Case No: 2202750/2020

EMPLOYMENT TRIBUNALS

Claimant: Dr N Couvaras

Respondent: The Fine Clinic Limited

Heard at: London Central (by CVP) **On:** 26th & 27 January 2021 & in chambers 2 & 3 February 2021

Before: Employment Judge Isaacson

Representation
Claimant: In person
Respondent: Mr J Stuart, Counsel

Covid -19 Statement
This was a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face- to- face hearing was not held because of the Coronavirus pandemic.

RESERVED JUDGMENT

The judgment of the Tribunal is:

1. The claimant is not an employee and consequently her claims for unfair dismissal, redundancy pay, and notice pay must fail and are dismissed.

2. The claimant is a worker and may continue with her claims for whistleblowing (subject to a deposit order), sick pay and holiday pay.

3. The Tribunal has not struck out the claimant's whistleblowing claim as there is factual evidence in dispute which should be decided by a full Tribunal, having heard all the evidence. It is not clear to this Tribunal that the whistleblowing claim has no reasonable prospects of success.

4. However, the Tribunal finds that the claimant's whistleblowing claim has little reasonable prospects of success and is made subject to a separate deposit order. The claimant is required to pay a deposit of £50 as a condition of continuing to advance that claim.

5. Further case management orders have been made in a separate order.

REASONS

Background and evidence before the Tribunal

1. The Tribunal was presented with an agreed bundle. There was some dispute over what documents had been included in the bundle, but the Tribunal is satisfied that all the documents both parties wanted the Tribunal to see were before the Tribunal.

2. The claimant had difficulty connecting to the hearing on her computer. At first there were sound problems and later she could be heard but not seen. Both parties agreed that the Tribunal was not in any way compromised by the claimant not being seen when giving her evidence.

3. The Tribunal heard evidence from the claimant and from four respondent witnesses. The witnesses' initials are used to identify them for their privacy as this judgment will go on the public register. The Tribunal heard evidence from Dr V and Mrs V, directors of the respondent, Ms G, a receptionist at the respondent and Ms S, also a receptionist at the respondent. The claimant provided two witness statements.

4. Both parties had an opportunity to question witnesses and give oral submissions (a summary of their case) and provided written skeleton arguments and copies of the cases referred to in the skeleton arguments.

5. At the beginning of the hearing, due to technical difficulties, it was not possible to clarify the issues. At the beginning of day two the Tribunal sought clarification of the respondent's case and this was further clarified in submissions. The claimant clarified her whistleblowing claim.

6. The Tribunal then sought further clarification regarding case law on the definition of worker and the respondent's counsel provided a further note on 1 February 2021.

Claims and issues

7. The claimant presented a claim form on 13 May 2020. Her claim form was brief and included claims for unfair dismissal, redundancy pay, notice pay, holiday pay, sick pay and whistleblowing.

8. At a case management preliminary hearing, before EJ J Burns on 15 October 2020, this open preliminary hearing was listed to decide:

    i) Whether or not the claimant was an employee of the respondent, and if so, for how long?

    ii) Whether or not any claims, which depend on her having been an employee, should be struck out on the grounds they have no

reasonable prospect of success or are outside the Tribunal's jurisdiction?

iii) Whether the whistleblowing claims should be struck out or made subject of a deposit order on the grounds that they have no or little reasonable prospect of success?

iv) Further case management.

9. The claimant was asked to provide further and better particulars of her whistleblowing claim which she did on 29 October 2020. The respondent argued that her further and better particulars were an abuse of the court process as they went outside the boundaries of her claim form and failed to set out the grounds of her claim.

10. The claimant later repeated the contents of her further and better particulars in a second witness statement, which was served on the respondent after the exchange of witness statements. The respondent objected to the second witness statement but the Tribunal allowed it as the respondent had already had notice of its' contents from the further and better particulars and it was relevant to the issue regarding her whistleblowing claim.

Submissions

11. In brief, and not including all that was said, the respondent argued that the claimant is not an employee but concedes that the claimant is a worker, and that the same definition of worker applies to both statutory definitions of worker under section 230(3)(b) of the Employment Rights Act 1996 ("ERA") and Reg. 2 of the Working Time Regulations 1998 ("WTR"). The claimant's claims for ordinary unfair dismissal, redundancy pay and notice must fail. The claimant's claim for whistleblowing is hopeless and should be struck out, or alternatively made the subject of a deposit order. This leaves only a claim for sick pay and statutory holiday pay.

