EMPLOYMENT TRIBUNALS

Claimant: Dr A Herane-Vives

Respondents: 1) Implemental Worldwide CIC
2) South London & Maudsley Hospital NHS Foundation Trust

Heard at: London South Croydon (in public; by CVP)

On: 27 & 28 January 2022

Before: Employment Judge Tsamados (sitting alone)

Representation

Claimant: Mr S Liberadzki, Counsel
Respondent: Ms L Chudleigh, Counsel

OPEN PRELIMINARY HEARING RESERVED JUDGMENT

The Employment Tribunal has no jurisdiction to hear the claimant's complaints and his claim is dismissed.

REASONS

Introduction

1. The claimant presented a claim form to the Tribunal on 11 May 2020, following a period of early conciliation from 13 March to 13 April 2020. In essence he seeks a declaration of his status as a worker/employee and has made complaints of race discrimination, sex discrimination including equal pay, as well as damages for breach of contract/ unauthorised deductions from wages in respect of arrears of pay.

2. In their response, the respondents deny that the claimant was an employee or a worker and further deny his claim in its entirety. They also aver that his discrimination complaints are not sufficiently particularised and the equal pay complaint is misconceived.

3. By letter dated 22 July 2020, the Tribunal sent a notice of a preliminary hearing on case management to be held by telephone on 16 February 2021.

4. By a letter dated 19 August 2020, the respondents' solicitors made an application to convert that hearing to an open preliminary hearing at which to consider the issue of employment status, jurisdiction (time limits) and for a strike out order/deposit order on the basis of the chances of success of the claim.

5. By a letter dated 15 October 2020, the Employment Tribunal notified the parties that the hearing had been converted to a one-day open preliminary hearing as requested. This was followed by a formal notice of that hearing dated 19 October 2020.

6. On 6 January 2022, the claimant made an application to amend his complaint of unauthorised deductions from wages to include an alternative complaint that he was contractually entitled to be paid the minimum wage in respect of the hours he worked pursuant to section 17 of the National Minimum Wage Act 1998. Whilst this was outside the parameters of this open preliminary hearing, I was invited to consider this application if time permitted.

7. By an email received on 26 January 2022 timed at 10:42 am, the claimant withdrew his discrimination and equal pay complaints. I have recorded these complaints as dismissed on withdrawal in a separate Judgment.

The issues for the open preliminary hearing

8. On the second day of the hearing, it became apparent that there was no time limit issue. Given the dates of presentation of the claim and early conciliation the last date on which a matter could be in time was 14 December 2019. The claimant's relationship with the respondents ended on 6 December 2019. But his position is that he was entitled to be paid on the 24th of each month in line with other Trainee Doctors, or the 23rd of each month, being the anniversary date of the commencement of his employment or at the end of each month. In each case this would mean that the last date of payment would fall in time. Nevertheless, the parties did provide submissions on the time point.

9. As a result the remaining issues to be determined at this hearing were as follows:

    a. Whether the claimant was an employee or worker of the respondents, and if so;

    b. Whether the claim was presented in time;

    c. The respondents' strike out and deposit order applications;

    d. The claimant's application to amend his claim to add a complaint of failure to pay him the National Minimum Wage.

Conduct of the hearing

10. I conducted the hearing by video using the HMCTS' Cloud Video Platform (CVP). Whilst there were conductivity issues at times we overcame these and I was able to conduct a fair hearing. At the end of the hearing a reserved judgment.

Evidence and documents

11. I was provided with the following electronic documents: a bundle of documents from the respondents consisting of 575 pages, including additional documents from the claimant; an index to the bundle; and 2 pages of oncall rota emails from the claimant. I will refer to pages from the bundle by reference to "B" followed by the requisite page number(s).

12. I heard evidence from the claimant by way of two written statements and in oral testimony. I heard evidence on behalf of the respondents from Dr Elizabeth Parker by way of two written statements and in oral testimony.

13. At the end of the evidence I was provided with a skeleton argument and supporting authorities by Mr Liberadski and with written submissions and authorities by Ms Chudleigh. Both Counsel spoke to their respective documents.

14. There was insufficient time for me to deliberate and reach a decision. I therefore adjourned and indicated that I would send out a reserved decision. I must apologise for the length of time that it has taken to provide my Judgment. This is due to pressure of work and my part-time working pattern.

Findings

15. I decided all the findings referred to below on the balance of probability, having considered all of the evidence given by witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that I failed to consider it. I have only made those findings of fact necessary for me to determine the preliminary issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

16. Where individuals have been referred to who did not give evidence at the hearing I have used their initials.

17. The claimant is a Chilean national. He is a long-term EEA national and permanent UK resident having arrived to live in the UK in July 2011. His further position is that whilst he is a non-EEA national he is entitled to be treated as one pursuant to the EEA Citizen Directive 2004/38/ECI following his marriage to an EEA national on 14 May 2014.

18. Before coming to the UK, the claimant obtained 5 years' clinical experience as a Consultant Psychiatrist in Chile. He came to the UK on a full Postgraduate Research Student Scholarship to undertake 5 years' Clinical Research in Psychiatry and obtained an MSc and PhD in Psychological

Medicine from the Institute of Psychiatry, Psychology and Neuroscience at King's College London.

