EMPLOYMENT TRIBUNALS

Claimant: Mrs D Cocker

Respondent: The Village Physio And Sports Injury Clinic Ltd

Heard at: Liverpool (by video hearing) **On:** 16-20 August 2021

Before: Employment Judge Buzzard

REPRESENTATION:

Claimant: Mr Searle (Counsel)

Respondent: Mr Taylor (Counsel)

JUDGMENT

The claimant's claims that of direct and indirect disability discrimination, and for a failure to provide itemised pay statements are dismissed on withdrawal.

The claimant is found to have been self-employed. Accordingly, the claimant's remaining claims are all dismissed as she lacks the employee or worker status needed to be eligible to make the claims.

REASONS

The Issues

1. The parties had prepared a list of issues in advance of the hearing. At the outset of the hearing the list of issues was discussed. As part of that discussion, and after taking instructions from the claimant, it was confirmed before evidence was heard that the following claims were withdrawn:

1.1. Direct Discrimination

1.2. Indirect Discrimination

1.3. Failure to provide itemised pay statements contrary to s.8 ERA.

These claims are accordingly dismissed on withdrawal.

2. The remaining claims pursued by the claimant were as follows:

2.1. Constructive unfair dismissal;

2.2. Discrimination arising from disability;

2.3. Harassment related to disability;

2.4. Victimisation;

2.5. A claim for Holiday pay under Working Time Regulations 1998 ('WTR'); and

2.6. A failure to pay notice pay, known as wrongful dismissal.

3. The employment status of the claimant was in dispute.

3.1. The respondents' position is that the claimant was a self-employed person. On this basis the respondent argued that none of the claimant's claims could succeed. The claimant did not dispute that if she was found to be self-employed her claims must all be dismissed.

3.2. The claimant asserts that she was an employee and thus her claims can be pursued. In the alternative the claimant argues that she had the status of worker, that would permit her to pursue her claims under the Equality Act 2010, namely discrimination, harassment and victimisation and in addition her claims relating to holiday pay and notice pay, albeit in the case of the latter it is unclear what notice entitlement there would be.

Law

4. **Employment, Worker or Self-Employed Status**

4.1. The claimant was found not to be eligible to pursue any of the claims she made, having been found to be self-employed and not to have been a worker or an employee. Accordingly, the only legal test applied in this case related to the claimant's employment status.

4.2. To pursue her claims the claimant needs to establish that she meets the eligibility requirements. In this case the only relevant eligibility requirement was the claimant's status. To pursue any of her claims the claimant must establish that she was either a worker or an employee. The burden to establish this falls on

the claimant. It does not fall on the respondent to show that the claimant is not eligible to pursue her claims.

4.3. *Relevant Statutory Provisions*

4.3.1. The claimant pursues claims under the Employment Rights Act 1996 (Unfair Dismissal and notice), the Equality Act 2010 (Discrimination claims) and the Working Time Regulations 1998 (Holiday Pay).

4.3.2. The claimant's notice pay claim may be argued to be a breach of contract claim in the alternative. For there to be jurisdiction for the claimant to pursue it on that basis in the Employment Tribunal the claimant would need to establish the breach of contract was in place at the date of termination of employment.

4.3.3. The Employment Rights Act 1996 ("ERA") provides the following definition of an employee and a worker at s230:

230 Employees, workers etc.

(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 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.

4.3.4. The Equality Act 2010 ("EqA") uses a different definition for 'employment', as set out in s83(2):

"employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour …"

4.3.5. The Working Time Regulations 1998 defines a worker is regulation 2 in the same terms as the definition of worker in the Employment Rights Act 1996. It is common ground that there is no material difference of substance between the definition of a worker in s230 ERA and 'employment' in s83(2) EqA.

4.3.6. The definition of worker in the ERA and the EqA includes, and extends beyond, the definition of employee. Thus, an employee must also satisfy the definition of worker. Viewed the other way, if the claimant cannot meet the definition of worker, she cannot be an employee.

4.4. *Case Law and submissions*

4.4.1. The statutory tests for employment status lack clarity. This has resulted in a substantial number of cases reaching the higher courts, and a substantial body of guidance coming from those cases.

4.4.2. In submissions the parties referred the Tribunal to a small part of that guidance. The respondents' representative provided written submissions and made no significant additional comment in oral submissions. The claimant's representative made oral submissions only. At the outset of those oral submissions he confirmed that the respondent's written submissions as to the law were not disputed. No further material submissions as to the applicable law were made on the claimant's behalf.

4.4.3. In determining if a claimant was a worker or self-employed the following issues must be determined

4.4.3.1. Did the claimant have a contract with the respondent to provide work or services?

4.4.3.2. If so, was the claimant obliged to perform that work or those services personally?

4.4.3.3. If so, was the claimant providing that work or services to the in the course of running a profession or business undertaking?

4.4.4. These issues are distilled from the wording of s230 ERA.

4.4.5. *Did the claimant have a contract with the respondent to provide work or services?*

4.4.5.1. There did not appear to be any dispute between the parties that there was a contract between the claimant and respondent to the effect that the claimant would provide work or services.

4.4.5.2. The respondent referred the Tribunal to a written statement of terms. The claimant in evidence suggested she had not seen this document however she did seek to rely on it in submissions and in evidence as showing the terms of the contract between the parties. Whilst the document was not accepted, as explained in the findings below, as a useful source of contract terms, the nature of the dispute about the document and whether it is a reliable source for the contract terms strongly infers that the parties agree there was a contract.

4.4.5.3. Nothing stated in the hearing suggested that there was not a contract.

4.4.6. *Was the claimant obliged to perform that work or those services personally?*

4.4.6.1. A significant part of the submissions made by the respondent focussed on the question of whether the claimant was required to provide that work or those services personally. In particular, the submissions focussed on whether the claimant was able to nominate a substitute, and if so if that was inconsistent with an obligation to provide work or perform services personally.

4.4.6.2. The Tribunal was referred to the case of **Pimlico Plumbers Ltd & Mullins v Smith** [2018] UKSC29. In this case it was argued that the claimant was able to send a substitute, and thus there was no obligation to provide work or services personally. In that case the power to send a substitute was not completely unfettered. Only substitutes from within the pool of other individuals who provided work or services to the respondent could be sent.

4.4.6.3. The finding was that a power to send a substitute is not necessarily inconsistent with an obligation to do work or provide services personally.

4.4.6.4. The respondent's position is that the claimant had nominated a substitute, her sister, who was not a part of the pool of people who did work or provided services to the respondent. On this basis the respondent argues that there is a distinguishing and substantive material difference to the **Pimlico Plumbers** case.

