Case No: 22305397/2021

EMPLOYMENT TRIBUNALS

Claimant: **Dr R Cottam**

Respondent: **NHS Sussex Integrated Care Board**

Heard at: **London South Employment Tribunal (by CVP)** **On:** **9 and 10 November 2022**

Before: Employment Judge T Perry

Representation
Claimant: Mr J Arnold (Counsel)
Respondent: Mr P Sangha (Counsel)

JUDGMENT

1. The Claimant was an employee of the Respondent from 2014. The Claimant's claim for unfair dismissal is well founded and succeeds.

2. The Claimant is not entitled to a redundancy payment under section 136 Employment Rights Act 1996.

REASONS

Claim and issues

1. At the start of the hearing it was confirmed that the correct Respondent is NHS Sussex Integrated Care Board. This is the successor to the Brighton and Hove Clinical Commissioning Group, which was the initial Respondent.

2. The Claimant brings a claim of unfair dismissal under section 95 Employment Rights Act 1996 and seeks a determination that she is entitled to a statutory redundancy payment under s163 Employment Rights Act 1996.

3. The central issue in the case is whether the Claimant worked under a contract of employment under section 230 Employment Rights Act 1996 from either 1 May 2014 or alternatively from 1 July 2017. Both counsel agreed that in answering this question

I need to have regard to: the true agreement between the parties, whether there was mutuality of obligation, whether the degree of control by the Respondent was sufficient to amount to a relationship of employment; and whether the other provisions of the contract are consistent with a contract of employment. It was accepted that the Claimant at all times agreed to provide and in fact provided personal service.

4. If the Claimant is an employee, I have to consider whether on 31 May 2021 she was dismissed within the meaning in either section 95(1)(a) or 95(1)(b) Employment Rights Act 1996 and whether the dismissal was unfair within the meaning set out in section 98(4) Employment Rights Act 1996. It was agreed between the parties that the reason for any such dismissal was redundancy.

5. I also may have to consider the effect of section 138 Employment Rights Act 1996 on any entitlement to a statutory redundancy payment.

6. These issues were set out in a list of issues provided by Mr Arnold and agreed following minor amendment by Mr Sangha.

7. The list of issues included consideration of jurisdiction of the Tribunal under Section 111 Employment Rights Act 1996 to consider a claim of unfair dismissal. Given the date of the alleged dismissal, the dates of Early Conciliation and the date of the Claim form, the Tribunal has jurisdiction..

Evidence

8. The Tribunal was provided with an agreed final hearing bundle of 493 pages.

9. The Claimant gave evidence from a witness statement.

10. For the Respondent, Dr Elizabeth Gill (Deputy Chief Medical Officer), Dr Andrew Hodson (Executive Medical Director), and Mr Adam Doyle (Chief Executive Officer) gave evidence from witness statements.

11. Both Counsel produced written closing submissions, which were supplemented by oral submissions.

Findings of fact

12. I was provided with a chronology agreed in all but one relatively minor respect.

13. From 1 May 2014, the Claimant was appointed Clinical Programme Lead – Sustainability at Brighton and Hove Clinical Commissioning Group for an initial period of six months, working one four hour session per week for 24 weeks per six months

for which the Claimant was paid £14,400 per annum. Payment was made on a monthly basis.

14. The written contract attached as Annex A was described both as a "contract of services" and a "contract for service". It provided for the Claimant to "act on [her] own initiative in completing the contract works" and required her to "make all reasonable efforts to do so within agreed timescales." The Claimant was afforded "discretion to work flexibly subject to agreed completion dates and specified attendance requirements." The contract provided for "an identified supervising manager" who would "arrange to meet regularly with [the Claimant] to discuss performance and progress in relation to work assigned under this Agreement." The Claimant was required to "provide regular progress reports and information as required" and to "maintain reasonable availability to liaise with their manager at Brighton and Hove CCG." The Claimant was required to maintain appropriate professional indemnity and liability insurance. The Respondent retained the right to terminate without notice if there were "a failure to adhere to agreed timescales, including milestones and break points specified." The Claimant was responsible for expenses incurred unless specifically agreed otherwise. The contract specified that both parties agreed their relationship was not that of employer and employee and that the Claimant "will not be entitled to any benefits associated with a direct employer/employee relationship eg annual leave, sick pay. There is no obligation on either party to offer or accept work or contracts, nor does the Consultancy Agreement create or imply any mutuality of obligation beyond the terms agreed."