19. On 17 March 2015, he applied to the first respondent (previously known as Maudsley International or "MI" for short) to participate in the Clinical Development Fellowship ("CDF") programme. The second respondent acts as a host organisation for the clinical placements that Fellows undertake as part of the Fellowship.

20. Dr Elizabeth Parker was the Coordinator of the CDF. She was a Consultant Psychologist working for the second respondent. After her retirement in June 2010, she continued to work on a part-time basis within the second respondent's Department of Postgraduate Medical Education until February 2012 and subsequently worked in a voluntary capacity for the first respondent.

21. Her role as Coordinator involved considering CDF applications, facilitating interviews for suitable candidates and if a candidate was successful at interview, she was the nominated sponsor for their registration with the General Medical Council ("GMC"). The relevant speciality Training Programme Director was responsible for planning each doctor's specific training schedule and placements with consultant supervisors. However, it was Dr Parker's role to ensure appraisal meetings took place and regular progress reports were sent to the sponsoring body funding each Fellowship.

22. I was referred to the claimant's CDF application form at B 90-96. I was also referred to the CDF programme document at B 81-84. That document is headed Maudsley International Psychiatry Fellowship programme outline for 2014/2015. The CDF was previously referred to as the Maudsley International Psychiatry Fellowship or MI Fellowship. I was further referred to an extract from the first respondent's website at B 63-65.

23. The CDF is a vocational programme for overseas psychiatrists who wish to gain experience working in the NHS. Applicants are required to have completed a minimum of 3 years residency training in psychiatry in their home country and obtained the International English Language Testing System (IELTS) level 7.5 across all domains, as required by the GMC. Successful applicants are sponsored for GMC registration. The CDF is for a period of 13 months in total, with the initial month for orientation and observation. The 12 month clinical training component is described at B 84 as offering:

" an experience level to that of first year specialist registrars in the UK".

24. The first respondent's website at B 63 states as follows:

"Fellows will be expected to participate fully as medical members of multidisciplinary teams carrying out assessments and reviews of patients offering advice to non-medical colleagues attending ward rounds and team meetings and liaising with referrers and other agencies. They will also be encouraged to become involved with teaching and to gain some experience of medical management."

25. The CDF is described at B 82 of the MI Fellowship programme outline (and repeated on the first respondent's website at B 63) as follows:

"This scheme is a clinical development programme specifically designed to provide opportunities for overseas colleagues to have access to a wide range of clinicians and researchers in order to share good practice with other countries. It runs in parallel with the existing approved psychiatric training scheme of South London and Maudsley NHS Foundation Trust (SLaM)., although it is not an alternative to the UK based psychiatry training scheme. It is part of the commitment MI has to the wider goals of improving global mental health".

26. The document clearly states that the CDF is not an alternative to the UK-based psychiatry training schemes. Having heard the evidence from Dr Parker at paragraphs 15 to 19 of her first witness statement, I accept that in any event neither respondent would have had the opportunity to appoint the claimant to such a scheme because that is the responsibility of Health Education England's ("HEE"'s) North West Local Office. Moreover, the claimant was aware of this prior to commencing the CDF, as indicated within the correspondence he had with Dr Parker at that time. I refer to B 485-486 and 492-493 in this regard.

27. The document also makes clear that the purpose of the programme was the provision of training and experience for psychiatrists from overseas. In addition, the guidance notes within the claimant's application form (at B 90-96) state that the scheme is a training and development programme for suitably qualified and experienced international psychiatrists and that the cost of it is payable by the applicant.

28. Within his application form at B 91, the claimant was asked to outline the purpose of his Fellowship and which service area he would like to be hosted in to carry out the Fellowship. His response was as follows:

"During my PhD I have gained a comprehensive experience in research. This experience whilst fulfilling and rewarding would not be complete if I failed to enhance my clinical training in probably the leading psychiatric centre in the world.

The clinical development Fellowship will enable me to update my knowledge and clinical skills embedded in an environment which offers a patient cohort driven from a diverse cultural traditions and multicultural backgrounds.

It is also my intention to register my specialist psychiatric qualification/degree, awarded in Chile, here in the UK. The clinical fellowship would offer me the opportunity to gain the appropriate clinical experience required to achieve this. In the future I look forward to returning to Chile to practice and continue my clinical work…

… My aspiration is to pursue a career as a clinical academic psychiatrist in my home country of Chile…"

29. In evidence, the claimant was cross examined as to whether he intended to return to Chile at the end of his CDF. His responses were contradictory. He initially stated that he did intend to return, but not at the end of the CDF, but at the end of his academic studies. When pressed on the basis that if he had not intended to return to Chile to practice as a psychiatrist he would not have been offered a place on the CDF, he answered that as he had said to Dr Parker it was his intention never to return to Chile but to practice as a Clinical Academic Psychiatrist. When it was put to him that he had then lied on his application form, he became incensed and said that he did not lie, he told Dr Parker that he was unsure of his future, that he wanted the ICL and so would not be returning to Chile. This was not something that had been said before and was not put to Dr Parker in cross examination.

