

mf



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr T Sodipo

**Respondent:** My Locum

**Heard at:** East London Hearing Centre

**On:** Wednesday 8 May 2019

**Before:** Employment Judge Jones

## **Representation**

**Claimant:** In person

**Respondent:** Mr Joshi (Consultant)

## **JUDGMENT**

**The judgment of the Employment Tribunal is that:-**

- (1) The Claimant was a worker.**
- (2) The Respondent has not made an authorised deduction from the Claimant's wages.**
- (3) The claim is dismissed.**

## **REASONS**

1 The hearing in this matter took place on 8 May 2019. The Tribunal apologises for the delay in promulgating the judgment and reasons in this matter. This was due to pressure of work on the Judge and her ill-health.

2 The list of issues in this matter was agreed at a preliminary hearing with EJ Burgher on 21 February and essentially concerned whether the Claimant was a worker or was self-employed and whether he had been paid the correct amount for shifts that he worked. The detail of the issues will be referred to below in these reasons.

### ***Evidence***

3 The Tribunal had live witness evidence from the Claimant. He had not prepared a witness statement so the Tribunal considered his case as set out in the ET1 Claim Form issued on 28 November 2018, recorded at the preliminary hearing before EJ Burgher on 21 February 2018, an application dated 15 March 2018 and in 2 further emails sent to the Tribunal and the Respondent dated 18 March 2018. On the Respondent's behalf the Tribunal heard from Tyrone Apaloo-Taylor, Nursing Division Account Manager and Dean Connor, Finance Manager; who had both prepared written witness statements.

4 The Tribunal had an agreed bundle of documents. The Tribunal also had written submissions from the Respondent. The Claimant's submissions were received after the date set by the Tribunal. The parties were to send their submissions in by 22 May 2019. The Claimant's submissions were received by the Tribunal on 5 June 2019. They were not considered. However, the Tribunal noticed that they were copies of documents that were already before the Tribunal.

5 From that evidence, the Tribunal made the following findings of fact. The Tribunal has not made findings on every aspect of the evidence but only on those matters relevant to the list of issues.

### ***Findings of Fact***

6 The Claimant is a Health Care Assistant. The Respondent is a temporary and permanent recruitment specialist within the medical, healthcare and education sectors. The Claimant registered with the Respondent on 31 May 2017 to provide his services to various NHS Trust Hospitals. The Tribunal was not given a copy of any document the Claimant signed to register with the Respondent. It is unlikely that there was a document signed between the parties as it would have been produced. The Claimant remained registered with the Respondent until 25 January 2019, when it received a complaint from the Trust about the Claimant's poor working practices. The Respondent telephoned the Claimant and informed him that it was no longer able to advise him of any more available shifts at the Trust. The parties stopped working together from that date.

7 The Claimant confirmed that when at work at the Trust he was not under the Respondent's supervision. He would usually be supervised by the matron or other staff on the ward. He also confirmed that he was free to refuse work whenever he was contacted by the Respondent and offered a shift. The Claimant's evidence was that he worked for other agencies over the same period that he worked for the Respondent. The Claimant's evidence was that he never sent his timesheets direct to the

Respondent for payment. Apart from the short time in May 2018 during which he was paid under the PAYE scheme by the Respondent, his timesheets were usually sent to an umbrella company who would then submit these to the Respondent for payment.

8 There were two central disputes between the parties in this case. One was in relation to the fees charged by the umbrella company used by the Claimant. The other was in relation to the shift payments made to the Claimant.

#### *Shift payments*

9 The way in which the parties worked together was that the Respondent would telephone the Claimant and offer him a shift. If he accepted the shift and agreed to work he would be assigned to work that shift. He would be paid £13.50 for each shift booked in this way. The Claimant could also book shifts directly with the Trust. If he booked himself onto the shift he would be paid 50p extra for the shift. On those occasions he would be paid £14.00. The rate on Saturdays was £17.00 per hour, while Sundays and Bank Holidays worked would earn him £19.50 or £19.00 if booked through the Respondent. A week night (Monday to Friday) shift was paid at the rate of £17.50 or £17.00 if booked through the Respondent.

10 Although he registered in May, the Claimant did not start working for the Respondent until 29 December 2017 as he was not happy about the rates of pay that the Respondent offered. During that time the Claimant worked elsewhere as a Healthcare Assistant. His evidence was that he worked with Tonbridge Nursing. They deducted income tax and National Insurance from his wages and paid him a net salary.

