



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Cleverley
Respondent: Holywell Park Ltd t/a Walden Care

Heard at: Croydon **On:** 13/11/2019

Before: Employment Judge Wright

Representation

Claimant: In person
Respondent: Ms I Hamblin – solicitor

JUDGMENT

The Judgment of the Tribunal is that the claimant was self-employed and was not a worker or employee of the respondent. As such, the claimant's claim is dismissed.

REASONS

1. This was an open/public preliminary hearing to determine whether the claimant was an employee or a worker of the respondent. If not, then there is no jurisdiction to hear her claim. The hearing commenced at 2pm and was listed for three-hours. The claimant gave evidence on her own behalf and the Tribunal heard from Mr Green and Mr Whitehead for the respondent. There was also a statement from Ms Turner who had worked with the claimant, however she did not attend and therefore could not be challenged on her

evidence¹. There was an agreed bundle running to 130+ pages. The hearing allocation was taken up with the evidence and the parties' submissions. There was not time to deliberate and deliver judgment and accordingly, judgment was reserved.

2. It was agreed that the claimant may supplement her oral submissions by submitting a copy of the written presentation she had prepared. She agreed to do so by close of business on 15/11/2019. That document was produced and considered.
3. The claimant presented a claim form on 4/1/2019. She submits a claim for: notice pay; holiday pay; arrears of pay; other payments; bonus payment; and pension.
4. In its response of 18/3/2019, the respondent's primary defence was that the claimant was engaged on a self-employed basis and she was neither an employee or a worker of the respondent. The respondent is a national care home for the elderly which provides care to those with dementia, physical disabilities, mental health conditions and sensory impairments.
5. Mr Green was a recruitment consultant who works in that capacity with the respondent. He was instrumental in recruiting the claimant. Mr Whitehead is a director of the respondent and he was responsible for the claimant's engagement.
6. Having heard the evidence, examined the documents referred to in the bundle and considered the submissions, the Tribunal makes the findings set out below.
7. The claimant is an experienced health care professional, having been a nurse and manager for 44-years. She has held a verity of NHS and non-NHS positions, including Director of Nursing in two NHS Trusts, CEO and Chief Operating Officer in the independent sector. She has three nursing qualifications and a Master's Degree in Business Administration. She is the director and majority shareholder in Care Empowerment Limited.
8. The claimant says that six years ago she sought out the role of nursing home manager. In September 2017 she was approached by Mr Green with a proposal to be the Registered Manager² (RM) at the respondent's Holywell Park Nursing Home.
9. Mr Whitehead put forward a proposal via Mr Green to the claimant. Mr Green asked the claimant what her current package was to start the negotiations for

¹ In any event, her evidence did not deal with the claimant's status at the respondent.

² The Registered Manager is regulated by the CQC, has to have certain qualifications and experience and has to comply with the relevant legislation.

the offer which the respondent wished to put to her on 22/9/2017 (page 42).
The claimant responded:

'My current package is as follows

Holidays 32 days plus bank holidays.

Pension 5% non contributory

Bonus 10% plus 5% at Xmas.

I would also like to maintain my self employed status as I run a social enterprise under my company name.

...'

10. Mr Green passed those details to Mr Whitehead and he passed them onto his administrator so that the file could be opened up on 26/9/2017.

11. Mr Whitehead responded to Mr Green (page 46):

'You will have to help me out. No issue with Jane maintaining her self employed status but what will she need from us?

Still an offer letter?'

12. Mr Green suggested that an offer letter was sent out and Mr Whitehead asked his administrator to do it 'a.s.a.p.'

13. The first offer letter was sent out via Mr Green at 12:48 (page 52). The offer letter was silent as to the claimant's status at the respondent and set out some pre-conditions. The letter did refer to:

'You are expected to familiarise yourself & abide by the policies and procedures of The Home and the Employee Handbook.'

14. Ms Hamblin submitted that this phrase was an error and was left in the letter by an administrator who did not appreciate the nuances of employment status and it is nothing more than an oversight. She says that it certainly does not confer employee or worker status on the claimant. It is accepted that this phrase is not determinative and is as Ms Hamblin says, an error on the part of the administrator.

15. Later that evening, Mr Green and Mr Whitehead had an email exchanged (page 49):

'Jane has just messaged me to say that the offer does not cover the pension she currently receives of 5% non contributory. She has her own private pension and not looking for any type of company scheme.'

In reply, Mr Whitehead said:

'I'm a bit confused by this, do we contribute to Jane's private pension or just make a deduction of 5% and pay it to the private pension?'

16. There must have been a further exchange as a revised offer letter was sent out on 27/9/2017 at 8:34 (page 54). The revised letter included an offer of an additional payment of 5% of base remuneration p.a. in lieu of pension contributions.
17. The claimant accepted the offer and confirmed her start date as 30/10/2017 (page 56). She also said that she had started her RM application and would sort out the CQC DBS.
18. The claimant agreed that Mr Green proposed that she be an employee of the respondent and at the start of the engagement, she declined that offer, said she preferred to be self-employed and that she wanted the 'freedom' of self-employment. Furthermore, it is not credible that the claimant would then invoice the respondent via her limited company on a monthly basis, if she wanted to be an employee as she now claims. Had that been the case, the claimant would have said at the time (until the parties fell into dispute, they clearly had a good working relationship) why am I not on PAYE? She did not do this and she took the opposite course of action to a claim to employment status by submitting invoices. It is not accepted that the invoices were produced at the respondent's request. There is no evidence of this. Due to the fact the respondent's evidence is corroborated by the contemporaneous documents and the fact the claimant's evidence is undermined by the same documents, the evidence of the respondent is preferred.
19. The claimant said in evidence that Mr Green proposed she be employed by the respondent as a permanent, full-time employee. That is correct. The claimant also says that was also her expectation. That is not accepted. The contemporaneous documentation clearly shows, the claimant wanted to remain self-employed. She clearly was aware³ of the differences in status between self-employment and employment and she specifically requested self-employment status.
20. From 30/11/2017 the claimant submitted monthly invoices from Care Empowerment Ltd for her services (page 58). The invoice included her:

³ It may be that the respondent was not aware of the difference in status.

