



EMPLOYMENT TRIBUNALS

Claimant: James Main

Respondent: SpaDental Limited

Heard at: Bristol Civil Justice Centre **On:** Friday, 11 October 2019

Before: Employment Judge Mr. M. Salter

Representation:

Claimant: Mr. J. Williams of counsel

Respondent: Mr. S. Healey of counsel.

RESERVED JUDGMENT

The Claimant was not a worker within the meaning of the Working Time Regulations 1998

REASONS

References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.

References in round brackets are to the paragraph of these reasons or to provide definitions.

INTRODUCTION

1. These are my reasons for the reserved judgment above.
2. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>. The Employment Tribunal

has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

BACKGROUND

The Claimant's case as formulated in his ET1

3. The Claimant's complaint, as formulated in his Form ET1, presented to the tribunal on 27th March 2019, is in short, he was an employee or, alternatively a worker, and entitled to holiday pay [13 §5]. The value of his claim was for £229,411.98.

The Respondent's Response

4. In its Form ET3, received by the tribunal 26th April 2019 [16], the Respondent denied the Claimant was an employee or worker but contended he was, in fact, self-employed.

Relevant Procedural History

5. On 29th March 2019, by way of Notice of Claim that was sent to the parties upon receipt of the ET1 the was listed for a one-hour hearing. Employment Judge Harper MBE later ordered that time estimate for the hearing be extended to one-day.
6. The matter came before me for that hearing. The day before the hearing however, the claimant's Trustee in Bankruptcy, Mr. Timothy Alexander Close ("the Trustee"), became aware of these proceedings and instructed Mr. Parsons of counsel to attend on his behalf to object to the hearing progressing until the Trustee had had an opportunity to consider the claim.
7. The Claimant was represented by Mr. Williams of Counsel and the Respondent by Mr. Healey of Counsel.

8. After some discussion a useful and practical way forward was agreed by counsel which was that the hearing proceed to determine one issue: the claimant's employment status. Mr. Williams then agreed he would provide the Trustee in Bankruptcy with a copy of the judgment. This approach avoided the matter having to be adjourned to another day with the inevitable delay and cost consequences that would result.
9. With this approach agreed, and with my permission, Mr. Parsons left the tribunal, and the Trustee took no further part in the Preliminary Hearing. I will not, therefore refer to them further, but am grateful for Mr. Parson's skeleton argument setting out the Trustee's position.
10. In discussion of how to proceed with the day's hearing the Claimant confirmed he was not advancing an argument that he was an employee, rather he was arguing he was a worker.

DOCUMENTS AND EVIDENCE

Witness Evidence

11. I heard evidence from the Claimant on his own behalf and from Christopher John Conynsby Hilling, the managing director of the Respondent and Sandra Jane Smith, who, at the time her employment with the Respondent ended in April 2019 was its Operational and Compliance Manager.
12. All witnesses gave evidence by way of written witness statements that were read by me in advance of them giving oral evidence. All witnesses were cross-examined

Bundle

13. To assist me in determining the matter I have before me today an agreed bundle originally consisting of 133 numbered pages (but with additional pages 116A and B added). This bundle was prepared by the Respondent. Some other documents were added during the course of the hearing and these became pages 134-137. My attention was taken to a number of these documents as part of me hearing submissions and, as discussed with the parties at the outset of the hearing, before commencing their submissions, I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.

SUBMISSIONS

Claimant

14. Mr. Williams provided a written closing submission and supporting authorities. Since the skeleton is in writing it is unnecessary to repeat them here and they are referred to as appropriate in the conclusions.

Respondent

15. The Respondent made oral submissions which I have considered with care but do not rehearse here in full. In essence, in the course of the hearing, it was accepted that the Claimant had a contract with the Respondent and that, as a professional, the obligation of personal services was made out. The focus of Mr. Healey's submissions was, however, that the Claimant was self-employed.

MATERIAL FACTS

General Points

16. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by the Claimant, Mr. Hilling and Mrs. Smith in evidence, both in their respective statements and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.
17. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principle findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