11 Mr Apaloo-Taylor had a conversation with the Claimant at the time he registered with the Respondent - as he does with all new workers - and informed him of the rates of pay, the hours and when the shifts started. He also remembered informing the Claimant that the rates of pay changed at 8pm and at 6am. The majority of the Claimant's shifts with the Respondent were at the Whittington Hospital.

12 When working the day shift the Claimant would need to be on the ward for 7.30am but the shift did not start until 8am. Similarly, he would need to be on the ward at 7.30pm to start the night shift at 8pm. The Claimant usually worked nightshifts. Those ended at 8am. Between 6am and 8am the Claimant would get paid at the day rate leaving the balance of the time paid at the night shift rate. This meant that the night shift straddled two rates of pay.

13 We looked at some of the invoices in the bundle and cross-referred them to the Claimant's timesheets to confirm these payments and times. At page 66 there is a timesheet which relates to 17 January 2018. That was a night shift that the Claimant worked. The time recorded on the timesheet is 11.5 hours worked between 8pm and 8am. The payment for that shift is recorded on the invoice from Slickly Services Ltd which was a subsidiary of IPS at page 62 which was for the week ending 21 January 2018. The Claimant was paid 9 hours at the rate of £17.00 per hour = £153.00 plus 2 hours between 6am – 8am at the rate of £13.50 = £27.00. Those figures can be seen on the invoice at page 62.

14 We also looked at the timesheet at page 61 of the bundle. On 9 January the Claimant worked between 7.30pm and 8am. This was a Tuesday night. He recorded a total of 11.5 hours on the timesheet. He was paid 9 hours at the rate of £17.00 = £153 plus 2 hours between 6am – 8am at the day rate of £13.50. Those amounts can be seen on the invoice at page 58.

15 Another example we looked at was at page 85. The Claimant worked the nightshift on 11 February. He worked from 7.30pm to 8am. 4.5 hours were paid at the Sunday rate, which was calculated as follows:  $4.5 \times £19.50 = £87.75$ . He was also paid the night rate from midnight Sunday to 6am on Monday, which was calculated as  $5 \text{ hours} \times £17.50 = £87.50$  and the last two hours between 6am – 8am was paid the day rate, which was  $2 \times £14.00 = £28.00$ . Those three payments can be seen on the invoice from Slickly Services Ltd filed on the Claimant's behalf dated 21 February 2018 at page 82 of the bundle. The Claimant was not paid for his break time.

16 At page 208 there is a timesheet for a nightshift the Claimant worked on 5 August 2018. He worked from 7.30pm to 8am. This was also a Sunday night. The first 4.5 hours were paid at the rate of £19.50, which was calculated as follows:  $4.5 \times £19.50 = £87.75$ . Between 12 midnight on Sunday and 6am on Monday, the Claimant was paid for 5 hours (less 1 hour unpaid break) at the rate of £17.50 (being the night time rate) = £87.50. The two hours between 6 – 8am was paid at the day rate of £14.00 per hour. The total amount due for that shift was £203.25. This can be seen on pages 206 and 207 of the bundle, on the invoice that related to that shift.

17 The Claimant's case was that he was always unhappy about this and that he expressed his unhappiness about the Respondent's rates of pay to Mr Apaloo-Taylor. The Claimant denied knowing how his colleagues were paid but did agree that this was also the way he had been paid by some of the other agencies that he also worked with. Mr Apaloo-Taylor explained to the Claimant that he was being paid correctly. He went through the breakdown in his payments with the Claimant and tried to explain how they were calculated. The Claimant also had a conversation with the Respondent's accounts department.

18 The Claimant believed and it was his case in the hearing that he should be paid a flat rate for all the hours worked over a nightshift. It was his expectation that he should be paid the same rate for the entirety of the shift, irrespective of the start or end time of the shift. He informed EJ Burgher at the preliminary hearing on 21 February that his claim was for a total of £1,056 as the total shortfall in pay for the weekday nightshifts and £825 as the shortfall in pay for Sunday nightshifts.

19 The Respondent explained to him that it had to apply the Hospital, Trust and Framework agreements under which it worked. The Tribunal had excerpts from the NHS London Procurement Partnership Framework (LPP) agreement in the trial bundle. The document began at page 42. The list of members of the NHS London Procurement Partnership on that page confirmed that the Whittington Hospital NHS Trust was part of the partnership. The Respondent confirmed that the earlier pages in

the document that had not been put into the bundle were the balance of the list of hospitals under the LPP.

