Worker status, ‘services agreements’ and the need for an ‘irreducible minimum of obligations’

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***Nursing and Midwifery Council v Somerville* [2022] EWCA Civ 229**

Introduction

1. The Court of Appeal recently handed down another decision on worker status: *Nursing and Midwifery Council v Somerville* [2022] EWCA Civ 229. This time, the key issue was whether an individual who undertakes short term engagements can be a ‘limb (b) worker’ only when they are working, without the need for an ‘irreducible minimum of obligations’ between those engagements.

Background

2. The Claimant is a panel member and chair of a Fitness to Practise Committee for the Nursing and Midwifery Council (‘NMC’). In July 2018 he brought a claim for unpaid holiday pay on the ground that he was a worker within the meaning of regulation 2(1) of the Working Time Regulations 1998 (WTR 1998) (which has the same definition as s230(1)(b) Employment Rights Act 1996 and is often referred to as a ‘limb (b) worker’).

3. The Claimant has, as the ET described it, a ‘portfolio of work’. Alongside his role at the NMC, the Claimant is a practising barrister, accredited mediator, arbitrator, magistrate and has a number of other roles. His appointment with the NMC was for a four-year term by letter dated 9 May 2012, and a further four-year term by letter dated 5 May 2016. Each appointment was subject to a panel members services agreement (referred to as the 2012 and the 2016 Agreements respectively).

4. In order to undertake work, the Claimant offered his available dates, was offered a hearing and could accept or reject the work. There was no obligation for the NMC to provide work and no obligation on the Claimant to accept it. The number of days the Claimant sat on panels varied from year to year, from 7 to 129 days.

Issue

5. The Claimant was successful in establishing that he was a worker in the ET and EAT. The question of worker status was the only issue considered by the Court of Appeal.

6. The key issue for the Court of Appeal was whether an irreducible minimum of obligations *between engagements* is a prerequisite for worker status, in particular where there is no requirement to offer or accept work.

Summary of decision

7. The judgment starts with a useful reminder of the three elements of a 'limb (b) worker':

   (a) *First, there must be a contract. That is, there must be legally enforceable obligations owed by the parties*;

   (b) *Next, the contract must include a certain type of obligation… whereby the individual undertakes to do or perform any work or services and to do so "personally"*.

   (c) *Finally, the other party must not be a client or customer of any profession or business undertaking carried on by the individual* **[45]**

8. The reasoning of the Employment Tribunal (which was upheld by the EAT) was as follows. In this case, there were two types of contracts. First, there was the overarching agreement between the Claimant and the NMC (the 2012 and 2016 agreements), which governed the claimant's appointment as a panel member and chair. This included mutually enforceable obligations setting out how the Claimant would undertake the role (for example for the NMC to provide training and for the Claimant to comply with relevant guidance) but did not impose any obligation on the NMC to offer or pay for work or any obligation on the Claimant to provide any services. As such, this contract alone was not a worker contract within the meaning of limb (b). However, the Claimant also entered into a series of individual contracts, each time the NMC offered him a hearing date and he accepted it in return for being paid a fee. Taking these individual agreements together with obligations contained in the 2012 and 2016 Agreements, the Claimant "agreed to provide his services

personally". Furthermore, the NMC was not a client or customer of the Claimant. As such, while he worked under one of these individual agreements, he was a worker within the meaning of 'limb (b)' **[46-48]**.

9. The Court of Appeal agreed and considered this reasoning to be consistent with the judgment of the Supreme Court in *Uber v Aslam* [2020] ICR 657, in which it was held that Uber drivers provided work under individual contracts for each trip they accepted, rather than under any overarching contract between them and Uber **[49-52]**.

10. The key point made by the Court of Appeal was that ***"the fact that an overarching contract does not impose an obligation to work does not preclude a finding that the individual is a worker when he is in fact working"*** **[54]**.

11. The Court of Appeal went on to confirm that it did not consider the overarching 2012 and 2016 agreements to be worker contracts **[57-58]**.

Comment

12. This judgment is useful for assessing the worker status of an individual who provides work under an overarching or other service level agreement. The Court of Appeal was clear that the fact an overarching agreement does not constitute a worker contract does not preclude an individual being a worker *while they are working*.

13. This is another example in a series of appellate decisions which make clear that the concept of a 'limb (b) worker' is broader than may have previously been thought; in particular in the context of individuals who have a number of jobs and are able to accept and reject work as they wish.

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