Case No: 1600478/2016

EMPLOYMENT TRIBUNALS

Claimant: Dr D Moodley

Respondent: Mental Health Care (UK) Ltd

Heard at: Remotely, by video **On:** 4- 6 October 2021

Before: Employment Judge S Moore

Representation
Claimant: Dr Wilson, Queen's Counsel
Respondent: Dr Morgan, Queen's Counsel

RESERVED JUDGMENT

1. The claimant was a worker for the purposes of Section 43K Employment Rights Act 1996.

REASONS

Background and introduction

2. The claim was lodged on 4 July 2016. The claimant claims he was subjected to detriments[1] having made protected disclosures under S47B ERA 1996. The Tribunal claim was stayed pending a claim in the High Court which determined amongst other matters that the claimant was not an employee in accordance with S230 ERA 1996. The stay was lifted and there was a preliminary hearing before EJ Ryan on 15 August 2019. It was decided that the issue of whether the claimant was a worker would be decided at a preliminary hearing lasting 3 days. This was listed to take place on 25 – 27 January 2021 at Wrexham but due to a number of reasons this was postponed and eventually took place before me on 4 – 6 October 2021. The hearing was part heard in so far as the Tribunal heard the evidence and oral submissions but it was agreed the parties could make further written submissions. These were received on 3 / 4 November 2021.

3. The parties have dealt with in evidence and submissions whether the claimant was a S230 (3) (b) ERA 1996 worker. This had not been

[1] This is the only live claim remaining

specifically clarified as an issue to be determined at the preliminary hearing in Judge Ryan's order but the notice of the preliminary hearing dated 2 September 2019 did not limit the issue to S43K worker rather encompassed the wording "worker for the purpose of his extant claim of whistle blowing detriment..".

4. I wrote to the parties about whether they were expecting me to deal with the S230 (3) (b) worker issue on the basis that at the time of the alleged protected disclosures the claimant had entered into the second consultancy agreement, to which he personally was not a party. As such if he was found to be a worker should this be limited to the S43K extension.

5. The claimant in his reply dated 13 December 2021, confirmed that he was also relying on S230 (3) (b) worker extension in respect of other services provided either as a variation of the first consultancy agreement or as discrete standalone agreements which amounted to "another contract" within S230 (3) (b) as at the date his services were terminated. As such S230 was a live issue to be determined.

6. The respondent asserted that a S230 worker status issue was irrelevant and not necessary to make such a determination given the way in which the Claimant has advanced his case and the terms of Employment Judge Ryan's Order.

7. Further correspondence followed. The respondent's position was that I could only determine the S43K issue as in summary, Employment Judge Ryan had determined that a Preliminary Hearing would take place to consider whether the Claimant was a "worker" exclusively in accordance with the extension of the meaning of worker under section 43K ERA.

8. Having regard to the pleaded case, the notice of preliminary hearing and that the parties had dealt with the S230 worker status, I have concluded that whether the claimant was a worker under S230 remains a live issue. Some of the findings of fact I make below may be relevant to this issue but I am not at this stage determining that issue. Having found that he is a worker under the S43K, I have determined that it is not necessary to decide the S230 status at this stage of the proceedings and potentially not at all. I therefore direct that the S230 issue is stayed pending determination of the substantive claim. At the material time, that is the time the alleged protected disclosures were made I have found that the claimant was a S43K worker.

Bundle and witnesses

9. I had two bundles before me. The one prepared by the respondent ran to 3054 pages. The claimant produced a supplementary bundle ("SB") of 1658 pages which contained a lot of duplication. I advised the parties at the outset of the hearing that they would need to draw my attention to any documents not specifically referenced in the witness statements or submissions. It was not proportionate of either party to have produced such a large bundle for a three day hearing.

10. The respondent called the following witnesses:

- Kerry McDevitt, former Head of People Services;
- Lee Reed, former Managing Director for the respondent;
- Graham Hallows, former consultant engaged by the respondent.

11. The respondent had exchanged a witness statement for Mr Roberto Pino, former Chief Executive. On the first day of the hearing the respondent advised Mr Pino would not be giving evidence as he was unavailable.

12. The claimant gave evidence and called Ms L Bessal, former manager for the respondent.

Preliminary issue - estoppel

Background

13. A preliminary hearing had taken place on 20 November 2020 as the parties were unable to agree, amongst other matters, on disclosure.

14. At the preliminary hearing on 20 November 2020, the respondent had asserted that the High Court Judgment ("the HCJ") had already determined that the relationship between the claimant and respondent was recorded accurately and evidenced in a commercial contract voluntarily adopted by the claimant and the company of which he was the alter ego.

15. I was not persuaded that the respondent demonstrated that the HCJ precluded as relevant any evidence other than the terms of the commercial contract. The worker status was not specifically dealt with by the High Court. I determined that if there were facts the respondent maintained bound the Employment Tribunal when considering the S43K status, the Tribunal would need full detail in the further particulars setting out these facts with reference to the Judgment, before reaching such a decision.

16. I directed that no later than 15 December 2020 the respondent would provide further particulars identifying the specific findings of fact with reference to the High Court Judgment ("HCJ") which are said to be binding upon the Employment Tribunal. These were duly provided by the respondent.

17. On 6 January 2021 the respondent made an application to relist a one hour case management hearing to an open hearing listed for one day hearing to consider the estoppel issue and in consequence their strike out application. The claimant objected to the application.

18. On 3 February 2021 Judge Jenkins refused the respondent's application and directed the issue of estoppel should be determined at the three day preliminary hearing then listed 12 – 14 April 2021.

19. The respondent appealed the decision of Judge Jenkins to the Employment Appeal Tribunal. On 7 April 2021 HHJ Tayler refused the appeal under rule 3(7) of the EAT Rules his opinion being the notice of appeal disclosed no reasonable grounds for bringing the appeal. By this time, the effect of the appeal meant neither party was ready for the hearing on 12 – 14 April 2021 and it was postponed.

20. I therefore was required to determine the issue of estoppel as part and parcel of this preliminary hearing. The respondent's primary position was that no further evidence was required to determine the S43K issue and that issue estoppel applies. The claimant submitted that issue estoppel does not apply. In the alternative if it were well founded the respondent is prevented from relying on it by reason of estoppel by convention and/ or representation.

Conclusions - estoppel

21. I have had regard to the detailed submissions on this issue from both leading counsel and I was referred to a number of authorities. For reasons of proportionality I do not propose to set these out here.

22. I have concluded that issue estoppel does not preclude the Tribunal from determining the preliminary issue as to whether the claimant was a worker. My primary reason is that the Employment Tribunal has exclusive jurisdiction in respect of S47B detriment claims. It cannot therefore follow that an Employment Tribunal is prevented from even hearing such a claim based on the findings of the HCJ.

23. I do not agree with Dr Wilson that I am at liberty to make such findings as I see fit based on the evidence before me. I am bound by findings of facts in the HCJ unless there was new evidence before me which could give rise to different findings or where the HCJ findings were limited to the issues before the High Court. Whilst the claimant's witness statement referenced a number of emails and evidence now available that were not disclosed in the High Court I was not clear on what these specific documents were. I have not been invited to consider any such new evidence or had any such facts identified to me by the claimant. I am obliged to draw conclusions from all facts before me and apply the law accordingly.

24. I set out in the findings of fact below those findings I consider I am bound by the HCJ.

25. The respondent's particulars (see paragraphs 16 above) identified a number of sections in the HCJ that are said to be either of relevance or are findings of fact that bind the Employment Tribunal specifically in respect of the "S43K issue". These can be broken down into two categories.

26. Firstly, the primary position, as advanced by the respondent at the preliminary hearing on 20 November 2020, was that the HCJ had already determined that the relationship between the Claimant and Respondent was recorded accurately and evidenced in a commercial contract voluntarily adopted by the Claimant and the company of which he was the alter ego. In this regard the respondent referred to paragraphs 57-60, 78, 79, 80, 85, 112 and 116. In other words the respondent submitted that I was not able to look at what happened in practice because the HCJ had reached conclusions that the relationship was recorded in the consultancy agreement(s).

27. I do not accept this contention. In particular, in respect of paragraph 112, where HHJ Judge Pelling QC states that the relationship between MHC,

ELHL and DM was governed exclusively by the 1st and then 2nd consultancy agreement. I have accepted Dr Wilson's submissions that the only relationship HHJ Pelling QC was determining in the HCJ was whether the claimant was an employee of the respondent and that what the judge therefore found in this regard has no bearing on the discrete question of whether the claimant was a worker. I also accepted Dr Wilson's submission that the Tribunal is required to carry out an exercise that is wider than what the terms of the written agreement might state as the test under S43K requires the Tribunal to make a determination of what the terms "in practice" were rather than simply construing the terms of a written contract at the specific date on which the contract was executed.

