# EMPLOYMENT TRIBUNALS

**Claimant:** **Miss Deborah Martin**
**Respondent:** **NHS Business Services Authority (NHBSA)**

## Record of an Open Preliminary Hearing (Hybrid)

**Heard at:** **Nottingham** **on Wednesday 21 July 2021**

**Before:** **Employment Judge P Britton (sitting alone) (by CVP)**

**Representation**
**Claimant:** **In person, assisted by Mr Tim Downes, Friend**
**Respondent:** **Miss A Rumble, Counsel (by CVP)**

***Covid-19 statement:***
***This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.***

# JUDGMENT

1. The claim of unfair dismissal is dismissed upon withdrawal.

2. The claim of disability discrimination is dismissed upon withdrawal.

3. The claim of discrimination by reason of religious or some other philosophical belief is dismissed upon withdrawal.

4. As to the remaining claim namely, detrimental treatment by reason of whistle blowing pursuant to Section 47A of the Employments Right Act 1996 the claim is dismissed the Claimant having not been either an employee or a worker of the Respondent.

5. The Respondent reserves its position as to costs and will notify the Tribunal one way or the other in due course in accordance with the rules of procedure.

# REASONS

## Introduction

1. The issue that I have to determine put simply is whether for the purposes of material events the Claimant was a worker of the Respondent. I say that for this reason. When the Claimant originally brought her claim (ET1) to the Tribunal it was a claim against this Respondent and three other Respondents. The identifiable claims were primarily for unfair dismissal; disability discrimination; discrimination by reason of religion or some other substantive belief; and a claim for detrimental treatment by way of whistleblowing. I can also read into that possibly a claim of unfair dismissal predicated on the same basis.

2. The Respondent's stance in its ET3 was very clear, namely that it really didn't know what the Claimant was talking about as it has had no employment relationship with her at all and was unaware of the issues before it received the ET1.

3. So, the matter came before my colleague Employment Judge Ahmed at a case management hearing on 15 April 2021. He observed that on the pleaded scenario including the ET3, it was difficult to see how the Claimant was an employee of any of the then Respondents she was citing against or on the face of it a worker. If he was correct, then her claims were destined to fail. Suffice to say that he therefore ordered that the claims should go before another Judge at an open preliminary hearing to deal with whether or not they should be struck out or in the alternative a deposit made.

4. At that first case management hearing the Claimant made plain that she wasn't wishing to proceed with the claims based upon disability discrimination. She then followed that up with what she said was a "seeking to amend" on 22 April 2021. What she had to say is in the bundle before me at bundle page (Bp) 107. What she now did, having withdrawn her claim against any Respondent other than NHBSA, was to abandon any argument that she was its employee. Thus, she cannot claim for unfair dismissal as a precursor is that she was an employee. Thus, what it was down to was a reliance on that she was a worker within "an agent/principle relationship". She asked the Tribunal to strike out the discrimination-based claims. This does not appear to have been referred to a Judge: hence why at this stage with her consent I dismiss those claims upon withdrawal and also the claim for unfair dismissal.

5. What was left, and she said she needed to amend, "was a claim based upon detrimental treatment by the first Respondent due to having made a public interest disclosure". Although the Respondent appeared to be objecting to that amendment before today, I am grateful for the sensible approach taken by Ms Rumble who makes clear the application if it was needed is not opposed. In fact there is no such need in that it is clear that there was such a claim from the very start.

6. Ms Rumble had put in for today a written skeleton submission that inter alia accurately summarises the law as to what is a worker she, also sought thereinto to address the issues which have fallen away doubtless because she did not realise they had been abandoned, but I don't need to go to those anymore.