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18. The Claimant is a dentist. In 2013 he sold his practice to Main Dental Partners Limited (“MDPL”). He provided his services to MDPL through two contracts: a contract of employment as the managing Director and a service agreement (“the First Service Agreement”). The latter of these involved the Claimant providing his services to MDPL through J Main Limited, a limited company owned by the Claimant.
19. Throughout the period until he resigned the Claimant filled out self-employed tax returns and paid national insurance contributions as a self-employed individual. Indeed, in April 2017, as part of an IVA the Claimant stated he was self-employed [131 §2.17]. In July 2017 a bankruptcy order was made [132] against the Claimant on the petition of HM Revenue and Customs. In that Bankruptcy the Claimant stated he was self-employed at the date of the bankruptcy order [133].
20. On 3rd August 2017 the First Service Agreement was terminated, and a second Service Agreement was entered into on 31st August 2017 (“the Second Service Agreement”). This did not have the Claimant providing his services to MDPL through J Main Limited, he supplied them directly to MDPL.
21. Whenever there was a change in the contractual arrangements these did not affect how he performed his clinical tasks.
22. Throughout his engagement with MDPL, the patient would pay MDPL who, in turn would calculate how much they were to pay J Main Limited, and latterly the Claimant, and payment would be made. The Claimant received payments from J Main Limited in the form of the net profit and dividend payments. This changed in 2017 when payments were made to him directly [100] as J Main Limited “no longer existed”. In the letter Mr. Main offered to indemnify the Respondent for any claims brought by the creditors of J Main Limited.
23. In October 2018 MDPL was purchased by SpaDental Holdings Limited and subsequently changed its name to that of the Respondent.
24. I accept the Claimant’s evidence that when there were changes in his contractual arrangements in 2017 these had no impact on his clinical practices. He contends

however there were changes in his non-clinical procedures in that he was no longer the managing director of the company but would have to make decisions as “one of three”.

25. Looking at the practicalities of the Claimant’s engagement with the Respondent the claimant supplied a limited amount of equipment including a dental loop, a dental headlight and he used his iPhone to take photographs. He was also the only dentist to be provided with remote access to the Practises’ computer system.
26. The Claimant was obliged under the agreement to maintain his own indemnity insurance [49 §5.8; 73 §5.8] and was responsible for his payments to the General Dental Council [49 §5.9.2; 73 §5.9.2].
27. The hours had reduced under the second agreement from those in the first agreement. Under the first agreement the Respondent was open from 0845 until 1730 five days a week.
28. Under the second agreement the Respondent would provide the facilities to the Claimant between the hours of 0900 and 1730 Monday, Tuesday and Thursday and 0900 to 1500 on Wednesday and Friday [71 §4.2]. The Claimant would have to make himself available for those hours on the days he decided to work. It was a term of the Service Agreements that the Claimant would use all reasonable endeavors to utilize the facilities provided by the Respondent during the days and time that they are made available to him pursuant with that clause. The Claimant agreed not to practice elsewhere during such times without the consent of the Respondent [71-72 §5.2.1]. it was left to him to determine when he worked at the other two practices.
29. If the Claimant did not use the facilities, then he would be charged an “Absent Dentist Charge”. I am told and accept this is because the Respondent would have provided resources such as staffing and the like) and not receive any commission from the work the Claimant was going to do during that time.
30. The reduction in working hours came about at the Claimant’s request as he was to collect his children from school on Wednesday and Friday ad so needed to leave

the premises early. I accept the Claimant's evidence that the Respondent never refused the Claimant's requests to leave early.

31. Subject to General Dental Council obligations the Claimant had free choice as to which patients he treated and which he did not. I am told, for instance, that he chose not to treat Tewkesbury implant patients of Dr May, when that doctor retired. Normally, patients would book in with the practice's receptionist, but the Claimant could and would change these. I do not find this surprising as the Claimant is a professional and would likely know how long certain procedures would take and whether the appointment was appropriate in length. However, also, the Claimant would change appointments if he was not able to see that patient at the time booked.
32. Mr. Hilling explained that the Claimant would set the prices for work he undertook. This led to a substantial difference in prices charged within the Respondent: I am told, and accept that, for example, the Claimant charged £599 for whitening work, whilst other dentists in the practice charged £299.00.
33. If dental work carried out by the Claimant required correction, then it would be undertaken by the claimant at his own expense. He carried his own indemnity insurance.
34. He was responsible for the supervision of the support staff provided by the Respondent [50 §5.10.1; 74 §5.10.1] even though they were engaged by the Respondent. Again, I find this unsurprising given the Claimant's position as a medical professional reliant upon support staff to assist him in furtherance of his clinical obligations. This may, for instance, require the Claimant to work through lunch if the Claimant and allocated support staff were sterile and working on a lengthy procedure.
35. The Claimant also specified how he wanted the support staff to be dressed when they worked with him, requiring them to wear gowns and face masks when other dentists did not require this.
36. The Claimant would have to provide a locum or cover for an emergency. Costs would be shared jointly by the Respondent and Claimant [53 §6.4.4; 76 6.4.4].

