Appeal No. UKEAT/0536/13/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 14 April 2015
Judgment handed down on 11 June 2015

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

DR M SUHAIL APPELLANT

(1) BARKING HAVERING & REDBRIDGE UNIVERSITY HOSPITALS NHS TRUST
(2) THE PARTNERSHIP OF EAST LONDON COOPERATIVE RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR NICHOLAS SINGER (of Counsel) Direct Public Access
For the First Respondent	MISS SALLY COWEN (of Counsel) Instructed by: DAC Beachcroft LLP Solicitors 100 Fetter Lane London EC4A 1BN
For the Second Respondent	MR SIMON FORSHAW (of Counsel) Instructed by: DWF LLP Solicitors 20 Fenchurch Street London EC3M 3AG

SUMMARY

JURISDICTIONAL POINTS - Worker, employee or neither

Whether a GP, whose services were provided to the Trust through a Cooperative, was a worker under section 230(3)(b) **Employment Rights Act 1996**. The Employment Tribunal was entitled to find that he was not.

Whether the Claimant had abandoned an argument that he was a worker under section 43K(1)(a) **Employment Rights Act 1996**. Against the Second Respondent he had expressly and against the First Respondent Trust he had implicitly by not pursuing it below (see **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531).

Observations made as to employment status under section 83(2) **Equality Act 2010**, an issue which did not strictly arise in this appeal.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding before the East London Employment Tribunal. The parties are Dr Suhail, Claimant, and Barking Havering & Redbridge University Hospitals NHS Trust ("the Trust"), First Respondent, and Partnership of East London Cooperative ("PELC"), Second Respondent. I have before me for a Full Hearing the Claimant's appeal against the Reserved Judgment of the late Employment Judge Major, promulgated with Reasons on 6 March 2013, following a pre-hearing review held on 5-6 February 2013, which found that the Claimant was neither an employee nor a worker under the extended definition for public interest disclosure claims, so that his public interest disclosure claims could not proceed.

The Claims before the Employment Tribunal

2. The Claimant brought separate claims against each Respondent which were then combined. As appears from the Agreed List of Issues, the Claimant raised complaints of detrimental treatment short of dismissal against both Respondents and unfair dismissal by reason of his making protected disclosures; ordinary unfair dismissal (the **Employment Rights Act 1996** "ERA" claims) and complaints of direct racial discrimination and victimisation contrary to the **Equality Act 2010** against PELC only.

Preliminary Issues

3. In order to pursue those claims, the following jurisdictional issues arose:

(1) Was the Claimant an employee of PELC within section 230(3)(a) **ERA** for the purposes of bringing his unfair dismissal claims?

(2) Alternatively, was he a "limb (b)" worker within section 230(3)(b) **ERA** for the purposes of his complaint under section 47B **ERA** against both Respondents?

(3) In the further alternative, was he a worker for that purpose under the extended definition in section 43 (see **ERA** section 230(6))?

(4) Was he an employee within the meaning of section 83(2)(a) **Equality Act** for the purposes of his claims under that Act brought against PELC?

4. By his pre-hearing review Judgment, Employment Judge Major resolved the first three issues against the Claimant and made no finding on the fourth issue

Factual Background

5. The Employment Judge set out his findings of fact at paragraph 1 of his Reasons. I note that the evidence of Deborah Wheeler, the Trust's Director of Nursing, and Mary Goyder, Company Secretary of PELC, was not in dispute (paragraph 1.2). I have therefore read the original and supporting witness statements of both witnesses.

6. The Claimant is a registered GP. He worked as an out-of-hours GP for the Rotherham Primary Care Trust and additionally signed a members agreement with PELC, relevant terms of which are set out at paragraph 1.4. PELC provided his services from time to time to the Trust at the Urgent Care Centre ("UCC") at Queens Hospital. He was described in the members agreement as a self employed contractor, rendering invoices which were paid without deduction of Tax and NIC. There was no obligation on PELC to provide work, nor for the Claimant to accept assignments when offered.

7. I note from Ms Goyder's statement that the Claimant first provided clinical sessions for PELC. In addition to his other work in Rotherham (where his parents lived) he was also, at that time, providing services to Herts Urgent Care ("HUC"). That organisation provides GP out-of-

hours services in Hertfordshire. He commenced proceedings against HUC in the Watford Employment Tribunal complaining of "whistle-blowing" detrimental treatment contrary to section 47B **ERA**.

