Case No: 2600562/2018

EMPLOYMENT TRIBUNALS

Claimant	**-v-**	**Respondent**
Ms K Bagniewska-Tomczak		Nationwide Healthcare Providers Limited

JUDGMENT

Heard at: Nottingham **On:** 25 September 2018

Before: Employment Judge Evans (sitting alone)

Representation
For the Claimant: Mr Gracka, Consultant
For the Respondent: Miss Checa-Dover, Counsel

JUDGMENT

1. The Claimant was in "Employment" for the purposes of section 83(2) of the Equality Act 2010.

2. The Claimant was a "worker" for the purposes of section 230(3) of the Employment Rights Act 1996.

3. The Claimant was not an "employee" for the purposes of section 230(1) of the Employment Rights Act 1996. The Tribunal therefore has no jurisdiction to hear her claim of unfair dismissal which is dismissed.

4. The Claimant was not an "employee" for the purposes of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. The Tribunal therefore has no jurisdiction to hear her claim of wrongful dismissal (breach of contract) which is dismissed.

5. The Claimant's claim for discrimination on the grounds of race is dismissed following its withdrawal by the Claimant.

6. The Claimant's claim for unlawful deductions from wages in respect of "wages for training" (as set out in paragraph 21 of her particulars of claim) is dismissed following its withdrawal by the Claimant.

REASONS

Preamble

1. The Claimant presented a claim form on 1 March 2018 complaining that she had been unfairly dismissed and discriminated against on the grounds of race and of sex (equal pay). She also argued that she had been dismissed in breach of contract and that the Respondent had made unlawful deductions from her wages.

2. When the Respondent presented its response it argued that the Claimant was not an employee or worker as defined by section 230(1) of the Employment Rights Act 1996 ("the ERA"), that she was not in "Employment" as defined by section 83(2) of the Equality Act 2010 ("the EQA") and that the claims were out of time.

3. There was then a Closed Preliminary Hearing for the purpose of case management on 25 June 2018 before Employment Judge Blackwell. He ordered that there should be a preliminary hearing to determine:

   3.1. Whether the Claimant was an "employee" or "worker" as defined by the ERA;
   3.2. Whether the Claimant was in "Employment" as defined by section 83(2) of the EQA;
   3.3. Whether the Tribunal had jurisdiction to hear the claims or whether they were out of time.

4. That preliminary hearing took place on 25 September 2018. Prior to the hearing the parties had prepared and agreed a bundle running to 134 pages. Pages 135 to 138 were added to the bundle at the beginning of the hearing with the agreement of all the parties. All page references in these reasons are to the bundle unless otherwise stated.

5. The Claimant was represented by Mr Gracka and gave evidence on her own behalf. The Respondent was represented by Ms Checa-Dover and Dr Ahmad, one of its directors, gave evidence. Mr Gracka provided a written skeleton argument; Ms Checa-Dover did not.

Claims and issue

6. At the beginning of the hearing the Claimant withdrew her claim of race discrimination. The Claimant also withdrew her claim for unlawful deductions in respect of "wages for training" as set out in paragraph 21 of her particulars of claim (page 16). I therefore dismissed both these claims. The Claimant's remaining claims were for:

   6.1. Unfair dismissal;
   6.2. Wrongful dismissal (breach of contract);
   6.3. Equal pay;
   6.4. Unlawful deductions from wages in respect only of (1) a bonus payment that the Claimant says should have been paid in November; (2) the wages which the Claimant says should have been paid in respect of September and October.

7. The Respondent agreed that the claims of unfair dismissal, wrongful dismissal and equal pay had not been presented out of time. Nor had the claim for wages except that part of it which related to the bonus payment. I decided not to deal with that limitation issue on the grounds that it related to only a small part of the Claimant's claims and could conveniently be dealt with at any final hearing.

8. It was therefore agreed that the issues for me to decide were as follows:

   8.1. Was the Claimant an employee as defined by section 230 of the ERA? If the Claimant was, the tribunal would have jurisdiction to hear all of her claims.
   8.2. If the Claimant was not an employee as defined by section 230 of the ERA, was she:
      8.2.1. a "worker" for the purposes of section 230(3)(b) of the ERA? and
      8.2.2. in "Employment" for the purposes of section 83(2) of the EQA?

9. The Respondent agreed at the beginning of the hearing that it had a contract with the Claimant, albeit that contract had not been reduced to writing.

