EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Mark Ter-Berg	v	(1) Simply Smile Manor House Limited (2) NHS England Midlands and East (3) Mr Parul Malde (4) Dr Colin Hancock

Heard at: Cambridge

On: 24 and 25 February 2020
26 February 2020 (In chambers – no parties in attendance)

Before: Employment Judge Ord

Appearances:

For the Claimant:	Mr W McNerney, Counsel.
For the First, Third and Fourth Respondent:	Mr S Butler, Counsel.
For the Second Respondent:	Ms C Heinz, Solicitor.

JUDGMENT having been sent to the parties on 13 March 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This matter came before me following the Case Management Hearing before and Orders made by Employment Judge Laidler on 17 January 2019, signed by her on 21 January 2019 and sent to the parties on 5 February 2019.

2. That case management hearing and those orders followed the Judgment on an Application for Interim Relief dated 17 January 2019 finding that it was likely that on determining the Claimant's complaint the Tribunal would find that the reason that (or if more than one the principal reason) for the dismissal was that specified in Section 103A of the Employment Rights Act 1996 and making an Order for the continuation of the Claimant's contract from the effective date of termination (9 November 2018) until the determination or settlement of the complaint.

3. The case management Order was for a further preliminary hearing to take place to determine whether the Claimant was an employee within the meaning of Section 230 of the Employment Rights Act 1996, so that he would be entitled to pursue a claim for unfair dismissal.

4. At the commencement of the hearing before me (which was that hearing so Ordered by Employment Judge Laidler, subsequently postponed to today), Counsel for the Claimant indicated that the Claimant's status generally was for determination at today's hearing (i.e. not merely whether or not he was an employee, but also whether he was a worker). Counsel for the Respondent objected saying that the Respondent was not in a position to deal with that secondary issue (worker status) and that the Order had been clearly to determine solely the issue of whether or not the Claimant was an employee.

5. I agreed with the Respondent's position. The directions for this hearing were entirely clear and precise. Further, the Respondent said, through Counsel – and this could not be gainsayed – that the Respondent did not have with it the evidence to deal with the issue of worker status because the Respondent had prepared for the hearing purely on the basis of it being to determine whether or not the Claimant was an employee.

6. On that the hearing proceeded before me. Where reference is made in this judgment to "the respondent" that is a reference to the first respondent.

The Hearing

7. Evidence was heard from the claimant. On behalf of the respondent evidence was called from Dr Colin Hancock (at the relevant time a director of the first respondent) and Denise Rasmussen (company secretary of the first respondent and the operations officer for the dental practice operated by it). A statement from Mr Malde, third respondent, was accepted by the claimant without the need for that witness to be called. Mr Malde is an investor in the first respondent and played no active part in the matters relevant to these proceedings.

Findings of Fact

8. Based on the evidence presented to me I have made the following findings of fact.

9. Prior to 1 April 2013 the claimant had been the principal of two dental surgeries operating as single practice. He had purchased them in 1992. He also set up an additional NHS dental practice in Brundall. Those business interests were sold to the first respondent in 2013.

10. Whilst a principal of the practices the claimant issued to those dentists working in the practice with him the standard form of British Dental Association Associate Contracts. He entered into a contract as an associate dentist with the first respondent from 1 April 2013.

11. An example of the Associate Agreement as issued by the claimant whilst he was a principle does not differ in any material way from that which he entered into on 1 April 2013. There were re-issues and amendments from time to time as follows:

    11.1 On 5 April 2013 the initial agreement was entered into (contemporaneously with, and I am told and I accept as a condition of the sale of the claimant's practices to the first respondent). In that document the claimant is said in the recitals to be "a Performer engaged by the Practice Owner to provide services under the Head Agreement and privately". The first respondent is the practice owner.

    11.2 The claimant was granted by the first respondent a non-exclusive licence and authority to carry on the practice of dentistry at specified premises and surgeries of the first respondent.

    11.3 The agreement was personal to the parties named it was not capable of assignment, charge or other disposition expect by way of termination.

    11.4 The agreement was said to exclude making of a partnership between the first respondent and the claimant and nothing in the agreement should constitute a contract of employment between the claimant and the first respondent.

    11.5 Other important operative clauses of the contract were as follows:

"8

(a) Subject to the Terms of this Agreement the Practice Owner shall provide for the use of the Associate the premises and maintain in good and substantial repair and condition the undermentioned 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 provision of dentistry the items referred to in (i) and (ii) having been identified by the Practice Owner to the Associate on the (Blank Date).

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

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

(ii) 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 a laboratory being agreed by the Associate to be generally acceptable).

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

9. The Associate shall not without the prior consent of the Practice Owner use the premises any equipment or services of the nature referred to in clause 10 other than the equipment and services provided pursuant to this Agreement.

10 The Associate shall at all times utilise the facilities in a proper manner and only upon and subject to the terms of this Agreement and shall indemnify the Practice Owner against all costs of any repair or replacement of any equipment occasioned by the negligence of the Associate.

12 The staff comprised in the services referred to in clause 8(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.

13 The Associate should at all times during the currency of this Agreement be a member of one of the three British defence bodies or carry insurance acceptable to the Practice Owner giving comparable benefits. The Associate shall produce evidence of current membership to the Practice Owner on request.

14 If any part of the equipment shall become unsuitable for its purpose the Practice Owner shall with due despatch cause the same to be replaced renewed or repaired.

16 The Practice Owner shall cause the facilities to be available at the following times except on days agreed by the parties to be holidays and the Associate shall use every reasonable endeavour to utilise the facilities for the aforesaid hours:

Mondays from 9.00 to 5.30
Tuesdays from 9.00 to 1.00
Wednesdays from 9.00 to 5.30
Thursdays from 9.00 to 6.00
Fridays from 8.30 to 4.30

17 Outside the aforesaid hours the Associate shall have reasonable access to the premises for proper purposes connected with the practice of dentistry at the premises (not being the treatment of patients).