15. The Claimant was given only minimal training on commencement of her role. Other Clinical Leads who had taken up their roles in 2012 may have had more training.

16. On 11 Mar 2015 the Claimant's appointment was extended to 31 March 2016. The extension letter stated that the rate of pay "is calculated on the assumption that you will take the equivalent of 6 weeks annual leave over the year. If you could keep Naz informed in advance when you are taking annual leave that would be much appreciated."

17. In 2015 the Claimant was involved in a quasi grievance brought by a colleague. A form of grievance process was used at this time, although I saw no documentary evidence of this process.

18. On 4 April 2016 the Claimant's appointment was extended to 31 March 2017. The covering letter referred to "terms and conditions of your employment remain[ing] unchanged."

19. In 2017 a Clinical Programme Lead Job Advertisement was created setting out the nature of the role and responsibilities of the Clinical Programme Leads. This document set out that each Clinical Lead would be "aligned to one of the clinical programmes" described in the CCG's clinical strategy. The ideal commitment was stated to be four sessions a week but applicants would be considered if only able to provide two or three sessions a week. There was a minimum requirement to be available for two sessions on a Tuesday. The roles and responsibilities were in four (somewhat overlapping) areas: lead clinical strategy and delivery of a specific clinical programme; engage; provide senior clinical leadership and support; and clinical and corporate leadership. Whilst "leadership" and "representation" of member practices are both stressed in this document, there is very little detail on what the day to day requirements of the role are.

20. On 22 March 2017 the Claimant's appointment was extended to 30 June 2017. The letter extending the appointment referred to the appointment as a "contract for services" and included an entitlement to 6 weeks unpaid leave each year.

21. The appointment was extended again from 1 July 2017 to 30 June 2019. The Claimant's "contract title" expanded to "Clinical Programme Lead Planned Care and Sustainability". The Claimant worked four sessions per week. The same contract from 2014 was attached as Annex A to the Clinical Lead Agreement.

22. In 2018 the Claimant was sick for an extended period with cancer. The Claimant informed the CCG of the dates of her surgeries and that she had been signed off work. A decision was made by Dr Hodson and Mr Doyle to continue to pay the Claimant her fee even when unable to work.

23. There were discussions with Dr Hodson in 2019 about the possibility of the Clinical Leads getting more job security. I accept the Claimant's evidence that this was more to do with the end of short term contracts rather than a detailed discussion of employment status. Dr Hodson ultimately told the Claimant that he did not have the power to make any changes without approval.

24. In May 2019 Dr Hodson produced a report regarding reappointment of the Clinical Leads designed "to set the direction of travel" in light of "changes to the landscape such as Primary Care Network (PCN), Integrated Care Partnership and Integrated Care System". The report went on to state "the job specification will include a requirement to shift and accommodate changes within the roles as new challenges and requirements emerge." The number of Clinical Leads was reduced from seven to five. Very limited changes were made to the job descriptions including a statement that the role was liable to develop and change in the future.

25. The Claimant applied for and was appointed to a Clinical Lead role started on 1 July 2019. The Claimant's application includes probably the most useful description of what the Clinical Lead role actually was for both planned care:

"I am involved in both the detailed delivery of the CCG's project plans as well as the development of higher level strategy and financial responsibility. This includes working with others in the CCG, including Public Health and Business Intelligence to ensure that we equitably address the needs of the whole population.

I attend Localities Meetings in order to engage the membership on current local developments and challenges. As a conduit for the views of member practices, I raised and seek to address any concerns around quality – and ensure effective use of member perspectives in ensuring continuous pathway improvements. I also facilitate constructive relationships with local clinicians in order to nurture reflective use of data to promote higher value care through appropriate demand management."

26. And community services:

"I provided clinical leadership and direction of the delivery of a range of services in the community, ranging from the Memory Assessment Service to Community Rapid Response Services. This included being involved in both the commissioning and development of new services, such as the Integrated Respiratory Care Service, and their performance management (including some challenged services which needed support to improve performance and meet KPI's).