The Law

10. The right to bring a claim of unfair dismissal only applies to "employees". An employee is defined in section 230(1) of the ERA as an individual:

    who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

11. Section 230(2) of the ERA defines a contract of employment as:

    a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

12. A worker is defined under section 230(3) of the ERA as 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 express or implied and (if it is express) 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.

13. Section 83(2) of the EQA provides that the EQA protects those who are in or applying for "Employment" which means:

    (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.

    Employees

14. Whether there is a "contract of service" (and so a contract of employment) falls to be determined by consideration of a number of factors. The starting point in this exercise can reasonably be taken to be the decision in Ready-Mixed Concrete (South East) Limited v. the Ministry of Pensions and National Insurance [1968] 2QB 497. This case determined that:

    The contract of service exists if these three conditions are fulfilled:

    (1) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.

(2) 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.

(3) The other provisions of the contract are consistent with it being a contract of service.

15. Since Ready Mixed Concrete, three areas have attracted the greatest degree of case law attention and been viewed as central factors in determining whether a contract of employment exists: personal service, control and mutuality of obligation. Mutuality of obligation is often described as the obligation on the employer to provide work on the one hand and the obligation on the individual to accept that work on the other hand. The significance of mutuality is largely that it determines whether there is a contract in existence at all.

16. Nevertheless, other relevant factors in assessing whether there is a contract of service may include: who provides and maintains the tools or equipment used; whether the person hires their own help; the degree of financial risk adopted; the degree of investment in and management of the business; whether the individual has the opportunity to profit from their own good performance; whether the person is paid a fixed wage or salary; whether the person is paid when absent due to holiday or sickness; the degree of integration into the business; whether the person is free to provide services to others; the description applied by the parties; the nature and length of engagements.

Worker under section 230(3) ERA / "employment" for the purposes of the EQA

17. The meaning of "worker" under section 230(3) of the ERA is the same as the extended meaning of "Employment" contained in the EQA (Pimlico Plumbers Ltd and another v Smith [2018] UKSC 29.

18. The term "worker" effectively draws a distinction between two kinds of self-employed people, identified as follows by Lady Hale in Bates van Winkelhof v Clyde & Co LLP [2014] ICR 730:

One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them.

The arbitrators in Hashwani v Jivraj [2011] UKSC 40, [2011] IRLR 827 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else. The general medical practitioner in Hospital Medical Group Ltd v Westwood [2012] EWCA Civ 1005; [2012] IRLR 834, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a 'worker' within the meaning of s.230(3)(b) of the 1996 Act …

19. In reaching this conclusion Lady Hale cited two further decisions of the EAT, in Cotswold Developments Construction Ltd v Williams [2006] IRLR 181 Langstaff J said, (para. 53):

… a focus on 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.

20. In James v Redcats (Brands) Ltd [2007] ICR 1006; a case involving a self-employed deliverer of parcels; Elias J agreed that this would "often assist in providing the answer' and provided the following analogy:

> *in a general sense the degree of dependence is in large part what one is seeking to identify - if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached …'*

21. However personal service is en explicit component of the definition of "worker". An unfettered power of substitution will therefore result in an individual not coming within the definition of "worker".

Findings of Fact

22. I am bound to be selective in my references to the evidence when explaining the reasons for my findings and conclusions. However, I wish to emphasise that I considered all the evidence in the round.

23. The Claimant is a fully-qualified dentist. She worked for the Respondent from July 2005 until October 2017. She terminated her contract with the Respondent by a letter dated 16 October 2017 in which she gave two weeks' notice (page 81).

24. There was no written contract between the Claimant and the Respondent governing the terms of her engagement. However, as stated above, it is not in dispute that at all relevant times a contract existed between the Respondent and the Claimant. I find that throughout her engagement with the Respondent there was an obligation on the Respondent to provide the Claimant with work and an obligation on the Claimant to perform it.

25. The credibility of the witnesses, who were the Claimant and Dr Ahmad, is of some significance because there were significant conflicts of evidence. I therefore make general findings about their credibility at this stage. So far as the Claimant was concerned:

    25.1. Her witness statement contained obvious exaggerations and distortions. For example:

        25.1.1. At paragraph 5 she states "I had neither control or shared the risk and benefits of working for myself". This is palpably incorrect. The Claimant was paid under what was in effect a fee sharing arrangement (see the "self-employed associate monthly pay" statements between pages 59 and 70). She did share the benefits – the more she worked, the more fees the Respondent charged, the more she was paid. Equally, she shared the risk: if for some reason a client did not pay the Respondent then she was not paid either. Indeed the Respondent's alleged failure to chase bad debts is something that she complained about for exactly this reason.