12. There is no written contract and it was clear that the respondent did not intend the claimant to be an employee. The arrangement between the parties suited them both. There was no obligation on the claimant to provide her services and the respondent had no obligation to give her work. Looking at the whole picture and considering similar case law, the claimant is not an employee. She is, and has at all material times been, a genuinely self-employed independent professional medical practitioner. At all material times, she provided such services by way of a contract for services (not a contract of employment). She made repeated express declarations that she was self -employed and worked a variety of client businesses. She had her own private insurance, invoiced the respondent, stating she was self -employed and was paid gross. She was not instructed or controlled in the manner she worked and was entirely unsupervised. She was not subject to any disciplinary or grievance procedures, decided when and for how long she went on holiday and was not contractually entitled to any sick pay or contractual holiday pay. The claimant was not restricted from working for others and regularly did so. The parties always conducted themselves on the basis and understanding that the Claimant was a professional self-

employed doctor, providing her services to the Respondent, rather than being an employee of the Respondent.

13. Alternatively, if the claimant was an employee she was only employed directly by the respondent for less than two years and therefore does not have two years continuous service to bring an unfair dismissal claim.

14. In relation to the whistleblowing claim the respondent asserted that the claimant had not pleaded her claim and had not set out what was the disclosure, to whom it was made, whether it is a protected disclosure of information and how it is linked to any detriment. The respondent argued that the facts are obvious that the claimant resigned and that the claimant's contract was terminated because the number of patients coming to the clinic had greatly reduced due to the clinic no longer being able to prescribe medication until it was registered with the CQC (Care Quality Commission) and the impact of the covid pandemic.

15. The claimant argued, in summary, that she asked for a contract of employment from the respondent. That she was treated as an employee: she was told exactly which days to work, which hours, she could not leave work when she wanted to, was told how to do her job in a prescribed way, her work was monitored by Dr Porritt ("Dr P") and the receptionists. She had to give notice or ask in advance for time off and could not send someone else to do her work. She had to use the products and guidelines of the respondent and not her own. She used the equipment of the respondent – weighing scales, blood pressure machine, computer, syringes, needles and medication, urine bottles, urine testing strips and PPE. She argued she was reprimanded for taking time off or being late. The patients were the clinic's patients and she couldn't decide to give them any preferential treatment. She did not control the bookings and all appointments were through reception.

16. Her other private work was totally different, invoiced and paid through a private company and she paid the respondent for the use of the premises. The respondent referred to her in correspondence as an employee. She received regular emails during her non work days from work. The claimant invoiced through Merco Medical staffing limited ("Merco") as she needed, at that time, due to a GMC (General Medical Council) requirement a designated body and responsible officer. The respondent did not pay Merco her fees but £5 was deducted from her hourly rate. There was no placement fee. Her private work was through a company she registered, DrNinaCMed Limited ("private company"). Payment was through an IZettle card machine, and payment went to her business account and not her private bank account like her payments from the respondent. She did not have any website, advertise, promote in the press or on social media. For her own work she provided her own PPE, controlled and booked in her own patients when she wanted them.

17. In relation to her whistleblowing claim the claimant asserted that she made protected disclosures at two different times. One on 7 September 2017 to the CQC for which she has not suffered a detriment. Then on 14 November 2019 when she telephoned and emailed the CQC regarding Dr P prescribing medication after the CQC had notified the clinic not to do so and

to the GMC via an email to professor Baker regarding the same concerns and further follow up correspondence with the CQC and GMC.

18. She alleged the disclosures were to a responsible person or a prescribed person and were disclosures of information. In her reasonable belief, were made in the public interest and tended to show that either a criminal offence has been committed, is being committed or Is likely to be committed or that a person had failed, is failing or is likely to fail to comply with any legal obligation to which she is subject.

19. She asserted that the detriment was being sent a self - employed contract in December 2019 and then having her hours reduced and her contract terminated in March. She alleged that Dr V knew the claimant had made the protected disclosures in November to the CQC and GMC and did not want the claimant working there anymore. Dr V then reduced her hours and then terminated her contract.

The law

20.. S. 230(1) ERA defines an "employee" as "*an individual who has entered into or works under a contract of employment."* A contract of employment is defined under s.230(2) as a contract of service or apprenticeship, whether express or implied.

21. The rights on termination of employment granted under the ERA (not to be unfairly dismissed, and statutory minimum notice and the right to receive a redundancy payment) apply only to employees.

22. A worker is defined under section 230(3) ERA as "*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 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."

23. In the context of whistleblowing claims (also brought under the ERA) the term worker has a wider definition than the ordinary s.230(3)(b) worker test, because in certain cases there is no requirement for personal service. Specifically, s.43K extends the definition of worker for the purposes of whistleblowing to include agency workers and individuals supplied via an intermediary provided that the terms are not set by the worker themselves.

24. The same definition of "worker" can also be found in Regulation 2 of the WTR. For the purposes of the WTR the usual definition of worker is extended to include an agency worker supplied by another person to do work for a principal who is not carrying out the work under a contract where the principal is a client or customer of a professional or business undertaking carried on by the individual (Reg 36).

25. There have been various tests established over time to guide a Tribunal when deciding whether a claimant is an employee, worker or an independent contractor. In summary the most recent guidance is that a Tribunal should weigh up all the factors in the particular case and ask whether it is appropriate to call the individual an employee; to stand back and look at the whole picture before reaching a conclusion.