18

a) In any calendar year the Associate shall not during the operation of this Agreement take more than (Number Blank) 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 4 weeks' notice of any holiday lasting 3 working days or more. The Practice Owner shall give similar notice to the Associate of holidays to be taken by the Practice Owner.

c) The Practice Owner shall give the Associate at least 4 weeks' notice of holidays of 3 working days or more to be taken by staff provided to assist the Associate and shall use every reasonable endeavour to arrange cover for the said staff.

d) The Associate shall be entitled to take 5 days' study leave for continuing education in any calendar year.

The Practice Owner may at his discretion close the practice on applicable public holidays and for the period between Christmas and New Year and the Associate shall have no claim in relation to non-provision of the facilities on such occasions.

19 The Associate may offer advice or treatment at the premises under private contract provided that such advice or treatment does not contravene the terms of the Head Agreement.

20 The Practice Owner may introduce to the Associate patients desirous of NHS dental advice or treatment and will endeavour to introduce sufficient patients to allow the Associate to meet the UDA commitment defined in clause 22 and Schedule 1. Subject to clause 21, and the terms of the Head Agreement, the Associate shall be under no obligation to accept for advice or treatment any patient so introduced provided that non-acceptance or the reason for it does not cause the Practice Owner to breach the terms of the Head Agreement.

21 The Practice Owner shall not place any restriction on the NHS patients that the Associate may attend or the types of treatment they may provide save that all NHS treatment the Associate provides must:

(a) be in full compliance with the Practice Owner's obligations and liabilities under the Head Agreement; and

(b) must not cause the Practice Owner to be in breach of the Head Agreement.

22 The Associate shall comply fully with the Practice Owner's policies, work systems and practices in so far as they are necessary for the Practice Owner's to meet their obligations under the Head Agreement. This includes, but it [SIC] not

limited to, requirements relating to Performers contained in the Head Agreement in relation to appraisal, continuing professional development, information governance, clinical governance and quality assurance.

23 The Associate is required in each NHS year, to provide the number Units of Dental Activity (UDA) shown in Schedule 1 to the agreement and for the period stated in the said Schedule. For the purposes of this Agreement, an NHS year shall be from 1 April in one year to 31 March in the next. If this agreement is terminated for any reason during the course of NHS year, the number of UDAs the Associate is required to provide in the NHS year of termination shall be calculated as the proportion of the NHS year up to the date of termination.

24 Where the Associate fails to meet the monthly UDA requirement or there has been no suspension of the availability of the facilities ….. the Associate shall compensate the Practice Owner as set out in Schedule 1.

25 The Associate must make reasonable efforts to ensure the performance of their UDAs is spread throughout the year and that they do not complete their UDA requirement before 31st March.

28 In respect of all patients attended by the Associate at the premises under either private contract or National Health Service agreements the Associate shall maintain full and accurate books and records of treatment afforded and fees payable. The Associate shall on request promptly make such information available to the Practice Owner. The Associate shall assist the Practice Owner by ensuring that any information required by the PCO will be supplied within the required time period.

29 The Associate agrees to abide by the practice's policies, procedures and work systems including those relating to health and safety, infection control, decontamination, information governance, confidentiality, data protection, freedom of information, patient complaints, staff employment and equal opportunities together with such other practice policies as have been duly notified to the Associate by the Practice Owner. The Associate shall further undertake any training or other action required for the Practice Owner and/or practice to meet the requirements of any relevant regulatory body.

GDS Performer Fee

(c) There will be no payment made for any UDAs provided by the Associate or their locum tenens in excess of the Associate's annual requirement unless agreed by the Practice Owner.

(e) Any financial sanction imposed on the Practice Owner due to the failure by the Associate to meet relevant UDA requirements in this Agreement will be paid by the Associate.

(g) Where applicable and subject to clause 36 the Associate is entitled to 100% of the following payments listed in (i) to (v) made by the NHS in respect of the Associate:

(i) Sickness payments.
(ii) Adoption payments.
(iii) Maternity payments.
(iv) Paternity payments.
(v) Seniority payments.

(h) The Associate will be responsible for the entire cost of any laboratory work in accordance with Schedule 1.

32 The Associate shall discharge personally all their personal tax and national insurance liabilities.

36 In the event of the Associates failure (through ill health or other cause) to utilise the facilities for a continuous period of more than 20 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 PCO and 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 that the method of payment of the locum tenens. The Practice Owner will notify the PCO 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 of a Primary Care Trust in England. The Associate will confirm to the Practice Owner that the requirements of the immediately proceedings sentence have been carried out and will provide the Practice Owner with such relevant information as he/she may reasonably require.

37 Save as set out in clauses 38 to 41 inclusive, this Agreement may be terminated by 3 months notice given by the Associate to the Practice Owner or 3 months' notice given by the Practice Owner to the Associate. Earliest termination date shall be two years following the date of this Agreement.

38 This agreement shall be subject to immediate termination by the Practice Owner by giving notice to the Associate if the Associate shall:

(a) be refused entry to, be disqualified or removed … or suspended from the Dental Performers List of any Primary Care Trust in England or Local Health Board in Wales.

(b) become bankrupt or insolvent or compound to make arrangement with his creditors.

(c) be guilty of any conduct likely to significantly injure the Practice Owner and his profession or act in any manner likely to significantly prejudice the reputation or business interests of the Practice Owner or the practice.

(d) be suspended or erased from the Dentist's Register.

(e) be guilty of any conduct that leads to the termination of the Head Agreement.

(f) provide a reference that is not satisfactory ….

