EMPLOYMENT TRIBUNALS

Claimants: Mr T Pugh

Mrs C Marks

Respondent: Cygnet Health Care Limited

RESERVED JUDGMENT ON A PRELIMINARY HEARING

Held At: Birmingham by CVP **On:** 20 November 2020
1 December 2020 (in Chambers)

Before: Employment Judge Connolly (sitting alone)

Appearances

Claimant: Mr Pugh, In person for both claimants
Respondent: Mr T Sheppard (Counsel)

JUDGMENT

1. The claimants were not employees of the respondent.

2. The claimants' claims are therefore dismissed in their entirety.

REASONS

INTRODUCTION

1. By a Claim Form presented on 10 June 2019 (after a period of early conciliation from 15 April 2019 to 29 May 2019), the claimants each brought a claim of unfair dismissal and a claim that the respondent failed to provide them with a written statement of the reasons for their dismissal. Both claims depend upon the claimants being employees of the respondent at the relevant times. By a response dated 16 September 2019, the respondents denied that the claimants were employees within the meaning of the Employment Rights Act 1996 (the 'ERA 1996').

2. In the circumstances, the claim was listed for the determination of a single preliminary issue, namely, whether the claimants were each an employee of the respondent within the meaning of the ERA 1996 at the effective date of termination of their working relationship (and for the requisite period prior to that).

EVIDENCE

3. I heard evidence from Mr Pugh on his own behalf and on behalf of Mrs Marks as their situations were agreed to be indistinguishable for these purposes. On behalf of the respondent, I heard from Ms Watters and Ms Byrne who were, respectively, a Senior HR Business Partner and the Regional Mental Health Act Lead for the West Midlands at relevant time. The respondent did not call another potential witness, Mr Kamba, to give evidence and I, therefore, disregarded his written statement. I was referred to an agreed bundle of documents of 271 pages. Mr Pugh incorporated written submissions into his witness statement and Mr Sheppard produced a short Skeleton argument.

RELEVANT LAW

4. Section 230(1) of the ERA 1996 defines an 'employee' as:
"*an individual who has entered into or works under a contract of employment*".

5. Section 230(2) of the same Act provides that a 'contract of employment' is "*a contract of service…,whether express or implied, and (if it is express) whether oral or in writing*".

6. An employee working under a contract of employment is to be distinguished from a 'worker' working under a contract whereby an "*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 client or customer of any profession or business undertaking carried on by the individual" (s.230(3)).

7. This is a case where it is agreed that there was a written contract between each of the claimants and the respondent. In order to determine whether the claimants are employees working under a contract of service, I first need to identify the terms of that contract and then characterise or assess the nature of the contract.

8. The starting point must be the written terms while taking care to take into account the relative bargaining power of the parties at the time the contract was entered into and to be astute to ensure that the written terms accurately represent the true agreement, not only at the inception of the contract but at any later stage where evidence shows that the agreement has been expressly or impliedly varied (**Autoclenz Ltd v Belcher and ors 2011 [2011] ICR 1157, SC; Uber BV and ors v Aslam and ors [2019] ICR 845, CA)**. The true agreement *may* have to be gleaned from all the circumstances of the case of which the written agreement is only a part.

9. In terms of characterising the contract, I have been referred to the classic statement in **Ready Mixed Concrete (South East) Ltd v Ministry of Pensions and National Insurance [1968] 1 All ER 433, QBD**:
"*A contract of service exists if the following 3 conditions are fulfilled:*
(i) the servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master.
(ii) he agrees expressly or impliedly that in the performance of that service he will be subject to the other's control in sufficient degree to make that other master.
(iii) the other provisions of the contract are consistent with its being a contract of service"

10. As the caselaw has developed it is, however, clear, that the question of whether an individual is an employee requires a multi-factorial approach. As set out in **O'Kelly & ors v Trusthouse Forte plc [1983] ICR 728, CA** (in the particular context of considering whether an individual was an employee or a worker, in the alternative) a tribunal must
"*consider all aspects of the relationship, no single factor being in itself decisive and each of which may vary in weight and direction and, having given such balance to the factors as seems appropriate, to determine whether the person was carrying on business on his own account".*

11. Relevant factors include:

    11.1 whether the contract is to do the work personally

11.2 hether there is mutuality of obligation sufficient to create a contract at all and/or a contract of employment specifically
11.3 whether there is sufficient control by the putative employer
11.4 the degree of organisational integration of the individual
11.5 the economic reality i.e. who takes the ultimate risk of loss or profit and whether the individual can be said to be in business on their own account
11.6 any other factors which appear consistent or inconsistent with the contract being one of employment.

