EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr A Chesters	**v**	East Anglian Air Ambulance (a Company Limited by Guarantee)

Heard at: Norwich **On:** 20, 21, 22 May 2019

Written Submissions Received
From the Respondent: 5 June 2019
From the Claimant: 10 June 2019

Respondent's Rebuttal to Submissions: 18 June 2019
Claimant's Response to the Respondent's Rebuttal: 19 June 2019
In Chambers: 24 June 2019

Before: Employment Judge Postle

Appearances
For the Claimant: Mr L Varnam, Counsel
For the Respondent: Mr P Strelitz, Counsel

RESERVED JUDGMENT on a PRELIMINARY HEARING

1. The Claimant, prior to July 2107, was a self-employed contractor and not an employee of the Respondent.

RESERVED REASONS

1. This is a preliminary hearing to determine the Claimant's status, namely whether he was engaged as a self-employed contractor or as an employee.

2. In this Tribunal we have heard evidence from the Claimant through a prepared witness statement, the Claimant without the leave of the Tribunal and / or with the consent of the Respondents attempted to adduce further evidence by way of a supplemental witness statement which appeared to

be no more than a response to the Respondents' witness statements. This was contrary to any Order made by the Employment Tribunal. In fact, the Respondent's Counsel objected to the additional supplemental witness statement that the Claimant had made and ultimately after hearing from both Counsel the Tribunal concluded that apart from paragraph 13, it is clear that the rest of the supplemental witness statement strays into pure comment. On the Claimant's supplemental witness statement paragraph 13 was allowed in as evidence as this was in respect of an additional document produced by the Respondents at a late stage.

3. For the Respondents, the Tribunal heard evidence from Mr A Wilson the Medical Director, Mr A Downes Clinical Operations, Mr M Jones Director of Operations and Miss S P Atkins Head of HR; all giving their evidence through prepared witness statements. The Tribunal also had the benefit of a joint bundle of documents consisting of some 1,076 pages.

4. The Tribunal also had the benefit of thorough and detailed written submission given that there was insufficient time at the hearing for oral submissions. The Order of the Employment Tribunal was for written submissions to be provided by 5 June 2019 and for reasons best known to the parties, the Claimant's submissions were received on 10 June 2019 and there were further submissions from the Respondents on 18 June 2019 and the Claimant on 19 June 2019.

5. The Tribunal also had been provided with the following authorities to consider,

   On behalf of the Respondent:

   - Hall (Inspector of Taxes) v Lorimer [1994] 1WLR209;
   - Saha v Viewpoint Field Services Ltd. UK EAT-0116-13; and
   - Quashie v Stringfellows Restaurants Ltd. [2013] IRLR 99C.

   On behalf of the Claimant:

   - Readymix Concrete v Minister of Pensions [1968] 2QB497;
   - Nethermere (St. Neots) Ltd. v Gardiner [1984] ICR 612;
   - Stephenson v Delphi Diesel Systems Ltd. EAT-1314-01;
   - Cornwall County Council v Prater [2006] IRLR 362 CA;
   - North Wales Probation Area v Edwards EAT-0468-07-RN;
   - St. Ives Plymouth Ltd. v Haggarty EAT-0107-08-NAA
   - Drake v Ipsos Mori EAT-0604-11-13;
   - Pimlico Plumbers Ltd. v Smith EAT-0495-12-DM;
   - Pimlico Plumbers Ltd. v Smith [2017] ICR 657; and
   - Uber BV v Aslam EAT-56-17.

6. It is common ground that the Claimant's effective date of termination from the Respondent was 17 July 2018. The Claimant's contention is that his employment with the Respondent as a PHEM Doctor began on 12 October 2010, whereas the Respondents assert his employment commenced on 1 July 2017 following the Claimant's successful application in a competitive selection exercise to become an employed PHEM Consultant.

