Claimant and the Respondent and that is clearly a point which is material for this Tribunal to take into account. The Claimant's case was that he negotiated his terms and to a certain extent initiated the reduction to 'compressed hours of working' which meant that he only needed to be at the Respondent's premises for six hours from 8am to 2pm as opposed to from 8am to 4pm when he was conducting his sessions. It appeared to this Tribunal that this account was inconsistent with someone whose status was that of an employee or indeed a worker and this indicated a quite considerable bargaining position.

39. The Claimant said that he was forced to sign the contract in 2011 but no complaint was made about that, even though he launched some very detailed challenges especially later in the employment to various aspects of his working relationship with the Respondent. Indeed he stated at some of those times that his challenge was launched after legal advice. He did not challenge his status as an independent contractor. The evidence from the relevant witness on behalf of the Respondent, Mr Richards, was that he understood that the signed contract reflected the arrangement up to that point.

40. In all the circumstances, I was satisfied that first, the Claimant had not established that he was an employee, and that the circumstances did not indicate that the Claimant was a worker either.

41. I found that the agreement which was signed identified him as an independent contractor was a true reflection of the contractual status of the Claimant when he was working for the Respondent.

Employment Judge Hyde

3 April 2019