Case No: 2501672/2017

EMPLOYMENT TRIBUNALS

Claimant: **Dr Shawn Zaman**

Respondent: **ELM Alliance Ltd**

Heard at: Teesside **On: 21 May 2018**

Before: Employment Judge A.M.S. Green

Representation
Claimant: Mr Wilson - Counsel
Respondent: Mr Newstead - Solicitor

RESERVED JUDGMENT

The judgment of Tribunal is the Claimant was, at all material times, neither an employee of the Respondent nor a worker providing services to the Respondent pursuant to Employment Rights Act 1996 sections 230(1) and 230(3) The Tribunal does not have jurisdiction to hear his claim of automatic unfair dismissal under Employment Rights Act 1996 section 103A or for a written statement of particulars of employment pursuant to Employment Rights Act 1996 section 11.

Reasons

Introduction

1. At a Private Preliminary Hearing on 9 February 2018, Employment Judge Shepherd directed that this Public Preliminary Hearing should determine whether the Tribunal had jurisdiction to hear the Claimant's claim for automatic unfair dismissal. For the Tribunal to have jurisdiction, the Claimant must establish that he was, at the material time, either an employee or a worker engaged by the Respondent. If this Tribunal determined that it had jurisdiction, it was then to decide whether any of the claims brought are out of time and whether such time should be extended and to consider any application in respect of further information provided by the Claimant.

2. The Claimant is a registered GP and at the material time he worked as an out of hours GP for the Respondent. The Respondent is a not for profit Federation for 43 GPs in South Tees. The Respondent was commissioned

to deliver GP Extended and Out of Hours services across South Tees from 1 April 2017. Other than two GPs who were transferred to the Respondent as employees under Transfer of Undertakings (Protection of Employment Regulations) 2006 ("TUPE") when it was awarded the contract, the Respondent regarded the other GPs, including the Claimant as self-employed contractors. The Claimant joined the Respondent on 1 April 2017. The Claimant has his own company called Open Health Ltd (the "Company") and the Respondent understood that he provided his services to it through the Company on a self-employed basis. It also understood that like the other GPs on its books, the Claimant was not guaranteed any hours. He was required to book his shifts through a programme called RotaMaster. The Claimant has a different understanding of his working relationship with the Respondent. He believed that he was an employee or, in the alternative, a worker.

3. From 2 April 2017, the Claimant raised several concerns regarding the way in which the Respondent conducted its services. The Respondent claims that these were properly investigated. On 3 July 2017 the Claimant complained to the Care Quality Commission. This resulted in the Respondent being placed into Special Measures. He also raised a complaint of bullying and harassment on 3 August 2017. The Claimant reported an incident involving another GP, Dr Hood, on 12 August 2017. The Respondent investigated the complaints. The parties disagree about when and how the Claimant's relationship with the Respondent ended which is relevant to time bar issues. However, on 8 December 2017, the Respondent provided the Claimant with a comprehensive response to his complaints and his engagement was terminated for the reasons set out in its letter of that date [479]. The Respondent stated that he was a contractor and terminated the engagement. Had he not been a self-employed contractor, it would have instigated disciplinary proceedings against the Claimant. The Respondent contends that the engagement was not terminated for raising any grievances or disclosures.

Claims

4. The Claimant presented a Claim Form to the Tribunal on 15 December 2017 claiming automatic unfair dismissal having made a protected disclosure ("PID") under section 47B of the Employment Rights Act 1996 ("ERA"), ordinary unfair dismissal under section 94 ERA and failure to provide a statement of employment under section 11 ERA. The Respondent has resisted the claims. In its grounds of resistance, it contends, amongst other things, that the Tribunal does not have jurisdiction to hear the Claimant's claims for automatic and unfair dismissal because the Claimant was neither an employee nor a worker within the meaning of sections 230(1) and 230(3) ERA. It is common ground that if the Claimant was an employee, he did not have sufficient service to claim ordinary unfair dismissal.

The issues

5. The issue that the Tribunal must determine is whether the Claimant was an employee or a worker within the meaning of sections 47B, 230(1) and 230(3) ERA. If he is neither, the Tribunal does not have jurisdiction to hear his claims. A preliminary matter was raised on the question of time bar as to when he suffered the last detriment relied on. I agreed with the representatives that I would address this point if I determined that the Tribunal had jurisdiction to hear the claims.

The hearing

6. The parties filed and served a joint evidence bundle in advance of the hearing. On the morning of the hearing, the Claimant emailed additional documentation which I admitted into evidence at the hearing. Mr Newstead did not object to this. I heard evidence from the following people who adopted their witness statements:

    a. The Claimant
    b. Dr Teck Goh – The Respondent's Medical Director
    c. Mrs June Johnson – The Respondent's Head of Operations

    The representatives made closing submissions.

Burden standard of proof

7. The Claimant must establish his claim to be an employee or a worker on a balance of probabilities.

Basis of my decision

8. In reaching my decision, I have considered all the oral and documentary evidence together with my record of proceedings. My record of proceedings contains a detailed minute of the oral evidence and submissions. I have summarised the key aspects of the oral evidence below.

The oral evidence

The Claimant

9. In his oral evidence in chief, the Claimant stated that when he first joined the Respondent, he had attended an induction conducted by Dr Andrew Threadgold, one of the Respondent's clinical directors. He had been informed that there were policies available on the intranet. The Claimant had spoken to Mrs Johnson on several occasions because he had been unable to access any of the policies on the intranet. It was purely an IT issue. He never recalled signing the policies.

