Case No. 1806735/2020

EMPLOYMENT TRIBUNALS

Claimant: Dr J Brink

Respondent: MSI Reproductive Choices

Heard at: Leeds **on** 11 and 12 August 2021

Before: Employment Judge Cox

Representation:
Claimant: In person
Respondent: Dr Ahmad, counsel

REASONS

1. The Claimant presented a claim to the Tribunal alleging that he had been unfairly dismissed, harassed on racial grounds and directly discriminated against on racial grounds by the Respondent. At the Hearing, he withdrew claims for a redundancy payment and arrears of pay and did not object to them being dismissed.

2. At the beginning of the Preliminary Hearing, the Tribunal clarified and agreed with the parties what issues it was to decide. These were slightly amended from the issues identified at the Preliminary Hearing for case management, but neither side objected to those amendments.

3. In order to be entitled to claim unfair dismissal, the Claimant needed to have been employed by the Respondent as an employee (Section 94(1) of the Employment Rights Act 1996 ("ERA")), that is, under a contract of employment rather than a self-employed contract for services. He also needed to have completed at least two years' continuous employment by the effective date of termination of his employment, which the parties agreed was

17 July 2020 (Section 108(1) ERA). The issues for the Tribunal to decide were:

3.1 Did the Claimant work for the Respondent under a contract or contracts of employment for all or any part of the time he worked for it?

3.2 If so, when did that contract or those contracts begin and end?

3.3 If the Claimant worked under a succession of employment contracts the last of which had not lasted two years or more, could he nevertheless establish that he had completed two years' continuous employment by virtue of the application of Section 212 ERA?

4. In order to decide whether the Claimant was an employee, the Tribunal needed to apply the guidance in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance (1963) 2QB 497. An employment contract exists if three conditions are met:

   4.1 The worker agrees that he will provide his work and skill in performance of some service for the employer, in return for remuneration.

   4.2 The worker agrees, expressly or impliedly, that in performing that work he will be subject to the employer's control in a sufficient degree to make him an employee.

   4.3 The other provisions of the contract between them are consistent with it being a contract of employment, as opposed to a contract for services.

5. In this case, the Claimant and Respondent had signed a document headed "Consultancy agreement" (referred to in these reasons as "the Agreement") which stated in several places that the Claimant was self-employed and not an employee. The Supreme Court has said, however, in Autoclenz Limited v Belcher and others [2011] UKSC 41 that 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. The true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only part.

6. The Tribunal heard oral evidence from the Claimant. For the Respondent, it heard oral evidence from Mrs Debi Hammond, UK Head of Vasectomy Services. On the basis of that evidence and the documents in the Hearing file to which it was referred by the witnesses or during the course of the Hearing, the Tribunal made the following findings of fact.

The facts

7. The Respondent, formerly Marie Stopes International Ltd, provides sexual and reproductive health services. The Claimant was engaged in April 2018 as a surgeon to provide vasectomy services in various of the Respondent's clinics. At his interview, at which Mrs Hammond attended, it was explained to the Claimant that he would be delivering his services at the clinics the Respondent ran in various locations, which would therefore require him to travel, and he would be paid a fee per client. The Respondent would train him in vasectomy surgery. Mrs Hammond explained that he would need to follow the Respondent's protocols and processes for vasectomies. On 27 April 2018 he signed the Agreement and the Respondent's Code of Conduct.

8. The Tribunal was referred to a document headed "HR offer form" which appears to be an internal document recording details about new joiners. This gives the proposed start date of the Claimant's employment as 6 May 2018. In the absence of any evidence from the Respondent on whether this was ever agreed with the Claimant, or on when the Respondent signed the Agreement, the Tribunal finds that the Claimant's employment relationship with the Respondent began on 27 April when he accepted the work on the terms offered by signing the Agreement. He did not carry out his first work under the contract until some time later.

9. Under the terms of the Agreement, the Respondent was under no obligation to offer the Claimant any work at all and nor was he obliged to accept any of the work it offered. In practice, the Respondent's administrators sent the Claimant details of the sessions it needed covering, sometimes several months in advance, and he indicated which sessions he could deliver. There was ongoing email dialogue between them about sessions that the Respondent needed to cover and the Claimant's availability and what he could do "to help". If he could not help with a session, he just said so, he did not always explain why. Once the Claimant had indicated that he would deliver a session, the parties' expectation was that he would deliver it, but there was at least one occasion on which he told the Respondent a few weeks before a session he had agreed to do that he was unable to deliver it and the Respondent arranged a replacement. There was no evidence before the Tribunal to indicate that the Respondent considered that the Claimant was in breach of any legal obligation by not delivering the session.

