EMPLOYMENT TRIBUNALS

Claimant	Dr M Simpson
Represented by	Mr Lloyd (solicitor)
Respondents	(1) Infinity Dental Care limited (2) Pradip Patel (3) Raja Chadha (4) Aleksandr Drzazga
Represented by	Mr T Pacey (counsel)
Before:	**Employment Judge Cheetham QC**

10 September 2020 at
London South Employment Tribunal by Cloud Video Platform

JUDGMENT

1. The Claimant was not in employment, alternatively a contract worker for the purposes of the Equality Act 2010.

2. The employment tribunal therefore has no jurisdiction to hear the complaints brought under the Equality Act 2010 and they are dismissed.

3. The claim for breach of contract succeeds in the sum of £1,000.

REASONS

1. *This has been a remote hearing on the papers, which the parties have not objected to. The form of remote hearing was: V - video. A face to face hearing was not held because it was not practicable and the issue of the future determination of the claim could not be resolved from the papers. The documents that I received were the witness statements, those contained in the agreed hearing bundle, as well as those in the tribunal file.*

2. This hearing was listed to determine whether the Claimant was in employment, alternatively a contract worker for the purposes of the Equality Act 2010. There was an additional issue over a breach of contract claim in respect of a pay deduction.

The relevant law

Employment status

3. Under the Equality Act 2010 s.83:

> *(2) "Employment" means—*
>
> *(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;*
>
> *(b) Crown employment;*
>
> *(c) employment as a relevant member of the House of Commons staff;*
>
> *(d) employment as a relevant member of the House of Lords staff.*
>
> *…*
>
> *(4) A reference to an employer or an employee, or to employing or being employed, is (subject to section 212(11)) to be read with subsections (2) and (3); and a reference to an employer also includes a reference to a person who has no employees but is seeking to employ one or more other persons.*

4. Under s.41 ("Contract workers"):

> *(5) A "principal" is a person who makes work available for an individual who is—*
>
> *(a) employed by another person, and*
>
> *(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).*
>
> *(6) "Contract work" is work such as is mentioned in subsection (5).*
>
> *(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).*

5. I was referred to a number of well-established authorities. Starting with ***Autoclenz v Belcher*** [2011] ICR 1157 SC, Lord Clarke said in that case (at §29), "*The question in every case is … what was the true agreement between the parties*". He continued:

> *30. In para 57 of Kalwak (set out above) Elias J quoted Peter Gibson LJ's reference to the importance of looking at the reality of the obligations and in para 58 to the reality of the situation. In this case [2010] IRLR 70 Smith LJ quoted (at para 51) para 50 of her judgment in Szilagyi :*

> *"The kernel of all these dicta is that the court or tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by."*

31. She added:

> *"52. … the court or tribunal must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them.*
>
> *"53. In my judgment the true position, consistent with Tanton , Kalwak and Szilagyi , is that where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right …*

6. I was also referred to ***Pimlico Plumbers Ltd v Smith*** [2018] ICR 1511 SC, which concerned employment status under the Employment Rights Act 1996. In considering the question of substitution, Lord Wilson said (at §34, and after an analysis of the relevant authorities and the contract in question):

> *"The tribunal was clearly entitled to hold, albeit in different words, that the dominant feature of Mr Smith's contracts with Pimlico was an obligation of personal performance. To the extent that his facility to appoint a substitute was the product of a contractual right, the limitation of it was significant: the substitute had to come from the ranks of Pimlico operatives, in other words from those bound to Pimlico by an identical suite of heavy obligations. It was the converse of a situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done."*

7. Two of the other cases to which I was referred were considered by the Court in the **Pimlico Plumbers** case: ***Halawi v WDFG UK Ltd (t/a World Duty Free)*** [2015] IRLR 50, CA and ***Jivraj v Hashwani*** 2011] ICR 1004, SC.