20 At page 43 of the bundle, the Framework agreement sets out the terms of the engagement or hiring of temporary workers or workers like the Claimant who were referred to as agency staff. It stated at section 4.12 under the heading 'Agenda for Change' that unsocial hours payments were only applicable to all time on Saturday (midnight to midnight) and any weekday after 8pm and before 6am. On page 44 it stated:

*"4.17 The basic hourly pay rate shall be subject to the following shift/assignment times:*

*4.17.1 Days (Monday to Friday between the hours of 8.01pm and 5.59am inclusive, excluding Bank Holidays); or*

*4.17.1.1 Nights (Mondays to Friday between the hours of 08.01pm and 5.59am inclusive, excluding Bank Holidays) and Saturdays (between the hours of midnight and 11.59pm); or*

*4.17.1.2 Sundays and Bank Holidays (between the hours of midnight and 11.59pm)*

*4.18 For the avoidance of doubt, if the Temporary Worker's shift commences at 06.00pm on a Friday and finishes at 04.00 the next day (Saturday), then the basic hourly pay rate payable to the temporary worker supplied in the provision of services shall be calculated as follows, two hours Days plus eight hours Nights/Saturday rates.*

*4.19 Please note: these unsociable hour requirements may be subject to change and alteration in line with any changes that NHS employers put in place.*

21 It was the Respondent's case that this was standard practice and was applicable to agency staff wages across the NHS. The Respondent pointed out that bank staff and agency staff were different and were paid differently.

22 The Respondent confirmed that although a hospital could agree to pay staff outside of the Framework, the Respondent as a supplier of labour, had to adhere to the LPP Regulations or it would be in breach of it and ran the serious risk to its business by getting itself thrown out. The Claimant disputed that but did not bring any documentation to support his claim that the Respondent could pay him the flat rate he wanted to be paid across shifts or that other agencies paid differently. His evidence was that he spoke to someone called Deborah at another agency who informed him that the Whittington Hospital pays the same rate from morning to night, regardless of the shift.

23 In his email dated 18 March to the Tribunal the Claimant included the details of an agency called Zentar UK which he stated supplied staff to Whittington Hospital, with whom he stated he was registered and where Deborah worked. He stated that she had told him that the Whittington was one of the hospitals that paid a flat rate for the whole shift. The Claimant confirmed in the hearing that he had so far not been paid by Zentar UK. They were waiting for references before sending him an agreement to sign. The Claimant did not call Deborah as a witness and did not bring any documents from another agency to support what he was saying.

24 The Claimant complained to the Tribunal in an email dated 1 May that the Respondent had not produced its memorandum of understanding or the agreement between it and the Whittington Hospital showing the rates of pay as he had been told, by someone who did not want to be quoted, that the Respondent was paid a flat rate by the hospital. On 3 April, in response to the Claimant's emails to the Tribunal, EJ Burgher ordered the Respondent to provide a copy of the memorandum of understanding between it and the Whittington Hospital concerning payments of hourly rate staff including weekends and night shifts by 12 April 2019. The Respondent did not disclose this document to the Tribunal but did include the excerpt from the Framework document in the trial bundle which it stated was the relevant agreement governing rates of pay for staff placed by it at the Whittington Hospital.

25 Mr Apaloo-Taylor spoke to the Claimant and explained the rates of pay in a discussion they had in the office on 19 December 2018. This was confirmed in an email he sent to the Claimant which is on page 284 of the bundle. In the email he set out the rates and the changes in the rates. He ended the email by stating that the Respondent would continue to pay at those rates and that the Claimant should confirm that he was happy to attend shifts at these rates and breakdowns. In his response the Claimant referred to bank staff being paid at a flat rate. The Claimant was not bank staff.

26 The Respondent provided the Claimant with an excerpt of the Framework document and explained to him the rates at which his invoices were paid in another email. At page 286 of the bundle is a copy of an email from Stephen Kelly to the Claimant sent the following day, on 20 December 2018. He stated that Mr Apaloo-Taylor had made him aware that the Claimant had raised a concern over the breakdown of his payments where all or part of his payment included an '*unsociable hours element*'. He stated that on investigation he had concluded that the payments to the Claimant had been processed correctly. He also provided the Claimant with a link to the definition and rates of pay applied to unsociable hours on the NHS employers' official website. The Claimant was informed that the rates had been in place since April 2008 following the Agenda for Change Review and its subsequent implementation. The email went on to state that the requirement for Agency workers to be paid in line with this was written in to the NHS CPP National Clinical Staff Framework and that all nurses had been made aware of these rulings in their Nursing Handbook. Mr Kelly confirmed in the email that he had checked the Claimant's personnel file and there was evidence there that on 22 May 2017, the Claimant had signed a statement confirming that he had read and understood the Handbook.