26. The relevant circumstances may include:

    a. payment of wages or salary or different methods of payment, and the extent to which the worker takes a degree of financial risk;
    b. invoicing by the worker;
    c. whether the worker provides her own equipment (in whole or in part);
    d. whether the worker is subject to disciplinary or grievance procedures;
    e. receipt of sick pay or contractual holiday pay;
    f. receipt of Health care or other benefits;
    g. whether the worker is part of the employer's business;
    h. whether there are restrictions on working for others (or working for oneself).
    i. is the person concerned in business on her own account? – **Hall (Inspector of Taxes) -v- Lorimer [1994] IRLR 171**.

27. The starting point is any written agreement, if there is one, and then to question whether any written agreement reflects the reality of the relationship. What was the true intention of the parties?

28. The greater degree of personal responsibility an individual undertakes in any of the matters listed above, the more likely she is to be considered an independent contractor rather than an employee.

29. The way in which a person is treated for tax is relevant (but not necessarily decisive). The tax and employment regimes are separate and do not necessarily have to give the same answer as to a person's status.

30. The conduct of the parties (including the manner in which they describe themselves and the way in which they understood their relationship) is a legitimate factor for the Tribunal to take into account – ***Carmichael -v- National Power plc [2000] IRLR 43.***

31. In terms of medical professionals, a general practitioner is not employed by a health authority. GPs are under obligations in relation to the nature of the work they undertake. These obligations are imposed by statutory instrument and not by contract, so that the obligations do not make the GP an employee of the health authority – see ***David-John -v- North Essex Health Authority [2004] ICR 112.***

32. In the case of **Community Based Care Health Ltd v Dr Reshma Narayan UKEAT/0162/18/JOJ (**"Narayan") The EAT held that the Tribunal had correctly decided that the claimant doctor was a worker within section 230(3)(b) of the ERA. There was no inconsistency between that finding and its decision that she was not an employee under section 230(1) of ERA or

in employment within section 83(2) of the Equality Act 2010. The facts of the Narayan case are similar to the facts in this case:

(1) The claimant worked mainly out of hours as a "duty doctor", providing her own professional indemnity insurance, describing herself for insurance purposes as an "[i]ndependent GP (locum or private work)".

(2) The claimant did not need or seek permission to work as a locum outside the respondent's activities. She (and subsequently the company) was paid gross for her locum work. She did not receive sick pay or holiday pay from the respondent.

(3) She had to log onto a shift booking system and book her shifts months in advance. In practice, the shifts were pre-populated because her shift pattern of about 30-40 hours a week was mostly regular and consistent over the 11 to 12 year period.

(4) The group of about 12 doctors working regular shifts would check availability with each other and to avoid administrative confusion would normally not "hand back" a shift to the respondent without checking availability of a substitute first.

(5) The claimant provided her own bag of medical equipment, the contents of which were the subject of guidance from the respondent. She was not required to wear a uniform. She used prescription pads supplied by the respondent.

(6) The respondent supplied required drugs to the claimant and other GPs providing the out of hours service. The respondent provided ambulance transport, and other transport when the claimant had to make home visits to patients.

(7) There were "sparse" documents setting out features of the relationship: a service manual requiring compliance with the respondent's rules; requirements to be on time, annual appraisals, familiarity with the respondent's IT systems, and the like.

(8) There was no written disciplinary or grievance procedure but the rules provided for disciplinary action, including imposition of fines, in the event of bad conduct, e.g. failing to follow guidance on telephone advice or prescribing, or late cancellation of shifts.

(9) The claimant and the other GPs were required to keep records of prescriptions and drugs issued and to provide these to the respondent and keep a computerised consultation record of all patient consultations.

(10) The claimant and the respondent were free not to offer work or accept work from each other. Thus, the claimant could book holidays as and when she wished, unlike an employee.

(11) The arrangement suited the parties over the 11 or 12 year period. The parties worked together but the arrangement "did not give rise to mutuality of obligation such as to create a contract of employment" (reasons, paragraph 15.4).

(12) The claimant was required to work personally for the respondent; if unable to work a shift, she would, albeit having ascertained availability of a suitable substitute, hand the shift back to the respondent (paragraph 15.12).

(13) Alternatively, if that was wrong and she were able to send a substitute, the right was not unfettered since the substitute had to be a GP already approved by the respondent from its panel of doctors (paragraph 15.12).

33. Although the **Narayan** case is similar to this present case and is helpful guidance, each case must be decided on its own facts.

Findings of fact

34. The Tribunal has tried to limit the findings of fact to those relevant to the preliminary issues. Most of the facts were undisputed and supported by documentation.

35. The claimant is a medical doctor. She started to work as a diet doctor at the respondent 's Harley street diet clinic in August / September 2015. She was made aware of and was introduced to the position through a friend and former colleague who worked at the respondent and was planning to return to South Africa.

