EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms Kady Mitchell	**v**	(1) Orton Bushfield Medical Practice (2) Dr Saber Alemi

RESERVED JUDGMENT ON PRELIMINARY HEARING

Heard at: Cambridge **On:** 3 May 2019

Before: Employment Judge Ord

Appearances
For the Claimant: Ms C Rayner, Counsel.
For the 1st Respondent: Mr R Choudhury, Solicitor.
For the 2nd Respondent: Mr S Forshaw, Counsel.

RESERVED JUDGMENT

1. By consent the claimant has leave to amend her statement of case in accordance with the draft dated 18 March 2019.

2. The second respondent was at all material times an employee of the first respondent within the meaning of s.83 of the Equality Act 2010.

3. A further preliminary hearing will be held to determine the precise issues between the parties in the case, to give case management directions and to list a final hearing in accordance with the notice of hearing attached.

REASONS

1. This matter came before me following my direction of 20 November 2018 that a preliminary hearing should be held to determine the jurisdictional issues raised by the second respondent in his response.

2. The second respondent maintained that the tribunal had no jurisdiction to consider the claims against him, and that the first respondent could not be liable in law for the acts complained of by the claimant (discrimination on the protected characteristic of sex) because, according to the second respondent's response:

> "The second respondent was not an employee of the first respondent. There was a service company between them and so as a consequence no express contract between the first and second respondents."

3. The purpose of today's hearing was therefore to determine the status of the second respondent and whether the tribunal had jurisdiction in respect of the allegations made by the claimant again relating to the acts or omissions of the second respondent.

The hearing

4. The second respondent gave evidence and was cross examined by the claimant's representative. The second respondent and the claimant made submissions through their respective counsel. I was referred to a bundle of documents and a bundle of authorities provided by the second respondent. The first respondent's solicitor was in attendance throughout the hearing, but neither raised any questions of the second respondent nor made any submissions. No evidence was given from any other party.

The facts

5. Based on the evidence before me I have made the following findings of fact.

6. The second respondent has worked as a general medical practitioner since 2014 and throughout the period since that time has worked as a locum GP.

7. The second respondent markets his services by email to local practices advising of his services. He sent an email of this type on 10 August 2017 to a number of General Practices including the first respondent.

8. That email was sent from "ALEMI, Saber (WANSFORD)". The email address is salemi@NHS.net. That is the second respondent's personal email account with the NHS.

9. The second respondent referred to his status as a locum GP and said he was "working via my limited company and as self-employed" and invited practices to contact him for short or long term local services and "guaranteed" what he described as "the best experience for the patients and the colleagues". The limited company referred to by the second respondent in that email was not named or identified in anyway.

10. On behalf of the first respondent, the practice manager, Cathy Morris asked the second respondent for his CV and references. He replied the following day with his CV (which was not included in the bundle before me) but not, apparently, with any references.

11. On 14 August 2017 Ms Morris emailed the second respondent stating that the practice was looking for cover on Mondays and Fridays during September. The second respondent's reply of 15 August 2017 set out his rates which depended on the number of patients seen but was £500-£650 per session which was said to be negotiable.

12. There is no evidence before me of any further agreement between the first respondent and the second respondent, and no evidence at all of any communications between the first respondent and the second respondent's limited company (SA Safe Care Ltd) prior to the second respondent carrying out any locum work for the first respondent.

13. Indeed, thereafter there is an equal paucity of documentary or other evidence about the terms agreed between the first respondent and any other party. There is evidence of the second respondent, from his own salemi@NHS.net email address re-negotiating rates from time to time. There are a series of invoices from SA Safe Care Ltd to the first respondent for the work carried out by the second respondent. Neither the first nor second respondent gave any other evidence about how the arrangements between the first respondent and either the second respondent or SA Safe Care Ltd, with whom the second respondent maintains the first respondent contracted, were put into operation.

14. Throughout all of the email correspondence which has been seen by me, the first respondent corresponded with the second respondent, and only the second respondent, using the salemi@NHS.net email address. At no time (other on the occasions when the first respondent received an account raised by SA Safe Care Ltd) did the second respondent provide the first respondent with the name or address of the limited company in question, nor did he state that he would be working through that limited company as part of the arrangements with the first respondent. The only step he took was to arrange for invoices to be sent by SA Safe Care Ltd to the first respondent.