27 Even though the Claimant had expressed unhappiness about his pay, the Claimant continued to accept shifts offered to him by the Respondent. He continued working through the Respondent at Whittington Hospital until the night shift on 24 January 2019. Following the receipt of a complaint from the matron on the ward on 25 January, the Respondent informed the Claimant that it would no longer be able to use his services.

*Umbrella Company*

28 It was the Claimant's case that the Respondent made him use IPS Ltd to submit his invoices to the Respondent and that it was the Respondent's fault that he had suffered what he considered to be an unacceptable level of deductions from IPS which the Respondent should be made to refund to him. He claimed the sum of £6,000. It was the Respondent's contention that it had no choice over the umbrella company the Claimant chosen to process his wages and that as far as it was concerned, the Claimant had always been paid correctly.

29 The Tribunal finds that the Claimant did not usually send his timesheets direct to the Respondent. They had to be submitted to what was referred to as an umbrella company who then submitted an invoice to the Respondent. Once the umbrella company received pay from the Respondent on the Claimant's behalf, it would deduct tax and national insurance and pay the Claimant his net wages.

30 The Respondent agreed that it did occasionally send the Claimant's timesheets to IPS to assist him in getting paid quickly. Mr Apaloo-Taylor confirmed that there had been a few times when he had forwarded the Claimant's timesheets or attached them to an email to IPS in order to assist him as it meant that the invoice would be produced faster and he would get paid more quickly.

31 Although the Claimant's evidence was that the Respondent had sent him an email telling him that he had to use IPS Progression Ltd to process his pay, he did not produce this email to the Tribunal and it was not in the bundle of documents. The Tribunal finds it highly unlikely that such an email had been sent to him as it would have been simple enough for it to be produced.

32 The Tribunal finds it likely that the Respondent had a list of the umbrella companies that it had frequent dealings with and the details of which it already had on its systems. It would have been able to confirm which umbrella companies were on its system, if it had been asked. It is unlikely that the staff in the office or Mr Apaloo-Taylor recommended IPS to the Claimant. The Respondent was adamant in the hearing that the choice of umbrella company is a choice that has to be made by the worker. Mr Connor's evidence was that the Respondent would not recommend a particular umbrella company as each one has different terms, conditions, fees and costs and each worker must assess the terms offered by each company and decide for themselves which is best suited to them. The umbrella companies are independent entities and there was no suggestion that IPS, Elite or any other umbrella company

was connected to the Respondent in any way. The legal agreement was made between the candidate and the umbrella company.

33 There was a copy of the agreement which the Claimant made with IPS Countrywide Ltd in the bundle. This document referred to itself as an 'employment contract' between IPS Countrywide and the Claimant, who signed it on 14 March 2018. The document had clauses that related to notice pay, hours of work, holidays, sickness and other terms that would usually be found in an employment contract. IPS Ltd was based at Suite 114, Business First, Business Centre, 25 Goodlass Road, Liverpool L24 9HJ. The Claimant had previously worked for the Respondent being paid through the umbrella company, Slickly Services which was a subsidiary of IPS. That was from April 2017 to 14 March 2018 and then under IPS Countrywide from 15 March 2018 until 17 May 2018. Copies of those invoices were in the bundle of documents.

34 If the Claimant booked the shift directly with the Trust, once he had completed his shift he would submit his timesheet to the Respondent. The Respondent would then inform the umbrella company of the total hours worked and they would issue an invoice and send it to the Respondent.

35 The Hospital Trust would inform the Respondent of the number of shifts which needed to be filled for a particular day. If the Claimant's consultant, Mr Apaloo-Taylor had confirmed with him that it was work that he wanted to do, the Respondent would submit the Claimant's name to work the shift. The Trust would confirm its acceptance or rejection of the Claimant for the shift. The Claimant worked the shift and once the shift was completed, the Claimant could opt to be paid by the Respondent on a PAYE basis or via an umbrella company. The Respondent would ask him how he wanted to be paid and would pay him accordingly.

36 If the Claimant opted to be paid via an umbrella company, then that company would submit an invoice to the Respondent detailing the hours that person worked and the charge rate agreed between the Respondent and the Trust. Once the Respondent paid the invoice the umbrella company would make the relevant deductions for tax, national insurance and any applicable fees and pay the worker the balance.