36. The director of the clinic at the time was Dr Porritt (Dr P). It is not disputed that the claimant was not provided with a written contract when she started working at the clinic and that the claimant never signed a contract. Therefore, there is no written contract in this case. The claimant was told by Dr P she did not provide contracts to any doctors because doctors should trust one another.

37. The claimant initially started working 2 mornings a week. In 2016 her shifts increased to 3 mornings and by October 2018 she worked 4 mornings. They were regular shifts 8-12 or 1pm on fixed mornings. It is agreed she was paid for the hours she worked and that was not dependent on the number of patients she saw in those hours. She could pop out if there were no patients during a shift. There was only one diet doctor working at the clinic at any one time and would be referred to as the Fine Clinic Doctor.

38. The claimant had to adhere to the clinic's strict hours of 8 am start time and would have to explain why she was late when a patient was waiting.

39. The claimant also did additional shifts and covered the majority of her colleague's holidays and maternity leave.

40. Because the claimant had left the UK to work abroad in 2011-2013 she had to re- register with the GMC (General Medical Council) and although her full registration was restored, she was required to be contracted through a Designated Body for the first year and under - go revalidation.

41. To assist the claimant in completing appraisal and revalidation the claimant asked to be contracted through Merco Health Ltd (Merco), who would act as her Designated Body. This is confirmed in an email from Merco to Dr P dated 12 October 2015 (p202). The email stated that the claimant had asked Merco to formalise a supply arrangement between Merco and the respondent for the claimant's services. It confirmed that the claimant would agree her working hours directly with the clinic, but that there was no minimum, just what they used her for. Merco would charge £65 per hour, including VAT, for the claimant's services and Merco would pay the claimant £60 ph for the hours she worked. The clinic would be invoiced weekly with a signed time sheet.

42. There is also an email from the claimant to Merco where she says Dr P agreed to "employ" her through Merco (p199).

43. Merco did not charge the respondent any placement fee or locum fee, only the charge of £5 ph. Merco did not control any part of the claimant's work.

44. Later on the claimant's designated/responsible officer changed to Professor Baker through Maar Gateway Ltd.

45. The claimant used the term "employing" throughout her email exchange with Merco at this time and mentioned about getting back into employment. The claimant showed the Tribunal references from Dr P in 2016, 2017 and 2019 (pp256, 291) where she referred to the claimant as a colleague and as employing her. However, in an email to Merco dated May 2016 (p219) the claimant tells Merco that she was looking for more job security but that Dr P did not mention it and she doubted Dr P would even think of it.

46. Dr P did not appear as a witness before the Tribunal so what was Dr P's intentions had to be gleaned from the documents and evidence from the claimant.

47. The claimant admitted, when questioned by the Tribunal, that Dr P never intended the claimant to be an employee but that she herself wanted more job security and wanted to directly ask Dr P for an employment contract but was too afraid to do so. She confirmed she never asked Dr P for a contract of employment, holiday pay or sick pay. The Tribunal finds that the use of the word "employing" in correspondence from Dr P does not demonstrate that Dr P viewed the claimant as an employee. The term in the context of the various emails seemed to mean no more than "contracted".

48. From August 2018 Merco advised Dr P that they may start to charge her VAT due to a recent high - profile case. Consequently, from September 2018, Merco ceased invoicing the respondent and the claimant started invoicing the respondent directly. It was agreed that the claimant would invoice the respondent £70 ph as Merco had been charging the clinic, by then, £70 ph and deducted £5 ph for their fee and then paid the claimant £65 ph (p274). The claimant confirmed there was no discussion with Dr P at this time about a contract of employment.

49. The claimant explained to the Tribunal that she got two templates from Merco for an invoice to send to the respondent, one was for a limited company and one for self - employed and chose the self - employed template. An example of the claimant's invoice is at p 276. Each invoice had the claimant's unique tax reference number and at the bottom the claimant stated: "*I, Nina Couvaras, declares that I operate as a Self Employed Individual."*

50. The claimant was paid by the respondent for her invoices into her private bank account. The claimant did not receive any other benefits. The claimant took out her own professional indemnity insurance.

51. The claimant confirmed to the Tribunal that throughout her period of work at the respondent, over 4 years, she was paid gross but had not filed any tax returns in the period. She was vague in her explanation why. She seemed to suggest that it was partly due to her believing she was employed and so wanted to be paid net of tax and NIC but agreed that in fact she had been paid gross.

52. In an email (p355) from the claimant to Profesor Baker,in about November 2019, the claimant asked for his guidance on the fact that Dr P has refused to give her a contract although she had been there for 4 years. She stated*: "I am essentially on a zero hours contract. That means that if I do not turn up to work, I have no income."*

53. There is no suggestion from the respondent that the claimant did not have to provide her services personally. She was a medical doctor and could not just substitute herself with another doctor. When she wasn't able to work a shift she would try and accommodate the clinic by swapping shifts with other colleagues but if she couldn't Dr P would close the clinic.

