



EMPLOYMENT TRIBUNALS

Claimant: Ms F Jameel

Respondent: British Medical Association

Heard at: London Central (via Cloud Video Platform)
On: 25 and 26 September 2024

Before: Employment Judge Joffe

Representation

Claimant: Mr S Gorton KC

Respondent: Mr S Cheetham KC

RESERVED JUDGMENT

1. The claimant was an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996 at the relevant time.
2. The claimant was an employee of the respondent within the meaning of section 83 of the Equality Act 2010 at the relevant time.

REASONS

Claims and issues

1. This was a public preliminary hearing listed to consider the following issues:
 - a. whether the claimant was at the material time an employee or worker within the meaning of section 230 of the Employment Rights Act 1996;
 - b. whether the claimant was at the material time an employee or worker within the meaning of section 83 of the Equality Act 2010;
 - c. whether there are matters contained within the claim which fall outside of the tribunal's jurisdiction on the basis that these relate to a resolution process which would apply to trade union members and should be dealt with in a different jurisdiction (articulated by the respondent at paragraph 17 of the grounds of resistance under the heading "Preliminary Point 4").
2. There was a further application by the respondent to exclude material in the claimant's claim form which were said to refer to advice covered by legal professional privilege. That application was withdrawn by Mr Cheetham on 26 September 2024.
3. I was asked to consider a further application made by the respondent on 5 August 2024 for permission to use documents disclosed by the claimant in these proceedings for a purpose other than the conduct of the case pursuant to CPR 231.22 and Guidance Note 2 of the Presidential Guidance – General Case Management.
4. Mr Gorton said that the claimant was not asking me to determine whether there had been a TUPE transfer between the GP Defence Fund ('GPDR') and the respondent in 2018 as part of her case on employment status. Mr Cheetham was content that I not determine the point.
5. After the evidence was complete, both counsel indicated that they were not urging me to determine issue c), although the respondent was still intending to pursue the point at the full merits hearing. I did not have in front of me an agreed list of issues, although I was informed by Mr Cheetham that one had been agreed. In the circumstances, I concluded it would not be possible to identify particular issues as falling outside the Tribunal's jurisdiction since the issues which were said to fall into this category had not been identified.
6. Although I reserved my judgment on the preliminary issues, I also issued some case management directions for the full merits hearing on the basis that these would become redundant if the preliminary issues on status were determined in the respondent's favour.

Findings

The hearing

7. There were a number of members of the public present both days of the hearing and I posted the restricted reporting order previously made by Employment Judge Adkin in the chat function and drew the attention of attendees to its terms.
8. Some members of the public communicated to the Tribunal clerk a wish to see the bundle / documents from the bundle and the respondent agreed to host a hard copy of documents which were referred to in the hearing at BMA premises, which members of the public could view by appointment.
9. I was provided with an electronic bundle of 1692 pages. I had witness statements from the claimant on her own behalf and, for the respondent, Ms R Podolak, co-CEO of the respondent and Mr J Summers, head of complaints and member liaison for the respondent. The claimant and Ms Podolak gave live evidence. Mr Gorton indicated that he had no cross examination for Ms Summers on the issues in front of me and Mr Summers was not called.

Findings of fact

What is the BMA?

10. It is a company limited by guarantee, a trade union and a professional association. It has some 195,000 members and 5,000 elected roles. There are about 600 staff.
11. The General Practitioners Committee ('GPC') is a committee of the BMA with approximately 68 voting members at any one time. It is governed by standing orders. It has an executive consisting of its chair and three other members.
12. Standing orders for the GPC set out aspects of its constitution and governance. Some relevant sections of the standings orders which my attention was drawn to are:

Remit of Committee

- 1 *The remit of the Committee is to deal with all matters affecting medical practitioners providing and/or performing primary medical services under the National Health Service Act 2006, the National Health Service (Consequential Provisions) Act 2006 and the Health and Social Care Act 2012 and any Acts or Orders amending or consolidating the same and as from time to time extended to England.*

...

7 The Committee shall elect one of its voting members as Chair for a period of three years. A member shall be eligible for re-election as Chair on one further occasion.

7.1 When the Chair is elected, it will always be with the intention of the completion of three successive sessions.

...