15. The second respondent was asked during cross examination whether SA Safe Care Ltd was simply a device for payment to be received for his work and he agreed. He accepted that he did not at any stage seek to substitute another person's work for his with the first respondent, accepted that the first respondent expected him and him alone to carry out the work contracted for, and that they were interested in him and his skills. He accepted that whilst carrying out work at Orton Bushfield Medical Practice he worked closely with a nurse practitioner and other staff.

16. When the second respondent was asked to point to any documents passing between SA Safe Care Ltd and the first respondent to show that SA Safe Care Ltd was the contracting party, the second respondent identified only the invoices forming part of the bundle, and when taken to emails from his personal NHS email account dated 25 December 2017 and 4 January 2018 regarding changes in rates it was put to the second respondent that this was further evidence of an agreement between himself and the first respondent to which his reply was "not paying me, paying the company".

17. The series of invoices produced as part of the bundle all bear the date 29 January 2019, save for three invoices which are all dated 5 October 2018. Those three invoices of 5 October 2018 are repeated in the invoices dated 29 January 2019 and cover the period 11 September 2017 to 30 May 2018. I was told by the second respondent that the date of the invoices in the bundle is the date upon which they were respectively printed, but I have not seen any other, earlier dated invoices and I have not seen any bank statements or other information pointing to when and to whom payment was made.

18. SA Safe Care Ltd was incorporated on 19 June 2014. There are two directors, the second respondent and another family member. They were appointed on the date of incorporation and there has been no change in the ownership or directorship of the company since.

19. The second respondent agreed under cross-examination that all negotiations regarding fees to be charged to the first respondent were from him at his personal email address and not the company email address. When payment was slow in being made by the first respondent emails were sent not by SA Safe Care Ltd but again by the second respondent himself. I was taken to one such email of 25 January 2018 prompting payment for the invoice for the previous month and referring to his not having received payment for the November 2017 invoice until January 2018 and saying that:

> "I have to make you aware that from January 2018 there will be a penalty if my invoices are paid later than the two weeks deadline."

20. At no stage was there any communication from SA Safe Care Ltd asking for payment of their invoice and emphasising their terms. The invoices which have been produced dated 5 October 2018 have a "payment due" date upon them of "12 October 2018" and those dated 29 January 2019 have a payment due date of "12 February 2019". It is not possible to glean from the information provided when and how payment terms were agreed and there are no terms of business from SA Safe Care Ltd upon which the respondents seek to rely, indeed no contractual documents apparently exist (or if they do exist, no party has seen fit to produce them before me today).

21. The second respondent confirmed that whilst carrying out work at the first respondent's medical practice he would see patients who had previously been seen by other doctors for the purpose of new or follow-up care, and that those patients which he saw were equally likely to be seen by other doctors for further follow-up treatment or consultations if required. He was assisted by nurse practitioners who would, for example, take blood samples from patients whom he was seeing and worked with the administrative staff of the first respondent.

22. Although in his statement the second respondent said that he could take holiday whenever he wished and could cancel appointments whenever he chose, stating that "as a matter of courtesy" he usually gave 2-4 weeks' notice when doing so, he gave no evidence at all of holidays actually taken or appointments actually cancelled. Indeed, the initial emails passing between him and the first respondent indicated a commitment to certain days per week throughout the month of September. The matter clearly grew from there because the invoices demonstrate a consistent and regular pattern of work over a lengthy period of time, but no evidence at all was given as to how this developed or the level of commitment/notice/obligation either party had.

23. In his own witness statement, to the truth of which he affirmed, the second respondent said this:

> "Payment of my services would involve me rendering regular invoices to the first respondent. I refer to those invoices."

Those invoices were from SA Safe Care Ltd. Throughout his evidence, just as throughout his correspondence, the second respondent referred to "I" or "Me" and not the company.

The Law

24. Under s.83(2)(a) of the Equality Act 2010 "employment" means "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work".

25. Under s.109(1) of the Act, "anything done by (A) in the course of (A's) employment must be treated as also done by the employer".

26. Under s.109(2), "anything done by an agent for a principal, with the authority of the principal must be treated as also done by the principal".

27. Under s.110, "a person contravenes the Equality Act if they are an employee or agent and do something which is treated as being done by their employer or principal which amounts to a contravention of the Act by the employer or principal".