8. On 7 April 2011, a pre-hearing review was held before Employment Judge Manley sitting at Watford. The issue was whether he was a limb (b) worker under section 230(3)(b) **ERA**, as extended by section 43K. She found that he was not. I note (see paragraph 5) that at the relevant time he also worked for the out-of-hours GP service in East London.

9. His claim to protection failed on a number of grounds (see paragraphs 19 to 23); in particular, I note that at paragraph 22 the Judge said this:

> **"… I accept that the basis of this relationship was more of client and customer with the claimant selling his services on a shift basis to the respondent when he chose to do so and was not working elsewhere."**

10. Against that pre-hearing review Judgment, dated 27 April 2011, the Claimant appealed to the Employment Appeal Tribunal. That appeal came before a division presided over by HHJ Serota QC on 13 January 2012. By a Reserved Judgment handed down on 14 November 2012, the appeal was dismissed. I draw particular attention to paragraph 44, where the Employment Appeal Tribunal said this:

> **"… the finding by the Employment Tribunal that the Respondent [sic; Claimant] was in business on his own account is fatal to the suggestion that he was either an employee or a worker. This finding seems to me to be crucial and conclusive. The Claimant was clearly marketing his services to whichever provider of medical services might wish to provide him with work. For his convenience this was limited to the Respondent, the service in east London and Rotherham. The Claimant was able to take work as a locum at any time he chose."**

11. The significance, it seems to me, of the finding, both by Employment Judge Manley and the Employment Appeal Tribunal in the HUC case, that the Claimant was providing his services to HUC as his client or customer (see the proviso to section 230(3)(b) **ERA**), lies in the

approach of Employment Judge Major in the present case to be found at paragraph 2 of his Reasons. There, the Judge refers to the HUC litigation, observing that there was no agency layer between HUC and the centre at which he worked, adding:

> **"… The Tribunal is not bound by those decisions but they are of course persuasive and it would be illogical to come to a different view unless the Claimant were able to satisfy the Tribunal that there was a good reason for so doing."**

The Present Appeal

12. The Claimant's appeal was initially considered by HHJ Serota QC who had presided at the HUC appeal. He referred to that case in giving reasons for rejecting the appeal under Rule 3(7) on the paper sift (see Rule 3(7) letter dated 18 July 2013).

13. Dissatisfied with that opinion, the Claimant exercised his right to an oral permission hearing under Rule 3(10) which came before HHJ Birtles on 11 December 2013. He put the matter over to an all parties Preliminary Hearing, which came before Mitting J on 29 July 2014. I have read with care the helpful Judgment given by the Judge on that occasion. In summary, as appears from the Employment Appeal Tribunal Order dated 7 August 2014, the appeal was dismissed as to the Claimant's employee status under section 230(3)(a) **ERA**, but was permitted to proceed to this Full Hearing on two points:

(a) whether or not the Claimant was a limb (b) worker under section 230(3)(b), and

(b) under the extended definition in section 43K(a) [sic; section 43K(1)(a)] **ERA**.

14. The basis on which those two issues were allowed to proceed, as appears from the Judgment, requires attention.

(a) The sole question under section 230(3)(b), it being conceded on behalf of PELC that there was a contract for the provision of services and the Claimant did provide services (I would add, personally) to the PELC, was whether PELC was a client or a customer of the Claimant (see Judgment, paragraph 30). Mitting J formed the view (provisionally, since he was conducting a Preliminary Hearing), first that Employment Judge Major did not address that question - client or customer - and secondly expressed his opinion that the Claimant was a worker "employed" by PELC, having referred to the judgment of Maurice Kay LJ in **Hospital Medical Group Ltd v Westwood** [2013] ICR 415, whilst acknowledging that this was "a matter which must proceed to a Full Hearing and will have to be determined by a different Judge at this Tribunal" (paragraph 32). That is now my task.

(b) An issue arose between the parties at the Preliminary Hearing (paragraphs 34 to 35) as to whether or not the Claimant had withdrawn his contention that he was a worker specifically under section 43K(1)(a) **ERA**. That is also an issue which I must resolve.

15. Separately, I note that the question as to whether the Claimant was an employee of PELC for the purposes of his **Equality Act** claims within the meaning of section 83(2) of that Act is touched on in the Preliminary Hearing Judgment.