**Findings on the remaining issue**

7. So, we start from the premise that the Claimant contends that she made a protected interest disclosure (PID) to this particular Respondent. For the purposes of this stage of my adjudication, albeit I have got no documentary evidence from the Claimant before me today that she did make any such public interest disclosure to this Respondent, I work on the premise that she did. But if I factor in the evidence of Paul Gray, a Senior Person within the first Respondent and who I found to be convincing witness of integrity, all he can say is he is not aware of any such disclosure: And there has been nothing put to him by the Claimant to show that they did. But I leave that on one side, because the crucial point becomes this as per Section 47B of the Employment Rights Act 1996 (ERA) which affords the protection to whistle blowers: -

> *"(1) A worker has the right not to be subjected to any detriment by any act or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure and*
>
> *(1A) A worker ("W") has the right not be subjected to any detriment by any act, or any deliberate failure to act, done-.*
> *…*
> *(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure".*

8. What it means is that the Claimant, who has abandoned that she was an employee of the Respondent, has to bring herself within the definition of worker to gain the protection of this provision and thus pursue her claim. As set out within the skeleton submission of Ms Rumple, engaged is Section 230(3 ) of the ERA: -

> "*In this Act "worker"…. means an individual who is 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 personally perform 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 provision or business undertaking carried out on by the individual".*

9. Cross referencing back to the whistle blowing provisions to which have referred, and it can be seen that the protection extends as per that definition to embrace

agency workers as per s43K:

> *"(1) " For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230( (3) but who-*
>
> *(a) works or worked in circumstances in which-*
>
> *(i) he is or was introduced or supplied to do that work by a third person, and*
>
> *(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them.*

10. That relates to the usual tripartite type arrangements one sees with agency workers: hence the protection. An example being that where a person is employed by an employment agency to work in the factory of an end user and in which that person discovers health and safety issues and raises the same, that person has the same protection against detrimental treatment by the end user i.e. the factory owner as he or she would have if it was done by the employer. What it means is that the fundamental for the residual claim, and which means that without it the Claimant does not get past go, is that she has to show me on a balance of probabilities that she was a worker of the Respondent. That then brings me into the core evidence as I find it to be having considered the bundle and heard evidence from the Claimant and thence Mr Gray. The facts are as follows.

11. The Claimant is a practicing dentist of some years standing. She is highly qualified including as a medical Doctor and with an MA. She has written papers particularly on her subject speciality which is the training of dental nurses. Her modus operandi for practising, like many dentists, is that she will provide her services on a freelance basis to dentists in practice; for my purposes who contract to provide services for the NHS (they are hereinafter referred to as the "provider"). And so as an example I have looked at a list of engagements that she has undertaken (Bp 353). That brings in the regulatory regime under which those dentists work for the NHS. In order to be given a contract to provide NHS dentistry to patients the provider needs to apply and be considered through the aegis of what is nowadays referred to as NHS England (NHSE). It in turn operates through regional commissioning bodies. If a dentist meets the necessary standards required, which of course would include a check with the GDC, then he is given a contract to provide NHS services in a given area. That dentist or registered dental practice is then in turn free to employ dentists as for example associates; or engage the services of freelancers, such as the Claimant, on a regular basis; or locums for such as holiday cover. They are referred to as "performers".

12. Once the provider has been given a contract, its details are put onto an IT system known as Compass which is operated by the Respondent. Usually the

dental practice will have its own software to link to Compass because it has to register each job of work done for a given patient cross referenced to such as their NHS number; account for whatever the dental treatment was; and deduct from the fees claimed any sum that the patient might have had to pay if for instance they are not eligible for free treatment because of non-entitlement to social security payments. benefits. Also in in the data provided to Compass will be details of the "performer" who undertook the dental work.

13. What then happens is that the information for the claim for payment having been submitted to Compass, it goes through scrutinization by the Respondent and for instance queries might be picked up and then raised with the relevant provider. Once the claim has been approved, a gross payment is made. The payment is drawn down from a fund allocated for that purpose by NHSE. No payments are made direct to the "performer". But there are deductions made for those who are registered for the purposes of a levy which goes to the local BDS which is there to support dentists when they need assistance. Second, if the performer is in the NHS pension scheme, which is voluntary, then the necessary deductions will be made and paid into the relevant NHS pension fund.

14. In times gone by the Respondent used to have an extensive regulatory function, a bit like OFSTED. And so it used to have back before 2006 sixty to seventy qualified dental inspectors who would go into practices on a random basis. But that was taken away from 2006 when the supervision of private dental premises went across to the CQC and the mainstream professional practice regulatory function went to the predecessor of NHSE. The Respondent is still called upon from time to time but only if there is an identified specific concern in which case, they will send one of only fifteen inspectors remaining post 2016.