Working with commissioning colleagues, I was required to identify new areas of development based on the needs of the local population, develop annual commissioning intentions, and contribute to the delivery of CCG objectives.

The post required the development of robust relationships, and partnership working with a wide range of stakeholders, including community providers and BHCC. I also played an active part in various CCG committee and contractual meetings, as well as facilitating relationships between CCG and member practices."

27. A "contract for services" dated 8 July 2019 was prepared. This contract described the Claimant as a worker and provided for corresponding benefits to sick pay and paid annual leave. The agreement was clear at several points that "nothing in this Agreement will render you an employee of the CCG". The Claimant was explicitly excluded from participation in grievance and disciplinary procedures. The agreement provided that changes to the nature of any part of the services may be required "with mutual agreement and a reasonable notice period." The CCG agreed to provide

training but not CPD for maintaining professional registration. The Claimant was required to provide an average of one session per week and agreed to use reasonable endeavours to remain available "at all times on reasonable notice to provide such assistance or information as agreed with the CCG." The Claimant was required to "observe and comply with our reasonable requirements and instructions." The agreement provided for periodic review of performance. The fee was payable monthly via payroll and included employer pension contributions at 14.38% if paid in a practice account. The Claimant did not recall ever signing or possibly even being sent this document. The version in the bundle was unsigned.

28. From November 2019 the Claimant increased her hours to five sessions per week.

29. On 1 January 2020 Dr Gill and Dr Caroe were appointed job sharing Chief Medical Officers.

30. In April 2020 there was a restructure whereby the seven CCG within Sussex were merged into three.

31. During the covid 19 pandemic, the Respondent was organised into a command structure of Gold, Silver and Bronze. The Claimant was included within this structure.

32. On 21 July 2020 the contracts of the Clinical Leads were extended for six months from 1 October 2020 to April 2021. The email to the Clinical Leads acknowledged "We know each predecessor CCG engaged its clinical leads differently and we will meet you all on a one to one basis during the consultation period so we can understand these arrangements and discuss how the proposed model will impact on you."

33. This consultation process regarding the new structure for the Chief Medical Officer directorate commenced in October 2020. The Final Change paper for Clinical Leadership delivery set out that historically different CCGs had engaged Clinical Leads on different "contracted models" and that there had been "significant variation in the way in which Clinical Leads worked. Some have worked intermittently, semi-autonomously, made independent decisions without regular line-management, whilst others have worked nearly full-time, in collaborative environments with clear engagement with the wider team." I reject the suggestion that there was a custom and practice of engaging all Clinical Leads on a self employed basis. The stated aim of the reorganisation was a more integrated and focussed way of working to ensure the best utilisation of resources. Specifically narrow clinical focus was stated as undesirable because of a lack of flexibility. The role title was changed from Clinical Lead to Clinical Director.

34. The conclusion of the consultation was that Clinical Leads would be separated into two groups: A and B. Group A would be Clinical Leads who were deemed employed and would be slotted into Clinical Director roles and group B was for Clinical Leads not deemed employed who would be considered for Clinical Director vacancies. All Clinical Director posts going forward were employees.

35. On 26 October 2020 the Claimant was informed she had been providing services under a Contract for Service and would be involved not in formal consultation but rather an engagement process, which the Claimant did not attend. The Claimant was informed that if she considered her contractual position had been defined incorrectly she should request a one to one meeting with either a Local Medical Director or one of the Chief Medical Officers.

36. The Claimant did not initially contest her assignment to Group B. Appeal meetings for people who did challenge their allocation took place in October and November 2020. An appeals panel met on 7 December 2020 and upheld all allocations to both groups.

37. On 14 January 2021 the Claimant by email appealed her allocation to Group B. She did this after a discussion with a CCG Pensions Manager, Ms Dunderdale, who the Claimant says informed her that she was working under a contract of service meaning the Claimant was eligible to be slotted in to a role rather than having to apply.

38. On 26 January 2021 Ms Dunderdale wrote to the Claimant to state that her role was one for services and that Ms Dunderdale had been unaware that different CCG's had different arrangements.

39. On 27 January 2021 the Claimant wrote to Salli Roddis, Deputy Director of People, setting out that in 2018 she had been told sick pay and holiday would be in the revised contracts. The Claimant said she had been promised greater job security.

