



EMPLOYMENT TRIBUNALS

Claimant: Miss J Maclean
Respondent: Partnership East London Co-operatives
Heard at: East London Hearing Centre
On: 28 September 2023
Before: Employment Judge C Lewis

Representation

For the Claimant: In person
For the Respondent: Mr A Watson - Counsel

PRELIMINARY HEARING JUDGMENT

1. The Claimant was an employee of the Respondent within the meaning of s230 (1) of the Employment Rights Act 1996.
2. The Claimant also falls within the meaning of worker under the Working Time Regulations 1998.

REASONS

1. The Respondent provides healthcare services across East London and the provision of urgent treatment at four Urgent Treatment Centres (UTCs).
2. The Claimant is a qualified nurse and carried out work for the Respondent as a Clinical Streamer which involves carrying out an initial assessment of a patient at an urgent treatment centre and placing them in the correct queue for the care or treatment that they require. She worked from August 2018 until she terminated the arrangement in March 2023.
3. The Claimant has brought claims of constructive unfair dismissal, being subjected to detriments for having made public interest disclosures (whistleblowing) and holiday pay. This preliminary hearing was listed to determine the Claimant's employment status.

The Claimant says she was an employee whilst the Respondent says that she was neither an employee nor a worker within the meaning of s 230 of the Employment Rights Act 1996 (ERA), or the extended definition under s 43K of that Act.

4. For the purposes of the constructive unfair dismissal complaint under the ERA 1996 s 95 and automatically unfair dismissal s 103A that the Claimant has been dismissed as a result of whistleblowing, she must be able to show that she was an employee; worker status alone is not sufficient.

5. For the claims of being subjected to a detriment as a result of whistleblowing the Claimant has to establish that she is a worker, the extended definition of worker contained in s 43K ERA will apply.

6. For the purposes of her holiday pay claim for a claim under her contract, which falls under the Employment Tribunals Extension of Jurisdiction (England and Wales) Regulations 1994, the Claimant has to establish that she is an employee. For a claim under the Working Time Regulations 1998 she has to establish that she is a worker within the meaning of those regulations.

7. Mr. Watson, Counsel for the Respondent, produced a helpful detailed skeleton argument for this preliminary hearing which set out the relevant law and legal principles. The Claimant who is a litigant in person, relied on the content of her claim form, the documentary evidence and her oral submissions.

8. The Respondent's position is that it uses a combination of employed clinical streamers, bank staff who are also employees, and self-employed contractors at its four UTC's. It says that the Claimant worked as a self-employed contractor and performed her work through her personal service company Maclean J Limited. The Respondent submits that this is consistent with how both parties behaved throughout the contract and as set out in the Respondent witness statements and with what both parties told HMRC. The Claimant's position is that she was an employee of the Respondent: she maintains that she applied to work as a bank employee and only set up the company Maclean J Limited at the behest of the Respondent and as a vehicle for payment only.

9. The Claimant had not produced a witness statement. There had been a flurry of correspondence between the parties in the lead up to this hearing in relation to exchange of witness statements, in the course of which the Claimant had stated that she would not be producing a witness statement and would rely on her claim form, the documents in the bundle and asking questions of the Respondent's witnesses and answer any questions asked by the Tribunal. The Respondent's solicitors asked the Claimant to confirm that she understood the implications of this position. Having been assured by the Claimant that she understood the implications, the Respondent's solicitor acted on that assurance and sent the Claimant its witness statements. Mr Watson confirmed in his skeleton argument sent to the Claimant in advance of this hearing that any attempt by the Claimant to resile from her position on giving evidence would be robustly resisted.

10. At the start of the hearing, I asked the Claimant whether she understood that the burden of proof was on her to establish that she was an employee or a worker. She told me that she did not resign from her stated position in respect of not giving evidence. Mr Watson sought to clarify whether the Claimant understood that she would not be able to put forward a case in cross examination that was not supported by any evidence and that the only evidence (other than the Respondent's witness statements) was the documents in the bundle. The Claimant confirmed that she would rely on the contents of the documents in the bundle. The Claimant told me that she had only received the Respondent's skeleton argument that morning and had not had time to read it. I adjourned the hearing for an hour and a half to allow time to read the Respondent's witness statements, documents and skeleton argument.