The Facts

7. The East Anglian Air Ambulance ("EAAA") is a charity providing helicopter emergency medical services across the Norfolk, Suffolk, Cambridgeshire and Bedfordshire area. It was established in 2000 and appears to have expanded its operations over subsequent years. Now, helicopters fly on a daily basis from both Norwich and Cambridge airports, providing essential medical / emergency care to those involved in a variety of serious accidents. In addition to the pilot, each helicopter will be manned by at least one, if not two, doctors and a paramedic. It would appear the EAAA started as a charity in 2000 and in the early years the service flew only one day per week with a paramedic and a single pilot. However, over the years the EAAA has evolved into a multi pilot operation with specialist Doctors and more specialist equipment. It is perhaps not surprising that flying emergency helicopters is highly regulated. The Respondents therefore must ensure that all those that fly as part of its operation, whether employed by the Respondents as a few Doctors are, or engaged as Locums (as apparently most Doctors are), or as ad hoc specifically permitted observers, are fully compliant with the industry rules and regulations regarding the use of and flying of helicopters.

8. The two helicopters used by the Respondents are leased from Babcock Mission Clinical Services (on shore) Limited, pursuant to a detailed agreement dated 10 December 2011 which has been varied and updated over the years (pages 880 – 1064). This provides amongst many other requirements that as the leasing party certain conditions must be met by all parties using and flying with the helicopter. Some of which are imposed in any event by the Civil Aviation Authority, the Aviation Safety Agent the Joint Aviation Requirement and some actually by Babcock. One of which is the provision by the Respondents of protected clothing, helmets, overalls and footwear for use by all flight personnel whether employed or not which is subject to the approval by Babcock. The Respondents are also required to provide identity badges to all personnel flying on the helicopter in order for them to gain access to the airport bases themselves and for the purposes of attending the scene of an accident which may be controlled (that is the scene) by the Police.

9. It is also the case that clinical activities are clearly highly scrutinised and regulated, as they would be for other clinical settings such as the Ambulance Service and Hospital Emergency departments. The Care Quality Commission expects there to be Standard Operating Procedures (SOP) in place. These SOP of course do not detract from the autonomy you would expect of treating clinicians who are affected and expected to

exercise their professional judgment as they would do in an Emergency Department in hospitals, applying equally to those employed as a Doctor throughout the NHS Trusts as they do to a Locum who may be undertaking their first and perhaps only shift. Clearly, they are there for patient care and safety in such a way as the Respondents clearly have no choice but to put them in place and ensure they are followed by all personnel whether employed or Locums.

10. Clinical governance (teaching and auditing of clinical matters) was from 2009 until 2015 out sourced by the Respondents to a private company known as EMSC based at the Royal London Hospital. This firm or hospital provided remote clinical advice to those dealing with incidents at the scene and provided a dedicated Doctor to the Respondents to support training and teaching. However, in or about 2015 the Respondents took a decision to bring teaching and training etc. in-house within the Respondents. The Respondents, although remaining as a charity, moving forward to a much more structured organisation. The General Medical Council stipulates that all Doctors undertaking missions with the Respondents engage in clinical governance,

> *"Doctors must participate in the systems and processes put in place by organisations to protect and improve patient care"*.

11. The then Respondents' Medical Director stipulated that all clinicians (Doctors and Paramedics) whether employed or not, should attend more than four clinical governance meetings per annum.

12. It is believed that the Claimant's association with the Respondents initially arose via secondment through EMSC as there is no documentary evidence advanced by the Claimant that the Respondents were making payments for the Claimant's services in 2010 or 2011.

13. It would appear, the Claimant commenced work for the Respondents directly and received payment for those shifts from the Respondents in 2012. It was on 25 July 2012, the Claimant signed a 'Locum Joining Form' where he declared his current post with the NHS was Specialist Registrar in Emergency Medicine Eastern Deanery (pages 91a / b). Thereafter each shift the Claimant undertook, he would be paid directly without deduction of tax and National Insurance and clearly the Claimant would then declare such income in his annual tax returns.