Purchase of the respondent clinic in December 2019

54. Dr V had discussions with Dr P around summer 2019 regarding purchasing the respondent clinic. His company Harmony purchased the shares in the Fine Clinic Ltd from Dr P and Dr R by way of a share purchase agreement on 13 December 2019.

55. There were two documents produced from Dr V regarding the claimant's contractual status: an operating information sheet (p158) and a draft contract produced in December 2019.

56. The operating Information sheet was produced by Dr P for Dr V when he purchased the respondent clinic on 13 December 2019. The document provided staff details and referred to the doctors as independent contractors paying their own tax and not getting paid "*holidays etc"* and stated that the claimant "*invoices me at the end of each week as a contractor working as a sole trader".* The Tribunal accepts that this document is evidence that Dr P was of the opinion in December 2019 that the claimant was an independent contractor and not an employee.

57. After the share purchase of the clinic by Dr v and Mrs V at the end of December 2019 a contract was sent to the claimant (p136) headed contract for self-employed or freelance services. It was an agreement between Harmony, the respondent's umbrella company, and the claimant and referred to the nature of the claimant's work as carried out by the freelancer on behalf of the organisation. The contract stated the contract could be terminated giving two weeks' notice and referred to an hourly fee of £70 ph. Absences had to be notified. Copyright was held by the clinic. The claimant couldn't accept other work without the agreement of the clinic. For tax purposes the freelancer had to show evidence of independent freelancer status or self-employment status. It went on to state under the heading "Status": "*This agreement does not form the basis of an employment relationship between the organisation and the freelancer, and the freelancer is responsible for paying their own tax and*

National Insurance contributions. The freelancer is not an agent of the organisation and cannot create any obligations for it."

58. The claimant refused to sign the contract. The claimant felt she was being deceived and forced into signing an unfair contract. It is accepted by the respondent that the draft contract was never agreed. However, the Tribunal accepts Dr V and Mrs V evidence that they intended and believed the claimant was an independent contractor.

Private work compared to work for the respondent

59. The claimant had registered her own company in 2017 DrNinaCMed Ltd. She took on a small amount of additional work outside of her work for the clinic. She occasionally hired a treatment room for £25 ph or a consulting room for £65 ph from the respondent clinic for hours outside her normal shifts. She offered minimally invasive aesthetic treatments and sold a liquid collagen supplement called Skinade. She also did some General Medical courses and CPD to fit around her work (p245).

60. She accepted payment for the work through an iZettle card machine or by bank transfer, into her business bank account with Santander. She paid for the room rental through that business account.

61. The claimant confirmed that she did not own a website for her business and did not advertise or promote her business in the press or on social media. Her evidence on this was not challenged.

62. For the work she did in her private capacity she bought and provided her own PPE, supplies and equipment. She controlled her own bookings when she wanted.

63. The claimant explained how this contrasted with her work for the clinic. The clinic controlled the bookings and told her exactly which days she was working and what hours. She worked regular shifts and couldn't decide when the shift ended. She was told how to do the job in a prescribed way. For example, what diets were on offer and what medication. She was not permitted to use her own products and guidelines.

64. There are some examples in the bundle where Dr P accepted advice from the claimant on the standard Fine diet (p223 and p210). However, the general impression from the various emails is that Dr P decided how the clinic was run and each doctor was expected to follow her plans.

65. The claimant had no say in the fees patients paid for her services and couldn't offer regular patients a discount. She was not involved in the clinic's communications to the patients.

66. The claimant alleged that her work was monitored by Dr P and the receptionist but the claimant made it clear in an email to Dr P (p207) in June 2016 that she would ignore any unreasonable requests, demands or instructions. She had always taken ultimate responsibility for the patients she treated.

67. The claimant used the equipment of the clinic, eg. weighing scales, blood pressure machine, computer, syringes, needles and medication as well as urine bottles and urine testing strips and PPE, when working for the clinic.

Holidays

68. The claimant covered the majority of other colleagues' leave. Generally, each doctor would notify Dr P in advance of when they wanted to take leave and try to accommodate each other. Sometimes the claimant would amend her holiday to fit in with others. However, there was evidence before the Tribunal that if the claimant wanted to take leave and it was not convenient for the clinic, she would still go ahead and book it (p156d, p266,p268 & p273). The claimant confirmed there was no compulsion for her to cover holidays, although she often did.

69. There were times when Dr P decided that the clinic should be closed even when the claimant wanted to work. For example there was one August when the claimant was planning on returning from holiday to work in August but Dr P chose to close the clinic in August.