37 The Claimant's case was that he was told that he had to use IPS in order to be paid. He also stated that when he registered with the Respondent he was given a list of many umbrella companies with the telephone numbers and that he had the opportunity to telephone them and decide which one he wanted to work with. He stated that he suggested an organisation called Cavendish as another umbrella company that he wanted to use but the Respondent refused to allow him to do so. The Respondent confirmed that its only responsibility in the choice of umbrella company was to ensure, if it was not a company known to it, that the company was not running a tax avoidance scheme and was operating a properly constituted business. It may have taken some time to make the necessary checks before agreeing to work with an unknown umbrella company.



38 It is likely that the Respondent made it clear that the Claimant could choose any umbrella company that he wanted but if it was not a company with which the Respondent was familiar and which it needed to check, it may have taken a bit more time for the wages to be processed and paid. The Claimant may have taken that as a 'no' but the Tribunal finds it likely that he had the option of requesting that the Respondent authorise Cavendish or any other company to be his umbrella company, if this was what he wanted.

39 The Tribunal finds that the Claimant was unhappy about the size of the deductions made by IPS from his wages and he complained about this to the Respondent. It was not clear whether he also complained to IPS Ltd about this.

40 After the Claimant expressed his unhappiness with the size of IPS' deductions from his wages, he decided that he wanted to continue working for the Respondent but be paid through the PAYE system. The Respondent agreed that he could do so and copies of the payslips issued to him by the Respondent are in the bundle at pages 144 and 147. Working under the PAYE scheme means that the Respondent had to deduct tax and national insurance from the sums due to the Claimant and pay him net wages. After a few weeks the Claimant was unhappy with the deductions from his wages and opted to go back to the way he had been working previously. The payslips cover the period 17 May to 30 May 2018.

41 This time the Claimant chose to work through the umbrella company known as Elite Management & Consultancy Ltd. The written agreement between the Claimant and Elite was in the bundle. The document advised the Claimant to read the pages in it carefully as it set out the arrangements upon which he had agreed to work for Elite and on which he would be paid. Although the document was undated, there was an email from the Respondent's payroll administrator to the Claimant dated 29 August to inform him that it had received an email from Elite in which they had been informed that he was now registered with them. The Claimant was asked to confirm whether he wanted to receive his pay through Elite. The Claimant confirmed by return email that he wanted Elite to pay his wages. The Tribunal did not hear evidence of the Claimant using any other company and it is likely that the Claimant continued to be registered with Elite until January 2019 when the Respondent decided that it was not going to offer him any more shifts.

### **Law**

42 The Claimant's main claim was for unlawful deduction of wages under section 13 Employment Rights Act 1996. It was his case that the Respondent had failed to pay him properly for the shifts that he worked by not paying him a flat rate for the whole nightshift.

43 In order to consider that claim the Tribunal had to decide on the Claimant's status. Had he been an employee, a worker or had he been self-employed? Did the Tribunal have jurisdiction to hear these complaints against the Respondent? What was

the Claimant's relationship with the Respondent? Was the Respondent responsible for the deductions made by IPS Countrywide?

44 Section 13(1) states that an employer shall not make a deduction from wages of a worker employed by him unless –

- (a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
- (b) The worker has previously signified in writing his agreement or consent to the making of the deduction.

45 A worker is defined in section 230 of the same Act as someone who has entered into or works under (or where 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 service 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 out by the individual;

And any reference to a worker's contract shall be construed accordingly.

46 An employee is defined in the same section as an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment.

47 The test as to who is an employee was originally formulated by Mr Justice MacKenna and set out in the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* 1968 2 QB 497 and has been developed in other cases since then. There are four essential elements that must be fulfilled for someone to be an employee. These are: (1) a contract between the worker and the alleged employer; (2) an obligation on the worker to provide work personally; (3) mutuality of obligation; and (4) an element of control over the work by the employer.

48 The definition of 'worker' is much broader and includes employees. A worker is someone who provides personal service under a contract, including casual workers. It does not extend to self-employed people who work under a contract for services and are genuinely pursuing a business activity on their own account. A worker's contract need not be in writing.

49 Personal service is an important element of that definition.

50 The Respondent referred to the case of *Secretary of State v Windle & Arada* [2016] EWCA Civ. 459 in which the Court of Appeal held in a discrimination case that when determining whether a worker was employed under a contract personally to do

work pursuant to section 83(2) of the Equality Act 2010, the ultimate question was the nature of the relationship during the period that the work was being done. However, the absence of mutuality of obligations outside of those periods was also a relevant factor as it could shed light on the character of the relationship.