10. The Agreement contains a clause stating that the Claimant would not sub-contract any of his obligations without the prior written consent of the Respondent's Chief Executive. The Tribunal was satisfied that, in reality, the parties did not contemplate that the Claimant would seek to sub-contract his work and this clause was no part of the agreement between the parties. Mrs Hammond accepted in her evidence to the Tribunal that sub-contracting would have been unworkable: the Respondent is not willing to allow anyone it

has not trained in its protocols and processes to carry out surgery on its behalf. The Respondent itself would arrange cover for any dates on which the Claimant was unavailable. There were no circumstances in which the Respondent would, or need to, agree to the Claimant sub-contracting his session to anyone else.

11. The Agreement states that the Claimant would be paid a fee for each session which would depend on the number of clients he treated. He would be paid £40 per client for the first 14 clients he treated and £50 per client for the remaining clients. For a full list of 20 clients, therefore, he would be entitled to £860. In January 2020 he renegotiated the basis of his payment for sessions held on Teesside. He would be paid the sum he would earn for treating 20 clients regardless of how many clients might in fact cancel their appointments, to ensure that he was what he considered to be adequately remunerated for the time involved in travelling to and delivering the sessions.

12. The Claimant invoiced the Respondent for the work he did and was paid at the end of each month for the invoices he had submitted that month. He was responsible for paying income tax and National Insurance contributions on his earnings and in the Agreement he agreed to indemnify the Respondent against any claim made against it by the relevant authorities for income tax or National Insurance contributions relating to his work. The Respondent agreed to pay the Claimant for the travel and accommodation expenses that he incurred when attending the sessions he did and he invoiced for those sums also. Between sessions, the Claimant was required to deal with queries or problems arising from the operations he had carried out in previous sessions, which might involve him speaking to the client on the phone, and to check blood test results for clients due to have operations at future sessions he was due to deliver.

13. In the first months of his work for the Respondent, in April, May and June 2018, the Claimant was trained in the techniques of vasectomy surgery and in the Respondent's protocols. He began by observing other surgeons in their work and then moved on to carrying out the surgery himself under supervision. He was paid a flat fee of £100 per session for that work. By October 2018 the Respondent was satisfied that the Claimant was competent to carry out sessions unsupervised.

14. Over the course of his employment, the Respondent required the Claimant to carry out further training on various subjects. Some of this training was delivered online, and he was paid for completing this. Two training sessions were delivered face-to-face, dealing with basic life support and capacity and consent. The Respondent paid for these courses and reimbursed the Claimant for the expenses he incurred in attending them but did not pay him for the time he spent in attending them.

15. The Claimant was on two occasions required to attend a peer-to-peer review, at which two other vasectomy surgeons (one also employed by the Respondent on a sessional basis and the other being the Respondent's Lead Surgeon for Vasectomy) discussed his clinical practice with him and gave him feedback. He also underwent annual appraisals, because this was required by the regulatory body covering his practice as a doctor, in his case NHS England. The Claimant also attended at least two meetings with Mrs Hammond and Dr Gazet, Clinical Director UK, to discuss issues relating to his practice and other matters connected with his work, such as the suitability of equipment and premises, his relationship with the staff he worked with and plans for future sessions. The Tribunal did not accept that either of these individuals was the Claimant's line manager in the conventional sense, that is, someone responsible for managing all aspects of an employee's day-to-day work. Rather, Dr Gazet was the Claimant's clinical lead, that is, she was his main point of contact within the Respondent in relation to his clinical practice. He reported to her in relation to that only.

16. Under the terms of the Agreement, the Claimant was entitled to be engaged in any other occupation, provided it did not cause him to breach any obligations under the Agreement or any professional code or requirement to which he was subject. During the period when he worked for the Respondent, up until the COVID-19 lockdown in March 2020, the Claimant also worked for two other employers providing medical services. This was work as a doctor, which he was offered on an occasional basis, often at short notice, and on a self-employed basis. The amount of work he did for these employers was relatively small compared with the volume of work he did for the Respondent.

17. In due course, the Claimant began conducting sessions in Leeds and Manchester on most weeks, numerous sessions in locations on Teesside and some elsewhere. On occasions, however, the Claimant decided not to accept the sessions the Respondent offered in a particular period because he had other things he wanted to do. That included, but did not need to be limited to, time he wanted to spend on holiday. He was not paid holiday pay.