Election of Chair

10 When a Chair is to be elected:

10.1 The nomination of candidates shall be undertaken in advance of the Committee's first meeting in the session, and

10.1.1 The names of the candidates shall be circulated to the Committee no later than seven days before the meeting.

10.1.2 Candidates shall submit a written statement, of no more than 400 words, for circulation with their nomination.

The statement must include a self assessment of the candidate's suitability for the role described against the role profile, together with their reasons for standing for the office.

10.2 When two or more candidates are nominated, each candidate will give an election address of no more than five minutes in the presence of the other candidates, to those Committee members present.

...

Appointment of an Executive Team

13 Three Executive Team members shall be appointed, each for a term of three years or until a new committee chair is elected or re-elected (whichever is sooner), and shall be eligible for re-appointment on the same basis thereafter.

13.1 When vacancies arise for Executive Team members, applications shall be invited from interested candidates, with details of the process for application and selection and a closing date to be included as part of the invitation.

13.2 The invitation for applications for Executive Team members will be circulated to GPC England members and to LMCs in England.

13.3 The GPC England Chair, working with a senior member of BMA staff and other appropriate expert advice, will decide on:

(i) a fair process for selection and (ii) use that process to select the successful candidates as Executive Team members.

13.4 *At appointment, no more than one of the successful candidates for Executive Team members may not be a GPC England member or a GP; remaining successful candidates must be members of GPC England.*

13.5 *At his/her discretion, the Chair may invite other GPC members or LMC members with a particular expertise to work with the Executive Team on one or more designated issues for a specified period of time.*

Policy leads

16 Policy Leads and if necessary, Deputy Policy Leads, may be appointed by the Chair, in consultation with members of the Executive Team, the GPC Committee Secretary and the Representation Policy Lead, from among Committee members; other national GPCs; LMCs or others who have expertise in a particular policy area. The areas of policy to be covered and the length of appointment necessary to carry out a defined piece of work will be decided by the Chair, in consultation with members of the Executive Team; the GPC Committee Secretary and the Representation Policy Lead. The Chair may also consult chairs of the other national GPCs to determine whether a policy area is best dealt with at GPC England or UK GPC level.

13. Local Medical Committees ('LMCs') are statutory bodies funded by a statutory levy. The relevant provision is section 97 of the NHS Act 2006

97 Local Medical Committees

(1) NHS England may recognise a committee formed for an area, which it is satisfied is representative of—

(a) the persons to whom subsection (2) applies, and

(b) the persons to whom subsection (3) applies.

(2) This subsection applies to—

(a) each medical practitioner who, under a general medical services contract entered into by him, is providing primary medical services in the area for which the committee is formed, and

(b) each medical practitioner who, under a general ophthalmic services contract entered into by him, is providing primary ophthalmic services in that area.

(3) This subsection applies to each other medical practitioner—

(a) who is performing primary medical services or primary ophthalmic services in the area for which the committee is formed—

(i)

(ii) in accordance with section 92 arrangements, or

(iii) under a general medical services contract or a general ophthalmic services contract, and

(b)who has notified NHS England that he wishes to be represented by the committee (and has not notified it that he wishes to cease to be so represented).

(4)A committee recognised under this section is called the Local Medical Committee for the area for which it is formed

14. The General Practitioners Defence Fund is funded by a levy. It supports LMCs and also subsidises aspects of the work of the BMA, in particular providing funding for GPs to take part in BMA activity.
15. In 2010, the claimant was first elected as a BMA member. In 2014, she was elected as a member of the GPC. She received some honoraria in 2016 or 2017 but this was not a remunerated position.
16. The role of the GPC is to act as the body with negotiating rights for the whole GP profession, in particular in respect of contractual negotiations. Its other work includes supporting LMCs, liaising with NHS England / the Department of Health and developing policy. Every year the GPC negotiates the National Standard GP contract with NHS England.
17. In 2017, the claimant's case is that she became an employee having been appointed to the England Executive Team of the GPC after a competitive recruitment process. This involved an all day interview, an assessment, a mock presentation, a group task and a pre-interview test. I saw a document which set out the process for appointment which showed that it involved a process similar to many employment recruitment processes: a covering letter and CV had to be submitted, applications were reviewed, interviews held and then a selection was made.
18. I saw a letter containing the claimant's contract for this role simply dated October 2017. The letter spoke of the arrangements as an employment relationship:

The "Chair of GPC England" is elected by the members ("the Members") of the General Practitioners Committee England ("GPC(E)") a Subcommittee of the General Practitioners Committee ("GPC") a Branch-of-Practice Committee of the British Medical Association ("BMA") to represent their interests. The Chair is elected for a 3 ye r term and during that tenure is supported by an executive team

The Chair would like to appoint you to assist him during his term of office as an Executive Team Policy Lead

This position is offered subject to the general terms set out below. Fundamentally, however, your employment hereunder, is conditional upon the continued service of the Chair. Should he leave office for any reason, be that the natural expiry of his term, resignation, the loss of trust and confidence in

him by the members, or for any other reason whatsoever, your appointment as a member of his executive team will also be determined in accordance with the terms set out below.