10. Under cross-examination I noted the following from the Claimant's evidence:

    a. Prior to joining the Respondent, he worked for three years as an out of hours GP using a personal services contract working random shifts as and when required.

    b. During the first month of his engagement with the Respondent it was unclear whether he was working as an employee. As time progressed, it became clearer that he was an employee. He was challenged on this because on 3 July 2017 he had complained about the Respondent to the Care Quality Commission [267]. In paragraph 4 of his email of complaint he referred to the fact that he was a locum and that there was clearly an employer-employee relationship given the regular nature of his work. However, he also said that he worried that as an independent contractor the Respondent could stop him from working with little or no notice. He

was asked why he was referring to himself as an independent contractor if he thought that he was an employee. He replied that he was still unsure about his status. It was put to him that he knew that he was an independent contractor because he had signed his emails often using the Company in his signature line. He also accepted that he had sent his invoices through the Company. He could not recall if he had asked the Company for payslips. At the time, he was still trying to decide whether he was a locum or employed. The draft consultancy agreement that had been sent to him did not reflect the reality of being able to cancel shits or the fact of his regular working time. There was still no agreed form of contract. It was put to him that if he believed that he was in substance an employee, why had he continued to ask Dr Goh about his employment status in an email as late as 9 November 2017 (13:06) [470]. In that email he had asked Dr Goh to confirm his understanding that he was self-employed for all the time that he had worked for the Respondent and confirmation that the payment structure was IR 35 compliant. The Claimant replied that he had never received a clear answer about his status.

c. It was put to the Claimant that the intention all along had been for him to be a self-employed contractor and it was only when the relationship soured that he claimed to have employment status. He replied that he felt that a regular working agreement would not fit the locum model. He had originally intended to use the Company as a locum, but he was still unclear about what his status was.

d. He had originally intended to work through the Company but was concerned about IR 35. He had taken advice on IR 35 from his accountant. The Respondent had also sent a zero hours contract to him in error. He thought there were multiple issues regarding IR 35 compliance particularly as he wanted to have a long-term relationship with the Respondent. It was put to him that when he emailed Dr Goh on 23 May 2017 (14:39) this contradicted what he had just said because he was referring to the fact that he was looking for some great opportunities elsewhere [225].

e. He used the Company for staff education and he had developed a feedback form for use by the Respondent. He had sent this to Mrs Johnson on 1 May 2017 [177]. Mr Newstead noted that the feedback form had a copyright symbol in the name of the Company [178]. He asked the Claimant why, to which he replied it taken time to put the documents together and the intellectual property belonged to the Company. He gave the Respondent permission to use the form.

f. When he joined the Respondent, he agreed to work four nights per week from Friday to Monday. He was taken to an email dated 3 May 2017 (19:30) where it indicated that he was requesting Mrs Johnson to allocate the shifts to him [205]. He said that this was intended to be a long-term arrangement. It was put to him that this was contradicted by the email that he sent to Mrs Johnson on 12 August 2017 (09:19) where, at paragraph 4, he had requested that as at 1 September she was not automatically to book him for Friday and Saturday night shifts. He said that after a meeting with Dr Lowe, he had been advised to reduces hours to minimise risk to the service.

g. On the question of the ability to provide a substitute, he was taken to the draft consultancy agreement dated 1 April 2017 which had been sent to him. Paragraphs 3.3 and 3.4 stipulated that he could nominate a substitute no later than six hours on the day before he was required to work [188]. It was put to him this clearly indicated that he had a right to nominate a substitute, but in response he said that on the occasion that he tried to swap a shift he had been sent the Respondent's cancellation policy by Mrs Johnson. He had tried to find a substitute on at least one previous occasion. He had sent an email to Mrs Johnson on 3 June 2017 (08:10) requesting her to cancel his shifts from 16 to 27 June inclusive because he needed time off for Ramadan and for his son's birthday. He agreed with Mr Newstead that he had not had any problems doing this when he spoke to Mrs Johnson.

h. When work was being allocated, he said that it was the joint responsibility following a discussion between two clinicians or a doctor and nurse.

11. I asked the Claimant some questions to clarify my understanding. He told me that he had set up the Company about a year or two before he joined the Respondent. He had used it with a previous out of hours provider because they had required it. He had proposed using the Company with the Respondent when he first joined them having had discussions with Dr Threadgold. Both had felt that it was the best interim measure until a contract had been put in place. He told me that each month he would send an invoice to the Respondent through the Company based on his hourly rate. He had software to calculate the invoice. He did not charge VAT because the Company is not VAT registered. He was unclear how tax and national insurance would be dealt with. He did not pay himself a salary through the Company. He only paid himself dividends. He had never received a tax coding notice from HMRC. When he had worked on other locum practices prior to joining the Respondent, he had been paid through the Company and the Company would then account to HMRC. The Respondent provided equipment for him to do the work. They provided a vehicle, a stethoscope and drugs. Regarding his Medical Defence Insurance, he would pay the premium and they would reimburse him retrospectively. This would usually be done after three months. He taken two weeks off for holiday during Ramadan. He said that he had to give two weeks' notice.

12. On further cross-examination, he said that he had sent invoices to the Respondent because he had not received any payslips.

13. On re-examination, he said that he had sent a WhatsApp message to the GP Group looking for someone to cover his shift [385]. Mrs Johnson had replied by email pointing out the cancellation policy required at least two weeks' notice. He said that he knew that someone could have covered his shift and would have been happy to do so. Regarding the email that he had sent to Dr Goh on 9 November 2017 [470] he said that at that time ACAS had become involved and he did not understand his position regarding employment and termination thereof. He thought that he had been asked to return to work on 15 September 2017. He was also concerned that the locum model would be seen as disguised employment and he wanted clear answers. He was not asking for confirmation of being an independent contractor. He wanted job security. It had never been made clear to him

previously that he was an independent contractor and he was also surprised that Dr Goh had said that the Claimant had terminated his engagement some time ago. He was disappointed that Dr Goh would not meet him until the end of November to discuss the issues.

