



# EMPLOYMENT TRIBUNALS

## Claimant

Mr S Cox

## Respondent

and West London Mental Health NHS Trust

**Preliminary Hearing held at  
Reading on:**

5 January 2017

**Before Employment Judge:** Mr SG Vowles (sitting alone)

## Appearances

**For the Claimant:**

Mr A Jones, solicitor

**For the Respondent:**

Mr B Gill, counsel

## RESERVED PRELIMINARY HEARING JUDGMENT

1. The Claimant did not have the status of employee or worker with the Respondent.
2. The Employment Tribunal has no jurisdiction to consider the Claimant's complaints of unfair dismissal, breach of contract, unpaid holiday pay, unauthorised deduction from wages and failure to provide written particulars of employment. These complaints are dismissed.
3. This judgment was reserved and written reasons are attached.

## REASONS

### Submissions

1. Claimant On 28 September 2016, the Claimant presented complaints to the Tribunal of unfair dismissal, breach of contract, unpaid holiday pay, unauthorised deduction from wages and failure to provide written particulars of employment.
2. Respondent On 11 November 2016, the Respondent presented a response and resisted all the claims on the basis that the Claimant was not an employee or a worker and that he had no entitlement to pursue these complaints.

## Evidence

3. I heard evidence on oath from the Claimant, Mr Stephen Cox, and from Mr Anthony Cloke (Business and Performance Manager) on behalf of the Respondent.
4. I also read documents in a bundle provided by the parties and heard submissions from both representatives.
5. From the evidence heard and read, I made the following findings of fact.

## Findings of fact

6. The Respondent is an NHS Trust providing mental health services. It provides high security psychiatric services at the Broadmoor Hospital, Crowthorne, Berkshire.
7. In May 1995 the Claimant worked at the Broadmoor site through Capita on a fee and project basis as a consultant surveyor. Capita had a contract with the Respondent for the provision of various services including the Claimant's services. He provided fee quotations on the basis of various projects and carried out work on the projects at the Broadmoor site.
8. In August 2009 the Capita contract ended and the Claimant registered with Reed Employment Agency which placed him to work full time at the Broadmoor site. In August 2011 that arrangement came to an end. The Claimant accepted that, up to that time, he was not an employee or worker for the Respondent.
9. In July 2011 the Claimant was informed by Keith Otley (Assistant Director of Estates at Broadmoor) that the agency contract was coming to an end but that the Respondent could engage him directly if he wished. Mr Otley informed him that there was no post for a surveyor on the establishment but they would be willing to engage him as a self-employed contractor. He would be paid on an hourly rate and would have to invoice the Respondent on a monthly basis for the work he had carried out. The Claimant agreed.
10. The Claimant's case was that from August 2011 until May 2016 he was an employee or, at the very least, a worker for the Respondent.
11. In his evidence, the Claimant said he did not dispute that he had agreed with the Respondent to be a self-employed contractor. He said that he was presented with no other choice. He wanted to remain working at the Broadmoor site and he had an opportunity to do so. He said:

*"It was made clear to me that employment was not an option due to the Trust's internal procedure. I of course did not appreciate the various rights that I had as an employee and, I am clear, that in hindsight, the pattern on*

*which I was engaged, the reporting structures, the manner in which I was paid, and the fact that I devoted my whole time and attention to the Trust, meant that I was clearly an employee. In addition, the Trust expected me to be available for work and I expected to be offered that work.”*

12. On behalf of the Respondent, Mr Cloke said:

*“Mr Cox was engaged on a self-employed basis. The Trust would inform him what services it required and Mr Cox would provide a quote. Usually this meant on a bi-monthly basis the Trust would consider what services it needed for the next two months and Mr Cox would quote for the same. Over time these requests included some routine work as well as ad hoc advice. Advice was also sought on an interim basis when required. We would accept the quote if we wanted to proceed and would then complete a requisition form for our finance team to issue a purchase order number. Mr Cox would do the work and then invoice us. Once a purchase order number was in place would then check the invoice and if we were content with it we would pay it.”*

13. The Claimant did not dispute that this was the case. There were several examples in the bundle of documents of the Claimant’s fee quotations and invoices. For example:

.....

04.04.2013

Dear Mr Ottley

Re: Professional Services – Fee Quotation 010

*Following my recent discussions with you regarding the provision of professional services relating to the following:*

- *Land Surveying*
- *Measured Building Surveys*
- *Property Databases*
- *Asset Management*
- *Plan Information – digital and hard copy formats*

*I have pleasure in submitting my fee quotation of £10,064 no VAT to be charged.*

*It is understood that all works will be carried out as directed via the Estates management.*

*I trust that this fee quotation is acceptable to you and I may look forward to receiving your instructions in due course.*

.....