This Letter sets out the main terms of your employment with the GPDF and together with the other terms and documents referred to herein constitutes your contract of employment.

19. The claimant's employer was said to be the GPDF and the terms specified her place of work as BMA House. As to her hours of work:

4.1. There are no normal hours of work associated with this position but your standard working week equates to two days per week. Given the seniority of your role, however, you will be expected to work such hours as are may be reasonably required and necessary to fulfil the requirements of the role. No overtime or additional payments beyond your normal salary and legitimate expenses shall be paid.

20. The claimant's annual leave entitlement was set out in the letter and there was provision for sick pay. The claimant was permitted to do outside work which did not conflict with her work for the GPDF.

21. In May 2018, the claimant said that she met the chair and director of operations of GPDF and was told there would be a TUPE transfer of her employment to the BMA and that she would remain as an employee. She received a letter from the GPDF dated 4 May 2018:

Transfer of employment from the General Practitioners Defence Fund Limited (GPDF) to the British Medical Association (BMA)

Following your meeting on 2 May 2018 with Dr Douglas Moederle-Lumb, Chair of our client the GPDF, and Dr John Canning, its Director of Operations, we are writing to you about the likely transfer of your employment to the BMA.

The GPDF currently provides executive functions to the GPC, largely through the executive team, of which you are part and whose members are its employees. We understand Dougy explained to you that all responsibility for these functions, along with the funding of the GPC, is expected to pass from the GPDF to the BMA on 1 July 2018.

Since the GPC's executive functions will no longer be carried out by the GPDF on the BMA's behalf but will instead be carried out by the BMA directly, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended) ("TUPE") will apply to this situation. As the activities transfer to the BMA, so will your employment and that of all other executive members of the GPC.

22. It appeared that negotiations about whether the BMA would treat the members of the executive team as employees dragged on; it was not clear how they were resolved. The claimant said that she had no meetings with the BMA about the matter and the 'transfer' took place in July 2018 without there

being any change to the claimant's role. The claimant continued to be paid remuneration as before; this was through the BMA's payroll on a PAYE basis.

23. Although I saw earlier versions of a draft contract between the claimant and the BMA, the claimant first signed a version on 11 September 2019, according to the claimant's unchallenged evidence. This document is described as a 'consultancy agreement' and it describes the claimant as a 'contractor'.
24. The claimant was subject to a number of obligations under the agreement, including: to comply with the respondent's health and safety procedures, 'policies on IT, social media, use of information and communication systems, anti-harassment and bullying, no smoking, dress code, substance misuse and all other BMA policies relevant to the Engagement'. The claimant was allowed to do other work which did not cause any breach of the agreement or compete with the business of the BMA (the latter unless she had the written consent of the BMA).
25. There were the following further relevant provisions:

2.3 The Engagement shall commence on the Commencement Date and shall continue until the Termination Date, unless earlier terminated:

(a) either immediately, or upon reasonable notice, at the request of the Contractor; or

(b) pursuant to an outcome of the BMA's disciplinary procedures from time to time in force (copies of which are available upon request).

3. DUTIES AND OBLIGATIONS

3.1. During the Engagement the Contractor shall:

(a) provide the Services with all due care, skill and ability and use their reasonable endeavours to promote the interests of the BMA and any Group Company;

(b) unless the Contractor is prevented by ill health or accident or otherwise, devote such time as may be agreed to the carrying out of the Services together with such additional time if any as may be necessary for their proper performance;

...

11. TERMINATION

11.1. Notwithstanding the provisions of clause 2.2, the BMA may terminate the Engagement with immediate effect without notice and without any liability to make any further payment to the Contractor (other than in respect of amounts accrued before the Termination Date) if at any time the Contractor:

(a) commits any gross misconduct affecting the business of the BMA or any Group Company;

(b) commits any serious or repeated breach or non-observance of any of the provisions of this agreement or refuses or neglects to comply with any reasonable and lawful directions of the BMA.