11. The hearing was adjourned at 10.30 am and resumed at 12pm. After some discussion the Claimant clarified that her case was that she was employed as a bank employee but paid via a limited company. She accepted that she had always been responsible for her own tax and national insurance payments and that she had been aware that she would be paid more if she was paid via a limited company. Mr Watson submitted this was new information and whilst he had no issue with the Claimant clarifying her case, he contended that she had no evidence to support that case. The Claimant disagreed that there was no evidence and pointed to the evidence in the bundle which she said shows, for example, that she never provided a substitute and Mr Rubery's witness statement at paragraph 18 to the same effect.

12. The Claimant then asked for an extension of time to prepare a witness statement. Mr Watson objected and submitted this would fall with Rule 30A application to postpone a hearing less than 7 days in advance and required exceptional circumstances. He asked for an opportunity to take instructions in respect of any postponement over lunch. I adjourned the hearing until 2pm to also allow time for copies of the emails between the Claimant and the Respondent's solicitors in respect of witness statements to be sent to me before we reconvened.

13. Having heard from the Claimant and Mr Watson after lunch, I refused the application to postpone for the reasons given orally and proceeded with the hearing.

Evidence and findings

14. I heard evidence from Mr Steve Rubery the Chief Executive Officer of PELC who has held that position since May 2022 and Sonia Gangapatnam currently employed as Workforce Information Analyst, but employed as an HR advisor at the time the Claimant applied to work for PELC as a Clinical Streamer. The Claimant confined her questions of the Respondent's witnesses to putting to them the contents of their own documents in the bundle.

15. Ms Gangapatnam gave the following evidence: The Claimant completed an application form [page 41] as a result of an expression of interest in the role. It was not advertised on the NHS jobs website as individuals heard about the role through word of mouth and contacted the Respondent to apply. Miss Maclean approached the Respondent and expressed her interest in the position and as with all individuals who

expressed an interest, she was asked to complete an application form with her details, the Respondent provided the Claimant with a standard NHS application form described as an "Application for Employment" with the Respondent. Although the initial email dated 17 August 2018 [39] refers to enrolling in the Bank, Miss Gangapatnam maintained that the form was simply used to obtain the relevant information and did not determine the status of the individual's working relationship with the Respondent. Miss Gangapatnam told me that Miss Maclean subsequently confirmed that she chose to be a self-employed contractor through her personal service company and she was therefore not ever provided with a contract of employment and has not ever been paid through PELC's PAYE system. Miss Maclean did not attend an interview and the document at page 119 is a checklist with standard requests for documents for contractors as well as employees. As far as Ms Gangapatnam was aware all self-employed contractors are paid the same hourly rate.

16. The Respondent relies on the payment authorisation declaration provided by the Respondent to the Claimant and signed by her as evidence of the agreement between them [p 47]. The declaration is on PELC headed paper and sets out the authorisation in the following terms:

"I authorise and request the Partnership of East London Co-operatives Ltd ("PELC") to pay all sums **due to me** to the account below until further written notice

[account details]

I agree that payment to MACLEANJ LTD will discharge any liability owed by PELC **to me**.

I acknowledge that the Members Agreement under which I provide clinical services **is strictly between PELC and myself as an individual NURSE member of the Society**" [emphasis added]

it was signed by the Claimant as Joanne Maclean and dated 7 November 2018.