8. I was referred to the EAT's decision in ***Community Dental Centres v Sultan-Darmon*** [2010] IRLR 1024. The judgment includes consideration of the following clause, which I am going to set out in full, as it is relevant to the present case. At §17, Silber J said:

> *"… Mr Stafford contends that the true test is whether the power to substitute an alternative for him was limited to the case of inability only or whether it was an unfettered power because in the latter case, such a provision would be inconsistent with the person concerned being a "worker". He submits that in this case the substitution power was exercisable in circumstances far greater than just on grounds of inability. He relies on the wording of clause 17 which states under the heading "Absence" (with my emphasis added):—*
>
> > *"In the event of your failure (through ill-health, maternity or <u>other cause</u> excluding up to 30 days annual holiday absence" to utilise the facilities for a continuous period of more than 5 days you shall make arrangements for the use of the facilities by a locum tenens acceptable to [the respondent] and in the event of your failure to make such arrangements [the respondents] shall have authority to appoint a locum tenens if possible to act on your behalf who shall be your servant or agent and shall be paid by you".*

9. After reviewing the relevant authorities (which I shall not set out here, but which I have considered), Silber J concluded:

> *31. In the recent case of Yorkshire Window Company Limited v Parkes (27 May 2010 – UKEAT/0484/09/SH) Judge Serota QC giving the judgment of this Appeal Tribunal reviewed the authorities and he held that:—*
>
> > *"the right or obligation to employ a substitute will not necessarily mean that there is no obligation on the part of the 'contractor' to perform personal services unless that right to employ a substitute is unfettered" [77(c)].*
>
> *32. That conclusion supports our view that the unfettered right given to the Claimant to appoint a substitute without any sanction at will means that he cannot be a "worker".*

10. In other words, the EAT concluded that the clause above gave the Claimant an unfettered right to provide a substitute and was therefore inconsistent with his status as a "worker". I have considered whether this decision has been affected by subsequent decisions in the Court of Appeal and Supreme Court, but I do not think it has. In ***Pimlico Plumbers***, Lord Wilson distinguished between a situation where the substitute plumber had to come "*from the ranks of Pimlico operatives*" and one where the other party is

uninterested in the identity of the substitute, only that the work gets done. It does not seem to me that the necessary requirement that any substitute dentist was suitably qualified and registered makes a difference. The dental practice is uninterested in the identity of a substitute and only wants the work done, but obviously it must be satisfied that the substitute is able to do the work.

11. Finally, Mr Pacey provided a copy of the first instance decision in ***Ter-Berg v Simply Smile Manor House Limited and others*** Case no 3334608/2018 ET, which also considers the employment status of a dentist, although under the Employment Rights Act 1996. I note that most of the above authorities are referenced in that case, together with several more. I also note that there is consideration in that case of a clause in very similar terms to that referred to above. The case went on appeal to the EAT (***Hancock v Ter-Berg*** [2020] ICR 570), but on an unrelated point.

The relevant facts

Employment status

12. I heard evidence from the Claimant and from Dr Chadha, both of whom had also provided written statements. I consider that both witnesses were doing their best to provide a truthful version of events. I was struck by the fact that both of them made sensible concessions in their evidence and that, although they were in disagreement, they were polite and respectful of each other. Where there were differences in their evidence over what was said or done, I think it more likely that it reflects different recollections and understandings, rather than any lack of credibility on the part of either.

13. The Claimant entered into an Associate Agreement with the Second and Third Respondents, who are described in the Agreement as "the Practice Owner", on 4 April 2017. I was told that this was a standard British Dental Association agreement. Some of the key clauses are as follows (but it was necessary to consider the document as a whole):

    Whereas

    …

    (B) The Practice Owner wishes to introduce patients to the Associate and to make available to the Associate equipment and services in connection with the practice of dentistry at the premises by the Associate upon such terms and conditions and for such consideration as hereinafter respectively appear.

    …

    (E) The Associate is a Performer engaged by the Practice Owner to provide services under the Head Agreement and privately.

    6

    Nothing in this agreement shall constitute a contract of employment between the Practice Owner and the Associate.

…

Facilities
10
(a) to the Terms of this Agreement the Practice Owner shall provide for the use of the Associate at the premises and maintain in good and substantial repair and condition the under-mentioned equipment which is hereinafter referred to as 'the equipment':

(i) dental and other equipment apparatus instruments and implements customarily used in the exercise of the profession of dentistry

(ii) all other furniture and things incidental to the exercise of the profession of dentistry items referred to in (i) and (ii) having been identified by the Practice Owner to the Associate on the 4th April 2017.

(b) Subject to the terms of this Agreement the Practice Owner shall further provide for the Associate at the premises the under-mentioned services which are hereinafter referred to as 'the services':

(i) the services of a dental nurse(s) at the chairside;

(ii) the services of a dental hygienist;

(iii) such other staff as are usual for the administration of a dental practice,

administration of NHS claims and assisting a dental practitioner including the maintenance of the accounts and records hereinafter referred to;

(iv) such materials drugs and supplies as are customarily used in the profession of dentistry;

(v) the services of a dental laboratory acceptable to the Associate (OR the services of the laboratory at the premises being agreed by the Associate to be generally acceptable).