Dr Goh

14. I have noted the following from his evidence given under cross-examination:

    a. He confirmed that the Respondent was awarded the contract to provide out of hours GP services with effect from 00:00 hours on 1 April 2017. The Claimant had been recruited at the last minute to work on the contract. Dr Threadgold knew of the Claimant because he was a big fish in the local area and worked for other providers. He was taken to an email from Dr Threadgold to the Claimant dated 29 March 2017 (11:28) [154] which suggested that IR 35 was not an issue and that the Respondent would be happy to pay him through the Company. He was asked whether this indicated that the Respondent did not have a contract in place to give to GPs. He replied that most of the GPs including himself had worked as a contractor. They had agreements through limited companies. He was not party to the specific agreement that would be used with the Claimant at that time. He repeated that most GPs asked to work through limited companies. They all worked as contractors. On the question of IR 35, it depended whether they were being paid through a limited company or was self-employed working directly as a locum. He was asked why Dr Threadgold had indicated that the Respondent would be happy to pay the Claimant through the Company "for now". He replied that he could only speculate on that point because he was not party to the discussion.

    b. Dr Goh's secretary, Vicky Kirwin, had sent the Claimant a draft consultancy agreement 3 May 2017 by email (16:34) [183 & 184]. He was not sure what had been agreed regarding hours of work. It was put to him that the draft agreement was not specific about hours of work. He agreed saying that the Respondent's services varied, and they operated a roster which was password accessible. It was published four weeks in advance and as they developed the service, people could choose when they wanted to work. It was put to him that this contradicted what the Claimant had said where he claimed that he had been placed on the roster between 10 PM and 8 AM. Dr Goh replied that this was no different to the other GPs. He said that all the doctors were treated as contractors or locums and did not have fixed hours. They were building the business and the service. Some doctors wanted certain shifts and days. However, there was a severe shortage of GPs in the area and the Respondent had wanted to offer preferential treatment to retain them because it was a very competitive market. It was put to him that the Claimant's is position was different to the vast majority of the other doctors working for the Respondent. Dr Goh disagreed and said that he checked that everyone got the shift they wanted. The Respondent tried to have the arrangements put in place for them otherwise they would struggle to get GP cover.

    c. He was taken to the final paragraph of his letter to the Claimant dated 8 December 2017. He said that he would not have got more

work. There was then some discussion about whether he understood if the Claimant had signed off sick on 13 August 2017. In his email to the Claimant dated 17 August 2017 (11:40) [427] he had stated that it was being recorded to show that his cancellation was because of sickness. It was also stated that he should remain off work pending the investigation of his complaint. The email also said that the decision did not impact on the Respondent offering him shifts in the future. Dr Goh elaborated on what he thought this meant. He told Mr Wilson that when the Claimant had cancelled his shift on 13 August 2017 it was critical for the service to get doctors to come in to provide cover. This was difficult. He did not want the Claimant to come back in, pending the outcome of the investigation and it was put to him that the message was ambiguous because he also seemed to be saying that shifts would be available in future. Dr agreed and repeated there was a shortage of GPs.

d. Ultimately, the Claimant could not be allowed to return because of its investigations. The Respondent had found a breach of professional conduct. IR 35 or working through his Company was not the issue.

15. On re-examination he confirmed that all the doctors who worked for the Respondent did so as contractors

Mrs Johnson

16. I noted the following from her evidence under cross examination:

a. She explained how RotaMaster worked. Shifts were published in advance and the GPs could book them in advance. Initially, bookings had been done on a four-weekly basis, but this had changed. The Claimant had been different because he would speak to her and wanted to work night shifts. There were very few doctors who are willing to work night shifts. She would log his shifts onto RotaMaster for all to access. It was accepted that at the beginning of May an arrangement and been set up whereby he would work from Friday to Monday mornings, 10 PM to 8 AM. This would be booked up for him every two months. However, at the beginning, bookings were taken on a four weekly basis cycle. The Claimant could choose his shifts. Eventually, shifts would be booked up to 2 months in advance, although she understood that she had to have a rota that covered for at least four weeks in advance.

b. The Claimant never entered a written agreement. She remembered that he had been concerned about IR 35 and she had planned to give him the consultancy agreement [184] in person. However, given his concerns about IR 35 she had to speak to HR for advice. She understood that he was worried about working regular hours and he thought the arrangement could be seen as disguised employment. However, Dr Goh had said that he was a locum working for other providers and he had other jobs working in the area.

c. She was asked about substitution and taken to the WhatsApp message [385]. She confirmed that all the GPs were members of the WhatsApp group and that when she saw his request, she had emailed him telling him that she expected him to have contacted

her and given two weeks' notice as per the policy. The Claimant worked his shift. She said that the cancellation policy applied to the Claimant and been prepared by Dr Threadgold [147]. Dr Threadgold had the power to give orders to the Claimant regarding medical matters. She explained that the cancellation policy applied to all employees. There was no provision for workers. The policy had been prepared by someone else with more knowledge than her and it had been a foolish mistake to send it to the Claimant. If someone wanted to offer a substitute it had to be by arrangement because everyone knew how much the Respondent was struggling and everyone had to help each other. The Claimant should have come to her to discuss his request. She did not accept that the WhatsApp message was the first time that he tried to arrange a substitute using that method. He had got colleagues to cover for him for two days that he took off. She agreed with Mr Wilson that on that occasion, he had given 14 days' notice.

d. She was taken to clause 5.5 of the cancellation policy [152] which set out the difference between acceptable and unacceptable reasons for shift cancellation. Once a doctor had booked a shift they would be expected to work it because of the duty of care and GMC practice. There were escalating sanctions applicable which could result in a doctor been reported to the GMC. Essentially, sessions could be cancelled once within 14 days. If sessions were cancelled on two occasions within 14 days the doctor would receive a warning and would not be offered any more sessions for six weeks. If they cancelled sessions on three occasions despite the warning they could be referred to the GMC. She agreed with Mr Wilson that the policy said nothing about providing a substitute. It was put to her that she had sent him the cancellation policy suggestion that he could not offer a substitute. She replied that there was always a verbal arrangement in place if he could find someone to do his shift. This was done by the operations team and not via WhatsApp.

