



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Moon

Respondent: Anglian Radiology Associates Limited

Heard at: Nottingham **On:** Monday 8 October 2018

Before: Employment Judge Blackwell (sitting alone)

Representatives

Claimant: Mr L Pikes, Solicitor

Respondent: Miss S Murphy, Solicitor

RESERVED JUDGMENT

1. The Claimant was at all relevant times an employee of the Respondent because she had entered into and worked under a contract of employment within the meaning of Section 230(1) of the Employment Rights Act 1996.
2. The Respondent has conceded that the Claimant is a worker within the meaning of Section 230(3) of the 1996 Act.
3. It follows therefore that all of the Claimant's claims as set out in paragraph 4 of the case management summary of Employment Judge Camp sent to the parties on 27 July 2018 are to proceed to a full hearing.

REASONS

1. Mr Pikes represented the Claimant Mrs Moon whom he called to give evidence. Ms Murphy represented the Respondents and she called Dr Elmadbouh, a Director of the Respondent.

2. The purpose of this Preliminary Hearing was to determine as follows:-

“Which of the Respondent's was the Claimant's contract with and was it: A contract of employment (Section 230(1) of the Employment Rights Act 1996 (ERA), a worker contract (ERA) Section 230. (3) a contract giving the Claimant the status of worker in accordance with ERA Section 43K and in light of the discussion on this issue, which of the Claimant's complaints if any should be dismissed on the basis that the Tribunal lacks jurisdiction to hear them.”

3. That was Employment Judge Camp's direction as indicated above sent to the parties on 27 July 2018.

4. Subsequent to that direction the Respondent conceded that Mrs Moon was a worker within the meaning of Section 230(3) and Section 43K of the Employment Rights Act 1996.

5. At the start of the hearing it was agreed that the appropriate Respondent was Anglian Radiology Associates Limited and I therefore made an order sent to the parties on 9 October removing North Street Clinic Limited trading as Avicenna Clinic as a Respondent.

6. Because of both a lack of time and because it seemed to me that full disclosure of relevant documents had not been made I made orders on the hearing date requiring that the parties exchange written submissions and that they have liberty to comment upon each other's submissions. Both parties have submitted closing submissions and comments on their opponents submissions.

7. There has also been disclosure of the Claimant's "personnel file" and an e-mail from Dr Elmadbouh to which the document at page 248 of the agreed bundle was a response.

The relevant law

8. The relevant statute law is set out in Section 230, subsections 1, 2 and 3 of the 1996 Act:-

(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."

9. There is a plethora of case law but I indicated at the beginning of the hearing that I would normally begin with the formulation set out by McKenna J in the case of **Readymix Concrete (South East) Limited v The Ministry of Pensions and National Insurance** [1968] 1 All ER 433 namely:-

“Did the worker agree to provide his or her own work and skill in return for remuneration?

Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant (now employer and an employee)?

Were the other provisions of the contract consistent with it being a contract of service?”

10. Mr Pikes has referred me to a very similar formulation set out in *Express and Echo Publications Limited against Tanton* [1999] IRLR at 367. Ms Sweeney refers me to the very recent authority of **Pimlico Plumbers** [2017] EWCA civ 51, that being the decision at first instance.

11. Both parties agree that a decision on employment status is fact sensitive.

Findings of Fact

12. The matter begins with a clear conflict of evidence between Mrs Moon and Dr Elmadbouh. Mrs Moon’s case is that in June 2016 Dr Elmadbouh offered her employment as “Clinic Manager”. The role would initially involve getting the clinic registered with the CQC and its preparation for opening and operation.

13. Thereafter Mrs Moon would be employed to be the Clinic Manager managing its day to day operations. She says a salary of £30,000 was agreed but that until the clinic was opened if she would not work regular hours she would work such hours as were necessary and an hourly rate of £15.38 was calculated derived from dividing the £30,000 annual salary by 52 and then dividing that figure by 37.5 hours that would normally be worked once the clinic was operational.

14. Dr Elmadhouh’s intention was to open an independent consultant led private healthcare practice in Peterborough. He states that the reason for Mrs Moon being engaged was so that she could register the clinic with the Care Quality Commission (CQC) and ensure that it was ready to open and operational and compliant with health and safety and clinical care standards etc. Thus his case is that Mrs Moon was a self-employed independent contractor and that he made no reference whatsoever to life after the necessary CQC and other consents were obtained. I will return to this conflict of evidence in my conclusions.

15. Mrs Moon worked both from home and increasingly from the clinic as it took shape. She submitted a record of the hours she was paid and subject to her complaints of underpayment it is common ground that she was paid at the rate of £15.38 in respect of the hours submitted. Dr Elmadbouh had also engaged the services of a consultant Ms Walker, who was recognised as an expert in obtaining CQC registration.

16. It is plain from both Mrs Moon's evidence and her CV that she had no previous experience of obtaining CQC registrations or in setting up a new clinic. Mrs Moon's profession for some 30 years was that of a nurse. She and Dr Elmadbouh had worked together at the Fitzwilliam Hospital.

17. Mrs Moon's evidence which I accept is that she began work at the clinic on 24 July 2016 and continued to do so until 30 November 2016.

18. It is common ground that there was no written contract. I have now seen though it was not available on the hearing date, Mrs Moon's personnel file which, read as a whole, is consistent with the status of employee.