70. The claimant never invoiced the respondent when she went on holiday or needed time off.

Whistleblowing

71. On 7 July 2017 the claimant decided to make a complaint to the CQC about various hygiene and other concerns she had regarding the respondent clinic. Details of these concerns are set out in an email from the claimant to the CQC (p343). When investigating how to complain the claimant discovered that the clinic was not registered with the CQC. This meant that the respondent clinic's doctors were not authorised to prescribe medication. Although the claimant received an automatic reply to her email, she did not hear anything further from the CQC. The claimant alleged this complaint was a protected disclosure but she does not allege that she suffered any detriment in relation to this disclosure.

72. On the 14 November 2019 the CQC contacted Dr P and informed her that the clinic was not to prescribe medication to patients until further notice (p345). Dr P told the claimant the CQC had been very heavy handed with her. Despite this instruction Dr P told the receptionist to continue to give patients prescribed medication until the following Monday.

73. The claimant refused to prescribe the medication and telephoned the CQC around midday on the 14 November 2019 and spoke to a Vicky and set out her concerns about being asked by Dr P to continue to prescribe the medication until the Monday. She then sent an email to CQC on the same day forwarding a copy of Dr P's email confirming the CQC's instructions (p346-349). The claimant alleged this was a protected disclosure of information to a prescribed body, in the public interest, that falls under sections 43B(a) and (b) of ERA.

74. The following day the claimant telephoned Mathilda at Maar Gateway Ltd, the company with whom she undertook her annual appraisals. The call was to report the incident of Dr P continuing to ask the doctor to prescribe the medication, despite the CQC's instructions to immediately stop prescribing medication, to her Responsible Officer Professor Baker. She didn't speak to Professor Baker that day but then emailed him on the 18 November 2019 (p351-353) setting out the events of the 14 November 2019. The claimant alleged this was a further qualified protected disclosure including her further correspondence with the CQC.

75. On the 29 November 2019 Harmony made an application for registration with the CQC, in anticipation of their purchase of the respondent clinic.

76. On 6 December 2019 the claimant received a telephone call from Ms P Writer, investigating officer of CQC, regarding her report to the CQC of 14 November 2019 and her previous concerns she raised about the clinic in 2017. She agreed to fully cooperate with the CQC and GMC. She then forwarded her previous complaint to the CQC on 10 December 2019 (p364). The Claimant also mentioned the issue of the wrong width of blood pressure cuff being used, as well as non-adherence by Dr P to regulations regarding the prescription of the controlled drugs issued by The Fine Clinic. This matter related to Dr P overriding the Claimant's decision to refuse drugs to patients with a Body Mass Index of below 24, or patients with raised Blood Pressure.

77. The Claimant sent further emails to Ms Prochi Writer regarding the new CQC application made on 28 November 2019, and of the sale of The Fine Clinic Limited on 13 December 2019.

78. The claimant confirmed to the Tribunal that she did not tell Dr P about her communication with the CQC or GMC but believed that the reason why she was sent a new contract in December 2019 was because of the protected disclosures she had made. She also believed that Dr P linked her complaint to the CQC in 2017 to her, despite there being over 2 years between the claimant's complaint and the CQC contacting Dr P.

79. There is no evidence before the Tribunal that Dr P actually knew about the claimant's complaints to the CQC in 2017 and 2019 or her complaint to the GMC in 2019. Nor is there any direct evidence that DR V knew about the claimant's complaints.

80. On Wednesday, 15 January 2020, the Claimant received an email from Jemma Wilkinson (Ms W) from the GMC to say she had important information to send to her. The Clamant replied to the email and also called Ms W on the morning of 16 January 2020.

81. During the conversation the claimant alleged that Ms W asked for the Claimant's permission to reveal her name during the GMC investigation into the actions of Dr P, following the disclosures of November 2019 (including the previous disclosures to CQC of September 2017). Ms W reminded the Claimant of her rights to protection as a whistleblower. The Claimant confirmed that she was aware of her rights, but also advised her that she did not think that she would suffer any discrimination because

The Fine Clinic Limited had changed hands and no longer belonged to Dr P.

82. Dr P's registration with the GMC was suspended on 4 February 2020.

83. On 9 February 2020 Dr V chased the CQC regarding Harmony's application for registration. The CQC by email dated 11 February (p161a) notified Dr V that the normal 10-12 weeks timescale for registration had been extended to 16-18 due to the number of applications received. The CQC registration was only granted on 6 June 2020.

Allegations regarding 15 February 2020

84. The claimant alleged that on 15 February 2020 Dr V announced, in front of the claimant and Ms G that he was now taking "*common law*" into his hands and that he had to reduce the claimant's hours due to the clinic closing on Wednesdays and Saturdays.

85. The claimant also alleged Dr V then said that he received a letter from CQC to explain that the registration of The Fine Clinic Limited would now take up to 16 weeks. It is alleged Dr V also said that *"someone from within the clinic was working with and informing CQC*".

