HENDERSON CHAMBERS

UPDATE
Employment Law

WORKER STATUS AND THE LIMB (B) EXCEPTION

By Kathleen Donnelly

In Westwood v The Hospital Medical Group [2012] EWCA Civ 1005, the Court of Appeal considered the ambit of the "limb (b) exception" to worker status. By judgment handed down on 24th July 2012, the CA held that that a hair transplant surgeon who was "clearly in business on his own account" and who contracted with HMG in the course of that business, was nevertheless a worker, and as a result was entitled to claim 6 years of holiday pay and claim unlawful deductions from wages. The decision is likely to be of interest to businesses and public sector organisations which engage self-employed persons as part of their business model, and may now find themselves exposed to potentially costly claims.

SUMMARY OF THE FACTS

Dr Westwood was the senior partner in a GP surgery, who carried out hair transplant surgery for HMG, and transgender surgery for another separate clinic. His contract with HMG expressly referred to him as a "self-employed independent contractor". HMG introduced patients to him. and he was paid fees calculated as a percentage rate of the procedures undertaken by him each month, upon which he paid his own taxes and national insurance contributions.

Dr Westwood was not obliged to work at a set time or work a set number of hours, and had the option to decline to undertake procedures if he chose to do so. When he carried out work at HMG's premises he engaged a locum to cover his GP responsibilities. He had a business card which referred to him as a hair restoration surgeon and provided his GP practice details on the reverse. He was responsible for his own expenses and paid his own professional indemnity insurance.

When Dr Westwood did take holiday he was not paid holiday pay and did not claim any. His contract with HMG provided for restrictive covenants which prevented him from providing services to any competitor during the period of his agreement with HMG or 12 months after its termination.

Dr Westwood's agreement with HMG was terminated summarily by HMG because of HMG's concerns about his professional services. Dr Westwood subsequently brought claims in the Employment Tribunal for unfair dismissal, unpaid holiday pay, and unlawful deductions from wages.

STATUTORY DEFINITION OF WORKER

Worker status is defined by section 230 (3) of the Employment Rights Act 1996, which provides:

> **In this Act '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.**

Limb (a) encompasses all those who are employees, and limb (b) encompasses all those who are not employees but who contract to provide a personal service, subject to the exception which applies where the other party to the contract is "*a client or customer of any profession or business undertaking carried on by the individual*". This is the "limb (b) exception", which lay at the heart of the appeals in this case.

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Proceedings began with a Pre Hearing Review by the ET to consider Dr Westwood's status as an employee and/or worker. Dr Westwood's primary contention was that he was an employee (which he required in order to pursue his unfair dismissal claim), but his secondary case was that he was a worker (which would entitle him to pursue his holiday pay and unlawful deductions claims).

The ET made the findings of fact set out in the Summary of Facts above, and went on to hold that Dr Westwood was not an employee, in the following terms (emphasis added):

> *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.*

After recording HMG's concession that personal service was required of Dr Westwood, the ET went on to consider whether the limb (b) exception applied, and found that it did not, for reasons given as follows (emphasis added):

> *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…*

Thus Dr Westwood was held to be a worker by the ET. He was accordingly entitled to seek payment of holiday pay going back 6 years and claim unlawful deductions from wages. These claims were subsequently agreed by HMG in principle, subject to the issue of Dr Westwood's status.

HMG'S APPEAL: SINGLE DESCRIPTIVE PHRASE

HMG appealed the finding that Dr Westwood was a worker to the EAT, and thereafter to the CA, on the basis that the limb (b) exception should be construed as a single descriptive phrase, such that in cases where an individual is carrying on a profession or business undertaking, the words "*client or customer*" add very little to the analysis, merely referring to the counter-party to whom such an individual provides his services.

HMG argued the legislative intention was never to extend worker status to the genuinely self-employed, and that imposing an additional hurdle to the limb (b) exception through the phrase "*client or customer*" was unwarranted and misconstrued the exception.

JUDGMENT OF THE COURT OF APPEAL

The CA considered the existing EAT authorities, which were not uniform in their approach.

In Dr Westwood's case the EAT had applied the dicta in *Cotswold Developments v Williams*, and *James v Redcats*, which emphasised indicative factors of worker status being whether a person "*actively markets his services as an independent person to the word in general*" or "*whether he is recruited by the principal to work for that principal as an integral part of the principal's operations*". The CA said that whilst these tests were not of universal application, they had been rightly deployed by the EAT in this case.

HMG's construction of the limb (b) exception was rejected by the CA on the basis that it was said to "*effectively emasculate the words of the statute*", and that whilst it had "*the attraction of greater simplicity and predictability*", the CA concluded that "*The status exception does indeed provide a third, albeit negative hurdle.*"

Smith v Hewitson and *IRC v Post Office*, on which HMG had relied, were said to be particular to their own facts and not to lay down any universal principle.

DISCUSSION POINTS

This case is thought to be the first in which an individual has been found to be genuinely "*in business on his own account*", and dealing with the other party in the course of that business, and yet still a worker. The application of a separate hurdle after having found someone to be in business on his own account, is novel.

The decision has the potential to affect the status of hundreds of thousands of people as well as businesses, professions, and public sector organisations.

It appears to open the door to self-employed individuals making substantial and unexpected claims against those with whom they contract. Dr Westwood had of course never claimed holiday pay before his agreement was terminated, when he then made claims for holiday pay going back 6 years.

Despite permission to appeal to the CA having been granted by Mummery LJ on the express basis that the CA "*perhaps might give some guidance as to a more uniform approach*", the CA's decision leaves a lingering uncertainty as to how the limb (b) exception will be applied in any particular case.

Whilst the CA has said that the *Cotswold* "integration" test will often be appropriate, there is no guidance as to when it might not be appropriate, and if it is not, what test(s) ought then to be considered.

Kathleen Donnelly

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Patrick Green QC, Kathleen Donnelly, and James Williams were instructed for HMG in the appeal to the CA. Kathleen also appeared before the ET and EAT below. An update to this Alerter will be published in the event of permission being granted to appeal to the Supreme Court.

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