30. Whilst it is of course a matter for the claimant as to his intention to return to Chile or not, I deemed this line of questioning appropriate to the extent that the underlying thrust of his own case was that the respondents had falsely represented the CDF programme to the Chilean government as being a training/experience programme when in reality he was being employed as trainee doctor on an unpaid basis and was being exploited.

31. It was a term of the CDF programme that applicants should have finance in place before making their application, the cost of the programme being £30,000 per year. I was referred to the MI Psychiatry Fellowship programme outline for 2017/18 in this regard, at B 117-118, as well as correspondence between the claimant and JR, the Director of Business Strategy & Operations, Implement, at B 234-235.

32. The Claimant's application confirmed at B 95 that he had sponsorship with the Comisión Nacional de Investigación Científica y Tecnológica (CONICYT) which had been approved in principle. As I understand it, this is a Chilean government agency responsible for coordinating, promoting and aiding scientific research in Chile.

33. As a result, the claimant's fees were to be/were paid by a scholarship from the Chilean government, which also extended to payment of his living costs, travel expenses, as well as other expenses. I was referred to B 239 and 295 in this regard.

34. Following his application and subsequent interview on 13 May 2015, the claimant was offered a Fellowship conditional upon receipt of references and the attainment of the English language requirements for GMC registration.

35. I was referred to a letter from JR to the claimant dated 15 May 2015 at B 248-249. I note that the letter states as follows:

> *"The panel were impressed by your very evident enthusiasm for psychiatry and your commitment as both a clinician and researcher. However, they share the reservations which you identified - the fact that you have never practised as a clinician within the UK medical system; have not worked as a clinical psychiatrist for the past four years and have no experience of practising in English.*
>
> *For these reasons, the panel feel that it would be unreasonable to expect you to function at the equivalent level to that of a first year UK senior trainee, but would wish to support your application and could offer you a Fellowship programme involving a higher level of supervision and support, in order to address these concerns in a targeted and gradual manner."*

36. The claimant has made a number of assertions within his two witness statements. Essentially these amount to the following: that because he is married to an EEA national this gives him some form of exemption to practice medicine in the UK. I am not convinced that this is correct and was not provided with any definitive evidence in support of his contentions. Whilst marriage to an EEA national allows the claimant to live and work in the UK, it does not provide him with some sort of exemption from UK medical practice requirements. The claimant had no experience of practising in the UK. Indeed the claimant did not hold any EU medical qualifications. Furthermore, the email correspondence at B 228 indicates that the Claimant had a clear understanding of the common routes to GMC registration, having not studied medicine in the UK or the EU and not having sat the Professional and

Linguistic Assessment Board (PLAB) 1 & 2. Indeed, part of his rationale for applying to the CDF was to obtain GMC registration.

37. The claimant was successful in passing the IELTS test and obtaining the requisite scores required by the GMC. He was sponsored for registration with the GMC by Dr Parker. I was referred to the Certificate of Sponsorship at B 123-124. This states that the claimant's grade was ST4 and his speciality was Psychiatry. He was issued with a certificate by the GMC at B 125-126. This shows his status as "full registration in APS with a licence to practise" for a year commencing on 20 October 2017. APS is an abbreviation for approved practice settings and the APS scheme.

38. The claimant commenced the CDF programme on 23 October 2017 following a delay during which he completed his PhD and undertook the IELTS examination.

39. He was issued with a number of Honorary Clinical Fellowship contracts by the second respondent for the duration of the Fellowship. The first of these is dated 21 May 2018 and is at B 127-128 and is stated to be effective from 23 October 2017 ending on 22 October 2018. The second of these is dated 2 October 2019 and is at B 189-190 and is stated to be effective from September 2019 ending in December 2019. Neither of these documents are signed and I was not referred to any intervening contracts although nothing was made of this by either party.

40. The first of these documents states that the claimant was offered an unpaid Honorary Clinical Fellowship Contract for 40 hours per week based in PHYCHOSIS CAG under Dr JR. Reference is made to the terms and conditions governing the appointment as well as other procedures, policies and legislation at clauses 7-14. Terms relating to termination and notice are at clauses 16 and 17.

41. The second of these documents is virtually identical save that the claimant is based in the PSYCHOLOGICAL MEDICINE CAG for 35 hours per week, the dates of its duration and an additional paragraph stating that the claimant will be accountable to Dr GR.

42. The total sum of £55,000 was paid by the Chilean government in respect of the claimant's participation on the CDF programme. This money was divided between the two respondents and King's College London's Health Service and Population Research Department Institute of Psychiatry, Psychology and Neuroscience (a code awarding body). The distribution of these funds is set out within paragraphs 2 to 3 of Dr Parker's supplementary witness statement.

43. The claimant undertook work at a number of psychiatric services and was assigned a clinical supervisor for each placement:

    a. From October 2017 at Lambeth Early Onset Service for 10 months, initially in the community clinic and after 7 months in the inpatient ward for 2 days per week, under the supervision of Dr EI (B 263 & 268);

b. From August 2018 two days per week in the National Affective Disorders Service under Prof AY, and two days at the OPTIMA service under Dr KM. He was provided with a job description and weekly timetable for this role (B 129-130);

c. From March to June 2019 he took three months of compassionate leave with the Respondents' agreement (B 359);

d. In the final five months to December 2019, he worked in liaison psychiatry at Kings College Hospital under Dr IM, then at the Wandsworth Community Drug and Alcohol Service under Dr SB.

