EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Dr K Giannopoulos	**v**	NC Healthcare Limited

Heard at: By video conference (CVP) **On:** 14 July 2020

Before: Employment Judge Hawksworth

Appearances
For the Claimant: In person
For the Respondent: Mr M Ali (director)

JUDGMENT

1. The claimant was not an employee of the respondent. He cannot bring complaints of less favourable treatment of a fixed term employee or breach of contract in respect of notice, because those complaints can only be brought by employees.

2. The claimant was not a worker of the respondent. He cannot bring complaints of unauthorised deduction from wages because those complaints can only be brought by workers.

3. The claimant's claim is dismissed.

REASONS

Claim, hearing and evidence

1. The claimant is a doctor. The respondent is a medical recruitment agency. The claimant was assigned by the respondent to work as a locum doctor at Weston General Hospital and at South Tyneside Hospital for periods during 2019.

2. The claimant presented a claim on 5 July 2019 after Acas early conciliation from 17 June 2019 to 5 July 2019.

3. The claimant brought complaints of less favourable treatment of a fixed term employee in respect of on-call working requirements, breach of contract in respect of notice, and complaints of unauthorised deduction

from wages in respect of arrears of pay for periods when he was available for work but turned away, and other periods which were said by the respondent to be break periods but during which the claimant says he was on call or working.

4. The respondent presented an ET3 and defends the claim.

5. The hearing before me on 14 July 2020 took place by video conference (CVP). I had an electronic copy of a bundle of documents which had 90 pages and which was prepared by the respondent. It contained witness statements of the claimant and of Mr Ali, a director of the respondent. I heard evidence from Dr Giannopoulos and from Mr Ali and both had the opportunity to make closing comments.

6. I gave judgment at the end of the hearing; written reasons were requested.

The issue for decision by me

7. The hearing on 14 July 2020 was listed as a public hearing to decide a preliminary issue regarding the claimant's case. I did not have a copy of the notice of hearing and it was not in the bundle. I adjourned the hearing to check this; during the adjournment Mr Ali located the notice of hearing which was sent to both parties on 30 November 2019 and which confirmed that the hearing is to consider the claimant's employment status, that is whether he was an employee or worker of the respondent.

8. The claimant says he was an employee of the respondent. The respondent says that he was an independent contractor (self-employed). There is a third possibility: that the claimant was a worker under the Employment Rights Act 1996. Workers have some but not all of the employment rights of employees.

Findings of facts

9. I made the following findings of fact about the relationship between the claimant and the respondent, and about what happened. References to page numbers are to the hearing bundle.

10. The claimant is a doctor. He carried out two assignments as a locum doctor for the respondent, a medical recruitment agency.

11. The respondent had a document called Engagement Terms and Conditions (page 31). The person being offered an assignment was referred to as the Contractor. The document said:

> *"2. The Contractor will provide any services under this Contract as an independent Contractor of NC Healthcare who is on assignment to the Client. For the avoidance of doubt, this Contract constitutes a contract for services and is not a contract of employment…*

> *3. It is a fundamental condition of this Contract that the Contractor understands and agrees that neither this Contract nor any term of this Contract nor any work or assignment carried out under or by virtue of it shall give rise to or is intended to give rise to any contract of employment or contract of service, whether express, implied or otherwise, between the Contractor and NC Healthcare or with any Client, whether in respect of any particular or general assignment and regardless of the duration of any assignment or assignments or otherwise. For the avoidance of doubt, this Contract therefore constitutes a contract for services and is not a contract of employment in anyway. All Contractors supplied by NC Healthcare to Clients are engaged on assignment as "independent contractors" under "contracts for services". They are therefore not the employees of NC Healthcare Ltd and are deemed to be under the supervision, direction and control of the Client from the time they report to take up duties and for the duration of the Assignment.*
>
> *4. …The Contractor shall be under no obligation to accept any assignment offered to him/her, although if the confirmation of assignment is accepted, the Contractor will then be duty bound to deliver those services in accordance with the terms of this contract.*
>
> *…*
>
> *15. The Contractor is under no obligation to accept any offer of work but if he/she does so … he/she undertakes to [the Respondent] that he/she is qualified and competent to undertake that work…*
>
> *16. The nature of temporary work is such that there may be periods between assignments when no work is available. No contractual relationship of any nature shall subsist between the parties during any such period."*