(c) the premises and equipment and services are hereinafter referred to as 'the facilities'. '

11. The Associate shall not without the prior consent of the Practice Owner use at the premises any equipment or services of the nature referred to in clause (a) other than the equipment and services provided pursuant to this Agreement.

…

Supervision of Staff
14. The staff comprised in the services referred to in clause (a) (b)(i) and (ii) shall be subject to the day-to-day supervision of the Associate in the course of their work with the Associate notwithstanding that the Practice Owner shall be the sole employer of the said staff.

…

Holidays/CPD
20. Holidays
(a) In any calendar year, the Associate shall not during the operation of this Agreement take more than 11 working days of holiday from the practice of dentistry at the Premises unless agreed with the Practice Owner.

(b) The Associate shall give the Practice Owner at least 6 weeks' notice of any holiday lasting 1 working day or more.

...

Locums
37. In the event of the Associate's failure (through ill health or other cause) to utilise the facilities for a continuous period of more than 5 days the Associate shall use his best endeavours to make arrangements for the use of the facilities by a locum tenens, such locum tenens being acceptable to the Practice Owner to provide dental services as a Performer at the Premises, and in the event of the failure by the Associate to make such arrangements the Practice Owner shall have authority to find a locum tenens on behalf of the Associate and to be paid for by the Associate. The Practice Owner and Associate will agree the method of payment of the locum tenens. The Practice Owner will notify the NHS England that the locum tenens is acting as a Performer at the Premises. The Associate will be responsible for obtaining and checking references and the registration status of the locum and ensuring that the locum is entered into the Performers List in England.
The Associate will confirm to the Practice Owner that the requirements of the immediately preceding sentence have been carried out and will provide the Practice Owner with such relevant information as he/she may reasonably require.

14. Schedule 1 contained the financial arrangements, including the following:

UDA requirement
The Associate will provide no more than 1800 Units of Dental Activity during the NHS year (1st April in one year to 31st March in the following year) which will be the maximum amount payable under the Agreement without prior agreement with the Practice Owner. The monthly limit is 150 UDA's. At least 900 Units of Dental Activity must be provided by 1st October each financial year.

The maximum number of UDAs to be paid for under the contract each calendar month will be 150. If the number of UDAs provided within the preceding month exceeds this amount, the surplus will be carried forward until the end of the financial year to offset any shortfalls in subsequent months within the same financial year.

If, at the end of the NHS year, the Associate has not met their annual UDA target, the Practice Owner will require the Associate to pay to the Practice Owner an amount equal to the gross UDA value multiplied by the shortfall in UDAs; provided and to the extent that those UDAs have not been completed by another associate at the practice.

15. The Claimant's case is that this Agreement does not reflect the true nature of the working relationship. However, it is relevant at the outset to record that the evidence before me was that both parties freely entered into the

Agreement. The Claimant told me that she did not object to it at the time that she signed it, nor was there any evidence to suggest that she ever challenged any of the clauses as being inaccurate or misleading. She did ask for fresh terms and conditions, she said, but she also confirmed that the existing terms were never varied.

16. Starting with hours and attendance, the Claimant says that initially she was working 2 days a week and, subsequently, she was "contractually obliged" to work 5 days a week. I do not find the word "obliged" is an accurate reflection of what happened, if that suggests any coercion. As she told me in evidence, she was asked to increase her hours and she agreed to do so. It was therefore agreed at some point that she should work 5 days, rather than 2 days a week. On her working days, she was expected to attend between 9.00 and 5.00, but in a dental practice which revolves around timed appointments for patients, that is to be expected.

17. On the evidence before me, the Claimant retained complete control over how she provided treatment for patients, although like all dentists, she was subject to professional rules and requirements. She said that she needed to discuss with Respondents if she was using a "new skill" such as implant procedures, but she did not say that she was prevented from doing so.

18. The Claimant said that she was obliged to attend training and staff meetings and there was a dispute on the facts over this issue. She said she was required to be there and gave the example of having to attend "lunch and learn" meetings. Dr Chadha said that she was not instructed to attend, but there was – for example – an annual meeting dealing with medical emergencies that everyone attended. It is difficult to resolve this issue because, as noted above, I do not think either witness was trying to be misleading. I think there was encouragement to attend training and staff meetings, which I do not find surprising, but I have seen no evidence that the Claimant was penalised if she did not attend.