e. He was taken to the email he had sent in July with a list of dates and the two occasions when he wanted to cancel [243] and she confirmed that he had been able to get a colleague to cover for him.

f. In terms of the financial arrangements, he had never been issued with payslips because he was a contractor. Only employees received payslips. No deductions for tax and national insurance were made.

g. There were two GPs, including the Claimant, who worked the out of hours shift. The remaining GPs worked the extended hours shift. The out of hours shift was between 10 PM and 8 AM. The extended hours service was 6 PM to 10 PM, Monday to Friday, and 8 AM to 10 PM at the weekend. The two doctors working the out of hours shift worked regular hours.

h. In terms of giving notice, the Claimant was required to give two weeks. There was no verbal agreement to give one months' notice.

i. There had been an issue with sending the Claimant a zero hours contract in error. Dr Goh retrieved it and Mrs Johnson apologised to the Claimant.

j. The Respondent agreed to reimburse the Claimant's premium for his Medical Defence Insurance.

k. The Claimant could access the Respondent's policies on the shared drive. He was expected to comply with policies. She acknowledged that the disciplinary policy applied to everybody from receptionist to the Chief Executive.

l. When the Claimant went on sickness absence she expected that he would be off work for a long time she was not sure what he wanted but her priority was to cover shifts. She ordered a temporary stop on the RotaMaster system whilst he was absent, but he would still receive texts that were sent to all the clinicians. She was aware of the investigation regarding the Claimant but did not know about the outcome.

17. I asked Mrs Johnson some questions to clarify my understanding. I asked her to clarify what she meant when she said that it had been a foolish mistake to send the Claimant the cancellation policy. She replied that she had been shocked that the Claimant had not contacted her directly about finding a substitute because they had a good working relationship. WhatsApp was new technology used to contact people. She told me that there were only two clinicians who were employees. There were 78 non-clinical staff and 42 GPs. Two of the GPs were employees.

18. On re-examination, she said that when the Claimant booked shifts he would normally contact her daughter Sarah Johnson who also worked for the Respondent. When asked about his working hours and discussions that she had with him she said that she remembered that he preferred to work from Friday to Monday morning.

The Respondent's submissions

19. Mr Newstead submitted that I should consider the intentions and expectations of the relationship at the end of March 2017. Both parties intended and expected that the Claimant to be a self-employed contractor. The Claimant's evidence backed this up. He signed his emails to the Respondent using his company's name. He described himself as a "working GP". He presented forms claiming copyright for his company.

20. On the question of mutuality of obligation, there was no evidence of the Respondent having to provide the Claimant with work. There was evidence that the Claimant initiated booking of shifts and there was a pattern of regular work because the Respondent had accommodated the Claimant's requests.

21. The question of bargaining power was irrelevant. The Respondent needed the Claimant more than he needed it. He was the "answer to their prayers" because he had offered out of hours shifts unlike most of the other GPs providing their services to the Respondent.

22. IR 35 had been the crux of the matter. The Claimant had wanted to be self-employed but was concerned that the relationship would not be IR 35 compliant. I was referred to the Claimant's email to Mrs Johnson dated 14 July 2017 (21:47) [295] which contradicted the Claimant's evidence that his hours were not documented. The email was a crystallisation of the issues

regarding the draft consultancy agreement. There was no suggestion of the Claimant being either an employee or a worker.

23. The decision in **Suhail v Herts Urgent Care [2012] UKEAT 0416/11** almost mirrored this claim and was in point. Mr Newstead summarised what he understood where the findings in **Suhail.** On the question of control, where there was a general system, cancellation was not a matter of control. This was a sensible conclusion. We were dealing with an out of hours GP service and not plumbers or carpet fitters as found in other similar cases dealing with this issue. Because GPs were providing an out of hours service, there were legitimate operational concerns which required a system for attendance. In **Suhail** the GP worked elsewhere at various sites which was the same for the Claimant. He could cancel. This was also the case with the Claimant who said that he had appointments elsewhere.

24. The Claimant had been provided with a draft consultancy agreement. This clearly stated that he had a right to provide a substitute. Others had also done this, and the Claimant was aware of that. There was no mutuality of obligation. There was insufficient control exercised by the Respondent for the Claimant to be an employee or a worker.

25. The Claimant had emailed Dr Goh on 9 November 2017 (13:06) [470] asking him about his self-employed status. He had intended and expected to be self-employed and it was only when the relationship had soured that he started to argue that he was an employee. There was no evidence that the Claimant was an employee and there was insufficient evidence that he was a worker.

26. Turning to the question of the Claimant's financial affairs, he had worked for five months and had always rendered invoices through the Company using his software. He had not requested payslips and he was responsible for his own tax and national insurance. There was no suggestion that he was entitled to holiday pay.

27. On the matter of time limits, if I was minded finding the effective date of termination was 13 August 2017 then the Claimant was out of time. If the first ACAS certificate was valid, the termination date was 14 August 2017, but this was a relevant. If the termination date was 15 September 2017 it was only relevant if the last detriment that the Claimant claimed he had suffered was on 8 December 2017.

The Claimant's submissions

28. Mr Wilson addressed me on the decisions in **Pimlico Plumbers v Smith [2017] EWCA Civ 51** and **Byrne Bothers (Formwork) Ltd v Baird and Ors 2002 ICR 667.** Paragraph 17 of **Byrne** identified the intermediate class of worker. Paragraph 94 of **Pimlico Plumbers** held that there was no single touchstone to answer the question of status to determine category. The headnote to the decision regarding substitution provided guidance on the terms and nature of substitution clauses and can point to when a person is an employee or self-employed. It depended upon the extent to which the discretion to offer a substitute was fettered. Each case depended on its own facts [145].