12. The terms and conditions did not contain a clause permitting a doctor to send another doctor to an assignment in their place; it was personal to them. (That is understandable given the nature of the work being carried out and the need for the respondent and the hospital to have verified that the person accepting the assignment is properly qualified.)

13. A document called a Confirmation of Assignment was sent to the Claimant at the start of both of the assignments he accepted (pages 26 and 28). Those documents were in the same terms. They started by saying:

> *"Thank you for accepting this assignment with NC Healthcare, please note that you have accepted this placement in line with our terms and conditions and your verbal acceptance is confirmation of agreement to NC Healthcare's Terms and Conditions."*

14. The Confirmation of Assignment documents included a summary of the Respondent's Terms and Conditions. This included a statement that:

> *"The Contractor's services are supplied to NC Healthcare for this assignment as an independent contractor and not as an employee."*

15. Both the terms and conditions and the confirmation of assignment documents included a requirement on the part of the doctor to give notice if cancelling an assignment after accepting it (although there was no requirement on the part of the respondent or the hospital to give notice to cancel an assignment).

16. The claimant had an arrangement with the respondent that he would be paid via an umbrella company called Alpha Republic. Alpha Republic was selected by the claimant from a list of suppliers given to him by the respondent but the company was not connected with the respondent. The claimant signed a contract with Alpha Republic which was expressed to be an employment contract between the claimant and Alpha Republic (pages 10 to 23). Alpha Republic invoiced the respondent for the work done by the claimant (page 24) and the claimant received his pay from Alpha Republic, not direct from the respondent.

17. The first assignment the claimant undertook for the respondent was at Weston General Hospital and this started on 4 March 2019. It was to be a 6 month assignment but the role was not what the claimant had expected and he gave notice after 3 days. The hospital did not require him to work his notice.

18. The claimant accepted another assignment for the respondent at South Tyneside General Hospital. The Confirmation of Assignment gave the start date as 18 April 2019, while the Doctors Assessment Form gave the start date as 4 April 2019 (page 60). Nothing turns on the difference of date.

19. While working at a hospital during an assignment, the claimant was under the control of the hospital. The hospital gave him a rota and told him where he would be working. His work was supervised by a clinical supervisor. He was not under the control of the respondent. The respondent assigned the claimant to a role, and he then undertook the role under the direction and control of the hospital.

20. The claimant's second assignment was terminated by the hospital on 25 April 2019.

21. When the claimant first registered with the respondent he was sent a copy of the Engagement Terms and Conditions but he did not sign and return it to the respondent. He received and relied on the two Confirmation of Assignment documents. These indicated that acceptance of the assignments was subject to the respondent's terms and conditions. They also said that the contractor was working as an independent contractor not

an employee. I find that the documents reflected the agreement between the parties.

22. In addition to the assignments he accepted from the respondent, the claimant worked as a locum doctor for other medical recruitment agencies and directly for hospitals.

The Law

23. The relevant statutory definitions of an employee are set out in section 230 of the Employment Rights Act. Under sub-section (1) an employee is:

> *"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".*

24. Section 230(2) defines a contract of employment as:

> *"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".*

25. A starting point when considering contracts of employment and employment status is Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, which held that three conditions must be met for a contract of employment to exist:

    (i) the employee agrees, in consideration for a wage or other remuneration, to provide their own work and skill in the performance of some service for the employer;
    (ii) the employee agrees, expressly or impliedly, to be subject, in the way they perform that service, to a sufficient degree of control by the employer for the relationship to be one of employer and employee; and
    (iii) the other provisions of the contract are consistent with it being a contract of employment.