12. The first three factors above benefit from a little more elucidation. In relation to 'personal service', a limited or occasional power to substitute someone else to undertake the work will not necessarily prevent the contract being one of personal service. In **Ready Mixed (supra),** Mr Justice MacKenna observed that
'*Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, although a limited or occasional power of delegation may not be.'*

13. This was reinforced in **MacFarlane and anor v Glasgow City Council 2001 IRLR 7, EAT** where the fact that a gymnastic instructor could arrange her own replacement from the Council's list of approved instructors when she was unable to take a session and the replacement (rather than the claimant) was paid directly by the Council did not prevent there being an employment relationship.

14. Mutuality of obligation is usually concerned with the obligation on an employer to provide work and pay for it and a corresponding obligation on the employee to accept and perform the work. It does not, however, mean that, to be considered an employee, an individual must accept work on every occasion it is offered.

15. The concept of control requires that ultimate authority over the purported employee in the performance of his/her work rests with the employer. The question is not necessarily whether a respondent employer exercises day-to-day control over a claimant's work but whether it had a contractual right of control over content and/or manner of working to a sufficient degree (**Troutbeck SA v White & Todd [2013] EWCA Civ 1171**). Indeed, in roles requiring particular skill or expertise, there may well be very little day to day supervision of the work. Control includes, for example, whether the individual is under a duty to obey orders, has control of his/her hours or work etc.

16. Neither party referred me to **Commissioners for Her Majesty's Revenue and Customs v Professional Game Match Officials Ltd 2020 UKUT 147 (TCC)** but I have considered it because it provided a useful analysis of the

cases and statement of the principles to which the parties did refer me and as set out above.

17. The object of the exercise I undertake is to paint a picture and make an assessment of the relationship based on the accumulation of detail.

RELEVANT FACTS

The Parties

18. It is right to say that the majority of the facts were agreed or undisputed. The real issue in this case was how to assess or weigh those facts when considering the question of the claimants' employment status.

19. The respondent is part of a group of companies which act as independent providers of a wide range of services for individuals with mental health needs and learning disabilities. The group own and operate 55 inpatient psychiatric units in which patients are cared for, including a proportion who have been detained under the Mental Health Act 1983 (the 'MHA'). The group often works in partnership with the NHS.

20. Section 23 of the MHA 1983 contains the power to review and discharge detained patients and those subject to a Community Treatment order. It requires that the power is exercised by what might be termed a 'panel' of three individuals who are not employees of the relevant NHS Trust / Board / Health Authority etc in whose hospital the patient is detained. No formal qualifications are required to undertake this role and, in that sense, those who sit on such panels are 'laypersons'.

21. The claimants were engaged by the respondent to sit on such review panels at various units / hospitals in the West Midlands, Staffordshire and Wales. The claimants were known as 'Independent Hospital Managers' ('IHM') for this purpose. The respondent had a 'pool' of IHM's in each region from which they would draw panel members although, like the claimants, some worked across more than one region.

The Written Contract

22. Mrs Marks began working for a predecessor to the respondent in May/July 2005 and Mr Pugh on 9 December 2011. Their contracts were terminated with notice and the termination took effect on 22 February 2019.

23. Taking Mr Pugh's situation first: he applied and was interviewed for the role in Autumn 2011. By letter dated 25 October 2011 he was informed his

application had been successful. He was provided with and signed an agreement drafted by the respondent's predecessor.

24. The agreement was headed 'Agreement for Appointment of a Hospital Manager'. It was expressed to continue for 3 years. Approximately 3 years later, in December 2014, Mr Pugh signed a further 3 year agreement. Finally, on 5 July 2018, he signed the agreement which ostensibly governed the relationship at the time the contract was terminated.

25. There is no written contractual material available in respect of Mrs Marks until 2014 when she signed an agreement in the same terms as Mr Pugh had signed and, again, on 5 July 2018 when she signed an agreement in the same terms as Mr Pugh.