16. At paragraph 8, Mitting J refers to paragraph 1 of Employment Judge Major's Reasons where it is said, in identifying the preliminary issues for him to decide at the pre-hearing review:

> **"… alternatively whether he [the Claimant] was an employee under the Equality Act …"**

However, as Mitting J correctly observed at paragraph 13, the Employment Tribunal made no finding on whether or not the Claimant was employed for the purposes of the **Equality Act 2010** under section 83(2)(a).

17. Mitting J retuned to that question at paragraph 37, where he said this:

> **" "Employment" under the Equality Act**
>
> **37. Finally, there remains the question of "employment" under the Equality Act 2010. I simply do not know what the position is there. If at the Full Hearing the Tribunal decides that the case should be remitted to an Employment Tribunal for redetermination, it may feel it needs to address that issue too."**

18. It follows that I must determine the two issues put forward to this Full Hearing, which I shall refer to for convenience as section 230(3)(b) **ERA** and section 43K(1)(a) **ERA** and also deal, so far as is appropriate, with the section 83(2)(a) **Equality Act** question.

Section 230(3)(b) Employment Rights Act 1996

19. Mitting J thought that the Employment Judge failed to deal with the "client or customer" proviso to section 230(3)(b). Mr Singer adopts that proposition. Thus, the Employment Judge's Reasons are deficient; they are not "**Meek**-compliant". Substantively, he submits that the relationship between the Claimant and PELC was not that of client or customer, relying on **Westwood**. Separately, he contends that the Employment Judge further failed to consider whether or not there was an implied contract between the Claimant and the Trust.

20. I take those submissions in turn. First, it is correct that the Employment Judge does not in terms spell out his reasoning in relation to the client/customer proviso. However, I note that in his skeleton argument below settled by solicitors, paragraphs 68 to 72, the Claimant quoted extensively from the judgment of Maurice Kay LJ in **Westwood**, to which I must return. To the contrary, in written submissions below, it was argued on behalf of the Trust (paragraph 41)

that the Claimant provided his services as an independent contractor and for PELC (paragraph 32.2) that "the Claimant actively marketed himself to whichever locum agency offered the most attractive sessional work". I also note, at paragraph 32.3, that PELC applied the same reasoning to the question of employment status under section 83 **Equality Act**, a point to which I shall return.

21. Thus the customer/client issue was fairly before Employment Judge Major. Is it implicit, if not expressly dealt with, from his Reasons?

22. In my judgment it is. First, because the Judge directed himself to section 230(3)(b) **ERA** at paragraph 4 of his Reasons; secondly, because, as I have earlier observed, at paragraph 2 he referred to the HUC litigation which, in the Employment Appeal Tribunal in particular, was resolved on the client/customer reasoning below (see EAT Judgment, paragraph 44; ET Reasons, paragraph 22). It is clear to me that the Claimant failed to persuade Employment Judge Major that he should depart from those views expressed by the Employment Tribunal and Employment Appeal Tribunal respectively in HUC.

23. More substantively, I respectfully take a different view from Mitting J at the Preliminary Hearing on the application of the client/customer proviso. I return to the case of **Westwood**.

24. In that case, Dr Westwood was a general practitioner and senior partner in a medical practice in Timperley, Cheshire. He also had an interest in minor surgery and started performing minor operations for a company called Transform in 1997. Thirdly, he commenced work for the Respondent, Hospital Medical Group Ltd ("HMG"), undertaking hair restoration

procedures in 2006. For completeness, he also provided advice on transgender issues for a separate organisation, the Albany Clinic.

25. Having rejected the Claimant's case that he was a section 230(3)(a) employee of HMG, the Employment Tribunal went on to find that he was a limb (b) worker under section 230(3)(b). The Employment Judge expressly negatived the client/customer exception. On appeal, I considered the decision below to be "plainly and unarguably right"; see the judgment of Maurice Kay LJ in the Court of Appeal, paragraph 6. On further appeal, the Court of Appeal upheld the decisions of the lower Tribunals. For completeness, I am satisfied that all three decisions in **Westwood** were correct because Baroness Hale of Richmond DPSC said so in **Bates van Winklehof v Clyde and Co LLP** [2014] ICR 730, paragraphs 38 to 40.