28. The second category is in respect of the respondent's submissions that paragraphs 107, 126, 154, 155, 156, 157, 184, 185, 190 and 192 all contain findings that demonstrate the claimant was routinely able to negotiate terms with both third parties and the respondent on behalf of ELHL and his other business interests and that such state of affairs demonstrated that the claimant also had an ability to freely negotiate terms of behalf of ELHL with the respondent and did so.

29. I have concluded that these findings of fact are not relevant to the issues that I am required to determine in this case. The claimant's involvement or beneficial interests with other business activities cited are not relevant to whether he was a worker save potentially in respect of the question of equal bargaining positions.

30. I will not determine the parties' submissions in respect estoppel by convention or representation and I have not embarked on an examination of what the parties agreed or did not agree in regard to the worker status issue in their dealings with each other in the high court litigation as this is not necessary or proportionate given I have found issue estoppel does not apply.

<u>Documents submitted by the respondent with their closing submissions ("document relating to Muckle LLP bundle")</u>

31. During the hearing a query arose regarding the various differing versions of the 1st consultancy agreement in the bundle. The version starting at p1279 had been understood to be the contemporaneous agreement and it was the claimant's case that this document was drafted by Castlebeck's solicitors. Mr Reed had cast doubt on this in his witness statement and this was the subject of cross examination. I have set out my findings below at paragraph 60. Dr Wilson called formally for an original copy of the document. It was agreed the provenance was potentially relevant and parties would go away and investigate if they could obtain the original document. At the end of the evidence I was informed by Dr Wilson that the claimant's solicitors had located a draft of the agreement with a hallmark of Muckles LLP who had previously been instructed by the respondent. Dr Morgan explained that his instructing solicitors had not been involved in the High Court proceedings and they could not resolve the matter that day.

32. When the respondent filed their closing submissions on 3 November 2021, they also filed a 36 page bundle said to contain "documents relating to Muckle LLP". It was not clear whether these were new documents or

whether they were in the existing bundles and I was not prepared to cross reference the 4500 or so pages before me to make any such determination. There were within that bundle two different versions of the first consultancy agreement. Both had different versions of Muckles LLP logo on the covering page and different draft watermarks. At paragraph 68.14 of the written submissions, the respondent contended that these documents addressed the issue that had arisen during the course of the hearing as to whether the first consultancy agreement had been issued with a solicitor's logo format. The submissions were as follows:

68.14 During the course of the hearing, an issue arose as to whether the Agreement adopted by the parties had been issued with a solicitor's logo format. Subsequent inquiry has confirmed:

(i) The terms of the proposed contract in 2011 emanated from C; utilising his contractual terms with The Priory for this purpose: [email 29.9.11];

(ii) The contract formerly entered into with The Priory cited ELHL as the contracting party;

(iii) The document had been compiled [Supplemental Bundle p2] with the involvement of Muckle Solicitors;

(iv) The terms of that document recited the service provider as ELHL, with a condition that this company 'engaged' C [Supplemental Bundle p7];

(v) On 20 July 2012, C provided a copy of the agreement to which he and ELHL were parties to PWC [supplemental Bundle p19]; and

(vi) These documents were disclosed within the High Court Proceedings;

33. When the claimant filed his closing written submissions on 4th November 2021, the claimant attached the draft of the 1st consultancy agreement with the Muckle LLP name and address on the covering page referenced by Dr Wilson at the end of the evidence. This was a third variation of the agreement as it did not match either of the versions produced by the respondent in their supplementary bundle lodged on 3 November 2021. The claimant objected to the admission of the new 36 page bundle by the respondent. This was on the basis that if one of the documents related to any disclosed document had not been put in evidence at the Hearing, then the Claimant would strongly object both to its consideration by the Tribunal now and to any argument(s) based on it within the Respondent's written submissions seeking to adduce evidence after the close of evidence by both parties, and after oral submissions which would be entirely impermissible. The Claimant reserved his position until he and his legal advisors had an opportunity to consider all the documents relating to Muckle LLP that had been sent to the Tribunal as attachments to the Respondent's solicitors' e-mail of 3 November 2021.

34. Subsequently on 12 November 2021 the claimant lodged a witness statement, a new bundle ("DM1") and further written submissions,

addressing the respondent's submissions set out above and the further documents sent to the Tribunal on 4 November 2021.

35. The claimant's primary position was that at 68.14 the respondent had asserted through counsel giving evidence that the claimant had provided the terms of the proposed contract to the respondent in 2011 and this assertion was fundamentally false. This was dealt with in the claimant's witness statement filed to address those assertions in the event the Tribunal decided to admit that evidence.

Decision

36. At the hearing, on the final day, there was a discussion as outlined above regarding the provenance of the document at p1279 of the bundle and whilst there was no formal order made, I am satisfied that both parties understood they would be making further enquiries and dealing with it in written submissions. However I consider that the respondent has gone much further in asserting in submissions that "s*ubsequent inquiry has confirmed the terms of the proposed contract in 2011 emanated from C; utilising his contractual terms with The Priory for this purpose.* The source relied upon for the purported confirmation was an email from the claimant dated 29.9.11 to himself attaching a version of the 1st consultancy agreement but with substituted parties namely the claimant and the Priory Group. There is no explanation as to why this confirms the first consultancy agreement was drafted by the claimant. The email postdates the agreement between the claimant and respondent. There is a raft of questions that would naturally arise from this submission and it must follow that if I decide to admit the evidence in the respondent's supplementary bundle that would require a reopening of the evidence. Indeed that has inevitably led to further correspondence between the parties and the claimant has considered it (quite reasonably) necessary to file a witness statement dealing with this assertion and additional documents.

37. It is not in the accordance with the overriding objective to permit the respondent to seek to adduce new evidence after the conclusion of the hearing either though the production of new documents or by way of a submission from counsel in reliance of a document with no explanation as to why it would support such a contention. I note that the claimant's solicitors have invited the respondent's solicitor to accept the said document was drafted by the respondent and / or connected company or Muckle LLP but they have pointedly refused to answer the question other than to state it was disclosed by the claimant and they have no further evidence or instruction that would deal with this enquiry.

38. To admit such documents would inevitably mean the parties were not on an equal footing and would prejudice the claimant who has not had the opportunity to challenge the evidence. There is not even an application before me setting out reasons why I should admit this evidence.

39. Further, the identity of who had actually drafted the 1st consultancy agreement was not relevant to the issue on worker status as the 1st consultancy agreement was not relied upon as establishing the claimant was a S43K worker.

40. I therefore conclude that the evidence produced after the hearing shall not be admitted as evidence. Firstly it is not relevant and secondly, in any event, I have concluded for reasons set out below that I am satisfied based on the evidence before me at the hearing, that the first consultancy agreement was drafted by the respondent's legal representative.

The Law

S43K

41. Whether the Claimant was a worker within S43K(1)(a) ERA 1996.

43K Extension of meaning of 'worker' etc for Part IVA
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 for a person 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,

42. I have been referred to an extensive number of authorities by the parties which can be referenced in their respective bundle of authorities.

43. In **Keppel Seghers UK Ltd v Hinds [2014] IRLR 754**, the EAT held that the tribunal had not erred in finding Mr Hinds was a worker for the purposes of S43 (K) despite his services having been engaged through a services company of which he was the sole shareholder, director and employee. It is also authority that the correct approach for a Tribunal is to adopt a purposive construction which favours protection under S43K wherever possible rather than deprive individuals of that protection and that the important issue is whether the worker had been introduced or supplied to the employer who decided the terms of the engagement.

44. The relevant passage is at paragraph 18 (per Judge Eady QC) and it is appropriate to consider the whole of that paragraph in the context of the purposive construction given the caveat in the final sentence:

"It is common ground that, in construing these provisions, it is relevant to have regard to the fact that s.43K was explicitly introduced for the purpose of providing protection to those who have made protected disclosures. Given that background, it is appropriate to adopt a purposive construction, to provide protection rather than deny it, where one can properly do so, see per Wilkie J in Croke v Hydro Aluminum Worcester Ltd [2007] ICR 1303, EAT, at paragraph 33, (and in saying this, I note the warning given in Redrow Homes (Yorkshire) Ltd v Wright [2004] IRLR 720, CA, against the determination of cases by reason of policy consideration rather than the correct application of the law)."