26. In Autoclenz v Belcher [2011] IRLR 823, the Supreme Court emphasised the importance of considering the 'true agreement between the parties', which might mean looking beyond what is set out in a written contract: '*the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.'*

27. The 'irreducible minimum' constituents of a contract of employment were summarised by Langstaff J in Dakin v Brighton Marina Residential Management Company Ltd EAT 0380/12 as follows:

> *"First there must be a contract between the employee and the employer. Secondly, that contract must contain mutual obligations which are related to work... Thirdly, the employee must be subject to the control of the employer at least insofar as there is room for such control… Fourthly, the employee must be obliged to perform*

> *his work personally for the employer… Finally and fifthly, the contract must not contain terms which are inconsistent with it being a contract of employment."*

28. A range of other factors may be relevant to the question of whether there is an employee/employer relationship, but the courts have cautioned against a 'checklist approach'. What is required is consideration of all the factors that are relevant, and an evaluation of the whole.

29. If I find that the claimant was not an employee, I then have to consider whether he was a worker. Workers do not have all the employment rights that employees do, but they have some basic employment protections which do not apply to those who are self-employed. This includes the right not to have unauthorised deductions made from pay.

30. A worker is defined under section 230(3) of the Employment Rights Act as:

> *"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 that of a client or customer of any profession or business undertaking carried on by the individual".*

31. This definition includes employees (sub-section 230(3)(a)). Someone who is not an employee but who is a worker because they fall within the wider definition in sub-section 230(3)(b) is sometimes referred to as a "limb (b) worker."

32. In Bates van Winkelhof v Clyde & Co LLP 2014 ICR 730, SC Lady Hale said that when considering whether someone is a limb (b) worker, *'there can be no substitute for applying the words of the statute to the facts of the individual case'*. Sub-section (b) provides that the following factors are necessary for an individual to fall within the definition of 'worker':

    a) there must be a contract, whether express or implied, and, if express, whether written or oral;

    b) that contract must provide for the individual to carry out personal services; and

    c) those services must be for another party to the contract who must not be a client or customer of the individual's profession or business undertaking.

33. In Bates van Winkelhof, Lady Hale drew a distinction between self-employed people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them (who are neither workers nor employees), and self-employed people who provide their services as part of a profession or business undertaking carried on by someone else (who are limb (b) workers).

Conclusions

34. Complaints of less favourable treatment of a fixed term employee and breach of contract in respect of notice can only be brought by employees. The claimant cannot bring these complaints against the respondent if he was a worker or an independent contractor of the respondent.

35. Complaints of unauthorised deduction from wages can only be brought by employees and workers. The claimant cannot bring this claim if he was an independent contractor of the respondent.

36. I emphasise that the claimant's claim is against the respondent: when considering the claimant's employment status, I am considering whether he was an employee or worker of the respondent. I do not have to consider whether he was an employee of the hospitals he worked at during assignments, or of the umbrella company Alpha Republic. Also, it is not the case, as the claimant suggested, that he must be an employee of someone. He might not be an employee at all; he might be a worker or an independent contractor.

37. In considering whether the claimant was an employee of the respondent, I have focused on the 'irreducible minimum' constituents for an employment relationship. I have considered both the terms of the contract between the claimant and the respondent, and the features of the working relationship.

38. First, there was a contract between the claimant and the respondent. It described the claimant's status as that of an independent contractor. There were also Confirmation of Assignment documents sent to the claimant at the start of both of the assignments he accepted: these also said that the claimant's services were provided as an independent contractor.

39. As to mutuality of obligation, the claimant was not under any obligation to accept work and the respondent was not under any obligation to provide the claimant with work. There was no mutual obligation between the parties when the claimant was not carrying out an assignment. After he accepted an assignment, the claimant was under a duty to deliver his services in accordance with the terms and conditions. Those terms and conditions included obligations during an assignment, for example there was a requirement on the part of the doctor to give notice (although there was no requirement on the part of the respondent or the hospital to give notice to cancel an assignment).