51 In the case of *Byrne Brothers (Formwork) Ltd v Baird and others* 2002 ICR 667 the EAT referred to the final part of section 230(3) set out above as a distinction 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. Factors to consider in deciding where someone falls could include the degree of control exercised by the employer, the exclusivity of the engagement and its typical duration, the extent to which the individual is integrated in the employer's organisation, the method of payment, what equipment the 'worker' supplied and the level of risk taken. Factors such as the individual having business accounts prepared and submitted to the Inland Revenue, being free to work for others, being paid at a rate that includes an overheads allowance and not being paid when not working, can all be relied on as supporting the view that the individual is running a business and that the person for whom the work is performed is a customer of that business.

52 It was also the Claimant's case that the Respondent forced him to contract with IPS Countrywide and that it was therefore the Respondent's responsibility that he had been subjected to high fees by them and that it should be ordered to refund that money to him. As the Claimant had signed one document with the Respondent and two documents that both described themselves as '*employment contracts*' with IPS Countrywide and then with Elite; the question for the Tribunal was whether he was anyone's employee? Was he a worker with either IPS, Elite or the Respondent?

53 It was not the Claimant's case that he was employed by the Whittington Hospital.

54 There is a significant body of caselaw addressing the relationships between agency workers, end-users and clients. The most recent case in which this issue is discussed in depth is that of *James v London Borough of Greenwich* [2007] IRLR 168. In that case the claimant worked for the council through an employment agency. A few years into the arrangement, she left that agency and joined another and continued to work for the same council. She did so because the second agency gave her a higher hourly rate. She had a contract with the agency and the agency had a contract with the council but there was no contract directly between her and the council.

55 She was off sick for a period of time and when she tried to return to work she was told that she was no longer required. Her claim was for unfair dismissal against the council. It was therefore a claim under the Employment Rights Act. The EAT held that some mutual irreducible minimal obligation is necessary to create a contract; if mutual obligations relate to the provision of, or payment for, work which must be personally provided by the worker, there will be a contract in the employment field; and if the nature and extent of the control is sufficient, it will be a contract of employment.

The Court went on to say that it would be an exceptional case where a contract of employment can be spelt out in the relationship between an agency and the worker as typically, the agency does not have day-to-day control which would establish such a contract. There is usually no obligation on the agency to find work or on the worker to accept it, or to personally do it. The work is not usually carried out directly for the agency. The issue was whether the way in which the contract was in fact performed was consistent with the agency arrangements or whether it was only consistent with an implied contract between the worker and the end-user and would be inconsistent with there being no such contract. Provided that the arrangements are genuine and the express contracts themselves both explain and are consistent with the nature of the relationship, no further implied contract would be justified. The Court's decision was that there was no basis for implying a contract between the claimant and the end-user.

56 In the case of *Cairns v Visteon Ltd* [2007] IRLR 175 the emphasis was again on the 'necessity' test outlined in *James*. In that case there was a subsisting contract of employment with the supplying agency. On that basis, the EAT held that it was not necessary to find a second contract with the client. Judge Clark cautioned against anything that could lead to the possibility of having two employers, in any context other than vicarious liability in the law of tort. This was even though the agency worker in that case had worked for only that client for four years.

57 If the Claimant was a worker for the Respondent, it was submitted that the burden was on him to establish that there was a term of his contract entitling him to be paid at a 'flat rate' for every hour that he carried out work on his shift.

### ***Applying law to facts***

58 In order for the Tribunal to have jurisdiction to consider both parts of the Claimant's case, he would have to be either an employee or worker for the Respondent.

### ***The Claimant's status***

59 The Respondent submitted that the Claimant was a self-employed person and that the Tribunal did not have jurisdiction to hear his complaint.

60 Looking at the four main elements that must exist for the Claimant to be an employee: The Claimant had signed to register with the Respondent for work but neither party submitted the document to the Tribunal.

61 Secondly, there was an absence of mutuality of obligations in this case. The Claimant agreed that he had the right to refuse assignments offered to him. He had to perform the work once he accepted an assignment but he could and often did refuse shifts offered to him. Although he was registered with the Respondent from May 2017, he did not accept a shift until December when he was satisfied that the terms of the shifts offered were acceptable to him.

62 In relation to 'control', the Claimant confirmed in evidence that he was not line managed by the Respondent during his shifts. When he worked on a ward at the hospital he was managed by the staff on the ward who could be either staff employed by the NHS or workers/agency staff from various agencies and other entities. They would control what the Claimant did while on shift.