17. Miss Gangapatnam told me that the terms of the Claimant's engagement are set out in the Members Agreement, an example of which was in the bundle [143-154]. She acknowledged that the example in the bundle referred to doctors but told me that at the time there was not a separate agreement in respect of nurses and the Agreement was applied to nurses with the substitution of the NMC and professional obligations and qualifications relevant to nurses for those applicable to doctors. Miss Gangapatnam accepted that it was possible that the Claimant had requested a copy of the Members Agreement but that she had not retained a signed copy, but pointed to the pay declaration returned on the 7th of November 2018 [page 47] in which Miss Maclean acknowledged the application of the Members Agreement. Miss Gangapatnam told me that at the time of the Claimant's appointment there was no separate service contract in place for self-employed nurses and the doctor's members agreement would have been used. She did not accept that the Claimant was employed as a bank worker (i.e. an employee for the Respondent's purposes). She told me that the Claimant would have

been responsible for providing an induction/ orientation to any substitute she provided as well as being responsible for ensuring they held the relevant qualifications and registration; she accepted that Mr Rubery's evidence in his statement suggested that the Claimant had not ever provided a substitute and she was not aware of any occasion when she had, nor could she suggest any circumstances when she might have done so.

18. As already noted, the draft Members Agreement in the bundle is described as an agreement between the Respondent and a doctor. It is headed as follows:

"THIS AGREEMENT is made the [blank] day of [blank] 20[blank]

BETWEEN

[The Respondent]

and

Dr [blank]

GMC Number [blank]

of (address)[Blank]

(The "Member")"

19. Relevant clauses of the agreement include the following:

"1. Background for Members

1.1 [description of the Respondent]

1.2 The Member is a fully registered medical practitioner whose name appears on the current list of the General Medical Council, and who has fulfilled the requirements for the granting of and has been granted a certificate of Prescribed or Equivalent Experience by the Joint Committee for Post Graduate Training for General Practice under the Vocational Training Regulations, and whose name currently appears on the Performers' List of a Clinical Commissioning Group.

1.3 The Society appoints the Member and the Member agrees to act as a Member Primary Care Physician. Only members of the Society can provide clinical services to the Society and the obligations of the Member in this agreement cannot be delegated.

1.4 This Agreement is for the provision of clinical services by the Member to the Society.

...

2 Terms of contract

3 [obligations on Member to amongst other things provide evidence of current registration and license to practice with GMC; current professional indemnity insurance; proof of appointment to CCG Performers' List; satisfy enhanced DBS disclosure; report any change in professional status/ potential disciplinary matters; observe GMC professional conduct rules; preserve patient confidentiality]

4 Allocation of Sessions

4.1 The Society shall invite the Member to bid for the personal provision of clinical services ... to patients ... on an "as and when needed" basis as a self-employed sub-contractor to the Society.

4.2 The Member shall be offered the opportunity to provide clinical services to patients by personally undertaking clinical sessions on the roster for Members of the Society, according to need as determined by the Executive of the Society and at the sole discretion of the Society.

...

4.4 The Society is not obliged to offer the Member any sessions and the Member is not obliged to accept any sessions that are offered.

4.5 A roster will normally be published on a monthly basis listing the session are available for the following month.

...

6 Duration of Sessions

...

6.2 For the avoidance of doubt, the Working Time Regulations 1998 ("the Regulations") do not apply to the Member as a self-employed contractor....

...

14 Status of the Member

14.1 In view of the fact that the Society is under no obligation to offer the Member work and the Member's ability to decline work that is offered by the Society the Member and the Society agree that during this appointment, the Member shall be a self-employed contractor and not an employee or worker of the Society.

14.2 The nature of the arrangement under which the Member provides clinical services through the Society is that the Member exercises his or her profession on the Society's premises or for patients referred by the Society. The Member is not subject to directions from the Society in the

exercise of his or her profession and shall not be subject to direction from the Society except as set out in this Agreement.

14.3 In consequence of the Member's status as set out in clause 14.1 above, it is agreed that:

14.3.1 The Member shall not be entitled to any holiday entitlement or holiday pay (either statutory or Society holiday entitlement and pay):”

...

Further provisions include at 10 for submission of monthly invoices and at 15 for Member to maintain adequate indemnity insurance and at 19 a whole agreement clause.