Submissions and authorities

28. On behalf of the second respondent it was submitted that neither the requirement of there being a contract between the first and second respondent, nor that any contract was, if it existed, was a contract personally to do work had been met.

29. It was said that all of the second respondent's services were provided through SA Safe Care Ltd and, to quote from the submissions, it was "made clear from the outset that this is how the parties would arrange their affairs". Counsel relied upon the email of 10 August 2017 stating "I am working via my limited company and as self-employed" which was sent to a number of practices including the first respondent as evidence of that.

30. It was submitted that there was no express contractual relationship between the second respondent and the first respondent and that "the only remaining question is whether a contractual relationship [could] be implied".

31. I was reminded (James v London Borough of Greenwich [2008] IRLR 302) that in the context of an agency worker it would be very unlikely that a worker would be an employee of the end user on the basis that it would be necessary to imply a contract between the agency worker and the end user, the test for the implication of a contract being one of necessity.

32. That case of course was decided on the definition of employment contained in Employment Rights Act 1996 and not the wider definition contained in the Equality Act 2010.

33. Counsel also referred me to the case of Tilsom v Alstrom Transport [2011] IRLR 169 where the Court of Appeal said that where the parties would or may have acted as they did without there being a contract between them, that is fatal to the implication of any contract.

34. Further, it was said on behalf of the second respondent that if there was a contract between the first and second respondent it was not a contract personally to do work. I was referred to the case of Jivraj v Haswani [2011] IRLR 827 confirming that an arbitrator was not engaged under a contract personally to do work even though there was a contract which required the arbitrator to perform certain functions personally he was not in employment for the purpose of the Equality Act 2010 because there was no relationship of subordination with the parties. Further, in Windle v Secretary of State for Justice [2016] IRLR 628 court service translators were said not to be in a relationship of subordination with the Ministry of Justice, as they could decide when they would work and when they would not work and were in business on their own account. The Judgment of Lord Justice Underhill included these words:

> "It seems to me a matter of common sense and common experience that the fact a person supplying services is only doing so on an assignment by assignment basis may tend to indicate a degree of independence or lack of subordination."

Although he goes on to say that that would "not always" be incompatible with employee status and that:

> "Its relevance will depend on the particular facts of the case; but to exclude consideration of it in Limine runs counter to the repeated message of the authorities that it is necessary to consider all the circumstances."

35. Lord Justice Underhill also, in the same judgment referred to Bates van Winkelhof v Clyde and Co. LLP [2014] IRLR 641, where Lady Hale warned against treating the presence or absence of "subordination" as the infallible touchstone for distinguishing between the two kinds of self-employed worker under s.230(3) of the Employment Rights Act 1996.

36. I was referred to the case of James v Redcats (Brands) Limited [2007] IRLR 296 as authority that whether a putative employee is in a subordinate relationship and consideration should be given to the extent to which that person is in a dependant relationship with the putative employer or whether the putative employee has a range of clients or customers. That case was to define the definition of worker under the 1998 National Minimum Wage Act (which is the same as that in s.230 of the Employment Rights Act 1996). Those Acts define a worker as:

> "An individual who has entered into or works under …. (a) a contract of employment; or (b) any other contract, whether express or implied and (if it is expressed) 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 professional business undertaking carried on by the individual".

The definition in the Equality Act 2010 does not contain the caveat of the status of the person who has contracted personally to do work.

37. I was also referred to the Employment Appeal Tribunal authority of Suhail v Barking Havering & Redbridge University Hospitals NHS Trust UKEAT/0536/13 where a locum doctor who offered his services to various practices was not a worker for the purposes of s.230 of the Employment Rights Act 1996.

38. It was submitted on behalf of the second respondent that he worked for various practices suggesting that he was in business on his own account, provided his services on an assignment by assignment basis, that the practice could not "require him to perform sessions", that the practice could not interfere with his clinical judgment and that he provided his own insurance, "tools" and undertook his own administrative work. Describing the first respondent's role as being "limited to giving Dr Alemi a room to sit in when he arrived to perform a clinical session and arranging which of the practices patients he would see".

39. In relation to the question of whether the second respondent was an employee of the first respondent within the meaning of the Equality Act 2010 the claimant referred to the wider definition of employee in s.83 beyond that contained in s.230 of the Employment Rights Act 1996 and indeed s.54(3) of the National Minimum Wage Act 1998. Employment includes "Employment under ….. a contract personally to do work".

