EMPLOYMENT TRIBUNALS

Claimant: Miss L Ryan

Respondent: (1) The Belvedere Clinic Ltd

(2) The Belvedere Private Clinic Ltd

(3) The Pemberton Laser Cosmetic Surgery Clinic Limited

(4) Cosmetic Surgery London Limited

Heard at: London South Employment Tribunal (by CVP)
On: 30 and 31 May 2024

Before: Employment Judge T Perry

Representation
Claimant: Mr R Bhattacharya, Mr J Saville-Tucker (Solicitors)

First and Third Respondents: Mr M Akram (Counsel)

Second and Fourth Respondents: did not attend

RESERVED JUDGMENT

It is the Judgment of the Tribunal that:

1. The Claimant was an employee within the meaning of section 230 ERA 1996;
2. The Claimant was an employee within the meaning of section 83 EA 2010;
3. The Claimant was a worker within the meaning of section 230 ER 1996;
4. The Claimant was employed by Cosmetic Surgery London Limited;
5. The claims against The Belvedere Clinic Ltd, The Belvedere Private Clinic Ltd, and The Pemberton Laser Cosmetic Surgery Clinic Limited are dismissed.
6. The Claimant's claims will proceed to be considered at the full merit hearing listed on 18, 19 and 20 June 2025 against Cosmetic Surgery London Limited only.

REASONS

Evidence

1. The Tribunal was provided with a bundle from the Claimant running to 593 pages and a bundle from the First and Third Respondents running to 248 pages. There was substantial overlap between the two bundles with much but not all of the additional documentation in the Claimant's bundle being inter partes correspondence. The Respondents' bundle included two documents relating to the employment status of Doctor X, which were of only limited relevance to the matters to be determined at this hearing.

2. The Claimant gave evidence from two written witness statements. For the Respondents Mr Robert Lovitt, Chartered Accountant, gave evidence from a written witness statement. Mr John Barber gave evidence from two written witness statements. The Claimant did not challenge the evidence of Ms Joanita Ngaire who had produced two written witness statements but did not attend due to ill health.

3. I heard oral submissions from both sides and had the benefit of skeleton arguments from the Claimant in relation to employment status and the correct respondent.

The issues

4. The issues before the Tribunal were as set out in paragraph 1 of the list of issues set out by EJ Krepski on 8 February 2023 together with the question of which of the Respondents was the Claimant's employer.

Findings of fact

5. The Belvedere clinic is a private cosmetic surgery clinic operating at a private hospital in Abbey Wood, South East London.

6. Belvedere Clinic Limited ceased trading in December 2019. It appears that before this time it was the entity that contracted with customers of the clinic. Belvedere Private Clinic Limited was in a CVA by 2020. I am unclear what its role was in the structure before this time. Clearly neither entity was likely to be the Claimant's employer.

7. The Pemberton Laser Cosmetic Surgery Clinic Limited was by 2020 registered with the CQC to operate the private hospital in Abbey Wood. It grants permission for surgeons to operate at the hospital. Remuneration of those surgeons (referred to as the "commercial contracts") is by Cosmetic Surgery London Limited. The current hospital

manager, Mr Barber suggested that Cosmetic Surgery London Limited was in some way simply a broker which referred patients to the hospital but in fact I find that it was in effect the operating company for the clinic. Were it simply a broker, Cosmetic Surgery London Limited would not be paying the surgeons. I accept that on occasion Cosmetic Surgery London Limited may have referred patients to other hospitals.

8. The Claimant was introduced to the Belvedere clinic in early 2020 by her friend Clare Ballaram, with whom she had previously worked elsewhere.

9. The Claimant had a conversation on 23 February 2020 with Ms Ballaram (in person) and Mr Terrence Bartlett (joining by phone) about working at the clinic as a patient co-ordinator. It was agreed the Claimant would be paid £10 an hour for work done. There was no specific term agreed as to the Claimant's working hours but it was indicated that the Claimant might work three or four days per week. The Claimant was also told she would be entitled to commission on procedures she booked.