HOLIDAY, SICKNESS AND OTHER LEAVE

12.1. The Contractor shall be entitled to take 7 weeks of annual leave, pro rata, on full pay. The Contractor shall not receive payment in lieu of any unused leave, nor are they entitled to carry any unused leave forward into another year.

12.2. The Contractor shall be entitled to take up to 12 weeks sick leave on full pay in any rolling twelve month period.

12.3. The Contractor shall be entitled to take up to 52 weeks parental leave, paid at 12 weeks full pay and 12 weeks half pay, less any statutory payments. The Contractor will also have the right to utilize the BMA Childcare Policy

...

14. STATUS

14.1. The relationship of the Contractor to the BMA will be that of independent contractor and nothing in this agreement shall render it an employee, worker, agent or partner of the BMA and the Contractor shall not hold himself/herself out as such.

25. Ms Podolak said in evidence that the respondent's disciplinary policy did not apply to the claimant as an elected member. Instead she was subject to the Code of Conduct and Resolution Process.
26. There was more information about the Resolution Process in the statement of Mr Summer. The Resolution Process exists to deal with complaints made about the conduct of members. The Code of Conduct sets out the expected behaviour of members when engaged on BMA business.
26. On 1 February 2019, the claimant received instructions on how to sign into her BMA email. She said that she had a Gmail account for her BMA role and that the BMA account set up in 2019 was mostly for calendar functionality. In 2022, she got a further BMA account with improved functionality which she used alongside her other email accounts.
27. On 11 September 2019, the claimant signed the consultancy agreement. She said in evidence that she was in her third trimester and shortly due to go off on maternity leave. She said it was clear to her from emails that if she did not agree she was at risk of losing her employment. She was concerned about losing her maternity pay.
28. The claimant said that before the pandemic she worked at BMA House. There was an area assigned to the GPC executive team and members of the team had brought in personal effects and photographs. After a refurbishment at the start of the pandemic, staff ceased to have fixed offices and there was

a hot desking arrangement. The GPC executive team had a room for meeting and from which they could work. The claimant had an access pass which said 'staff'. She could access all the areas she needed to, including staff toilets, the staff cafeteria and the onsite staff gym.

29. As to time off, the claimant said that she had some flexibility but she had to liaise with BMA staff and the rest of the executive team, to ensure that meetings were covered and apologies sent.
30. On 30 September 2020, there was a deed of grant between the GPDF and the BMA. This recorded that

... for the period 1 July 2018 to 30 June 2019, GPDF made a grant to BMA to be used to top up the honoraria payments to GPC members and remuneration of the 10 executive team members previously engaged by GPDF until 30 June 2018, pursuant to the terms of a deed of grant dated 23 January 2019.

31. On 7 May 2021, the claimant was invited to talk at a monthly BMA all staff meeting.
32. On 18 November 2021, the claimant was elected chair of the GPC.
33. An unsigned agreement relating to the role recorded the expectation as to working hours:

TIME COMMITMENT

4.1. You will be expected to, and you agree to, devote such time as is necessary for the proper performance of your duties. A minimum of 3 days per week will be required for the proper performance of your duties. This will include (but is not limited to) attendance at:

- (a) scheduled GPC England meetings;*
- (b) Local Medical Committee conferences;*
- (c) Executive Team meetings;*
- (d) Negotiating meetings;*
- (e) the Annual Representatives Meeting (ARM);*
- (f) relevant committee meetings;*
- (g) external and overseas meetings;*
- (h) inductions and training as required by the BMA; and,*
- (i) any other meetings which the BMA may reasonably require you to attend.*

4.2. You will be expected to attend these meetings unless unavoidable circumstances prevent you from doing so.

4.3. The nature of the role makes it impossible to be specific about the maximum time commitment and the pattern of working, which may include weekends. You may be required to devote additional time to the BMA in respect of preparation time and ad hoc matters which may arise and particularly when the BMA is undergoing a period of increased activity. At certain times it may be necessary to convene additional Executive Team, Committee, or member meetings, which you are required to attend.

4.4. During the Engagement you are free to engage in other work provided it does not conflict with the responsibilities of your office and your duties to the BMA. In considering whether there may be a conflict you should consider the consequences of fatigue on your ability to meet your commitments.

