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Neutral Citation Number: [2012] EWCA Civ 1005

Case No: A2/2011/2529

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
JUDGE PETER CLARK
UKEAT/023211LA**

Royal Courts of Justice
Strand, London, WC2A 2LL
24/07/2012

B e f o r e :

**LORD JUSTICE MAURICE KAY,
Vice President of the Court of Appeal, Civil Division
LORD JUSTICE LONGMORE
and
LORD JUSTICE TOULSON**

Between:

THE HOSPITAL MEDICAL GROUP LTD Appellant

- and -

WESTWOOD Respondent

**(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)**

Mr Patrick Green QC and Mr J Williams (in place of Ms Kathleen Donnelly) (instructed by The Wilkes Partnership LLP) for the Appellant
Mr Simon Gorton QC (instructed by SAS Daniels LLP) for the Respondent
Hearing date : 10 July 2012

HTML VERSION OF JUDGMENT

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Lord Justice Maurice Kay :

1. The statutory protection of employment rights is not provided on a uniform basis. Some rights are conferred only on "employees" who are individuals who have entered into or work under a contract of employment. The right not to be unfairly dismissed is so limited. Other rights are conferred on a wider category of "workers", who include but are not limited to employees. This wider category is protected by, among other things, the statutory control of deductions from wages (Part 2 of the Employment Rights Act 1996), the National Minimum Wage Act 1998, The Working Time Regulations 1998, The Public Interest Disclosure Act 1998 and The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. The precise terms of extended definitions are not always the same. For example, Part 5 of the Equality Act 2010 applies to "employment" but that concept is defined to include not only employment under a contract of employment but also employment under "a contract personally to do work": section 83 (2)(a). Employment tribunals spend a great deal of time taxonomising borderline cases in all these areas.
2. The employment rights remaining in issue in the present case relate to unlawful deductions and holiday pay. Their catchment is "workers". The qualifying provision is section 230 (3) of the Employment Rights Act 1996. It provides:

"In this Act 'worker' (except in the phrases 'shopworker', 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 expressed or implied and (if it is expressed) 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."

The issue is whether Dr Colin Westwood, during the currency of his relationship with the Hospital Medical Group (HMG), was a worker. If he was, it is common ground that he is entitled to a substantial sum of money in respect of unlawful deductions and accrued holiday pay.

The facts

3. Cases of this kind are particularly fact sensitive. For this reason, it is appropriate to set out at some length the facts found by the Employment Tribunal (ET).

"4. The claimant Dr Colin Westwood is a general practitioner with a practice in Timperley, Cheshire. He has been a GP since 1977. He is the senior partner in a small surgery and has direct experience in employing staff and management of employment contracts and related documentation for this purpose. As is entirely normal he engaged accountants to prepare practice accounts and various expenses were claimed against practice income. He was responsible for payment of his own tax and National Insurance even though he asserts that as a GP he was in effect employed by the health authority. He has always had an interest in minor surgery and in the mid- 1990s he trained with a company called Transform and began performing minor operations for them in about 1997. During 2005 he was approached by the respondent and agreed to undertake procedures relating to hair restoration on their behalf. He was offered a role working on Saturdays only with a provisional start date of 1 July 2005. Following a slow start the claimant began to work regularly at the beginning of 2006.

5. The respondent is the Hospital Medical Group Limited. It has clinics based throughout the UK and Europe. Some of these clinics have facilities for cosmetic surgery procedures, and other clinics have facilities for consultation and non-surgical procedures. The respondent engages surgeons and doctors who have their own practices or businesses in their own right and none are engaged on contracts of employment. The respondent's business is based upon demand and the amount of procedures to be carried out on a monthly basis is not therefore fixed. If members of the public do not contract with the respondent to undertake certain procedures, then that work would not be available to be allocated to a particular surgeon or doctor.