(g) be unable to provide the Practice Owner with satisfactory evidence that their name appears on a Dental Performers List within 7 days of the start … of this agreement …

(h) be in breach of any of the warranties in clause 7.

44 The goodwill relating to patients treated by the Associate at the premises belonging to the Practice Owner during the notice period or after termination of the agreement the Associate shall not inform such patients of new practicing arrangements after termination of this agreement unless requested to do so by such patients.

45

a) For the purpose of protecting the goodwill of the practice on the Associate ceasing (for whatever reason) to be an Associate of the practice, the Associate will not:

(1) for a period of 12 months carry on practice as a general dental practitioner at premises situated within a radius of 2 mile(s) from Long Stratton …

(2) for a period of 3 years within a radius of 10 miles from Long Stratton … provide any professional service of any kind normally provided by a general dental practitioner to any person who was at the date of their so ceasing, or had been at any time within the period of 12 months prior to their so ceasing, a patient of the Associate as defined in clause 50(b).

(3) for a period of 3 years solicit in any manner any person who was, at the date of their so ceasing, a patient of the Associate …

(4) during the period of 12 months after termination of this Agreement either on their own or in partnership or through a corporate body either directly or indirectly solicit, canvass, approach or endeavor to entice away from the Practice any employee of the Practice.

(5) at any time after the termination of this Agreement, howsoever caused, make use of any corporate or business name in connection with dentistry which is identical to or is likely to be confused with the name Manor House Dental Practice or which might suggest an ongoing connection with it.

47 The Associate shall at all times remain liable for dental, medical or clinical negligence or alleged dental, medical or clinical negligence on the part of the Associate in connection with this Agreement.

48 The Associate shall during the operation of this Agreement display the usual professional announcements and signs outside the premises subject to the Associate at their own expense obtaining all and any necessary consents and permissions in respect thereof and he/she will similarly be entitled to remove them on termination."

12. Under Schedule 1 the financial arrangements and charges for licence are set out.

13. On a separate sheet attached to the agreement is the "UDA Requirement". Under that agreement the Associate, i.e. the claimant, was to provide no more than 4800 units of dental activity during the NHS year, which was to be the maximum amount payable under the agreement without prior agreement with the practice owner with a monthly limit of 400. At least 30% of the UDAs were to be provided by 1 October each year.

14. Further, if at the end of the NHS year the Associate had not met their annual UDA target the practice owner may require the Associate to pay the practice owner an amount equal to the licence fee applicable per UDA multiplied by the shortfall in UDAs provided and to the extent those UDAs have not been completed by another performer at the practice.

15. Under Appendix A to the agreement, made the same day, the claimant agreed to accept responsibility for a number of matters of governance, performance monitoring and complaint handling in relation to the first respondent. He was to be paid a maximum of £500 each month for undertaking the clinical governance role at Manor House and was to be paid a travel allowance for travel between the practices.

16. In 2015 the claimant's role as clinical lead at Manor House and Brundall dental surgeries came to an end and this was then carried out by a Mr Fenn.

17. At that time the claimant asked to alter his current UDA allocation for the then current year to 5400 per annum.

18. The unchallenged evidence of Dr Hancock was that the number of UDAs to be carried out by the claimant in each year was chosen by the claimant. The first respondent agreed to the claimant's request to carry out a specific number of UDAs each year.

19. Equally, the times when the claimant worked (two days per week, Tuesday and Thursdays with one additional Monday per month) were the times chosen by the claimant to which the respondent agreed.

20. The claimant accepted that in the event that there was a shortfall in his number of UDAs being carried out there was a formula in the agreement which would apply to the recovery of monies from him (the first respondent

having contracted with the primary care provider to provide an overall number of UDAs).

21. Although there was a year when the number of UDAs from the practice fell below 96% the contracted number it was also confirmed that at no time did the claimant fail to meet his UDA target.

22. The claimant accepted in his evidence in chief that when he was initially engaged by the first respondent he was engaged as a self-employed contractor. His case was that matters changed over time so that he "realised that the employment relationship was not one of a self-employed contractor but more of an employer/employee".

23. In his application to the Tribunal the claimant set out the basis upon which he said he was an employee. There are four sections to that part of his case and they are recited below. It is said that:

> "The claimant avers on the following basis that he was an employee of the first respondent under s.230(1) ERA.
>
> (a) The claimant had worked for the first respondent from April 2013 and had always been provided with work by the first respondent in this period and had always been required to carry out the work. The claimant contends that there was an obligation on the first respondent to provide work and for the claimant to accept this work, and therefore a mutuality of obligation. Under the claimant's contract he was required to deliver a requisite number of UDAs and the first respondent was required to facilitate the provision of such work for the claimant to fulfil these obligations as set out at clause 23 of the claimant's contract with the first respondent. The claimant worked 14 hours per week on Tuesdays and Thursdays and one Monday per month.
>
> (b) The claimant was fully integrated into the first respondent's practice in that his contract provided for holidays and how these should be taken and when (clause 18). He was required to comply with all the first respondent's policies and procedures (clause 29) including the disciplinary policy. Furthermore, the claimant's contract provided for entitlements to paternity and adoption leave (clause 34) akin to a contract of employment and a fully integrated employee rather than a self-employed contractor who has no entitlement to such leave. The first respondent also dealt with all the payments from patients (clause 30) meaning the claimant bore no financial risk with the working arrangements. The claimant's contract also provided for far reaching restrictive covenants in relation to the claimant's future activities and activities during employment (clause 45). The claimant was very much tied to working for the first respondent and had no control over his work or the ability to undertake other work. Furthermore, the claimant was fully integrated into the first respondent's practice as he would be required to attend staff meetings. The first respondent also controlled which patients the claimant would see for treatment. The claimant was also a Care Quality Commission manager for the practice until his dismissal.
>
> (c) The first respondent exercised a significant degree of control over the claimant to suggest he was an employee. The claimant was required to deliver a set number of UDAs. The private patients that the claimant saw