29. Turning to the facts, there was no written agreement. On 1 April 2017 the Respondent was not ready to provide the GPs with a contract. They had to deal with matters in an ad hoc way. There were ramifications to this

because if the Claimant wanted to rely on a substitution clause, he required a written agreement. The draft agreement was very clear in saying that he was neither an employee or a worker. The Claimant's situation was different to that in **Suhail** because there was nothing like an agreement in place. There was an only ad hoc agreement. The Claimant had been welcomed and there was an arrangement that he would work fixed hours between 10 PM and 8 AM from Friday to Monday. He was to provide out of hours services. Mrs Johnson would book his hours on RotaMaster over a two-month period. Mr Wilson accepted that this could weigh against the Claimant being an employee not a worker because there was an agreed set of working hours.

30. On the question of mutuality of obligation Mrs Johnson agreed in her evidence that he was booked until September. There was mutuality of obligation running through at the period that the Claimant provided his services. There was no contract to negate that finding.

31. Regarding the question of IR 35 [295], other than the two GPs who came across to the Respondent under TUPE, all the other GPs were using IR 35. The expectation was that the Claimant would be IR 35 compliant which rarely pointed to being an employee. It was useful to the Respondent to have this arrangement because there was no need to account for tax and national insurance. It was useful to the Claimant because it was more tax efficient. He would be taxed on his dividends. The Claimant had been confused about his status which is why he had been corresponding with Dr Goh. Because he had a regular shift pattern this could point to a form of employment.

32. I was taken to paragraph 4 of the Claimant's email to the Care Quality Commission dated 3 July 2017 [268] which illustrated the very real concerns that the Claimant had regarding his status. Whilst he acknowledged that he was a locum he had said that he might be unfairly dismissed because there was clearly an employer-employee relationship given the regular nature of his work. He felt that he could be terminated without recourse. He had also stated that as an independent contractor they could stop the Claimant working with little or no notice. Mr Wilson invited me not to give this email too much weight given the IR 35 dimension. The email sat with the notion of the Claimant being a worker.

33. Mr Wilson submitted that section 43K ERA did not apply to the Claimant.

34. The Claimant's hours of work were significantly different to the other locum doctors and were more commensurate with the Claimant having worker status. He had regular hours of work. There were disputed facts over the level of control that was exercised over the Claimant if he wanted to terminate a booking. He believed that he was required to give one month's notice but Mrs Johnson said that he was required to give two weeks' notice.

35. Regarding the right to provide a substitute, they needed to be a clear contractual term. There was no such term upon which the Claimant could rely, and I was referred to the WhatsApp correspondence regarding cancellation. On 5 August 2017, which was after the time of the supposed agreement, Mrs Johnson understood that the Respondent's cancellation policy applied to the Claimant together with all other workers and employees. In her evidence, Mrs Johnson had said that all the Respondent's policies applied to everyone. This did not sit well with the concept of the Claimant being able to provide a substitute when one looked

at paragraph 5 of the policy. Mr Wilson took me to the Claimant's email to Mrs Johnson dated 26 June 2017 (16:51) [243] in which the Claimant requested Mrs Johnson to confirm a list of bookings in July 2017. In that email, he said that he was unable, because of other commitments, to work on 23 July 2017 because he had to attend a friend's funeral. The Claimant had a limited power to provide a substitute as evidenced by the email correspondence with Mrs Johnson on 5 August 2017 (20:27) [385]. In that email, Mrs Johnson had acknowledged that the Claimant had tried to get a shift covered by a colleague, but she stated to him that she would have expected to have been contacted prior to a WhatsApp message going out to the Group to make her aware of the situation. Mrs Johnson had gone on to refer to the cancellation policy stipulating that two weeks' notice of a shift cancellation was normally required. In her evidence it was also suggested that if 14 days' notice was not given this would be treated as a quasi-disciplinary measure and the Claimant could be reported to the GMC. Essentially, there was no right to provide a substitute within 14 days unless there was a very good reason.

36. The evidence indicated that there was a requirement on the part of the Claimant to provide a personal service. He had agreed to carry out the work personally. If there was a right to provide a substitute it was strongly fettered, and he was only able to offer a substitute who was suitably qualified.

37. Regarding the question of control there was not much evidence of this. Generally, doctors regulate how they do their work.

38. I was invited to distinguish this case on the facts and not to follow **Suhail.** In this case, there was no evidence of equipment being provided by the Respondent. Although he initially bore the cost of paying his medical defence insurance, this was reimbursed by the Respondent. This militated against the Claimant being self-employed. Had he been self-employed, he would have absorbed the cost of his insurance into his invoice and not have separated out as he did.

39. The evidence also showed that the staff handbook applied to everybody. This included the disciplinary and grievance policy which went away from the GPs having self-employed status. On balance, the evidence pointed to the Claimant being an employee. Mr Wilson acknowledged that the Claimant agreed his working hours and IR 35 did not help. However, if I found that the Claimant was not an employee that there was a strong argument for finding that he was a worker.

40. Finally, I was addressed on the question of the timing of termination and detriment. Mr Wilson submitted that the letter dated 8 December 2017 [406] was not commensurate with the Claimant being self-employed. There was confusion about when the Claimant's relationship with the Respondent had come to an end. Mrs Johnson believed that he had signed off sick whereas Dr Goh said something different. In his email to the Claimant dated 14 August 2017 (14:43) [424] Dr Goh stated that he was sorry to learn that the Claimant felt stressful at work and had terminated his position with immediate effect. He went on to thank the Claimant for his contribution and to confirm that he would investigate the concerns and allegations that he had raised and would revert to him. I was then referred to the Claimant's email to Mrs Johnson dated 15 August 2017 (21:37) [428] where he confirmed that he had seen his GP and there was no concern regarding his ability to work. He had stated that he was able and willing to return to work

with immediate effect. This looked like a situation sitting somewhere between being employed and self-employed and suggested an obligation to provide work.