        25.1.2. At paragraph 5 she states "I worked for the salary dictated by my employer". This is quite clearly not correct. She did not receive any payment which might reasonably be characterized as a salary.

    25.2. I find that the Claimant was dishonest in her evidence about the email at page 48 of the bundle. The Respondent says the forwarded email is between the Claimant and Nabarro solicitors whom (they say) she had instructed to defend a possible negligence claim by Mr Khan. The Claimant says that the email is a fabrication by the Respondent. Given that (1) the Claimant did not deny the fact of the complaint by Mr Khan; (2) the Claimant would indeed have

been responsible for liaising with solicitors in relation to the defence of any claim brought against her; (3) the email is written in slightly imperfect English of the kind used by the Claimant; (4) if the Respondent had wished to fabricate evidence against the Claimant it would I find not have done so by fabricating a 5 year old email which is of only tangential relevance to the claims brought; and (5) the day list (page 138) for the day in question suggests that the Claimant was free when the email at page 48 was sent, I find that the Claimant did indeed send the email at page 48 and that her denial that she did so substantially damages her credibility.

26. So far as Dr Ahmad's evidence was concerned, I found it generally to be more measured and to be more consistent with the documentary evidence contained in the bundle than that of the Claimant. This was notwithstanding that I find that there was one issue in relation to which his evidence was wrong. Dr Ahmad denied that the Respondent had a price list for private treatments. The Claimant said that it did. The Respondent's website refers to a price list (page 106). Because of this documentary evidence, I find that there was a price list for private treatments. Dr Ahmad's denial that there was any such price list damages his credibility.

27. Overall, therefore, I did not find either of them to be entirely satisfactory witnesses. However I found Dr Ahmad to be a generally more credible witness than the Claimant.

28. Turning to the terms on which the Claimant was engaged by the Respondent, I find that there was a requirement that she personally perform the work. There was no written document giving her a right to send a substitute. There was no suggestion in her evidence or that of Dr Ahmad that dentists did send along substitutes – there was simply evidence of "shift swapping" that will take place in any workplace where one dentist would arrange cover with another dentist already engaged by the Respondent because of holidays or other absences from work. I find that if the Claimant had sent along another dentist not already engaged by the Respondent to cover a particular day's work for her that other dentist would have been turned away.

29. I am fortified in my conclusion that there was a requirement on the Claimant to personally perform work by Dr Ahmad's frank evidence when cross-examined in relation to this issue. He said that locum dentists would be obtained to cover periods of maternity leave and the like but that he could not recall a dentist sending a locum in his or her place to cover a short-term absence. He also conceded that in practice this would not be possible because a dentist could not work in a particular practice until registered with the NHS, which would take about a week. That applied even when the dentist in question was registered with another of the practices owned by the Respondent.

30. Turning to the issue of control, I find that the Respondent controlled the fees charged by the Claimant for particular treatments. However, beyond that, I find that the control exercised by the Respondent over the Claimant was limited:

    30.1. I find that in general terms the Claimant was able to choose which days and which hours she worked and how many weeks off she had each year. I find that the Respondent would acquiesce with her choice of days and hours provided that a dental surgery and dental nurse was available to work with her. I preferred the evidence of Dr Ahmad to that of the Claimant in relation to this issue because I found him to be a more credible witness and because there was documentary evidence in the bundle (page 94 et seq) showing substantial variations in the number of days off which the Claimant took each year. (That is not to say that the Claimant could on any particular day or in any particular week decide that she would arrive two hours later than anticipated or leave two hours earlier: obviously that would be incompatible with the basic structure of any

dentist's day whether employed or a business owner which is based on pre-arranged appointments with patients.)

30.2. I find that she had complete control over the treatment that individual patients received.

30.3. I find that she was not required to wear a uniform by the Respondent although clinical wear was provided that she could use if she so wished. In relation to this issue I preferred the evidence of Dr Ahmad because he was a more credible witness and because his evidence was supported by the photographs contained in the bundle.

30.4. I find that the Claimant could decide whether as a matter of principle she wanted to accept emergency or walk-in patients. I so find because I preferred the evidence of Dr Ahmad to that of the Claimant because I found him a more credible witness.

31. Turning to other relevant matters, I find that:

31.1. The Claimant was responsible for arranging her own professional indemnity insurance and if there was an allegation of negligence the claim would be brought against the Claimant and not against the Respondent.

31.2. The Claimant had a choice of which laboratory to use for her dental work and from where to purchase her dental supplies. I find that she chose to use Genesis because it shared premises with the Respondent and it was the largest supplier to dentists working for the Respondent. Nevertheless the choice was hers.