4.4.6.5. The respondent's representative anticipated in the written submissions provided that the claimant would seek to argue that any right of substitution in this case was not unfettered. This is on the basis that the respondent applied a vetting process to ensure the claimant's sister was suitable to cover provide the services or do the work. Noting that the claimant's representative confirmed that the summary of relevant legal principles set out in the respondents' submissions was not disputed, this has been treated as a submission made.

4.4.6.6. The respondents' representative went on to refer to the case of **MPG Contracts Ltd v England** UK/EAT/0488/09. In this case the EAT considered the issue of substitution. The following conclusions (as appear relevant to the facts and dispute in this case) were reached:

- The right to send a substitute will not necessarily negative an obligation of personal service (paragraph 19)

- It is not enough that the claimant ought to be a worker if, on a proper construction, the contract is not one of personal service (paragraph 22)

- It is not enough to merely look at the wording of the contract, the entire factual matrix must be looked at to see the true intentions of the parties and judge if the wording of the contract reflects these (paragraph 28)

4.4.6.7. It is noted that in the **MPG Contracts Ltd v England** case it was found that vetting of substitutes is a fettering of the right to substitute that did not negative the obligation of personal service. Whilst this is noted, the fact sensitivity of the cases in this area makes the overall conclusion in that case of limited assistance, what matters are the principles that can apply to the case before this Tribunal.

4.4.6.8. Accordingly, this Tribunal has considered the evidence presented to determine the true intention of the parties regarding substitution. In this case, as found below, the written statement of terms was not found to be helpful. The terms of the contract were not express, but over a substantial period established, and the intentions of the parties must in any event form a key part of that process of establishing a contract.

4.4.7. *If so, was the claimant providing that work or services in the course of running a profession or business undertaking?*

4.4.7.1. The parties did not refer the Tribunal to any further specific case authority as guidance that should be considered when determining this issue.

4.4.7.2. This is an issue for the Tribunal to determine based on the evidence presented. The authorities presented make it clear that this question will always be fact sensitive.

4.4.7.3. The parties referred to the control test, which is a multifactor approach to assessing if the degree of control exerted by the respondent over the claimant was inconsistent with the claimant being self-employed. This cannot be logically separated from what some authorities call the '*economic reality*' test.

4.4.7.4. The question of whether the claimant was truly in business is one for the Tribunal to decide, considering any relevant evidence or submissions. There is no simple formula to apply in determining this issue, there is no checklist of factors that can simply be ticked off. All relevant factors will have uniquely varying weight and relevance in each case, the weight and relevance being for the Tribunal hearing that case to determine as best it can.

Facts

5. **Evidence**

5.1. The Tribunal heard evidence from the claimant, and from her sister Susan Hanley, who had done some work at the first respondent clinic in the past.

5.2. For the respondents evidence was heard from the second respondent in person, as well as:

5.2.1. Robert Sheridan: a physical therapist who provided services at the first respondent clinic;

5.2.2. Molly Hall: the daughter of the second respondent who was employed as a receptionist at the first respondent clinic; and

5.2.3. Janine Williams: who was employed as the Practice Manager at the first respondent clinic.

5.3. In addition to this witness evidence the Tribunal were directed to an extensive bundle of documents.

6. **Reliability of Witnesses Evidence**

6.1. The evidence presented by the parties in this dispute was on many issues completely contradictory. There did not appear to be any realistic way that the witness evidence presented by the parties could all be honest; the contradictions were too stark.

6.2. The Tribunal's findings are made on the balance of probability. This means that decisions that a particular witness's evidence is preferred as more reliable and accurate is no more than a decision that the preferred account is more likely to be correct.

6.3. It is noted that the claimant's representative invited the Tribunal to take into account the impact of her condition when assessing her oral evidence. Taking that into account, there were elements of the claimant's evidence that the Tribunal were unable to accept as likely to be an accurate account of events. This was because her written evidence and pleadings did not, after her oral evidence had been explored in detail, appear to be accurate. The submission regarding the claimant's difficult with giving evidence related to the pressure of oral evidence, not the preparation of written evidence in advance. In particular, the claimant was found to have at the least exaggerated some matters in an attempt to assist her case.

6.4. The claimant complains in her claim about the frequency of several events which she claims were discriminatory and form part of the foundations of her

substantive claims. In particular she complains about what occurred during what she referred to as "*chats*", which occurred between her and the second respondent.

6.5. This was explored at significant length with the claimant in her evidence. The claimant confirmed that she was in fact referring to no more than a handful of '*chats'* spread over a period in excess of a year.

6.6. In her claim form, and her written statement, the claimant uses the following to describe the '*chats*' complained of:

6.6.1. "*many*" – ET1

6.6.2. "*often*" – paragraphs 72 and 73 of her statement

6.6.3. "*regularly*" – paragraph 73 of her statement

6.6.4. "*typically*" – paragraph 74 of her statement

6.6.5. "*constantly*" – paragraph 96 of her statement

6.7. The view of the Tribunal is that there is no credible way this repeated description of the frequency of these alleged acts of mistreatment in written pleadings and evidence, can be consistent with the admitted reality of the frequency when giving evidence at the hearing.

6.8. It is also noted that there was no suggestion in submissions that on this point the claimant's oral evidence was not accurate. It was explored in such detail and with such care that it appears probable to the Tribunal that the evidence given at the hearing was accurate. The claim form and written statement appear to have been a significant exaggeration of the position that is difficult to explain as anything other than deliberate.

6.9. Other areas where there was a dispute of evidence, and the claimant's evidence was not preferred are discussed in the findings of fact below.

7. The relationship between the respondents

7.1. The first respondent is a limited company. The second respondent is the owner and Managing Director of the first respondent. There was no clarity in the submissions made which respondent the claimant pursued which claims against. Nothing that would have influenced this decision turns on this uncertainty. There was no attempt by the first respondent to rely on a defence that there was not vicarious liability for any potential actions of the second respondent.

7.2. In the discussion of the evidence below the respondents are simply referred to in the plural for ease.

8. Discussion of evidence and findings of relevant facts

8.1. The findings of fact set out below are not intended to provide a chronological narrative of events. The discussion of evidence and relevant findings of fact are grouped into a structure that deals in turn with the points raised by the parties in their submissions. The order of those points reflects the order they were raised by the claimant and then the respondent respectively during submissions.

8.2. They are confined to matters that the Tribunal considered to be relevant to the decisions reached. It is not intended that all facts presented to the Tribunal are discussed below. Where there is no discussion explaining how a relevant finding was reached, that is because the fact was not credibly disputed.

8.3. *The Way the Parties Understood and Labelled the Claimant's status*

8.3.1. It is not disputed that the claimant entered her relationship with the respondents on the basis that she was self-employed. The claimant was candid in her oral evidence that she had understood and wanted to be self-employed. The claimant confirmed that this was the case in other clinics she had worked, including the clinic she currently works at.