19. The Claimant was provided with a treatment room. She said that she was not allowed to use it outside her contracted hours. The practice provided the dental assistants or nurses, who were employees of the practice. The Claimant said she would have liked to bring in her own nurse, but she understood when she signed the Agreement this would not happen. When at work, she supplied her own "scrubs", whereas the practice supplied them for assistants and nurses.

20. The patients divided between those receiving treatment via the NHS and private patients. We had some discussion about the different types of contract involved, but on reflection, I am not sure that is material. The practice had an agreement with the NHS, under which there were fixed prices, and all dentists in the practice undertook work with NHS patients under the rules of that agreement. The Claimant said there was no option not to see NHS patients. There was one occasion, however, when she wanted to treat her mother as an NHS patient and – she said – was prevented from doing so.

21. Private patients were charged according to a fixed level of charges, although the Claimant said there would be some treatments where there was no set charge, for example, dental implants. The costs of these would be discussed, but the Claimant said the Second and Third Respondents would decide the price and she would always agree. Dr Chadha said it was ultimately the individual dentist's decision. The difficulty here is that, if the Claimant always agreed the price, one does not know what would have happened had she not done so.

22. The dental practice collected the fees from the patients and then paid the dentists. Mr Chadha was a little unclear about who would be liable for what over the fees, but I find that this was no more than a routine and efficient process for collecting fees from patients. It would have no impact at all on the Claimant's professional liability (in respect of which she paid for indemnity insurance). That is a different liability to that which would arise when a patient failed to pay the practice for the services provided by the Claimant.

23. There were annual targets for dentists to achieve in terms of units of dental treatment ("UDAs" – and see Schedule 1 above). The Claimant said that she was obliged to "hit" these targets and was chased by the directors to make sure that she did so. Dr Chadha said that targets were a financial necessity because the Respondents were running a business, but there were also financial implications for the Claimant. As set out in Schedule 1, there were agreed rules on payments and UDAs and therefore achieving the requisite number of UDAs did affect what the Claimant would be paid. I find that it was a financial necessity for the Respondents to set UDA targets in order be a viable business. The Claimant agreed to this structure of targets and payments in signing the Agreement.

24. The practice had its own rules and procedures, which Mr Pacey referred to as "administrative necessities". One "administrative necessity" was the patient booking system. Dr Chadha accepted that the Claimant did not have complete freedom to change bookings, which was one of the Claimant's complaints. However, she clearly had some control over it. I was shown an email in which she wrote: "*for the past two years at Infinity Dental Care I have personally controlled the bookings of my treatment appointments. I have always booked patients in for treatments myself and have contacted patients personally to change or bring their appointments forward*". The Claimant told me that she should have had greater freedom to organise the diary in the way she wanted to. However, I find that Mr Pacey's description of this as an "administrative necessity" is apposite. It would be impractical if each dentist had complete freedom over what was a centralised booking system overseen by a receptionist, but the Claimant was able to manage her diary to an extent.

25. The Claimant was required – she said – to follow the Respondents' policies if she was absent or taking annual leave and any holidays had to be pre-approved. For example, I was referred to the screenshot of a text exchange

dated 14 June 2018 where she asked for leave and the response was: "*six weeks (notice) please if you can though in future. Trying to get that across the board for all staff and dentists apart from emergencies. Ta*". I agree that this meant that the Claimant could not take her holidays when she wanted, in that she had to give notice, but it seems to me that this would also fall under the umbrella of "administrative necessities".

26. The Claimant complained that the practice name and logo was present on documents, name badges and so on and that this effectively prevented her from promoting herself. She also contrasted her current role, where she is able to use social media, with her time with the Respondents, when she says she was discouraged from doing so. Dr Chadha did not dispute the use of the practice name and logo, although he did not agree with the extent of its use. He said there had been no discussions about social media. I find that there was no conscious attempt to stop the Claimant from marketing herself, but that she may well have felt discouraged from doing so, given the prominent identity of the Respondents' practice.

27. Regarding clause 37 (Locums), the Claimant said that the reality was different and that locums were never arranged when associates were away, but in any event, any substitute would have to be vetted by the practice. In her statement, she said: "*if I was sick and could not come into work, my patients were cancelled by reception and rebooked for another day. When I went on holiday, reception would simply not book any patients in during that time."*

28. Dr Chadha said that it was obviously not the case that an associate could send anyone they want, because they would have to be acceptable to the practice in terms of qualifications and so on. He also said that it was generally unnecessary to provide cover during absence, as appointments could be moved to other associates. He said the clause was there to be used if necessary.