37. I accept the Claimant's evidence that he would largely have to pay for his own training, although the Respondent would pay if there was a benefit to them or they required the training. The Claimant was able to choose when he undertook the training.
38. The Claimant had to agree his holidays with the Respondent. The Practice Manager (the Claimant's wife until 2014; Mr. Russ Beaumont until 2016 and then Sarah Trout until the Claimant left) would attend and ask him when he was taking time off. The Claimant would usually take the same holidays each year: a week in August around the second Bank Holiday, so as not to impact his earning potential. He would call and arrange for Dr. Gilmore to cover his absences.
39. The Claimant was entitled to take an unlimited amount of holiday, but anything over 25 days would result in him having been deemed to authorise the Respondent to deduct from his fees an amount equal to an Absent Dentist Charge for each day in excess of his annual leave entitlement [50-51 §6.1.1] Throughout his time with the Respondent the Claimant's requested holidays were never refused.
40. As would be expected the Respondent had a number of policies and procedures in place which the Claimant was subject to. Further they were required by the British Dental Association and NHS England to keep records of patients and their treatments. As the treating dentistry this obligation was passed onto the Claimant and was a term of the Service Agreements he entered into [90 and 91].

THE LAW

Working Time Regulations 1998 ("the 1998 Regulations")

41. So far as is relevant reg 2, of the 1998 Regulations is as follows:

"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;

42. A similar definition appears in the Employment Rights Act 1996 s230(3).

Authorities and Texts

43. I was referred to the following authorities: Marshall v Southampton and South-West Hampshire Area Health Authority (No 2) [1993] ICR 893, ECJ; Revenue & Customs Comrs v Stringer [2009] ICR 985, HL; Hospital Medical Group Limited v Westwood [2013] ICR 415, CA; Sash Window Workshop Limited v King [2015] IRLR 348, EAT; Fenoll v Centred'Aide par le Travail 'La Jovenne' C-316/13 [2016] IRLR 67; King v Sash Window Company [2018] ICR 693, ECJ Pimlico Plumbers v Smith [2018] ICR 1511 Stadt Wuppertal v Bauer; Willmeroth v Broßonn C-569/16, C-570-16 [2019] IRLR 148 and Hashwani v Jivraj [2011] UKSC 40, [2011] IRLR 827

CONCLUSIONS ON THE ISSUES

44. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.
45. There having been appropriate and correct concessions on contract and personal service, the one aspect I am left to determine is whether the [the Respondent's] "status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the [Claimant]"
46. I did not consider the fact that the Claimant referred to himself as self-employed in the IVA or Bankruptcy as being of much assistance in determining this matter, albeit is an accurate reflection of what I have found. His payment of tax on a self-employed basis is indicative of a man who, as he told me, was at the time under the impression he was self-employed and was cognisant of his liabilities to pay tax. It was only later that he considered himself to be a worker after his wife, who is an HR professional, raised this matter with him.
47. As is probably usual in cases where there are professionals, those they work with or for may not have their skill set or experience and so the professional is given autonomy to undertake their profession. The autonomy for the claimant went

beyond clinical autonomy however, as I find he set fees and discounts, decided when he would work, determined his hours and location of work and made demands of the Respondent's staff that other dentists did not (for instance working over lunch or clothing requirements). He was also responsible for his work and to correct any errors.

48. I also do not consider that the levels of control purportedly exercised by the Respondent were of a level that showed some degree of authority over the Claimant inconsistent with a self-employed professional. In a regulated profession such as dentistry it is obvious records of treatments would be required to be kept. The fact that the Respondent required the Claimant to keep records of his procedures in order for them to comply with their obligations does not, it appears to me, show a degree of control over the Claimant that is inconstant with being self-employed, after all, who better to ensure the record was accurate and complete than the treating dentist.
49. Against this, however, I weighed the holiday pay provision in the Service Agreements that referred to leave "entitlement" and set a maximum period on this of 25 days per annum before a charge would be made against the Claimant by the Respondent. although this is inconsistent with being self-employed, when I weighted it against the other factors identified above I consider that the Claimant at the time his engagement with the Respondent ended the Claimant was a self-employed dentist receiving, effectively, support services (e.g. support staff and premises) from the Respondent who was a customer of his, or previously of J Main Limited. The Respondent did not exercise tight control over the claimant.
50. I do not consider therefore, that the Claimant has proven, on the balance of probabilities, that he was a worker within the meaning of the 1998 Regulations.

Introduction

51. These are my reasons for the judgment set out above. I have arrived at these after hearing

Employment Judge Salter
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Date: 14th November 2019

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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