44. On 6 November 2017, Dr Parker undertook a review of the claimant's Fellowship in which she made clear that he had initially found the NHS system very different to that of the Chilean system and that he had made excellent use of the training opportunities. I refer to B 156-162 which sets out some of the training and clinical experience that the claimant had received.

45. The claimant completed the CDF programme on 6 December 2019.

46. Following his completion, the claimant was awarded a CDF certificate stating that he had successfully completed the programme. The document summarises the training and experience that he received. I was referred to this certificate at B 191-192.

47. The claimant's position in evidence is as follows:

a. He was in reality employed by the second respondent as a trainee doctor working on a full-time basis as a psychiatrist in clinical practice. He was provided with clinical work by the second respondent to undertake each day. His duties, level of responsibility, supervision arrangements and rotation between placements and weekly hours were either identical or very similar to trainee doctors employed by the second respondent at ST4 and ST5 grades, who worked alongside him as colleagues. He further relies on the requirement that he obtain full registration with the GMC, for which the respondent sponsored him, on the basis that he was (initially) an ST4 level higher trainee.

b. In note that these are grades which relate to what are called speciality trainees and speciality registrars with a certain number of years of experience. As such, the claimant believes that he was entitled to the same terms and conditions as a trainee doctor. I was referred to an extract from a document entitled "Doctors' Titles: Explained" at B 443 and to the Pay and Conditions Circular (M&D) 2/2020 at B 371-374 which sets out terms and conditions of employment.

c. Notwithstanding the above, the respondents required him, or more accurately the Chilean government on his behalf, to pay them a fee for working for the second respondent rather than paying him a salary for his work.

d. That he rotated between his placements in the same manner as any higher trainee doctor employed by the second respondent. That he had one study special interest day per week, in which he was free to pursue his own research or specialist interests, in the same way as is prescribed by the Royal College of Psychiatrists' curriculum on specialist training (at B 377-378).

e. His clinical duties were considered by his supervisors to be identical to those of other higher trainees and he was required to undertake the same mandatory training courses. By way of example I was referred to B 275, 283-284 and 293. He worked alongside ST4 and ST5 trainees and was able to cover their duties when needed (B349). His supervisor supported his application for approval under section 12 of the Mental Health Act 1983 to authorise involuntary detention of patients.

f. He was subject to the same performance assessment framework as other higher trainees, including annual reviews completed in November 2018 at B 156 and November 2019 at B 458.

g. He was permitted to take up to 6 weeks' annual leave plus bank holidays (at B 259).

h. The two honorary contracts both state that as follows (at B 127 and 189):

> *"The terms and conditions of appointment are as set out in the Terms and Conditions of Service of Hospital Medical and Dental staff (England & Wales) and General Council Conditions of Service, as amended from time to time".*

i. In addition the contracts both state that *"your employment"* is subject to the second respondent's grievance and disciplinary policies at B127 and 189.

j. Higher trainees employed by the second respondent are subject to the same national terms and conditions and the NHS Trust policies. I was referred to the sample ST5 contract at B 171-179.

48. The respondents' position in evidence is as follows:

a. The CDF programme offered a commensurate level of training and experience to that of a junior doctor.

b. The HEE recruited and appointed trainee doctors and not the first or second respondent.

c. The claimant was not eligible to apply as a trainee doctor in any event having not practiced medicine in the UK and having not passed the Professional and Linguistic Assessment Board ("PLBA") examination.

d. He was not required to be on the on-call rota.

e. Whilst he was offered work, his attendance to undertake the work was voluntary. However if he was unable to attend there was an expectation that he would notify his supervisor and if he simply did not attend without notification then it could lead to disciplinary proceedings. But this never happened. The claimant was very diligent.

f. He was not included in the staffing levels of the services in which he worked. The sole purpose of the CDF programme was to offer training opportunities comparable to the training that specialist registrars received. He was in effect supernumerary, that is additional to the services that the second respondent provided, those services already being staffed. Whilst he made a contribution to the services and had a positive impact on the numbers of patients seen, if he had not been there for any reason, the patients would still have been seen. And in any event there was an obligation upon the second respondent to train, supervise and offer feedback which detracted from the amount of time he spent with patients.

g. The honorary contracts are not the same as the contractual documents issued to junior doctors on a HEE accredited higher training programme. The relationship had to be subject to a degree of regulation. Fellows would be practising as doctors within the second respondent Trust, seeing patients, accessing patient records and participating in confidential discussions about patient care. In addition, the purpose of issuing honorary contracts to Fellows was for insurance and indemnity purposes because the GMC requires practising doctors to be properly insured.

49. It was accepted by the parties that there were similarities between the trainee doctor and CDF fellows. These related to the length of clinical experience, English language qualification, GMC registration, training, supervision, two annual reviews and 6 weeks' annual leave. This also included the duties undertaken by the claimant in his various placements. But I accepted the respondents' evidence that clearly the intention of the CDF was to offer a commensurate experience to that of a trainee doctor.