under his contract were provided by the first respondent through the practice. The first respondent provided the claimant with all of his equipment to carry out his role as a dentist, and also would provide replacement equipment if anything broke or needed repairing. The claimant was not able to provide any of his own equipment to use whilst working for the first respondent. Further, the first respondent also provided the claimant with access to a dental nurse for the better performance of his role. The claimant was not required to deal with any cash handling from patients and this was dealt with by the first respondent. As set out above the claimant was subjected to control by the first respondent in relation to holidays, and following their policies and was subjected to the first respondent's appraisal system. If the claimant was behind on his targets for UDAs then he was called to task over this at bi-monthly meetings. The claimant was required to attend performance meetings on a bi-monthly basis to deal with UDA targets and was also required to attend staff meetings.

(d) The claimant was required to provide personal service. The claimant's contract provided for provision of a locum at clause 36. However, the claimant contends that this was not a genuine substitution clause and was never engaged by the first respondent should the claimant be absent due to illness."

24. It is on those bases that the claimant alleges that he was an employee.

25. In their response the respondent replies as follows:

"(1) The claimant's contract is a standard agreement used and recommended by the British Dental Association.

(2) The claimant has exercised his rights under the Associate Agreement.

(3) The claimant also used his own dentistry equipment.

(4) The claimant's contract clearly states the contract was not one of employment.

(5) The terms are not consistent with a contract of employment.

(6) The claimant himself was under no suspicion [but] that he was self-employed.

(7) The claimant derived tax benefits from his tax status as a self-employed entity.

(8) The claimant is construed as self-employed by HMRC for tax purposes.

(9) The claimant was responsible for his own Tax and National Insurance.

(10) The claimant despite his application for interim relief has indicated via letter to the first respondent the he is pursuing them through the civil court system for unpaid Associate fees. The respondent submits that this act demonstrates that the claimant himself does not believe that he ever was an employee of the first respondent as logically if he did these losses would be claimed for under this claim."

26. Importantly the claimant accepts that when he entered into the agreement, which was not changed in any material way (other than the claimant giving up his role as clinical lead which was an addendum or annex to the agreement in any event) during the course of his engagement with the first respondent, he was contracting as, intending to be, and was being engaged by the first respondent as a self-employed contractot.

27. The intention of the parties when they entered into the agreement therefore was, as the parties both agreed, that the claimant would not be an employee of the first respondent.

28. The claimant continued to emphasise this. On 30 October 2013 he sent an email to Ms Rasmussen which included these words:

> "You must remember we are not employees but independent contractors paid on piece rate."

29. The first respondent did not lay down any terms as to how and when the claimant should take holiday. There is no provision in the agreement for holiday pay and the only requirement (the number of days holiday being left blank in the agreement) was for the claimant to advise the first respondent of any holiday lasting 3 working days or more at least 4 weeks in advance.

30. The claimant was in receipt of a memo, which was sent to all persons working within the first respondent's businesses (addressed to "All Staff") regarding General Data Protection Regulations and the requirement that no one should share their password for computer access with anyone. The memo concluded with these words, "If you are found to be allowing access knowingly or unknowingly you will be subject to a disciplinary process.". It was the evidence of Ms Rasmussen that this would not, in relation to an Associate dentist – including the claimant – mean a process under the staff disciplinary policy. She gave that evidence during cross examination and it was not materially challenged. I accept it.

31. The provisions for maternity/adoption/paternity leave and payments deal with arrangements to be made for the care of the Associates private patients and discharge of their responsibilities under the agreement to be made at least 1 month before the expected date of commencement of leave and for the payment to the Associate of any NHS payments received for the benefit of the Associate.

32. As a fact it is not correct that the claimant carried no financial risk. If through his default he failed to carry out the relevant number of UDAs in the year then there was a recoupment process which would result in the claimant having to re-pay to the first respondent the value of the shortfall in those UDAs. The claimant was obliged to carry the cost of repair and replacements of private treatment.

33. The evidence of Ms Rasmussen was that the respondent set a minimum private charge fee for private patients. She could not say with certainty whether there was any ceiling price also set and thus whether the price was set on a "from" or a "between" basis. She confirmed, and it was not

disputed, that either from the low point or between the two points the claimant could set his own fees. Notwithstanding this being part of the claimant's case, he had not obtained and did not provide a copy of the charging scheme.

34. In the claimant's evidence he said that the first respondent provided him with "the majority of my equipment and materials". Inevitably, therefore, the minority was provided by him.

35. The claimant complained in evidence that he was subject to the respondent's clinical audit system checking his record keeping in matters relating to radiography. His evidence was that these are part of compliance standards "but are only required to be carried out by the practitioner". He accepted under cross examination, however, that the respondents' liability under the Head Agreement lies with the first respondent and that they can appoint a delegated person to carry those activities out. The claimant said that there was no compliance "requirement" for audits to be carried out by a third party but he did not say that there was any bar to those compliance requirements being carried out by a third party.

36. The claimant complained in evidence that he was told he could only use certain types of materials and the brand of materials he used and that he was told to use the laboratories approved by the first respondent. Under cross examination he accepted that he was at liberty to use other materials or laboratories but that the excess cost (ordinarily 50% would be paid by the first respondent and 50% by the claimant) would be borne 100% by him.

37. In relation to the question of substitution, the claimant said that he had no right "just to appoint a substitute to step in and carryout my duties" and that the contract was to provide personal services. He said in his evidence and on oath that he did not believe the locum clause was a genuine clause. He said it was never utilised nor did he see it used by another Associate.