10. There was no written contract governing the Claimant's working relationship.

11. The Claimant was unsure about which legal entity employed her. The Claimant stated, and I accept, that she had limited knowledge of the operation of employment law and felt uncomfortable asking anyone at the clinic to clarify matters.

12. The Claimant was not provided with a disciplinary policy or told of any consequences if she was absent or late. The Claimant was not provided with details of any benefits including annual leave or sick pay.

13. At some point, Mr Bartlett unilaterally changed the Claimant's hourly rate from £10 to £7.

14. The Claimant's first day of work was 5 March 2020. The Claimant was required to sign a number of documents. These included a DBS policy statement for the Belvedere Private Hospital and a document about "Etiquette of a Front Office Receptionist" for Belvedere Private Clinic Ltd. The Claimant was required to provide a copy of her passport, CV and utility bill to be added to her "HR file" and was required to undergo an enhanced DBS check.

15. The Claimant was not required to sign any document preventing her from working elsewhere but did not, in fact, work elsewhere during the period she worked at the clinic.

16. Also on 5 March 2020, the "HR Department" at the Belvedere Clinic Limited sought a reference for the Claimant in respect of "the position of Patient Services within our

organisation."

17. The Claimant's role of patient co-ordinator required her to market cosmetic surgery services, offering options to customers and providing details of prices. This was done in face to face appointments on the basis of a guidance document provided to the Claimant by Ms Ballaram. The Claimant had discretion to charge as much as she felt a customer could afford but not less than the amounts included in the guidance document. The Claimant noted the status of her consultations and any sales made by hand in the clinic office diary. Contracts for customers (including the Claimant) were signed with Cosmetic Surgery London Limited. The Claimant did not have to cold call customers but would on occasion stand in as a receptionist at the clinic.

18. The Claimant was required to purchase and wear a uniform, specifically a blue blazer and skirt that had to be purchased from a particular store.

19. On a day to day basis the Claimant dealt with Ms Ballaram, Ms Ngaire and Mr Bartlett. Ms Ballaram trained the Claimant up and gave her instruction on how to do the job.

20. The Claimant was informed of the days available either by phone or in person at work. With only one exception (when a shift was offered last minute) the Claimant worked those days made available to her.

21. In March 2020 the Claimant completed a timesheet with the name Cosmetic Surgery London Ltd at the top. I find this was a document provided by the clinic. The Claimant used this timesheet to "clock in" and "clock out" each day. The timesheets were kept by the back door of the main building. She worked 10 days in that month of between one and eight hours a day (over two of three days a week). The Claimant appears to have had no set start and finish times.

22. The Claimant completed a hand written invoice for commission for March 2023. She entered her bank details and contact details on this form. The invoice was addressed to Cosmetic Surgery London Ltd. I find this was a document provided by the clinic.

23. During the Covid 19 lockdown from April 2020, the clinic was closed. The Claimant was not furloughed. She was told in a WhatsApp exchange with Ms Ballaram

    "You are self employed, you can be furloughed.

    You have no contracts and are liable for your own taxes.

    **cant not can sorry"*

24. It appears Ms Ballaram was also not put on furlough. The Claimant was able to name

a number of other colleagues but was unsure whether any of them were furloughed.

25. The Claimant performed no services for the clinic during lockdown.

26. In July 2020 the Claimant again completed a timesheet with the name Cosmetic Surgery London Ltd at the top. She worked 6 days in that month of between five and nine hours. One week she did not work. One week she worked one day. One week she worked two days and one week she worked three days.

27. The Claimant underwent a procedure as a patient of the clinic in the first week of July 2020. The Claimant's was one of the first procedures after the clinic reopened. The Claimant did not work the following week as she was recovering from the procedure. The Claimant received no sick pay.

28. In August 2020, an invoice was raised for hours worked and commission for July 2020. The invoice was addressed to Cosmetic Surgery London Ltd. It was unclear how this invoice was raised as the Claimant claimed not to have the computer skills to produce it. It was signed by the Claimant. On balance I find that this was created by someone other than the Claimant based on the combination of the timesheet entries made by the Claimant and the sales reported by the Claimant. The format is very similar to those submitted by Doctor X.