14. It was clearly the case that each Locum, including the Claimant, was asked every month to submit the day or days upon which they were available to undertake a shift, following which a monthly rota would be prepared. There clearly was no obligation upon the Respondents to provide a minimum or maximum number of shifts on the days offered by the Claimant or other Locums. Equally, there was no obligation on the Claimant to offer any minimum number of days, or indeed a maximum number of days. Clearly, if for any reason the Claimant and other Locums were unable to work on a shift they had been offered and accepted they

could arrange alternative cover via another Locum whom had been accepted by the Respondents as an appropriate Locum. It is also noted, whilst it suited the Claimant to offer Mondays to work a shift which fitted in with his full time employment with the NHS, clearly there was no obligation on the Respondents to offer the Claimant Mondays. However, it does appear the Respondents did their best to accommodate the Claimant's preferred working shift of Mondays. It is noted, in 2015 the Claimant worked 28 Mondays and 19 other days. In 2016 the Claimant worked 34 Mondays and 25 other days. For the five months in 2017 prior to the Claimant being employed by the Respondents as a PHEM Consultant, he worked 24 Mondays and 4 other days.

15. It is also noted that the Claimant could and would invariably refuse any shifts at Norwich Airport which the Respondents were happy to accept and accommodate.

16. As with all Doctors / Locums following their shift, they rendered an invoice for their services and the Tribunal repeats they were paid gross sums and would account for their own tax and national insurance. This continued until the Claimant's appointment as an employee with the Respondents which came about and he entered into a contract of employment on 1 July 2017.

17. Prior to this, the Claimant / Locums had received no holiday pay, or any sickness benefit, or participated in any pension and none of them had apparently questioned it or their status as self-employed Locums.

18. The Claimant clearly believed his status prior to 2017 was that of a self-employed Locum as particularly on 21 January 2015 (page 114) in an email addressed to Alistair Wilson the Medical Director,

> *"It's renewal time of year again. Could you please confirm what MPS-MDU indemnity I am covered by while working for EAAA (if any), obviously slightly unusual in that I am self-employed currently (although I would like that to change soon)."*

Reference to wanting it to change soon, the reference to permanently employed staff which the Respondents sought to advertise in the future, within the new structure being put in place within the Respondents organisation.

19. Further, on 28 April 2015 (pages 135 -136) the Claimant had written to the Medical Director offering of his own volition his proposal for *"remote medical advice",* the Claimant again confirming his understanding of his employment status by,

> *"As we discussed last night, I am not technically employed by EAAA, rather I carry out clinical duties as a private medical practice."*

20. Further, the Claimant's email to Matthew Jones of 7 November 2016 (page 271) in which he says,

> *"Clearly the role that I have in the organisation is entirely at the discretion of the Medical Director and the Chief Executive."*

21. A sentiment of the Claimant clearly showing his understanding of his position within the Respondents' prior to July 2017, was that of self-employed Locum.

22. It is to be noted that the Claimant had also formerly applied on two occasions for positions within the Respondents whereby his status would have changed to that of an employed PHEM Consultant which all candidates had to go through a formal interview and assessment process. At that stage the Claimant was unsuccessful.

23. It was in or about 2015 that the Respondents considered a restructure of the organisation to a more self-sustaining method of operation. This included running its own on-call advice in house (as referred to earlier) and employment of some Doctors on substantive contract (the PHEM Consultant) rather than operating on an ad hoc Locum scheme.

24. It is to be noted that following the Claimant's successful application to become an employee within the Respondents' organisation from 1 July 2017, the new PHEM Consultants including the Claimant, were required to undertake the following which Locums had not been required to undertake. In particular,

    24.1 they were informed of the requirement to dial in to 'evening prayers' with the Medical Director each Tuesday evening at 1830 hours which is a meeting where all matters pertinent to the Respondents' operations were discussed with minutes being taken;

    24.2 the new employed Consultants were informed of the requirement to attend the Respondents' charity induction sessions;

    24.3 there was a newly created Consultants email distribution list to encompass the new then employed Consultants and the Medical Director;

    24.4 they were required to go on to the Consultant on-call rota (as opposed to the Claimant doing this for free from March 2017 when he was trying to demonstrate his commitment to the Respondents in order to secure a full time Consultant PHEM post;

    24.5 there would be a staff day three times per year in which employees were expected to attend and though Locums were invited there was no requirement to attend;

24.6 there was now an entitlement to holiday pay and a scale of paid sickness leave.