63 The Tribunal was not told that the Claimant could send a substitute to do the work on a shift. If he accepted the shift, he had to do the work. There was therefore the element of personal service.

64 The Claimant worked for the Respondent on an assignment by assignment basis. There was the degree of independence and lack of subordination in the relationship while at work which was incompatible with employment status.

65 The Claimant did not submit that he was employed by the Respondent. He worked with the Respondent on a PAYE basis for the short period 17 – 30 May 2018 but the evidence was that the way in which he was allocated shifts did not change. It is likely that during that period, the Claimant continued to have the ability to refuse to accept shifts and that the Respondent was not obliged to offer him shifts.

66 It was this Tribunal's conclusion that the Claimant was not the Respondent's employee. He was not employed by the Respondent.

67 The Claimant had signed a contract with IPS. The contract with IPS Countrywide was in the bundle. There may well have also been a contract with Slickly Services Ltd from April 2017 to 14 March 2018. The contract with IPS Countrywide lasted from 15 March to 17 May 2018. The Claimant then chose to contract with Elite Management & Consultancy.

68 It is this Tribunal's judgment that the Claimant did not have his own accounts prepared and was not in business on his own account. Slickly, IPS Countrywide and then Elite deducted and paid his tax and National Insurance on his behalf. It is unlikely that the Claimant was genuinely self-employed.

69 Every time the Claimant accepted an assignment, he agreed to provide personal service as a Healthcare assistant to the NHS on the Respondent's behalf. There was no overarching contract in between assignments. He was not paid by the Respondent between assignments. The ease with which the Respondent was able to terminate its arrangement with the Claimant once it had received the complaint from the Whittington is evidence of the absence of any overarching contract between it and the Claimant. It simply informed him that it was no longer going to offer him shifts. There was no process or procedure to follow. There was no mutuality between assignments or to offer assignments at all.

70 Although the Claimant had signed documents with IPS and Elite that referred to themselves as '*contracts of employment*', it is unlikely that he was an employee of Sickly, IPS or Elite. The contracts set out terms and conditions of employment but bore little relation to what really occurred between the Claimant and these organisations. Those companies were based in Liverpool. The Claimant worked at the Whittington Hospital. They did not supervise the Claimant. They did not provide him with work. They did not control the Claimant – even during assignments - as that was the job of whoever was in charge of the ward he was working on for the duration of the shift.

71 They simply received his timesheets from him, processed them and invoiced the Respondent for his pay. Once they received his pay from the Respondent, they would deduct their fees, tax and national insurance which they would pay over to the Inland Revenue on his behalf; and pay him the balance.

72 The reality was that he was not their employee. As already stated, he was also not employed by the Respondent.

73 Sickly Services, then IPS Countrywide and then Elite Management together with the Respondent performed as an agency with the functions split between them. The Respondent assigned work to the Claimant as an agency would do. Sickly, IPS and then Elite processed his pay and paid his wages. There was no relationship between the Respondent and the respective companies who '*employed*' the Claimant.

74 There was no mutuality of obligations between the Claimant and the Respondent or between the Claimant and IPS Countrywide or with Elite that related to the provision of work. There was an agreement that he would get paid when he did work and that it would be processed in the way described above. They did not have control over the Claimant. As in the case of *James* referred to above, the Respondent did not have day-to-day control on what the Claimant did. There was no obligation on it to find work or on the Claimant to accept work when offered. He did not work directly for the Respondent.

75 The way in which the contract was performed was consistent with agency arrangements. In this Tribunal's judgment the Claimant was an agency worker for the Respondent.

76 As a worker, the Claimant is entitled to be paid for the work he has done, in accordance with the terms of any relevant contract.

*The claim for the shortfall of hourly rates*

77 In this Tribunal's judgment, the Respondent explained the terms upon which work was offered to the Claimant when he registered with it to be offered work. It is likely that this was why having registered with the Respondent in May he did not work his first shift until December. It is highly likely that he was aware of the split hourly

rates of pay and was unhappy about it and that is why he took so many months before accepting his first assignment.

78 It was always the Claimant's decision to accept assignments on those terms. The Claimant confirmed that he was not obliged to accept work that the Respondent offered to him. He chose to do so.

79 The Claimant confirmed that he was registered with more than one agency. He was aware that there were other agencies that paid in the way the Respondent did and that there were others that did not. It was his choice to work for the Respondent and to continue to do so even after the rates of pay had been explained to him.