34. Although the claimant had no set hours, to an extent her hours were governed by the timing of meetings, which the claimant did not control. She actually worked five days per week and in excess of 40 hours per week. Her salary increased at that point from £77,525 to £185,786.
35. I saw a role profile which described the role. The list of responsibilities of the role was as follows:
- *Attend and give reports to meetings of GPC England*
 - *Agree the agenda for GPC England meetings*
 - *Attend meetings of the LMC England conference agenda committee*
 - *Provide top table comment for LMC England conference and deliver a speech*
 - *Comment on and sign-off press statements*
 - *Attend weekly meetings of GPC England executive*
 - *Attend regular catch-up meetings with RCGP*
 - *Represent GPC England at meetings with external stakeholders*
 - *Represent GPC England in media engagements*
 - *Lead the work and strategic direction of GPC England*
 - *Lead GPC England in negotiations with NHS England*
 - *Attend meetings of GPC UK*
 - *Work closely with GPC England secretariat and other staff*
 - *Work closely with GPC England policy groups*
 - *Chair RCGP/GPC England liaison meetings (1 a year, alternates with RCGP chair)*
36. The claimant said that there was no suggestion that her contractual status was changed in any way at this point. She carried on working but with

increased responsibility. The negotiation process involved a cycle of meetings with third parties. There was a large number of internal meetings leading to those meetings. BMA staff ran the claimant's diary and provided support. She did not have much control over her diary and she was reliant on BMA staff for the preparation of documentation. She had weekly staff meetings where the agenda was set by BMA staff.

37. The claimant described herself in evidence as 'taking instruction' from some BMA staff. She said that they would dictate what policy stands to take on particular issues. No examples of this were included in the bundle. It appeared from the nature of the respective roles and the limited amount of evidence from the claimant about what this entailed, that advice might sometimes be firmly given, but that what BMA staff would be providing was ultimately advice and guidance.
38. So far as taking holiday was concerned, in practice the claimant said that she had to liaise with staff and the rest of the executive team and work around meetings.
39. On 6 January 2022, the claimant sent an email about diary management to BMA staff which cast some light on the ambit of the role and its demands. She said inter alia:
'Meeting scheduling: Going forward please could we schedule meetings only between 9 - 5. That leaves me with some contingency time for urgent request meetings where necessary.'
40. On 24 January 2022, in the course of ongoing discussions about the claimant's consultancy agreement, the claimant sent an email asking about the lack of reference to maternity or a child care clause in the consultancy agreement. The answer which was provided was that the claimant's entitlement was included in the respondent's Family Leave Policy.
41. On 1 February 2022, a collective grievance was submitted by members of the GPC secretariat against the claimant.
42. On 15 February 2022, the respondent sent the claimant another consultancy agreement.
43. On 1 March 2022, a formal complaint against the claimant was submitted by one staff member on behalf of another BMA staff member.
44. On 7 March 2022, a BMA code of conduct investigation into the staff complaint was commenced.
45. On 9 March 2022, the claimant was signed off with work related stress.
46. When Ms Podolak commenced her role of co-CEO in May 2022, she picked up the issue of the claimant's unagreed consultancy agreement. Ms Podolak said that, whilst there were various issues raised on the claimant's behalf

about the contract, no issue was raised about the description of the claimant in the contract as a contractor.

47. In a BMA GPCE Briefing April 2022 about executive team appointment governance, the following passage appears:

GPCE executive team members are elected and appointed by the GPCE chair who is democratically elected to lead the committee. Like the GPCE chair, the executive team become officers of the BMA as a trade union. It is essential to the proper functioning of the BMA as a trade union that its duly elected and appointed officers are empowered to act independently in the best interests of their electorate and the wider membership and not subject to control by the BMA in the manner that an employee would be.

GPCE executive team members unlike the chairs and deputy chairs of committees, receive a fee for their services, partly funded by the GPDF. The fee is paid under a consultancy agreement and includes the enhanced contractual benefits outlined above. As with all BMA officers, the GPCE executive team members are not employees of the BMA. Indeed, if they were employees they would be under the direction and control of the BMA and that would fundamentally undermine their independence and be wholly inconsistent with their role.