45. **McTigue v University Hospital NHS Foundation Trust [2016] IRLR 742 (EAT).** In this case it was held that an important purpose of S43K was to protect agency workers provided to an end user. If both the supplier and the end user had substantially determined the terms of engagement, then both

were the employer for the purposes of the section. It is not necessary for the Claimant to show that the Respondent determined any such terms to the same or greater extent than the agency did. Paragraph 38 set out questions to be addressed by tribunals in dealing with these issues (per Mrs Justice Simler DBE, President, as she was then):

In conclusion in the hope that it will assist tribunals dealing with these issues, it seems to me that in determining whether an individual is a worker within s.43K(1)(a) the following questions should be addressed:

For whom does or did the individual work?

Is the individual a worker as defined by s.230(3) in relation to a person or persons for whom the individual worked? If so, there is no need to rely on s.43K in relation to that person. However, the fact that the individual is a s.230(3) worker in relation to one person does not prevent the individual from relying on s.43K in relation to another person, the respondent, for whom the individual also works.

If the individual is not a s.230(3) worker in relation to the respondent for whom the individual works or worked, was the individual introduced/supplied to do the work by a third person, and if so, by whom?

If so, were the terms on which the individual was engaged to do the work determined by the individual? If the answer is yes, the individual is not a worker within s.43K(1)(a).

If not, were the terms substantially determined (i) by the person for whom the individual works or (ii) by a third person or (iii) by both of them? If any of these is satisfied, the individual does fall within the subsection.

In answering question (e) the starting point is the contract (or contracts) whose terms are being considered.

There may be a contract between the individual and the agency, the individual and the end user and/or the agency and the end user that will have to be considered.

In relation to all relevant contracts, terms may be in writing, oral and may be implied. It may be necessary to consider whether written terms reflect the reality of the relationship in practice.

If the respondent alone (or with another person) substantially determined the terms on which the individual worked in practice (whether alone or with another person who is not the individual), then the respondent is the employer within s.43K(2)(a) for the purposes of the protected disclosure provisions. There may be two employers for these purposes under s.43K(2)(a) ERA 1996.

46. In **Day v Lewisham & Greenwich NHS Trust & anor (Public Concern at Work intervening) [2017] EWCA Civ 329,** a case involving a registrar in training under a contract of employment with the NHS Trust, it was held that the Claimant was also a worker for Health Education England ("HEE"). At paragraph 11 (Lord Justice Elias) :

"I would make two preliminary observations about these definitions. The first is that, if the terms on which the individual is engaged are substantially determined by the individual himself, he cannot bring himself within this extended definition of "worker". That is so even if the end user and/or introducer can also be said substantially to determine the terms of engagement. The second is that, if the terms of engagement are not substantially determined by the individual, his employer is the person who does substantially determine them. It is envisaged in section 43K(1)(a)(ii) that this may be both the end user and the introducer. That might be either because the introducer and the end user determine the terms jointly, or because each determines different terms but each to a substantial extent. Mr Reade submitted that notwithstanding that both introducer and end user may substantially determine the terms of engagement, the

definition of employer in section 43K(2)(a) was limited to the person who played the greater role in determining the terms of engagement. He submitted that this follows from the reference to "the person" in that subsection. I see no warrant for restricting the scope of the section in that way. By section 6 of the Interpretation Act 1978 the singular includes the plural unless the contrary intention appears, and in my view it does not do so here. Indeed, Mr Reade's construction involves giving a different meaning to "substantially determines" in subsection (1) than in subsection (2). Since both introducer and end user can in principle substantially determine the terms of engagement for the purposes of the definition of worker, I see no basis for concluding that they cannot do so when it comes to applying the extended definition of employer. This will in some cases have the effect that both introducer and end user are employers and each will then be subject to the whistle-blowing provisions. Indeed, that would seem to be an inevitable conclusion if the terms are determined by the end user and introducer acting jointly. If only one party can be the employer, it is difficult to see by what principle it would be possible to determine who that should be."

47. And at paragraphs 29:

...The issue is whether, when considering the terms on which the person is engaged, the tribunal is limited to considering contractual terms and must ignore other matters which might affect the way in which the work is carried out but are not contractual in nature. The argument in favour of so limiting it is that in *Sharpe v Bishop of Worcester* (*in his corporate capacity*) [2015] EWCA Civ 399, [2015] IRLR 663, [2015] ICR 1241 ('*Sharpe*') the Court of Appeal held that in order for s 43K to bite, there must at least be a contract of some sort with the putative employer. So, it is said, the reference to terms must be to contractual terms. It is right to say that neither party sought to challenge the *Sharpe* decision nor to suggest that we need not follow it. However, even if it be the case that some of the terms of engagement must be contractual (on the assumption that the relationship needs to be contractual) I do not accept that it follows that a tribunal should limit itself to focusing solely on the contractual terms, although no doubt the terms will be overwhelmingly contractual. The section requires the tribunal to focus on what happens in practice and I do not think that Parliament will have envisaged fine arguments on whether a term is contractual or not before it can be taken into account. In my judgment when determining who substantially determines the terms of engagement, a tribunal should make the assessment on a relatively broad brush basis having regard to all the factors bearing upon the terms on which the worker was engaged to do the work.

Findings of Fact

48. I make the following findings of fact on the balance of probabilities.

49. The claimant is a consultant psychiatrist. He is an experienced medical practitioner within psychiatry and has been practicing medicine for over 20 years. He is an approved clinician under various terms of the Mental Health Act 1983. He is also a Responsible Officer as defined within the Medical Profession (Responsible Officer) Regulations 2011 as amended in 2013.

50. The respondent is a company that provides mental health and care home services to adults and young people. Prior to 2012, Castlebeck Group was the parent company of the respondent. It was acquired from Castlebeck Group by Mr Michael Adey in late 2012. Mr Adey had previously sold the respondent to the Castlebeck group in 2007.

The first consultancy agreement

51. In or around May 2011, the claimant was approached by a recruitment agency called Stone Executive Recruitment about a position of consultant psychiatrist with the respondent at its New Hall site. The claimant went

through a competitive interview process and was informed, via the agency that he had been successful and was offered the role of Consultant Psychiatrist. He commenced work in late July/ early August 2011. The claimant was required to complete a "new employee starter form". This contained the personal bank account details of the claimant. This was signed by Mr Beattie on 17 August 2011 and had a start date of 1 August 2011. The claimant reported to Mr Beattie who was at that time the managing director of the mental healthcare division. His duties were to manage the service at the New Hall independent hospital. He held an inpatient caseload and had no managerial or line management responsibilities. When he commenced work, he was provided with an office and mobile telephone and a laptop.

52. The claimant submitted invoices for payment to be made to Edward Lupen Healthcare Limited.

53. On 16 August 2011 the Director of Clinical Services wrote to the health board to advise that the claimant had been employed as a Consultant Psychiatrist and sought approval for him to work as an approved clinician.

54. The claimant subsequently entered into a consultancy agreement. The claimant had not led any evidence in his witness statement to this Tribunal as to how it came about or who drafted it. However in his witness statement to the High Court proceedings (produced in the bundle) he stated that it had been provided to him by Mr Beattie. The HCJ found that it was an agreement offered to the claimant (paragraph 48). It had a commencement date of 18 July 2011 but was not signed until 11 October 2011 by the claimant and 14 October 2011 by Mr Beattie. The parties were defined as follows:

Parties

(1) Mental Health Care (UK) {a division of Castlebeck Care (Teesdale) Limited incorporated and registered in England and Wales with company number 02050483 whose registered office is at Suite 201, The Chambers, Chelsea Harbour, London, SW10 0XF (**Company)};**

(2) Dr. Devan Moodley (**Consultant Psychiatrist**) t/a Edward Lupen Healthcare Services Limited

55. Edward Lupen Healthcare Ltd ("ELHL") is a limited company incorporated in May 2011. The claimant is the sole director, shareholder and secretary for the company. He agreed that whatever the company did, it was done through the claimant. He also agreed that he was responsible for the raising of invoices. Throughout that period the claimant completed a tax return declaring that his employer was ELHL and he apportioned his income between salary and dividends. In terms of payment, the claimant would send invoices to the respondent for payment and payment would be made into the account of ELHL.

56. The bold type was as used in the document. The word "Consultant" was subsequently referenced throughout the document. In particular under (2) Terms of Engagement and (3) Services it stated:

The Company shall engage the Consultant and the Consultant shall provide the Services on the terms of this Agreement.