29. The Claimant's bank statement shows that this August invoice was settled by "Cosm Sur Ltd SW". As far as the Claimant could remember this was the only entity that paid her invoices. No tax was deducted at source. The Claimant did not include VAT on her invoices.

30. The Claimant did not work in August 2020. It was unclear why not. She claimed not to have been on holiday and that she was supporting herself from savings.

31. The Claimant's engagement at the clinic was ended in September 2020.

32. In March 2021 the Belvedere clinic closed for several months before reopening in June 2021. This was due to regulatory issues with the CQC.

The Law

33. Section 230 Employment Rights Act 1996 states

    (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.

34. Section 83 Equality Act 2010 states

(1) This section applies for the purposes of this Part.

(2)“Employment” means—

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

35. Ultimately it is impossible to draw up a complete and immutable list of criteria to be considered when deciding whether a contract is one of employment or one for services: **Maurice Graham Ltd v Brunswick** (1974) 16 KIR 158, Div Ct.

36. The modern approach is to use a 'mixed' or 'multiple' test and consider a number of factors while having regard to the arrangement as a whole.

37. The starting point is generally considered to be the judgment of 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 …'.'

38. The obligation to render personal service is of crucial importance. It is however far

from conclusive; for there is nothing to prevent an independent contractor from undertaking to perform the relevant tasks personally.

39. As to control, in **White v Troutbeck SA** Judge Richardson in the EAT ([2013] IRLR 286) held that the control test has to be applied in modern circumstances where many employees have substantial autonomy in how they operate, and are left to an extent to exercise their own judgment; the original idea that there must be detailed control of working methods may no longer always apply.

40. Moreover, at para 45 he said '… the question is not by whom day-to-day control was exercised but with whom and to what extent the ultimate right of control resided'. This was approved in the Court of Appeal [2013] IRLR 949, CA.

41. One further factor which has been found frequently in the case law is 'mutuality of obligations' which will usually mean an obligation on the employer to provide work and an obligation on the employee to do it. This is of particular relevance in the area of casual work where it may well be a crucial element in drawing the line between relatively informal employment relationships and arrangements which ultimately are too loose to qualify.

42. Eventually, a view must be taken on all of the facts by balancing all the factors (the modern 'multiple test'). This can include considering:

    42.1. What was the amount of the remuneration and how was it paid?—a regular wage or salary tends towards a contract of employment; profit sharing or the submission of invoices for set amounts of work done, towards independence.

    42.2. How far, if at all, did the worker invest in his or her own future: who provided the capital and who risked the loss?

    42.3. Who provided the tools and equipment?

    42.4. Was the worker tied to one employer, or was he or she free to work for others (especially rival enterprises)? Conversely, how strong or otherwise is the obligation on the worker to work for that particular employer, if and when called on to do so?

    42.5. Was there a 'traditional structure' of employment in the trade or has it always been a bastion of self-employment?

    42.6. What were the arrangements for the payment of income tax and National Insurance?

42.7. How was the arrangement terminable?—a power of dismissal smacks of employment.

43. As to the status given to the relationship by the parties, in **Quashie v Stringfellow Restaurants Ltd** [2013] IRLR 99, CA Elias LJ summed the overall position up as follows:

"It is trite law that the parties cannot by agreement fix the status of their relationship: that is an objective matter to be determined by an assessment of all the relevant factors. But it is legitimate for a court to have regard to the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain it can be decisive…"

44. The basic question as set out by the Supreme Court in the leading case of **Autoclenz Ltd v Belcher** [2011] UKSC 41, is whether the written contract represents the true intentions or expectations of the parties.

45. **Autoclenz** was reviewed in the Supreme Court in the case of **Uber BV v Aslam** [2021] UKSC 5. At [69] the judgment states:

"Critical to understanding the Autoclenz case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation."