48. It was not clear who drafted this document. The statements made about why BMA officers should not be employees of the BMA do not seem to acknowledge the nuances of situations where individuals can be both employees and office holders and the sliding scale of direction and control necessary to establish employment status.
49. The claimant's comment in evidence on the BMA's assertion that the role of the executive team required the postholders to be in some way independent of the BMA was that she did not understand the argument. She said that her role was not some kind of oversight role over other individuals within the BMA where she needed to be independent. She was carrying out a core function of the respondent in negotiating the national standard GP contract.
50. On 9 May 2022, the claimant returned to work one day per week on a phased return plan. The BMA referred the claimant to occupational health and a report was received on 25 May 2022.
51. Questions asked by the respondent were:

In your opinion, is Dr Jameel fit to continue working in their current role? Please provide details of what (if any) aspects of the role, is Dr Jameel not fit to continue with or which duties require adjustments (by reference to the role profile).

2. Are there any adjustments (of either temporary or permanent nature) which could be made in order to enable Dr Jameel to return to their role?

3. *Dr Jameel has been working to a 1 day out of three phased return plan since resuming work on 9 May 2022. We have suggested a continuation of the phased return for an additional four weeks, gradually increasing to 3 days a week. Do you have any advice regarding the suggested additional phased return plan.*

4. *Is Dr Jameel fit to participate in workplace meetings? If not, when do you suppose that she might be able to and are there any adjustments which would enable Dr Jameel to participate in such discussions including meetings to discuss workplace investigations?*

5. *Is there any other relevant information or advice you feel will help us to deal with the current situation by managing Dr Jameel's on-going service agreement with us and assisting in getting them back to work?*

52. The claimant was pregnant and informed Ms Podolak about her pregnancy on 31 May 2022.

53. On 16 June 2022, Ms Podolak wrote to the claimant:

I have now had the opportunity to discuss your Med 3 form with HR colleagues and reflect on its content, in conjunction with your change of circumstances and recent symptoms. Given the aforementioned, we must require that you do not undertake any work for the BMA / GPC until our return to work meeting has taken place to protect your health, wellbeing and safe return to work. This means that you must not engage in any work for the BMA/GPC whether by telephone, email, or by way of attending meetings either virtually or in person.

54. She went on to say that these measures were to protect the claimant's health and that she would be telling BMA staff that the claimant was not contactable

55. On 22 June 2022, Ms Podolak had a return to work meeting with the claimant. Ms Podolak made a further occupational health referral at the end of that meeting, due to the claimant's deteriorating health.

56. 23 June 2022, Ms Podolak reported to a Ms Senior about the discussion: 'I said that I'd ask staff to engage with her to ensure she was briefed on this item but that we'd hold all other comms until an OH assessment had taken place next week. She remains on a 1 day a week return for now and should not be emailed outside of working hours, preferably only on the working day...'

57. A further occupational health report was produced on 25 July 2022.

58. On 11 August 2022, Ms Podolak wrote to Ms C Ashley, employment relations delivery manager, who was liaising on the claimant's behalf about her contract:

In terms of the contract, Dr Jameel holds a leadership position within the BMA but is not an employee of the BMA. The contract being offered to Dr Jameel is a contract for consultancy services to remunerate her for a leadership role.

Following review, we are not minded to make any further changes to this contract. The final version is now attached.

59. On 1 November 2022, the claimant was suspended on pay.
60. On 20 July 2023, the claimant was the subject of a vote of no confidence in the following terms:

That this committee is deeply concerned at the lack of clarity surrounding the status of the alleged suspension of the Chair of GPCE ahead of significant impending contractual and political upheaval from now through 2024, and:

i, is sympathetic towards the Chair and the difficult circumstances surrounding her absence

ii. applauds the Acting Chair and Officer Team for their commitment, work, and leadership during the Chair's absence

iii. asserts that the proper, effective, democratic representation of the profession is of paramount importance to this committee

iv. regrets that it has no alternative but to declare that this committee has no confidence in the current elected Chair of GPCE, and demands elections be held as soon as possible for a new Chair (and subsequent Officer Team) in accordance with Standing Orders.

61. On 7 August 2023, Ms Podolak wrote to the Claimant terminating her contract in a letter stating that its purpose was 'to formally confirm that your unsigned and undated Consultancy Agreement with the BMA is terminated pursuant to clause 12.1(d) with immediate effect'.

Law

Employment status

62. A claim for unfair dismissal can only be pursued by an employee as defined in section 230 of the Employment Rights Act 1996:

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

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

63. A claim under the Equality Act 2010 in the employment sphere may be brought by an employee as defined in section 83 of the Equality Act 2010:

(2) "Employment" means –

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

64. The Tribunal must consider in every case what the true agreement between the parties was, looking at the reality of the obligations and the situation: Autoclenz v Belcher [2011] UKSC 41

So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description.