38. Though his counsel, however, the claimant accepted that the locum clause was a genuine clause. The fact upon which the claimant relied was confirmed, through counsel, as being the fact that it was never used. He accepted that it was a genuine clause but one which was never used and thus he said the claimant did not have a right of substitution.

39. The respondent's position can be shortly stated. The respondent says, first, that the intention of the parties throughout was that the claimant would be a self-employed Associate. The claimant has himself contracted with Associates when he was a principle on exactly the same terms and they had always been considered to be self-employed. The intention at the time the contract was entered into was that the claimant would not be an employee. Both parties conducted themselves throughout on that belief and assumption.

40. Indeed, the respondent relied upon the fact that in his own evidence the

claimant accepted that he was engaged, initially, as a self-employed contractor.

41. The respondent says that the contract or agreement was thereafter complied with by both parties at all times.

42. I note that the agreement contains within it a mediation clause which states that:

> "If any dispute or difference shall arise between the parties or their representatives either during the continuance of this agreement of afterwards concerning the construction or application of this agreement or the rights, duties or liabilities of the parties then the matter in dispute or different shall be in the first instance be referred to the BDA mediation scheme or such other mediation or conciliation scheme as the parties may agree; and the parties shall use their reasonable endeavours and good faith to agree a solution to the dispute or difference."

43. I have not been advised that any reference to BDA mediation scheme was made by the claimant in the event that he considered there was any dispute regarding the position under the agreement.

44. The respondent pointed out, and it is correct, that the claimant does not identify when he says his employment began. In his application to the Tribunal he says it began on 1 April 2013, the date upon which he sold his businesses to the respondent. That, however, runs contrary to his own evidence which is that he was engaged as a self-employed contractor but "over time … realised that the first respondent was attempting to exercise more control".

45. Further, at no stage did the claimant assert, prior to termination of the agreement, that he was an employee. When asked under cross examination why he had not done so, he gave no answer other than to say that it was "not straightforward".

46. When asked by me during the course of closing submissions, what had changed in the agreement in terms of its implementation or the parties' intentions during the currency of the agreement, counsel for the claimant relied solely upon the fact that the substitution/locum clause had never been used. He had accepted on the claimant's behalf that it was a genuine clause. The claimant referred in his evidence to it being "untenable". When asked to explain this the issue related not to the efficacy or practicality of the implementation of the clause but to the financial implication to him (i.e. that if he used a locum to carry out work his net income would be substantially reduced).

The Law

47. Under Section 230 of the Employment Rights Act 1996,

> 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.

48. Further, under sub-section (2) of that Section,

> A "contract of employment" means "a contract of service or apprenticeship whether express or implied and (if it is express) whether oral or in writing.

49. I have been referred to a number of Authorities in this case, in particular I note the following:

49.1 Arnold v Britton and Ors [2015] UK SC 36, where the Supreme Court emphasised (per Lord Neuberger) that,

> *"…reliance placed in some cases on commercial common sense and surrounding circumstances… should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision."*

49.2 Autocleanz Limited v Belcher [2011] UK SC 41, where the Supreme Court held that for a contract of employment to exist there had to be an irreducible and minimum of obligation on each side and that a right of substitution is inconsistent with employee status. The question of whether or not the right to provide a substitute was not used, was not relevant provided it was genuine. The fact that a term is not enforced does not mean that such a term is not part of the agreement.

49.3 Community Dental Centres Limited v Sultan-Darmon [2010] IRLR 1024, where the Employment Appeal Tribunal held that a dentist was not, in the circumstances of that case, an employee when using the model form of contract provided by the British Dental Association (as the parties did in this case).

49.4 Hafal Ltd v Lane-Angell UKEAT/0107/17 where Mr Justice Choudhury stated that a Tribunal must have regard to the terms of (in that case) a letter of appointment. That letter of appointment was not said to be a sham designed to create an impression of casual work when in fact the relationship was one of employment. Any such allegation would in that case have been contrary to the claimant's pleaded case where she acknowledged that she was employed on a "bank basis", her case being that the position evolved over time to become something more formalised.

49.5 Mental Health Care (UK) Ltd v Edward Lupen Healthcare Ltd & Others C40MA058, His Honour Judge Pelling QC holding that in deciding the question of whether or not an individual was an employee focus had to be on the true intentions or expectations of the parties. If the allegation was that a written agreement did not

properly reflect those intentions the role of the court was to determine objectively what the parties had actually agreed at the time the contract was entered into. The enquiries are multi-factorial one focusing on reality and the true intentions or expectations of the parties. An unfettered freedom to substitute is inconsistent with a contract of employment but a limited or occasional power of delegation may not be. The more limited the right the more likely it is the contract will be construed as being one of service rather than services (per Pimlico Plumbers Ltd & Another v Smith [2018] UKSC 29).

49.6 Wright v Aegis Defence Services (BVI) Ltd & Others [2018] UKEAT/0173/17/DM. In that case Langstaff J determined that the question of whether or not control existed (sufficient to make a finding of employment) did not depend on the practical demonstration of control by drawing attention to occasions when it had or had not been exercised, but on the contract which was said to give rise to the right or power of the alleged employer to direct.

49.7 Pimlico Plumbers Ltd & Another v Smith [2018] UKSC 29 (as referred to above). Protectacoat Firthglow Limited v Szilagyi [2009] EWCA Civ 98, where the Court of Appeal confirmed the obligation on a court was to consider whether the words of the written contract confirmed the true intentions or expectations of the parties, not only at the inception of the contract but if appropriate as time went by. Quashie v Stringfellow Restaurants Ltd [2012] EWCA Civ 1735 where lack mutuality of obligation (in that case between a lap dancer and the club at which she worked) with neither an obligation to make work available or to undertake any work meant that the terms of any agreement between the parties did not amount to a contract of employment.

