



EMPLOYMENT TRIBUNALS

Claimant: Mr E. Ekakitie

Respondent: Bookachemist Recruitment Ltd

**Heard at: Leeds via CVP
2021(deliberations 01 March 2021)**

On: 26 February

Before: Employment Judge T.R. Smith

Representation

Claimant: In person

Respondent: Mr Nawaz (Director)

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V-video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

RESERVED JUDGMENT

The Claimant was a worker at all material times within the meaning of section 43K of the Employment Rights Act 1996.

Reasons

The Issue

- 1.The issue for the Tribunal to determine was concisely set out in an order of Employment Judge Buckley dated 29 October 2020.
- 2.The Tribunal had to determine whether or not the Claimant was a worker, and the Respondent his employer, within the meaning of either section 230 or section 43K of the Employment Rights Act 1996.
- 3.The material time was the date the Claimant contended he made protected disclosures namely of 12 March, 30 March and 22 April 2020.

The Evidence

4.The Tribunal had before it a statement from the Claimant and also from Mr Nawaz, a director of the Respondent. Both gave sworn evidence. In addition, the Tribunal had before it a bundle consisting of 51 pages.

Findings of fact

The Corporate structures

- 5.The Respondent operates under the general trading style of Pharmasurge Partnerships, although that is not a legal entity.
- 6.Bookachemist Recruitment Ltd, despite its name, is not a recruitment agency. It operates a number of chemists in Yorkshire including, for the purposes of these proceedings, Rotherham Road pharmacy, Winter Hill pharmacy, and Green Arbour pharmacy.
- 7.There are two associated companies within the Pharmasurge group namely Morthen Group Limited, which operates Wickersley pharmacy and Dinnington Partnership Ltd, which operates the Dinnington pharmacy.
- 8.The Respondent has a contract to supply NHS pharmacy services with its local Clinical Commissioning Group.
- 9.The Claimant is a registered pharmacist.
- 10.He earns his living as a locum pharmacist.
- 11.The Claimant was formerly a director of Click Heath Ltd from 2012 until 26 July 2019.
12. According to Company House documents placed before the Tribunal the company has a capital of 500, £1 pound shares and all that share capital has been issued to the Claimant.
- 13.Prior to events giving rise to these proceedings the Respondent believed that Click Heath Ltd was effectively the corporate vehicle used by the Claimant to work as a locum pharmacist.
- 14.The Tribunal found as a fact that the Claimant controlled Click Heath Ltd, given he had all the issued share capital.
- 15.The Claimant accepted that Click Heath Ltd invoiced for his services and he then obtained dividends from the company, presumably due to the favourable tax

treatment.

16.Mr Nawaz confirmed it was common for locum pharmacists to operate via service companies or sometimes to operate using such companies but with an employment agency intermediary.

The Job offer

17.In February 2020 the country was still in the grips of Covid 19. It was important that pharmacies remained open. There was therefore a particular demand for registered pharmacists throughout the United Kingdom.

18.The Respondent placed an advertisement for a locum pharmacy manager/pharmacy manager on a website known as chemistand drugistjobs.co.uk

19.The post was for a full-time pharmacist based at the Rotherham Road pharmacy.

20.The Claimant attended interview with Mr Nawaz on or about 27 February 2020 and provided his CV.

21.An offer of employment was made to commence on 01 May 2020 at the Rotherham Road pharmacy.

The Offer.

22.The agreement was recorded in writing.

23.The parties to the agreement was the Respondent, Click Heath Ltd and the Claimant. A copy of the agreement was before the Tribunal (30 to 35) Having set out the services to be provided the agreement stated *“this agreement regulates the arrangements by which Click Heath Ltd will provide these services”*

24.The agreement provided that there was no right of substitution.

25.The role was full-time Monday to Friday.

26.The Agreement recorded the required duties of the job holder which included as acting as a pharmacy superintendent, training staff and other activities.

27.The contract was labelled *“standard service contract for Ltd companies”*

28.The Respondent was to make payment for the Claimant’s services to Click Heath Ltd.