[per Lord Clarke]

65. In determining whether a contract of employment there is no single factor which is determinative. Tribunals must apply a 'multiple test':

I must now consider what is meant by a contract of service. A contract of service exists if the following 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. I need say little about (i) and (ii).

*As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands, or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be: see Mr. Atiyah's *Vicarious Liability in the Law of Torts* (1967), pp. 59-61, and the cases cited by him.*

*As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted. "What matters is lawful authority to command, so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters." *Zuijus v. Wirth Brothers Pty., Ltd.* (1). To find where the right resides one must look first to the express terms of the contract, and if they deal fully with them after one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication.*

Per McKenna J, Ready Mixed Concrete Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433

66. The nature and degree of control necessary to found a contract of employment is likely to vary with the type of work in question:

HMRC v PGMOL [2024] UKSC 29

65. This question was discussed in Montgomery in which Buckley J said at para 19 that, as to control, MacKenna J:

“had well in mind that the early legal concept of control as including control over how the work should be done was relevant but not essential. Society has provided many examples, from masters of vessels and surgeons to research scientists and technology experts, where such direct control is absent. In many cases the employer or controlling management may have no more than a very general idea of how the work is done and no inclination directly to interfere with it. However, some sufficient framework of control must surely exist. A contractual relationship concerning work to be carried out in which the one party has no control over the other could not sensibly be called a contract of employment.”

66. The phrase used by Buckley J: ‘a sufficient framework of control’, has also been adopted by subsequent authorities including the FTT and the UT in the present case. Neither party in this case sought to advance a more precise test of control, and I doubt it is possible to do so.’

[Per Lord Richards]

67. In Young & Woods Limited v West [1980] IRLR 201, the Court of Appeal considered the effect of the label placed by the parties in the relationship. The Court said that whether a person is employed or is self-employed is a question of law not a question of fact. The label which the parties choose to use to describe their relationship cannot alter or decide their true relationship, although in deciding what that relationship is, the expression by them of their true intention is relevant, but not conclusive.

I do not think that they would justify me in concluding that, wherever there is an agreement openly made that a particular person shall be treated by a company as self-employed, it follows that he must accept the position and cannot claim compensation for unfair dismissal as if he was not self-employed but an employee. It must be the court’s duty to see whether the label correctly represents the true legal relationship between the parties in that case as in every other....

68. A person may at the same time be an office holder and an employee. There are three categories of office holder: an office holder whose rights and duties are defined by the office they hold and not by any contract, such as a police officer; secondly, there are also office holders who retain the title “office holder” but are in reality employees with a contract of service (those workers

would be rightly described as employees); and, thirdly, there are also workers who are both office holders and employees, such as company directors.
Johnson v Ryan and others [2000] ICR 236

69. In a case about whether a club secretary was an employee, the EAT considered that the following questions were of importance: was the secretary merely a member of the club who did some extra work for it and was compensated for the inconvenience or was he a member who had agreed to become a paid employee? Also important was whether payment was fixed in advance or voted at the end of the year, whether the secretary was under the control of the club, the extent and weight of his duties, and his tax and national insurance position. It was not relevant that the secretary was a club member and an elected office holder removable by a two-thirds majority: 102 Social Club and Institute Ltd v Bickerton 1977 ICR 911, EAT

Submissions

70. I had helpful written and oral submission from both counsel. There was consensus as to the law I should apply.

Respondent's submissions

71. The respondent's position was that, whatever the GPDF had called the relationship between it and the claimant, it was not an employment relationship. The relationship did not change after the 'transfer' to the BMA. The label of 'contractor' which the claimant accepted from September 2019 was relevant because the claimant accepted it. This was a paradigm case of an office holder whose rights and duties were defined by the office they held and not by any contract. Personal service in this case was a function of the claimant's appointment / election as an office holder and not referable to a contract of employment.
72. As to control, the claimant had full autonomy as to how she carried out her roles and she directed the respondent's staff members as to how they should assist her in her role. She did not follow direction the respondent's staff but had a responsibility to work in partnership with them. The claimant was accountable to her constituents and not to the respondent. It was the constituents who passed a vote of no confidence in the claimant.
73. Looking at other indicia of a contract of employment:
- The claimant was not set objectives by the respondent and was not subjected to any appraisal process by the respondent;
 - The claimant was not required to work from the respondent's premises or other specified location. The claimant had restricted access to R's premises not including staff areas;
 - The respondent did not specify the hours the claimant should work;

- The claimant did not have to ask permission to take annual leave; she took leave when she wished to. Her annual leave was not logged on the respondent's HR systems;
- She was allowed to use her personal email address;
- She did not have a desk space, office or computer;
- She was not subjected to the disciplinary processes which applied to staff.