80 It is this Tribunal's judgment that the Respondent followed the London Procurement Partnership Framework document in the rates of pay that it paid the Claimant's invoices. The Claimant has failed to show that the Respondent breached any NHS terms and conditions or any contractual term or condition with him in paying him in the way that it did. Although the Claimant referred to other arrangements that he had been told about by Zentar UK and others, he failed to produce evidence that the Respondent had breached any terms by which they were bound.

81 The burden is on the Claimant to prove that the Respondent has paid him incorrectly and he has failed to discharge that burden.

82 There was no evidence that the Respondent had paid incorrect shift payments for shifts that the Claimant worked.

*The deductions made by IPS Countrywide*

83 The second part of the Claimant's claim is that the Respondent forced him to register with IPS Countrywide (which the Respondent referred to in the papers as IPS Progression) and it should be made to repay the amounts deducted from his wages by IPS.

84 The Claimant did not provide a Schedule of Loss showing how the amounts he claimed had been calculated. He claimed the figure of £6,000 in total. It was not clear whether some of that figure was related to deductions for tax and National Insurance which the Claimant would have had to pay regardless of which umbrella company he used or whether it was only made up of administrative fees charged by IPS.

85 The Claimant stated that he had no choice but to work with IPS but the evidence shows that he chose when he wanted to leave IPS and register with the Respondent on a PAYE basis. He was not told that he had to continue to be registered with IPS in order to be offered assignments. When he stated that he wanted to try being paid on a PAYE basis the Respondent agreed and paid him in this way. When he changed his mind, and decided that he wanted to stop being paid that way, the Respondent agreed and it ceased. When he decided that he wanted to be paid through Elite Management, the Respondent carried out his instructions and paid him that way.

86 It is unlikely that the Respondent sent the Claimant a list of umbrella companies and asked him to choose one. If it had done so the Tribunal would have expected the Claimant to produce the email to which he stated the list was attached, as he was aware that this was a matter of dispute before the hearing. He failed to do so. But in this Tribunal's judgment, even if the Respondent did provide him with a list of names of the umbrella companies already on its books to assist him in choosing one so that he would get paid quickly, it was still the Claimant's choice of which one to use or to opt instead to work on a PAYE basis. There was no evidence of compulsion or coercion.

87 In this Tribunal's judgment, the Respondent has an obligation while working with the NHS to ensure that the companies with which it does business are properly constituted and comply with Inland Revenue regulations. It was appropriate for the Respondent to check if an umbrella company referred to it by a worker is a properly constituted company before working with it. The Tribunal does not consider that to be coercing the Claimant to work with IPS. At all times the Claimant had the choice – as he later exercised when he decided to stop working with IPS in May 2018 – to work through a different company or to work on a PAYE basis. When he decided that he was not happy with the level of deductions made by the Respondent he chose to work through the Elite Management Company and he communicated that to the Respondent.

88 There was no evidence that the Respondent had anything to do with Slickly Services, IPS Countrywide or Elite Management & Consultancy. They were all independent companies from the Respondent. The Respondent had dealt with them for other workers and so had their account details on its system which would make it easier for workers to be paid quickly. The Claimant was informed of that and he chose to enter into contracts with Slickly and then with IPS Countrywide and lastly, with Elite Management & Consultancy. This was his choice. He also chose to be paid on a PAYE basis for a few weeks in May 2018. The Respondent worked with the Claimant's choices. There was no evidence of any complaint from the Respondent in respect of those choices.

89 It is therefore this Tribunal's judgment that the Claimant chose to enter into a contract with IPS Countrywide. The Claimant later became unhappy with the deductions that IPS made from his pay and chose to leave IPS and enter into a PAYE arrangement with the Respondent. He then chose to stop that arrangement as he continued to be unhappy with deductions from his pay, and entered into a contract with Elite Management & Consultancy.

90 There was no evidence that the Claimant was coerced into these arrangements or that the Respondent was responsible or had any control over the level of fees or administration costs that IPS charged the Claimant. On a few occasions the Respondent forwarded the Claimant's timesheets to IPS to assist the Claimant with getting paid faster. Otherwise the Respondent simply paid the invoices submitted to it.



91 In those circumstances, the Claimant has failed to prove that the Respondent is responsible for any of the terms of the contract between the Claimant and IPS Countrywide or that the Respondent coerced him into the contract with IPS Countrywide.

92 The Respondent did not make any unauthorised deductions from the Claimant's wages.

93 The Claimant's claims are dismissed.

Employment Judge Jones

13 January 2020