49.8 Rainy Sky SA & Others v Kookmin Bank [2011] UKSC 50 where Lord Clarke held:

> "The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

But that:

> "Where the parties have used an ambiguous language, the court must apply it."

49.9 Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance [1967] 2 QB 497 confirming three conditions which must be fulfilled for an employment relationship to exist:

1) An agreement that in consideration of a remuneration a person will provide their own work and skill in performance of some service for the other.

2) An express or implied agreement that in performance of that service he will be subject to the others control in a sufficient degree to make that other person "master".

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

49.10 Wood v Capita Insurance Services Ltd [2017] UKSC 24 confirming that the task of a court when interpreting contractual terms was to identify and give effect to the agreement of the parties, not to make some different bargain because the court thought the parties or one party would have been wiser to do so.

49.11 Augustine v Econnect Cars Ltd [2019] UKEAT/0231/18. In that case whilst the individual was, when working, subject to substantial control (as to wearing a suit and tie, accepting jobs allocated to them, promotion of the image of the "employer" and appropriate standards of communication) it was the individual who determined whether, when and how often he would work and subject himself to those obligations. In those circumstances Mr Justice Kerr held that a Tribunal could on that basis decide that whilst control was sufficient for a contract of service at stage 2 that a degree of autonomy in deciding whether or when to work was a factor pointing away from a contract of service at stage 3.

49.12 Yorkshire Window Company Ltd v Parkes [2010] UKEAT/0484/09. In that case His Honour Judge Serota QC emphasised that the role of the court was to construe the contract not to deal with general policy considerations.

50. I have also been provided with copies of four earlier Employment Tribunal decisions (Hardie v Lochinch Limited 4108097/2015; Kalsoom v Castle Dental Care 1301402 & 1302468/2008; Lynn v Damira Dental Studios Limited 2424246/2017 and Moodley v Stock Road Dental Surgery Limited & Others 3200920/2015). Those cases are not binding upon me and have been considered by me for assistance.

Conclusions

51. Applying the facts found to the relevant law I have reached the following conclusions.

52. The starting point for any consideration of the terms of the agreement between the parties is the agreement itself (per Arnold v Britton).

53. The agreement entered into between the parties was contemporaneous with the agreement by the Claimant to sell his dental practices to the Respondent.

54. The wording is straight forward and is set out in a standard form of associative agreement for use in general dental surgery contracts. It is effectively identical to those contracts which the Claimant himself issued to dentists working in his practices and he accepted that at all times he considered them to be self-employed and not employees.

55. In the agreement the following clauses are relevant:

    55.1 Under Clause 5 – *"nothing in this agreement shall constitute a contract of employment between the practice owner [i.e. the Respondent] and the Associate [i.e. the Claimant]."*

56. Further, the agreement was annexed (in draft, not altered as far as I have been told at execution) to the sale agreement between the Claimant and the Respondent.

57. In his own evidence before me, the Claimant accepted that the intention of the parties at the time the agreement was entered into, was that he would be engaged as a self-employed contractor. In his own evidence, he said that he was,

    > *"Initially… engaged by the First Respondent under an Associate Agreement as a self-employed contractor".*

58. Further, the Claimant asserted his status as a self-employed contractor following the signing of the Associate Agreement. On 30 October 2013, he wrote to Ms Rasmussen stating,

    > *"You must remember we are not employees but independent contractors paid on piece rate".*

59. On 18 June 2014, he wrote again to Ms Rasmussen stating,

    > *"If you look at the contracts we signed, we are self-employed contractors – we pay 50% of our income to SS Limited who provides us with the facilities and access to the patients… Therefore, the primary business activity of SS is to support us, the dentists."*

60. The Claimant was not bound, under the terms of the Associate Agreement, to work solely for the Respondent. He emphasised the fact that he did not work for any other practice, but he was at liberty to do so provided he was not in breach of any covenant in the sale agreement.

61. Having therefore agreed at the commencement of the arrangement that the intention of the parties (and I found the wording of the agreement made between them) was entered into on the basis that the Claimant would be a self-employed contractor, the Claimant set out in his witness

statement a number of reasons why he believed that his position had become one of an employee.

62. It is right, however, to say this. The matters which the Claimant sets out in his witness statement are matters which are either set out in the Associate Agreement (which specifically states it is not a contract of employment and which the parties did not intend it to be) and he does not identify particular changes from that agreement which would serve to alter that position, nor does he say that the written agreement between the parties was not as they intended or that it failed to reflect the position as it was "on the ground".

63. Dealing with them, however, the position is, I find, as follows,

63.1 Clause 18 of the Agreement deals with holiday. The Claimant alleges that the Respondent controlled how and when he should take his holidays. But the Agreement does not limit the amount of time of holiday the Claimant could take, simply required him to give the practice owner 4 weeks' notice of any holiday lasting 3 working days or more (which the practice owner would reciprocate). As the Respondent pointed out, however, the number of Units of Dental Activity (UDAs) which the Claimant agreed to perform under the Agreement was not adjusted by any period of holiday absence. No payment was made if the Claimant was absent on holiday. If the Claimant took holiday, he would not make any income.

63.2 This is not consistent with the Claimant's argument that the presence of Clause 18 pointed to a contract of employment.

63.3 Clause 34 of the Agreement reads,

"In the event of the Associate taking maternity / adoption / paternity leave, the parties shall agree arrangements to be made for the care of the Associate's private patients and discharge of his / her responsibilities under this agreement; such agreement to be made not later than one month before the expected date of the commencement of leave."