26. Each successive agreement was almost identical in terms to the previous. The most relevant provisions of the 2018 Agreement are as follows:

    26.1 each claimant is engaged to act in a "non-executive and voluntary capacity";
    26.2 each is engaged to "exercise the Company's powers as set out in s.23 of the MHA 1983 and the Code of Practice to that Act";
    26.3 the contract is for a fixed term of 3 years terminable by either party giving not less than 1 month's notice;
    26.4 each is "retained on a non-exclusive when needed basis …at such times as the Company and Hospital Manager shall agree from time to time provided that the Hospital Manager agrees to be available to act on at least 2 days per month as notified by the Company";
    26.5 each will be paid "an honorarium of £100 per hearing…The amount and basis of calculation of such honorarium may be varied from time to time by the Company on notice";
    26.6 reasonable travelling and other expenses will be reimbursed by the respondent company;
    26.7 the respondent company will indemnify each claimant in respect of personal civil liability, claims or costs arising out of the exercise of their functions subject to some conditions;
    26.8 the contract can be terminated by the respondent without notice in certain situations including a breach of the terms of the agreement by the claimant, gross misconduct and a failure or refusal after a written warning to provide the services reasonably required of them under the Agreement or a failure to comply with policies or guidance issued in relation to the role;
    26.9 It is declared that it is the intention of the parties that each claimant has the status of an independent contractor and that nothing in the agreement shall render the claimant an employee or worker of the respondent and they shall not hold themselves out as such.

26.10 Neither claimant is entitled to a pension, bonus or other benefits from the respondent and it is agreed that each shall be responsible for any income tax liabilities and national insurance or similar contributions in respect of the honorarium paid.

27. In July 2018, the respondent also provided the claimants with a 'Discharge of Powers Procedure' p66 ('The Procedure'). It set out the various situations in which a IHM may have to consider discharging a patient. It summarised, by way of a flowchart, how a hearing would be convened, what information would be provided to the IHM panel and what facilities would be provided to them. It also referred the IHM to a standard form to guide them through the hearing, the relevant sections of the MHA 1983, the issues which would arise under those sections and a space in which the panel should record their decision and reasons (p260-265).

28. The Procedure acknowledged that the IHM had some discretion in the conduct of a hearing, that they must exercise the powers under the MHA and have regard to the MHA Code of Practice. It emphasised the importance of the public function which IHMs carried out. It also reiterated that the IHMs had committed in their terms of appointment to a minimum of 2 days a month to participate in reviews (hearings) and undertake any necessary updating training. It provided for a self-assessment appraisal to be undertaken by the IHM annually. The self-assessment document was listed in the procedure (p326). It contained a list of competencies and the IHM's view as to their proficiency in respect of each and whether they perceived they needed any training. The Procedure also made provision for a face-to-face appraisal with the respondent every 3 years when the IHM contracts were due to expire. This appraisal was to be based on feedback from IHM colleagues and other professionals with whom the IHMs engaged.

29. The Procedure noted in a 'Conflict of Interest 'section that, in keeping with the definition of the IHM role (presumably under the MHA), those appointed must not be on the staff of the hospital. It was agreed between the parties that, were the claimants employed by the respondent they would not, strictly, breach the letter of this provision because the respondent is not the body within the group who employs the staff at the hospitals.

30. Finally, the Procedure referred the reader to the standard terms of appointment for IHMs, as set out above.

<u>The Offer and Acceptance of Work</u>

31. The MHA administrator at each of the hospitals / units was responsible for arranging the MHA detention review hearing dates. Ms Byrne carried out this administration for a hospital known as Heathers in West Bromwich. She would contact each of the IHM's in the pool for her region in turn by email

and ask them if they were available for a particular scheduled hearing. If they were able and willing, they would be 'booked' for that hearing.

32. The claimants would reply from their personal email address. They were free to accept or reject such offers of work subject to one qualification: they had to provide a minimum of 2 days per month to the respondent for either training or hearings (see §3.1 of the terms of the agreement and §3.15 of the Procedure).

33. Each of the claimants also sat on review hearings for other mental health providers: Mr Pugh, for another three; Mrs Marks for at least another four.

34. In the year January 2018 to January 2019, Mr Pugh attended approximately 75 review hearings at the respondent's request. He accepted that he was not available for particular bookings on approximately 16 occasions. His evidence was that, on approximately half a dozen occasions, he chose to decline a booking for personal reasons (see, by way of example, p123 where he says he has other plans and the notice given of the hearing is too short to change them; p126 he declines because he has a holiday booked). On the others, he contended that he was already booked at another of the respondent's / the group's hospitals.

35. It was similar picture for Mrs Marks. She attended approximately 58 hearings at the respondent's request. She accepted she declined about 18 bookings / requests in that year, 4 of which were because she was on holiday and 4 for personal reasons. In respect of the others, she maintained she was working at other of the respondent's / group's hospitals. There is an example in the bundle (p139) where Mrs Marks was booked for a hearing but informed the respondent she was no longer available and the respondent arranged for another IHM to attend.