19. Amongst the tasks carried out by Mrs Moon were:-

17.1 Receiving orders and deliveries.

17.2 Organising contractors.

17.3 Making arrangements to set up a PAYE system.

17.4 Ordering equipment.

17.5 Preparing a stock register.

17.6 Liaising with Ms Walker and the CQC.

20. Mrs Moon worked from home, from the nearby Waitrose Café, and increasingly as the clinic became habitable in the clinic itself. She used her own laptop computer for the purposes of her tasks but I accept that that was because there was no equipment available at the clinic. I accept also that she had a dedicated business e-mail address. Ms Walker did not.

Conclusions

21. Turning now to the relevant test set out in RMC, firstly did Mrs Moon agree to provide his or her own work and skill in return for remuneration. That test has become known as mutuality of obligation. To an extent this overlaps with the Respondent's concession that Mrs Moon is a worker, namely that she worked under "any other contract whether express or implied and whether 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 of a client or customer of any profession or business undertaking carried on by the individual".

22. I have no doubt that there was mutuality of obligation even on Dr Elmadbouh's case Mrs Moon was expected to perform the tasks set out above (inter alia) and in return she was to be paid at the hourly rate of £15.38. Again, on Dr Elmadbouh's case that was at least to persist until such times as the clinic was able to operate.

23. The second matter is one of control. There are many documents in the agreed bundle which indicate that Mrs Moon was under the control of Dr Elmadbouh, eg on the very first day a to do list at page 121. Instructions at pages 66, 68, 69, 70, 72, 74, 76 and 77. A further to do list see page 67.

24. I accept that Dr Elmadbouh became more involved as the CQC inspection became closer. Nonetheless it is clear that he exercised sufficient control at all times to satisfy the RMC test.

25. Were there other matters that were either consistent or inconsistent with a contract for services? It is clear that Mrs Moon took no financial risk. By that I mean she had no investment in the clinic. Nor was there any bonus arrangement for example, for delivery of an operational clinic by a given date. This is entirely consistent with Mrs Moon being an employee.

26. It is also clear that when it suited Dr Elmadbouh he held out Mrs Moon as either practice manager or clinic manager, see for example pages 146 to 149, 168 and 169, 164, 179, 211/212 and 213. The minutes of a meeting of 14 October 2016, 159 to 162 are consistent with Mrs Moon being held out by Dr Elmadbouh as an employee.

27. In relation to holidays there is a conflict of evidence. Dr Elmadbouh's evidence was that Mrs Moon worked when she pleased and took holiday when she pleased. Mrs Moon's evidence was that there was an initial discussion of holidays that she had already booked prior to her commencing work at the clinic. Dr Elmadbouh agreed to honour those holidays and asked her to confirm the dates. This she did and I prefer Mrs Moon's evidence on the point, namely that Dr Elmadhoub approved the taking of her holiday prior to her doing so.

28. As to the deduction of tax and national insurance it is common ground that during the relevant period the Respondent's did not have a formal payroll system. Indeed, it was one of Mrs Moon's tasks to put one in place. I accept Mrs Moon's evidence that she has provided all the relevant material to her own accountant so that the appropriate tax and National insurance can be paid.

29. I also note as being relevant that Mrs Moon undertook a number of training courses. Dr Elmadbouh says that she did so at her own instigation and without authority. However, it is clear that he was aware of those training courses. It is also common ground that Dr Elmadhoub carried out a DBS check on Mrs Moon, he says because the CQC would need an example on its inspection. Mrs Moon's evidence which I prefer is that that would not have been a requirement of the CQC.

30. There is considerable material in the bundle relating to High Court litigation between the parties. It is clear that a number of damaging admissions, that is damaging to the Respondent's case, were made during that litigation both in the pleadings and in correspondence. Dr Elmadhoub tells me that he is suing the lawyers that made those damaging admissions for negligence. It seems to me to be unnecessary to rely upon that material to reach a conclusion in this case.

30. I set out in paragraphs 12, 13 and 14 the conflict of evidence on what took place in the initial negotiations. I prefer Mrs Moon's evidence, she had a much clearer picture and recollection of those events. Dr Elmadhouh's evidence was at times vague and often evasive. In saying that I make due allowance for the fact that his first language is not English. In my view during those early discussions Dr Elmadbouh gave no thought to Mrs Moon's status, he has only had to address the matter in retrospect as a consequence of these proceedings and I am satisfied that he has done so in a partisan fashion. On balance I am

satisfied that Mrs Moon has discharged the burden of proof which lies upon her to show that she is an employee. Given that the Respondent has already conceded worker status then it follows that all of the claims brought in Mrs Moon's claim form can proceed to a full hearing.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. There will need to be a case management discussion to deal with the listing of the hearing and appropriate directions in relation to disclosure and the exchange of witness statements.

2. I note that throughout these proceedings the Respondents (effectively Dr Elmadbouh) have a history of delay and failure to comply with directions concerning in particular disclosure. Even the items that I ordered to be disclosed were delivered late. They also ought always to have been within that category of documents to be disclosed pursuant to Employment Judge Camp's orders. The picture painted is one of Dr Elmadbouh being dragged reluctantly to disclose material which is plainly relevant. Dr Elmadbouh should note that if there is further failure to comply timeously with the Tribunal's directions it may result in the striking out of the Respondent's response.

Employment Judge Blackwell
Date 20 Nov 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

NOTES

- (i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.**
- (ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.**
- (iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.**
- (iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management':**

<https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf>

- (v) The parties are reminded of rule 92: “*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of “cc” or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*” If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.