Duties
3.1 During the Engagement the Consultant shall:
3.1.1 provide the Services with all due care, skill and ability and use his best endeavours to promote the interests of the Company or any Group Company;
3.1.2 unless prevented by ill health or accident, devote 5 days per week to the carrying out of the Services together with such additional time if any as may be necessary for their proper performance (special interest days as detailed in point 17 are part of the Consultants paid time); and
3.1.3 promptly give to the Line Manager all such information and reports as it may reasonably require in connection with matters relating to the provision of the Services or the business of the Company or any Group Company.
3.2 If the Consultant is unable to provide the Services due to illness or injury he shall advise the Line Manager of that fact as soon as reasonably practicable and shall provide such evidence of his illness or injury as the Line Manager may reasonably require.

57. If there was a period where the consultant could not provide the services, the consultant with prior written approval of the company or line manager appoints a suitably qualified and skilled substitute to perform the services on his behalf, provided the substitute entered into direct undertakings with the company.

58. In the Interpretation section "Services" was defined as "the services described in the job description and person specification". The agreement referenced a job description and person specification at section 17.1. The job description was for a consultant psychiatrist. In summary the role was to "provide high quality psychiatric services to New Hall Hospital". The job description referenced in the first consultancy agreement was limited to this specific role. It did not anywhere incorporate wider roles or responsibilities other than a provision that the job holder may be required to undertake other duties which fall within the grade of the job in discussion with the managing director and group clinical director.

59. Under "Fees" the agreement specified the company would pay the consultant. Under "Insurance and Liability" the consultant had "personal liability" for any loss, liability or costs incurred by the company. Under "Termination" the company can terminate the engagement if the consultant is guilty of gross misconduct" or a number of other misdemeanors that could only sensibly be envisaged as being carried out by an individual.

60. The agreement also provides that the respondent would fund the consultant's external supervision.

61. Based on the above wording of the agreement I find that the first consultancy agreement was between the claimant as an individual and the respondent. ELHL were not a party to that agreement.

62. The claimant was required to complete a new employee details form containing his personal data such as contact details, next-of-kin and bank details. He was granted paid annual leave and was obliged to complete employee annual leave request forms. He was also granted study leave and compassionate leave which was paid. He was placed on the on call rota.

63. I set out the following relevant findings of fact that I consider I am bound by from the HCJ in respect of the 1st consultancy agreement.

Paragraph 48

64. *On DM's own evidence this was not an agreement offered to him on a take it or leave it basis. It was a freely negotiated agreement entered into because one party (MHC) wanted the services of DM and the other party (DM) was willing to provide his services providing agreement could be reached on terms that were satisfactory to him. As such the agreement is more akin to a commercial agreement than to an employment contract.*

Paragraphs 50

65. *"Although I accept that the 1st Consultancy Agreement was fully and freely negotiated between DM and Mr Beattie.."*

Paragraph 51

66. *In my judgment it is inherently more likely than not that the parties chose consultancy over employment because it suited the commercial interests of each party. It eliminated the payment by Castlebeck or MHC of Employer's National Insurance contributions and ELHL had only to pay Corporation Tax on its profits.*

Paragraph 52

67. *As Ms Anderson points out in her closing submissions, when DM was asked whether he had offered to account to HMRC on the basis he was an employee, he confirmed that he had not done so – see T5/11/940/2-15. DM was entitled to adopt this position only if the relationship in reality and substance was as set out in the consultancy agreements. It is inconsistent with the relationship between DM and MHC being one of employee and employer. Whilst this point is not decisive, it is a highly material factor in deciding what the true intentions of the parties were.*

Paragraph 67

68. *In my judgment the 1st Consultancy Agreement was (and was intended by both parties to it from the outset to be) a contract for the provision of services.*

69. In terms of other activities, the agreement provided that the claimant was not prevented from being engaged, concerned or having any financial interest in any capacity in any other business, trade, profession or occupation during the Engagement provided that such activity did not cause a breach of any of the Consultant's obligations under the Agreement; and any activity did not relate to a business which was similar to or in any way competitive with the business of the Company or any Group Company without the prior written consent of the Line Manager.

70. The claimant was required to maintain his own insurance in respect of the provision of services.

71. The claimant accepted under cross examination that there was negotiation between him and Mr Beattie on certain aspects of the consultancy agreement. In particular he recalled that quantum of remuneration was discussed as well as external supervision.

72. The tribunal heard evidence from Mr L Reed on behalf of the respondent. Mr Reed had not been involved in the arrangements between Mr Beattie and the claimant in respect of the first consultancy agreement. This included not being involved in any of the discussions, negotiations or how and by whom the terms of the agreement were reached. His evidence was that as far as he could recall the agreement was not in the form of a typical template that either MHC or Castlebeck used at the time and referred to a clause concerning travelling abroad which he maintained was not normally within the respondents' templates. Mr Reed also gave evidence that he was confident the negotiation between the claimant and Mr Beattie was genuine and evenhanded. Whilst Mr Reed was able to give evidence about the general procedure when appointing consultants' psychiatry services, he was not able to give any specific evidence in relation to the appointment of the claimant. The same can be said regarding Mr Reed's evidence about the introduction of the claimant by Stone Executive Agency. As he was not able to comment within his own knowledge or dealings I have preferred and accepted the claimant's account about how he came to be recruited which I set out above.

73. At some point after the claimant's appointment he was informed by Mr Beattie that MHC was being split from Castlebeck Group and would be sold as a separate entity.

74. On 16 August 2011, Ms D Roberts (who at that time was the Director of Clinical and Therapy Services) wrote to the relevant health board to inform them that the claimant had been employed as a consultant psychiatrist and he would be required to work as an approved clinician.

75. As part of the due diligence process in respect of the acquisition of the respondent by Mr Adey, Mr Reed emailed the claimant on 7 September 2012 to ask him about his employment agreement with the respondent. He wanted to know if ELHL was registered at Companies House and the company number. He also wanted to know if there was any "paperwork" that was given to Mr Beattie when he first commenced that clearly outlined he would be responsible for paying his own income tax. He also asked what insurances the claimant had in place and whether he paid his own professional registration fees. The claimant replied the same day confirming ELHL company number details, that he had sent a letter regarding payment of his own income tax (to Castlebeck) but he had not retained a copy. He agreed that if he needed his own insurance it was his responsibility to pay and also that he paid for his own registration fees.

76. In October 2011, the claimant was successful in his interview for the role of Medical Director and was appointed to the post towards the end of that month. This role involved managing all other medical practitioners within the

company. There was no formal job description. I accepted the claimant's description of what this role entailed. In general this meant the claimant was responsible for ensuring clinical standards of the individual practitioners and the group as a whole was up to the required standard. It also involved medical mentoring, leading clinical teams, being involved in strategic clinical decisions at Board level and liaising with external agencies such as the GMC and other stakeholders.

77. In November 2011 there were discussions between the claimant, Mr Pino and Mr Adey regarding the management of the hospitals. The claimant sent an email to two hospital managers, Mr Holcroft and Mr Bromfield confirming what had been discussed. He explained it had been decided (by Mr Adey and Mr Pino) that the claimant would manage the line management of the hospitals and Mr Pino would manage the residential aspect. The claimant had previously been managed on a day to day basis by Mr Holcroft. At this time the claimant moved from just having an inpatient caseload to the caseload and a mixture of management responsibilities.

78. At paragraphs 55 and 56 of the HCJ HHJ Pelling held that the claimant being responsible for paying his own tax and ELHL arranging its own insurance was consistent with the substance of the relationship being regarded by both parties as a services provider relationship not an employment relationship.

Appointment as Responsible Officer

79. Towards the end of 2012, the respondent appointed the claimant as its designated Responsible Officer. This particular role must have been undertaken by the claimant and he is not able to, by law, substitute another person to undertake that role. It cannot be performed by a corporate vehicle or someone who was not occupied in a full-time role and capacity. The role is defined by the Medical Profession Regulations 2010. The holder of the role is required to provide recommendations on a medical practitioner's revalidation. To become a Registered Officer, the individual must meet specific criteria set out by the GMC and that person is appointed to the organisation and reports to the GMC on revalidation.

80. In December 2012 Mr Adey decided to purchase a hospital called Young Foundations. The claimant was later asked to be the Responsible Officer for this establishment and line manage the medical practitioners who worked there.

81. On 11 November 2012, Mr Pino forwarded a copy of the 2011 consultancy agreement to the respondent's tax advisers. The claimant was unaware of this correspondence at the time. In the covering email Mr Pino stated as follows:

"Can you please review this floored (sic) contract for Dr Moody.
You will remember that there was an issue with him being an employee.
Can you please let me know what adjustments are necessary to ensure that he could not be considered so?"