86. It is alleged by the claimant that Dr V told the Claimant and Ms G that he had to find out who that person was and '*deal with them.*' and that Dr V said, '*how else would they (CQC) know about the hot water and the blood pressure cuff*?' It is alleged Dr V then said '*we must find out who that is'*.

87. Dr V denies saying anything about common law or the other allegations and asserts that the reason he reduced the hours of the clinic was because the number of patients were falling due to the clinic not being able to prescribe medication and the impact from the beginning of the pandemic. He only recalls notifying the claimant of the delay to the CQC registration. Ms G did not recall Dr V using the term common law or saying the other things alleged by the claimant.

88. There is an email exchange between the claimant and Dr V dated 18 February 2020 (p162) regarding the announcement made on 15 February 2020 reducing the claimant's hours. In the email the claimant states: "*Your proposed reduction in hours also seem to affect only my working conditions and not yours, nor that of any other members of staff, and I have to wonder why I am being targetted, and whether I am being discriminated against for any reason?* ". There is no mention in this email regarding the other comments Dr V is alleged to have said by the claimant. There are further emails between the claimant and Dr v / Mrs V and no mention of the other comments (p165) dated 20 February 2020.

89. Mr V alleged that he was aware, in general terms, of the issues raised by CQC regarding DR P and was aware that the clinic was not registered with the CQC when Harmony purchased the shares.

90. What knowledge Mr V had at the time is a matter of evidence for a full panel to decide. This Tribunal does not make any findings of fact in relation to what happened on the 15 February. There is clearly a dispute of

evidence and should be a matter for a full panel to decide, having heard all the evidence. However, the Tribunal does take into account the witness statements of Dr V and Ms G and the claimant 's two statements and the documents referred to in the bundle in deciding on whether to make a deposit order.

91. In late February and March 2020 there is correspondence between the parties regarding the claimant's invoices.

March 2020

92. On 3 March 2020 the claimant saw her GP and was given a three weeks' sick certificate for stress due to work. On 23 March 2020, the day before the sick certificate expired, the Claimant emailed Dr V to tell him that she was fit and able to attend work the following day. The Claimant also emailed Dr V an invoice for the previous 3 weeks that she was off sick, charging at her normal rate of £70/hour. This was the only time the claimant had ever claimed for sick pay during her time working at the respondent. In her email the claimant stated she was unsure what decisions had been made about the services of the clinic during a time when all are affected by the covid pandemic (p174).

93. Dr V and Mrs V responded to the claimant's email on 23 March 2020 (p175) stating that due to the pandemic the clinic was facing an extremely difficult and challenging period. The clinic had minimal patients and the claimant was asked to stay at home to carry out any work that got referred using skype or facetime. The position would be reviewed at the end of the week.

94. On the 25 March Dr V emailed the claimant giving her two weeks' notice of termination due to the pandemic having a very serious and tangible impact on the business, with a significant downturn and no clinical referrals. (p179-180). The email also confirmed they would not pay the claimant for sick leave and she would only be paid for any clinical work referred and authorised to her during her two weeks' notice period.

95. The claimant responded by saying she was taking legal advice but that she would no longer work for the clinic with immediate effect.

Applying the law to the facts

Employment status

96. Based on the findings of fact above the Tribunal finds that the claimant was not an employee but a worker, as defined under the ERA and WTR.

97. The Tribunal has taken an overview of all the relevant factors and has taken guidance from the Narayan case.

98. Firstly, there was no written contract stating what the intention of the parties were, but the claimant admitted that Dr P never intended the claimant to be an employee and viewed her as a self-employed independent contractor. The claimant would have liked the job security of being an employee and wanted to ask for a contract of employment but

never in fact did. Even if she had done so it is likely that Dr P would not have agreed to giving her one. Dr V and Mrs V also intended the claimant to be an independent contractor.

99. The evidence before the Tribunal is that although the claimant worked regular hours on regular days, there was no obligation on her to work and she could refuse the work at any time.

100. Although the claimant wanted the security of a contract of employment it did suit the claimant to have the flexibility to choose the hours she wanted to work. For example, the claimant tried to accommodate the needs of the clinic when she went on holiday but went ahead and booked or took leave when she wanted or needed to, even when it was inconvenient for the clinic. Similarly, Dr P closed the clinic for August when she decided it was what she wanted to do.

101. Therefore, although the claimant did work regular hours for the respondent, she wasn't contractually obliged to do a minimum number of hours. There was no obligation on the claimant to accept the hours offered to her. However, when she agreed to work on a day, the respondent did then commit to pay her for the full morning, and not just the hours she was with patients. The parties worked together but this did not give rise to mutuality of obligation such as to create a contract of employment.

102. The claimant was able to do other work, without the need to seek permission, to work outside the respondent's clinic.

103. The claimant provided her own professional indemnity insurance, describing herself as operating as a self - employed individual on her invoices to the respondent. She was paid gross and had not received sick pay or holiday pay from the respondent. She was not in receipt of any benefits.