6. When the claimant was initially engaged he signed a Practice Privileges Agreement which sets out some basic terms upon which he would provide his services to the respondent. In short it was an agreement under which the claimant who was referred to as 'the Consultant' agreed to utilise the facilities of the respondent, and to conduct professional practice and provide care for patients within the respondent's facility. The agreement was silent as to employment status and the method of payment. The parties subsequently entered a written contract of services on 1 April 2007, and this was superseded by a Surgeon's Contract for Training and Services dated 1 December 2007. This is the agreement which became effective, and which was in place when the relationship was ultimately terminated. [I refer to this as 'the Agreement'.]

7. When this new Agreement was sent to him in November 2007, the claimant took issue with some aspects of it and made these known to the respondent in a letter dated 20 November 2007. However, he raised no objection to any of the provisions of the contract relating to his status which was expressed to be as a self-employed independent contractor. He accepted the Agreement on this basis.

8. The Agreement is expressed to be a contract for services between the parties. The claimant is referred to in the Agreement as "the Surgeon". The Agreement was expressed to be for a fixed term of three years from 1 November 2007, but there were early termination provisions in clause 12 including the right to terminate without notice for any behaviour or conduct likely to have a serious adverse effect on the reputation of the respondent.

9. Clause 3 sets out the claimant's obligations under the Agreement. He was

required to give such advice and assistance to the respondent in connection with the provision of hair restoration surgery as the respondent might request from time to time; to make himself available for any further instruction or discussion as may be necessary; to obey all lawful reasonable directions of the respondent; and not to provide his services within the UK to any competitor of the respondent.

10. Clause 4 required the claimant to raise invoices at the end of each calendar month in respect of the services provided. These were expressed to be exclusive of VAT if appropriate. The claimant was to be paid a fee calculated as a percentage rate of the procedures undertaken and the respondent had the right to amend the percentage rate on one month's notice. Under clause 13 the claimant was responsible for payment of his own expenses.

11. Under clause 5 the claimant agreed that he was an independent contractor and that he was liable for his own tortious acts and breaches of contract. He had to undertake to take out his own professional indemnity insurance. He was also required to carry out any post operative reviews and any remedial surgery at his own risk and without any additional fee being paid by the respondent.

12. Under clause 6 the claimant was required to notify the respondent if he was absent because of sickness. There were no provisions for payment during sickness but he was required to produce a doctor's certificate for each week of absence after more than seven days. There were no occasions upon which he did this. Apart from the absence of any sick pay, there were no provisions relating to holidays or holiday pay, and the claimant never claimed any. When the claimant wished to take holiday, he notified the respondent and the respondent arranged any necessary cover.

13. Clause 7 included restrictive covenants, preventing the claimant from providing services to any competitor of the respondent during the continuance of the Agreement, and also against soliciting patients of the respondent for the period of 12 months after termination of the Agreement. Clause 8 contained confidentiality provisions.

14. Under clause 9 the claimant was required to pay all tax and national insurance as a self-employed person and agreed to indemnify the respondent in respect of any claims or demands which might be made by the authorities. Under clause 10 the claimant gave a warranty and a representation that he was an independent contractor and agreed that he was to bear sole responsibility for payment of tax and National Insurance contributions.

15. For many years from 2006 the relationship worked well between the parties. The claimant was habitually available towards the end of each week. For instance, from the beginning of January 2010 until August 2010 the claimant attended on average on at least two sessions per week. However, he was not obliged to work at a set time or for a set number of hours. He was able if he wished not to accept any assignments given to him by the respondent. He told us that he thought that the respondent would 'not be very happy' if he refused to carry out procedures which had been booked in for patients. Nonetheless he had the option to decline to undertake procedures if he chose not to attend, or if he felt for medical reasons that the arrangements made should not proceed. The fact that the arrangements suited both parties, and as a matter of fact did take place on average about twice a week, should not be confused with the finding that there was a requirement that the claimant had to complete the procedures, or that the respondent was required to provide work. I find that there was no mutual obligation that the respondent had to

provide patients to be operated on, nor that the claimant necessarily had to undertake those arrangements. In short there was no mutuality of obligation. In addition the respondent did not have direct control over the claimant in the way in which he treated the patients. The responsibility for safe medical practices remained throughout with the claimant.