50. In addition, I accept that there were similarities between the contracts issued to trainee doctors and the honorary contracts issued to the claimant. I was taken to a standard contract for an ST5 training post at B 171 by way of comparison to clauses 1.2, 1.3, 1.4, 3.1 and 7. The claimant's position is that this contract reflected an employment relationship with a heavy element of training and supervision and that the only difference with his arrangement was that he was not being paid.

51. The claimant accepted that he was not on the oncall rotas as was required of trainee doctors. In addition, the respondents' evidence was that trainee doctors would usually be on placement for either 3 or 12 months or a combination of 6 and 12 month placements generally rotating in the first week of February and August of each year.

52. The claimant also submitted that he was given study leave and was paid for it. The respondents' denied that he was eligible for study leave because he

was not a trainee doctor on an accredited training scheme. The claimant pointed to a payment to attend a conference. However, it was clear in evidence, at paragraphs 7-10 of Dr Parker's supplementary witness statement, that this was a discretionary payment and from B 154 that, in any event, it was simply for reimbursement of expenses that the claimant incurred in attending the conference. I accepted the respondents' evidence and drew no inference from the expense claim form being "for all staff".

Relevant law

53. Section 230 of the Employment Rights Act 1996:

"(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) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly…"

Conclusions

<u>Employment status</u>

54. In order to bring complaints of, inter alia, damages for breach of contract, in the Employment Tribunal a person must be employed (ie work under a contract of service). A person who is self-employed (ie working under a contract for services) is not entitled to bring such a complaint, although he may still fall within the definition of worker under section 230(3) of the Employment Rights Act 1996 (ERA 1996) for the purposes of a complaint of, inter alia, unauthorised deductions from wages.

Employee

55. There is no clear guidance given by case law by which tribunals are able to distinguish between those who are employed and those who are self-employed. An 'employee' is defined simply as someone who has entered into, or works under, a contract of employment (section 230(1) ERA 1996). A

'contract of employment' means 'a contract of service or apprenticeship, whether express or implied, and (if it is express), whether it is oral or in writing' (section 230(2) ERA 1996).

56. There is no single test which determines whether a person is employed or self-employed although there have been a large number of cases which have tried to establish the approach to be adopted to determine this issue. The usual approach taken is referred to as the multiple test which requires all aspects of the relationship to be considered and then to ask whether it could be said that the person was carrying on a business on his/her own account (O'Kelly v Trusthouse Forte plc [1983] IRLR 369,CA). The multiple test requires the consideration of a number of factors.

57. The first consideration is whether there is a mutual obligation to supply and perform work, ie is the employer contractually obliged to provide work and the person obliged to carry it out? This is the most important single factor. If no such obligation exists, then the person is not an employee (Carmichael v National Power plc [2000] IRLR 43, HL).

58. It is also a vital component that the Respondent has a sufficient framework of 'control' over the person, although direct supervision and control is absent in many kinds of employment today (Montgomery v Johnson Underwood Ltd [2001] IRLR 269, CA) If the person controls when, where and how she performs the work, this degree of autonomy would suggest that she is self-employed. However, if the employer has the power to tell the person when, where and how to perform, it would indicate that the person is an employee (Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance [1968] 2 QB 497).

59. Another factor is that the other provisions of the contract must be consistent with its being a contract of service. We need to consider the purpose of the contract and what the parties intended when they formed it. It is the nature of the agreement and the actual performance of the contract which counts, not simply the label attached to the relationship by the parties. For example, just because a person is told by an employer that she is self employed does not mean that is the true legal position.

60. The method and mode of payment to the person could be a relevant factor. If pay is referable to a period of time rather than productivity, this suggests that the person is more likely to be an employee. She is also more likely to be an employee if she gets paid sick leave and is subject to the usual disciplinary and grievance procedures. However, again this is not necessarily conclusive of employee status.

61. The above assumes that it is clear what the contract terms are, but this may not be the case. When deciding what terms have been agreed between the parties, the first step is to look at any written contract. This can be a problem. People sometimes sign pro forma contracts which are designed to prevent them from being an employee, eg by stating that there is no mutuality of obligations or that they have the right to send along a substitute (see below). However, if there is evidence of the true nature of the agreement this should be considered (Autoclenz Ltd v Belcher & Ors [2011] IRLR 820, SC;

Protectacoat Firthglow LTd v Szilagyi [2009] IRLR 365, CA; Consistent Group Ltd v Kalwak & Ors [2008] IRLR 505, CA; and Redrow Homes (Yorkshire) Ltd v Buckborough & Sewell [2009] IRLR 34, EAT).

Worker

62. Certain employment rights apply to "workers". For example, entitlement to annual leave and holiday pay, the National Minimum Wage and the ability to bring a claim in respect of unauthorised deductions from wages.

63. If the person is an employee then they will also satisfy the definition of worker. But sometimes the problem is to prove that the person is a worker as opposed to self-employed.

64. The definition of worker within section 230 (and for other claims reliant on this status) is wider than the restrictive definition of employee. It covers those who have entered into, or work under, a contract of employment and any other contract 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.