Applicable Law

41. The framework for the protection given to individuals who make a PID is contained in ERA. Section 47B ERA confers a right on workers not to be subjected to any detriment on the ground that they have made a PID. Section 103A ERA stipulates that an employee will be regarded as having been unfairly dismissed if the principal reason for his or her dismissal is that he or she made a protected disclosure.

42. Most statutory employment rights are conferred on employees or workers. Employees are those who work or worked under a contract of employment, meaning a contract of service or apprenticeship, whether express or implied and whether oral or in writing (section 230 (1) & (2) ERA). A worker is defined by section 230 (3) as an individual who has entered into or works under (or, where the employment has ceased, has worked under):

    a. A contract of employment (defined as a "contract of service or apprenticeship") (section 230 (3) (a) ERA); or

    b. Any other contract, whether express or implied, and (if 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 the contract that of a client or customer of any profession or business undertaking carried on by the individual (section 230 (3) (b) ERA) (known as a "limb b worker"). Section 43K ERA provides an extended definition of a worker but it was conceded by Mr Wilson that this was not applicable to the Claimant.

43. With the possible exception of those receiving work-related training, it remains an essential requirement that there must be some kind of contractual relationship between the Claimant and the Respondent. Consequently, if the Claimant was genuinely and wholly self-employed he does not have protection against detriment or automatic unfair dismissal as claimed.

44. It is clear from section 230(3)(a) that all employees are workers. However, the second limb of the definition is of much wider scope and includes some people who are nominally self-employed.

45. For the Claimant to lay claim to worker status he must first show that there is a contract with the "employer". To be a worker, the Claimant must "do or perform personally" the work or services required under the contract. Personal performance is generally considered necessary for a contract of employment. To qualify as a worker, the Respondent must not be a client or customer of any professional business undertaking carried on by the Claimant. This was designed to exclude, for example, a barrister who contracts with the client to perform personal services as part of his or her profession or plumber in business on his or her own account who does the work personally.

46. I am reminded that in **Byrne Bothers**, the EAT gave guidance and held that the intention was clearly to create an intermediate class of protected

worker made up of individuals who are not employees but equally could not be regarded as carrying on a business. Accordingly, the essence of the intended distinction must be 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.

47. Drawing this distinction in any particular case will involve all or most of the same considerations that apply when distinguishing between a contract of employment and a contract for services but with the boundary pushed further in the individual's favour. Factors to consider could include the degree of control exercised by the "employer", the exclusivity of the engagement and its typical duration, the method of payment, what equipment the "worker" supplied on the level of risk undertaken. Factors such as the individual having business accounts prepared and submitted to HMRC, being free to work for others, being paid at a rate that includes an overheads allowance and not being paid when not working cannot be relied on to support the contention that he or she is running a business and that the person for whom the work is performed as a customer of that business.

48. Mutuality of obligation is now generally regarded as a necessary element of the contract of employment (**Carmichael and Another v National Power plc 1999 ICR 1226, HL**). This is usually expressed as an obligation on the employer to provide work and a corresponding obligation on the employee to accept and perform the work offered. Relevant considerations include whether there are any notice requirements and whether a worker is free to leave at any time in favour of alternative work. If there is no mutuality of obligation between the parties, then it is highly unlikely that there will be a contract of employment in existence.

49. Another factor pointing to employment is the incidence of income tax and national insurance contributions; deductions at source points to employment; gross payment suggests self-employment. However, this factor is not generally regarded as strong evidence and the opinion of HMRC on a worker's employment status for tax purposes will never be conclusive as to his or her status for employment law purposes. Payment of tax and national insurance on a "self-employed" basis is not conclusive proof of a contract for services (**Enfield Technical Services Ltd v Payne; BF Components Ltd v Grace 2008 ICR, 1423, CA**) just as being part of the PAYE scheme and paying employees' national insurance contributions is not conclusive evidence that a worker works under a contract of service (**O'Kelly and others v Trusthouse Forte plc 1983 ICR 728, CA**).

50. The parties' stated intention as to the status of their working relationship in law may be a relevant factor but the courts will always look at the substance of the matter, even if the parties expressly agree on a label with the approval of HMRC.

51. An express agreement that a relationship is only between limited companies is a factor to be considered in deciding whether a contract of employment exists. I am reminded that in **Winter v Westward Television Ltd EAT 589/77**, Mr Winter arranged to work for Westward Television and a detailed agreement was drawn up. It included a clause providing that Mr Winter would give his exclusive services and abide by the company's staff rules but also providing that his remuneration was to be paid to S Ltd, a limited company owned by Mr Winter and his wife. The EAT held that Mr

Winter was not an employee. In **Catamaran Cruisers Ltd v Williams and others 1994 IRLR 386, EAT** it was held that the fact that the worker had formed a limited company and supplied his services through that company did not affect his employment status. There was no rule of law that the importation of a limited company into the relationship prevents the continuation of a contract of employment. If the true relationship was one of employment under a contract of service, putting a different label on it would make no difference. The formation and existence of a company had to be evaluated in the context of all the other facts found. In that case, Mr Williams was obliged to provide the services himself and worked under the same terms and conditions as the rest of the workforce, including terms relating to sick pay, holiday pay, and disciplinary procedures, and the only difference was that his "wages" were described as fees were paid gross to the service company. The employer conceded that, had it not been for the existence of the service company, Mr Williams could not be anything other than an employee.