40. On 9 February 2021, Ms Roddis wrote to the Claimant setting out that whilst Dr Hodson, as Local Medical Director, had been willing to support offering employment contracts no change had taken place because it had not been approved by the various committees.

41. On 5 March 2021, the CCG served notice to end the Claimant's engagement on 31 May 2021.

42. On 1 June 2021 the Claimant started as Clinical Director under a contract of employment for 15 hours a week. For the Claimant, there was a reduction in pro rated salary down from £144,000 to £120,000.

43. The Claimant continued to hold the brief for Planned Care.

44. On 26 August 2021 the Claimant contacted ACAS to start Early Conciliation.

45. On 1 October 2021 the Claimant increased her hours to 18.75 per week.

46. On 7 October 2021 the Claimant received her Early Conciliation Certificate.

47. The Claimant issued her claim on 5 November 2021.

48. On 1 July 2022 the respondent CCQ was abolished and replaced by an Integrated Care Board.

49. On 24 October 2022 the Claimant gave notice to terminate her employment. The Claimant's employment ended on 21 January 2023..

The Law

50. The question whether someone is an employee or not is one of fact.

51. 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;

52. 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 …'.'

53. 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. This is not generally in issue in cases such as this where there is a regular pattern of work running over many years.

54. 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.

55. 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.

56. 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.

57. In cases such as this, where the individual is a professional, employed on the basis that they shall use their own skill and judgment in carrying out the tasks, the organisational test may be useful. If they are to decide for themselves how to perform the task, they may fail the control test; and yet common sense may say that they are, and policy may say that it is expedient that they should be, an employee. A resident surgeon, for example, is and ought to be an employee of the hospital authorities. Plainly the hospital authorities cannot instruct the doctor how to perform an operation; and it is difficult to say that they even have the theoretical right to do so. Nevertheless, they are part of the organisation and so is an employee of the hospital authorities (**Cassidy v Ministry of Health** [1951] 2 KB 343, [1951] 1 All ER 574, CA).

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

    58.1. 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.

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

    58.3. Who provided the tools and equipment?

    58.4. 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?

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

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

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

59. 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…"

60. 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.

61. Autoclenz was reviewed recently in the Supreme Court in the case of **Uber BV v Aslam** [2021] UKSC 5

62. 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."

63. 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."

64. It was suggested to me by Mr Sangha in paragraph 24 of his written submissions effectively that the arguments are different for the 'employee' category. However, as the worker category includes anyone who is also an employee (as a limb a) worker), and as an employee is equally a statutory construct for the purposes of unfair dismissal protection, it would seem that the policy statements in **Uber** apply equally to employees. The terms of the contract and label given by the parties remain a relevant factor.

Conclusions

The Claimant's role before 1 June 2021

65. The Claimant gave largely unchallenged evidence about the structure of her working day. Tuesdays were fully dedicated to the Clinical Lead work. The Claimant's other sessions were largely set by the schedule of meetings she had to attend such as at her local hospital on Monday mornings. Although meetings would sometimes happen without the Claimant, her attendance at such meetings was seen as important. Meetings were largely face to face. Many of the meetings the Claimant attended were minuted. For less formal meetings, the Claimant or colleagues would keep minutes or action logs but these were not checked by supervisors. The Claimant's diary was kept open for people to booking meetings in if required.

66. The Claimant at all times used a laptop belonging to the CCG and had a desk available to use at their premises. The CCG provided a degree of administrative and IT support.

67. The Claimant, as a senior leader, was expected to prioritise work to achieve outcomes. The objectives worked towards were the CCG objectives based both on national planning guidance and local restraints. Timelines were set collaboratively including the team of commissioning and managerial colleagues in the context of the commissioning

teams having specific completion dates.

68. The Claimant had 1-2-1 meetings with her clinical line manager and the "heads of" from the commissioning team on at least a roughly monthly basis. They worked collaboratively on many matters. I accept the Claimant's evidence that Dr Hodson or Dr Supple could ask the Claimant to attend certain meetings or lead on certain matters but that they did not have a close involvement in setting the Claimant's plan of work. Equally, I accept Dr Hodson's evidence that he was often acting as a sounding board to help unblock tricky issues. The relationship with Dr Hodson was one of supervision and oversight in a broad sense.

