



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R. Somerville  
**Respondent:** Nursing and Midwifery Council  
**Heard at:** East London Hearing Centre  
**On:** 7 November 2022  
**Before:** Employment Judge Massarella  
**Representation:**  
Claimant In person  
Respondent Ms C. Darwin (Counsel)

## RESERVED JUDGMENT

1. The Claimant's claims arise out of his work as Chair of both fitness to practice and registration appeals hearings.
2. The Employment Tribunal's judgment that the Claimant was a worker of the Respondent related to all his work for it, including his work as a Chair on registration appeals. It was not restricted to his work as a Chair on fitness to practise hearings.

## REASONS

1. The issue I had to determine at this hearing was raised by the Respondent in a proposed, draft agreed list of issues sent to the Tribunal on 12 April 2022. At paragraph 1, the following issue was identified:
  - '1. What "work" carried out by the Claimant for the Respondent is relevant to the Claimant's pleaded holiday pay claims?
    - (1) The claimant's position is that he was a member of the Practice Committee and a Registration Appeal Member, and that the ET's judgement concerned his status in respect of both roles.

(2) The Respondent's position is that the Claimant's pleaded claims are based on his appointment as a member of the Practice Committee, which ended in March 2020, and that the ET in its judgment only considered his status as a member of the Practice Committee. The Respondent does not accept that the Claimant was a worker when he provided other services to the Respondent, or that any claims in respect of that engagement are before the Employment Tribunal.'

2. In a record of a preliminary hearing, which took place on 20 April 2021, I decided that this dispute should be dealt with by me, since I was best placed to determine it, having first-hand knowledge of what happened at the hearing on worker status in 2019/2020.
3. The significance of this issue, according to Ms Darwin (Counsel for the Respondent) is that the Respondent now wishes to advance a case that, for the purposes of the Claimant's claim, time runs from the last day that the Claimant sat as an FTP Chair (thereby excluding any subsequent work as a RA Chair) and that his claims are out of time.

### **Findings of fact**

4. These proceedings were initially brought against two regulators: the present Respondent and the Medical Practitioners Tribunal Service (MPTS). The issue of worker status was listed for a preliminary hearing before me in November 2019/February 2020. By a judgment sent to the parties on 20 July 2020, I dismissed the Claimant's claims against the MPTS on the basis that they were brought out of time. I concluded that the Claimant was a worker of the present Respondent.

### The pleadings and the list of issues

5. The Claimant's ET1 contained the following passages.
  - 5.1. At paragraph 2 of the particulars of claim, he pleaded: 'The claim against both the First and Second Respondents is a "status" claim in respect of his role as a Tribunal Member and Panel Chair respectively'.
  - 5.2. At paragraph 5 he referred to the fact that he was appointed in March 2012 as a 'Lay (Nonprofessional and Nonlegal) Panel Chair of the Second Respondent's conduct and competence committee'.
  - 5.3. At paras 12 and 13 of the ET1, he wrote: 'It is the Claimant's case that in respect of both Respondents, notwithstanding the provision of the contract between the parties, that he was not a self-employed contractor but was either an employee or a worker. The Claimant therefore claims for the loss of the various benefits to which he was entitled for the duration of his engagement, by virtue of being an employee or worker for the Respondents'.
6. At para 2 of the Further and Better Particulars, the Claimant wrote:

'The claim against both the First and Second Respondents is a "status" claim in respect of his role as a Tribunal Member and Panel Chair respectively'.

7. The Respondent's ET3 refers in terms only to the Claimant's work as a Chair of the FTP committee; it does not refer to the Claimant's work as a Chair in registration appeal ('RA') hearings.
8. By the beginning of the preliminary hearing on worker status, the parties had failed to comply with the order of the Regional Employment Judge to agree a list of issues. I asked them to do so as I read into the case.
9. After several failed attempts, an agreed list was produced: the agreed issues in relation to the MPTS were set out over three and a half pages and included limitation issues; the agreed issues in relation to the NMC were in two paragraphs as follows:

'7. Was the Claimant an employee or a worker within [sic] section 230(3) ERA and/or regulation 2(1) WTR?

The Claimant contends he was for the same reasons as set out above in respect of R1.'

#### The approach to limitation

10. As for the question of limitation, the two Respondents took a markedly different approach. At paragraph 3 of my reasons, I found as follows:

'The Respondents are professional regulatory bodies: the MPTS for doctors, the NMC for nurses and midwives. The Claimant was a Tribunal Member with the former and is a Panel Chair with the latter. The relationship (to use a neutral term) with the MPTS ended in April 2018; with the NMC it was, at the time of the hearing, continuing.'

11. It will be apparent there was no suggestion by the NMC that the Claimant's relevant work for it had ended.
12. At paragraph 5 of my reasons, I recorded:

'The MPTS presented its ET3 on 24 August 2018: it raised limitation issues in relation to both of the claims against it and denied that the Claimant was an employee or a worker. The NMC presented its ET3 on 24 August 2018: it too denied that the Claimant was an employee or a worker. The NMC was content for any limitation issues in respect of the claim against it to be held over for the final hearing, should the claims proceed.'