52. The tax implications of using intermediary or personal service companies are now governed by Chapter 8 of Part 2 of the Income Tax (Earnings and Pensions) Act 2003, commonly known as the "IR 35" rules. These rules apply where a worker provides services to a client through an intermediary (whether a limited company or a partnership) in circumstances where, if the worker had been engaged directly (i.e. without the use of an intermediary) he or she would in law be an employee of the client. Broadly, the effect is that the worker's tax and national insurance contributions are to be calculated as if he or she were an employee. There is nothing in IR 35 that affects the actual employment status of a worker. It merely provides that, for the purpose of tax and national insurance, the worker will in certain circumstances be treated as an employee by HMRC.

53. In **Pimlico Plumbers** the Court of Appeal had to determine whether a plumber engaged on a self-employed basis was a worker for the purposes of rights under ERA, holiday pay, unlawful deduction from wages and disability discrimination. It held that he was a worker because he had to provide personal service although there was a conditional right to provide a substitute. The level of integration into Pimlico Plumbers' business and control by Pimlico Plumbers over Mr Smith was inconsistent with being self-employed. Mr Smith normally had to be available to take on a minimum of 40 hours' work a week. He was subject to restrictive covenants including a three-month non—compete restriction. He had to wear a uniform and drive a Pimlico Plumbers branded van.

54. The Court of Appeal provided a helpful review of relevant authorities on personal service (paragraphs 75 to 83) and summarised the relevant principles as follows:

    a. An unfettered right to provide a substitute is inconsistent with an undertaking to provide services personally.

    b. A conditional right to provide a substitute may or may not be inconsistent with personal performance. It will depend on the degree to which the right is limited or occasional. By way of example, a right to substitute:

        i. Only when the contractor is unable to carry out the work is consistent with personal performance (subject to any exceptional facts);

ii. Limited only by the need to show that the substitute is as qualified as the contractor to do the work whether or not that entails a particular procedure, is inconsistent with personal performance (subject to any exceptional facts); and

iii. Only with the consent of another person who has an absolute and unqualified discretion to withhold consent is consistent with personal performance.

55. The Master of the Rolls commented that the test for determining whether an individual is a limb (b) worker or self-employed does not involve any single touchstone. Relevant factors might include:

    a. Subordination (also referred to as control).

    b. Are there are number of discrete separate engagements?

    c. Do obligations continue during the breaks and work engagements (sometimes called an umbrella contract)?

    d. The extent to which the individual is integrated into the putative employer's business.

56. In **Suhail** an out of hours GP who was required to provide his own equipment, exercised complete clinical independence, where there was no mutuality of obligation and an effective substitution clause was held to be in business on his own account.

Discussion and findings

57. Having considered matters, I have concluded that the Claimant was self-employed at all material times during his relationship with the Respondent. Consequently, the Tribunal does not have jurisdiction to hear his complaints under sections 11 and 103A ERA.

58. On his own evidence, he admitted that he had established the Company one or two years prior to joining the Respondent. He not only used the Company for educational purposes but also to provide ad hoc GP services to a previous service provider. He was clearly familiar with providing his services through the Company. It is also noteworthy that he prepared a feedback form which he gave to the Respondent whilst reserving the copyright to the Company. Clearly, he believed that the Company had intellectual property rights that needed to be protected when engaging with business with the Respondent. This is behaviour that is commensurate with providing a service to a client. When one reads the many emails that the Claimant sent to the Respondent during his time with them, he almost exclusively signs them using the name of the Company. This suggests he regarded the Respondent as a client. It is also clear that he provided his services to other users in addition to the Respondent. There was not suggestion that the Claimant was subject to any post-termination restrictions regarding whom he could offer his services to. This points away from being an employee.

59. When he provided his services through the Company, it was the Company that invoiced the Respondent and he was paid gross of tax and National Insurance. I accept that it was then a matter for the Claimant to decide how

he chose to remunerate himself. In some instances, individuals providing their services through a company choose to pay themselves a salary and make the appropriate deductions. Others choose to take a dividend. The Claimant chose to take a dividend.

60. Dr Goh's evidence was also weighty in this regard because I had no reason to doubt what he said about the arrangements that he had in place between the Respondent and other GPs (excluding the two who were transferred over under TUPE). The use of companies for the GPs to provide their services was a commonplace although IR 35 was an issue.

61. I acknowledge that the Claimant was reimbursed his Medical Defence Insurance premium by the Respondent. In itself, that does not point to his being employed or a worker. It was an expense of his business, and it is often the case that service providers will claim for their expenses to be reimbursed. This is commonplace with travel and subsistence. There is no reason why the same could not be said of insurance. I also note that the Respondent provided a vehicle, stethoscope and drugs to the Claimant. His could point to employee or worker status as in **Pimlico Plumbers**. However, there was no suggestion that it was branded or readily identifiable as being associated with the Respondent.

62. Fairly early in the relationship, it was understood that the Claimant would continue to provide his services through the Company as acknowledged by Dr Threadgold. The Claimant says this was never intended to be more than an interim arrangement until a contract was in place. On 3 May 2017, the Respondent sent the Claimant a draft consultancy agreement [184]. Although this agreement was never signed, it is at least of some evidential value to indicate what the parties intended their relationship to be. That agreement clearly provides in clause 13.1 that the consultant is an independent contractor. There was nothing to suggest that the Claimant was to be employed. Indeed, the evidence is that only 2 of the 42 GPs were employed. Their employed had transferred under TUPE. One point that is worth noting, however, is that the Company is not designed as a contracting party in the draft consultancy agreement. The Claimant is designed as one of the parties. That does not undermine the idea that he was to be a consultant. Indeed, in his evidence, Dr Goh said that GPs could provide their services through an intermediary or directly as a locum. I regard the incorrect designation as a drafting point.