Date: 01 May 2013

Payment is now due

<i>DESCRIPTION</i>	<i>TOTAL</i>
<i>Part Payment.</i>	
<i>For the provision of professional services as Instructed.</i>	
 18 days @ £272.00 per day (no vat to be charged)	 £4,896.00
<i>Subtotal</i>	<u>£4,896.00</u>
<i>VAT</i>	zero
<i>TOTAL</i>	<u>£4,896.00</u>

.....

Date: 31 May 2013

Payment is now due

<i>DESCRIPTION</i>	<i>TOTAL</i>
<i>Part Payment.</i>	
<i>For the provision of professional services as Instructed.</i>	
 19 days @ £272.00 per day (no VAT to be charged)	 £5,168.00
<i>Subtotal</i>	<u>£5,168.00</u>
<i>VAT</i>	zero
<i>TOTAL</i>	<u>£5,168.00</u>

- .....
14. The Claimant explained that the reason why no VAT was to be charged was that was because he did not reach the VAT threshold.
  15. It was not in dispute that the Claimant was paid gross and was responsible for paying his own income tax and NI contributions. Some of his tax returns to HMRC were included in the bundle of documents in which he declared himself to be "self-employed". Under description of business, he declared "Chartered Land Surveyor Sole Practitioner" and declared his income as "business income". He claimed "allowable expenses" which were set off against "net profit". He confirmed that the expenses which he offset against his profit were mileage to and from work, professional subscriptions and indemnity insurance.

16. The Claimant agreed that his statement that *“the Trust expected me to be available for work and I expected to be offered that work”* was not the same as an obligation to offer work and an obligation to perform the work. He accepted that the Respondent could have offered the work to another contractor and that he could do work for someone else if he wished, although he said that he never did so.
17. He accepted that he was not subject to the Respondent’s disciplinary policy and that there was no written contract between him and the Respondent.
18. He accepted that although he worked regularly four days per week, there were no set days and he had no rota. He also accepted that he largely managed his own time and no-one supervised him or told him how to do his work. He only dealt with the Assistant Director of Estates and he accepted that other independent contractors also had to report to the Assistant Director.
19. The Claimant was not paid for holidays or sickness absence.
20. The Claimant had a security key to access some parts of the secure site. This was the case for employees but Mr Cloke confirmed that other independent contractors, who were not employees, also had security keys.
21. The Claimant disputed that the record of his comings and goings by reference to his use of the security keys indicated that he was not at work. It was simply that he may have been on some other part of the site which did not require security key access.
22. In August 2014 there was an exchange of correspondence between the Respondent’s Head of Procurement and the Claimant regarding the Claimant’s status as follows:

.....

*From: Syed Hasnain  
To: Syed Hasnain  
Sent: Monday, 18 August 2014, 14:31  
Subject: Copy of Contract and Contact Details*

*Dear Supplier*

*We are in the process of updating our suppliers’ record and wonder if you could please provide me with the following details:*

- 1. Copy of your contract with under which you are providing your services/goods to us and*
- 2. Your Account/Sales Manager details who is currently looking after our accounts.*

*If you could please let me have these details by this Friday, 22<sup>nd</sup> August, it will be greatly appreciated.  
Many thanks for your help.*

*Syed  
Syed Hasnain  
Interim Head of Procurement*

.....

*From: Stephen Cox  
Sent: 19 August 2014  
To: Syed Hasnain  
Cc: Matthew Hardy  
Subject: Re: Copy of Contract and Contact Details*

*Dear Mr Hasnain*

*With regard to updating your records I can confirm that I am a self employed Chartered Surveyor providing professional services on an order by order basis with no contract in place.*

*Point number two does not appear to be applicable to me.*

*Best regards  
Stephen Cox M.R.I.C.S.*

.....

23. In 2015 the Claimant was asked to prepare a job description for "consultancy employment" with the Respondent. The Claimant did so and a copy was included in the bundle of documents. The Claimant said that he assumed it was on the basis that he would be having a discussion about converting his status to an employee but said that this discussion never occurred. He said that following the production of the document by him, no further conversations were had. Mr Cloke said that the Claimant was offered the opportunity to be employed and that was the reason for the job description being drafted but the Claimant decided not to go forward with this. Accordingly, whilst creation of the draft contract of employment was not in dispute, the reason why it was requested and the reason why it was not taken any further forward were disputed.
24. Mr Cloke explained that in early 2016 concerns were raised about whether the arrangement with Mr Cox met the Respondent's procurement rules and requirements and an investigation (which is still ongoing) was instigated. There was also an investigation into irregularities in the Claimant's invoices but no evidence of wrongdoing was found. However, on the basis of non-compliance with the Respondent's procurement requirements, the Respondent informed the Claimant on 6 May 2016 that he would not be offered any further work.