20. I find that there was a direct contract between the Claimant personally and the Respondent. The agreement to accept payment to MacleanJ Ltd was expressly stated to be in discharge of any liability to make payment to the Claimant in relation to the service provided by her personally. The Members Agreement sets out at Clause 1 the personal nature of the agreement between the member i.e. the doctor, or in this case the nurse, and the Respondent and makes no reference to the Claimant's company.

21. Miss Gangapatnam also told me that as a medical care provider PELC is monitored and regulated by the Care Quality Commission (CQC); the regulations apply to the whole of the regulated service and all individuals providing it, whether they are employees or self-employed and that includes requirements for mandatory training and updates. Miss Gangapatnam emailed the Claimant on the 31st of January 2020 [59] informing her that the Respondent had gone through her HR file and found missing or expired training certificates and advising her that she had to register for an e-learning portal and then send the certificates to the Respondent.

22. The training [details at page 59 and 81] was not provided by PELC, it is provided by the NHS and available on a central portal to all individuals who work within the NHS. PELC did not oversee the training and did not pay the Claimant for the time she spent carrying out the training. Miss Gangapatnam simply required the Claimant to confirm that she had completed the training in compliance with the CQC requirements by providing the relevant certificates.

23. The regular 1:1 meetings with senior individuals (see for example p.60, e-mail dated the 27th of January 2021 from the Claimant line manager Cherry Sanchez to the Claimant copying in Cheryl Saunders informing the Claimant that is her one to one supervision was due and informing her of available dates) was also a CQC requirement, according to Miss Gangapatnam these were not performance appraisals and they did not discuss career development or progression opportunities; they were meetings to discuss the delivery of the contractual obligations and to ensure the individual remained

aware of and compliant with all regulatory obligations and guidance applicable to that critical role.

24. On the 7th of February 2021 the Claimant emailed the Respondent a completed IR35 status check form [66-69] which the Claimant had been asked to complete by the Respondent. The Respondent places reliance on the IR 35 checks as evidence of the Claimant's status as a self-employed contractor. The result produced was that the off payroll working rules (IR 35) did not apply; the reason for this result was that the Claimant had given answers stating :”

- [the Respondent] has accepted or would accept a substitute
- you or your business will have to fund costs before your client pays you.

This suggests you are working on a business to business basis

The completed form with the answers provided by the Claimant is at page 67 the answers include the following:

“Who are you? Worker

Do you provide your services through a limited company partnership or unincorporated association? yes

Have you ever sent a substitute to do this work? -yes, your client accepted them

Did you pay your substitute- yes”

An additional questionnaire was also completed [70] the answer sheet provided by PELC states:

“It is PELC's expectation that you (or your limited company) will provide a substitute if you are unable to complete work agreed and you (or your limited company) will be expected to pay the substitute.”

The Claimant signed and dated this document on the 5th of April 2021.

25. The Respondent completed a version of this document on the 6th of April 2021 [page 72] the answer to the question has the worker ever sent a substitute to do this work was “no it has not happened”.

26. The IR 35 status determination completed by the Respondent [at page 76 to 77] describes the employment as starting on 6th of April 2021 and that the engagement falls outside IR 35 and is therefore self-employed for tax purposes. It provides 11 numbered reasons for that determination, including:

“1. Substitution - This outcome is on the basis that PELC has established that you have the right to provide a substitute to complete the work that has been booked. This means that you are able to get another clinical individual of the same qualification and experience to complete the session booked with PELC.

PELC will make payment to your limited company and it will be the responsibility of your limited company to pay the substitute.

...

4 Control – The determination is made on the basis that you (contractor) work in various areas depending on where you have chosen to book a shift.

5 Mutuality of obligation - This determination is made on the basis that you (contractor) work on an ad hoc basis depending on when you have chosen to book a shift and PELC has chosen to give you the shift requested. PELC have no obligation to offer you work and equally you do not have any obligation to book work with PELC. You will book the shifts you want to work on the available booking portal.

6 Working arrangements -This determination is made on the basis that the place of work for any shift agreed will be determined by the location set out on Rota Master.