69. The Claimant had annual appraisals. These may not have taken place every year but did since at least 2017 (on Dr Hodson's evidence). There was one example in the bundle of a form completed in November 2018 by Dr Hodson. This included setting objectives for the following year by reference to the CCG's corporate strategies although I accept the Claimant's evidence that there was a clear focus on developing her personally in this document.

70. The CCG paid the Claimant's course fees for a course at Oxford University and provided study leave.

71. In respect of the period before 2019 when under the terms of the contract the Claimant had periods during which she did not provide services, I accept the Claimant's evidence that she had to make sure there was effective cover (eg over Christmas) and that she provided details of her holiday or annual leave dates. At 480 in the bundle there is an example of the Claimant being asked to submit an annual leave request form in 2016. The Claimant's dates were never refused. I accept that the Claimant worked more that the contracted number of days but was not paid extra for doing so.

72. Despite the Clinical Leads having assigned specialisms, I accept the Claimant's evidence that during the Covid 19 pandemic, the Clinical Leads were adjusted to fit within a command structure to respond to the pandemic.

The Claimant's role from 1 June 2021

73. Evidentially, the difference between the Claimant's role on 1 June 2021 as opposed to the period beforehand is instructive when asking to what extent the Claimant's employment status changed on that day. I accept the Claimant's largely unchallenged evidence that many things did not change.

74. I accept that the Claimant, as a senior leader, was still expected to prioritise work to

achieve outcomes and that she would not be sanctioned for failing to attend an individual meeting.

75. I accept that the claimant's line management arrangements remained largely unchanged from 1 June 2021 and that her work was on a daily basis subjected to no more scrutiny than before.

76. The Respondent's case is that after June 2021 there was an increased ability to direct how the Claimant's work would be done. In particular they rely on the change of job title without being assigned a specialism and annual appraisals as evidence that Clinical Directors were under increased control. Mr Doyle's evidence is that under the pre June 2021 arrangements Clinical Leads might be resistant to direction. Dr Gill stated that by contrast after June 2021 the Claimant's line manager could set her day to day tasks However, I have not been provided with any concrete examples of either reluctant Clinical Leads pre June 2021 or day to day direction of the Claimant's work after June 2021. I find both of these failures telling and they lead me to prefer the Claimant's evidence in this regard. Dr Gill accepted that the Claimant's day to day role may not have changed and that people with pre-existing specialisms might well still have kept the same brief going forward as the Claimant appears to have done.

Analysis

77. Despite the contractual documentation at points suggesting otherwise, the Respondent did not seek to suggest before me that there was any lack of mutuality of obligation between the parties. This is not surprising as this was an ongoing relationship covering numerous years.

78. Moreover, the Respondent accepts that the Claimant was required to provide work personally.

79. The key areas of difference between the parties were: whether the level of control exercised by the Respondent was sufficient to make the Claimant an employee; whether the other provisions of the contract are consistent with a contract of employment; and whether the labelling of the relationship as one of self-employment and later worker status (but not employee status) was a true agreement and determinative of the Claimant's status.

80. Turning first to the question of control, as an experienced and skilled professional, I would not expect in any event to see close control over how the Claimant did her work. The question is to what extent there was or could be direction of what the Claimant did before June 2021. This is a somewhat tricky question to get to grips with. Clearly as

to the corporate day on a Tuesday, the Claimant was under quite close control as to how and where the services were provided. Moreover, the specialised area the Claimant covered was set effectively by the Respondent. The targets and projects the Claimant worked towards seem to have been governed by the CCG's objectives and the projects the commissioning team were working towards. This also impacted on deadlines although it seems that everything was done essentially as quickly as possible. Much of the work of the Clinical Lead appears to have been attending various meetings. It does not appear that the Claimant had much of a free hand to schedule these meetings. The meetings appear to have been scheduled at times that suited the various participants at the meetings. As I have set out above, I do not consider that the job description provides much assistance with the question of control because it is couched in such vague terms.