46. Stressing then the policy of protecting vulnerable persons, it is further stated at [76]:

"Once this is recognised, it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker". To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the

National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it."

47. The various options in relation to substitution are set out in the judgment of Etherton MR in ***Pimlico Plumbers Ltd v Smith*** [2017] IRLR 323 at [84]. However, it was not suggested in this case that there was even a theoretical right of substitution.

Worker

48. Although the 'worker' definition is deliberately wider that the 'employee' definition, there is still the basic requirement in domestic law that the relationship between the parties be contractual.

49. The tests under the Equality Act 2010 and Employment Rights Act 1996 (Although different in form) are effectively identical as to substance (**Jivraj v Hashwani** [2011] IRLR 827) as both exclude those providing services to clients as part of a business or profession.

50. In applying the worker definition, while certain concepts such as mutuality, umbrella contracts and substitution may be useful, the question ultimately is one of applying the statutory wording (**Sejpal v Roderick's Dental Ltd** [2022] IRLR 752).

51. There is a requirement to undertake to do or perform personally any work or services so if it is found that an individual was not an 'employee' because of a lack of personal service, it should follow that that individual was also not a 'worker': **Community Dental Services Ltd v Sultan-Darmon** [2010] IRLR 1024, EAT.

52. There is no need for the individual to undertake to do an irreducible minimum of work **Nursing and Midwifey Council v Somerville** [2022] IRLR 447.

53. In applying the business or professional exception, a key factor may be whether the individual is integrated into the organisation or continues to provide services to several clients **Cotswold Developments Ltd v Williams** [2006] IRLR 181, EAT

54. it may be relevant to look at the 'dominant purpose' of the arrangement and whether he or she had a pre-existing business before contracting with this particular 'client': **James v Redcats (Brands) Ltd** [2007] IRLR 296, EAT

55. Ultimately 'it is a case of deploying appropriate tools in relation to the specific factual matrices': **Hospital Medical Group Ltd v Westwood** [2012] EWCA Civ 1005,

Multiple employment

56. Although in most cases it will be obvious who or what 'the employer' is, there will be

occasions where this is less than clear, especially in cases of complex corporate or other organisational arrangements (**Clark v Harney, Westwood & Riegels** [2021] IRLR 528, EAT).

57. Whilst there is no reason why there cannot be separate employers for separate work, in employment law, as a matter of policy the courts have tended strongly to oppose any idea that an employee can be employed by two (or more) employers at the same time on the same work. This was reaffirmed clearly in **Patel v Specsavers Optical Group Ltd** UKEAT/0286/18 (13 September 2019, unreported).

58. Questions of vicarious liability under the law of Tort may raise rather different problems from questions of employment law. In that context, dual vicarious liability has been established in cases such as **Viasystems Ltd v Thermal Transfers Ltd** [2005] IRLR 983, CA. Those considerations do not apply to this case.

59. There are also particular issues that can arise as to whether an agency worker could become the direct employee of the client (**Dacas v Brook Street Bureau (UK) Ltd** [2004] IRLR 358, CA). Again, those considerations do not apply to this case.

Conclusions

Worker status

60. There clearly was a contractual arrangement, even if this was only verbal. The Claimant agreed to personally perform services. This was not a case where the Respondents sought to argue that the Claimant had even a theoretical power of substitution.

61. The Claimant did not provide her services to any of the Respondents as client of a business or profession carried on by her. This was not seriously advanced by the Respondents. The Claimant had never previously worked in this industry and had no other clients. Although free to work elsewhere, the Claimant did not do so.

62. Although the Claimant only worked a relatively few days in total and there were periods when the Claimant did not work (notably August 2020), the level of mutuality of obligation and level of work are more consistent with worker status than with the Claimant having been self employed.

63. Accordingly, it is clear that the Claimant was a worker within the tests set out in the Employment Rights Act 1996 and Equality Act 2010.