65. A worker is different from someone who is self-employed. Self-employed individuals can make their own choices as to what work they do and when and where they do it. They work for themselves. Although the practical realities of getting work mean they must satisfy (often quite stringent) requirements of those who engage their services, ultimately the choices are their own to make (O'Brien v Ministry of Justice [2013] IRLR 315, SC).

66. There are three key elements to the definition of worker in the legislation: 1) there must be a contract between the individual and the 'employer'; 2) the individual must be required to work 'personally' for the employer; and 3) the individual must not be working for someone who is in reality his/her client or customer. As long as these apply it does not matter if the individual is in business on his/her own account (Hospital Medical Group Ltd v Westwood [2012] IRLR 834 CA.)

67. It is also important to consider the true contractual position. Although any written contract will be the starting point, it may be possible to prove that the document does not reflect the true agreement between the parties. But this will need strong evidence.

Submissions

68. I received a skeleton argument and supporting authorities from Mr Liberadski and written submissions and supporting authorities from Ms Chudleigh. Both Counsel spoke to their respective documents. I have fully taken into account the submissions from both Counsel and will refer to them only where appropriate.

69. In essence, Mr Liberadski made the following submissions:

a. The claimant is an employee within the meaning of section 230(1) or at a minimum a limb (b) worker under section 230(3)(b) ERA;

b. It is clear that the arrangement was one whereby the claimant undertook to perform work as a clinical psychiatrist for the second respondent and the second respondent agreed to provide work for him;

c. He was able to assess and treat patients in the same way as any employed higher trainee;

d. It was a prerequisite of his engagement that he had the qualifications, experience, regulatory approval and English language requirements necessary to work as a higher trainee;

e. He worked to a fixed timetable within a job description in each placement. The respondents' argument that he could refuse to come to come to work on any given day or that the second respondent was that liberty to withhold work from him was not the reality of the situation;

f. The lack of remuneration and the requirement to obtain sponsorship fees from the Chilean government is no bar to establishing mutuality of obligation;

g. He was subject to the level of control consistent with that of an employer employee relationship allowing for the highly skilled and professional nature of his role;

h. The other provisions of the agreement were more consistent with employee or worker status than with any other status. On an objective assessment the primary purpose was for him to provide services to the second respondent, or at the very least, it had a mixed purpose and it cannot be said that training for the claimant was clearly the dominant purpose;

i. Sponsorship for the CDF fees was not determinative of the primary purpose. It is entirely plausible that an employer could seek to obtain the benefit of a worker's services without needing to pay them, as in the case of unpaid internships that go beyond merely shadowing other staff;

j. The Tribunal must consider the protective purpose of the legislation that underlies the claim, In the case, Part II ERA and, potentially, the National Minimum Wage Act 1998. To hold that the claimant cannot avail himself of this protection simply because the respondents chose not to pay him in the first place or defeat purpose of legislation.

70. In essence, Ms Chudleigh made the following submissions:

a. The claimant was not employed under a contract of employment or a contract to do work by the second respondent. It was purely a contract entered into to facilitate training and experience. Moreover, the second respondent was paid to provide services to the claimant, not the other way round;

b. In the circumstances, there was no wage/work bargain and the requisite mutuality of obligation was lacking;
c. The dominant purpose of the arrangement was not work, it was to afford the claimant training and clinical experience. Whilst this of course would have involved significant work experience, that does not make work the primary or dominant purpose of the contract;

d. Whilst the claimant asserts that he was employed as a Specialist Training Doctor or an ST4 and ST5 Trainee, the respondent had no authority to recruit such trainees, the appointment of doctors in those roles being the responsibility of HEE. Further, the claimant was not issued with a contract of employment and work schedule as ST4 or ST5 Trainees are and were not paid a wage;

e. As a CDF Fellow, the claimant was not included in the roster/consideration of staffing levels across the second respondent, was supernumerary, was not part of the service provision for out of hours on-call rotas unlike ST4 and ST5 Trainees and was permitted to negotiate his own roles to align the areas he wished to develop;

f. The claimant's case against the first respondent is even more unsustainable. The first respondent is the co-awarding institution that organises the CDF programme, advertises it and selects successful candidates. There was no contractual relationship between the claimant and the first respondent and no employment relationship. The claimant did not provide any kind of service the first respondent who did not provide him with any kind of work. The first respondent was paid to facilitate the CDF programme on behalf of the claimant.

Conclusions

71. Having considered the evidence before me, the submissions of each party and the legal tests I have reached the following conclusions.

72. It was unclear which of the two respondents the claimant asserted employed him. But primarily it appeared to be the second respondent. However, I have considered the position of both respondents' collectively although I acknowledge that the first respondent in effect established and administered the CDF programme and the training and experience was provided to CDF Fellows by the second respondent in its hospitals and clinics.

73. As I have indicated above, in order to determine employment status I am required to apply a multi factor test in which any one matter is not necessarily determinative.

74. I was referred to Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 which identified three requirements for there to be a contract of service. The first is that there is an agreement that in consideration of a wage or other remuneration, an individual will provide his own work and skill in the performance of some service for the employer. The second is that the individual agrees that in the

performance of that service he or she will be subject to the other's control in a sufficient degree to make that other the employer. The third is whether the other provisions of the contract are consistent with its being a contract of service.