81. Overall, I consider that there was a structure of control by the Respondent of the Claimant meaning that the ultimate right of control lay with the Respondent. The Claimant was very much part of the Respondent's organisation. The Claimant was appraised each year, she had what was effectively a line manager. The area of specialisation was set by the Respondent. The Claimant worked set shifts (albeit with some flexibility). I accept the Claimant's evidence that had Dr Hodson told her to work in a certain area she would have felt compelled to do so. This was not a purely abstract power of control. A clear example of it is that when the Covid 19 pandemic hit, the Claimant was moved into a command structure at the Respondent's direction. Importantly, I do not accept that this structure of control changed significantly in June 2021. It was now documented correctly but I find that this was effectively documenting a structure that already largely existed rather than imposing something new. Although only a small example, it is clear that the Claimant continued to retain a specialism in planned care as a Clinical Director (see page [309]).

82. As to the other provisions of the contract swhether they are inconsistent with employment status, I bear in mind that I am not working on the basis of any presumption of employment because of my finding on control. Rather I am looking at an accumulation of detail to see what was the reality of the situation. On balance, I find that those accumulated details are not inconsistent with employment status. Indeed they seem to be weighted more towards employment than anything else. These include the method of payment and the fact that the Claimant did not invoice for work but was paid via payroll over 12 months with pension contributions included from at least 2019. Whilst I accept there were particular reasons for some of this (including the operation of IR35 and potentially specific obligations to contribute to the Claimant's pension) the overall picture is consistent with employment. The fact that the Claimant

had to report periods of annual leave and received effectively sick pay during a period when unable to provide services in 2018 both suggest employment. A policy largely akin to a grievance was applied to the Claimant in 2015. There was a high degree of integration of the Claimant into the Respondent's organisation, albeit this did not include any line management responsibility. The Claimant worked closely with the Respondent's commissioning team.

83. As to the status of the documentation and the label given by the partie, I remind myself that this is a factor to take into account but that it tends only to be determinative on its own in borderline cases. The documents themselves are at times confused regarding employment status. There are several reference to contracts of service or the Claimant being described as an employee. However, the overwhelming weight of the documentation before 2021 denies employment status. However, it also denied worker status before 2019, when this was manifestly wrong. It sought to deny mutuality of obligation by suggesting "there is no obligation on either party to offer or accept work or contracts" when this obligation plainly existed throughout the period from 2014 to 2021. There was a largely artificial provision seeking to provide unpaid holiday pay before 2019. I reject the suggestion that the terms of the agreements between the parties were negotiated without any imbalance of power. The Respondent alone set the terms of the various Agreements and did so for its own purposes (such as in relation to holiday pay). On balance, I accept the Claimant's evidence that she did not pay much attention to the references in her various contracts as to her employment status or the difference between a contract of service and contract for services. I accept this notwithstanding that the Claimant must have had some understanding of the different employment statuses (eg between an employee and a partner) having held various roles and statuses in her private practice. Overall, having regard the decisions in Autoclenz and Uber, I do not consider that the written agreements before 2021 reflected the reality of the arrangement between the Claimant and the Respondent, which was in fact one of employment from 2014.

84. It follows that the termination of the Claimant's employment on 31 May 2021 was a dismissal within the meaning set out in section 95(1)(a) Employment Rights Act 1996. As set out above, there is no issue with jurisdiction of the Tribunal under section 111 Employment Rights Act 1996.

85. The reason for that dismissal is somewhat perplexing. It was effectively agreed between the parties as being a redundancy. There was, on my analysis, no redundancy situation within the meaning of section 139 Employment Rights Act 1996 because there was no expectation of a reduction of the need for employees doing the

work the Claimant was doing. Her role effectively continued. As a reorganisation not creating a redundancy there was potentially a dismissal for some other substantial reason. In any event, the point becomes moot if the reason was redundancy or SOSR because the Respondent did not act reasonably within the scope of section 98(4) Employment Rights Act 1996 in dismissing the Claimant for this reason given her role continued and financial pressures were not the reason for the dismissal which Dr Gill said was overall cost neutral. Accordingly, the dismissal was unfair.

86. The Claimant was re-engaged immediately under a new contract of employment in pursuance of an offer made before the end of her employment. Under section 138 Employment Rights 1996 the Claimant was not dismissed for the purposes of part XI Employment Rights Act 1996. However, this does not affect the Claimant's rights under part X Employment Rights Act 1996 per **Jones v Governing Body of Burdett Coutts School** [1998] IRLR 521, CA..

Employment Judge T Perry

Date 29 November 2022