18. Initially, the Claimant was required to provide his own professional indemnity insurance cover. From 1 January 2019, the Respondent joined the Clinical Negligence Scheme for Trusts, which is run by NHS Resolution, part of the NHS. This provides insurance cover on a not-for-profit basis funded by contributions from its members. From that date, the Claimant's work for the Respondent was covered by that scheme in relation to NHS patients (who made up around 93% of the patients he treated).

19. In March 2020, the Claimant travelled to South Africa on holiday. He had planned to have a two-week trip but was unable to return at the time planned because South Africa had entered a lockdown as a result of COVID-19. He ended up returning to the UK in mid-May. The Respondent did not run clinics

from mid-March to mid-May 2020 because the GP surgeries at which they ran many of their sessions were closed.

Analysis

20. There were several features of the Claimant's employment by the Respondent that might at first sight indicate he was the Respondent's employee.

21. The parties had an agreement that the Claimant would personally carry out work for it in return for remuneration: he would carry out vasectomy surgery sessions in return for an agreed fee. In practice, he worked regular sessions for the Respondent at various locations for over two years.

22. The Claimant was also subject to the Respondent's control to a significant degree. He was required to carry out his work according to the Respondent's protocols and was expected to submit to a peer review of his clinical practice.

23. Some of the other terms of the Claimant's employment might also have indicated that he was an employee. In particular, the Tribunal accepted the Claimant's evidence that the fact he was offered training by the Respondent for which it paid was "exceptional" and not something he had experienced in any of the other work he had done for health bodies on a self-employed or agency basis. Likewise, he would normally expect to provide his own professional indemnity insurance for his self-employed work. Further, he was to some degree integrated into the Respondent's organisation, in that he had meetings with the Respondent's managers to discuss issues arising from his work.

24. On the other hand, there were fundamental features of the Claimant's employment that indicated that the parties' agreement was genuinely one that the Claimant would be working as a self-employed contractor.

25. Although the Respondent did in practice offer the Claimant many sessions that it needed to staff, there was no evidence before the Tribunal that the parties considered that it was legally obliged to do so. The Claimant was not obliged to accept any of the sessions that were offered and on occasions decided not to do so. Even if he did not deliver the sessions he had initially said he would cover, there was no evidence before the Tribunal to indicate that either party considered that to be a breach of the terms of the contract between them.

26. Although the Respondent expected the Claimant to comply with a significant number of requirements that it imposed, notably its Code of Conduct and its

surgical protocols, and to submit to peer review, this was because the Respondent operates in a highly regulated area of activity. It needs to have systems in place to demonstrate to the Care Quality Commission and the NHS Clinical Commissioning Groups that contract with it for its services that it is delivering a high standard of care. That involves putting measures in place to ensure that all those working for it, whatever their employment status, are competent to carry out that work. (The annual appraisal to which the Claimant was also subject was a requirement of the regulatory body, and was necessary for him to be authorised to continue to practise, regardless of where and on what basis, whether employed or self-employed, he did that work.)

27. The Respondent's need to be assured of the quality of the services it is providing also explains why it required the Claimant to undergo training. The fact that it agreed to pay for that training, even if unusual, did not of itself indicate that it was doing so because the Claimant was its employee.

28. There were other terms of the employment that also indicated that the Claimant was not an employee. In particular, he was not required to obtain prior approval for any holidays or other breaks that he took. Although he would discuss the dates on which he planned to take holiday with the Respondent's managers and administrators, to try to ensure that these were convenient to both sides, this was, in his words, a "gentleman's agreement" rather than a legal obligation. He was not paid holiday pay. He was not entitled to sick pay or any pension benefits. He did not have fixed hours of work and was free to leave work once the last client on the list had been discharged.

29. When deciding whether the Agreement accurately reflected the terms agreed by the parties, the Tribunal considered it significant that the Claimant was not in a vulnerable bargaining position when he agreed the basis of his employment by the Respondent. He is an intelligent man and a very skilled worker, who has been willing to work for other health bodies on a self-employed basis or through agencies. He knew what self-employment meant. He signed a written agreement with the Respondent in which he acknowledged and accepted that he was a self-employed person and not an employee. His agreement with the Respondent entitled him to significant sums of money for the work he did. He was content to be taxed on a self-employed basis, with the advantages that that basis of taxation brings. He retained complete freedom not to do any of the shifts on offer if they did not suit him for any reason.

30. Looking at all the facts and circumstances in the round, the Tribunal concluded that the Claimant was not the Respondent's employee at any time whilst he was working for it.

31. As the Claimant's claim of unfair dismissal depended upon him being an employee, that aspect of his claim failed and was dismissed.

Employment Judge Cox
Date: 16 August 2021