16. Eventually, the Agreement was terminated summarily by e-mail dated 19 August 2010. The reason given related to concerns about the claimant's ability to carry out his professional services properly. The e-mail from Mrs Carter of the respondent stated 'our conclusion was reached as clinicians have expressed some concerns'.

17. Throughout this time the claimant carried on his main profession as a GP. He engaged a locum to cover his GP responsibilities whilst working for the respondent. He did not submit formal invoices to the respondent as such, but did submit handwritten claim forms in respect of each session. He was paid the agreed percentage rate as against these claims. He stamped these with his professional address namely the Timperley Health Centre. He also corresponded with the respondent and with patients from this practice address. His own business card referred to him as a hair restoration surgeon with his practice details on the reverse of the card. The relevant e-mail correspondence was submitted through his NHS e-mail address. He did not use any of the respondent's stationery, address or contact details. He also paid his own expenses as required by the Agreement, and arranged and paid for his own professional indemnity insurance.

18. During this time the claimant also worked for an entirely separate independent medical organisation known as the Albany Clinic. He gave advice on transgender issues."

The decision of the ET

4. Before the ET Dr Westwood's primary case was that he was an employee falling within section 230(3)(a). Having rejected that submission, the Employment Judge turned to Dr Westwood's secondary case that he fell within section 230(3)(b). I shall refer to a person falling within that provision as a "limb (b) worker". The relevant findings were expressed as follows:

"30. ... I find that it is clear that the claimant was engaged by the respondent as a self-employed independent contractor. I have no hesitation in rejecting the assertion that he was employed under a contract of service. There was no mutuality of obligation, and no direct control of the claimant by the respondent. The claimant was clearly in business on his own account and was engaged under a contract for services as a self-employed independent contractor. This was his preferred status throughout and only changed when he wished to challenge the termination of the Agreement.

31. ... I find that it is equally clear that the claimant was engaged personally to carry out the work himself. This has been conceded by the respondent in these proceedings. The claimant had no right to delegate, and the respondent wished to engage the claimant because he personally had the skills required to treat patients introduced by the respondent.

32. ... I find that the claimant's work was not done with the respondent in the capacity of client or customer of the claimant. The patients treated were the clients or customers of the respondent, and the claimant was paid a percentage of the agreed rate which the client or customer of the respondent paid to the respondent.

The claimant was an independent contractor in his own right, engaged by the respondent who in effect introduced their patients to him, and the respondent was not a client or customer of the claimant. Accordingly I find that the claimant was a worker under 'limb b' of section 230 of the Act, and that this Tribunal does have jurisdiction to hear his claims relating to unlawful deduction from wages and for accrued holiday pay."

5. The ET also found that it had jurisdiction in relation to an age discrimination claim but that is no longer pursued by Dr Westwood. Thus, the live issues after these preliminary rulings were unlawful deductions and accrued holiday pay. Claims for unfair dismissal and breach of contract were rejected for want of jurisdiction because Dr Westwood had failed to establish that he had worked under a contract of employment.

The decision of the Employment Appeal Tribunal

6. Upon the appeal of HMG to the Employment Appeal Tribunal (EAT), Judge Peter Clark considered the decision of the ET to be "plainly and unarguably right" (paragraph 18). His analysis was expressed as follows:

"16. ... It is absolutely clear to me that Dr Westwood was not, by virtue of the Agreement, performing work or services for the respondent as a client or customer of any profession or business carried on by him.

17. Under the Agreement the claimant agreed to provide his services as a Hair Restoration Surgeon, exclusively to the respondent (see clause 7). He did not offer that service to the world in general. He was recruited by the respondent to work for it as an integral part of its operations. The respondent introduced the patients who the claimant saw and treated at the respondent's Birmingham premises, using their equipment. That work was wholly separate from his work as a General Practitioner at his surgery in Cheshire. It had nothing to do with his work giving advice on transgender issues at the Albany clinic ... In short, it is plain that he did not fall on the 'limb b' exception side of the line."