Claimant's submissions

74. Although the claimant did not seek to argue the TUPE point at the preliminary hearing and was only seeking to establish her employment status from 1 July 2018, she did seek to rely on the continuity of the nature of the relationship from GPDF to the BMA. It was clear that the claimant was employed by GPDF as recognised in her contract with GPDF. She was not dismissed by GPDF or the BMA when the executive team moved from GPDF to the BMA. There was no termination of that employment relationship. The respondent had called no evidence to support the proposition that that was not an employment relationship and no evidence to show that the relationship created by the GPDF contract was terminated. The respondent had called no evidence to show how the claimant became a self-employed contractor.
75. There was no change to the agreement covering the relationship in 2018 and nothing changed when the claimant signed a new agreement in September 2019. The label of contractor did not reflect the reality of the agreement and the contract which contains that label was accepted by the claimant when she was about to go on maternity leave and felt that she had no choice.
76. The claimant was both an office holder and an employee. There was clearly an obligation for personal service. There was an essential framework of control and a level of subordination. Other incidents of the contract pointed towards employment status:
 - the management of the claimant's sickness absence and payment of sick pay;
 - the occupational health referrals and management of the claimant's return to work;
 - the claimant's suspension on pay;
 - the claimant's entitlement to maternity benefits;
 - the claimant's entitlement to holiday pay;
 - the applicability of BMA policies and procedures;
 - the provision that the claimant could be dismissed for gross misconduct;
 - the fact that the claimant was dismissed by the respondent.

Conclusions

77. The contract between the parties was in large part contained in the written agreement signed by the claimant in September 2019 but inevitably modified by her change of role when she became chair of the GPC.
78. Looking at the nature of the relationship, I accept that the requirement of personal service was necessarily an incident of the office which the claimant held so could only go so far in indicating whether there was also an employment relationship.
79. I carefully considered the issue of control. Like any elected office holder, the claimant clearly had rights and obligations which derived from her elected office. There were clearly some aspects of her role which were not within the respondent's remit to control; in that sense she was not unlike surgeons, ships captains and referees. Was there, however, a sufficient framework of control to bring the claimant's role into the employment sphere?
80. It seems to me that there were significant features which pointed in the direction of such a framework. There was a requirement as to the number of working hours the claimant was obliged to work even if there was no explicit control over the pattern of those hours. As a matter of fact there were significant constraints created by the pattern of meetings the claimant was obliged to attend and which she did not control the scheduling of. The respondent had power to discipline the claimant and to terminate the relationship in the event she committed gross misconduct; that provision was not tied to a requirement that the claimant should have been voted out by the membership.¹ She was required to discharge her duties in order to continue to earn a very substantial salary
81. The treatment of the claimant in respect of her sick leave reflected a level of control. The respondent referred the claimant for occupational health and advice and in effect controlled the terms on which she was able to return to work (or not return to work) in accordance with views it took about her health.
82. I was not persuaded by the respondent's suggestion in internal documents that the chair of the GPC needed to be in some way independent of the BMA in a way which an employee would not. Nothing was said in evidence or submissions which explained why that might be necessary.
83. Looking at other indicia of an employment relationship, there is some significant crossover with the framework of control. There were numerous factors which were characteristic of an employment relationship; these included the payment through PAYE, the holiday and sick pay arrangements and the maternity arrangements together with the requirement for the claimant

¹ I did not hear sufficient evidence to reach any conclusions as to the nature of the claimant's dismissal in this case, ie whether that involved some decision making by the respondent after the vote of no confidence had occurred. That will be a matter for the full merits hearing.

to comply with many of the respondent's policies. The claimant clearly also had use of a BMA email address and of the premises for various purposes.

84. Bearing all of that in mind, I concluded that the proper analysis of the relationship was that the claimant was both an office holder and an employee of the respondent, looking at the test under the Employment Rights Act 1996 and that under the Equality Act 2010. The 'contractor' label was one the respondent sought to impose to alter that nature of the relationship but it did not change the reality of the situation.

Employment Judge Joffe

4 November 2024

Sent to the parties on:

7 November 2024

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For the Tribunal Office:

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