8.3.2. There is no dispute that the respondents genuinely intended and believed that the claimant was self-employed.

8.3.3. The arrangement between the claimant and the respondents was described by the second respondent as the claimant "*renting space*" in which to provide clients with massage therapy. The second respondent stated that the claimant was provided with administrative support and the use of some materials and equipment in addition to mere space. Half of anything paid by clients for the services provided by the claimant was for the respondents, the other half was for the claimant. None of this was in material dispute.

8.3.4. The claimant was one of a number of sports massage therapists and physiotherapists (referred to from here as 'therapists') who used space at the respondents' clinic. There was no evidence that the others using space were intended to have a different status to that the claimant had. They all appear to consider themselves to be self-employed. This included the claimant's sister, when she briefly provided services to clients at the respondents' clinic in 2013.

8.3.5. The respondent's clinic employed several staff who were not therapists. These were described as receptionists, a clinic manager and a cleaner. These staff were treated as employees by the respondents, that treatment being materially different to the way the claimant and other therapists were treated.

8.3.6. The therapists were referred to in documents as "*sub-contractors*" and "*associate therapists*". The therapists, including the claimant, were not in those parts of the documents the tribunal were directed to in evidence, referred to as "*employees*" by the respondents at any time.

8.3.7. The parties accepted in their submissions that the label attached to the relationship between them was not determinative. It is, however, relevant that for the period from May 2009 when the claimant entered a relationship with

the respondents, until 2019, the parties agree they intended and genuinely believed that the claimant was truly self-employed. There is no suggestion that this was imposed by the respondents either because of greater bargaining strength or otherwise.

8.3.8. The second respondent conceded that she had been on a steep learning curve since she started the clinic, and that learning curve continued. Accordingly, the Tribunal is unwilling to place any significance on the choice of words used by her when drafting documents. The Tribunal are of the unanimous view that what matters is what the parties intended and the basis of the relationship in practice. For this reason, the Tribunal do not find the labels placed on the relationship to be of any assistance in determining the nature of the relationship.

8.3.9. The mutually held genuine intent of the parties that it would be and was a self-employed relationship, at least up to 2019, is found to be a relevant factor. This factor weighs in favour of the claimant providing therapy services as part of a genuine self-employed undertaking.

8.4. *"Subcontractor Conditions" Document [evidence bundle pages 57-58]*

8.4.1. The Tribunal were directed to a document headed "*Subcontractor conditions*" within the bundle. The second respondent stated that she drafted this document, without any advice or assistance. This was not credibly disputed.

8.4.2. The claimant in her written witness statement asserts that this was given to her on commencing her relationship with the respondents' clinic (paragraph 12). The claimant goes on in her statement to assert that

> *"Many of the listed conditions essentially told me what I had to do and how I had to do it (see conditions 4,5,6,8,9 etc.)"*

For reasons that were never explained this list commences at item 4 and omits item 7. A logical inference from the use of "*etc.*" suggests that it is not intended to exclude items 10 onwards.

8.4.3. In her oral evidence the claimant confirmed very clearly that she did not recall if she had ever been shown this document. At the conclusion of her evidence she was given an opportunity to clarify if this was correct, given the content of her written statement. The claimant was very clear that the assertion the document was given to her at the outset of her starting to work at the clinic which is contained in her statement was an assumption by her when writing the statement. The claimant was also clear that she did not actually recall reading the document, or even the document being given to her.

8.4.4. Mr Sheridan, another therapist who gave evidence, was clear he had not seen the document before this claim.

8.4.5. Noting the claimant does not recall the document, it is difficult to conclude that the claimant considered herself to be in any way bound by the stated conditions. In any event, the Tribunal are of the unanimous view that what defines the relationship is not a document the claimant cannot recall seeing, but the reality of how that relationship worked and evolved over the many years it continued. For this reason, the Tribunal placed little if any weight on the content of the "*subcontractor conditions*".

8.5. *Did the claimant have to be available for the whole of sessions that had been agreed?*

8.5.1. The claimant rented a room in the respondents' clinic for blocks of time. These blocks were referred to by the parties of sessions.

8.5.2. The claimant asserts that she was required to be available to deliver therapy to patients for the duration of the sessions that she had agreed. The claimant's case was that this included any time when there was not actually a client booked in, presumably the requirement being to be available should there be a list minute booking.

8.5.3. The claimant's representative submitted this was consistent with point 4 in the "*subcontractor conditions*" document.

8.5.4. The second respondent disputed the claimant was correct in this regard. It was the second respondent's evidence that the claimant was free to do whatever she wanted during any gaps between patient bookings in a session. The second respondent was clear that this included complete freedom to leave the clinic.

8.5.5. Mr Sheridan's evidence was that he was free to do as he wanted in any breaks or gaps during a session. There was no credible evidence that suggested any reason why Mr Sheridan would have been treated differently to the claimant in this regard.

8.5.6. The Tribunal were referred to an email from the claimant at page 95 of the bundle. In this email the claimant explains how she asks reception to try to avoid booking appointments with long gaps between them, instead grouping the appointments on any day if the diary is not full. The claimant describes her actions between the appointments as being "*sat around*".

8.5.7. There was no suggestion in any part of the evidence that the claimant would be asked to undertake other tasks during any gaps in a session, or that she was or ever would be paid for anything she did in those gaps. The time appeared to be entirely at the claimant's disposal.

8.5.8. On balance the Tribunal find that there was no requirement for the claimant to be available for the whole of any agreed session. The claimant was not required, in gaps in a session, to remain at the clinic. The only expectation was that the claimant would, where possible, honour client bookings. It is not

clear to the Tribunal if this expectation was from the clients, the second respondent, the claimant herself, other therapists or the claimant's professional body. It appears to the tribunal logical that it would be to some extent from all these sources. It is an expectation that would exist whether the claimant was an employee, worker or truly self-employed. Accordingly, the Tribunal do not believe this expectation in any way assists with the determination of the claimant's status.

8.6. *Could the claimant send a substitute?*

8.6.1. The claimant asserted that she had never, and could not, send a substitute to do any sessions she had agreed to do.

8.6.2. The second respondent asserted that the claimant had in fact nominated a substitute in 2013, her sister, when she was going to be away for her honeymoon.

8.6.3. It is correct that there is nothing in the documents that states a substitute can be sent or nominated. It is equally correct that there is nothing in the documents that precludes this. The claimant's representative suggested that the Tribunal should infer into point 4 of the subcontractor conditions document the word "*personal*", thus precluding the use of a substitute. This submission would be correct *if* the claimant was an employee or worker. It would not, however, be appropriate to imply that into the terms of the engagement to achieve the result that the claimant has that status. In any event, for the reasons set out above the Tribunal placed little weight on these conditions because the claimant's own evidence was that she could not recall seeing them.