82. The tax advisor replied as follows. The whole contract needed to be rewritten. As a minimum all references should be to the corporate body and not the consultant (this was because the agreement was specified as between the claimant *trading as* ELHL). The adviser commented that it contained 'numerous holes' if the claimant 'wished to avoid being caught under IR35'. Mr Pino replied asking for a recommendation as to someone who could draft something sensible that worked for both the claimant and respondent. He stated the primary brief was to make sure it was bullet-proof from a company/employee perspective. In response the tax advisers sent Mr Pino a template consultancy agreement from the website Qudos who he described as a leading IR35 consultancy. The tax adviser explained it could be used as a basis of a contract although it would need amending to suit the respondent's particular circumstances.

83. On 20 December 2012, Mr Pino emailed the respondent's VAT advisers to ask them whether the claimant's fee for his services would be VAT exempt. Mr Pino advised the VAT advisers that the respondent was contracting with the limited company. In summary the advice given was that it was questionable as to whether the claimant was solely supplying services as a consultant doctor as in Mr Pino's words the claimant was 'operationally responsible for the stream'. Further Mr Pino commented in a separate email to the claimant that **"as a medical director/ Stream leader you [the claimant] are essentially controlled by the board".** I find that from these emails that in Mr Pino's view, having taken advice from the VAT advisers, this would equate to a supply of staff (as opposed to solely supplying services as a consultant) and therefore the VAT exemption would not apply. It was very clear from this email exchange that at that time Mr Pino considered that the claimant was controlled by the board to the extent that the VAT exemption would not apply.

84. From December 2012 there were ongoing discussions between the claimant and Mr Pino regarding his employment status. Mr Pino sought legal advice and on 24 April 2013 received an email from the adviser which stated as follows.

"I have given the matter some further thought and have set out a written summary of the position below. Although you could use a "split contract" structure without any real tax risk for MHc, I think (on balance) it may be better to treat him [the claimant] as an employee for all his work (both management and medical)".

85. Mr Pino passed on this tax/employment advice to the claimant by email on 29 April 2013, subject: **"Dr Moodley – employment status"**. There must have been a discussion between Mr Pino and the claimant following this email as they agreed to speak on or around 1 May 2013. Mr Pino reported to Mr Adey in an email of 29 April 2013 as follows:

"I know we have discussed this and we agreed to put him on the payroll but Dr D was not so keen so we have tried to look at the split contract position. This in itself presents various issues"

To which Mr Adey replied **"Dr Moodley must be directly employed."**

86. The reference to a split contract was where a consultancy and employment relationship would run in parallel. The claimant accepted under cross

examination that this was his preference and that he was having these discussions with Mr Pino.

87. On 4 April 2013 Mr Pino emailed the claimant to inform him that he had not forgotten about the contract issue. I find that this was in respect of the ongoing discussions between Mr Pino and the claimant regarding his employment status.

88. Mr Pino's witness statement gave evidence that he subsequently spoke with the claimant who refused the employment proposal and was adamant he should retain his status as independent contractor contrary to the preference of the respondent. The claimant did not agree with this account. It was the claimant's evidence that his preference was for the split contract. I accepted the claimant's evidence as a true account of this discussion as Mr Pino was not called to give evidence and the claimant was therefore not able to challenge him, whereas I heard directly from the claimant on this matter. Further, it was corroborated by the email (see para 90) in which it refers to looking at the split contract position.

89. There was an email in the bundle of 3 June 2013 from Mr Pino to the legal advisers in response to their query as to whether or not the situation had been resolved. Mr Pino commented that he needed to sit down with the claimant and 'nail the whole subject'.

90. The next incident of note was that on 27 August 2013 there was a further email from advisers to Mr Pino attaching a draft consultancy contract for the claimant along with a side letter the point of which was described *"so that the obligations on Dr Moodley bite on him personally as well as on his company".* The documents had been drafted by an associate from Burges Salmon solicitors. The email stated the agreement and side letter had not been reviewed by a commercial / employment lawyer. It also stated that the definition of "Services" (i.e. what Dr Moodley has to do) was important and would need input from Mr Pino and *"there needed to be a clear definition of the medical services being provided"*. The advisor also stated he understood the supervisory / administrative work would be carried out pursuant to a separate employment contract which the claimant would enter into directly. There was no evidence before me that such a separate employment contract ever came into existence.

91. The draft consultancy agreement was produced on the legal adviser's headed paper. Mr Pino forwarded the draft agreement and side letter to the claimant on 29 August 2013. It specified the "individual" as Dr Moodley. [2]

92. On 25 September 2013, Mr Pino emailed an instruction that they should not pay any doctor or psychologist as self-employed without his specific approval commenting that the HMRC filing cost could be 'horrendous'.

93. In the claimant's supplementary bundle there was an email from Mr Pino to the legal adviser, subject matter *"Engaging consultants on contracts for services through limited companies".* In that email Mr Pino stated they had had four consultants recently where they had engaged their services

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In the later signed version of the agreement the definition of "Individual" had been changed from Dr Moodley to ELHL

through limited companies. He asked the adviser to come up with a *'simplistic contract to fully engage them avoiding the issue of PAYE'.* He referred to someone called Kelly, the recruitment manager who would be dealing with this. The date of this email was not included in the document before the tribunal. However Kelly Phillips, recruitment manager, forwarded an email with the same subject title to the claimant on 18 December 2013 attaching a draft side letter for consultancies. This in turn forwarded the said letter and an email chain between Kelly Phillips and the legal adviser. Therefore Mr Pino must have instructed the legal adviser to have drafted the document referred to above at some point before December 2013.

94. On 7 March 2014 Mr Adey emailed Mr Pino and requested that he arrange a meeting with the claimant to discuss the provision of a payment under the contract of service to enable the claimant to lease an appropriate car. The claimant had suggested a Mercedes C class vehicle. Mr Adey confirmed he had agreed to this request.

95. On 14 April 2014 Mr Adey informed Ms Phillips he had spoken to the claimant the week before and they had agreed a new amount of £180,000 per annum. He asked Ms Phillips to insert the figure in the standard SLA [3]and hoped that the claimant would sign it.

96. On 29 April 2014, Ms Phillips sent the claimant an updated service level agreement by email. She asked him to check he was happy with the dates she had inserted (the date the deed was set, which was 14 April 2014) and the definition of the service he provided to the respondent. This had been defined as:

"Services" means medical consultancy services within Group 7 Schedule 9 to the VAT Act 1994. To hold the post of Clinical Director and Responsible Officer for MHC in accordance with revalidation requirements and to provide Consultant Psychiatry services to the hospital for the period of the contract;"[4]

"The claimant replied on 30 April 2014 to Mr Pino and advised he had '*gone through it this evening'* and that it was 'f*ine with me'.*

97. On 2 May 2014 the claimant sent a memo to all staff within the respondent titled "Changes to the Senior Management Structure at MHC". It referred to a decision that had been made to form an Executive Board of Directors consisting of three members; Mr Beattie as Director of Operations, Mr Pino as Director of Finance and the claimant as Group Medical Director.

98. On 1 July 2014 Mr Adey emailed Theresa Quinn (Executive Assistant) attaching the claimant's SLA (the consultancy agreement) and asked her to insert the fee rate of £180,000 and get it signed by all parties. Ms Quinn then emailed the claimant to advise the agreement had been printed ready for him to sign and asked him to call in.

99. The signed version before me was not dated. Both signatures (the claimant and the director) were witnessed by Ms Quinn. It was unclear which director had signed for the respondent as the signature was unclear and there was

[3] This was a reference to the second consultancy agreement draft.

[4] This was not the same definition of services that ended up in the signed agreement, see paragraph 116

no name. The agreement was almost identical to the version referenced in paragraphs 95 and 96 above that had been drafted by Burges Salmon. I did not have sight of the side letter and it was not referenced as a document in any of the statements.. A number of changes had been made where the respondent had been advised to insert specific details such as the number of days the services would be provided per month (19) and the commencement date. Further, the definition of "Services" had been changed to remove reference to "Clinical Director".

100. I accepted the claimant's evidence that he played no part in drawing up the second consultancy agreement. I find this was drafted by the respondent's legal advisors.

The second consultancy agreement

101. The agreement was between the respondent and ELHL. The agreement mistakenly referred to the "Individual" as ELHL. The HJC held this was "plainly wrong and should have defined "Individual" as the claimant. In the original version drafted by Burges Salmon, Dr Moodley had been specified as the individual.