When liaising with stakeholders during work with PELC it is expected that the contractor sent by the services supplier will introduce themselves as an independent contractor working on behalf of PELC this is to ensure that there is no ambiguity about the contractor's connection to PELC.”

Financial risk is set out at 7;

“8 Equipment - Although you the supplier will provide some of your own equipment (including for any substitutes) it is understood that PELC may provide other equipment required for the services you will provide to PELC as this is critical to ensure patient safety.

9 Business in your own right -You the contractor will not be included on PELC structure chart or have any management responsibility with PELC this must remain the case for the duration of this contract. You may be given PELC NHS mail access due to the sensitivity of information sharing regarding the patient cases that you may have seen.

10 E-mails sent on behalf of PELC must clearly stipulate in the signatures that the Contractor is an ‘independent contractor working on behalf of PELC’. PELC expect that the contractor will continue to function as a business. You (the supplier or contractor) will not be covered under PELC business or any other insurance.“

The next steps includes issuing new terms of engagement applicable from the 5th of April 2021 and “ensure that you were working in line with the new contract”.

27. Ms Gangapatnam told me that before the IR35 assessment the Claimant was paid through Rota Master but since the IR 35 assessment she put her shifts on her invoices, she was paid gross and is responsible for paying her own tax and national insurance. This was not disputed by the Claimant.

28. The Claimant pointed the Respondent's witnesses to the fact that she was provided with an NHS email address and was included in an email about uniform to support her contention that she was an employee. Ms Gangapatnam accepted that the Claimant had an NHS email but believed this was because she had previously been employed by the NHS and this was simply reactivated.

29. The Claimant was included in an e-mail on the 9th of December 2021 about provision of fleeces to the Clinical Streamers in cold weather. The Respondent says that all the Clinical Streamers were included on the list due to their location within the building, which was a cold draughty area and despite PELC not being an under any obligation to provide uniform to self-employed individuals; the Claimant was able to choose whether to wear a fleece or not and could have worn her own jumper or fleece if she chose. Mr Rubery's evidence was that until COVID Miss Maclean and other self-employed contractors had been expected to provide their own scrubs but that since COVID all self-employed or employed staff were provided with scrubs by PELC in order to ensure adequate infection control was complied with. Mr Rubery accepted that apart from the scrubs PELC supplied the Claimant with necessary equipment to carry out her role.

30. Mr Rubery gave evidence that the task [job] description for the role [113 -116] of Clinical Streamer is the same as for the bank workers, who were employees, and the role requirements were exactly the same, irrespective of whether the role was being performed by an employee or a self-employed contractor [w/s para 8]. At 3 "Main Duties and Responsibilities", the first duty/responsibility set out is:

"To work as an autonomous practitioner and be professionally and legally accountable for upholding all aspects of your governing council's professional standards and guidelines".

31. The Person Specification at [117-118] required an "appropriately qualified healthcare professional", with the first two essential qualifications described being relevant nursing qualifications and experience.

32. I was told that the Claimant did not appear in the Respondent's Organisational chart and that the Respondent had instructed the Claimant to make clear on any email footer that she was not an employee of PELC but was an independent contractor, although no email footer of this type was in the bundle.

33. There was no evidence that as far as the patients (or clients) of the Respondent's service were concerned there was anything to suggest that she was other than an integrated part of the Respondent's service.

34. I am satisfied that due to the nature of the Claimant's role there was a significant degree of integration into the Respondent's service.

35. Mr Rubery told me that the Claimant had no set agreed working hours with the Respondent. The Respondent opens its rotas for all Clinical Streamer shifts 2 months in advance, the rotas are circulated to all Clinical Streamers at the same time whether

they are employees, bank staff or self-employed contractors. Staff can then indicate their availability and preferences for particular shifts. The rota team then allocates the shifts giving priority to the employed staff having regard to their contractual hours, then bank staff and then lastly allocating shifts to the self-employed contractors.