#### The evidence before me

13. There was clear reference to the Claimant's work as an RA Chair in the evidence I heard. In his witness statement at paragraph 5, Mr Paul Johnson stated:

'Prior to legislative changes in 2017, the NMC had three Practice Committees, namely the Investigating Committee, the Health Committee

and the Conduct and Competence Committee. The legislative changes in 2017 merged the Health Committee and the Conduct and Competence Committee into a single Fitness to Practise Committee. The Claimant is, therefore, now a member of the Fitness to Practise Committee. The Claimant also sits as a Chair in registration appeal hearings which consider appeals by people who have been refused registration by the registrar.'

14. At paragraph 6, Mr Johnson stated as follows, without referring to the RA work:

'I make this statement to explain the relationship between the NMC and the Claimant in his role as a member of the Fitness to Practise Committee from an operational perspective. I am aware that the NMC's General Counsel, Clare Padley, has provided a witness statement explaining the statutory and contractual basis of this relationship.'

15. However, at paragraphs 42-43 of his statement, under the heading 'Allocation of hearings', Mr Johnson stated that there was no regularity to the pattern of sitting days for each panel member. He wrote:

'During his appointment as a Panel Member the Claimant has sat on the following occasions, these days include sitting as chair for registrations appeals cases.'

16. Mr Johnson then listed the number of days the Claimant sat in total in each year between 2012 and 2019.

17. Mr Johnson's figures were broadly consistent with figures given by the Claimant in his 'Regulatory Income and Time Analysis' document, appended to his witness statement for the hearing on status. This too made no distinction between the two types of hearing. He was not challenged on those figures.

18. At the hearing, the Nursing and Midwifery Council (Midwifery and Practice Committees) (Constitution) Rules Order of Council 2008 was provided. This relates to the constitution of practice committees including the FTP committee.

### The judgment on status

19. My judgment on worker status was as follows:

'The Claimant was a worker of the Second Respondent for the purposes of s.230(3)(b) Employment Rights Act 1996, and Reg 2(1)(b) of the Working Time Regulations 1998.'

20. In my reasons at paragraph 4, I recorded the Claimant's case against the NMC as follows:

'The Claimant contended that, notwithstanding the terms of the contract between him and both Respondents, which characterise him as an independent contractor, he was either an employee within the meaning of s.230(1) Employment Rights Act 1996 ('ERA'), alternatively a worker within the meaning of s.230(3)(b) ERA; for the purposes of his age discrimination claim against the MPTS, he contends that he was an employee within the meaning of s.83(2) Equality Act 2010 ('EqA').'

21. At para 88 of my reasons, I summarised the work the Claimant did for the Respondent:

‘The Claimant was appointed as a non-registrant, Panel Member Chair of the FTP Committee (known at the time as the ‘Conduct and Competence Committee’) for four years from 16 April 2012. He was reappointed in 2016 for a further four years, ending on 5 April 2020. As might be expected, Chairs generally take the lead at hearings, and also complete a case preparation questionnaire for those hearings in which they sit, the purpose of which is to inform the NMC of any administrative issues which are have arisen. He also sits as a Chair in registration appeal hearings, dealing with appeals by people who have been refused registration by the Registrar.’

The distinctions the Respondent now seeks to make

22. In her skeleton argument for today’s hearing, Ms Darwin observes that different statutory provisions apply to registration appeal, which were not provided at the hearing and/or to which I was not taken. One of those distinctions, I am told, is that registration appeals are a delegated function of the NMC. Regulation 25 of the 2004 Rules provides that a registration appeal can either be considered by the NMC itself, or by an appeal panel appointed by the NMC for that purpose. Ms Darwin points out that this is in contrast to hearings before the FTP Committee which, referring to paragraph 77 of my judgment, she says ‘cannot be heard by individuals who are employees or agents of the NMC’. That is not quite accurate: the Order I referred to at para 77 provides that ‘the Council may not employ any member of the Council or its committees, or sub-committees’; there is no reference to agency in the Order.
23. Ms Darwin also submitted (at paragraph 9):
- ‘There are a number of significant differences between Registration Appeals and hearings before the FtP Committee. By way of brief summary, the NMC appoints panels to hear Registration Appeals on an *ad hoc* basis, as and when a Registration Appeal is made. There is no formal appointment process for individuals who want to sit on Registration Appeals. The contractual arrangements differ from those that apply to members of the FtP Committee.’
24. The Claimant was able to demonstrate relatively straightforwardly that this was factually incorrect. He took me to an email of 14 January 2015, in which the Registration Appeal Panel wrote to all panel members of the FTP committee, stating that it required ‘at least 20 new panel Chairs from the FTP pool’. The email invited expressions of interest from existing Conduct and Competence Committee and Investigation Committee panel members.
25. The email confirmed that ‘the payment schedule is the same as FTP hearings and exactly the same format’. Ms Darwin accepted that no separate contractual documentation relating to this work was produced. She referred, somewhat vaguely, to ‘an oral contract’, although she was unable to say what the terms of that contract were.
26. The email specifically refers to ‘criteria for recruitment’, which included ‘successful completion of all essential panel member training and e-learning’,

i.e. the very training provided to FTP members/chairs (consistent with there being overlap between the two types of work). Attached to the email was an application form.