8.6.4. The Tribunal accept that the claimant at least introduced her sister to the respondents. This does not appear to be in dispute. It is further agreed that the claimant's sister provided therapy to the claimant's clients to cover a period when the claimant was away. This occurred in 2013.

8.6.5. It is noted that in addition to this the claimant's sister did also cover reception at times, which was not something that the claimant did.

8.6.6. It is not disputed that the claimant's sister was paid directly, not via the claimant. The claimant's representative suggests that this precludes her being a true substitute. That is not a submission which the Tribunal found to be persuasive. It places too great a significance on process when the focus should be the substance. The claimant knew she was going to be away. The claimant suggested someone to cover her clients whilst she was away. That person was vetted by the second respondent to ensure competence, and then used to cover the claimant's clients. That person was paid exactly what the claimant would have been paid. The view of the Tribunal is that amounts to providing a substitute self-employed therapist.

8.6.7. It is noted that the claimant did not repeat this after 2013. The evidence was that there had been a complaint about the services provided to a client by the claimant's sister. The validity of that complaint is not relevant here. The client did not pay (or may have paid and been refunded), and accordingly the 50% due to the claimant's sister was nil, being half of nothing. Accordingly, the claimant's sister was not paid. The claimant's sister did not perform services at the respondent clinic again. This appears to have been connected to this complaint and non-payment.

8.6.8. The claimant's representative invited the Tribunal to conclude, from the fact that the purported substitution was at the latest in 2013, that by 2019 any right which may have been inferred could no longer exist. The Tribunal did not find this persuasive. The question is whether the claimant could send a substitute, not whether she ever actually did. In many cases this becomes an analysis of whether a never used right really exists. In this case it is an analysis of whether a previously used right continues to exist. There was nothing in the evidence before the Tribunal that suggested the right did not continue to exist, regardless of the fact it has not been used since 2013.

8.7. *Patient Records were kept at the Clinic & the clinic was a data controller*

8.7.1. There was no dispute between the parties that records relating to patients were kept at the clinic. There is no dispute that the clinic was a data controller for patient information.

8.7.2. The Tribunal do not agree that the fact the clinic was a data controller was of any significance. The arrangement between the parties was agreed to include at the least the respondents providing administrative support and taking patient bookings for therapy that were then stored on an electronic diary. For this information the clinic would appear to be a data controller.

8.7.3. The claimant's representative submitted that the fact that the client records were kept at the clinic suggested the patients who had therapy were clients of the clinic rather than clients of the claimant. It is correct that the keeping of the records at the clinic is consistent with point 3 of the subcontractor conditions, at least to the extent that they refer to "*notes*". It is also noted that this part of the sub-contractor conditions document is not one of the parts the claimant in her statement appears to assert was applied to her (paragraph 14).

8.7.4. The submission was that the fact the claimant was expected to keep patient notes at the clinic suggested the claimant was not truly self-employed. The argument was that a truly self-employed therapist could do what she wanted with the records, storing them away from the clinic if preferred.

8.7.5. The respondents accepted that the records were normally kept at the clinic and this was expected. The second respondent stated that this was understood to be required by "*law and patient privacy protection*".

8.7.6. It is not clear that this is correct but is accepted to be a genuinely held belief on the part of the second respondent.

8.7.7. The respondents' evidence was, however, that the claimant did on occasion, take patient notes away from the clinic, as did other therapists. The claimant in her evidence describes two patients she used to have to see away from the clinic due to their mobility issues. The point was not specifically addressed in evidence, but it appears illogical and unlikely that the claimant would commit to memory patient notes prior to a session rather than taking notes with her to the place the therapy occurred. This appears to the Tribunal to support the second respondent's evidence that there was no strict enforcement of any rule that patient records should not leave the clinic.

8.7.8. The claimant's submission was that any lack of freedom regarding the storage and use of patient records is an indicator that the patients were clients of the clinic not the therapists. There was a significant amount of evidence in many areas of witnesses' oral testimony that this was not correct. Witnesses, including the claimant, referred to patients being clients of individual therapists, and in effect therapists having their own following of clients that were often long standing. This did not appear to be disputed. Many patients would phone to book appointments with specific therapists, especially when there were repeat appointments. The Tribunal was referred to instances when the claimant had been unable to deliver scheduled therapy and clients had preferred to rebook with her at a later date, rather than accept a cover therapist.

8.7.9. There were patients who simply phoned the clinic looking for an appointment with any therapist. No specific evidence was provided regarding the proportion that fell into this category, but it appeared likely to be the majority of clients for their first appointment. This is not in any way inconsistent with the self-employed arrangement that the parties believed existed, at least up to late 2019. The 50% of the treatment fee retained by the clinic was understood and intended to include advertising, in effect identifying and securing potential new clients for the therapists. It is noted that some clients, and again no specific evidence was given, may have been content to be treated by any therapist, and thus were more clients of the clinic. The evidence heard suggested that at most this would be a small proportion.

8.7.10. Accordingly, it is found that the patients were mostly clients of individual therapists not the clinic. This is a factor which weighs in favour of the claimant being self-employed but has limited weight or significance.

8.8. *Therapists were required to wear clinic shirts*

8.8.1. The claimant's evidence was that she, and all the other therapists, were provided with clinic polo shirts that they were required to wear when at the clinic.

8.8.2. This would appear to be consistent with point 7 within the subcontractor conditions document. It is noted that in the list of the parts of the subcontractor conditions that the claimant states in her written statement were those that told her what she "*had to do*", point 7, relating to the clinic shirts, is specifically omitted. That omission appears more significant as deliberate, as the claimant lists the applicable points as "*4,5,6,8,9 etc.*"

8.8.3. The second respondent's position was that polo shirts were provided to those who wanted them, but there was no requirement to wear them. The second respondent further stated that the therapists did not in fact *all* wear the polo shirts.

8.8.4. The Tribunal were taken to extracts from the respondents' website, which includes photographs of the therapists who provide services at the clinic. In those photographs it is noted that several the therapists are wearing the polo shirt, although a significant number, including the second respondent herself, are clearly not. The Tribunal consider it unlikely that the respondents would have, and enforce, a rule that specific shirts had to be worn at the clinic and then not at the least ensure the website photographs reflected this.

8.8.5. On balance the Tribunal find that therapists that provided services at the respondents' clinic were not required to wear clinic polo shirts. They were available for those that wanted them. Therapists were free to wear their own clothes if they preferred. This is a factor that weighs against the claimant being more than self-employed.

8.9. *The claimant had to provide notice of leave*

8.9.1. The claimant states that she was required to give notice to take leave. The Tribunal notes that the claimant does not suggest that she needed consent or permission to take leave, merely that she had to give notice. The claimant confirmed that in the years she provided therapy at the respondents' clinic she was never told she could not, or should not, take leave.