40. It was submitted therefore that anyone contracted to work in a personal capacity will be an employee under the Act. It was said that the term includes the concept of worker within it thus a person who is paid as a self-employed contractor but is still under a contract personally to do work can be liable under the relevant sections of the Equality Act 2010.

41. The following matters were prayed in aid by counsel for the claimant as indicating that the second respondent fell within the definition of worker under s.83 of the Equality Act 2010:

    (1) He was under the wider control of the practice in terms of where he worked and which patients he saw.

    (2) He was required to comply with professional standards.

    (3) He was providing his services on a personal basis.

    (4) It was not suggested that if he was unavailable he could send a substitute.

    (5) He felt sufficiently integrated to use the internal complaints process within the practice when it suited him (which was actively confirmed by the second respondent in evidence).

    (6) He raised a grievance against a junior employee to the senior employer and it was investigated (again agreed by the second respondent).

    (7) The first respondent investigated the claimant's complaint against the second respondent when she raised it.

42. The claimant stated that although the second respondent may be paying tax and national insurance as a self-employed person it was immaterial to whether he fell within the definition of employee under the Employment Rights Act 1996. It was also said that it was immaterial that he may have been working through the mechanism of a company which provided his services.

Conclusions on employment

43. In the light of all the facts found and applying the relevant law I am satisfied that at the material time the second respondent was an employee of the first respondent within the meaning of s.83 of the Equality Act 2010.

44. There is no evidence whatsoever that the contract which was formed with the first respondent through which the second respondent would carry out locum work at the first respondent's practice was made with anyone other than the second respondent personally.

45. It was he, and not SA Safe Care Ltd, who contacted the first respondent. It was he, and not SA Safe Care Ltd who negotiated prices. It was he, and not SA Safe Care Ltd, who pursued payment and sought to impose "penalties" for late payment of what the second respondent described as "his invoices". On 25 December 2017, from his own personal email account – not that of the company – the second respondent wrote:

> "May I also politely request my invoices to be paid ontime ….. I am still waiting for my November invoice to be paid although we are at the end of December month."

And on 25 January 2018 he again wrote as a reminder:

> "That I have not yet received payment for invoice number 141 with the amount of £4020 for December 2017.
>
> As I received November 2017 invoice in January 2018, I have to make you aware that from January 2018 there will be a penalty if my invoices are paid later than two weeks deadline."

46. At all times the first respondent communicated with the second respondent at his private email address, the second respondent referred to "my" invoices and that "I" require payment, and the second respondent agreed that SA Safe Care Ltd was simply a device through which he received payment.

47. I am therefore satisfied that the contract which existed (as there must have been an agreement by which the second respondent was working at the first respondent) was made between the first and second respondents. At no stage was SA Safe Care Ltd even identified to the first respondent prior to the second respondent commencing work, so they could not have formed a contract with an unknown party. At all times they were communicating with and, I find, contracting with the second respondent.

48. Was this then a contract "personally to do work"?

49. The answer is, I find, "Yes".

50. There was no question whatsoever that the second respondent could or would send a substitute. As he confirmed the first respondent was interested in his CV, his skills, his experience.

51. The authorities relied upon by the second respondent in this area deal with different definitions of "employee" in particular under either s.230 of the Employment Rights Act 1996 or under s.54 of the National Minimum Wage Act 1998.

52. The definition of "employee" under the Equality Act 2010 is broader. Employment as defined includes employment under "a contract personally to do work". There are no other limitations or restrictions placed upon that definition.

53. Accordingly, that definition can include people who are considered (whether by themselves, any other contracting party or HM Revenue and Customs) to be "self-employed" or in business on their own account. It requires only that there exists a contract between the individual and another under which the individual contracts personally to do work.

54. In this case:

    (1) The contract was between the first respondent and second respondent.

    (2) Under that contract the second respondent and the second respondent alone was to carry out work for the first respondent.

55. For those reasons I find that the second respondent was, at the times he was carrying out work under the agreement between himself and the first respondent, an employee of the first respondent within the wider definition in s.83 of the Equality Act 2010.

56. In the light of my findings I do not need to consider whether the second respondent, had there been no contract, was an agent of the first respondent. I have therefore not considered the authorities and submissions put before me in that regard.

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Employment Judge Ord

Date: 7 August 2019

Sent to the parties on: .....09.08.19....

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For the Tribunal Office