27. The Claimant was informed that his application to sit on registration appeals had been successful by email dated 11 March 2015. He began chairing them shortly thereafter (some three years before issuing his claim) and continued to chair them until December 2019 (some eighteen months after he issued his claim).

### **Conclusion**

28. The Claimant's pleaded claim at para 2 related to his work as 'Panel Chair' for the NMC. He used identical language in his FBPs. He sat as a Panel Chair on both FTP and RA hearings.
29. The Respondent relies on the express reference to the FTP work at para 5 of the Particulars of Claim. However, this was in the 'Background' section of the particulars, in which the Claimant narrated when and how he came to work for both the First and Second Respondents. In the case of the NMC, that was by way of his appointment to the Conduct and Competence Committee. The fact that he did not refer expressly to his later appointment to sit as an RA Chair in what is a brief pleading is not, in my judgment, determinative of the issue.
30. As for the list of issues (above at para 9), as clarified with the agreement of the Respondent, the issue was simply whether the Claimant was an employee or worker of the NMC. No reference was made to that issue being restricted to the Claimant's work as an FTP Chair.
31. The fact that the NMC took no limitation issue at the status hearing (paras 10-12 above), indicated to me that it accepted, contrary to the position it now seeks to adopt, that at least some of the Claimant's claims were in time. I have no doubt that if it considered that it had a knockout point on jurisdiction, based on a distinction between FTP and RA hearings, it would have taken it, as the MPTS did.
32. That the Respondent knew that his RA work was part of his case is reflected in the fact that Mr Johnson referred to it, albeit briefly, in his evidence. Ms Darwin submits that Mr Johnson's use of the word 'also' in the passage I have quoted above at para 13 suggests that he considered it to be irrelevant to the issues before me. I disagree. On an ordinary reading, it suggests the opposite: that he was referring to other, relevant work that the Claimant did for the Respondent. That is how I understood it at the time. The fact that he did not deal with it at greater length suggested that there were no material differences between the types of hearing.
33. As for Mr Johnson's figures on the number of days for which the Claimant sat (para 15 onwards), the fact that he included RA hearings indicated to me that no distinction was made by the Respondent between the two types of hearings for the purposes of the status issue. Had the RA figures not been relevant to the issue before me, I assumed that Mr Johnson would have excluded them, so as not to distort the picture. Accordingly, I adopted Mr Johnson's figures in my findings of fact at paragraph 117 as to the volume and regularity of the

Claimant's work as a Chair for the Respondent. There was no challenge to that finding on appeal.

34. As for the express terms of my judgment (quoted above at para 19), I concluded that the Claimant was a worker of the NMC. The judgment was not restricted to one aspect of his work.
35. As for my reasons, there was no suggestion in my summary (quoted above at para 20) that the Claimant's case was confined to his work as an FTP Chair. In para 88 (quoted above at para 21), I specifically included reference to his work as an RA Chair. The fact that I mirrored the language Mr Johnson used in his statement was precisely because I understood him to be saying that registration appeals were a relevant aspect of the work the Claimant did for the Respondent as a Chair. My understanding was that he did not deal separately with registration appeals because what applied to one largely applied to the other. If that were not the case, I would have expected him to say so. He did not. If there were any material differences, I would have expected them to be highlighted. They were not.
36. The reason why I did not deal with the two types of hearings separately in my reasons was because there was no attempt by the Respondent to draw any distinction between them, either in evidence or submissions. It simply did not take the points it now seeks to take.
37. As for the distinctions the Respondent now seeks to identify, for the first time, between the two statutory regimes (para 22 above), in my judgment they would not have assisted the Respondent. If Ms Darwin is right, it would suggest a greater, rather than a lesser, degree of integration into the NMC's organisation. I infer it is for that reason that the point was not made at the status hearing.
38. As for the other differences Ms Darwin relied on (para 23 above), the email to which the Claimant took me (para 24 onwards) confirmed that Chairs of RA hearings were a subset of FTP panel members. Contrary to Ms Darwin's submission, appointment was not on an *ad hoc* basis; it was subject to a formal process. Insofar as there is any reference to contractual arrangements, the email confirmed that the arrangements in relation to pay were identical.
39. The fact that the Claimant was able to rebut Ms Darwin's submissions so effectively with a single document supports my conclusion that the reason why the Respondent did not seek to make the distinctions it now seeks to make was because they would not have materially assisted its case.
40. My judgment in relation to the Claimant's employment status covered his work as a Chair on both types of hearing. I did not deal separately with them because neither party raised material distinctions between them.
41. The Respondent now seeks to take points which it could have taken at the original hearing, but which it chose not to take. It is far too late for it to do so.
42. The Claimant is entitled to pursue his claims in relation to all the work he carried out for the NMC as a panel Chair, including his work on RA hearings.

**Next steps**

43. A separate letter will be sent out to the parties, making orders in relation to the hearing in January 2023.

**Employment Judge Massarella  
Date: 18 November 2022**