8.9.2. The second respondent's evidence was that therapists, including the claimant, were asked to keep the clinic informed of any planned time away. This was to ensure bookings by that therapists' clients could be coordinated to be at times when the therapist was available. The second respondent stated that the claimant, as with other therapists had complete autonomy over when they took leave.

8.9.3. There was evidence before the Tribunal of therapist absences being at short or no notice. There was no evidence that anything other than steps to cover or rearrange any already booked client therapy was done when this occurred.

8.9.4. The Tribunal do not find that the claimant was, in practice, *required* to give notice of leave. It was, however, expected from the therapists, given the respondents handled the client bookings, that therapists would, where possible, give advance notice of when they intended to be on leave.

8.9.5. The claimant submitted that an expectation that notice would be given was suggestive that the claimant was not self-employed. The Tribunal do not find this to be a persuasive submission. It is entirely consistent with a self-employed professional that if they were not going to be in a position to provide therapy for a period of time, they would, when possible, notify the organisation that handled the client bookings for them in advance.

8.9.6. The Tribunal find that the fact the claimant did not need permission or consent to take leave is inconsistent with her being an employee or worker.

8.10. *There was a limit on how much leave the claimant could take of 6 weeks*

8.10.1. This limit is referred to in the subcontractor's conditions at point 10. As noted above, the Tribunal give this document little weight given the claimant could not even recall reading the document.

8.10.2. There was no evidence that in any year the claimant had taken 6 weeks' leave. The claimant at no point suggested that she had either asked for permission, or in any circumstance told she could not take leave.

8.10.3. It is noted that the relevant point of the subcontractor's conditions does not actually purport to place a limit on leave, it states "…*and limit to 6 weeks per year unless discussed with…*" The arrangement was that that the claimant rented a treatment room for sessions from the respondents and then shared the profits from those sessions, is relevant. When a therapist is not treating a patient, no rent is paid. For this reason, a suggestion that absence above a threshold level needs discussion is entirely logical even if the claimant was in business herself. The Tribunal do not find that this is a factor that suggests that the claimant was not self-employed.

8.11. *What control did the claimant have over when she took time off?*

8.11.1. There was nothing in the evidence presented to the Tribunal that suggested that the claimant had been told when she could or should take time off. It was clear that when a patient had booked a therapy session the claimant, as with all therapists, would consider she had to cover that session if possible. It was not clear that this was because of any pressure or demand from the second respondent. It appeared to the Tribunal to be something that any therapist, self-employed or otherwise, would consider a professional expectation.

8.11.2. The evidence from Mr Sheridan clearly stated that if he did not want patients booked for him at any particular time, this was his choice. Clearly, given the respondent provided reception services that included taking bookings for him, he would have to notify the respondents in some way of these times. This evidence was not materially challenged by the claimant.

8.11.3. There did not appear to be any reason why the claimant would be treated differently to Mr Sheridan in this respect. Accordingly, the Tribunal find that the

claimant did have control over any time off she wanted, in a way that was entirely consistent with her being self-employed.

8.12. *Expectation that the Claimant would promote the Respondent Clinic*

8.12.1. There was no dispute that the claimant, along with other therapists, was asked to promote the clinic and also to sell relevant items to patients.

8.12.2. The tribunal heard no evidence that suggested that this was more than a request. There was no evidence that it was a requirement. It was clear that the therapists would be alone with patients during therapy, and there was no suggestion that any form of monitoring occurred.

8.12.3. Promoting the clinic would be to the benefit of all therapists and the respondents. Whilst some patients would seek to make an appointment with a particular therapist, others would simply want to see a therapist and would be given a convenient time for them. It is these latter clients that would be a benefit to all therapists and to the respondents.

8.12.4. The Tribunal does not agree with the submission of the claimant that the fact the claimant was encouraged to promote the respondents' clinic suggests she was not self-employed. The Tribunal make the same finding in relation to the selling of products. Whilst it was encouraged it was not required, and accordingly is entirely consistent with the intended self-employed status of the claimant.

8.13. *The claimant worked as part of a Team*

8.13.1. There is no dispute that the claimant provided therapy as part of a team at the clinic. This was described as a multi-disciplinary team. It is also agreed that the claimant was at times given the title of "*Associate Therapist*".

8.13.2. The Tribunal do not find the submission that the title of associate therapist suggests that the claimant was not self-employed persuasive. It is no more than a label and was clearly used during the years when the claimant herself concedes that her understanding, and importantly genuine intent, was that she was self-employed.

8.13.3. The fact that therapists of different disciplines treated clients as part of a multi-disciplinary team is a logical, and probably necessary, approach within a clinic. It is entirely consistent with a group of self-employed therapists working at a clinic in a coordinated way for clients that the respondents (and until 2019 the claimant) understood and intended to be the case.

8.14. *The claimant was only allowed to provide "Sports Massage" therapy.*

8.14.1. The claimant's representative submitted that the claimant was not permitted to do anything other than sports massage therapy by the respondents. Her evidence on this point was not consistent with this submission.

8.14.2. The claimant's evidence was that she did around 96% sports massage therapy and 4% other therapy, including pregnancy massage.

8.14.3. The claimant conceded in cross examination that she did pregnancy massages and hot stone treatments. The claimant conceded that she had brought some equipment into the clinic specifically for these treatments.

8.14.4. The second respondent disputed the claimant's evidence that she was told she could only do sports massage. The second respondent directed the Tribunal to the clinic website, which has a page for each therapist. The claimant's page clearly advertises services which the claimant can provide. Those services go beyond sports massage.

8.14.5. The claimant stated in evidence that she had no input into the website. This is disputed by the second respondent. The Tribunal noted that a WhatsApp conversation (recorded at page 215 of the bundle) shows the claimant did have some input into the website.

8.14.6. The respondents submitted that it made no sense whatsoever for the respondents to advertise a range of therapy services the claimant could provide to clients, to then seek to prevent her from providing those services. The Tribunal find this a persuasive submission. Such an approach would appear to be extremely unlikely; it would be illogical and irrational.

8.14.7. For these reasons the Tribunal prefer the evidence of the second respondent. The claimant was not told only to do sports massage, and in fact did not only do sports massage.

8.14.8. The Tribunal accept that the claimant may have been told not to provide beauty treatments, or physiotherapy treatments. The clinic was not marketed as a beauty salon and the claimant was not a physiotherapist. Accordingly, the Tribunal do not find any such restrictions shed any useful light on the relationship between the parties.

8.15. *The claimant had no control over which clients she saw*

8.15.1. The claimant gave evidence about two specific clients in relation to this point. The claimant's evidence was that she had informed the second respondent that she did not want to be booked to provide treatment to these two clients. One had a record of missing appointments, the other the claimant described as having made her feel uncomfortable.