104. As a professional the respondent would have had limited control over the claimant's work. However, Dr P did control the diets and medication provided by the clinic and the normal opening hours. The claimant was not subject to any grievance or disciplinary procedures.

105. The claimant was part of the business in the sense that she was referred to as a Fine Clinic Doctor and some of her suggestions for diets were taken up by Dr P. However, overall Dr P had complete control over the business and how it was run, as did Dr V and Mrs V when they took over in December 2019.

106. There is a clear distinction between the hours the claimant worked for the respondent and the hours she carried out her other private work. For the respondent she was provided with equipment, was told the hours to work and what to prescribe and recommend. She was paid a fixed hourly rate and had no discretion about the amount to charge the patients. The respondent chose the hours the clinic was open and controlled the bookings. She was paid the fixed amount into her private bank account. This work falls within the definition of a worker.

107. The claimant undertook to perform personally her work or services for the respondent. There was no suggestion by the respondent that the claimant could have substituted herself for someone else. If the claimant was unavailable for a shift the respondent would find an alternative doctor or close the clinic.

108. In contrast, her private work was completely dictated by herself. She decided the hours and type of work and what she charged the patients. She used her own equipment. She invoiced through her private company and was paid into a private bank account. Her only supervision was through her professional bodies.

109. In summary the Tribunal finds that when looking at all the relevant factors the claimant had a contract to personally provide her services for the respondent. She therefore falls within the definition of a worker. However, she did not have any obligation to provide her services or to be given work. She therefore was not an employee of the respondent. There was no intention by the respondent to enter into a contract of employment and many factors demonstrate that she was not an employee, including the way she was paid and the way she described herself in her invoices.

110. In relation to her private work the Tribunal finds she was working as an independent contractor. Her patients were clients or customers of her profession or business undertaking. She was a person concerned in business on her own account when doing her private work.

Whistleblowing

111. The Tribunal finds that this is not a clear - cut case based on the evidence before it that the claimant's whistleblowing case is hopeless and should be struck out.

112. The Tribunal does not accept the respondent's argument that her further and better particulars were an abuse of the process. Although the claimant had some limited legal advice from a no win no fee solicitor, the claimant is currently a litigant in person. Her further particulars do not set out the varies aspects required under the legislation, but she describes the facts upon which she relies. She was able to adequately set out the grounds of her whistleblowing claim when guided by the Tribunal.

113. The Tribunal believes that what the claimant alleged were protected disclosures to prescribed persons has reasonable prospects of amounting to qualified protected disclosures. This will be a matter for a full Tribunal to decide, having heard all the evidence.

114. On the issue of whether or not the claimant suffered a detriment as a result of the disclosures will also be a matter for a full Tribunal to decide, having heard all the evidence.

115. However, based on the evidence before this Tribunal, it appears that the claimant's claim that she has suffered a detriment as a result of the protected disclosures has little reasonable prospects of success. This is based, firstly, on the fact that Dr V has provided a reasonable and probable explanation to the Tribunal why the claimant's hours were

reduced and her contract was terminated, namely, the reduced number of patients due to the pandemic and the inability to prescribe medication due to the clinic not being CQC registered.

116. Secondly, the only evidence before the Tribunal that Dr V knew about the complaints the claimant made to the CQC and GMC is what the claimant alleges Dr V said to her on 15 February 2020, in front of Ms G. Dr V denies the comments and Ms G does not recall the comments. The claimant's email regarding other things said on 15 February 2020 does not mention the alleged comments.

117. The Tribunal believes it is unlikely that a Tribunal, having heard all the evidence, will be persuaded that Dr V knew that the complaints to the CQC and GMC had been made by the claimant and that her complaints influenced his decision to terminate her contract. It is more likely that the Tribunal will find that the reason the claimant's contract was terminated was due to the reduced patient numbers due to the pandemic and inability to prescribe medication. The claimant herself refers to the impact of the pandemic on the clinic in her own email dated 23 March 2020.

118. Therefore, the Tribunal will make a separate deposit order requiring the claimant to pay a deposit of £50 as a condition for her being able to continue to pursue her whistleblowing claim.

Conclusion

119. In summary, the Tribunal finds that the claimant was not an employee of the respondent and therefore the Tribunal does not have jurisdiction to hear her claims of unfair dismissal, notice pay and redundancy pay. These claims must fail and are dismissed.

120. The claimant is a worker and can pursue her claim for an unauthorised deduction from wages relating to holiday pay and sick pay and any claim under the WTR for holiday pay.

121. The claimant's whistleblowing claim can only proceed if she pays a deposit of £50. If this claim fails on the basis of the grounds set out in paragraphs 115 to 117 above, the claimant may be liable to pay the respondent's costs incurred as a result of pursuing the whistleblowing claim.

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Employment Judge **A Isaacson**

5th February 2021

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RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

9 February 2021

FOR EMPLOYMENT TRIBUNALS