Wage/Work Bargain

75. The first limb of the Ready Mixed Concrete test is often referred to as the "wage/work bargain". In Cotswold Developments Limited v Williams [2006] IRLR 181, the Employment Appeal Tribunal ("EAT") provided a refinement of this first element. Whereas under the Ready Mixed Concrete approach, there is no quantification of the amount of work that is to be provided by the putative employee, and the putative employer's obligation comprises pay and remuneration, it is clear now that a contract of service may exist where the putative employee agrees to some reasonable minimum amount of work and the putative employer's obligation may be discharged by merely providing the work to be done. The effect of this is to considerably broaden the scope of the first limb.

76. In Varnish v British Cycling Federation [2020] IRLR 822 the EAT reviewed the authorities on employment status and concluded that Cotswold does not undermine the appropriateness of the Ready Mixed Concrete approach as a starting point in the analysis. In particular, the EAT found that none of the cases on mutuality of obligation undermine the requirement under the first limb of Ready Mixed Concrete that there needs to be an obligation on the part of the putative employee to provide his own work and skill in the performance of some service for the other party. But the EAT held that in cases such as Varnish, where there is no dispute that there is a contract governing the relationship and there is no intermittency in the relationship, it may not always be helpful, given the different usages of the term of "mutuality of obligation" in the authorities, to analyse the situation by reference to that term. The EAT decided that the better approach in such cases is to determine whether the obligations under the contract are of the type that give rise to a contract of employment.

77. Varnish involved the professional cyclist Jessica Varnish who had a contract with the British Cycling Federation under which she was provided with a package of services and non-monetary benefits in return for which she agreed to various training requirements with the aim of winning medals for the British cycling team. When this contract was terminated, she brought complaints of unfair dismissal and sex discrimination in the Employment Tribunal. A preliminary point arose as to her employment status. The Tribunal held that she was neither an "employee" nor a "worker" within the meaning of section 230 ERA. The EAT upheld a finding that the Federation did not provide her with remuneration. Nor did selecting her for the elite training programme or providing her with training facilities amount to providing the claimant with work. As Mr Justice Choudhury explained, the purpose of the contract "was primarily to provide services to the claimant, and not the other way around."

78. And at paragraph 49 of the Judgment:

"The legislation does not seek to define what is meant by "work" or "service". The constantly evolving nature of what is regarded as amounting to work or service would probably make such definition impossible, or at least liable to be quickly outmoded. Not all work will be of the kind that gives rise to an employment relationship; the hard-working student at university is a possible example of that. It is left to the tribunal, having found that there is a contract, to consider all the relevant factors (including the nature of the work done) and assess whether the contract is one of service or not. This task of classifying the nature of the contract (i e whether it is a contract of service or some other type of contract) has been evident since Ready Mixed Concrete [1968] 2 QB 497 , whereby, under the third limb of the test in that case, it is necessary to consider whether the other provisions of the contract are inconsistent with its being a contract of service."

79. Mr Justice Choudhury also observed that it would not be an error of law for a Tribunal to consider the dominant purpose of a contract in determining whether it is a contract of service or not (or whether it gave rise to limb (b) worker status or not). If the dominant purpose is not personal service for the other party then that may be a factor pointing away from the relationship being one that lies in the world of employment or work. However, that question would not be determinative of the issue on its own.

80. Ms Chudleigh submitted that the present case was not dissimilar to Varnish. There was no agreement that the claimant would provide services to either respondent in return for payment to him. The agreement was in respect of a training programme, the purpose of which was to provide him with training and experience in psychiatry. There was no wage/work bargain, to the contrary the respondents were paid to facilitate and host the CDF. She specifically referred me to paragraphs 65 and 66 of Varnish.

81. Ms Chudleigh also referred me to Daley v Allied Suppliers Ltd [1983] ICR 90 which involved a claimant working as a trainee under the then Manpower Services Commission ("MSC") Youth Opportunities Scheme (a work experience scheme) paid by the respondent company who then recovered the full amount from the MSC. The EAT applied the Court of Appeal decision in Wiltshire Police Authority v Wynn [1980] ICR 649 and found that there was no mutuality of obligations between the company and the claimant from which a contract could be implied. Moreover, the EAT held that even if a contract did exist, its primary purpose was to train the claimant rather than establish the relationship of employer/employee. This resulted in the EAT determining that there was no contract of service or contract personally to execute any work or labour within the definition of employment in section 78(1) of the Race Relations Act 1976 (the legislation pre-dating the Equality Act 2010) for the purpose of a complaint of race discrimination. Ms Chudleigh submitted that the case before me is indistinguishable from Daley.

82. Mr Liberadski also relied upon Cotswold, as authority for the proposition that it is not necessary for the employer to pay the individual for there to be a contract of service. There need only be an obligation on the employee to undertake some minimum of work and on the employer to provide some work. He also relied on Varnish, where the question of whether the various services and benefit provide to the claimant constituted "remuneration" was secondary to the fundamental issue of whether she undertook any work for the respondent at all, and conversely whether it provided any work for her to do. He also referred me to authorities in which individuals established worker and employee status despite receiving no salary or being paid by somebody other

than the employer or being given accommodation only in return for their labour (at paragraph 19 of his submissions).