36. The Claimant tended to apply for shifts at the two locations which were most conveniently located for her in terms of travel and he understood that she was allocated some shifts most months that she requested them. He did not believe that the Claimant had ever sent a substitute to work any shift, pointing to the fact that she would only have applied for shifts that she was available for and wished to work.

37. I find that the relevant professional registration and qualification required was personal to the Claimant, as were the background checks albeit it was the Respondent's position that a similarly suitably qualified substitute would have been accepted in reality the Claimant did not ever send a substitute and it would have been impracticable for her to have done so.

38. I was referred by Counsel to the e-mail of 27th of February 2023 [page 93] which the Claimant relies on as a protected disclosure in which she states, "As you are fully aware, I am accountable for my actions /omissions therefore having raised safety concerns, I wish to understand and work with you to preserve the safety of those receiving care". Counsel pointed to the phrase "As you are aware I am accountable for my actions /omissions" as indicating that the Claimant knew she was self-employed contractor. However, I am satisfied that the context of the email is more consistent with the Claimant referring to her accountability as a nurse for her own professional practice under the NMC Code, she specifically refers to paragraph 11 of the NMC code and quotes it in her email on the same topic on 30 January 2023 [82].

39. Pages 102-112 of the bundle contained invoices from MacleanJ Limited to Partnership of East London Cooperatives Limited for various shifts carried out by the Claimant at two different locations. It was accepted that the Claimant worked regularly for the Respondent for over 4 and half years, and in that time, she did not work for anyone else.

Legal framework

40. The relevant statutory provisions are as follows:

S 230 Employment Rights Act 1996 employees, workers etc

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

- (a) a contract of employment, or
- (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

(4) 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.

(6) This section has effect subject to sections 43K ... and for the purposes of Part XIII so far as relating to Part IVA or section 47B, “worker”, “worker's contract” and, in relation to a worker, “employer”, “employment” and “employed” have the extended meaning given by section 43K.

Working Time Regulations 1998 Regulation 2 Interpretation

(1) In these Regulations

...

'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.

The parties' submissions

41. Mr Watson, set out the relevant law and authorities in his helpful skeleton argument. He rightly points out in his written skeleton that the Claimant has not put forward a case on the basis of the extended definition of worker under s 43K.

42. The Claimant in her submission was clear that she contended that she was an employee of PELC and that she was employed as a bank worker. She submitted that it was clear from the Respondent's own evidence that she had never provided a substitute, that any references in the documents to being able to provide a substitute were introduced at PELC's behest and did not reflect the reality of their relationship. She submitted that the contract was between her personally and PELC; that not any nurse could provide the streaming services to PELC and that to suggest that she would be responsible for ensuring someone else [a substitute] was suitably qualified, had a DBS check and health check, for inducting them and ensuring they met all of PELC's and CQC's compliance requirements was fanciful. The Claimant pointed to the provision of uniform, the job description and supervision arrangements as showing that she was fully integrated into PELC's organisation; she referred to the fact that PELC set the wage and there was no negotiation as to rates of pay to show that she was not in business on her own account or dealing with PELC as a client. While the Claimant disputes that the Members Agreement reflected the reality of the relationship, she submitted that even based on its contents it was clear that the contract was between herself personally and PELC and not with her company and that the arrangement with her company was limited to payment only and was suggested by PELC.

The relevant authorities

43. The starting point for determining whether someone is (or was) an employee was set out by McKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, [1968] 1 All ER 433 where he said as follows:

"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service ...!"

44. In *Plastic Omnium v P Horton* [2023] EAT 85 HHJ Tucker gave the following guidance:

"50. First, an accurate determination of the employment status is best resolved by adopting a structured analysis and structured application of the legal principles set out in section 230 of the ERA 1996. The passage quoted from HHJ Taylor's decision in *Sejpal v Rodericks Dental Ltd* [2022] EAT 91 may be helpful at that stage, per HHJ Taylor in *Sejpal* at paragraphs 10-11 in respect of worker status"

In *Sejpal* the EAT acknowledged that where there is a contract pursuant to which the individual undertakes to perform personally any work services for the other party, concepts of integration, control and subordination might assist in determining whether

that individual was excluded from being a worker because they carry on a professional business undertaking of which the other party is a client or customer.