25. Those are the background facts.

**Relevant law**

Employment Rights Act 1996

26. *Section 230 Employees, workers, etc*

*(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*

*(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and “if it is express” whether oral or in writing.*

*(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the 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 services for another party to the contract whose status is not by virtue of a contract that of a client or customer of any profession or business undertaking carried on by the individual;*

*and any reference to a worker’s contract shall be construed accordingly.*

27. Carmichael and another v National Power Plc [2000] IRLR 43. The court endorsed the concept of an “irreducible minimum” without which no contract of employment can exist. That is control, mutuality of obligation and personal performance.

28. Autoclenz Ltd v Belcher [2011] IRLR 820. The court said that where there is a dispute as to the genuineness of a written term in an employment contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. All the relevant evidence must be examined, including the written term itself, read in the context of the whole agreement, how the parties conduct themselves in practice, and their expectations of each other. Evidence of how the parties conduct themselves in practice may be so persuasive that an inference can be drawn that the practice reflects the true obligations of the parties, although the mere fact that the parties conduct themselves in a particular way does not of itself mean that the conduct accurately reflects the legal rights and obligations.

29. It is for the Claimant to show that he has the necessary status of employee or worker where that is in dispute.

### Decision

30. There was no written contract between the Claimant and the Respondent. It was necessary therefore to consider the circumstances under which the Claimant performed work for the Respondent and the reality of his working situation. All the circumstances indicated that during the relevant period he was not an employee or a worker within the meaning of section 230 Employment Rights Act 1996.
31. It was not in dispute between the parties that at the start of the relationship in August 2011 both parties agreed that the Claimant would be engaged on a self-employed contractor basis. In his evidence the Claimant confirmed that that was the understanding of both parties throughout the relevant period from August 2011 to May 2016.
32. In August 2014 in the email exchange set out above, the Claimant confirmed his status as a *“self-employed Chartered Surveyor providing professional services on an order by order basis with no contract in place.”*
33. In his evidence about the 2015 draft contract of employment he said; *“I assume it was on the basis that I would be having a discussion at some point about converting my status to that of an employee”*. That was an expression of his acceptance that he was not an employee.
34. The Claimant’s statements on his tax returns and his acceptance that he could (although he said he never did) work for someone else at the same time were consistent with independent contractor status and inconsistent with employee status. The fact that he worked for the same organisation for five years and did not carry out work for anyone else is not on its own determinative of employee or worker status. That was his choice. He was not fettered in any way in his right to work for others if he wished to do so.
35. There was no mutuality of obligation. As the Claimant accepted, an expectation is not the same as an obligation. The Respondent was not obliged to request his services, nor, when it did, was he obliged to submit a quote for the work. As the Claimant put it, he provided his professional services *“on an order by order basis”*.
36. Nor was there any sufficient control over the Claimant’s performance of his work or over his working hours as would be required for employee status. He was not subject to the direction or control of the Respondent’s employees on site.
37. He set his own rate of remuneration by the provision of a quotation. His income from the Respondent, as demonstrated by the invoices in the documents, fluctuated accordingly.



38. Although the Claimant performed work personally, and there was no realistic prospect of substitution bearing in mind the location (a high security mental hospital), all the circumstances were consistent with a contract for services through the Claimant's business rather than a contract of personal service as a worker.
39. The process by which the Respondent requested services required the Claimant to provide a quote, the acceptance of the quote, the completion of a requisition form by the finance team to issue a purchase order number, the completion of the work by the Claimant, and then the issue of an invoice by him for payment, followed by payment, was not a sham process. It was applied unfailingly during the relevant period. It was in essence the same arrangement which existed before August 2011, but without an agency intermediary.
40. There was no inequality of bargaining power here. The relationship between the parties was clear. The Claimant was a highly specialised individual content to be a self-employed Chartered Surveyor. The circumstances were wholly consistent with the Respondent's assertion that the Claimant was in business on his own account with the Respondent as his client. It was not necessary to imply a contract of employment in these circumstances.
41. I find that all the circumstances above are consistent with the Claimant having independent contractor status and inconsistent with having employee or worker status.

---

Employment Judge Vowles

Date 14 February 2017

Sent to the parties on: .....

.....  
For the Tribunals Office