83. Having considered my findings and the legal analysis I agree with the respondent's submissions. I accept that the claimant was provided with work and undertook work on a regular basis throughout the period of the CDF programme. Given the nature of the work, he was required to attend clinics on particular days and see patients at particular times and failure to do so without reasonable excuse could not doubt have resulted in disciplinary action. I am not inclined to go as far as to accept that the claimant's attendance at work was voluntary as suggested. To that extent there was mutuality of obligation but this did not extend to a wage/work bargain amounting to a contract of employment. The work that the claimant undertook was incidental to the primary purpose of the training and experience he was provided with that he could then take back to Chile. The claimant was in effect buying training from the respondents, paid for by his government. He was not employed by the respondents. The dominant purpose test indicates that his contract was not located in the world of work or in the employment field.

84. The claimant acknowledged the benefits of the training and experience in hospitals in the UK and GMC registration (at B 91 & 228). But he has asserted that the primary purpose was for him to provide services for the respondents and further asserted that the respondents were in effect exploiting him as unpaid labour. I disagree with his assertions. To the extent that I have considered the intention of the parties when going into the contract, the respondents made the nature of the arrangement clear and the claimant understood it. It was to provide training and experience to overseas doctors commensurate to that provided to trainee doctors in the UK which they could take back to their own countries and was paid for by their own governments. However, I do acknowledge that I must look behind the labels applied to the relationship and determine the legal position.

Control

85. As to control it is impossible to see given the nature of the programme, how the claimant could undertake the CDF programme without being subjected to some degree of control as to seeing patients and on particular days and at particular times and being required to turn up as rostered and as part of this being required to attend to other duties. In addition, there had to be control as to the care he provided, his professional expectations and obligations. However, control whilst necessary was incidental to the dominant purpose which was to provide him with training and experience. I therefore conclude that control alone is not indicative of employee status.

Labels

86. Mr Liberadski focused more on worker status in reminding me of the key issues to be considered (at paragraphs 20 and 21 of his submissions). He also reminded me that the parties cannot fix the status of their relationship by agreement. The labels used may be of relevance as an indication of their subjective intentions, but the legal effect of the agreement is for the Tribunal

alone to determine. He reminded me that most recently in Uber BV v Aslam [2021] ICR 657, the Supreme Court ruled that status is a question of statutory and not contractual interpretation. Any written agreement should not be treated as decisive, or even as the starting point; the Tribunal must always focus on the practical reality of the working relationship and assess whether it falls under the relevant statutory definition.

87. This relationship is governed by what are called honorary contracts and I have dealt with this in my findings above. I accept the respondents' evidence and submissions that these documents are not contracts of employment in the sense of there being an employer/employee or worker relationship. The claimant contends that he was in reality a junior doctor. I would note here that the honorary contracts are not the same as the contractual documents issued to junior doctors on a HEE accredited higher training programme although they might be similar in certain clauses. I accept that the purpose of issuing honorary contracts to training Fellows is for insurance and indemnity purposes because the GMC requires practising doctors to be properly insured. Further, an honorary contract was required because those undertaking Fellowships would be practising as doctors within the second respondent Trust, seeing patients, accessing patient records and participating in confidential discussions about patient care. As I have already indicated there had to be a degree of regulation of doctors in training seeing patients in hospital clinics but in the context of the programme under consideration that does not necessary amount to creation of a contract of employment.

Other aspects of the relationship

88. It is clear that whilst the claimant attempts to draw an analogy to the position of higher trainee doctors, he was not higher trainee doctor but was a Fellow under the CDF programme. He was not appointed by the HEE. Only the HEE can appoint special registrars to training contracts. He was not employed on an accredited training programme. He was not eligible for this in any event because he was educated/trained in Chile and had not passed the PLBA examinations.

In conclusion

89. The CDF is a vocational programme for overseas doctors promoting global mental health and designed to give training and experience similar to that received by doctors on the higher specialist training. The claimant was not employed on a contract of employment but an honorary contract. He was working on an unpaid basis and receiving training and experience in his chosen medical field. He was sponsored by the Chilean government on the basis that having undergone such training he would return to Chile in order for that country to have the benefit of the training that had been provided to him. Whether he does or does not return to Chile is a matter for him. He was not working on fixed rotations, not included in the ordinary rotas, he was supernumerary, the placements were governed by his wishes, he was not part of the on-call rotas, not paid for study leave, albeit on one occasion he was reimbursed expenses out of fees received from the Chilean government.

90. Taking into account all the circumstances including the reality of the situation I reach the conclusion that was not a contract of work but a contract of training and experience. It is not one founded in the world of work.

91. The claimant was neither an employee nor worker.

92. Whilst I heard submissions on the time point, in view of my conclusions I did not need to deal with this. Further, I did not need to deal with respondents' deposit order application claimant's amendment application.

93. The Employment Tribunal does not have jurisdiction to deal with the claimant's complaints and his claim is dismissed.

Employment Judge Tsamados
Date 26 May 2022