26. However, as Maurice Kay LJ said in **Westwood**, paragraph 3, cases of this kind are particularly fact sensitive. The essential point in **Westwood** was that, although Dr Westwood had other "jobs", the key factual finding was that he had agreed to provide his services as a hair restoration surgeon exclusively to HMG, he did not offer that service to the world in general, and he was recruited by HMG to work as an integral part of its operations (see **Bates**, paragraph 38). Maurice Kay LJ approved that approach (see paragraph 18). The Claimant very fairly cited that passage at paragraph 71 of his written submissions below.

27. That exclusivity is wholly missing on the facts of the present case. As Employment Judge Major found at paragraph 10(a) of his Reasons:

> **"The Claimant is free to work or not as often as he chooses and where. …"**

28. In **Westwood** I described the Employment Tribunal decision as "plainly and unarguably right". That is a formulation which held sway for 30 years; see **Dobie v Burns** [1984] ICR 812

(CA). However, in **Jafri v Lincoln College** [2014] ICR 920, Laws LJ found some difficulty with that test, see paragraph 21; preferring this formulation; that if the Employment Appeal Tribunal detects a legal error by the Employment Tribunal, it must send the case back unless (a) it concludes that the error cannot have affected the result.

29. For the avoidance of doubt, had I concluded that the absence of express reasoning by Employment Judge Major as to the client/customer proviso in section 230(3)(b) meant that the Reasons were not **Meek**-compliant, which I do not because, in my opinion, the reasoning is implicit, I would have held that that error cannot have affected the result, which is plainly correct.

30. For completeness, the question as to whether the Claimant entered into an implied contract with the Trust is rendered moot by my finding on the client/customer issue. However, the Trust takes the point that no such point was taken below and ought not now to be allowed for the first time on appeal (it was not raised before Mitting J at the Preliminary Hearing). More substantively, I can see no basis on the facts found for concluding that the Claimant would pass the necessity test for implying such a contract; see **James v Greenwich London Borough Council** [2008] ICR 545 (CA).

31. In these circumstances the Claimant fails on the section 230(3)(b) issue.

Section 43K(1)(a) Employment Rights Act 1996

32. Before the Employment Tribunal the Claimant appeared in person; Ms Cowen appeared for the Trust and Mr Edge of counsel for PELC. In the course of closing oral submissions Ms Cowen, I am satisfied, made the following note of the Claimant's submission:

> **"Different argument 43K(a) [sic] not relevant to PELC.**
>
> **Only rely on section 43K(1)(ba)**
>
> **…**
>
> **Not relying on 43K(1)(a) - only (ba)"**

And Mr Edge made this note:

> **"I am not referring to section 43K(a) [sic]. Not relied upon re: PELC**
>
> **Only BA**
>
> **Not relies upon section 43K(1)(a) ERA against PELC"**

33. The Claimant disputes any suggestion that he withdrew, or abandoned, an argument that he was entitled to worker status under the section 43K(1)(a) extension.

34. I note that in the Agreed List of Issues, under the heading "Pre-dismissal Detriment", at paragraph (vi) the question is raised:

> **"… is the Claimant a worker within the meaning of section 230(3)(a) or (b), or alternatively, section 43K(1)(a)/(b) and/or (ba) ERA."**

35. Further, the point was pursued in his skeleton argument below at paragraph 9.

36. Did he withdraw the section 43K(1)(a) contention against either or both Respondents in his closing submissions?

37. In order to resolve the issue as to what he said in closing, the Second Respondent made an application for the Employment Judge's notes. I considered it on paper and directed (EAT Order 20 January 2015) that a copy of Employment Judge Major's notes in relation to all parties' closing submissions below be provided to the parties for the purposes of the Full

Hearing. That was the best that could be devised, given that Employment Judge Major has sadly died and thus a **Burns-Barke** reference was impractical.

38. The relevant note reads:

> **"only ba. against 2nd R."**

That short entry seems to me to be consistent with the notes taken by counsel for the Respondents below.