8.15.2. The claimant's evidence was that despite this request, she continued to be booked to treat these clients up until she stopped providing therapy at the clinic. There was limited evidence as to why or how this occurred. The second respondent stated she could only recall one of these clients and recalled putting a note on the clinic system to the effect that client should not be booked with the claimant.

8.15.3. There was no evidence that the claimant had continued to raise objections to the subsequent bookings of these two clients after 2017, or even that she had repeated her request not to be booked to treat these clients.

8.15.4. It is noted that the arrangement between the claimant and respondents was that the respondents provided services to the claimant, including booking clients. There was, in that arrangement, a clear financial incentive for both parties for the claimant to be as fully booked as possible. It is entirely consistent with the claimant being self-employed for the respondents to book in clients for the claimant as much as possible.

8.15.5. A failure to adhere to two, one off, requests not to treat two specific individuals, made at a time when the claimant's own evidence is that she believed and intended she was self-employed, is not inconsistent with the claimant being self-employed. The facts that these requests do not appear to have been repeated, that there is no evidence that the claimant when the clients were booked the claimant sought to refuse to treat them, or of the reason for the failure to adhere to the request are relevant. Accordingly, this point is found to be of limited weight and little assistance in determining if the claimant was self-employed.

8.16. *The claimant's hours of work were dictated by the second respondent*

8.16.1. The claimant submitted that her hours of work were dictated by the second respondent. If that had been supported by the evidence, it would have been a persuasive indicator that the claimant was not self-employed.

8.16.2. The evidence did not support the claimant's assertions in relation to this. There was clear evidence that historically the second respondent had agreed to requests from the claimant to change her sessions to suit her. The only change in sessions which the claimant argued was not agreed was the disputed reduction in the sessions that the claimant rented a treatment room which occurred in November 2019.

8.16.3. The claimant, in the meeting convened to discuss her grievance, is recorded to have stated *"...and then I changed them to a Monday, Wednesday and Friday…*" with reference to her hours. The claimant goes on to be recorded as saying "*I decided the change in hours, but she totally agreed with me".* This is not consistent with the claimant's hours being dictated or set by the respondents.

8.16.4. On balance the Tribunal find that the evidence suggests the claimant had control over timing of her sessions, provided that there was a room available at the clinic. The clinic had three rooms, which means that it would be inevitable that the claimant did not have complete freedom to use a room whenever she wished from time to time.

8.16.5. The Tribunal noted that there was a dispute about the circumstances in which she ceased to have use of a room on Mondays, as from 4 November 2019. In particular, the Tribunal considered carefully the content of a note in the bundle, which on its face appears to be a note of a meeting between the claimant and second respondent on 1 November 2019.

8.16.6. The record of the meeting in this note is disputed by the claimant. The note states that the respondent suggested the claimant, who had been absent for a period, should only provide therapy one session a week, on Fridays. The note goes on to record a discussion which ended with an agreement that the claimant would have a session on Wednesdays and Fridays, ceasing her previous sessions on Mondays. The note concludes by recording that the claimant was happy with this outcome.

8.16.7. It is correct that this note is the only note of a meeting, formal or otherwise, that appears to have been made by the second respondent up to that point. The claimant disputes the note is an accurate note of the meeting. The claimant's representative's submission was that the note "*stinks*" and should be regarded by the Tribunal as wholly inaccurate and unreliable. This is on the basis that it was convenient that such a note was created for the first time that was so helpful to the respondent, and it could not be shown it had been shared with the claimant at the time.

8.16.8. The claimant's account was that at the meeting she did not agree to stop having a session on Mondays. The claimant further states that at this meeting the second respondent suggested she did a longer session on Wednesday and Friday. The claimant described her recollection of that meeting being about whether she would stop her session on Mondays, and that this was driven by the second respondent.

8.16.9. The claimant denied she was given this note prior to this litigation. The second respondent could not recall with certainty, but indicated the note had been printed, signed and then left for the claimant when next in the clinic. The copy the Tribunal had in the bundle was signed by the second respondent.

8.16.10. The Tribunal were referred to a text message sent to the claimant on 21 October 2019 by the second respondent. In this text message the second respondent suggests to the claimant that she just do a session on Fridays and if that goes well look to add Wednesdays. This message explicitly states it was sent in advance of what appears to have been a scheduled "*chat*" with the claimant. This is consistent with the second respondent's account of the meeting. It is not as consistent with the claimant's recollection of the meeting, which suggested the conversation was about not doing a session on Mondays and instead doing longer sessions on Wednesdays and Fridays.

8.16.11. For this reason, the Tribunal prefer the evidence of the second respondent, and accept the note as an accurate record of what was stated at the meeting of 1 November 2019.

8.17. *The claimant was required to have her mobile phone on her if she left the clinic during a session*

8.17.1. The claimant asserted in evidence, (paragraph 24 of her written statement) that she was required to have her mobile phone on her and answer it during any period a room at the respondents' clinic was rented by her.

8.17.2. The evidence of the second respondent was that the claimant wanted to be contactable. This was because additional clients would occasionally be booked in a short notice, from which she would profit.

8.17.3. Mr Sheridan's evidence was (paragraph 5(m)), "*if I need time in the day to attend to a personal errand I do not need permission I merely book that slot out as to remain clear".* The Tribunal do not view this as consistent with any suggestion that if he was not in clinic he had to be contactable.

8.17.4. Considering the balance of the evidence the claimant gives in paragraph 24 of her statement, the conclusion of the Tribunal is that the second respondent's evidence on this point is preferred. In paragraph 24 the claimant asserts she was told what hours she had to work from the outset. This is tied to her evidence that she had to be available for those hours. This, as noted above, is not consistent with other evidence and found not to be an accurate characterisation of the situation.

8.17.5. On balance, the Tribunal finds that there was no requirement for the claimant to be contactable if she left the clinic. The Tribunal accept that the claimant did normally have her phone on and answer it if called, by choice. The Tribunal do not find that the fact the claimant may have had her phone with her, switched on, and answered calls from the clinic, is in any way of itself inconsistent with her being self-employed.

8.18. *The claimant had no say in the standard rates charged to clients*

8.18.1. The claimant's claim is that the "*standard*" rates for treatments at the respondents' clinic were outside her control. That there were standard rates was not contradicted by the second respondent.

8.18.2. The Tribunal believe that this is unsurprising, given marketing was done by the respondents' clinic to attract clients for the claimant and other therapists. If a client did not ask for a specific therapist then they were booked to the first available therapist. Having a set of standard rates is in no way indicative of anything other than a sensible business practice.

8.18.3. The respondent' 'position was that the standard rate was set after consultation with therapists, including the claimant. The claimant denied this. There was no clear evidence to assist the Tribunal in this regard.