25. Furthermore, following the Claimant's employment in July 2017, even though the Respondents would try and accommodate his availability by reference to the many other positions the Claimant held, the Claimant was nevertheless now obliged to meet his contractual hours and if he failed his wages would be reconciled / reduced to the number of hours he actually worked. The Claimant now had to request leave and the first Christmas after the Claimant was employed actually fell on a Monday. The Claimant for the first time requested not to work on that Monday, previously he would simply not offer that Monday as a shift that he was available for. When the Claimant was off sick during August and November 2017, he entered negotiations with the Respondent to try and ensure that he received sick pay or additional non-flying shifts so that he was financially not out of pocket. Previously if a Locum simply was unavailable due to long term sick, there would be no financial compensation available.

26. Further, after July 2017 the Claimant was clearly on the payroll and the Respondents were now deducting tax and national insurance and there was no longer any need for the Claimant to provide invoices for each of his shifts undertaken.

The Law

27. Section 230 of the Employment Rights Act 1996 provides the following definition of an employee and employer for the purposes of the Employment Rights Act 1996,

> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> …
>
> (4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

28. The traditional test for identifying the contract of employment is set out by MacKenna J in Readymix Concrete (South East) Ltd. v Minister of Pensions and National Insurance [1968] 2 QB497 at page 515:

> *"A contract of service exists if these three conditions are fulfilled-*

(i) the servant agrees that, in consideration of the 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 is consistent with it being a contract of service."

29. In Quashie v Stringfellows [2013] IRLR 99, the Court of Appeal made a number of points relevant:

29.1 payment for services performed;

29.2 the claimant taking some form of economic risk;

29.3 the claimant accepting that she was self-employed and conducting her affairs on that basis paying her own taxes.

30. The Tribunal reminds itself there is no single test for criteria which satisfies the requirements of Section 230 of the Employment Rights Act 1996, and that section on its own is unhelpful in determining the question of employment status. In fact, each case will largely be determined on its own facts.

Conclusions

31. The Tribunal have had the very helpful written submissions provided by both Mr Varnam Counsel for the Claimant and Mr Strelitz Counsel for the Respondent, together with a long list of authorities.

32. It is of course correct that the burden of proof is on the Claimant to prove his case that he is an employee in order to obtain the protection from unfair dismissal which is clearly the purpose behind the Claimant's claim.

33. The first point the Tribunal would make is that it is interesting that the Claimant at all times prior to 1 July 2017, saw his position with the Respondents as that of a self-employed Locum, he never questioned his position, he never questioned the lack of sick pay, holiday pay, or any lack of pension by the Respondents. Indeed, it is clear, from the Claimant's emails referred to earlier in this Judgment, that he saw himself at all times as self-employed. Had he have not done so then one would have expected him to have questioned his status long before July 2017, particularly the lack of holiday pay, sick pay and any pension contribution. Furthermore, the Claimant might also have wondered why he was being paid gross and he was responsible for declaring the income in his annual tax returns as a self-employed person. Of course, the Tribunal reminds

itself that in itself is not the sole deciding factor, but it is in the Tribunal's view a relevant fact pointing towards the Claimant's status to that of self-employed.

34. Dealing with how the shifts were arranged prior to July 2017, the method clearly points to that of a self-employed Locum. It would appear that each month Locum Doctors were asked what shifts they could make themselves available for and if they were available they would be allocated to them by the Respondent. There was no guarantee of a set number of shifts. It was clear the Respondent endeavoured to match people's availability and Locums expressed their preferences, as indeed the Claimant did and the Respondents tried to accommodate those preferences. What is clear was the Claimant was absolutely entitled to say when he would work and when he would not. There was no form of obligation whatsoever by the Respondents to offer certain shifts to the Claimant or other Locums. It is accepted that the Claimant preferred to work on a Monday and where possible the Respondents tried to accommodate this, but there was never any guarantee the Claimant would always be offered Monday shifts. Clearly, if it did not suit the Claimant he would not work on a Monday or any other day.

35. It is also clear that once shifts had been allocated to the Claimant, or other Locums, there appeared no restrictions on the Claimant and other Locums changing their minds and cancelling it, amending to another date, or arranging another Locum to do the shift provided of course that Locum had been accepted by the Respondents previously as an appropriate Locum. This arrangement clearly does not point to that of an employed status.