The proceedings in this Court

7. Judge Peter Clark refused HMG permission to appeal to this Court. When HMG applied to this Court for permission to appeal, the application was refused on the papers by Sir Stephen Sedley who considered the Tribunal decisions to be "intuitively right", whereas HMG's arguments defied common sense. They would "make section 230(3)(b) practically unworkable (as well as, to many people, myself included, unintelligible)". Permission was later granted by Mummery and Moore-Bick LJ following an oral hearing. They did not grant permission on the basis of "a real prospect of success" but because they considered that there was a compelling reason to grant permission, namely to give this Court an opportunity to consider the consistency of the jurisprudence of the EAT on limb b workers (and perhaps give some guidance as to a more uniform approach to the way those provisions are construed and applied).

Grounds of appeal

8. In his written submissions, Mr Patrick Green QC provides a history of domestic and EU legislation which preceded section 230(3)(b). His industry takes him back as far as the Truck Act 1831. However, his central submissions are that (1) the wording of section 230(3)(b) is clear and in HMG's favour and (2) the ET and the EAT fell into legal error by failing to realise the consequences of the finding of the Employment Judge that Dr Westwood was carrying on a business on his own account.

Discussion

9. In his able submissions, Mr Green expressed his critique of the decision of the ET in these propositions:

1. Whether a person is engaged in business on his own account is a question of fact for the ET. It unequivocally found that Dr Westwood was so engaged.
2. Dr Westwood dealt with HMG in the course of that business.
3. HMG was therefore Dr Westwood's "client or customer" in his profession or business.
4. The ET was wrong to hold otherwise and in particular, was wrong to treat the status exception in section 230(3)(b) as a separate or additional hurdle.

Mr Green further submits that his approach provides a more certain and predictable framework for the determination of borderline cases.

10. These issues are not the subject of authority binding on this Court. In *Autoclenz Ltd v Belcher* [2010] 1RLR 70, this Court (and, thereafter, the Supreme Court) [\[2011\] ICR 1157](#), held the employees in question to be employed under contracts of employment. They were therefore limb (a) workers and, to the extent that the Court considered limb (b) workers, the judgments are *obiter*. However, Aikens LJ provided the following analysis of section 230(3)(b):

"75. There are three requirements. Two are positive and one is negative. First, the worker has to be an individual who has entered into or works under a contract with another party for work or services ...

76. The second requirement of the statutory definition in paragraph (b) of s.230(3) is that the individual undertakes to do or perform personally the work or services for the other party ...

77. The third requirement relates to the status of the other party to the contract. That other party must not, by virtue of the contract, have the status of a client or customer of any profession or business undertaking carried on by the individual who is to perform the work or services ... in most cases at least, it is easy enough to recognise someone who has this status. It includes, for example, the solicitor's or accountant's client or a customer who seeks and obtains services of a business undertaking such as from an insurance broker or pensions adviser."

I consider this to be a helpful formulation and I am content to adopt it. In the present case, there is no issue about the first and second requirements. The identification of the third requirement as such places an obstacle in the way of Mr Green's submission that the status exception should not have been treated as a separate hurdle in this case.

11. There is no doubt that the Employment Judge found that Dr Westwood was engaged in business on his own account. That finding informed the conclusion that he was not employed under a contract of employment. The next question is: what was that business? Mr Green submits that Dr Westwood effectively had one business which he pursued through three activities – his practice as a general practitioner, his transgender work at the Albany Clinic and his work for HMG. I do not consider this to be correct. They were three distinct businesses or outlets for his professional skills, quite unrelated to each other. Our concern is with work done under the contract whereby Dr Westwood undertook to do or perform work or services for HMG. In this, as in any other case, the starting point is the particular contract. Indeed, the status exception in

limb (b) relates expressly to status "by virtue of the contract". Before I turn to the contract, I should refer to some of the authorities upon which Mr Green seeks to rely.