29.Having regard to the agreement in its entirety, noting it was produced by the

Respondent, and was a pro forma agreement, the Tribunal concluded that the work to be undertaken at the Rotherham Road pharmacy was substantially determined under the terms of that agreement by the Respondent.

30.The Claimant responded indicating that he approved the contract but that there was a minor error as to the spelling of his name, and Click Heath Ltd would invoice bi weekly, as this was the process that they had used on his behalf in other assignments.

32.The Respondent accepted those minor amendments.

Events prior to the start of the agreement

33.However, work was undertaken prior to 01 May 2020 and, as it transpired, the offer was withdrawn prior to the start date for reasons that are the subject of the current proceedings.

34.There was no written agreement to cover the work undertaken prior to 01 May 2020.

35.The Claimant himself, in his statement, said that he supplied work for the Respondent via Click Heath Ltd in this period *“acting as my agency”*.

36.Work was offered by Pharmasurge Partnerships to the Claimant predominantly in respect of those pharmacies owned by the Respondent, but not exclusively.

36.Prescription medication cannot be dispensed without a trained pharmacist being present.

37.Unlike in respect of the written agreement the arrangement did not incorporate any set hours. Work was offered by telephone and the Claimant could accept it or refuse it. He could choose the pharmacies that he wanted to work at. This is clear from the WhatsApp messages placed before the Tribunal in the main bundle.

38.An hourly rate of pay was agreed.no deductions were made. There was no agreement for holiday or sick pay. There was no pension. The Claimant chose how to do the work and as a registered pharmacist he decided how to deal with prescriptions. It was left to him to organise his work and apply his own skill and expertise.

39.If the Claimant was booked by the Respondent, he was expected to attend but the Tribunal accepted Mr Nawaz evidence that had the Claimant, for example, rung up to say he was sick he could send a fellow registered pharmacist, such

was the demand to keep pharmacies open.

40. There was no obligation on the Respondent to offer work to either the Claimant or Click Heath Ltd prior to 01 May 2020.

41. No agreement existed between the Respondent, the Claimant and Click Heath Ltd in any periods when services were not provided to the Respondent.

42. Invoices were submitted in the name of Click Heath Ltd to the Respondent and paid. A study of those invoices (found attached to Mr Nawaz's statement) showed that whilst the Claimant was working reasonably regularly for the Respondent, he was not working full-time.

43. He was not training staff. He was not doing the full range of duties set out in the written agreement. For the above reasons the Tribunal did not accept the Claimant's submission that the parties agreed to commence their relationship on the terms of the written agreement prior to 01 May 2020.

Discussion.

44. The Claimant made a number of submissions on the law and rather than repeat those submissions the Tribunal has addressed them whilst explaining its judgement.

45. The Respondent made no specific reference to the law and therefore the Tribunal means no disrespect by not repeating those arguments.

46. To the extent of the Tribunal has not referred to each and every argument that either party made no disrespect is meant to the parties and all their submissions were given due regard.

The Statutory Framework

47. A worker is defined by S.230(3) ERA as an individual who has entered into or works under (or, where the employment has ceased, has worked under):-

“a contract of employment (defined as a ‘contract of service or apprenticeship’) —
S.230(3)(a), or

any other contract, whether express or implied, and (if 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 — S.230(3)(b).”

48. Section 43K Extension of meaning of “worker” etc. for Part IVA.

“(1) For the purposes of this Part “ worker ” includes an individual who is not a worker as defined by section 230(3) but who—

(a) works or worked for a person in circumstances in which—

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

(b) contracts or contracted with a person, for the purposes of that person’s business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for “personally” in that provision there were substituted “(whether personally or otherwise)”,

(ba) works or worked as a person performing services under a contract entered into by him with the National Health Service Commissioning Board under section 83(2), 84, 92, 100, 107, 115(4), 117 or 134 of, or Schedule 12 to, the National Health Service Act 2006

(bb)....

(c) works or worked as a person providing services in accordance with arrangements made –

(i) by the National Health Service Commissioning Board under section 126 of the National Health Services Act 2006.....