Other relevant factors

45. The degree of integration of a worker into the employer's organisation remains a material factor under the multiple test approach and will be a question of fact for determination by the Tribunal.

46. The stated intentions of the parties (whether or not reduced to writing) are also a relevant factor but the Tribunal should always look to the substance of the matter, even if the parties have expressly agreed on a label. A contractual description of the relationship ought to carry significant weight where all other factors are evenly balanced. In *Massey -v- Crown Life Insurance Co* [1978] ICR 590, CA, Lord Denning MR stated: "when it is a situation which is in doubt or which is ambiguous, so that it can be brought under one relationship or the other, it is open to the parties by agreement to stipulate what the legal relationship is."

47. In *Cotswold Developments Construction Ltd v Williams*[2006] IRLR 181 , the EAT suggested a four-fold approach in intermediate cases (especially with a casual element):

- (1) Was there one contract, or a succession of shorter ones?
- (2) If one contract, did the claimant agree to undertake some minimum (or, at least, reasonable) amount of work for the company in return for pay?
- (3) If so, was there such control to make it a contract of employment?
- (4) If there was insufficient control (or some other factor negating employment) was the claimant nevertheless obliged to do some minimum (or reasonable) amount of work personally, this qualifying him as a worker?

48. In April 2021, the IR35 regime in Part 2 of the Income Tax (Earnings and Pensions) Act 2003 changed in that medium and large private sector employers became responsible for establishing if the contractors that are working for them are self-employed or employees (for tax purposes). Prior to April 2021, if there was an incorrect categorisation, the individual or the personal service company was responsible for the error and therefore responsible for any unpaid tax or National Insurance contributions. The IR35 regime for public sector companies had made this change in April 2017.

49. The HMRC IR35 binary classification of workers into employed and self-employed is not the same as the categorisation(s) in employment law.

50. The Supreme Court in *Uber* held that worker status was a question of statutory interpretation, rather than contractual interpretation. The written documentation between Uber and the drivers was not the correct starting point. Instead, it was necessary to consider the purpose of the relevant legislation, which was to protect vulnerable individuals in a position of subordination and dependence in relation to another person who controls their work. Per Lord Legatt in *Uber* at 70:

“the ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically” (para 70)

The purpose is to protect those who are in position of subordination and dependence, beyond traditional employee category, so a degree of control is relevant (para 87) but the facts must be viewed realistically (para 87).

51. The courts must also be alive to situations where one party sets the terms and seeks to describe the relationship in a way that suggests a genuine right to substitute when in fact or practical reality one does not exist.

52. Employment Tribunals should be alert to the use of the label independent contractor as a device by which a potential Respondent employer seeks to avoid the normal legal consequences that attach to the employment relationship.

53. See also *Young and Woods Ltd v West* [1980] IRLR 201, CA, in which on the facts found by the Industrial Tribunal – that apart from being paid his wages without deductions and not being entitled to holiday or sick pay or to have the benefit of the disciplinary procedure, there was no difference at all between the working conditions applicable to the Respondent and those applicable to the workers who were subject to PAYE – were strong enough to satisfy the Respondent's burden to show that the label was a false label and that, though the mutual intention of the parties was to call the work services under a contract for services, nevertheless it was in reality service rendered under a contract of service

Conclusions

54. I reached the following conclusions based on my findings of fact.

55. The first issue I had to resolve was whether there was a contract between the Claimant and the Respondent at all, or whether the contract was with the service company Maclean J Ltd. I have found that there was a contract between the Claimant and the Respondent [see above].

56. I am satisfied that the documentation before me put forward as reflecting the contractual relationship, principally the Members Agreement, did not accurately set out the terms of the relationship between PELC and the Claimant which I find instead had to be determined from the reality of the working relationship.