39. It follows, on the material now before me, that the Claimant expressly disavowed reliance on section 43K(1)(a) as against PELC. Mr Forshaw, on behalf of PELC, refers me to the helpful summary of the position on the new points at the Employment Appeal Tribunal contained at paragraph 50 of the judgment of HHJ McMullen QC in **Secretary of State for Health v Rance** [2007] IRLR 665. It seems to me that the position is covered by **Jones v Burdett Coutts School** [1998] IRLR 521 (CA). The point having been abandoned/withdrawn below, even by a litigant in person, it cannot be resurrected in the Employment Appeal Tribunal absent exceptional circumstances which do not arise in this case. The case proceeded solely on the basis of section 43K(1)(ba); that argument was considered and rejected by Employment Judge Major at paragraph 11 of his Reasons. There is no extant appeal against that finding. Accordingly, this ground of appeal as against PELC fails and is dismissed.

40. During the course of argument, I was troubled as to whether the same could be said of the section 43K(1)(a) argument against the Trust. Having reflected on that matter, I see the force of Mr Singer's submission, first that the Employment Judge does not record that the section 43K(1)(a) contention was withdrawn (he does not refer to the provision at all; cf

Reasons, paragraph 5) and secondly, why would the Claimant abandon a point which was primarily directed to the Trust?

41. Section 43K(1)(a) provides:

> **"… "worker" includes an individual who is not a worker as defined by section 230(3) but who -**
>
> **(a) works or worked for a person in circumstances in which -**
>
> **(i) he is or was introduced or supplied to do that work by a third person, and**
>
> **(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them."**

42. The answer, it seems to me, lies in the disposal sought by the Claimant. At paragraph 50 of his skeleton argument he submits that the matter should be remitted to a fresh Tribunal, as it will require a close analysis of the documents and evidence.

43. Here lies the difficulty for the Claimant. It is not simply a question of whether he expressly withdrew the section 43K(1)(a) point as against the Trust, having considered the Judge's Notes of closing as a whole it is clear to me that the Claimant advanced no positive case against either Respondent based on section 43K(1)(a). It is also clear from the Court of Appeal decision in **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531 that a Claimant (there appearing in person) who raised an allegation of racial discrimination in her claim form but failed to pursue it at the Employment Tribunal hearing, could not then raise the matter on appeal to the Employment Appeal Tribunal.

44. That seems to me to be the position here. Even if the Claimant only withdrew the point expressly against PELC, his failure to advance any case on section 43K(1)(a) against the Trust amounted to an implicit withdrawal of the point. In these circumstances the Employment Judge

cannot be criticised for not dealing with the point in his Reasons. Thus, the Claimant fails on this second issue and the appeal must be dismissed.

Section 83(2)(a) Equality Act 2010

45. I return to the way in which Mitting J dealt with this matter at the Preliminary Hearing (see paragraph 37 of his Judgment, referred to earlier). Since this question was not put forward to a Full Hearing, it does not strictly arise for my determination.

46. Secondly, I have not remitted either of the two extant issues to the Employment Tribunal.

47. Thirdly, the Claimant applied for permission to amend his grounds of appeal to add an argument as to his employment status under section 83(2)(a) **Equality Act**. I refused that application on the basis that this was not his first application to amend and was made late in the day. Further, I noted (see reasons for my Order dated 20 January 2015) that in his application the Claimant admitted that he did not raise the section 83 question either at the Employment Tribunal or at the Employment Appeal Tribunal (including the Preliminary Hearing before Mitting J) until his application dated 1 December 2014.

48. In these circumstances I make no determination on the section 83 question. It is not before me.

49. That said, and without hearing argument from the parties, perhaps I may be permitted two observations which may be of assistance to the parties (specifically the Claimant and

PELC, against whom the **Equality Act** allegations are made alone) and any Employment Tribunal which is later asked to consider the point.

50. The first is that, having failed to pursue the point before Employment Judge Major, the Claimant may be open to the charge that he is now estopped from raising it again under the so-called rule in **Henderson v Henderson** [1843] Hare 100.

51. More substantively, having rejected the Claimant's appeal on the section 230(3)(b) client/customer point, it will be difficult for him to show that he is a section 83(2) employee under the **Equality Act**. Although section 83(2) does not, in terms, include the client/customer proviso, it is clear that there is a large degree of overlap with the test of subordination propounded by the Supreme Court in **Jivraj v Hashwani** [2011] ICR 1004. The question here is whether the Claimant provided his services to PELC as an independent provider of services who was not in a relationship of subordination with PELC.

Disposal

52. This appeal fails and is dismissed.