8.18.4. Noting the effective working relationship between the claimant and the second respondent for many years prior to an issue arising, the Tribunal believe it is

logical and credible that the claimant would have been consulted about the setting of standard rates. There is no suggestion that these were fixed, in fact discounts were given on occasion.

8.18.5. On balance the Tribunal believe it more likely that there was discussion about the standard rates that were advertised. Regardless, the existence of a standard clinic rate is not considered to be in any way inconsistent with the claimant being self-employed.

8.19. *The claimant had no control over discounts that may be offered*

8.19.1. The claimant stated in evidence that she could not offer clients discounts. The claimant's evidence was that discounts were offered, but only by the second respondent without her consent or input. The claimant submitted this was indicative of control by the respondents that was indicative of her true status being of employee or worker.

8.19.2. The second respondent's evidence was that the claimant did give discounts, both by providing longer treatments than the paid for and on occasions by agreeing with clients that they would not be charged.

8.19.3. The evidence of Mr Sheridan was that he had "*a choice with regards to offering some of my clients discounts and I am able to see friends without administering a charge*". This was not challenged in evidence. There does not appear to be any basis to conclude that Mr Sheridan and the claimant were treated differently in this regard.

8.19.4. The Tribunal prefer the evidence of the second respondent that the claimant did agree with clients that they would not pay the full standard rates for treatment, without the prior explicit agreement of the second respondent in advance of each occasion. This finding is, however, given no weight, as it appears to be equally consistent with self-employed and employee status for the claimant.

8.20. *The claimant was required to use only the respondents' equipment*

8.20.1. The submissions made on behalf of the claimant sought to assert that the claimant had been required to use the equipment provided in the clinic. This was disputed in evidence by the second respondent.

8.20.2. The Tribunal can see no logical reason why the claimant, even if she was an employee, would not be permitted to use her own equipment.

8.20.3. The evidence presented by the claimant was that she had in some instances brought in her own equipment to use, including (but not limited to) a pregnancy pillow and hot stones, which she then used. This contradicts her assertion that she was required to use the clinic equipment, as at least in relation to the pregnancy pillow the claimant stated she brought in her own because she was

not happy with the clinic one. Accordingly, she was not required to use the clinic pregnancy pillow.

8.20.4. The clinic provided equipment, and consumables, as part of the treatment room rental. The fact that the claimant chose to use a lot of the material and equipment provided by the respondents is in no way inconsistent with the claimant being self-employed.

8.21. *The claimant had to adhere to a privacy policy of the respondents*

8.21.1. There was no dispute that the claimant, along with other therapists, was expected to respect client privacy. This does not appear to be a point that has any useful bearing on the determination of the claimant's status.

8.21.2. The claimant will have seen clients attending the clinic for treatment by other therapists. In the circumstances the Tribunal do not find that any expectation that she respects client privacy is in any way inconsistent with her being self-employed.

8.22. *The claimant was provided with training by the respondents*

8.22.1. The evidence of the second respondent was that she arranged training sessions for therapists, and for herself, on a variety of issues and topics. There was no evidence presented that these were compulsory.

8.22.2. The therapists who attended these sessions were required to pay for the training. It was not disputed by the claimant that she would be expected to contribute, if she attended, to the costs of the training. The second respondent explicitly refers in August 2019 in a WhatsApp message to a "*charge*" in relation to an invite to therapists to attend some basic life-saving treatment, if "*interested"*.

8.22.3. The finding that training was optional, and had to be paid for, is entirely consistent with the claimant being self-employed. It is inconsistent with the claimant having the status of either worker or employee.

8.23. *The claimant was invited to functions during the festive season*

8.23.1. The claimant, along with all therapists, was invited to festive celebrations by the second respondent.

8.23.2. The claimant, and all others attending, were expected to pay the costs for themselves if they attended. Attendance was optional. The claimant did not always choose to attend.

8.23.3. The Tribunal do not find that an invitation to a festive celebration, which was optional and at her own cost, is in any way inconsistent with the claimant being self-employed.

8.24. *The claimant was part of a 'WhatsApp' group of therapists who worked at the respondents' clinic*

8.24.1. There is no dispute that the claimant was part of a WhatsApp group which included other therapists at the clinic.

8.24.2. The evidence of the use of the WhatsApp group suggests that it was used as a method of communication between those in the group.

8.24.3. The Tribunal do not find that this is in any way indicative of anything other than the fact that it was a convenient way to communicate. It is in no way indicative of employee or worker status, or inconsistent with self-employed status.

8.25. *The second respondent used the word "wages" when referring to payments due to the claimant*

8.25.1. This related to payment for attending a festive function as discussed above. The message was sent to all those attending, including those employed by the respondents' clinic.

8.25.2. Whist it is correct that the label 'wages' is one that is indicative of a worker or employee, the Tribunal do not believe that the use of the word in this context has significance. To avoid that word the message would have had to include alternative messages for employees and self-employed therapists.

8.25.3. Adopting a shorthand, which conveyed a meaning but was not technically accurate, is not something that could or should give rise to a finding that the claimant is not self-employed. It is not indicative of the parties' genuine intent.

8.25.4. Accordingly, the Tribunal have given no weight to the choice of language used to convey this message, which is no more than a label attached to the monies due to the claimant.

8.26. *The claimant was not given access to the clinic computer and thus her patient diary*

8.26.1. The claimant stated that she was not given a password to the clinic computer, so could not access it. The claimant alternatively suggests that she was never given access to the clinic computer, and that she had access removed in or around November 2019.

8.26.2. The evidence presented to the Tribunal was that there was a single password for the clinic computer, which all users used to log in. There was no evidence presented to the Tribunal that suggested that there had been a change to the single generic password.

8.26.3. Mr Sheridan gave evidence that he, along with other self-employed therapists, was offered the ability to access the clinic computer remotely. This offer came

with a small fee to cover the cost of the additional software licence that attached to additional remote access. Mr Sheridan took up this offer.

8.26.4. The claimant denied that she had been offered remote access. The claimant was not able to provide any logical reason why Mr Sheridan would be given that offer and not her. It is noted that this offer of remote access appears to predate the claimant becoming unwell, and thus occurred at a time when the evidence suggests there was no significant strain in the relationship between the claimant and the second respondent. This makes the suggestion that claimant would be excluded from this offer appear harder to explain.

8.26.5. On balance the tribunal prefer the evidence of the respondents in relation to access to the computer. There was a single password, which all the therapists, including the claimant, could use to access the computer if needed.

8.26.6. The Tribunal does not find that whether the claimant had access to the computer has any significant bearing on the claimant's status. The claimant paid the respondents to provide services, including reception and client booking services. Those bookings were recorded on a computer. Whether the claimant was granted access to that computer and booking diary is in no way inconsistent with self-employed status or indicative of worker/employee status.