The second consultancy agreement – High Court Judgment

102. There are a number of findings of fact in the HCJ relating to the second consultancy agreement which are necessary to set out here and I consider I am bound by these facts, subject to what I say above in paragraph 21-31 and below in my conclusions. These are as follows:

103. It was erroneously dated 17 July 2011 and signed in 2014. (*This remained unexplained as the version attached to Kelly Phillips email had been dated 14 April 2014. Someone must have later changed the date. I am unable to make findings as to why.)*

Paragraph 42

104. The claimant was not a party to the 2nd consultancy agreement. The agreement was between ELHL and the respondent.

Paragraph 66

105. Finally, at no stage did DM suggest that he was dissatisfied with the 1st Consultancy Agreement. He had an opportunity to do so when he was asked to agree the terms of and sign the 2nd Consultancy Agreement. As I explain below in relation to the 2nd Consultancy Agreement, he was fully aware of the distinction between a services agreement and an employment contract and even though he expressly recognised that it was an appropriate option for some of MHC's professional service providers. As I explain below, far from objecting, he approved the terms of the 2nd Consultancy Agreement when it was sent to him in draft and signed it when he was asked to do so.

Paragraph 68

106. Turning now to the 2nd Consultancy Agreement, it is material to note

that it was not intended by the parties that the 2nd Consultancy Agreement should record some agreed change of status. It was simply replacing the 1st Consultancy Agreement with what had become the standard form of consultancy agreement used by MHC. Secondly, the points made already concerning invoicing and the fiscal implications of the relationship apply with equal force to the period after the 2nd Consultancy Agreement was signed as they do to the position down to that date. In addition, in my judgment the following points also suggest that the 2nd Consultancy Agreement reflected the reality of the relationship between DM, ELHL and MHC.

Paragraph 69

107. The 2nd Consultancy Agreement was sent by Mr. Pino to DM in draft in August 2013 – see the email of 28 August 2013 captioned "Contract for services". The final version was sent to DM for approval under cover of an email dated 29 April 2014. DM responded to Mr. Pino the following day by email in which DM said that he had gone through the draft the previous evening and that it was "… fine with me …". At no stage did DM object (a conclusion I reach because there is no contemporaneous documentation recording him objecting) to the contents of the drafts, nor is there any contemporaneous documentation recording his view that that it did not reflect the reality of the relationship or that what he required or at least desired was a contract of employment.

Paragraph 70

108. *As I have explained, it is probable that it was the fiscal advantages that each party gained from the arrangement. If the truth had been that DM would have preferred an employment contract from the outset and both parties had agreed to a services agreement only reluctantly and for the reasons identified by DM, then in my judgment DM would have so stated when the 2nd Consultancy Agreement became an issue. Equally, if the true intention had been that the contracting party would be DM and not ELHL, DM would have stated that fact when he was asked to review the 2nd Consultancy Agreement in draft. Whilst DM asserts in paragraph 57 of his witness statement dated 2 August 2018 that other medical practitioners engaged by MHC objected to not having contracts of employment, it is noticeable that DM does not assert he made such an objection on behalf of himself. In my judgment Dr Wilson's submission at paragraph 159 of his closing submissions that the 2nd Consultancy Agreement was "… forced on [DM] and other doctors against their will …" lacks any substance at any rate so far as DM is concerned, being unsupported by anything other than assertion made for the first time after the termination of the relationship between the parties*.

Paragraph 71

109. "Secondly, it is clear that at the time when DM was asked to approve the terms of what became the 2nd Consultancy Agreement and then to sign it, he was fully aware of the distinction between an employment contract and a services agreement and that the former may be more suitable for some– see (i) the draft minutes prepared by Mr Adey contained in his email of 14 March 2014 which refer to contracts for senior clinicians as something

to be managed by Mr John Prior who was to liaise with DM"… to ensure that contracts of employment or contracts for service[s] are in place for all senior clinicians …" sent to DM by Mr Adey on 15 March to which DM replied "The minutes of the meeting are agreed" and (ii) DM's email on 4 June 2014, where he suggests that "… professionals on the SLA should be offered the opportunity to apply for new roles as direct employees …". The reference to "… the SLA …" is to MHC's standard services agreement. DM executed the 2nd Consultancy Agreement in July 2014 – see Ms Quinn's email to DM dated 1 July 2014 – with its commencement date being backdated to 18 July 2011."

Paragraph 77

110. Secondly, it is not suggested that the parties did not carry into effect the provisions within the 2nd Consultancy Agreement relating to tax and National Insurance. This suggests that the parties deliberately structured their contract so as to enable each to take advantage of particular fiscal benefits. Whilst that point may not be decisive, it is one of significant weight when arising in the context of a freely negotiated agreement between parties of approximately equal bargaining power. In relation to this last point, there is nothing to suggest that DM was in a take it or leave it position when he was first sent and then signed the 2nd Consultancy Agreement. As I have explained, the contemporaneous material suggests that he willingly entered into these arrangements, while recognising that it might not be appropriate for everyone.

The terms of the second consultancy agreement

111. The relevant terms of the second consultancy agreement were as follows.

"Services" means medical consultancy services within Group 7 Schedule 9 to the VAT Act 1994. To hold the post of Responsible Officer in accordance with revalidation requirements for provide Consultant Psychiatry services to the hospital for the period of the contract;
…

PROVISION OF THE SERVICES

2.1 The Company shall engage the Consultant Company and the Consultant Company shall provide the Services (which shall be carried out on behalf of the Company by the Individual) on the terms of this agreement from 18th July 201. (sic)

2.2 The Consultant Company shall, and shall procure that the Individual shall comply with the reasonable requests of the Company and shall use its or his reasonable endeavours to promote the interests of the Company in the course of the provision of the Services.

OBLIGATIONS

3.1 During the Engagement the Consultant Company shall provide the Services for at least 19 days in each calendar month together with such additional time if any as may be necessary for their proper performance.

3.2 During the Engagement the Consultant Company shall, and (where appropriate) shall procure that the Individual shall:

(a) provide the Services with all due care, skill and ability and use its or his best endeavours to promote the interests of the Company or any Group Company;

(b) promptly give to the Board all such information and reports as it may reasonably require in connection with matters relating to the provision of the Services or the business of the Company or any Group Company; and

(c) promptly disclose to the Board any information of which the Consultant Company becomes aware which may adversely affect the Company, the Group or any Group Company including, without limitation, any information relating to the wrongdoing or proposed wrongdoing of the Consultant Company or the Individual or any other employee or officer of the Company or any Group Company.

3.3 If the Individual is unable to provide the Services due to illness or injury the Consultant Company shall advise the Company of that fact as soon as reasonably practicable and shall provide such evidence of the Individual's illness or injury as the Company may reasonably require. For the avoidance of doubt, no fee shall be payable in accordance with clause 4 in respect of any period during which the Services are not provided.

….

3.6 The Consultant Company may use another person, firm, company or organisation to perform any administrative, clerical or secretarial functions which are reasonably incidental to the provision of the Services provided that the Company will not be liable to bear the cost of such functions.

6 WORK LOCATION

6.1 The Consultant Company shall provide the Services under this Agreement at New Hall Independent Hospital, New Hall Lane, Ruabon, LL14 6HB and may be asked to assist in the capacity of Consultant Psychiatrist at another MHC facility.

OTHER ACTIVITIES

7.1 Nothing in this Agreement shall prevent the Consultant Company or the Individual from being engaged, concerned or having any financial interest in any Capacity in any other business, trade, profession or occupation during the Engagement provided that:

(a) such activity does not cause a breach of any of the Consultant Company's obligations under this Agreement; and

(b) the Consultant Company shall not, and shall procure that the Individual shall not, engage in any such activity if it relates to a business which is similar to or in any way competitive with the business of the Company or any Group Company without the prior written consent of the Company.

10 INSURANCE AND LIABILITY

10.1 The Company will not be liable for any of the acts or omissions of the Consultant Company or its employees, agents or sub-contractors and the Consultant Company will indemnify the Company on a continuing basis against all liabilities resulting or arising at any time from any such acts or omissions (including losses or expenses resulting from personal injury or property damage).

10.3 The Consultant Company will accordingly maintain at its own cost and expense full and comprehensive Insurance Policies in respect of the provision of the Services. The Consultant Company shall (on request) supply to the Company on request copies of such Insurance Policies and evidence that the relevant premiums have been paid.

112. **Section 11.** This section contained clauses which entitled the respondent to terminate the engagement with immediate effect without

notice. At 11 (i) one such circumstance was if the individual did not own all of the issued shared capital (from time to time) of the consultant company. Further at (h) – if the Individual is incapacitated (including by reason of illness or accident) from providing the Services for an aggregate period of 19 working days in any 52 week consecutive period.