12. The first is *Smith v Hewitson* (17 September 2001, EAT/489/01). The respondents ran an unincorporated business called Executive Coach Catering Services (ECCS). It was effectively a sub-contractor supplying stewards to bus companies. From about 1991 the stewards became self-employed. They would carry out stewarding services, such as safety and the examination of tickets, but they were also permitted, indeed required, to sell refreshments. They would buy their own perishable and unperishable products and sell them at a profit to bus passengers. The case concerned a dispute under the National Minimum Wage Act 1998. Section 54(3) of that Act replicates section 230(3) of the Employment Rights Act. It was common ground that the stewards were carrying on a business of buying and selling refreshments. The Employment Tribunal had misdirected itself by concentrating on the appearance as opposed to the substance and the terms of the contract. The EAT (Judge D Serota, Dr D Grieves and Ms G Mills) allowed an appeal and said (at paragraph 19):

"Prima facie, when someone purchases services from another, in common parlance, he can be regarded as a customer of the other. The terms 'customer' and 'client' in section 54 of the Act are not used as terms of art. In our opinion, ECCS is a customer or client of the stewards, as it receives the benefit of the service provided by the stewards' business, and is described as such in the Stewards' Agreement. They provided ... the stewarding and catering services to ECCS, which ECCS was itself bound to supply to Durham Transport Services. On that analysis, as it seems to us and having regard to the fact that the major part of the contract, both in terms of time and in terms of remuneration related to the catering, and having regard to the fact that the stewards were performing, personally, catering services for ECCS pursuant to a business undertaking carried on by the stewards, that ECCS was a client or customer of that business undertaking. As such, it seems to us on the material findings, the Tribunal should have held that the stewards were not workers within the meaning of section 54 (3)(b) of the Act, by reason of the fact that they were outside section 54(3)(b). They were carrying on ... a business undertaking for reward for ECCS, and were clients or customers of ECCS."

13. Mr Green places considerable reliance on this case. He suggests that if the stewards were clients or customers of ECCS, HMG should properly be categorised as the client or customer of Dr Westwood. I do not agree. The judgment of the EAT ends with the warning that the case should not be understood as laying down any general principle but as a decision on its own specific facts. We cannot know that the EAT judgment is comprehensive as to those facts. Moreover, the facts which it discloses include express provisions in the Stewards' Agreement in which ECCS was described as "the client". The case has been referred to only in passing and occasionally in subsequent decisions. I am bound to say that I have reservations about its correctness but I am content to see it, as it invited, as a decision on its unique facts.
14. The next EAT decision upon which Mr Green relies is *Commissioners of Inland Revenue v Post Office Limited* [2003] IRLR 199. The case concerned a number of sub-postmasters and sub-postmistresses. They ran their sub-post offices under contracts with the Post Office. Again, the context was the National Minimum Wage Act. The claimants failed to establish that they were "workers" either under contracts of employment or pursuant to limb (b). The decision of the EAT (Burton J (President), Mr J R Crosby and Mrs L Tinsley) must be seen in the context of its factual matrix. The claimants' standard contract did not require a sub-postmaster to attend the sub-post office personally and he was free to absent himself, provided he made suitable arrangements for the conduct of the office during his absence. The conclusion that a sub-postmaster or a sub-postmistress provided services to the Post Office as his or her client did not involve the elaboration of any universal principle.