36. Ms Byrne gave evidence supplemental to her witness statement, that she recalled at least one occasion a few years previously when Mr Pugh had been booked to attend but Mrs Marks in fact attended because Mr Pugh was unavailable. She felt there were more occasions when this had occurred but could not specifically identify them. Mr Pugh could not recall such an instance. At one point in her evidence, Ms Byrne stated other IHMs would do this i.e. send someone else from the 'pool' in the event they were not available. On closer questioning, she clarified that this might occur in an emergency situation. What was more common was that an IHM who was not available would inform her of their non-availability and, at the same time, set out enquiries they had made and who was available in their stead. She would then confirm with the alternative IHM.

<u>Carrying out the work</u>

37. The hearings took place at the relevant hospital where the IHMs were provided with a room / rooms in which to conduct them. The location was an inevitable product of fact that the hearings concerned a detained patient and could only take place in the premises where the patient was detained.

38. Mr Pugh accepted that, at the outset of the review hearing, the Chairperson of the panel would confirm that the panel were independent of the company, clinicians and staff who were treating and caring for the patient. He also accepted that the purpose of this statement was to inform and reassure the patient that they were independent in accordance with the provisions of s.23 of the MHA 1983.

39. The hearings were carried out in accordance with the Procedure set out above. Ultimately, it was for the IHM to use their skills and experience to form a view on the need for the patient's continued detention and for the Chairperson to inform the patient of the panel decision and the reasons for it and to record that decision and reasons in writing.

Pay / Benefits / Policies / Tax

40. The respondent prepared an invoice for the claimants (and all IHMs) to submit for payment in respect of each hearing and any associated expenses. Each of the claimants was responsible for their own tax and NI payments.

41. As set out in the terms of appointment, the IHM did not receive any occupational benefits such as sick pay or pension. I find that the claimants, as IHMs were not subject to the respondent's disciplinary, grievance or appraisal procedures which applied to considered to be employees.

CONCLUSIONS

42. The claimants submitted that they were employees of the respondent; the respondent submitted that they were self-employed independent contractors. There is, of course, scope for the claimants to fall outwith the definition of employee but inside the definition of a 'worker' under the ERA. I did not, however, hear argument on this point because the claimant's claims were dependent on them establishing employee status.

43. Both the claimants and the respondent based their cases on what might be termed the 'global' contract between the parties. No case was advanced that each individual hearing was carried out under a contract of employment for that hearing. In assessing the nature / type of working relationship between the claimants and the respondent, I accept that the contract entered into by the parties and set out above does accurately reflect the working relationships which were agreed between the parties. I do not

accept that the fact that contract also expressed the 'views' of the parties on the nature of their relationship (independent contractor) or the nature of the payment they received ('honorarium') is in any way binding. I am entitled to look behind those descriptors and examine the substance of the relationship as they have set it out.

44. I have examined all aspects of the relationship between the Claimant and Respondent. It is only for ease of reading that I set my findings out under headings below. There are also occasions when the facts / conclusions could fall to be considered under more than one heading.

Personal Service

45. I find that the claimants were each required to personally sit on the review panels once booked. If, as Mr Sheppard on behalf of the respondent urged, a right of substitution could be implied into the contract from the way in which the claimants and respondents conducted themselves while working together, I find that it was not such as to prevent the contract being one of employment. I rely on the fact that the occasions where substitution occurred without the express permission of the respondent were limited to 'emergency' type situations, the substitute had to be another IHMs in the respondent's pool of such individuals and that the IHM who attended rendered the invoice to and was paid directly by the respondent as distinct from being paid by the IHM for whom they substituted. In the circumstances, I am satisfied that such right of substitution as existed was of the limited or occasional type described in **Ready Mixed** and **Macfarlane** (above).

Mutuality of Obligations

46. This is perhaps the one significant area of dispute which could be considered to involve a dispute of fact: the claimants submitted that I should imply a term into the contract that the respondent was obliged to offer them an average of 8 hearings per month. They contended this was, in fact, what had happened in respect of Mr Pugh, at least, and that the term should be implied from this course of dealing.

47. I find that, as a matter of fact, in the year 2018-2019 Mr Pugh was offered an average of 7.5 day's work pcm and Mrs Marks was offered an average of 6. I do not have sufficient evidence to find what happened in respect of offers of work in each year prior to that for each claimant. I can see that, over the 7 years Mr Pugh worked from 2012 - 2018, he sat on between 72 and 104 hearings each year for the respondent.