113. I continue to set out the relevant terms:

13 STATUS

13.1 The relationship of the Consultant Company (and the Individual) to the Company will be that of independent contractor and nothing in this agreement shall render it (nor the Individual) an employee, worker, agent or partner of the Company and the Consultant Company shall not hold itself out as such and shall procure that the Individual shall not hold himself out as such.

13.2 This agreement constitutes a contract for the provision of services and not a contract of employment and accordingly the Consultant Company shall be fully responsible for and shall indemnify the Company or any Group Company for and in respect of payment of the following within the prescribed time limits….

114. The second consultancy agreement provided that the claimant, via ELHL would provide "medical consultancy services" and specifically cited the role of responsible officer. It did not cite the roles of medical officer or Caldicott Guardian. I find therefore than in specifically not referencing these roles under the second consultancy agreement, whereas the role of responsible officer was clearly referenced, these roles did not fall under the second consultancy agreement and were outside of the scope of the agreement.

Events after the second consultancy agreement was entered into

115. At some point in 2013 the claimant had ceased direct clinical work and was no longer required to manage patients. In April 2014 he was appointed as the respondent's Caldicott Guardian. This is a member of staff given responsibility for ensuring patient data is kept secure. This role cannot be performed by a corporate vehicle. I find this was a separate agreement between the claimant and respondent for the claimant to provide this service to the respondent, and it must have been undertaken personally by the claimant.

116. In or around June 2014 the claimant, Ms Bessal and Mr Pino formed an Operations Board. Ms Bessal agreed a package with Mr Adey in respect of her additional duties. She was line managed by the claimant who would approve her annual leave, sick pay and other line management functions.

117. The Operations Board initially met weekly in June 2014, in attendance would be the claimant, Mr Adey, Mr Pino and Ms Bessal. In or around June 2014 Mr Adey ceased to attend the meetings due to a serious illness. Matters were delegated to Mr Pino although Mr Adey remained in contact via email and telephone. Mr Pino would convey instructions from Mr Adey to the claimant and Ms Bessal.

118. Ms Bessal was removed from the Operations Board by Mr Adey and Mr Hallows in the summer of 2015.

119. In June 2015 Mr Adey approved a bonus payment to the claimant in the sum of £20,000.

120. In August 2015 the respondent approved a relocation allowance for the claimant in the sum of £1500 per month.

121. The claimant was absent from work after sustaining an injury to his hand and was paid in full during his absence. This was outside of the terms of the second consultancy agreement which did not provide for paid sick leave.

122. There was also a period where he was unable to drive for 6 weeks during which time he did not visit any of the respondent's sites. He was also paid in full during this period.

123. In January 2016 Mr Hallows (who had been engaged by Mr Adey to perform a strategic review of the respondent) became part of a newly formed Executive Management Team ("EMT") along with Mr Adey. The claimant was not part of this team.

Claimant's line management responsibilities

124. The claimant performed a line management function for a number of respondent employees. Two personal assistants were employed by the respondent for the claimant namely Ms Edwards and Ms Oxberry. He also line managed Ms Ward, Hospital Manager, Ms Bessal, Director of Care, Dr Rauf, Clinical Director, Dr Qureshi, Medical lead, Dr Worthington, Head of Autism, Ms Taylor, Head of Business Development, Mrs Phillips (Head of Recruitment), Ms Surgeon, head of Therapies and Mr Ward, head of Contracts and Tenders.

Other duties performed by the claimant

125. The claimant refuted that the respondent had little or no control over his day to day working practices. His witness statement set out numerous examples of what the claimant described as examples of where he was subject to the control and direction of the respondent. For reasons of proportionality I do not set all of these out in the findings of fact. In summary I accepted the claimant's evidence which was corroborated by Ms Bessal. Ms Bessal confirmed that the claimant dealt with a wide range of matters across the organisation, outside of clinical matters and referenced examples in the Operation Board minutes. These were as follows:

- He participated and attended in board and executive meetings as well as management and operations meetings;
- He managed the transition of Regency Hospitals acquired by Mr Adey and was asked to review what type of service would be suitable at another acquired site, Heswall;
- He was instructed to hear an internal disciplinary panel;
- He was instructed to engage in tendering and procurement relating to hospital refurbishment projects;
- He was instructed to make decisions on contract renewals, identify staff roles and procure senior staff;

- For a period of time he managed HR; and he was asked to oversee training.

126. I find that the claimant was not autonomous in his decision making outside what would normally be regarded as having the authority to make high level decisions in executing the tasks and duties in his role. He was subject to the direction and control of Mr Pino and Mr Adey, who would make strategic decisions and then the claimant would manage the implementation of the decisions. The type of duties he was involved in went far beyond pure clinical matters.

Holiday requests

127. On 21 January 2014 Mr Adey emailed Mr Pino about the claimant's upcoming holiday. He stated as follows:

"Roberto.

Devan has failed to pick up on the fact that he needs to cancel his holiday because of the Regency deal.

I think that you should be more overt in your communication with him on this matter!

He is part of top management and should now be learning what this means!
M"

128. On 11 April 2014 the claimant emailed Kelly Phillips setting out on dates he wished to take leave the forthcoming year. The claimant referred to them as leave requests. He asked if these dates were okay with Ms Phillips.

129. On 12 December 2015 the claimant requested leave from Mr Adey for a visit to South Africa. Mr Hallows was copied into this email. The claimant stated *"May I request leave for the following periods..".* Mr Adey replied *"Devan. Approved. M"*

130. The claimant took annual leave throughout his time with the respondent and was always paid for it. This was not provided for within the consultancy agreement.

Draft CV

131. I find that the claimant's draft CVs in the bundle are not of any assistance when deciding the issues in this claim.

Termination of the claimant's engagement

132. On 4 April 2016 Ms McDevitt was informed by Mr Hallows that the decision had been taken to terminate the claimant's engagement with immediate effect. Ms McDevitt and Mr Selwyn (who was Head of Legal) met with the claimant that day to inform him that the respondent would be *'activating the provisions of the consultancy agreement to end its working relationship with ELHL and thereby the claimant'*.

Respondent's witness evidence

Kerry McDevitt

133. Ms McDevitt was engaged by the respondent as a consultant in November 2015. She became Head of People Services in around May 2016. Ms McDevitt gave evidence that it was her understanding the claimant worked autonomously and without supervision or direction and that she was not aware of him ever receiving support from senior individuals within the business. Ms McDevitt only ever attended two meetings with the claimant. One was his termination meeting. The other was when he was invited to a meeting with the consultant psychiatrists to introduce herself. It is therefore difficult to understand how Ms McDevitt was able to form the above understanding and I do not accept her evidence that the claimant worked autonomously and without supervision.

134. Ms McDevitt's witness statement also stated that to her knowledge the claimant only dealt with clinical matters over which he had complete autonomy and he did not have any involvement with other departments such as HR. Ms McDevitt was asked about this in cross examination. She accepted that no one had informed her that the claimant had complete autonomy over clinical matters and this was based on her perception from the meetings she had attended with the claimant. I do not accept the evidence that the claimant only dealt with clinical matters see paragraphs 129 – 130.

135. I did not find Ms McDevitt's evidence to be of any assistance in determinant issues in this case.

Graham Hallows

136. Mr Hallows was appointed by the respondent as a consultant to assist and support the managing director of Young Foundations in January 2015. From August 2015 he was asked by Mr Adey to conduct a strategic review across the respondent.

137. Mr Hallows asserted that the claimant had never requested an absence from him or anyone else as far as he was aware. Mr Hallows had to concede that this was not credible under cross examination as he was copied into the email set out at paragraph 134 above, where the claimant had requested and Mr Adey had approved leave.

138. Mr Hallows also asserted the claimant was "autonomous" in the manner in which he delivered services. He accepted under cross examination he could only speak for the period from August 2015 onwards. I did not accept Mr Hallow's evidence that the claimant was autonomous for the same reasons I did not accept Ms McDevitt's same assertions.

Mr Lee Reed

139. Mr Reed was CEO of Castlebeck from January 2011 until March 2012. From April 2012 until November 2012, when he left, he was the CEO of MHC and Young Foundations. I have set out the evidence I consider to be relevant from Mr Reed above.

Conclusions

140. I firstly deal with the absence of Mr Adey and Mr Pino as witnesses for the respondent. There was no explanation before the Tribunal as to why neither were called as witnesses for the respondent. I accept Dr Wilson's submission that they were the two individuals in the best position to have given evidence on the worker status issue and the claimant would have sought to cross examine them with a view to arriving at the truth.