15. It is common ground that there is no such principle which will condition the answer in every case. Moreover, we should be alert to the warning articulated by Pill LJ in *Redrow Homes (Yorkshire) Ltd v Wright* [2004] ICR 1126 when he said that "Employment Tribunals should not be deflected from a consideration of the definition of 'worker' and from consideration of terms of the contract in that context by general policy considerations as to the nature of employment and self-employment" (at paragraph 21).
16. In two later cases, the EAT has suggested analytical tools which, although not of universal application, may provide material assistance in particular factual matrices. The first, upon which Mr Simon Gorton QC places particular reliance, is *Cotswold Developments Construction Ltd v Williams*, a claim pursuant to the Working Time Regulations, regulation 2(1) of which is in the same form as section 230(3) of the Employment Rights Act. The claimant was a carpenter who was engaged to work for the respondents who were themselves sub-contractors to a main contractor providing maintenance services to London Underground. Langstaff J said (at paragraph 53):

"... it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."

Thus, he was emphasising indicative factors such as marketing services as an independent person to the world in general and, on the other hand integration in the business of the other party to the contract. These were advanced specifically as indications rather than principles of universal application.

17. In *James v Redcats (Brands) Limited*, [2007] ICR 1006, Elias J (President) agreed that Langstaff J's formulation "will often assist in providing the answer" (at paragraph 50). However, he referred to difficult cases where the putative worker does not in fact market his services at all, nor act for any other customer even though the claimant is not barred by contract from so doing. He further observed (at paragraph 52) that "the attempt to map the boundary separating workers from those in business dealing with a customer has proved elusive". He went on to derive "some assistance" from cases which have analysed the definition of "employment" in discrimination legislation. This involved the use of the "dominant purpose" test in an attempt to identify the essential nature of the contract. Again, he was not suggesting that such a test would provide the solution as a matter of universal application. Yet again, it is a question of deploying appropriate tools in relation to specific factual matrices.
18. The striking thing about the judgments in *Cotswold* and *Redcats* is that neither propounds a test of universal application. Langstaff J's "integration" test was considered by him to be demonstrative "in most cases" and Elias J said that the "dominant purpose" test "may help" tribunals "in some cases" (paragraph 68). In my judgment, both were wise to eschew a more prescriptive approach which would gloss the words of the statute. In the present case, Judge Peter Clark reached his conclusion after consideration of *Cotswold* and *Redcats*. It is apparent from paragraph 17 of his judgment that he placed particular reliance on *Cotswold*, observing that, under the contract, Dr Westwood "agreed to provide his services as a Hair Restoration Surgeon exclusively" to HMG; that he did not offer that service to the world in general; and that he was recruited by HMG, "to work for it as an integral part of its operations". In my judgment, that was the correct approach in this case and it led to the correct conclusion that Dr Westwood was indeed a limb (b) worker.
19. I am unable to accept Mr Green's submissions for a number of reasons. Firstly, they effectively emasculate the words of the statute. If Parliament had intended to provide for an excluded category defined as those in business on their own account, it would have said so, rather than

providing a more nuanced exception. Secondly, whilst it is true that Mr Green's approach has the attraction of greater simplicity and predictability, it simply does not fit with the words of the statute. The status exception does indeed provide a third, albeit negative hurdle. Thirdly, it is counterintuitive to see HMG as Dr Westwood's "client or customer". HMG was not just another purchaser of Dr Westwood's various medical skills. Separately from his general practice and his work at the Albany Clinic, he contracted specifically and exclusively to carry out hair restoration surgery on behalf HMG. In its marketing material, HMG referred to him as "one of our surgeons". Although he was not working for HMG pursuant to a contract of employment, he was clearly an integral part of its undertaking when providing services in respect of hair restoration, even though he was in business on his own account. That is apparent from, in particular, clause 3 of the Agreement (summarised in paragraph 9 of the ET's decision, set out at paragraph 4, above).

20. Mummery LJ, when granting permission to appeal, contemplated that we might "perhaps give some guidance as to a more uniform approach". I do not consider that there is a single key with which to unlock the words of the statute in every case. On the other hand, I agree with Langstaff J that his "integration" test will often be appropriate, as it is here.

Conclusion

21. For the reasons I have given, I would dismiss this appeal.

Lord Justice Longmore:

22. I agree.

Lord Justice Toulson:

23. I also agree.