63.4 Clause 35 of the Agreement reads,

"The practice owner will apply for NHS maternity / paternity / adoption leave payments on behalf of the Associate and pay the whole amount to the Associate".

63.5 The Claimant accepts that he would not be entitled to any payment or maternity / paternity or adoption leave and thus any application for such payments from the NHS would result in a nil payment. The Claimant would not receive any payment during any such leave and thus, like holiday absences, the Claimant would suffer financially when he took them and would still be required to meet the number of new UDAs.

63.6 Clause 22 of the Agreement states that the Associate would comply

with the Respondent's work systems and practices in so far as they are necessary for the Respondent to meet their obligations under the Head Agreement (i.e. that between the Respondent and the NHS England). That is said to include but not be limited to,

"requirements relating to performers contained in the Head Agreement in relation to appraisal, continuing professional development, information governance, clinical governance and quality assurance."

63.7 Clause 29, the Claimant agreed to,

"abide by the practice's policies, procedure and work systems, including those relating to health and safety, infection control, decontamination, information governance, confidentiality, data protection, freedom of information, patient complaints, staff employment and equal opportunities, together with such other practice policies that have been duly notified to the Associate by the practice owner".

64. The Respondent pointed out that there is no disciplinary or grievance policy or procedure referred to. Further, I find that these requirements were for the following reasons:

64.1 To ensure that no act or omission of the Claimant would adversely impact on the respondent's position vis-à-vis NHS England, because to do so would cause financial harm to the Respondent, perhaps irreparable harm.

64.2 The Clause remained the same from the moment it was signed by the Claimant at which time he was satisfied that, in accordance with Clause 5 of the Agreement, there was no contract of employment and in accordance with the intention of the parties he was a self-employed contractor.

65. The Claimant said that he did not have any financial risk in respect of the work he was undertaking because the First Respondent dealt with payments for dental work which were paid to the First Respondent.

66. This does not, however, give the full picture. If the Claimant did not complete the number of UDAs he had agreed to perform, then he would suffer financially. The Claimant was to bear a portion of bad debts and thus if the Claimant's patient did not pay for the advice and treatment he received, this would be at the Claimant's risk.

67. The Claimant pointed out that he was registered for administrative purposes with the NHS Area Team as the Practice Owner. Further, the Respondent said that this was an oversight or failure on its behalf to notify the appropriate Area Team of this change and there was no evidence to contradict this. In any event, the Claimant did not explain how he being registered as the Practice Owner made him an employee of the practice nor how it impacted upon his status as a self-employed contractor (that being the party's intention at the time the Agreement was entered into).

68. The Claimant relied upon the fact that he was identified on the Respondent's website as being part of the team of dentists working at the First Respondent's premises. The Respondent points out, however, that the website did not state that the Claimant was an employee and merely informed the public that the Claimant was a dentist performing services at the practice.

69. Further, it is not clear when that website showed the Claimant as a dentist working at the Respondent's premises. The Claimant had been asserting his position as a self-employed contractor in June 2014.

70. Although the Claimant set out in his statement that the First Respondent had control of which patient he saw and set the level of charges to be made, Clause 20 of the Agreement set out that the Claimant did not need to see NHS patients and the Claimant was under no obligation to accept patients for advice or treatment or any patient introduced by the Respondent provided it did not cause the Respondent to breach the terms of the Head Agreement.

71. The Claimant accepted, under cross examination, that he had the authority to determine what treatment the patient should receive and that the Respondent could not determine what was to be done or how it was to be done.

72. The Claimant stated that the Respondent dictated the materials and suppliers to be used and that he would only use certain dental laboratories. He accepted under cross examination that this was not correct. The Respondent supplied materials and a dental laboratory but it was entirely a matter for the Claimant to determine which dental laboratory to use. If the Claimant chose to use a dental laboratory other than that indicated by the Respondent, he could do so but any additional cost would be his own.

73. Equally, although the Claimant said he could not use his own equipment and he accepted he provided his own clinical wear and other additional items and if he wished to use his own equipment he could do so provided he obtained the consent of the Respondent.

74. The Claimant also said that he was under the control of the Respondent because the Respondent would undertake clinical orders. That is a requirement of the main contract and was nothing more, in the Respondent's words than

> *"monitoring of the Claimant's performance to ensure that the First Respondent was maintaining its obligation to provide a competent dental service to NHS England".*

which I accept to be the case.

75. None of those matters set out above altered in any way during the course of the Claimant's work for the Respondent. Accordingly, as the Agreement, in clear and plain language, states that the thing within it is

intended to form a contract of employment between the parties and further, given that the Claimant himself accepts that the intention at the time was that he would be a self-employed contractor. The Claimant has not in any of the matters set out above indicated any change in the arrangement between the parties.

76. I have been referred to an extract from 'Chitty on Contracts 29th Edition Volume 1', paragraphs 2 – 162, 2 – 175, 2 – 159 and 2 – 157, stating that the starting point of any contractual relationship is the intention of the parties and it is not necessary to prove that the parties intended to create legal relations on the terms set out in the Agreement unless one of the parties asserts that there was no intention. The onus of proving that there was no such intention is on the party who asserts that no legal effect is intended.

77. In relation to the matter set out above, the Claimant has not met that burden. All of the items which he points to as indicative of a Contract of Employment were in place at the time that the Agreement was entered into, and at the times he asserted, in writing, his self-employed status..

78. They do not set out a degree of control, integration into the business and a requirement to carry out services personally which are the three components of a Contract of Employment under the test in Readymix Concrete (South East) v Minister of Pensions and National Insurance.

79. I now turn to the one area where the Claimant said that the position had changed, the issue of substitution.

80. This is the issue which is the third limb of the requirements of the Contract of Service as set out in Readymix Concrete.