31.3. The Claimant was responsible for maintaining her own registration with the General Dental Council.

31.4. The Claimant provided only a small proportion of the dental equipment that she used in her work – just a few hand tools.

31.5. That she regarded herself as "self-employed" (as evidenced by the email at page 48), that she was self-employed for tax purposes, and that the view of the British Dental Association (that is to say the dentists' trade union and professional association) was that dentists working in the way that she worked were "self-employed" (page 93).

32. Turning to other matters which may be relevant to the question of whether the Respondent was a client or customer of any profession or business carried on by the Claimant, I make the following findings:

32.1. The Claimant did not work for anyone other than the Respondent during the term of her engagement with it.

32.2. The Claimant did not engage in any marketing of her services to the Respondent or to any other dental practice.

32.3. The Claimant did not market her service to any prospective individual patient(s). Her patients were initially allocated to her by the Respondent's reception staff. They would return to her thereafter for repeat treatment (other things being equal) but this simply reflected that it was she who had treated them on their first visit. Certainly there were not her clients in any real sense. From their perspective they will have been clients of the Respondent who were

treated by the Claimant. This is reflected, I find, in the fact that they will generally have remained clients of the Respondent after the Claimant ceased working for it.

32.4. The Claimant did not set the fees paid by the patients. Although the Claimant agreed the exact amount to be paid in relation to any particular private treatment, such agreement would have been reached by reference to the price list maintained by the Respondent and referred to on its website. Further such fees as were paid were paid to the Respondent and not to the Claimant.

32.5. Notwithstanding the limit of the Respondent's control over the Claimant, as set out above, she was integrated into their day to day business. Individual clients would, if they had turned their mind to it, probably assumed that she was employed by the Respondent.

Conclusions

Employee status

33. I conclude that the Claimant was not employed under a contract of service or apprenticeship and so was not an "employee" as defined by section 230(1) of the ERA. I conclude that there was mutuality of obligation and that the Claimant was under an obligation to personally provide her services. However I find that:

33.1. The Claimant had not agreed to be subject to the Respondent's control in a sufficient degree to make the Respondent "master" (to adopt the language of Ready-Mixed Concrete). Whilst the fact that the Claimant had more or less complete clinical control is neither here nor there – one would expect, for example, an employed senior doctor or lawyer to have complete control in relation to matters of professional judgment – the extent to which the Claimant could dictate when she worked and what work she would or would not accept resulted in the Respondent having a lack of control over her which was not consistent with a contract of employment existing.

33.2. Further and separately, there were a number of factors pointing away from the existence of a contract of employment (which is not to say that any of them is in and of itself decisive in considering whether a contract of employment existed):

33.2.1. The fact that she had to arrange her own professional indemnity insurance and would be the defendant if it were alleged she had been negligent when carrying out her dental work.

33.2.2. The fact that she had a choice of dental suppliers and that she was responsible for placing orders with them and paying a proportion of their charges.

33.2.3. The fact that she regarded herself as self-employed when corresponding with lawyers.

33.2.4. The fact that she was self-employed for tax purposes.

33.2.5. The fact that the British Dental Association described dentists working as she did as "self-employed".

33.2.6. The fact that her remuneration took the form of fee-sharing with the Respondent and that she shared risk with it – if the patient did not pay their bill then she was not paid for the work that she performed.

34. I also conclude for exactly the same reasons that the Claimant was not an "employee" for the purposes of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

Whether claimant a "worker" or in "Employment"

35. I turn now to the question of whether the Claimant was a "worker" for the purposes of the ERA or in "Employment" for the purposes of the EQA.

36. In light of my findings of fact above, I conclude that the Claimant worked under a contract to "do or perform personally any work or services" for the Respondent. There was no right of substitution: she could not send another dentist along in her place. The Respondent would not have permitted such other dentist to treat patients due to be treated by the Claimant on any particular day.

37. The question, therefore, is whether the Respondent was the client or customer of any profession or business undertaking carried on by the Claimant. I conclude that it was not. In light of my findings of fact above, I conclude that the Claimant quite clearly was not someone who entered into contracts with clients or customers to provide work or services for them. Realistically, she was a dentist providing her services as part of the business undertaking carried on by the Respondent. She was recruited to work as an integral part of the Respondent's operations.

38. I therefore conclude that the Claimant was a "worker" for the purpose of the ERA or in "Employment" for the purposes of the EQA.

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Employment Judge Evans

Date: 13 October 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS