EMPLOYMENT TRIBUNALS

Claimant: **Miss Alana Davies**

Respondents: **The Old Surgery Dental Practice Ltd (1)**
Mr Steven Lomas (2)
Mr Richard Willis (3)
Mrs Lisa Bainham (4)

Heard at: Birmingham remotely by CVP

On: 21 January 2022 and (without parties) on 8 April 2022

Before: Employment Judge Battisby (sitting alone)

Representation

Claimant: In person
Respondent: Mr Simon Lewis, counsel

RESERVED JUDGMENT

The judgment of the tribunal is that the claimant was neither an employee nor a worker employed by the respondents. Accordingly, the tribunal does not have jurisdiction to hear the claims being brought and all claims made are dismissed.

REASONS

The background and issue for determination

1. On 22 January 2022 there was a case management preliminary hearing before EJ Harding. Before her, the claimant confirmed she is pursuing claims for unfair dismissal, direct and indirect sex discrimination, harassment related to sex, victimisation, unpaid wages and unpaid notice pay. The claimant was asked to consider if she still wished to pursue her claims against the 3 named individuals, given that the first respondent had agreed that it would be vicariously liable for any proven acts or omissions on their part. Before me, the claimant confirmed she wished to maintain her claims against the named individuals.

2. The respondents aver the claimant was at all times in business on her own account when doing work for the first respondent (hereafter referred to as 'the respondent'). The claimant maintains she was an employee and/or a

worker. Accordingly, as this issue goes to the jurisdiction of the Tribunal to hear the claims, EJ Harding directed there should be a preliminary hearing to determine whether the claimant was an employee within the meaning of s230(1) of the Employment Rights Act 1996 ('ERA') and/or a worker within the meaning of s230(3) ERA and/or was employed under a contract of employment within the meaning of s83(2) of the Equality Act 2010 (EQA). This issue was listed for a hearing before me and the parties consented to the hearing taking place remotely by video.

3. The hearing started at 10am and was completely taken up with the giving of evidence by the claimant and Mr Lomas for the respondents. There was a large bundle of documents running to 265 pages. We did not conclude till almost 5.30pm. Accordingly, I gave directions for sequential written submissions (by agreement, the respondents first) and reserved judgment to a date to be fixed.

(A)The law - introduction

4. The statutory definitions of employee and worker under s230 ERA are:

230.— Employees, workers etc.
(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.
(3) In this Act "worker" (except in the phrases "shop worker" and "betting 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 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;
and any reference to a worker's contract shall be construed accordingly.

5. Workers as defined under s230(1)(b) ERA are often referred to as 'limb (b) workers'.

6. For the purposes of the Equality Act, s83(2)(a) EQA defines 'employment' as meaning 'employment under a contract of employment, a contract of apprenticeship or a contract personally to do work'. Although not the same as the definition of the limb (b) worker above, the equivalence in the legal effect of these statutory terms has been repeatedly confirmed: see, for example, ***Uber BV v Aslam and others*** [2021] UKSC 5 at paragraph 112.

7. At paragraph 38 of that decision, the Supreme Court described the effect of these different definitions and how they create three distinct statuses,

namely employees, the self-employed and the intermediate status of worker as follows:

> *"The effect of these definitions… is that employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else. Some statutory rights, such as the right not to be unfairly dismissed, are limited to those employed under a contract of employment; but other rights, including those claimed in these proceedings, apply to all 'workers'."*

8. It is well understood and accepted that tax treatment is a different issue from employment status, and one does not determine one from the other. In taxation law, one is either employed or self-employed, and the intermediate status of a worker is not recognised.

9. In his written closing submissions, Counsel for the respondent referred me to a bundle of authorities reflecting the body of case law in this area. They were produced for reference, if necessary, and a number of them were referred to in his written submissions.

    - *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497
    - *Autoclenz Ltd v Belcher* [2011] UKSC 41
    - *Uber BV v Aslam and others* [2021] UKSC 5
    - *Various Claimants v Catholic Child Welfare Society and others* [2012] UKSC 56
    - *Addison and others v London Philharmonic Orchestra Ltd* ICR 261
    - *Troutbeck SA v White & Anor* [2013] EWCA Civ 1171
    - *Commissioners of Inland Revenue v Post Office Ltd* [2003] ICR 546
    - *Brand v Paper Chain (East Anglia) Ltd* [1993] UKEAT/653/92
    - *Stringfellow Restaurants Ltd v Quashie* [2012] EWCA Civ 1735
    - *Ms F D Thomson v Fife Council* UKEAT/0064/05
    - *Bebbington v Palmer T/A Sturry News* UKEAT/0371/09/DM
    - *Community Dental Centres Ltd v Sultan-Darmon* UKEAT/0532/09/DA
    - *The Commissioners for HM Revenue and Customs -v- Weight Watchers (UK) Limited* FTC/57-59/2010 [2011] UKUT (TCC)

- *Staffordshire Sentinel Newspapers Ltd v Potter* [2004] IRLR 752
- *Real Time Civil Engineering Ltd v Callaghan* [2005] EAT/0516/05/ZT
- *Hall v Lorimer* [1994] ICR 218 CA
- *Massey v Crown Life Insurance Co* [1978] IRLR 31 CA
- *O'Kelly and Others v Trusthouse Forte plc* [1983] ICR 728 CA
- *Winfield v London Philharmonic Orchestra Ltd* [1979] ICR 726.
- *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32
- *Redrow Homes (Yorkshire) Ltd v Wright; Redrow Homes (North West) Ltd v Roberts and others v Redrow Homes (North West) Ltd* [2004] EWCA Civ 469
- *Byrne Bros (Formwork) Ltd v Baird and others* [2001] 9 WLUK 209
- *Dr M Suhail v 1) Barking Havering and Redbridge University Hospitals NHS Trust 2) Partnership of East London Cooperative* UKEAT/0536/13/RN
- *Hospital Medical Group Ltd v Westwood* [2012] IRLR 838 CA
- *Community Based Care Health Ltd v Dr Reshma Narayan* UKEAT/0162/18/JOJ
- *Mrs N Sejpal v Rodericks Dental Ltd* [2020] UKET 2201408/2019
- *Mr M Ter Berg v Simply Smile Manor House Ltd and others* [2020] UKET 3334608/2018
- *James v Redcats (Brands) Ltd* [2007] ICR 1006

10. Of course, the decisions of the Employment Tribunal in the 2 cases cited are not binding upon me, but have been of assistance.

11. The claimant referred me to the *Autoclenz* case and also to:

- *Walker v Crystal Palace Football Club* [1910] 1 K.B. 87 CA
- *Whittaker v Minister of Pensions & National Insurance* - the claimant gave this citation [1968] 2 QB 497, but I believe it should be [1967] 1 Q.B. 156.
- *Nethermere (St Neot's) Ltd v Gardiner and Another* [1984] ICR 612

12. I will now attempt to distil from all these cases the relevant propositions of law to which I must apply the facts of this case later. In doing so, it is worth recognising the different terminology used in the older cases. An employee for the purposes of s230(1) ERA is a person who works under a contract of employment. A self-employed person is usually said to have a contract for services, whereas in contrast an employee has a contract of service. This is old terminology dating back to when the law referred to

the 'master and servant' relationship. A 'contract of service' has the same meaning as 'contract of employment' in more modern terminology.

(B) The law - employment status: 'employee'

13. The starting point in determining whether a person is an employee is to establish whether there is a contract at all between the alleged employer and alleged employee.

14. Once the existence of a contract is established, the next question is whether the contract is a contract of employment or a contract for services (or indeed one under which a person has 'worker' status).

15. A common starting point is ***Ready Mixed Concrete v Minister of Pensions and National Insurance*** [1968] 2 QB 497 at 498E:

> *"A contract of service existed if (a) the servant agreed in consideration of a wage or other remuneration to provide his own work and skill in the performance of some service for his master, (b) the servant agreed expressly or impliedly that, in performance of the service he would be subject to the control of the other party sufficiently to make him the master, and (c) the other provisions of the contract were consistent with its being a contract of service*

16. It is now generally accepted that a multi-factorial approach should be taken to the question and then the Tribunal should stand back, weigh the factors and reach a decision in the round. However, it is well-established that there are three essential elements that must be present to establish a contract of employment. These form the irreducible core of the contract of employment, without which a contract of employment will not arise:

    (a) the contract must impose an obligation on a person to provide work personally;
    (b) there must be mutuality of obligation between employer and employee; and
    (c) the worker must expressly or impliedly agree to be subject to the control of the person for whom he works to a 'sufficient' degree.

17. If any of these three elements is not present, the contract is not a contract of employment. If each element is present, the contract may be a contract of employment. Whether or not it is will depend on an assessment of all of the other circumstances of the case.

18. In ***Autoclenz Ltd v Belcher*** [2011] UKSC 41, the Supreme Court confirmed that in the employment context the Court will look to the reality of the arrangements between the parties, as opposed to concentrating on the written terms of any agreement, in determining the true nature of the relationship. This means that a written term purporting to permit the use of a substitute does not preclude the conclusion that a contract of employment existed when in practice the right was not exercised.

19. The summary of what the Supreme Court held is set out in the headnote to the report at [2011] IRLR 820:

> *'It is important to be aware that employers may place substitution clauses, or clauses denying any obligation to accept or provide work, in employment contracts as a matter of form, even where such terms do not reflect the real employment relationship. A finding that a contract is in part a sham does not require a finding that both parties intended it to paint a false picture as to the true nature of their respective obligations. The question in every case is what is the true agreement between the parties; the approach of the EAT in Kalwak and of the Court of Appeal in Szilagyi is to be preferred to that of the Court of Appeal in Kalwak.*
>
> *Where there is a dispute as to the genuineness of a written term in an employment contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. All the relevant evidence must be examined, including: the written term itself, read in the context of the whole agreement; how the parties conduct themselves in practice; and their expectations of each other. Evidence of how the parties conduct themselves in practice may be so persuasive that an inference can be drawn that the practice reflects the true obligations of the parties, although the mere fact that the parties conduct themselves in a particular way does not of itself mean that the 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 the right is never exercised in practice does not mean that it is not a genuine right.*
>
> *The relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed. The circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. Organisations which offer work or require services to be provided by individuals are frequently in a position to dictate the written terms which the other party has to accept. In practice, in employment cases, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so.*
>
> *In the present case, Autoclenz's valeters had been employees in all but name and had fallen in limb (a) of the definitions. The elaborate protestations in the contractual documents that the men were self-employed had been odd in themselves and, when examined, had borne no practical relation to the reality of the relationship. The ET had been entitled to hold that the documents did not reflect the true agreement between the parties and that four essential contractual terms had been agreed: that the valeters would perform the services defined in the contract for Autoclenz within a reasonable time and in a good and workmanlike manner; that the valeters*

> *would be paid for that work; that the valeters were obliged to carry out the work offered to them and Autoclenz undertook to offer work; and that the valeters were obliged personally to do the work and could not provide a substitute to do so. The Court of Appeal had been correct to hold that those were the true terms of the contract and that the ET had been entitled to disregard the terms of the written documents, in so far as they had been inconsistent with them.*
>
> *The Court of Appeal and the ET had been entitled to hold that the claimants were workers because they were working under contracts of employment within the meaning of limb (a) of the definitions. Had they not been within limb (a), the Supreme Court would have held that they were in any event working under contracts within limb (b).'*

(a) The obligation to provide work personally

20. Dealing with the first of the 3 factors forming the irreducible core of the contract of employment, the requirement for personal service was made clear in ***Express and Echo Publications Ltd v Tanton*** [1999] IRLR 367. In that case, the contract provided that, if the worker was unable or unwilling to do the work personally, he had to provide a substitute. The Court of Appeal held that the power to send a substitute meant that this could not be a contract of employment. The irreducible minimum of a contract of employment was an obligation on the worker to provide his services personally. Where there is a power to send a substitute only where the worker is unable to do the work, the obligation to undertake work personally does not cease to exist: ***James v Redcats (Brands) Ltd*** [2007] ICR 1006. The key point about ***Tanton*** was that the worker could send a substitute, if he did not want to do the work, as well as if he was unable to do it. Where the employee must do the work personally if he is able, then the requirement of personal obligation is satisfied.

21. In ***Pimlico Plumbers Ltd v Smith*** [2017] EWCA Civ 51, the judgment of Sir Terence Etherton MR at para 84 sets out some general principles relating to the right of substitution which are of applicability to the employee/self-employed distinction, emphasising the need to examine the wording of the contract and the underlying reality of the situation:

> *'Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the*

> *contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.'*

22. The question of whether or not the contractual substitution clause is a sham or not is decided according to the principles set out in ***Autoclenz***.

(b) Mutuality of obligation between employer and employee

23. The second requirement for there to be a mutuality of obligations means that for the entire duration of the contract under consideration, both the employer and the employee must be under legal obligations to one another. The House of Lords has reiterated that the existence of mutual obligations between the parties is the irreducible minimum of a contract of employment: ***Carmichael v National Power plc*** [2000] IRLR 43. There, in a case where workers were engaged as power station guides on a 'casual as required' basis, there was no contract of employment. There was no obligation on the workers to work. Indeed, they had failed to attend on a number of occasions and had not been disciplined. Further, there was no obligation on the company to provide work.

24. Usually, the obligations will be an obligation on the employee to work and an obligation on the employer to pay for that work. It may not be necessary in every case for there to be obligations to work and to provide work. It may be sufficient if there is an obligation on the employee to accept and do such work as is offered to him and on the employer to pay the employee for the work that is done and, if there are periods when there is no work for the employee to do, to pay a retainer. In the absence of such a retainer in periods where there is no work to be done, there will be no contract of employment between the parties.

25. In ***Quashie v Stringfellow Restaurants Limited*** [2012] EWCA Civ 1735, the Court of Appeal affirmed that, in the absence of any obligation on the employer to pay the worker for services provided, there was no contract of employment. The claimant lap dancer was remunerated by the fees paid by visitors to the club and was therefore not an employee of the club itself. The club did not employ her to dance; rather she paid it to be provided with an opportunity to earn money by dancing for the clients. The headnote to the report at [2013] IRLR 99 records the Court of Appeal also found:

> *'The fact that the dancer took the economic risk was also a very powerful pointer against the contract having been a contract of employment. It might have been to go too far to say that, absent an obligation on the employer to pay a wage (or to secure or arrange for its payment by a third party), the relationship can never as a matter of law constitute a contract of employment. However, it would be an unusual case where a contract of service is found to exist when the worker takes the economic risk and is paid*

> *exclusively by third parties. On any view, the tribunal was entitled to find that the lack of any obligation to pay did preclude the establishment of such a contract in the present case.*
>
> *The tribunal's conclusion was strongly reinforced by the fact that the terms of the contract involved the dancer accepting that she was self-employed and she conducted her affairs on that basis, paying her own tax. In addition, and again consistently with that classification, she did not receive sick pay or holiday pay. It is trite law that the parties cannot by agreement fix the status of their relationship: that is an objective matter to be determined by an assessment of all the relevant facts. But it is legitimate for a court to have regard to the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain, it can be decisive. It followed that the fact that the parties intended that the dancer should have had self-employed status reinforced the conclusion of the tribunal.*
>
> *There were some mutual obligations in play when the dancer was at work; she had a duty, at least once on the rota, to work certain days. Also, it could have been readily implied that the club was under some obligation to allow her to dance when she was at work. However, with regard in particular to the clear finding concerning the obligation to pay, the tribunal had been fully entitled to conclude that there was no relationship of employer and employee. The EAT's analysis had been mistakenly premised on the assumption that the mutual obligations of work and wages had been established.'*

26. In essence, in the words of Mr Justice Elias (as he then was) in ***Redcats*** at paragraph 78:

> '*If there are no mutual obligations of any kind, there can be no contract. That is a simple principle of contract law, not unique to contracts of employment.'*

(c) Sufficient degree of control

27. The third element – that the employer must have a sufficient degree of control over the employee – does not mean that work must necessarily be carried out under the employer's actual supervision or control. The Court of Appeal has emphasised that what is required is the 'ultimate' ability of the employer to control the manner in which work is carried out; it is not necessary that the employee is subject to detailed factual control on a day-to-day basis: ***Troutbeck SA v White*** [2013] EWCA Civ 1171.

28. What constitutes sufficient control – and whether that means the imposition of a framework within which a person works or direct supervision of the performance of a person's functions – will vary from case to case. It is rarely a question of whether there is any control; but rather of whether there is enough control to render the relationship one of employer and employee.

29. In ***Troutbeck SA***, the question was not whether the respondent exercised day-to-day control over the claimants' work but whether it had, to a sufficient degree, a contractual right of control over them. The EAT had allowed the claimants' appeal, holding that the question does not depend upon the practical demonstration of control by drawing attention to particular instances when control has or has not been exercised, but rather on what is known of, or may be inferred from, the contract between the parties that is said to give rise to the employer's right to direct the individual in relevant respects. The EAT's judgment was upheld by the Court of Appeal.

30. In ***Commissioners of Inland Revenue v Post Office Ltd*** [2003] ICR 546, the EAT held that the obligations on sub-postmasters to keep accounts in a particular way, to notify the Post Office of various matters including sickness, to comply with requirements in the selection of staff and to meet certain quality standards, were all consistent with a contract "for" services. Such obligations were not sufficient to satisfy the control test. So, there are situations where even a substantial degree of control by the "employer" will not be decisive and will be outweighed by other factors.

31. By way of example, Mr Lewis referred me to the case of ***Brand v Paper Chain (East Anglia) Ltd*** EAT 653/92, where the EAT upheld an ET's decision that a manager of a newsagent's shop was self-employed, despite the fact that the respondent dictated the layout of the shop and display of stock; that any stock had to be purchased from nominated suppliers; and that it trained staff and provided them with uniforms. The degree of control had been necessary to protect the respondent's proprietary interest in the business and stock, and its trade image, but the claimant was still afforded independence in the way she carried out her duties and the ET had been entitled to place emphasis on the fact the claimant's business acumen and drive had a real influence on the extent of her income.

32. If the contract does not impose an obligation to provide services personally or if there is no mutuality of obligation throughout the period under consideration, or if there is no control present, then the contract in question cannot be a contract of employment. If all these elements are present, the contract *may* be one of employment. It will then be necessary to consider the surrounding circumstances to determine the nature of the relationship.

(d) The overall picture

33. In order to determine, once the irreducible minimum requirements are present, whether the contract is a contract of employment, it is necessary to paint a picture from the accumulation of relevant details. This means not only looking at the significant specific details in the instant case, but also standing back and considering the overall picture. This approach derives from ***Hall (Inspector of Taxes) v Lorimer*** [1994] ICR 218. The matters that are capable of being relevant are too numerous to list in full. However, they might include payment by wages or salary; whether the

worker provides his own equipment; whether he is subject to the employer's disciplinary and grievance procedures; receipt of sick pay or contractual holiday pay; provision of benefits traditionally associated with employment such as a pension scheme, health care or other benefits; whether the worker is a part of the employer's business, there are restrictions on working for others, he hires his own helpers, takes a degree of financial risk, has responsibility for investment and management or has the opportunity of profiting from sound management in performing his task. It involves looking also at the extent to which the worker is 'part and parcel' of the employer, for instance participating in staff training and other staff events.

(C) The law - employment status: 'worker'

34. I have set out the statutory definitions under s230 ERA and s82 EQA above. The following are necessary:

    a. First, there must be a contract, whether express or implied, and, if express, whether written or oral.

    b. Second, that contract must provide for the individual to carry out personal services.

    c. Third, those services must be for the benefit of another party to the contract who must not be a client or customer of the individual's profession or business undertaking.

35. When construing the nature of the contractual arrangements any regulatory requirements are not legally irrelevant and are simply part of the factual matrix to be assessed. A tribunal does not have to disregard factors simply because they might be said to arise from compliance with a particular regulation. In the ***Uber*** case, personal service was a regulatory requirement (of the private hire vehicle (PHV) licensing regime), but was also a relevant matter in determining worker status. The Supreme Court held that the fact that some aspects of the way in which Uber operates its business were required in order to comply with the (PHV licensing) regulatory regime could not logically be any reason to disregard or attach less weight to those matters in determining whether drivers are workers.

36. The Court of Appeal's judgment in ***Nursing and Midwifery Council v Somerville*** [2022] EWCA Civ 229 was published on 25 February 2022 after I had received written submissions of the parties. I do not believe it would affect those submissions in any material way, so did not return to them for further comment. The judgment upheld what had been decided by the EAT and clarifies that it is not necessary to establish an irreducible level of obligation on the parties for there to be a worker status. At paragraph 52, Lewis LJ held there is no requirement that, '*even where a person is working or providing services personally under a contract, there must be some superadded, distinct obligation on a putative employer to provide work or an individual to accept work before that can fall within the scope of limb (b) of regulation 2 of the Regulations'*. By contrast, when applying the test of 'mutuality of obligation' to determine whether a given

contractual agreement between parties is or is not a contract of employment, more is required. To be a contract of employment, it must be shown usually that there is an obligation to provide or pay for work on the part of the employer, and an obligation to perform that work on the part of the putative employee.

37. On personal service, I refer to paragraphs 20 and 21 above, which apply equally to the issue of worker status.

38. The final part of the definition of limb (b) workers is usually referred to as the 'client or customer' exception. In ***Byrne Brothers (Formwork) Ltd v Baird*** [2002] ICR 667, the EAT gave guidance on what it termed this "clumsily worded exception". It held the intention was to create an "intermediate class of protected worker" made up of individuals who were not employees, but equally could not be regarded as carrying on a business. The "essence of the intended distinction [created by the exception] must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves".

39. At paragraphs 17 and 18 of the EAT's judgment in ***Byrne Brothers*** Mr Recorder Underhill QC (as he then was) gave some helpful guidance:

> *17 We were referred to no authority giving guidance on that question; and we accordingly spell out our approach to it in a little detail, as follows.*
> *…….*
> *(5) Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services—but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken, etc. The basic effect of limb (b) is, so to speak, to lower the passmark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.*
>
> *(6) What we are concerned with is the rights and obligations of the parties under the contract—not, as such, with what happened in practice. But what happened in practice may shed light on the contractual position: see Carmichael v National Power plc [1999] ICR 1226, especially per Lord Hoffmann at pp 1234–1235.*
>
> *(7) ……*
>
> *18. Self-employed labour-only subcontractors in the construction industry are, it seems to us, a good example of the kind of worker who may well not be carrying on a business undertaking in the sense of the definition; and for whom the "intermediate category"*

> *created by limb (b) was designed. There can be no general rule, and we should not be understood as propounding one: cases cannot be decided by applying labels. But typically, labour-only subcontractors will, though nominally free to move from contractor to contractor, in practice work for long periods for a single employer as an integrated part of his workforce: their specialist skills may be limited, they may supply little or nothing by way of equipment and undertake little or no economic risk. They have long been regarded as being near the border between employment and self-employment: it is for this reason that their status has for many years been a matter of controversy with the Inland Revenue and has also given rise to a string of reported cases: see, e g, Lee Ting Sang v Chung Chi-Keung [1990] ICR 409 and Lane v Shire Roofing Co (Oxford) Ltd [1995] IRLR 493. Cases which "could have gone either way" under the old test ought now generally to be caught under the new test in "limb (b)". The fact that such a subcontractor may be regarded by the Inland Revenue as self-employed, and hold certificates to prove it, is relevant but not decisive.*

40. Further guidance on this issue has been provide by the Court of Appeal in ***Hospital Medical Group Ltd v Westwood*** [2012] IRLR 838. Indeed, leave to appeal to the court had been given expressly for that purpose. At paragraphs 16 and 17 of the judgment, Maurice Kay LJ referred to two previous cases of the EAT as follows:

> 16. *In two later cases, the EAT has suggested analytical tools which, although not of universal application, may provide material assistance in particular factual matrices. The first, upon which Mr Simon Gorton QC places particular reliance, is Cotswold Developments Construction Ltd v Williams, a claim pursuant to the Working Time Regulations, reg. 2(1) of which is in the same form as s.230(3) of the Employment Rights Act. The claimant was a carpenter who was engaged to work for the respondents who were themselves sub-contractors to a main contractor providing maintenance services to London Underground. Langstaff J said (at paragraph 53):*
>
> > *'… it seems plain that a focus upon 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.'*
>
> *Thus, he was emphasising indicative factors such as marketing services as an independent person to the world in general and, on the other hand integration in the business of the other party to the contract. These were advanced specifically as indications rather than principles of universal application.*

> *17. In James v Redcats (Brands) Ltd* [2007] IRLR 296*, Elias J (President) agreed that Langstaff J's formulation 'will often assist in providing the answer' (at paragraph 50). However, he referred to difficult cases where the putative worker does not in fact market his services at all, nor act for any other customer even though the claimant is not barred by contract from so doing. He further observed (at paragraph 52) that 'the attempt to map the boundary separating workers from those in business dealing with a customer has proved elusive'. He went on to derive 'some assistance' from cases which have analysed the definition of 'employment' in discrimination legislation. This involved the use of the 'dominant purpose' test in an attempt to identify the essential nature of the contract. Again, he was not suggesting that such a test would provide the solution as a matter of universal application. Yet again, it is a question of deploying appropriate tools in relation to specific factual matrices.*

Within paragraphs 18 and 20 he concluded that, whilst these tests may be a help to tribunals in some cases, they 'would be wise to eschew a more prescriptive approach, which would gloss the words of the statute', and there was not 'a single key with which to unlock the words of the statute in every case'.

41. Mr Lewis referred me to 3 interesting cases by way of contrast, which were decided in different ways on their facts. I quote from his submission the following:

(a) 'In ***Suhail v Barking Havering and Redbridge University Hospitals NHS Trust*** EAT 0536/13, the EAT held that an out-of-hours GP who also provided his services to an NHS Trust through a co-operative was not a worker. The co-operative's members' agreement described S as a self-employed contractor and his invoices were paid without deduction of tax or NI. There was no obligation on the co-operative to provide work, nor on S to accept assignments when they were offered. S was free to work for any other organisation, marketing himself to whichever locum agency offered the most attractive sessional work. HHJ Peter Clark noted that cases of this kind are particularly fact-sensitive. The essential point in a Court of Appeal case referred to, ***Hospital Medical Group Ltd v Westwood*** [2012] IRLR 838, was that, although W carried out other work, he had agreed to provide his services as a hair restoration surgeon exclusively to H, he did not offer that service to the world in general and he was recruited by H to work as an integral part of its operations. That exclusivity was wholly missing on the facts of ***Suhail***. In the circumstances, the co-operative could properly be regarded as his client or customer.

(b) The EAT distinguished ***Suhail*** in ***Community Based Care Health Ltd v Narayan*** EAT 0162/18, which also involved a GP providing out-of-hours services to the NHS. An ET held the GP was a worker. The judge took into account that the GP worked regular shifts for around 12 years, was required to work personally and did not have an unfettered right to send

a substitute. The judge also found that there was a critical difference between the instant case and ***Suhail***: whereas there the GP had been found to be marketing his services, in the present case, the GP worked regular shifts for one provider over many years. The EAT dismissed an appeal, finding no error of law in the judge's appreciation of the facts.'

42. In addition to what I have extracted above from ***Hospital Medical Group Ltd*** I would add that Maurice Kay LJ said at paragraph 19:

> *'…it is counter intuitive to see HMG as the claimant's "client or customer". HMG was not just another purchaser of the claimant's various medical skills. Separately from his general practice and his work at the Albany Clinic, he contracted specifically and exclusively to carry out hair restoration surgery on behalf HMG. In its marketing material, HMG referred to him as "one of our surgeons". Although he was not working for HMG pursuant to a contract of employment, he was clearly an integral part of its undertaking when providing services in respect of hair restoration, even though he was in business on his own account. That is apparent from, in particular, clause 3 of the agreement (summarised in para 9 of the employment tribunal's decision, set out at para 4 above).*

Under the said clause 3 of the claimant's contract with HMG, the employment tribunal had found he was required to give such advice and assistance to the respondent in connection with the provision of hair restoration surgery as the respondent might request from time to time; to make himself available for any further instruction or discussion as may be necessary; to obey all lawful reasonable directions of the respondent; and not to provide his services within the UK to any competitor of the respondent. Accordingly, whilst the tribunal found he was an independent contractor and not an employee, it went on to find he was a limb (b) worker and this was upheld by both the EAT and the Court of Appeal.

The evidence

43. I heard evidence from the claimant and Mr Steven Lomas, a director, shareholder and employee of the respondent dental practice. Both of them produced written statements as their evidence in chief (claimant -13 pages; Mr Lomas- 5 pages). However, before the claimant was cross examined, I questioned her at some length to get a fuller understanding of the overall picture and circumstances of her engagement by the respondent.

44. I received a bundle of documents running to 265 pages. References to page numbers of documents hereafter relate to the bundle.

45. I have to say with regret that the claimant struggled throughout to give a straight answer to a simple question. At times, she was also guilty of clear exaggeration and deliberate evasion. I consider she has read what she believed to be the relevant legal principles and attempted to make her evidence fit her claims. Possibly, this is out of her clear sense of

grievance, which has given rise to her claims.

46. As for Mr Lomas, I remain unconvinced that he really understands how the law operates in this field. At the end of the claimant's evidence, he commented she had admitted she was 'self-employed' at a point and in a way that suggested he was still unclear about the difference in treatment for tax and employment law purposes and the subtleties of limb (b) worker status contrasted with self-employed, but he may be forgiven for that.

The facts

47. The claimant is a qualified dentist. The respondent is a dental practice providing both NHS and private treatments at two locations in Crewe referred to as 'Hungerford Road' and 'Queen Street'. Prior to working for the respondent, she had been used to working as a self-employed associate dentist and enjoyed the freedom this gave her. In the summer of 2018, she heard the respondent was looking for a dental associate and saw this as an opportunity to learn and develop the practice of restorative dentistry and to undertake more private work.

48. The claimant applied and was interviewed. She was offered a position as a self-employed dental associate and sent a contract for signing. There followed negotiations in e mail exchanges over her start and finish times and clarifying payment terms (74-77). Terms were agreed and she started working for the respondent on 6 September 2018. There was no probationary period. By an e mail dated 2 October 2018 (78), she was sent an associate agreement for approval and was seen the same day by the practice manager, Lisa Bainham, to sign it. The respondent has produced an unsigned copy of the agreement and its 7 schedules (55-68). The claimant agrees she signed an agreement that looked like this one, but she was never given a copy. She did not dispute any of its terms that were put to her in cross examination. It is in the form of a model template agreement produced for dental practices by the British Dental Association ('BDA'). I am satisfied that she was employed on the terms of the agreement as produced ('the agreement'), though it is unfortunate that the original signed copy could not have been made available by the respondent. They say it cannot be located. There has been no suggestion that she signed it on any basis other than willingly and in full knowledge of its terms. It was always her intention to work as a self-employed associate dentist.

49. To accommodate her child care needs, it was agreed she could start later at 9.30am and finish at 5.00pm with a 45 minutes lunch break from 1pm. She contracted to work on Thursdays and Fridays each week. Under the agreement she was granted a non-exclusive licence to use the respondent's premises to provide both NHS and private treatment to patients in return for a licence fee. The agreement recorded the parties' intention that the claimant was self-employed and that the agreement was not intended to create a relationship of employer and employee and/or worker. The claimant was required to hold professional indemnity cover for negligence claims and was responsible for any costs incurred for replacing failed or defective treatment. She was required to pay her own

income tax and national insurance contributions. She was free to work for other practices during the currency of the agreement. She was entitled to arrange for a locum reasonably acceptable to the respondent to carry out any or all of her obligations under the agreement and also to assign the agreement to another dentist of equivalent experience to herself who was reasonably acceptable to the respondent and who confirmed in writing their acceptance of the agreement. The agreement provided for her to have complete clinical freedom in the way she treated patients. She was required to pay for her own training. The agreement made no provision for the taking of and payment for holiday pay or sick pay, nor were pension contributions to be paid by the respondent. There was no disciplinary or grievance procedure, as would be required by a contract of employment.

50. As for the claimant's remuneration, what happened in practice reflected what was in the agreement. She was paid by the respondent each month the agreed rate for each Unit of Dental Activity ('UDA') performed and she would receive 45% of the fee charged to any private patient. Out of those amounts she would be charged any associated laboratory costs and the cost of any failed treatments.

51. According to the BDA, self-employment has been the default status for associates in general dental practice for many years and this has been accepted by the Inland Revenue (264-265). The claimant was very familiar with this status and clearly preferred the freedom it gave her. With the respondent and her other engagements, she paid her own tax and national insurance and employed her own accountant to deal with her tax returns and affairs. HMRC has never challenged her self-employed status.

52. On Wednesdays, from around September 2018, the claimant worked for another dental practice in Warrington as a self-employed associate and continues to do so. In the last 3 years, she has worked at 3 other practices in Toxteth, Deeside and Birkenhead (where she works now in conjunction with the Warrington position). She was approached by one practice and she applied to the other two. All appointments were as a self-employed associate.

53. In February 2020, the claimant asked the respondent if she could work an extra day to do some private work. Initially she received a favourable response, but was then turned down as the respondent could not open the extra treatment space to enable her to do so due to inadequate staffing levels, and they preferred her to concentrate on filling up her diary on Thursdays and Fridays (97).

54. It is clear that different dental practices operate in different ways. For the respondent, and probably all practices, it was of paramount importance to comply with all regulatory requirements and meet the clinical standards required by the General Dental Council. NHS England also imposed conditions on practices regard to operating procedures and obligations on contract holders to deliver a certain number of dental activities – they are paid a certain amount for each UDA. The respondent employed a number of professional managers to make sure the practice operated efficiently

and in accordance with all the various regulations and procedures. However, within that framework, the dentists had complete clinical freedom to operate and were themselves as individuals subject to their professional rules and regulations.

55. The claimant's appointments were arranged by the receptionists when patients called in. The receptionists triaged each patient and estimated how much time would be needed. The claimant gave the receptionist a list of times she needed for different types of procedure. Sometimes, for whatever reason, there would not be enough time allocated for a particular patient's treatment. The claimant complains her timings were not respected, and she was at the mercy of the receptionists. She even suggested they should contact her before fixing an appointment to check how much time should be allowed. I find she has exaggerated here. In a busy practice, it would not be feasible or a good use of time to check each appointment length individually with each dentist. Most treatments are standard and the respondent's experienced receptionists would know how much time to allocate, but occasionally appointments were bound to fall short or overrun. Further, on the one hand, the claimant said she would not be permitted by the receptionist to carry on with a treatment if the allocated time had expired (in the respondent's expectation that the associate would arrange the follow-up appointment when they were able to specify the length of the appointment), yet on the other hand said she cut out the receptionist from the decision-making and 'did her own thing' to suit her opinion of whether to carry on or not according to what was in the patient's best interests.

56. Occasionally appointments had to be fitted into the claimant's diary when a patient needed urgent treatment. Sometimes the appointment would impinge on her lunch break. The claimant suggests this was part of the respondent's controlling behaviour. However, it was the same for everyone and a necessary part of operating a dental practice.

57. Under the agreement, the claimant had the right to refuse to accept a patient introduced to her, but she never sought to do so. Also, there was no restriction on the number of patients she could treat or the types of treatment offered other than those in superior agreements, namely those made by the respondent within the NHS system.

58. In terms of the treatment itself, the claimant had complete clinical freedom. She prided herself on providing a personalised service with a view to building relationships and trust with patients. She tailor-made her treatment plans and had her own method for giving pain-free injections.

59. For the performance of the claimant's treatment, the respondent provided the necessary equipment and the services of a dental nurse and administrative staff. The claimant paid for these through the licence fee. The schedule of remittances due to the claimant for the different types of work set out in schedule 3 of the agreement (62) are shown net of the charge for the licence, namely £12.49 per UDA and 45% of the patient's private fee. The claimant agreed to complete a minimum of 3000 UDAs each year. This was to contribute towards the respondent's provision as

agreed with the NHS for its practice as a whole, but it was not considered by anyone to be particularly stretching for the claimant. However, from August to December 2020, because of the Covid-19 pandemic, this target was reduced following the direction of the NHS to 20% to receive 100% of her contract value. From January 2021 to the end of the contract in May 2021, she was expected to perform 45% of her UDAs to receive 100% of her contract value. These payment variations were set by the NHS and agreed by the parties.

60. The respondent's administrative team handled the payment claims made on behalf of the claimant in respect of her treatments and accounted to the claimant, who was not required to submit invoices. She provided the necessary paperwork to the respondent's practice manager to enable her to make the claims to the NHS. Almost all the claimant's fees were from NHS treatments. The manager checked each claim before sending it on. On about 3 occasions the manager deemed the claims incorrect and changed them. As the claims were made in the name of the practice, they felt obliged to ensure they were correct as far as they were concerned. At other practices, they simply forwarded whatever was given to them by the claimant. The claimant decided not to challenge the respondent on these claims. She continued to leave it to them and relied on them for the record keeping.

61. If the claimant was ill and unable to attend the practice, she was asked to telephone first thing in the morning and confirm by the end of the day when she would be returning. She was not paid for sick days.

62. The claimant was required to give notice if she was intending to take a holiday or day off. Usually, she would e mail the relevant manager with her request. Even though she complained that she did not feel able to take holidays when she wished, she admitted there was never any problem save on one occasion when she asked for a day off and was told she would have to make it up on another day. That was when she requested a day off to attend a court appointment on 11 September 2020. However, in her request for the day off dated 2 May 2020, she said she would also need other unspecified days to attend court and she 'would be happy and willing to make up the lost days' (85). In the absence of a reply, she followed up the request and, in the manager's reply dated 18 August 2020 (86), she apologised for overlooking it and said they would 'find alternative days to cover [her] days holiday'. As was often the case with the claimant's evidence, she would make bold assertions of fact like this, only for the documents to show otherwise.

63. The claimant took maternity leave from March 2019 to October 2019. She received maternity based on her net pensionable earnings calculated by the NHS. All NHS dental associates are eligible to receive such pay. It is paid by the dental practice and refunded to it by the NHS. The claimant asked the respondent if they wanted her to arrange for a locum to stand in for her during her maternity leave. She says they told her not to worry as they would 'sort it'. She did not object at the time, but complains this is evidence of the respondent never allowing her to send anyone in her

place. As it turned out, the respondent decided to cover the claimant's work using existing staff.

64. At other practices where she worked, the claimant occasionally sent in another dentist to take her place if something came up and she needed to take the time off. She had dentists on whom she could call for that purpose and operated reciprocal arrangements. However, at the respondent's practice, the claimant never sought to send in anyone in her place. Of course, had she done so, she would have received no income from that work as the claim would be made in the name of the locum. She says she was never allowed to do so, but I find she never asked and, had she done so, the respondent would have complied with the agreement between them. This kind of arrangement is normal within the dentistry profession and there was no reason why the respondent would have prevented her from so doing.

65. Apart from when the claimant took maternity leave, there was only one further conversation between the claimant and Mr Lomas about locums. This was in January 2021 when NHS England required practices to increase their target UDAs from 20% to 45% of target in order to receive 100% payment. These targets had been revised in response to the Covid-19 pandemic when it was impossible to perform in the usual way. As part of their pandemic arrangements the respondent had had to employ a hygienist in the surgery where the claimant normally practiced and so were seeking to change the claimant's hours to 2pm to 8pm. As part of the conversation, Mr Lomas asked whether she would be using a locum if she could not manage such hours. The claimant said she was not willing to do so, presumably as it would have impacted on her earnings.

66. Whilst there was a right for the claimant to assign the whole agreement to another dentist who was of equivalent experience to her and reasonably acceptable to the respondent, she never sought to do so.

67. The claimant complains that she was forced to wear the respondent's uniform (221), namely burgundy-coloured scrubs (sanitary clothing worn by those caring for patients in a clinical setting), as part of her integration into the practice. She did not like their colour. In the other practices where she worked, she would take her own scrubs. Mr Lomas confirmed these were supplied to the claimant, but said there was no obligation to wear them. However, they formed part of the licence fee paid by the claimant. The claimant accepted there were others in the practice who did not choose to wear them. However, all the ladies on her NHS side of the practice wore them and it is noteworthy she accepted she wore them to 'blend in'. I do not accept there was any compulsion on her to wear them.

68. As further evidence of her argument that she was being integrated into the practice, the claimant said she was asked to write a piece for the respondent's website about child patients attending. I accept she did so.

69. The claimant said she was required by the respondent to attend training including on a day when she was not due to work. I was shown 2 messages sent on 7 January 2020 (134). The first concerns safeguarding

training on Thursday 30 January and states all clinicians 'really need to attend please' and confirms the Queens Street practice was being closed to ensure all could attend. The claimant said she was forced to attend all day and that she had no choice. She did attend and was not paid. There is no evidence that she objected in any way to attending and the training would have been of benefit to her continuing professional development. The second was on Tuesday 31 March for the whole day to deal with the practice's 'updates and future plans'. All employees and associates were asked to attend and to let the respondent know if it was not possible. Again, there is no evidence that the claimant objected or sought to excuse herself. She attended and received no payment.

70. Personal protective equipment ('PPE') in relation to the Covid-19 pandemic was sourced for the whole practice. Wearing a FFP3 mask would be necessary for any procedure involving aerosol generation (an 'AGP') and it was essential that these fitted each clinician satisfactorily. The respondent arranged for each person to be fit-tested for such a mask and unfortunately the claimant failed, meaning the mask would not fit satisfactorily and another means of protection would be required – a hood was suggested (92). This was expensive and, despite saying in evidence she had not offered to contribute to the cost, a document was produced to her in which she had stated she would contribute. The claimant said in her evidence, in a way I find unconvincing, that she had forgotten about that. Her offer to contribute then prompted the respondent to send the claimant an e mail in which she was told she would need to pay for it all herself as she was self-employed (93).

71. The respondent monitored the claimant's clinical performance to ensure her work met the standard expected of dental associates. As part of the regulatory system, it was incumbent upon them to do so and was obviously good business sense. There was one meeting referred to by the claimant to suggest she was being 'controlled' as if she were an employee, which was called an 'appraisal'. This took place on 16 January 2020 when all staff appraisals were being conducted and was recorded (191-193). Clearly the respondent used an appraisal template for use with its employees and it referred to the claimant as an 'employee'. The claimant accepted this was the only time such a form was ever used with her, whereas all employees of the respondent have an annual appraisal. She agreed this had been a useful opportunity to sit down and discuss how things were going and review her practice. At the end of the form the claimant wrote: 'Thank you for all the support to date'. There was no hint in the form of any dissatisfaction on the part of the claimant about the way the respondent was operating the contract between them.

72. The claimant was asked to write up her treatment notes and score X Rays in a particular way to fit in with the respondent's business practices. There were also procedures to follow in terms of making referrals, for example when a patient needed a service not offered by the respondent. The claimant found this to be too controlling. However, these matters were similar to those within the code of practice at schedule 6 of the associate agreement. The code was obviously needed to provide a consistency of approach across the respondent's practice.

73. The claimant had a complaint made against her by a child patient's mother. She was not allowed to handle it by Mr Lomas, who took control of it. I accept his explanation that this was because the mother would have nothing further to do with the claimant and, as she was a patient of the practice, he needed to placate her and deal with the complaint to avoid any escalation.

74. The claimant took responsibility for registering herself as a data controller with the Information Commissioner's Office.

75. As part of the response to the Covid-19 pandemic and standard operating procedures mandated by NHS England there were much less treatments administered by all dental practices and the respondent had to allocate other tasks to those working in the practice. As a result, the claimant was asked to vary what she did to include helping with all the extra cleaning of instruments required. Also, her hours needed to be changed in order to extend the overall operating hours of the practice and it was largely to do with disagreements over this that led to the contract being terminated.

76. The claimant did not actively market her services. There was no evidence that she wanted or needed more work than she was undertaking already.

77. The evidence covered a wide area and a good deal of specific detail, all of which has been considered by me in reaching my decision. In the findings of fact, I have recorded what I consider to be the most salient matters in resolving the issues.

Submissions

78. First, I received written submissions from Mr Lewis, running to 71 numbered paragraphs over 20 pages. A week later I received the claimant's written submissions, 37 numbered paragraphs over 14 pages.

79. I will not repeat the submissions here, but I have taken them into account in my conclusions.

80. The claimant's main thrust is that the associate agreement did not reflect the reality of the situation and that she was treated very much like an employee, particularly as far as control was concerned, where she claimed the respondent operated militaristic control and she was expected to do what she was told at all times and needed permission for many things.

81. The respondent's main arguments are that the associate agreement was entered into willingly with every mutual intention that this would be a self-employed arrangement. It submits it reflected the reality of the situation and, in every respect, the claimant arguments that she was an employee or, alternatively, a worker fail under all the various tests and principles of established case law on the subject.

Conclusions

82. Applying the facts as found to the law, I have concluded as follows. The claimant entered into the agreement with the respondent voluntarily. She was able to negotiate some of its terms. That showed she was able to look after herself. Nothing was imposed on her with which she disagreed. She accepted she was to be self-employed and conducted her affairs on that basis, paying her own tax and national insurance and employing her own accountant to deal with her tax affairs. She registered herself as a data controller. She obtained and paid for her own professional indemnity insurance. She accepted a degree of financial risk regarding having to put right failed treatments at her own expense. None of this is consistent at all with employee status.

83. The agreement clearly expressed the intention of the parties that the arrangement should be one of self-employment. Whilst it is trite law that the parties themselves cannot fix their status by agreement and it is a matter of law, it is a further factor here counting against employee status.