8.27. *The second respondent kept a file relating to the claimant described as a "personnel file"*

8.27.1. This was not a fact in dispute.

8.27.2. The Tribunal note that the second respondent had several employees, and ongoing relationships with several self-employed therapists.

8.27.3. It is unsurprising to the Tribunal that the second respondent kept information on file in relation to the self-employed therapists who provided services from the clinic.

8.27.4. The fact that the second respondent assigned the same label to the files she kept in relation to her employees and self-employed therapists is not considered significant. It is merely a convenient label.

8.28. *The second respondent dealt with the claimant's complaint in 2019 as a grievance.*

8.28.1. It is not in dispute that the claimant sent a letter to the second respondent on 29 November 2019 in which she stated she was raising a formal grievance. A significant part of this letter included a clear assertion that the claimant was not self-employed but was an employee of either the first or second respondent.

8.28.2. The claimant stated in evidence that she had sought legal advice prior to writing the grievance letter. The Tribunal had the benefit of sight of the

grievance letter. The letter includes a detailed argument that the claimant was an employee and refers on several occasions to her rights as an employee.

8.28.3. The evidence of the second respondent was that prior to receiving this letter her understanding had been that the claimant was self-employed. When the letter was received, the second respondent sought advice, and decided that the claimant's letter should be treated as a grievance. An external third party, Sharleen Hernandez, was appointed to consider that grievance.

8.28.4. The Tribunal had the benefit of sight of the report prepared by Ms Hernandez, and a transcript of the meeting the claimant had with her.

8.28.5. The conclusion reached in the report prepared was that the claimant was self-employed. The basis for this conclusion is discussed in some detail in the report provided. The recommendation made was that the claimant should be directed to a complaints procedure for self-employed therapists, or if there was not one advice should be sought as to how to handle the complaint.

8.28.6. The report also concluded that the claimant's allegations of discrimination, bullying and harassment had not been substantiated.

8.28.7. Following the recommendation of Ms Hernandez, the second respondent rejected the claimant's grievance and did not offer any appeal or continued process.

8.28.8. The Tribunal do not find that the initial treatment of the claimant's complaints as a grievance is in any way indicative of the claimant's status. A significant part of the complaint made sought to assert, for the first time, that the claimant was not self-employed. Accordingly, it is a natural and sensible step to proceed with caution initially, when determining if that assertion is correct. Once this has been considered, the fact that there was no further treatment of the claimant's complaints as a grievance, specifically there was no appeal offered, is considered by the Tribunal to be indicative that the claimant was not being treated as either a worker or an employee at that time.

8.28.9. Accordingly, the way that the claimant's complaints were handled is found to be entirely consistent with the claimant being self-employed, and inconsistent with her being either a worker or an employee.

8.29. *Tax and National Insurance*

8.29.1. There is no dispute that the claimant was paid her share of the income from clients, after deduction of the agreed 50% to cover the provision of the space at the clinic and other services, as a gross sum. There was no deduction of tax or national insurance.

8.29.2. The claimant was paid a profit share, not a salary.

8.29.3. The claimant was personally responsible for declaring her income to HMRC and made NI payments on the basis that she was self-employed. There was no suggestion from any party that the self-employed basis was chosen by the parties with particular regard to the tax implications of being employed or a worker.

8.29.4. This is found to be indicative of her status being that of self-employed but is not itself conclusive. It supports the finding that the parties had a genuine belief and intent that the claimant was self-employed.

8.30. *Professional Indemnity Insurance*

8.30.1. The claimant was providing therapy to clients. It was not disputed that this required her to have appropriate insurance, and to comply with applicable regulations.

8.30.2. It was not disputed that the claimant provided this insurance herself and was herself responsible for meeting any regulatory requirements.

8.30.3. This is indicative that the claimant was self-employed but is considered by the Tribunal not to be wholly inconsistent with what may apply to workers in the sector. Accordingly, this factor was not given significant weight.

9. Conclusion

9.1. It is for the claimant to establish that she has the necessary status to be eligible to pursue her claims.

9.2. There was no dispute that the claimant entered a relationship with the respondents on the basis that she was self-employed and in business for herself. There was no evidence to suggest that this was not a genuinely held intent, which was shared equally between the parties.

9.3. There is no suggestion that the respondents in some way imposed the need to adopt that status. There was no suggestion in the evidence that the status was selected with the mere intent of avoiding rights or obligations, including tax or employment rights obligations that would have fallen on both parties if the claimant was not self-employed. The evidence was that the claimant had worked in the sector on this basis both before her relationship with the respondents and after she ceased to do work from the respondents' clinic.

9.4. The claimant was one of several therapists who provided therapy at the respondents' clinic. The evidence from one of those other therapists, was that he also genuinely considered himself to be self-employed. The evidence was that within the sports therapy sector it is not an unusual arrangement for therapists to be self-employed, entering into arrangements with clinics to provide a space in which to provide services, often with some reception or administrative provision.

9.5. The claimant is found to have had the right to send a substitute. This was not a completely unfettered right, however, the right of the respondents to undertake vetting is not a form of fettering that undermines the right., and multiple aspects of the relationship which appear to be more likely to be consistent with the claimant being self-employed. This was not a theoretical right but found to have been a right that had been exercised.

9.6. It is noted that a right to send a substitute will not necessarily negate an obligation of personal service. In this instance, given that right was not found to be fettered in a way that was inconsistent with there being no obligation to provide personal service, it is concluded that the claimant must have been a self-employed person.

9.7. The Tribunal considered all the submissions made, and the wider evidence presented, regarding the claimant's status, with a view to considering the '*economic reality'* test. The detailed findings on each individual point are set out in the findings of fact above.

9.8. At no point did the Tribunal find any part of the arrangement evidenced to exist between the claimant and the respondents to be inconsistent with the intended and genuinely believed to exist self-employed status of all therapists, including the claimant.

9.9. Without repeating them all here, at the highest the Tribunal find that there were aspects of the relationship which were not inconsistent with the claimant not being self-employed. Balanced against this are several factors which the Tribunal find suggestive that the claimant was in, and running, a true self-employed undertaking.

9.10. Overall, the Tribunal conclude that the reality of the situation was that the claimant was operating as she intended, as a self-employed person. This afforded her flexibility and self-determination that she genuinely wanted and was consistent with the business model operated by the respondent. On this basis the Tribunal find that the reality of the whole picture was that the claimant was not an employee or a worker.

9.11. Accordingly, the conclusion of the Tribunal is that the claimant has not established that she was either a worker or an employee of either respondent. The claimant's arrangement with the respondents was on the basis which she intended at the time, namely that she was a self-employed therapist. For this reason, all the claimant's claims must fail and are dismissed.

Employment Judge Buzzard

11 October 2021

JUDGMENT SENT TO THE PARTIES ON

12 October 2021

FOR THE TRIBUNAL OFFICE

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