(2) For the purposes of this Part “ employer ” includes—

(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged,

(aa) in relation to a worker falling within paragraph (ba) of that subsection, the National Health Service Commissioning Board, or the Local Health Board referred to in that paragraph,”

49. In *McTigue v University Hospital Bristol NHS Foundation Trust* ICR 1155

EAT Simler P summarised the correct approach to determining whether an individual is a worker within the meaning of S.43K(1)(a). The relevant questions a Tribunal should answer in sequence are set out below. The Tribunal would interject that not all are relevant to this case.:

- for whom does or did the individual work?
- is the individual a worker as defined by S.230(3) ERA (the standard definition of ‘worker’) in relation to a person or persons for whom the individual works or worked? If so, there is no need to rely on S.43K in relation to that person for the purpose of whistleblowing protection. However, the fact that the individual is a S.230(3) worker in relation to one person does not prevent the individual from relying on S.43K
- in relation to another person for whom the individual also works and citing that person as a Respondent in Tribunal proceedings
- if the individual is not a S.230(3) worker in relation to the Respondent for whom the individual works or worked, was the individual introduced/supplied to do the work by a third person, and if so, by whom?
- if so, were the terms on which the individual was engaged to do the work determined by the individual? (If the answer is ‘yes’, the individual is not a worker within S.43K(1)(a))
- if the answer to the above is ‘no’, were the terms substantially determined (i) by the person for whom the individual works or worked, (ii) by a third person, or (iii) by both of them? (If any of these is satisfied, the individual is a worker for the purposes of the subsection.) In answering this question, the starting point is the contract (or contracts), the terms of which are being considered. There may be a contract between the individual and the agency, the individual and the end-user and/or the agency and the end-user that will have to be considered. In relation to all relevant contracts, terms may be in writing, oral and may be implied. It may be necessary to consider whether written terms reflect the reality of the relationship in practice
- if the Respondent alone (or with another person) substantially determines (or determined) the terms on which the individual works or worked in practice

(whether alone or with another person who is not the individual), then the Respondent is the 'employer' as defined by S.43K(2)(a) for the purposes of the protected disclosure provisions. There may be two employers for these purposes.

50. In this case work was done for the Respondent.

51. The starting point is whether the Claimant was a worker within the meaning of section 230 of the employment rights act 1996. If he was at the material time then he succeeds and it is not necessary to consider the extended definition.

52. There is a myriad of case law on the definition of a worker. The Tribunal had particular regard to **Jivraj -v- Haswani [2011]UKSC 40**, **Pimlico Plumbers Ltd -v- Smith [2018] UKSC 29** and **Windle -v- Secretary of State Justice[2016] IRLR 628**. From those decisions it derived the following principles. Firstly, the individual must be under an obligation to do the work personally, secondly the person to whom the work is done must not be a client or customer of a business being run by an individual, thirdly the Tribunal must look at the reality of the situation and a limited right of substitution was not necessarily fatal.

53. The Tribunal determined the Claimant was not a worker within the meaning of section 230 Employment Rights Act 1996 pre 01 May 2020.

54. It did so for the following reasons.

55. Firstly there was no direct contractual relationship between the Claimant and the Respondent. The contractual relationship was between the Respondent and the Claimants company Click heath Ltd. This is evidenced by the fact that all payment was made by the Respondent to Click Heath Ltd. The Claimant in turn extracted remuneration from that company in a tax efficient manner.

56. Secondly the Tribunal is satisfied that prior to 01 May 2020 there was no personal responsibility on the Claimant to undertake work for the Respondent. He could choose to accept it or not accept it. This differed greatly from the proposed position post 01 May 2020. He could send a substitute pre 01 May 2020. The Tribunal preferred the Respondent's evidence on this point that the need to maintain opening hours of pharmacies was such that any qualified pharmacist would suffice.