84. The claimant relies on ***Autoclenz*** for her proposition that the agreement was a sham and did not reflect the reality of the situation. She submits she was under the 'militaristic' control of the respondent. I have examined a number of her complaints in this respect within my findings of fact and have rejected most of them. Where there was a degree of control, such as requiring the claimant to give notice of her intention to take holidays or telephone the respondent upon being unable to attend due to sickness, that would be expected in any situation to enable proper planning and the efficient running of the practice. In other aspects, such as how appointments were organised and the system for obtaining payments and various administrative tasks, these were simply part of the respondent's need to create a business-like framework for its practice within which the claimant and other associate dentists operated. Also, certain exceptional practices were imposed on all dental practices at the time of the pandemic by the NHS, which necessitated changes being made to the claimant's agreement. She could have decided not to put up with those, but she accepted them. The limited monitoring of performance was necessary for the respondent to meet its own professional and regulatory obligations. On the other hand, and more importantly, there was no attempt whatsoever to control the way in which the claimant carried out her treatments, which were personal to her using her own initiative. This also gave her the opportunity to develop relationships with her patients leading to recommendations and repeat visits. That professional freedom easily outweighed the factors she complained about.

85. The training days and staff meeting days were not obligatory. The claimant chose to attend them. She would have derived a benefit from the training, which she did not have to pay for. It was probably sensible to attend the staff meetings to keep in touch with what was happening within the practice, but she could have declined.

86. I have found the scrubs provided were not a form of mandatory uniform and the claimant could have declined them and worn her own. In any

event, if the respondent had asked associates to wear one style of scrubs even with the name of the practice on them, it would not necessarily have indicated any integration into the practice and employment status. The same applies to showing or mentioning them on the practice website. Often, independent contractors are asked to 'badge' themselves as if they are part of the contracting party's organisation for presentation purposes.

87. The claimant's income depended on the number of UDAs performed and she was allocated a minimum of 3,000 per annum under the agreement, but this was not a limit to what she could earn with the respondent. Private work was also potentially available. The days worked, number of UDAs and the payment rates were all freely negotiated between the parties. As long as the claimant carried out the minimum number of UDAs over the course of the year, that would a comply with the agreement. This meant there was more freedom to do the work when it suited the claimant, and scope for doing more.

88. Also, the claimant had the freedom to earn other income by working for other dental practices, which she did.

89. Whilst equipment and practice facilities were made available to the claimant, she paid for them through the licence fee. In particular, standard PPE was provided by the respondent for all to use. However, when it came to the particular hood required for the claimant to wear instead of the masks provided, she was required to pay for it herself. That is more consistent with self-employment.

90. The agreement contained a right on the part of the claimant to appoint a locum in her place and also to assign the agreement. She complains these were not rights in reality. However, I find they were genuine. It is evident that in dental practices, locums are used frequently and the claimant herself has acted as a locum and also arranged locums for herself in other practices. The claimant could have appointed a locum to cover her maternity leave, if the respondent had needed one. Following a discussion, she agreed to leave it to the respondent to arrange whatever cover was needed. That suited her at the time. There was never any occasion when the respondent showed the slightest inclination not to allow a locum substitute. The fact that a right was not sought to be exercised is no basis, without further evidence, to suggest it was not a genuine right. It seems clear to me that the purpose behind the agreement is to have the patients seen and treated by a suitable dentist rather than having the treatment carried out by a particular person, and I find that was the case here. That finding is supported by the existence of the right to assign the agreement to another dentist. Had the respondent been concerned about personal service, such a clause would not have been agreed.

91. For all the above reasons, I am very clear there was no contract of employment between the parties. The agreement was entirely voluntary and not a sham. It did reflect the actual performance. In particular there was a genuine and unfettered substitution clause, meaning there was no legal requirement for personal service. The fact that the claimant chose not to exercise it, makes no difference. That finding alone is enough to

establish the claimant was not an employee. However, for the sake of completeness, I will give my conclusions on the other essential factors required for employment status.

92. On control, there was insufficient control to create a relationship of employment. Where there was an element of control, it was necessary either in the commercial or regulatory context and would apply irrespective of the status of the person involved. The claimant had complete control over the way in which the treatment was administered.

93. On mutuality of obligation, that test is probably more apt in the case of casual or agency workers. Nevertheless, the agreement here was for a certain amount of work to be performed over a year on two fixed days per week. Patients were introduced, but there was no obligation on the claimant to accept them. There was no obligation on her to attend and do the work on the fixed days, if she wanted to send a substitute under the terms of the agreement. She was also free to assign the whole agreement. She was at some risk of not being paid, where she was correcting treatment that had gone wrong. Again, none of this is consistent with a contract of employment.

94. Finally, standing back and looking at the overall picture, I see nothing to indicate employment status, and indeed it is quite the opposite with all the findings of fact (which I do not repeat) about how the agreement operated in practice pointing to self-employment. Accordingly, I determine the claimant was not an employee under s230(1) ERA, but was a self-employed contractor.

95. The next question is whether she would qualify as a limb (b) worker. Here I have found there was a contract in writing, but that it contained a genuine substitution clause. In some of the cases, attempts have been made to argue that, if the right to send a substitute is fettered in any way, then it is not sufficient to prevent worker status being established. An example is where the right can only be exercised if the contractor is unable to carry out the work. In the claimant's case, the only restriction on the right was that the substitute locum had to be reasonably acceptable to the respondent to carry out the claimant's obligations under the agreement. As long as that requirement was met, the claimant could send a substitute at any time irrespective of the circumstances, including whether she was fit to work or not. Whilst the right was not exercised in practice, it would have been reasonable for the respondent to have expected the locum to be a suitably qualified dentist and for the right to refuse on reasonable grounds to be construed in the context of meeting any genuine legal or regulatory concerns. Mr Lomas was not challenged on this. Accordingly, the condition does not, in my judgment, amount to a fetter on the right to send a substitute and the right here is inconsistent with personal service.

96. On this basis alone, the claimant fails to prove that she was a worker under s230(3)(b) ERA.

97. If I had to consider the client or customer exception, I would hold the claimant had a sufficiently arm's length and independent position as to be able to look after herself and was selling her services to the respondent as a client or customer of hers. The dominant purpose of the agreement was the provision of dental services, whether performed personally by the claimant or not. There was no exclusivity in the services she provided to the respondent; she was free to work for others and did so. She had her own reciprocal network of locums. She had her own business accounts and an accountant, who submitted her tax returns to HMRC. She was not paid when not working for any reason. She had to provide her own indemnity insurance. She was liable to correct faulty treatments at her own expense. She controlled her own data for regulatory purposes. The fact she did not actively market her services is not of sufficient import to counterbalance these other factors, which overwhelmingly point to the client or customer exception applying, so as to exclude limb (b) worker status.

98. Since the claimant was neither an employee nor a worker, she is not entitled to bring the claims made before the tribunal, and so those claims are now dismissed.

Employment Judge Battisby
19 April 2022