141. Where I have made findings of facts above I have done so on the balance of probabilities having regard to the documents before me and evaluating and assessing the witness evidence. As Mr Pino was not called to give oral evidence and therefore the claimant could not challenge that evidence, where there is a finding to be made between those two, I have given greater weight to the claimant's evidence than Mr Pino's but I have done so by considering and weighing all the evidence before me and not limited the evaluation to the non appearance of Mr Pino.

142. At the point at which the claimant and the respondent entered into the second consultancy agreement, the parties to that agreement changed. The HCJ held that the claimant was not a party to the second consultancy agreement. The parties to the second agreement were ELHL and the respondent. Accordingly, in respect of the work and services performed under the second consultancy agreement there was no direct contractual relationship between the claimant and respondent and he cannot have been a worker for the purposes of S230 ERA 1996 in respect of the work and services performed under that contract. Applying the guidance in **McTigue** I conclude as follows:

Did the claimant "work" for the respondent?

143. The claimant evidently worked for the respondent in performing the services of medical consultancy and responsible officer.

Was the claimant introduced or supplied to do the work by a third person?

144. The respondent conceded that ELHL was a separate legal entity but submitted it was artificial to suggest the claimant was introduced in the commonly encountered meaning of the term and further, that the threshold concept was intended to capture arrangements whereby a third party acts (e.g. an agency) as an intermediary for the provision of the putative worker and in circumstances where they have no control, over the introduction. The respondent further submitted that the evidence confirmed that it was the claimant who effected the introduction and directed the use of a corporate vehicle for his own financial benefit and that did not emanate from ELHL or the respondent.

145. I respectfully am unable to accept these submissions.

146. In my judgment the claimant was initially "introduced" to the respondent firstly by the employment agency in 2011 and subsequently "supplied" to do that work by ELHL, being the "third person". Although at this juncture I am considering the second consultancy agreement, in my

judgment I cannot reach conclusions as to who introduced or supplied the claimant in 2014 in a vacuum and without considering how that introduction could have come about in the first place.

147. In 2011 the claimant was clearly introduced to the respondent by an agency. He was interviewed and recruited personally as an individual. The respondent was not looking to engage a company to provide a consultant psychiatrist they were looking for an individual to provide that role personally. In 2014 the claimant's role had significantly expanded and evolved. He was no longer performing the services of a consultant psychiatrist. He did not even have a patient caseload. In my judgment he was clearly "supplied" as the named individual who would be supplying the services to the respondent by ELHL. It does not matter, in my judgment, that the claimant had sole control of ELHL as it was a separate and distinct legal entity. The second consultancy agreement provided that the consultant company (ELHL) had to procure the individual (the claimant). In my judgment it cannot be any clearer that ELHL supplied the claimant to the respondent.

<u>Were the terms upon which the claimant was engaged to do the work in practice substantially determined not by him but by the person he worked for, by the third person or both?</u>

148. The starting point is the contract whose terms are being considered. In my judgment the terms upon which the claimant was engaged to do the work or services under the second consultancy agreement were substantially determined by the respondent. There was no evidence to support the submission that the claimant effected the introduction and directed the use of the corporate vehicle. The terms were set out in the second consultancy agreement. ELHL did not draft the agreement nor did the claimant. The evidence overwhelmingly supported a finding that the respondent (via its advisors) had set the terms of the agreement upon engagement.

149. The respondent's advisors drafted the terms of the second agreement upon instructions from the respondent. I have reached this conclusion based on the evidence before me (see paragraphs 89-93 and 96-98). Both Mr Pino and Mr Adey were involved in specifying terms and instructing their advisors to draft the agreement. Ms Phillips and Ms Quinn were instructed to amend certain sections of the draft provided by Burges Salmon and secure the claimant's agreement to the terms. The fact that the claimant readily agreed to the terms, that it was mutually advantageous in respect of the tax position and that the claimant had some input in respect of negotiating remuneration does not in my judgment change the conclusion that the terms were substantially determined by the respondent.

150. The respondent, through the terms of the second consultancy agreement set out the place of work, number of days per month and the nature of the services to be provided. Although the agreement specified the services would be supplied by the consultant company, it referenced the obligations on the "individual" throughout. There was no right of substitution. The respondent also determined that they could terminate the agreement if the claimant was not the sole shareholder of the consultant company. The respondent determined that the claimant's service would be terminated and

also the terms of termination.

151. Dr Morgan submitted that it would be an incorrect legal position to incline to a view that the terms of the agreements between the parties might be discarded or relegated in favour of operational practices. This was in the context of the submission that it was not permissible to import to any agreement implied terms which contradict or are otherwise inconsistent with express terms which the parties have adopted.

152. In my judgment, the wording of the statute does require an examination of what happened in practice and this also cannot be disregarded.

153. I am assisted in determining what I should consider in deciding whether a claimant falls within the definition of s S43K worker by what Judge Eady QC held in **Keppel Seghers (paragraphs 70 and 71)**.

154. In that case the tribunal held, as I have done here, that the respondent was in the position of determining the claimant's initial terms of engagement ('the terms on which he was engaged to do the work'). However the tribunal also held that the employer had determined the claimant's terms of engagement during the course of the operation. This is precisely what I have been invited to do by the claimant in this case and what the respondent has submitted I must not do.

155. Judge Eady held as follows about this point:

"It was entirely consistent for the tribunal to conclude that the respondent had also determined the initial terms of the engagement. In so doing, the tribunal was not restricted to looking at the terms of the various contracts but to have regard to what had occurred 'in practice'. Not only is that the language of the statute, it will inevitably be required where there is (as here) no direct contract between complainant and respondent. Here the tribunal was entitled to look at the various contracts relevant to the relationship and to see how these worked in practice.

In terms of the determination of the claimant's terms 'in practice', it is right that the tribunal had regard to the question of control. In so doing, I do not consider that it thereby lost sight of the statutory language. As the claimant submitted, control is not irrelevant to the question as to who determines the terms on which work is to be done. In the present case, the tribunal was plainly influenced by the fact that the requirements of the work were laid down by the respondent and the claimant was obliged to report to its employee (paragraph 11). Those were findings of fact that it was entitled to make on the evidence before it and which plainly supported its conclusion as to both the initial determination of the terms on which the claimant was 'to do the work' (i.e. that it was not the claimant himself, through Crown, that had substantially determined those terms) and as to the continuing determination of those terms (i.e. that it was the respondent which was the employer for s.43K(2)(a) purposes)."

156. I have also had regard to what Lord Justice Elias held in **Day v Lewisham and Greenwich NHS Trust** at paragraphs 29 that S43K requires the Tribunal to take a broad brush approach having regard to all of the factors on which the worker was engaged to do the work.

157. I am therefore satisfied that I should look at the continuing determination of those terms. In doing so I reach the following conclusions:

158. The claimant was subject to control by the respondent. He was free to make decisions as a senior professional but within parameters set by the board and Mr Adey. I had no difficulty in reaching this conclusion given the contemporaneous documentation before me and that Mr Pino himself observed that he was essentially controlled by the board (see paragraph 83). I also took into account the language used by Mr Adey in his email concerning the claimant's annual leave (see paragraph 127). Such language used contemporaneously by Mr Pino and Mr Adey was wholly at odds with the respondent's case that the claimant was an autonomous business in his own right.

159. I do not accept that if the claimant was so controlled this would undermine his ability to discharge his professional duties. The claimant was able to operate within the parameters of his professional duties at the same time as being directed by the board. I am not making a finding that the board or Mr Adey operated a minutiae degree of control. I have concluded that the claimant operated within the parameters of decisions made mainly to implement those decisions. He was in some cases free to choose how to implement decisions but the decisions were ultimately made by the board or Mr Adey.

160. Lastly, I set out my overall conclusions in respect of the purposive construction which should favour protection under S43K wherever possible rather than deprive individuals of that protection. The claim is one of detriment having made protected disclosures. The claimant was the most senior clinician within the respondent organisation which provides care for vulnerable individuals. In my judgment if the claimant is not said to fall within the definition of a worker in these circumstances, for the purpose of making protected disclosures, then this would undermine the purpose of the legislation and the mischief it is designed to prevent.

161. For these reasons I find that the claimant was a worker for the purposes of S43K ERA 1996.

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Employment Judge S Moore

Date: 10 January 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 11 January 2022

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FOR EMPLOYMENT TRIBUNALS Mr N Roche