15. This is very much like the role performed in the NHS by the Royal Colleges when upon request the relevant Royal College will send in a pair of consultants to scrutinise the practice of a doctor about whom there may be concerns. This is based upon my extensive experience as a Judge.

16.Thus in summary the Respondent performs a payroll function for NHSE and a limited regulatory function. This does not remotely establish anything like a worker relationship with the Claimant.

17. I accept from her evidence that she has raised genuine concerns about the standard of NHS dental providers i.e. those with a contract, and the poor quality and supervision provided But it doesn't follow that she can bring a claim for detrimental treatment, if it I occurred, to the Tribunal and because it has no jurisdiction unless she comes with in the definition of "worker". Otherwise her recourse is to raise those concerns elsewhere such as to the Secretary of State for Health.

18,. Also I have learnt more about her concerns arising from the handling of the Coronavirus pandemic and as to the payment regime now in place as a consequence. Put simply as I understand it in order to ease the problems of the providers and provide some sort of continuity and security for their own dental practitioners i.e. associates, it was decided by NHSE, as of course so many dental

practices had to stop working, that via the Respondent it would provide cushion payments whereby it would pay monthly one twelfth of the annual budget from the previous year as spent out to the relevant provider.

19. There was a second issue which was the Claimant's own status. She didn't want to become PAYE and she could see that in such a regime she might have to be. That is a summarisation of her underlying concern.

20. I come to what she needs to understand, and I still don't think she does. She seeks to argue that for the purposes of payment the Respondent was her agent. That of course is the common law concept of agent not the definition of agency within the ERA, and to which I have now referred. But was it in any event her agent at common law? Well the answer to that question in so far as I need to go there today, is no it wasn't. It was performing a payroll function for NHSE. Its duty of care as so owed was therefore to it to ensure that it scrutinised and made proper payment to the contract providers. It has no contract that I can see at all with a supplier of services such as this Claimant to the contractual provider. Any contractual relationship that the Claimant has thus must assuredly follow as being with whoever was the contract provider dentist for whom she worked at any given time. And arrangements for how she should be paid by that provider are not within the remit of the Respondent. It is a matter of negotiation for her and the provider.

21. That therefore brings me on to the following. The jurisprudence on what is a worker has now become extensive.[1] This Judge in his long judicial career has himself been involved in dealing with the worker or not issue on many occasions.

22. Suffice to say that fundamental are the following.

(i) Was the Claimant obliged to provide work for this Respondent? Turn it around another way, was it required to provide her with work? The answer to that question is self evidently no. It has nothing to do with the contractual arrangements by which dentists decide to work as performers for the dental providers under this contractual regime.

(ii) Did it require the Claimant to wear its uniform when working or use its equipment? No, if the Claimant wore a uniform or used equipment of course it would be usually that of the dentist provider.

(iii) Was the Claimant under the control in anyway consistent with a working relationship of the Respondent? The answer is no. It has no control over her at all. Remotely it might have been asked to come in as I say as a second limb if NHSE had any professional concerns about the Claimant, but that never happened. And crucially there was a concern about the Claimant and which I can see flagged up, and which has got nothing to do with this Respondent, at Bp 308. I note that the decision in relation to the Claimant, it seems with her own consent because she might be

[1] The latest is Uber BV & Ors v Aslam & Ors (2021) UK SC 5 ( 19 February 2021).

going to no longer practice, and which is dated 6 January 2021, was made by NHSE. And the Claimant decided she would not pursue NHSE on that issue because, as she told me, she decided she was satisfied that it wasn't her employer that she wasn't a worker of it, despite that it clearly was exercising a supervisory control as to her practice.

**Conclusion**

23. I repeat there is no such evidence when it comes to this Respondent. To turn it around another way, and I take it very short, there is no evidence before me other than that the Respondents simply performed a payroll function. It follows that I cannot find anything that remotely gets close to a worker relationship. Thus it follows that I have no jurisdiction to entertain this claim of detrimental treatment by way of reason of whistle blowing and because the Claimant was not a worker of the Respondent.

Employment Judge P Britton

Date: 12 August 2021

JUDGMENT SENT TO THE PARTIES ON

1 September 2021

FOR THE TRIBUNAL OFFICE