Employment status

64. As set out above, the Claimant did agree to provide personal service.

65. There was a reasonably close degree of control over the work the Claimant did at the clinic. The place of work and times of work were not within the Claimant's control. The Claimant had no ability to offer discounts and offered treatments in accordance with guidance provided. She was told when to attend work and work had to be done at the clinic. The Claimant's rate of pay was set by the clinic. The Claimant was required to sign up to a number of clinic policy documents. The Claimant was required to wear a uniform and clock in and out each day.

66. As set out above, the Claimant only worked a relatively few days in total and there were periods when the Claimant did not work. It is notable that the Claimant did not work at all in August 2020. The Claimant also turned down a shift offered at short notice. However, there was some mutuality of obligation in that there appears to have been a broad expectation that the Claimant would be offered and would then work a few days a week.

67. Remuneration was paid partly based on commission and entirely on submission of invoices. The Claimant was responsible for her own tax and no deductions were made at source. However, the Claimant ran no financial risk and was guaranteed to be paid at least her hourly salary. When it came to consideration of furlough, the clinic sought to suggest that the arrangement was one of self-employment. However, the Claimant played no part in assigning that label to her working arrangement and I give that very little weight.

68. All tools and training appear to have been provided by the clinic.

69. The Claimant was free to work elsewhere but chose not to do so.

70. Although there are factors pointing both ways, on balance I consider that the level of control exercised by the clinic is on these facts determinative of the question of employment status. I consider that a number of the factors pointing against employment status in particular the invoicing and tax treatment were imposed by the clinic to try to avoid employment status. On balance, the evidence suggests that the Claimant was an employee for the purposes of section 230 Employment Rights Act 1996.

Who was/were the employer(s)?

71. For the purposes of employment law the weight of case law is against there being

multiple employers for the same work. The reasons for this are set out in **Patel**. There are other considerations that may apply to agency workers (see **Dacas**) or in relation to issues of vicarious liability (**Viasystems**). However, such cases remain very much the exception and do not apply to this case. I note the first instance decision in **Forstater v CGD Europe** [2022] 7 WL UK 106 and accept the principle that in some situations an artificial result may be achieved if joint employment is ruled out entirely.

72. The current case involves a respondent corporate structure that is somewhat complicated. I broadly accept Mr Lovitt's description of the Respondent group, notwithstanding some small areas of confusion about the employment status of directors and which entity currently employs Mr Barber. Whilst I do not accept that the operating company (Cosmetic Surgery London Limited) was effectively just a brokerage, I have found that there was a separation between the company that effectively owns the hospital and is registered with the CQC to run it and the operating company that contracted with the public and with the clinical staff. Although I do not accept the Claimant was self-employed, many of the medical staff who work at the hospital may well have been. There might also be more complexity in relation to which entity was involved in the management of surgical staff given the split between the commercial and regulatory aspects of those relationships. Those issues seem much less significant for the Claimant, whose employment status is probably more straightforward and traditional. Overall, I do not consider the division between the CQC registered entity and the operating company to be artificial. As pointed out at the hearing, such operating company models are not uncommon in a variety of industries.

73. I acknowledge that certain points are messy. A reference letter was sought for the Claimant by the Belvedere Clinic Limited. Various protocol documents had different corporate names attached to them. Ms Ngagire was connected to all Respondents due to her shareholding and director status. However, the overwhelmingly strongest connection with the Claimant's employment was with Cosmetic Surgery London Limited. This was the entity named on the time sheets and invoices. This was the entity that paid the Claimant. These are basic and crucial elements of the employment relationship. Accordingly, I find that the Claimant was employed by Cosmetic Surgery London Limited only.

74. Whilst I appreciate this may raise practical issues for the Claimant given the status of Cosmetic Surgery London Limited, I do not consider this an appropriate case to find some form of joint employment and it would be inappropriate for me to do so solely out of sympathy for the Claimant or in some way to enable her to pursue a claim against a solvent company.

Employment Judge T Perry

Date 18 June 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
2nd JULY 2024

FOR EMPLOYMENT TRIBUNALS

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