57. Some factors pointed away from employment status. The Claimant submitted monthly invoices from her company and was not paid within the PAYE system. She was able to log on to the Respondent's system and select shifts at one of four defined clinics, but in this respect, she was in the same position as the Respondent's bank employees (albeit they were allocated shifts first). She was described in correspondence as a self-employed contractor and the Claimant agreed to submit the IR 35 status determination indicating that she could provide a substitute and provided her own professional indemnity insurance.

58. I am satisfied that on the evidence before me substitution would have been impracticable and references to substitution in the IR 35 status determination and associated documentation were not operative. No substitution was ever requested by the Claimant or the Respondent, the nature of the job itself included knowledge of the Respondent's operation and the requirement for stringent background checks and qualification checks meant that the conditional nature of the substitution clause was such that there was no realistic prospect of substitution taking place. This, at least, is consistent with the wording of the Members Agreement.

59. Other factors pointing towards employment status included personal service. The agreement to accept payment to MacleanJ Ltd was expressly stated to be in discharge of any liability to make payment to the Claimant in relation to the service provided by her personally. The Members Agreement sets out at Clause 1 the personal nature of the agreement between the member i.e. the doctor or in this case the nurse and the Respondent. Clause 1 .2 specifies that the member must hold the relevant professional registration and 1.3 prohibits delegation, while 1.4 sets out that it is the Member who is agreeing to provide the services personally.

60. However, clause 4 provides that the member is invited to bid to provide services and does so on a self-employed basis; clause 4.4 states that there is no mutual obligation to provide or accept work. Clause 14 describes the status of the Member and expressly provides that they are self-employed and not a worker or employee.

61. I find that the emails from the Respondent to the Claimant were directed to her personally and not to her company, explicitly stating, "you are the person to be engaged". The qualifications and background checks required were personal to her as an individual. In relation to CQC matters she was treated as if she was a staff member.

62. I find there was a contract in place which required as its dominant purpose the Claimant to personally do work. It was not disputed that the relevant professional registration and qualification was personal to the Claimant. I do not find that it would reflect the reality of the arrangement to describe PELC as a client of the Claimant's. I am satisfied that she could not be said to be an independent provider of services who was not in a relationship of subordination with the Respondent.

63. I find that the Claimant was a worker under limb b) of section 230 of the ERA each time she accepted work at one of the Respondent's UTC's.

64. Was the Claimant an employee? I have already found for the Claimant in respect of personal service. The other factors relied on by the Respondent are lack of control and lack of mutuality of obligation.

65. In terms of control, I am satisfied the Claimant falls within the category of skilled employee identified by Lord Phillips in *Catholic Child Welfare Society and ors*. The Claimant was expected to exercise her skill and expertise as a nurse autonomously in carrying out her role, but I am satisfied that the Respondent could direct what she did, even if not how she did it (for example Mr Rubery's email dated 6 February 2023 [84]). Apart from not having the benefit of the disciplinary procedure she was in the same

position as the bank employees or the employed clinical streamers in this respect. I find that there was sufficient control to make the relationship one of employer and employee.

66. The Respondent also points to a lack of the irreducible minimum of obligation to provide and do work. The Claimant worked regularly for the Respondent for a number of years I am satisfied that the natural inference from the facts is that the Claimant agreed to undertake at least some reasonable amount of work for the Respondent and the Respondent agreed to offer at least some reasonable amount of work and pay for that work. There was at least an element of mutual obligation.

67. Having taken into account the factors consistent and inconsistent with employment I find as a matter of overall assessment that an employment relationship existed. I find that the Claimant was an employee within the meaning of s 230 (1) of the Employment Rights Act 1996.

68. The case is to proceed to a final hearing on 17, 18 ,19 20 and 24 September 2024.

69. I wish to express my sincere apologies to the parties in the delay in providing them with this judgment. This has been due in parge part to the pressure on judicial time and lack of available judicial resources.

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Employment Judge C Lewis
Date: 7 May 2024