63. When the Claimant complained to the Care Quality Commission on 3 July 2017, he said that he worried **that as an independent contractor** the Respondent would stop him from working with little or no notice. In his oral evidence, he was asked why he was referring to himself as an independent contractor to which he replied that he was still unsure about his status. I do not find that a plausible explanation given what he went on to say on 14 July 2017 when he emailed Mrs Johnson to discuss the draft consultancy agreement [295]. The Claimant still did not regard himself as employed by the Respondent. He said:

> *… Can you confirm that this is intended to be a "consultancy agreement with the service company"? I only ask as it is included a EWTD form which would not apply as I am not employed.*

Clearly and unambiguously, the Claimant did not regard himself as an employee. Indeed he seems to have picked up on the fact of the drafting defect that the draft consultancy agreement was not predicated on his

providing his services through the Company.

64. The Claimant had raised the IR 35 issue because of the regular shift pattern that he said that he would be working which he believed could potentially be construed by HMRC as some form of employment unless clearly stated. For the reasons given above, IR 35 is a matter relating to tax liability and does not, of itself, determine the Claimant's actual employment status as a matter of employment law.

65. The Claimant continued to refer to his self-employed status as late as 9 November 2017 when he emailed Dr Goh [470]. He stated, amongst other things:

> *… You have stated my position at ELM Alliance (STAR service) was as a self-employed GP, yet I was asked to sign a contract of employment and was at times treated as an employee. Please confirm it is your understanding that I was self-employed for you all of the time I have worked with ELM Alliance and that the payment structure was IR 35 compliant.*

66. Under cross-examination the Claimant suggested that he had taken advice from ACAS and he wanted clarity because Dr Goh had never previously confirmed his status. That does not sit comfortably with his own words in the email. He was asking Dr Goh to confirm that he had been self-employed for all of the time that he worked for the Respondent.

67. It is correct, that the Claimant had been sent a zero hours contract in error. I fail to see how this points to the Respondent treating the Claimant as an employee or a worker. It was a mistake and Dr Goh had retrieved the contract and Mrs Johnson had apologised to the Claimant.

68. Despite what the Claimant said in his oral evidence, I am not convinced that he thought that he was anything other than self-employed "all of the time" (his words) and he was concerned about the tax treatment of his earnings as a consequence because he did not want to for foul of IR 35. I repeat that IR 35 is a matter relating to tax liability and does not, of itself, determine the Claimant's actual employment status as a matter of employment law.

69. The Claimant was in a strong bargaining position with the Respondent because he was one of only two GPs providing the out of office hours service. The other 40 GPs provided the extended hours service. It was consistently said in evidence by Dr Goh and Mrs Johnson that there was a shortage of GPs and this would impact on the quality of the service that the Respondent could provide. Dr Threadgold had referred to the Claimant as being a big fish and, clearly, he was a "good catch". This appears to be reflected in the mechanism whereby he could book his hours as described by Mrs Johnson. The Claimant initiated his request for work. In his case, he appeared to have done this by contacting Sarah Johnson or Mrs Johnson. His request would then be booked on RotaMaster. The Claimant has suggested that it was a long-term arrangement, but I have not seen any evidence that it went beyond a two-month cycle. Furthermore, on 12 August 2017 the Claimant had asked Mrs Johnson not to automatically book any shifts after 1 September 2017. He could and did control the process.

70. Much has been made of whether the Claimant had the right to nominate a

substitute. It is accepted that prior to the WhatsApp message [385] the Claimant had successfully arranged for a substitute to cover two days in July. This was so that he could attend his friend's funeral. The draft consultancy agreement contains a substitution provision. However, as that agreement was never signed, it would be wrong to place reliance on it other than to show that the right to provide a substitute was something that was in contemplation. It is contextual. Mrs Johnson admitted that she sent the cancellation policy to the Claimant in error. She had simply wanted the Claimant to contact her directly rather than going through the WhatsApp group which reflected the informal arrangement that had grown up concerning how he booked his shifts and, therefore, how he might change them. It was her evidence that there was always a verbal arrangement in place if he could find someone to do his shift. This was done by the operations team and not via WhatsApp.

71. In practice, I believe that the Claimant had a conditional right to nominate a substitute. He is a GP and has professional conduct duties to his patients which if breached could result in him being referred to the GMC. His professional conduct duties exist regardless of any policy that the Respondent had in place. In fact, the cancellation policy refers to GMC guidance contained in their own document called Good Medical Practice. The policy prepared by the Respondent permits shift cancellation in clause 5.5 and distinguishes between acceptable and unacceptable reasons. The policy effectively allows a clinician to cancel a shift on giving 14 days-notice. This is where I believe Mrs Johnson thought that the Claimant needed to give two weeks' notice. Clearly, the Claimant could only offer a substitute who was suitably qualified such as another GP. The policy also seems to suggest by implication that if the Claimant notified his intention to cancel a shift at least 14 days in advance then this would not be conditional upon his requiring consent from the Respondent nor to provide a substitute. This is also consistent with the way in which work was allocated to the Claimant and other GPs. They initiated the process and were then allocated work with the Respondent trying to meet their requirements and to fulfill their wishes given the state of the market and the shortage of GPs to provide the service. This also militates against the finding of mutuality of obligation.

72. Finally on the question of control, I agree with Mr Wilson's submission that there was not much evidence of this. Generally, doctors regulate how they do their work. That has to be so in matters such as clinical decision making, triage, diagnosis, choice of treatment and prescribing drugs when attending a patient.

73. I appreciate that this will be a difficult decision for the Claimant and I have no reason to impugn his integrity but the facts of this case and the applicable law inexorably lead to my conclusion that the Tribunal does not have jurisdiction to hear his claims.

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Employment Judge Green

Date 4 June 2018