36. It is true that following the Claimant's successful application in the competitive selection exercised to become an employed PHEM Consultant in July 2017, the position changed in that although the Respondents tried to accommodate the Claimant's availability, given the Claimant's commitment to many other jobs as he still wanted to work on Mondays, the Claimant now had to undertake a specific number of contractual hours each month and if he failed to do so then his wages would be reduced accordingly.

37. Furthermore, the Claimant clearly now had to request leave, notably the first Christmas after his employment commenced fell on a Monday, the claimant had requested not to work that day and was informed that would have to come out of his annual leave entitlement.

38. There is then the position in August to November 2017 when the Claimant was absent through sickness, he commenced discussions with the Respondents to ensure he received sick pay or additional non-flying duties so that he would not be left financially out of pocket.

39. Prior to 1 July 2017, the Claimant would record each shift undertaken, complete an invoice and would then account to the Inland Revenue for the

income received, clearly when the Claimant had not undertaken any shifts no invoices would be submitted. Following 1 July 2017, the Claimant moved on to the Respondent's payroll, he was paid a monthly sum which included deductions for tax and national insurance. There was now no longer a requirement for the Claimant to provide invoices for the work undertaken. This arrangement clearly points to that of an employee arrangement rather than that of self-employed. Clearly, when the Claimant was submitting his annual returns prior to July 2017, he was representing himself to the Inland Revenue as a self-employed contractor.

40. It is also clear when one looks at some of the Claimant's correspondence by way of emails referred to earlier in this Judgment, prior to 1 July 2017, the Claimant clearly understood and accepted and knew that his position was that of a self-employed contractor. He did not question it.

41. It is also the case that after 1 July 2017, the Claimant's position as that of others who had been successful in the competitive exercise to become employees, the Respondents had now a greater degree of control. Particularly, the Claimant was required to attend evening prayers, being a discussion amongst the employed Consultants on Tuesday evenings led by the Medical Director Mr Wilson. I repeat, the Claimant was transferred onto payroll for payment, the Claimant for the first time was required to attend induction, the Claimant was added to the Consultant's email group for the first time and the Claimant was given a written contract of employment referencing his service date from 1 July 2017.

42. Finally, for the first time, the Claimant was given entitlement to paid annual leave and statutory sick pay, something the Claimant had not previously been in receipt of or questioned the lack of.

43. Dealing with the question of control, it has been argued that control prior to July 2017 by the Respondents and after, was exactly the same, but it is clear that for example the provision of identity badges and clothing prior to 1 July 2017, however, was an overriding obligation on the Respondent because in the case of an identity badge it was necessary when attending scenes of accidents where that scene would be controlled by the Police and they needed to establish the person entering the site had an entitlement to do so. Clothing and equipment was governed by the providers of the Helicopter Babcock as a condition in any event.

44. It is clear that Doctors would be subject to the usual regulatory control of their own governing body, but equally at the scene of an accident a certain amount of autonomy and how they dealt with it would be expected to be just the same as it would be when they were working in an employed NHS situation.

45. Further, a small matter prior to July 2017, there appears to have been a suggestion that the Claimant or Locums would be subject to disciplinary procedures. However, perhaps the nearest one gets to this is prior to July 2017, if the Respondents were dissatisfied with a Locum, that Locum

simply would not be offered any shifts in the future, there would be no disciplinary process. That is entirely different from the situation when the Claimant was subject to the Respondent's disciplinary process following his employment in July 2017. Ultimately, he was dismissed in July 2018.

46. It is clear, taking all factors into account, that prior to July 2017, the Claimant was simply engaged on an ad hoc basis as and when he wanted a shift with absolutely no mutuality of obligation or any element of control other than that that was imposed upon the Respondent one would expect working in the Claimant's environment.

47. It was to the Tribunal's mind, no more than a cynical attempt by the Claimant to try and establish continuity of employment to bring his claim for unfair dismissal which fails on the grounds he was never an employee prior to July 2017.

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Employment Judge Postle

Date: 25 / 9 / 2019

Sent to the parties on: 25 / 9 / 2019

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For the Tribunal Office