57. Thirdly the Claimant was undertaking his own business. He utilised a company that he controlled. He could work for any pharmacies he wanted. He was only paid when he worked. The the Claimant was working on an assignment-by-assignment basis. He could accept or refuse work. The reality was the Claimant was in business on his own account and marketed his services where he wished.

58. It is proper to record the Claimant made reference to **Gilham v Ministry of Justice 2019 UKSC 44, SC**, where the Supreme Court held that a district judge was able to bring a whistleblowing claim despite not meeting the literal definition of 'worker' in S.230(3) because she did not work under a contract. The Court went on to hold that the appropriate remedy was for S.230(3) to be interpreted purposively to include judicial office holders, relying on the Court's obligation under S.3 of the Human Rights Act 1998. However, that case is distinguishable on the facts given there was no dispute that Ms Gilham had to provide her services personally and could not send a substitute. She was not in business on her own account.

59. The Claimant also made reference to the decision in **Community Based Healthcare Ltd -v- Dr Narayan UKEAT/0162/18/JOJ** but in the Tribunal's judgement that does not set out any principle that assists the Claimant. Whilst it is true that the doctor in that case utilised a service company and was held to be a worker within the meaning of section 230 it was a case that turned on its specific facts and in particular on the point of whether there was an undisclosed principal and what points had or had not been taken below. It does not assist this Tribunal in the determination of the matter it faced.

60. The Tribunal having established that the Claimant was not a worker within section 230 the next question was whether he was a worker under the extended definition set out in section 43K.

61. The Claimant relied on section 43K (1) (a).

62. There are two limbs to that definition. The first requires that the Claimant is introduced or supplied to do work by third party. The Tribunal was satisfied the agreement placed before it fulfils that requirement. The Claimant was being introduced to the Respondent via Click Heath Ltd. The mere fact there was a service company does not mean that this limb cannot be satisfied, see **Croke -v- Hydro Aluminium Worcester Ltd 2007 ICR 1303 EAT**

63. The second requirement namely whether the terms of engagement were substantially determined not by the Claimant but by the person he worked for, by third party or by both of them is also fulfilled. The Tribunal reached this conclusion having regard to the very prescriptive nature of the agreement. However, none of the above assists the Claimant because the agreement dated 01 May 2020 never came into force given the Claimant ceased his relationship with the Respondent prior to that date.

64. The Claimant next relied on section 43K(ba) on the basis providing he was providing services to the National Health Service. Again, that does not assist the Claimant because it was not the Claimant who entered into a contract with the Clinical Commissioning Group but the Respondent.

65. Nevertheless the Tribunal was satisfied that the Claimant met the extended definition under section 43K and in particular subparagraph (1)(c). Section 126 of the National Health Services Act 2006 provides:-

“(1) The Board must, in accordance with regulations, make the arrangements mentioned in subsection (3).

(2) The Secretary of State must make regulations for the purpose of subsection (1).

(3) The arrangements are arrangements for the provision to persons who are in England of—

(a)....

(b)....

(i)....

(ii)....

(c)

(d) such drugs and medicines and such listed appliances as may be determined by the Secretary of State for the purposes of this paragraph and which are ordered for those persons by a prescribed description of person in accordance with such conditions, if any, as may be prescribed, in pursuance of functions in the health service, the Scottish health service, the Northern Ireland health service or the armed forces of the Crown, and

(e) such other services as may be prescribed.

(4) The descriptions of persons which may be prescribed for the purposes of subsection (3)(d) are the following, or any sub-category of such a description—

(a) persons who are registered in the register maintained under article 5 of the Health Professions Order 2001,

(b) persons who are registered pharmacists.....”

66. Prior to 01 May 2020 the Claimant worked as a person providing services in accordance with arrangements made by the National Health Service Commissioning Board. He was a registered pharmacist. Whilst on the Respondents premises, he was dispensing NHS prescriptions. Although as the Tribunal observed the Claimant used a service company it was he who personally signed off the prescriptions and he was personally accountable to his regulator in respect of those prescriptions.

67. It follows therefore the Claimant is entitled to bring his claim.

Employment Judge T.R.Smith

Date 01 March 2021