29. With regards to this clause, although the Claimant said the reality was different, I do not find that the clause was a "sham". The wording refers to the associate using her "best endeavours" to make arrangements to find a locum "acceptable" to the practice if absent through ill health "or other cause". The clause is not a sham solely on the basis that, on the facts, the Claimant did not make such arrangements. Rather, the clause reflected the intention of the parties that the Claimant could provide a substitute in these circumstances.

30. Although both witnesses referred to some other matters, both orally and in their statements, it seems to me that these are the key findings of fact. I should add that I was taken to a few documents where words or expressions had been used that were inconsistent with self-employed status – such as the Claimant being asked to accept amendments to the terms and conditions of her "employment" – but I do not find those to be of much assistance. Imprecise use of language works both ways and it is more

helpful to look at agreed terms and conditions and the way that the working relationship was carried out.

The pay deduction

31. This relates to £1,000 retained by the Respondents at the end of the working relationship with the Claimant. It is agreed that there was no clause in the Agreement entitling the Respondents to retain a dentist's fees in anticipation of having to refund private patients. Mr Chadha candidly accepted that, when the deduction was made in this case, no sums were actually owing. He simply predicted that there would be.

Submissions

32. I shall summarise the competing oral submissions as follows. Mr Pacey took me to various parts of the authorities listed above. He emphasised that the Claimant retained control over the treatment she provided as a dentist. The working patterns of the practice were no more than are required in any workplace to allow the efficient running of the business. He said that there was no reason why the tribunal should conclude that the written agreement did not reflect the true relationship between the parties. It was freely entered into and conferred clear benefits on the Claimant

33. Mr Lloyd also referred to the authorities, in particular ***Pimlico Plumbers***. He submitted that the locum clause was a sham. He said that the dominant feature of the working relationship was the provision of personal services and that clause did not allow substitution. The Claimant was part of the dental practice; there was an element of autonomy, but that did not take her outside the definition of "employment". She was in a position of subordination and he pointed in particular to the targets, the requirement to attend training sessions, the provision of nurses and the restrictions in her contract.

Conclusions

Employment status

34. The Associate Agreement amounts to a contract for services. That is how it describes itself and, taking the agreement as a whole, that is an accurate description. I attach importance to clause 37 (Locums). I note that the first – and material - part of clause 37 is in very similar terms to the one before Silber J in the ***Community Dental Centres*** case and it may therefore be a standard term in such agreements. That clause gave the Claimant an unfettered right to appoint a substitute and the fact that right was never exercised does not mean that the clause was not genuine. As made clear by Silber J in ***Community Dental Centres***, that clause is therefore inconsistent with personal service.

35. The parties methodically took me through all the features of the working relationship, in respect of which I have made the findings of fact set out

above. I accept that there are elements of control, which affected how the Claimant carried out how work. She did not have complete freedom over the diary booking system; she was not able to employ her own dental nurse; there was a discouragement from marketing herself; she could not take annual leave whenever she wanted without notifying the Respondent. I accept also that there are clauses within the Associate Agreement itself which do not sit very obviously with this being a contract for services (such as the provisions in respect of maternity leave).

36. The term "administrative necessities" will take a respondent so far, because there may come a point where the degree of control being exercised will affect the nature of the contract. However, there is an important distinction. None of these matters restricted how the Claimant performed her services as a dentist, over which she had complete control (within the necessary professional bounds). They were the policies and procedures needed to run a busy practice with multiple dentists and staff and a large patient body in a dental a practice that provided both treatment under the NHS and privately.

37. In my judgment and based upon the findings of fact, the parties entered into a genuine agreement that reflected their intentions and expectations and there is no reason to conclude otherwise. Under that agreement, the Claimant was self-employed and it does not seem to me that the way the contract was subsequently performed altered that arrangement. It follows that the Claimant was not in employment for the purposes of the Equality Act 2010, nor was she a contract worker (which was an argument that was not actively pursued).

38. It follows that the tribunal has no jurisdiction to hear her claims under the Act, which are dismissed.

<u>The pay deduction</u>

39. It was effectively conceded that this pay should not have been deducted and therefore the claim for breach of contract succeeds in the amount of £1,000.

Employment Judge S Cheetham QC
Dated 1 October 2020