81. The relevant clause in the Agreement between the parties did not alter. It says this,

> *"In the event of the Associate's failure (through ill health or other cause) to utilise the facilities over a continuous period of more than 20 days, the Associate shall use his best endeavours to make arrangements for the use of facilities by a locum tenens, such locum tenens being acceptable to the PCO of the practice owner to provide dental services as a performer at the premises, and in the event of a failure by the Associate to make such arrangements, the practice owner shall have authority to find the locum tenens on behalf of the Associate and to be paid for by the Associate. This owner and Associate will agree the method of payment of the locum tenens. The practice owner will notify the PCO with 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 performer's list of a Primary Care Trust 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 reasonable be required."*

82. The Claimant says that this is a narrow right of substitution such that it does not override the finding of a Contract of Employment.

83. Although it was submitted on the Claimant's behalf that the *"other cause"* must be interpreted as meaning something similar in gravity or substance to ill health to warrant non-performance of duties under the Agreement, I find no such implication in the wording. If the Claimant had wished to take a period of holiday, he would have been entitled to procure the services of a locum to fill his absence and to ensure that the Claimant's UDAs were fulfilled.

84. It is said that the Respondent retained a *"veto"* on whom the Claimant could send. The only requirement, however, was for the individual to be a qualified dentist who was registered as such at a Primary Care Trust in England.

85. It was further said, on behalf of the Claimant, that

> *"a third party to whom the Claimant owes no contractual obligations also retains a veto on whom the Claimant can send in his absence because of ill health or similar cause".*

86. Provided the individual is a registered performer as a dentist, there is no such *"veto"*.

87. The *"restriction"* on the identity of the individual provided by the Claimant as locum tenens is purely, I find, one which is obviously necessary for the protection of the Respondent's business and the patients of the dental surgery. Any locum tenens (or in any arrangement a substitute) must be competent to carry out the work. Where the work involves health treatment of the public, it would be bizarre if a wholly unfettered right of substitution (allowing an unqualified person to carry out dental work) were allowed. That would put not only the public and the Claimant at risk, but the business of the Respondent at risk too.

88. The Claimant relied heavily (indeed this was the one thing which Counsel on behalf of the Claimant said had *"changed"* from the initial agreement when the parties intended there to be no employment and entered into an agreement which specifically stated that there was no employment) was the fact that the Clause had not been activated in five and a half years.

89. It was accepted, on the Claimant's behalf, that the Clause was genuine. The fact that it was not used does not prevent it being a genuine substitution clause and the passage of time does not render it less genuine.

90. With due respect to Counsel for the Claimant, he invites me to approach the matter of employment from the wrong end of the telescope. I am invited to approach it in the following way,

    90.1 To determine if the written agreement negates one of the three relationships (worker, self-employed contractor or employee).

90.2 To determine whether the Agreement amounts to a contract to provide personal service which is described as the Claimant's primary position – that the Agreement requires the Claimant to provide personal service and he did and is thus an employee.

90.3 That if the plain reading of the Agreement is that it is not a contract for personal service or for a worker to provide personal service, then the reality of the relationship needs to be ascertained.

91. The starting point, is not to question whether the Agreement delineates one of the three relationships. The starting point is to consider what the Agreement says and what the intention of the parties was.

92. The Agreement states that it is not a Contract of Employment and does not create a relationship of employer and employee. That is clear.

93. The Claimant himself confirms that at the time the Agreement was entered into, the parties intended that he would be a self-employed contractor.

94. It is, as set out, for the Claimant to establish that the terms of the Agreement do not match the intention of the parties. In fact, however, the Claimant has established on oath that the intention of the parties (that he should be a self-employed contractor) is entirely consistent with the terms of the Agreement.

95. The Claimant was content that he was a self-employed contractor at least until June 2014. What then changed?

96. The only thing that changed, in relation to the working arrangements between the parties, from that date was – as submitted by Counsel on behalf of the Claimant – the fact that the substitution Clause was not activated.

97. I am satisfied that the substitution Clause was – and indeed the Claimant through Counsel accepts that it was – a genuine substitution Clause. That is inconsistent with a Contract of Employment. The fact that it was not used for five and a half years does not render it any less genuine.

98. Accordingly,

98.1 The Agreement between the parties sets out that no relationship with employer / employee is created by it.

98.2 That was the intention of the parties at the time and the parties were content to proceed on that basis.

98.3 The Claimant asserted his position as a self-employed contractor on two occasions in writing and never asserted that he was an employee during the currency of his work with the Respondent.

98.4 The Claimant has not established that there was control over his work to make the Respondent his employer.

98.5 The power of delegation / provision of a substitute was genuine (as was accepted on behalf of the Claimant) and was only *"limited"* to the extent that is obviously necessary to give business ethnicity to the right of substitution in circumstances where health treatment is being provided to a member of the public.

98.6 The fact that the Claimant chose not at any stage to implement or use the locum Clause does not render it any less genuine.

Summary

99. At all times the parties proceeded on the basis, and entered into an Agreement on the basis, that the Claimant would be a self-employed contractor. He raised no complaint about that status and indeed asserted it during the currency of his work with the Respondent. Nothing in the Agreement fails to reflect the intentions of the parties at the time and the Agreement itself is specifically said not to be a Contract of Employment.

100. Nothing changed in the way the Contract was carried out on a day to day basis to suggest that the Agreement did not reflect the true intentions of the parties.

101. For those reasons the Claimant was not an employee of the Respondent. I am not dealing with the question of whether or not he was a *"worker"* as defined within the Employment Rights Act 1996, the only question before me is whether he was an employee. He was not.

Employment Judge Ord

Date: 22 April 2020

Judgment sent to the parties on

.....18/05/2020.....

.....T Yeo.....
For the Tribunal office