‘Management services
Reimbursement for items purchased; and
5% pension contribution.’

21. The claimant had been offered a ‘salary’ of £70,000 and the ‘management fee’ claimed for the first period (30/10/2017 to 30/11/2017) was £6,363⁴ (one-twelfth of £70,000 is £5,833). The claimant explained that she invoiced for the number of days worked.
22. It was stated in evidence that the respondent did not know (on its case had no control over) the days and hours the claimant worked. The claimant agreed she did not clock in and out as the other staff did and that she had autonomy over her working hours and days.
23. The claimant then invoiced from December 2017 to September 2018. The invoices from February to May 2018 included a mileage claim, June and July included a claim for telephone costs and August and September included both mileage and telephone costs. All invoices included a claim for management services, expenses and 5% pension contribution. There was a final invoice for October 2018 in respect of travel expenses. The claimant was never paid through PAYE and was not in the respondent’s auto-enrolment pension scheme.
24. The evidence was that the claimant was not given any form of written contract. Her status was therefore not dealt with in any form of formal document, although of course, there are the emails and letters exchanged referred to above.
25. In respect of annual leave, there was evidence (contained in text messages) that the claimant did not ask for permission to take and informed the respondent when she was absent (page 104). The Tribunal accepts the claimant may have ‘reminded’ Mr Whitehead when she would be absent, but finds that the claimant did not follow the respondent’s holiday booking system which operated for its staff and that she controlled her own leave, as well as her working days and hours.
26. In August 2018 the claimant was asked to work at a different site(s) of the respondent and to take on a wider business development role. Mr Whitehead sent an email to the claimant on 18/8/2018, as it appeared there had been a misunderstanding (page 115). The offer included the claimant managing her own time and schedule, an increase in the rate of pay to £77,000 with a £3,000 car allowance. The email suggested the claimant take her own tax

⁴ It is noted that one-twelfth of £70,000 is £5,833 so it is not clear what daily rate the claimant was claiming. She said she did not work regular days or hours. The claimant also said in evidence that she was on-call 24 hours per day, seven-days per week, including holidays.

advice as to how to structure the £80,000. The claimant was also told she could 'keep' the 10 staff she had brought with her.

27. Ms Hamblin submits that there was no change in the claimant's status when her role at the respondent changed.
28. The claimant was claiming large sums of money each month⁵ by way of 'expenses'. She says, she repeatedly had to purchase items for the home and residents out of her own funds. The claimant says that she submitted all of the receipts as requested.
29. Mr Whitehead says the expenses were submitted without receipts. He believed that the claimant was falsely claiming expenses each month and that the accounts team had paid them in error believing they could do so without evidence from the claimant.
30. Mr Whitehead asked the accounts team to look into this on 24/10/2018 and said he was not sure the receipts were genuine. He also said he would like to get the September 2018 invoice paid if the receipts are genuine and relate to the invoice (page 129). This demonstrates he was willing to pay the sums claimed if they were properly incurred.
31. As a result of the expenses issue, the claimant's engagement was terminated on 3/10/2018. After engaging in the early conciliation process, this claim resulted. It is not clear what the sums the claimant was seeking, but no doubt, if necessary, they could be particularised.
32. The relevant legislation is s. 230 of the Employment Rights Act 1996, which provides the definition of employee and worker as follows:
 - (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 the contract

⁵ According to the respondent's particulars, the sum was £6,206.11 in total.

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.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly.

33. As the relevant section is s.230(3)(b), the test in the authorities is often referred to as a 'limb (b) worker' test.

34. The respondent accepts the claimant was engaged under a contract in terms of the letter of engagement sent out. It accepts the claimant provided personal service and does not rely upon any substitution argument. The respondent says the crucial question is whether or not the respondent was a client or customer of the claimant – as such, was she in business on her own account?

35. The claimant said the reason why she wished to retain her self-employed status was due to her running a social enterprise under her company name. The respondent says it is immaterial whether or not she did so, but the fact remains that the claimant did set out her position and that she had the freedom on intention to do so.

36. There was an imbalance of bargaining power here and it was the claimant who was dictating the terms to the respondent. She set out what she wanted and what she was prepared to accept.

37. Basis upon this factual matrix, the claimant was not a limb (b) worker. The claimant set out her stall at the outset of the engagement and she was clear that she wished to be operate on a self-employed basis. She negotiated a contribution to her pension, which she invoiced the respondent, along with her management services. The claimant was not PAYE and was not enrolled into the respondent's auto-enrolment pension scheme. The claimant was autonomous and organised her own working days and times; in addition, she took holidays when (within reason) she wished. She was in business on her own account. The claimant was offered employee status at the outset;

however, she wishes to and chose to remain and operate on a self-employed basis.

38. The Tribunal finds the claimant was self-employed and was not a worker or employee of the respondent.

Employment Judge Wright

Date: 14/11/2019