40. Once he had accepted an assignment, the claimant was obliged to perform the work for the respondent personally. He could not send a substitute.

41. I have next considered the extent to which the claimant was subject to the control of the respondent. I consider this to be an important factor. Once the claimant had accepted an assignment, the respondent did not tell the claimant how to do his work. It was the hospital who directed what work the claimant was to do, and which had supervisory and clinical oversight of the claimant's work. The claimant was assigned to a role by the respondent, but after that the respondent had no control over the way he performed the role.

42. I have to consider, taking those factors into account, whether the claimant was an employee of the respondent either under an overarching contract (that is, including time when the claimant was not on an assignment for the respondent) or during the time he was working on assignments.

43. I have concluded that there was no overarching contract between the claimant and the respondent when he was not performing an assignment. This is because there was no mutuality of obligation during that time. The terms on which the claimant was working provided that there was no obligation between the claimant and the respondent during periods when the claimant was not working on an assignment, and I have found that this was a genuine reflection of the position. The respondent was not obliged to provide work. The claimant was not required to accept assignments, and he could and did work for others during these periods.

44. I have also concluded that the claimant was not an employee of the respondent during assignments. This is because the level of management and control to which the claimant was subject by the respondent was not consistent with the claimant being an employee of the respondent. It was the hospital who directed what work the claimant was to do, and which had supervisory and clinical oversight of the claimant's work. Alpha Republic paid the claimant. The respondent did not have the required degree of control over the claimant's work such that the claimant was an employee of the respondent.

45. I have concluded that the claimant was not an employee of the respondent.

46. I have gone on to consider whether the claimant was a worker within the meaning of section 230(3) of the Employment Rights Act by considering the factors necessary for an individual to fall within the legal definition of worker.

47. First, there was an express written contract between the claimant and the respondent. Also, the claimant had to carry out work for the respondent personally, he could not send someone in his place.

48. The key question is whether the services which the claimant provided to the respondent were provided:

    a) in the context of the claimant's profession or a business undertaking on his own account, as part of which he entered into a contract with the respondent as a client or customer of his, to provide work or services for the respondent; or
    b) as part of a profession or business undertaking carried on by the respondent.

49. I have taken into account the terms of the contractual documents and assignment documents which were clear that the claimant's status was that of an independent contractor. I have found that those documents genuinely reflected the working arrangements between the parties. I have also taken into account the facts that the claimant provided services to the respondent and also to other agencies and hospitals, and that the umbrella company he used invoiced the respondent for his services.

50. I conclude that the claimant provided his services to the respondent as part of his own profession such that the respondent was the client or customer of the claimant. He was not providing his services to the hospitals as part of the respondent's business. The fact that the respondent made a fee from the work the claimant did while on assignments does not in itself make him an employee or worker of the respondent.

51. I conclude that the third element of the statutory test is not met and that the claimant was not a worker for the respondent within the meaning of section 230(3)(b) of the Employment Rights Act. He was not a 'limb (b) worker'.

52. In conclusion, I have decided that the claimant's relationship with the respondent does not meet the statutory tests for him to be either an employee or a worker of the respondent.

53. For the reasons set out above, I have not made a decision as to whether the claimant was an employee, worker or independent contractor of any other organisation.

54. In light of my conclusion that the claimant was not an employee of the respondent, he does not have the right to bring complaints of less favourable treatment of a fixed term employee and breach of contract in respect of notice against the respondent. These two complaints are dismissed.

55. In light of my conclusion that the claimant was not a worker, he does not have the right to make complaints of unauthorised deduction from wages against the respondent. Those complaints are also dismissed.

56. I have not made any decision as to whether the claimant is owed any money by the respondent under the terms of the contract between them. That is not a matter that can be determined by the employment tribunal, as the claimant was not an employee or a worker of the respondent.

Employment Judge Hawksworth

Date: 17 July 2020

Judgment and Reasons

Sent to the parties on:

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For the Tribunal Office

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