48. I find that, on a proper construction of the written terms of the contract between the parties, each claimant was obliged to accept 2 day's work / training per month, if offered, but the respondent was not subject to a

correlative obligation to offer it. I note that, as Mr Pugh himself stated in box 9.2 of his Claim Form (p13), neither claimant considered that the respondent was under an obligation to offer them any work and, for that reason, Mr Pugh stated that reinstatement would not be an appropriate remedy. I therefore find that the contract contains an express and accurate statement of the intention of the parties and I do not find that express term has been impliedly varied by the mere fact one of the claimant's was, for a period of a year, in fact, offered an average of 7.5 hearings per month.

49. Furthermore, I note that, even when the claimants had accepted a 'booking', they retained the right to cancel it without seeking the permission of the respondent to be released (see §35 above and p139). The fact that the claimants retained the right to refuse to perform work after they had agreed to undertake it seems me to be inconsistent with the obligation they would owe were they employees.

Control and Freedoms

50. I find that a mixed picture emerges in respect of the control the respondent was entitled to exercise over the claimants. This is an area which overlaps with mutuality of obligation above. On the one hand, the respondent had control of the scheduling of the hearing, the number of days it offered to each claimant and it dictated the fee that was payable. It also had the right to require that the claimants provide 2 day's work / time in training per month.

51. On the other hand, each claimant had a great degree of freedom in respect of which and how many offers of hearings they accepted (subject to the 2 day minimum commitment), whether they preferred one location over another, how many holidays they took, when they took holidays etc. They were not required to notify the respondent when they intended to take holiday; they were not required to obtain permission and the respondent had no control over whether a number of its IHMs took holiday at the same time or for how long.

52. Each claimant had the freedom to and did work for other mental health providers and to accept their bookings in preference to the respondent's offers. Each claimant therefore took an economic risk that they would not receive what they considered to be sufficient offers of work from the respondent and would have to rely on offers from and their relationship with other providers.

53. I was not assisted in my assessment of the degree of control exercised or the nature of the contract by the fact a document was provided to the claimants by the respondent to work through / consider during the course of the hearing. The work of an IHM was work which required the exercise

of independent judgment and one would not expect to see much, if any, control as to how that judgment should be exercised. Insofar as the respondent provided a form for the IHM's to work through and complete, I find it was (a) more in the form of guidance and (b) a reflection of the fact that the public nature of the function of the IHM (which could be challenged in the courts) than an indicator of the nature of the relationship between the respondent and the IHMs.

Integration

54. I accept that the work undertaken by the IHM's was vital to the respondent organisation but I do not find that they were integrated into that organisation in order to undertake the work. Quite the opposite, as accepted by Mr Pugh and reflected in s.23 of the MHA 1983, they were held out as separate from and independent of those involved in a patient's care and detention. It was contained in their very title. The did not have an email address or telephone or telephone number provided by the respondent. The single feature which could possibly be said to involve some form of integration was the respondent's acceptance that it would indemnify the claimants in respect of civil liability claims arising from the exercise of their functions as IHMs. This was not, in my view, sufficient to displace my assessment that the claimants were independent of and separate from the respondent organisation. The fact that this was consistent with the position under the MHA was an unusual and striking feature of this particular case.

55. They were also separate from the respondent's usual processes and procedures for employees such as disciplinary, grievance and appraisal procedures. The respondent had rights to terminate the claimants' contracts for matters which may be considered disciplinary in nature but these were 'abbreviated' procedures(if they could be referred to as procedures at all) and it was not contended they were the same as those applicable to employees.

Other Factors

56. I attach some but very limited weight to the fact that the claimants did not have access to occupational benefits in determining the issue in this case. I find there is a real risk of circularity in asking whether, as a matter of fact, an individual is entitled to employee benefits in order to determine whether, as a matter of fact of fact / law, they are an employee such as they should be entitled to such benefits. I acknowledge, however, that if they had as a matter of fact been granted such benefits or their equivalent it might have been significant.

57. Similarly, I attach some but very limited weight to the label of independent contractor applied by the parties to the relationship and the fact that the

claimants' tax affairs reflect the view that they were self-employed. This is primarily a matter for judicial assessment of the substance of the relationship, not the opinion of the parties although in a closely balanced case, the true view and intention of the parties can be significant.

Overall Conclusion

58. Standing back and assessing the above as a whole, I have come to the conclusion that the claimants are not employees of the respondent. In summary, their working relationship with the respondent lacks the obligations on the respondent to provide work which one would expect of an employer; it lacks the obligation on the claimant to carry out the work once accepted which one would expect of an employee; there is limited control and no integration. The parties genuinely intended to enter into a relationship whereby they were at arm's length (as Mr Pugh put it) in a way that was consistent with the provisions of s.23 of the MHA 1983 and which meant that the claimants were not considered employees. I find that is, indeed, what they achieved.

Employment Judge Connolly
1 December 2020